



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 244 OF 2001

KENYA BREWERIES LTDPLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MOMBASA1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

LUCY SALIKU MUKHONGO3RD RESPONDENT

NACY NJERI MAINA4TH RESPONDENT

HAWA LUL BASHIR5TH RESPONDENT

SHAHKRAM SHAHDOST HAJI5TH RESPONDENT

RULING

Pursuant to the provisions of Section 8 and 9 of the Law Reform, Order LIII rules 1(1), (2), (3) and (4) of the Civil Procedure Rules, Sections 75 and 84 of the constitution and Sections 27, 28, 128 and 136 of the Registered Land Act, Kenya Breweries Ltd, the exparte applicant herein took out the Notice dated 25.10.01 and prayed for the following orders:

1. That an order of Certiorari be directed to the 1st Respondent to remove and bring to the High Court to be quashed the 1st Respondent's decision originating and giving approval to a scheme of the amalgamation and/or consolidation of Plots No. Mombasa ("MSA") Block IX/133 belonging to the Applicant and Msa Block IX/134 belonging to the 1st Respondent, and the sub-division of the resultant illegally amalgamated plot to create Plot Nos. MSA Block IX/191, IX/192, IX/193, IX/194, IX/195, IX/196, IX/197, IX/198, IX/199, IX/200, IX/201, IX/202, ix/203, IX/204, IX/205, IX/206, IX/207, IX/208, IX/209, IX/210, IX/211, IX/212, IX/213 and IX/214 inclusive.

2. That an order of certiorari be directed to the 2nd Respondent to bring to the High Court to be quashed the decision giving approval to the 1st Respondent's scheme of the amalgamation and/or consolidation of Plots No. Mombasa ("MSA") Block IX/133 belonging to the Applicant and MSA Block IX/134 belonging to the 1st Respondent, and the sub-division of the resultant illegally

amalgamated plot to create Plot Nos. MSA IX/191 to 214 inclusive.

- 3. That an order of prohibition be directed to the 1st Respondent, its servants, agents and/or allotees, or whosoever, from approving any re-planning, or plans for further development, construction or use, sub-division, alienation or otherwise howsoever dealing with Plot Nos. MSA Block IX210, IX/211, IX212, IX213 and IX214.*
- 4. That an order of Prohibition be directed to the 1st Respondent, its servants and/or agents from further sub-dividing, amalgamating, alienating, allocating or approving the allocation or sub-division or any development/development plans, or construction or charging, pledging or in any manner howsoever dealing with property title No. Mombasa Block IX/133, and Blocks IX/210, IX/211, IX/212, IX/213 and IX/214 until the determination of this suit.*
- 5. That an order of prohibition be directed to the 2nd Respondent, its servants and/or agents from further approving or consenting to further sub-dividing, amalgamating, alienating, allocating or approving the allocation. Charging, pledging or sub-division or in any manner however approving any dealing with property title No. Mombasa Block IX/133, and Blocks IX210, IX/211. IX212, IX/213 and IX/214 until the determination of this suit.*
- 6. That an order of Prohibition/Injunction be directed to Shahkram Shahdost Haji, Hawal Lulu Bashir, Lucy Saliku Mkhongo and Nancy Njeri Maina, their servants and/or agents, from alienating, transferring, charging, pledging, developing, using, accessing, fencing, building on the Plots Nos. Msa Block IX/210 -214 inclusive and from trespassing on the Applicant's property (L.R. No. MSA IX/133), or entering into said plot Nos. MSA IX/210, IX/211, IX/212, IX/213 and/or IX/214 through the purported new access lane, through the Applicant's property trespassing, or otherwise howsoever via L.R. No. IX/133.*
- 7. That an order of Prohibition be directed to the 1st and 2nd Respondents from collecting from the purported owners (3rd, 4th, 5th and 6th Respondents) of the purported illegal plots, Msa Block IX/212, IX/213, IX/211 and IX/210, respectively all and any rates, rents and other such outgoings.*
- 8. That an order of Mandamus be directed to the 2nd Respondent to recall, cancel, and revoke the titles/certificates of lease and all the green cards, deed plans if any, and the Registry Index Maps or any other title deeds or records/documents/registers with respect to Plot Nos. Msa Block IX/210, MSA Block IX/211, NSA Block IX/212, MSA Block 213, and MSA Block IX/214.*
- 9. That this matter be consolidated and/or heard together with H.C.C.C. No. 46 of 1996 and High court Miscellaneous Application Number 12 of 1999.*
- 10. That this court be pleased to order an enquiry as to damages payable to the Applicant for the wrongs committed against it and the Respondents be ordered to pay the same.*
- 11. That costs of this Application be provided for.*

The orders were sought to be given and directed against the Municipal Council of Mombasa, Commissioner of Lands, Lucy Saliku Mukhongo, Nancy Njeri Maina, Hawa Lul Bashir and Shahkram Shahdost Haji being the 1st, 2nd, 3rd, 4th 5th and 6th Respondents herein. The motion is supported by the affidavit of Hesbon Kidula.

