



**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF PROHIBITION**

**AND**

**IN THE MATTER OF LAND PARCEL NO. GEDE/KIREPWE`B`/12**

**AND**

**IN THE MATTER OF: MALINDI PRINCIPAL MAGISTRATE`S LAND CASE NO. 1 OF 2007**

**IN THE MATTER OF: MALINDI LAND REGISTRAR CAUTION HEARING**

**OF 18<sup>TH</sup> DECEMBER 2006**

**BETWEEN**

**KARISA KALU BIRYA.....APPLICANT**

**-VERSUS-**

- 1. THE LAND REGISTRAR KILIFI MALINDI DISTRICT**
  - 2. THE PRINCIPAL MAGISTRATE MALINDI LAW COURTS**
  - 3. THE ATTORNEY GENERAL**
  - 4. COSMAS CHARO KATANA SUIING *THROUGH ATTORNEY***
- KARISA KATANA GUNGOMBE.....RESPONDENT**

**RULING**

The ex parte applicant seeks Judicial Review Orders of Prohibition by way of a Notice of Motion dated

2<sup>nd</sup> October 2007, seeks that;-

1. The Respondent's their servants and/or agents be are hereby prohibited from enforcing, acting upon or executing the judgments given in Malindi Land Registrar`s caution hearing in relation to Land Parcel No.GEDE/KIREPWE `B`/12 given on 18<sup>th</sup> December 2006 or the decree in Malindi Principal Magistrate`s Case NO. 1 of 2007 or from harassing and interfering with KARISA KALU BIRYA`S quiet use and enjoyment of the said parcel of land.

2. The costs of the application be paid for by the Respondents. The application is grounded on the annexed statement and affidavit of Karisa Kalu Birya(the exparte applicant) who states that he is the registered owner of Plot No.GEDE/KIREPWE/B/12 as per the Title Deed (KKBI) which is dated 19<sup>th</sup> August 1987.

The 4<sup>th</sup> Respondent Cosmas Charo Katana, registered a caution against the exparte applicant`s Title in 1991 and on 30<sup>th</sup> June 2006, pursuant to an application seeking the removal of the caution, the 1<sup>st</sup> Respondent (that is the Land Registrar Kilifi) invited the parties to be heard for purposes of removal and withdrawal of the caution. The same was heard on 18<sup>th</sup> December 2006 and the Registrar purported to determine the proprietary interest in the land, instead of determining whether the caution was to be removed or not. It is the ex-parte Applicant contention that in so doing, the Registrar exceeded the powers conferred on him by section 133 of the Registered Lands Act and his decision to confer proprietary rights on the 4<sup>th</sup> defendant was ultra vires.

It is the applicant`s contention, that he has his homestead on the piece of land and lives there with his family comprising his wife Halima, seven grown up children, thirteen grand children and two daughters in –law.

He states that in 1987, he entered into a sale agreement with the 4<sup>th</sup> Respondent for the sale of part of the suit property for a sum of Kshs.27,500/-. That agreement was never finalized as no Land Control Board met nor did the 4<sup>th</sup> Respondent lodge an objection in time to protect his interest.

The sale not having been concluded, the applicant then sought to refund to the 4<sup>th</sup> Respondent the purchase price. It was then that the 4<sup>th</sup> Respondent placed a caution on the suit property. The applicant wrote to the Land Registrar Kilifi and Malindi requesting for removal of the caution and in response, the Registrar called for a “Caution Hearing” and made a finding which was adverse to the applicant. This is what is challenged, that the Registrar instead of confining herself as to whether there were reasons to warrant removal of the caution proceeded to make a ruling on the validity or otherwise of a contract which was almost 20 years old. It is applicant`s contention that the Land`s Registrar was totally out of the scope of her jurisdiction to determine the ownership of the suit property and to interfere with the sancity of a first registration under the Registered Land Act.

