



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MISCELLANEOUS CIVIL APPLICATION NO. 450 OF 2009

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS
UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT
(CAP. 26 LAWS OF KENYA) & ORDER LIII OF THE
CIVIL PROCEDURE RULES**

-AND-

IN THE MATTER OF: THE LAW REFORM ACT (CAP. 26, LAWS OF KENYA)

-AND-

IN THE MATTER OF: THE LAND TITLES ACT (CAP 282, LAWS OF KENYA)

-AND-

IN THE MATTER OF: THE REGISTERED LAND ACT (CAP. 300, LAWS OF KENYA)

REPUBLICAPPLICANT

- VERSUS-

- 1. THE ATTORNEY-GENERAL**
- 2. THE DIRECTOR OF LAND ADJUDICATION&SETTLEMENT**
- 3. THE MINISTER FOR LANDS AND SETTLEMENT**

-AND-

- 1. CHARO MASHA.....1ST INTERESTED PARTY**
- 2. KENGA RANDU.....2ND INTERESTED PARTY**
- Ex parte Applicant*.....SALIM BAKARI**

JUDGMENT

The *ex parte* applicant's application by Notice of Motion dated **28th October, 2009** was brought under Order **LIII**, rule 1 of the Civil procedure Rules, s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya), and ss.8 and 9 of the Law Reform Act (Cap.26, Laws of Kenya). The *ex parte* applicant was seeking Judicial Review orders: (i) of **Prohibition**, to prohibit the respondents from issuing certificates of ownership and/or title documents to the Interested Parties and/or anyone else, in respect of Vipingo Settlement Scheme plots No. 169 and 176; (ii) of **Mandamus**, compelling 2nd respondent to forthwith issue the applicant with a certificate of ownership, or title documents for Vipingo Settlement Scheme plots No. 169 and 176, in view of the Judgment of the Recorder of Titles in the Land Registration Court at Kilifi, dated **20th June, 1972**.

The application rests on the following grounds:

- (a) the Recorder of Tiles in his Judgment dated 20th June, 1972 delivered at the Land Registration Court at Kilifi, decreed that certificates of ownership under the Land Titles Act, for the suit plots, be issued to the heir of the estate of Idi Bin Mohamed, then one Bakari Omari;**
- (b) the applicant is the lawful proprietor of Vipingo Settlement Scheme plots No. 169 and 176, the same having been awarded to Bakari Omari (now deceased) pursuant to the aforesaid Judgment and in respect of whose estate the applicant herein is the duly-appointed co-administrator;**
- (c) subsequent to the said Judgment of the Recorder of Titles, no appeal was lodged contesting the decision;**
- (d) the Judgment of the Recorder of Titles is, by its very nature, and pursuant to the Lands Titles Act, final and conclusive proof of ownership;**
- (e) 2nd respondent, without any lawful cause, demarcated and re-allocated the suit-plots to 1st and 2nd Interested Parties, without due regard to the Judgment of the Recorder of Titles;**
- (f) whereas 2nd respondent duly acknowledged that the Recorder of Titles, in the administration of the Land Titles Act (Cap.282, Laws of Kenya), had awarded the suit plots to Bakari Omari, the pertinent certificates of ownership were not issued until the office of Recorder of Titles was abolished.**
- (g) 2nd respondent is aware of the continued occupation and the substantial development of the suit plots by the family of Bakari Omari, but has neglected to issue the applicant with certificates of ownership;**
- (h) 2nd respondent has acknowledged that the re-allocation of the suit plots to 1st and 2nd Interested Parties was erroneous and should forthwith be cancelled, yet no effectual step has been taken by the respondents to actualize that object;**
- (i) the re-allocation of the suit plot by the respondents was erroneous and ultra vires the powers donated to the respondents;**

(j) the awarding by the Land Adjudication Court, of the suit plots to the ex parte applicant, imposed a duty on the respondents to issue the ex parte applicant with certificates of ownership, which duty the respondents failed, refused, or neglected to execute;

(k) notwithstanding service upon the respondents of a demand letter, which also gave notice of intended commencement of judicial review proceedings, 2nd respondent has failed, refused, and/or neglected to issue the ex parte applicant with certificates of ownership for the suit plots;

(l) the respondents' actions and inactions complained of are unfair and unjust, in all the circumstances of the case;

(m) the respondents' action and inaction constitute a neglect, or failure to execute a public and statutory duty.