When the motion came up for interpartes hearing, Mr. Gathuku learned advocate for the 5th Respondent argued a preliminary point of law against it. It is the submission of Mr. Gathuku, that the suit contravenes the provisions of section 3 of the Public Authorities Limitation Act. It is said the suit based on contract is time-barred since more than three years had lapsed before the action was filed. The 5th Respondent is of the view that the cause of action arose on 1st January 1988 yet these proceedings were taken out on 25.10.2001, more than twelve years. Mr. Gathuku's submission is expressed in the notice

dated 26.1.09. Mr. Muinde, learned advocate for the 1st Respondent adopted the submissions of Mr. Gathuku in seeking for the entire motion to be dismissed. It is his submission that the application was not brought in the name of the Republic but was instead instituted in the name of the applicant. It is Mr. Muinde's submission that the defect is fatal.

Mr. Mutungi, litigation counsel on behalf of the commissioner of Lands also adopted the submissions of Mr. Gathuku. He was of the view that the proceedings being judicial review were time barred as they were brought after six months had lapsed.

Miss Kanaga on her part, is of the view that the applicant's proceedings are founded on public administrative law hence cannot fall under the Public Authorities Limitation Act Cap 39 Laws of Kenya. She contended that there was no time limit in respect of the remedy of prohibition and mandamus.

I have considered the submissions of learned counsels appearing in this matter. The question which has been put to this court for determination is whether or not these proceedings are time barred? I have carefully perused the motion dated 25.10.2001 and the verifying affidavit. It is clear from the aforesaid documents that the exparte applicant is seeking for judicial review remedies in the nature of certiorari, prohibition and mandamus. These are public law remedies which are basically used to question the decision making process and not the merits of the decision.

Kenya Breweries Ltd. avers that that all material times it is and was the registered owner of the parcel of land known L.R. No. Mombasa Block/IX/133 with effect from 1st April 1943. The applicant claims to have developed the plot by setting up four (4) blocks of apartments popularly known as Tusker village". It is said that the 1st and 2nd Respondents purported and without its knowledge or consent to replan the applicant's said plot No. Mombasa Block IX/133 by purporting to amalgamate and or consolidate the same with another i.e. plot no. IX rule/134 belonging to the 1st Respondent. It is averred that the 1st and 2nd Respondents purported to create out of the purported amalgamated parcel of land over 20 plots. It is clearly stated that the amalgamation and or consolidation was approved by the 2nd and 3rd Respondents on or about 21st January 1988. It is said the 2nd Respondent gave a provisional approval on or about 25.09.1986. After a careful consideration of the submissions I, with respect agree with the submissions of Miss Kanaga that the proceedings before this court are in respect of public law remedies. It cannot be true that the same are based

On contract. I also agree with Miss Kanaga's submissions that the remedy of prohibition and mandamus has no statutory time limit. I with respect, also agree with the submissions of Mr. Mutungi that the remedy of certiorari can only be sought within 6 months from the date of the decision, proceedings and or order sought to be quashed. Any order of certiorari made after 6 months will be deemed to be time-barred. This position is fortified by the provisions of Section 9(3) of the Law Reform Act and under order LIII rule 3(1) of the Civil Procedure Rules. The applicant seeks to be given orders of certiorari in prayers 1 and 2 of the motion. The aforesaid prayers are reproduced as follows:

1. That an order of Certiorari be directed to the 1st Respondent to remove and bring to the High Court to be quashed the 1st Respondent's decision originating and giving approval to a scheme of the amalgamation and/or consolidation of Plots No. Mombasa ("MSA") Block IX/133 belonging to the Applicant and Msa Block IX/134 belonging to the 1st Respondent, and the sub-division of the resultant illegally amalgamated plot to create Plot Nos. MSA Block IX/191, IX/192, IX/193, IX/194, IX/195, IX/196, IX/197, IX/198, IX/199, IX/200, IX/201, IX/202, ix/203, IX/204, IX/205, IX/206, IX/207, IX/208, IX/209, IX/210, IX/211, IX/212, IX/213 and IX/214 inclusive.

2. That an order of certiorari be directed to the 2nd Respondent to bring to the High Court to be quashed the decision giving approval to the 1st Respondent's scheme of the amalgamation and/or consolidation of Plots No. Mombasa ("MSA") Block IX/133 belonging to the Applicant and MSA Block IX/134 belonging to the 1st Respondent, and the sub-division of the resultant illegally amalgamated plot to create Plot Nos. MSA IX/191 to 214 inclusive.

It is curious to note that the applicant did not specify the date when the decisions sought to be quashed in the prayers. What is clear is that in prayer 1, the applicant seeks for the decision of the 1st Respondent giving approval to the amalgamation and or consolidation to be quashed. In ground 12 of the motion, the applicant clearly states the date when the 2nd and 3rd Respondents approved the amalgamation and or consolidation to be 21.01.1988. In ground 13, the 2nd Respondent is accused of giving a provisional approval without jurisdiction on 25.9.1986. It is obvious that these proceedings were filed in 2001 more than 12 years since the decision complained of was made. I am constrained to sustain the preliminary objection raised by Mr. Mutungi as against prayers 1 and 2 of the motion dated 25.10.2001. In a nutshell the order for certiorari is not available as it is time-barred.

Mr. Muinde had raised the ground regarding the manner in which the application was made. According to Mr. Muinde, the application should have been applied through the name of the Republic. Mrs. Kanaga chose not to address her mind on this issue. The record shows that the ex parte applicant made an application to amend the motion. The same was argued and determined by the Honourable Mr. Justice Maraga on 30.06.2004, whereupon the Honourable Judge struck out the application. It is evident from the application for amendment that the applicant wanted to correct the defect now being pointed out by Mr. Muinde. This issue was substantively dealt with by Ringera J as he then was in the **Bungoma H.C. MISC. APPL.No.79 of 2002. Henry Amwayi Ndete –vs- Chairman Land Disputes Tribunal and Elizabeth Anyoklo Okoyana** unreported:

At page 2 of the decision Ringera J stated as follows:

“It is established law that applications for certiorari, mandamus or prohibition should be made in the name of the Republic. The case of Farmers Bus Service =vs= Transport Licensing Appeal [1959] E.A. 779, held that such applications should be made in the name of the crown..... The application for judicial review therefore ought to be made in the name of the Republic.

It is that the applicant is not the proper applicant in law It is an error of substance.....”

With respect I will adopt the position taken by the Honourable judge.

Mr. Gathuku had based his preliminary objection on the provisions of the public Authorities Limitation Act (Cap 39 Laws of Kenya) stating that the action is statute barred in view of the fact that it was filed after three years. That submission cannot be true because The Public Authorities Limitation Act does not apply to judicial review proceedings. The 5th Respondent’s Preliminary Objection must crumble.

I earlier stated in this ruling that the objection as against the remedy of certiorari must succeed. I also stated that the objection as against the relief of prohibition and mandamus will be spared. I have carefully perused the effect of the orders of mandamus and prohibition being sought. It is abundantly evident that without the grant of the orders of certiorari to quash the decision which gave rise to the intended decision which are sought to be prohibited or to be undone by an order of mandamus the pendency of the two reliefs i.e. prohibition and mandamus will not be issuable. In other words what is sought to be prohibited has been undertaken in pursuance of the decision which cannot now be quashed because the relief of certiorari is not available. Hence there will be no justifiable reason to keep those reliefs pending. There is only one prayer for an order of mandamus. The applicant seeks for an order of mandamus to compel the 2nd Respondent to recall cancel and revoke the titles and other documents in respect of Block IX/210, Mombasa Block IX/211, Mombasa Block IX/211, Mombasa Block IX/212 – 214. The decision to approve amalgamation and or consolidation cannot be quashed because the approval was done more than 12 years before the relief of certiorari was sought. The order of mandamus is dependent on the relief of certiorari in the circumstances of this case. Furthermore there is doubt whether the Commissioner of Lands can be directed by an order of mandamus to cancel and or revoke a title deed. That power is the preserve of the High Court. The moment the Commissioner of Lands or the Registrar of titles has issued

a title deed, such an officer becomes functus officio he cannot go back to undo what he has done.

For the above reasons I uphold the Preliminary objections raised by Mr. Mutungi, learned advocate for the 2nd Respondent and that of Mr. Muinde, learned advocate for 1st Respondent. The Preliminary Objection by Mr. Gathuku is without merit. The end result is that the motion dated 25th October 2001 is ordered struck out and dismissed with costs to the 1st, 2nd and 5th Respondents.

Dated and delivered at Mombasa this 28th day of May 2009.

J.K. SERGON

J U D G E

In open court in the presence of Miss Kanage for applicant

Gathuku for 5th Respondent

Mwakireti h/b Ouma for 1st Respondent.

Ms. Umara for 2nd Respondent.