The foregoing grounds are anchored in the detailed pleadings in the statutory statements of **1st October, 2009** which was filed with the application for leave to move the Court for issuance of Judicial Review Orders.

Although the respondents, by their notice of **11th November, 2009** appointed the Attorney –General to act for them, no written response was filed; and at the hearing , on **8th June, 2010**, learned counsel **Mr. Njoroge** first took note of the fact the Interested Parties have died, and then made a concession in favour of the **ex parte** applicant: “ In the circumstances, where even the relatives of the Interested Parties are absent, we agree to let the Court make a decision based on the submissions of counsel for the **ex parte** applicant . We have already agreed on the question of costs.”

Learned counsel, **Mr. Omondi** urged that since Judicial Review concerns itself only with the **manner** of public decision – making, rather than with the merits of the decision made, the fact of the Interested Parties having died during the pendency of the proceedings would be of little relevance ; besides, due service had been effected on next-of-kin of the Interested Parties, as shown in the return of service filed in Court; and had the recipients of the service wished to be heard, then they would have exercised their rights to be heard, in accordance with the terms of Order **LIII**, rule 6 of the Civil Procedure Rules ? and in this regard the Court has a discretion: **Ogendo & Another vs. Nzioka & Another** [1993] LLR 332 (CAK).

A similar position had occurred in Mombasa H.C. Misc. Civil Application No. 41 of 2006, **Republic vs. Chief Magistrate Mombasa & others, ex p. Al-Jiza Limited**, in which **Mr. Justice Sergon** thus held: **“The motion before this Court seeks to question how the decision of the Msambweni Land Disputes Tribunal was reached. The decision was adopted by the Chief Magistrate’s Court. The decision will always remain, whether the beneficiary is dead or alive.”**

This Court’s ruling on the question was set out as follows:

“Learned counsel, Mr. Omondi has urged that Interested Parties, in a Judicial Review application, should make it their duty to come before the Court, and seek the exercise of discretion to allow them to stand as parties.

“Counsel has shown the returns of service by which the Judicial Review matter had been brought to the attention of the likely Interested Parties. Such ‘parties’, however, have not presented themselves before this Court, or asked for any kind of representation.

“Just as learned counsel submits, the main object of judicial review is to ensure that administrative

decisions have complied with the law. And so, this end will be achieved through the normal operation of the judicial process, even where Interested Parties are unrepresented.

“Since the Court has a discretion in admitting Interested Parties as parties in such proceedings, and no case has been placed before this Court by any ‘Interested Party’, I now direct that the hearing shall proceed, notwithstanding the absence of Interested Parties.”

Learned counsel **Mr. Omondi** presented the *ex parte* applicant’s case, entirely consistently with the pleadings, the verifying affidavit, and the grounds supporting the application; and he urged that the respondents had failed to perform their statutory duty to translate the Judgment of the Recorder of Titles, dated **20th June, 1972** into documents of title and issue the same to the *ex parte* applicant. Consequently, the *ex parte* applicant was praying for an order of **Mandamus** to compel the respondents to perform their statutory duty. The *ex parte* applicant was also seeking orders of **prohibition**, to restrain the respondents from issuing title for the suit plots in the names of persons not entitled.

This uncontested application will, in my opinion, succeed on the basis of the balance of probability; but beyond that threshold, my scrutiny of the relevant facts and the merits as set out in the papers and as articulated by learned counsel, points to the existence of a well-founded case. This gives a basis for the Court to make orders as follows:

(1) An order of Prohibition shall issue, prohibiting the respondents from issuing certificates of ownership and/or title documents in respect of Vipingo Settlement Scheme plots No. 169 and No. 176 to 1st and 2nd Interested Parties and/or anyone else, except as stated in Order No. (2).

(2) An order of Mandamus shall issue, compelling 2nd respondent to forthwith issue the *ex parte* applicant with a certificate of ownership, or title documents, for Vipingo Settlement Scheme Plots No. 169 and No. 176, in accordance with the Judgment of the Recorder of Titles in the Kilifi Land Registration Court, dated 20th June, 1972.

(3) There shall be no order as to costs.

DATED and DELIVERED at MOMBASA this 22nd day of October, 2010.

J. B. OJWANG

JUDGE

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the *Ex parte* Applicant: **Mr. Omondi**

For the Respondents: **Mr. Njoroge**

Interested Parties: Unrepresented