Further, that the Land Registrar purported to be sitting as a Land Disputes Tribunal and/or a court of law. Subsequent to that, the Principal Magistrate, Malindi, endorsed the Land Registrar`s decision of 18/12/06 and in so doing directly contravened the provisions of the Land Disputes Tribunal Act of 1990 in particular section 4 (1) which creates the Tribunal and section 7 (1) which empowers the Chairman of the Tribunal to cause its decision to be filed in the Magistrate`s Court. Applicant`s states that the Respondent`s decisions made and given on 18<sup>th</sup> December 2006 and 2<sup>nd</sup> January 2007 respectively are;-

1. Ultra vires the powers conferred to them by law.
- b) The Land Registrar acted in excess and without jurisdiction by conferring title
- c) Bad faith and biased
- d) Unreasonable and irrational

- e) Failed to take into account the relevant consideration and the correct law in arriving at their decision
- f) Failed to question the validity of the Registrar's decision camouflaged as the Land Disputes Tribunal's decision
- g) Unfair and unjust in all the circumstances

In the supporting affidavit, applicant states that he had entered into the sale agreement without the knowledge of members of his family. Upon hearing about the sale, his family refused to sanction it and insisted that whatever money had been paid be refunded. The 4<sup>th</sup> Respondent declined the refund.

Applicant explains that he is a lay person, so after the Registrar's decision he came to seek advise at Malindi Law Court, he was told he would be informed when the matter from the Land Registrar was brought to court. He kept on checking to no avail, only to later be served with papers relating to a suit which 4<sup>th</sup> Respondent had filed and this only confused the applicant more – the suit was Malindi PMCC No.38 of 2007(Copies of plaint and defence were annexed and marked KKB5. While all this was going on, unknown to him, a decree in Malindi PM land Case No. 1 of 2007 was made on 2/1/07 and applicant only got to know about it when people went to his land on 3/4/07 demanding to survey the same with view to subdividing it in accordance with the court order – the court order is marked KKB6.

The effect of the Registrar's decision, was to grant a portion of applicant's land to the 4<sup>th</sup> Respondent. There was a notice of appeal filed by the AG on behalf of 1,2, & 3<sup>rd</sup> defendants but beyond that, no other documents were filed. The 4<sup>th</sup> defendant's response was filed by Karisa Katana Gungombe who had a power of attorney registered in his favour. He poked holes at the Notice of Motion saying the applicant was granted leave to apply for an order of prohibition and not the Republic as it appears on the Notice of Motion. His contention is that the Republic cannot be the Applicant versus the 3 Respondents which are offices of the State and the 4 defendant states that the Notice of Motion dated 2/10/07 is a non starter and bad in law. He also protests at being served with photocopies instead of the original documents. He maintains that the applicant voluntary and willfully sold and executed the sale agreement for a portion of his land to the 4<sup>th</sup> Respondent. He denies the claim that applicant's family has refused to sanction the sale and all they wanted was for Respondent to add more money as was demonstrated at the hearing of the caution before the Land Registrar Kilifi.

4<sup>th</sup> Respondent explains that he lodged a caution upon learning that the applicant wanted to sell the same parcel of land to one Don Amolo (now deceased). He argues that the Land Registrar acted within the powers conferred upon her by Law and gave a proper ruling. He states that if the Registrar had no powers of conducting the hearing and giving the ruling, then applicant ought not to have addressed the Land Registrar in the removal of the caution, in the first instance.

He avers that applicant simply wants to get back the land so as to sell it to a buyer of European extract who is infact the one fanning this Judicial Review matter. He points out that Applicant even filed an application for injunction against 4<sup>th</sup> Respondent in PMCC 38 of 2007 and the same was dismissed as per the copy of ruling annexed as KKG5.

The Land Registrar had ordered that any questions would be sorted out by the Land Control Board s per her ruling KKG6 and so on 15/3/07, the 4<sup>th</sup> Respondent appeared before the Land Control Board Malindi and obtained consent to survey and subdivide the land – the consent is marked KK7.

After the survey 4<sup>th</sup> Respondent obtained another consent from the Land Control Board to transfer the portion of land in dispute as per consent marked KKG8. The surveyor subdivided the land into two portions that is Gede Kirepwe B 253 measuring 1.3Ha in favour of the Applicant and Gede Kirepwe B254 measuring 0.5Ha in favour of 4<sup>th</sup> Respondent – the map for divisions is marked KKG9.

Parties filed written submission in the matter. The applicant's counsel submitted that there is no provision under the Registered Land Act for the adoption of a decision of the Land Registrar under section 133, as was done on this matter and that implementation of the Registrar's decision can only be done in accordance with the Act and not outside. Mr Anyanzwa points out that power of conferring proprietary interest in land are conferred only on the High Court of Kenya by virtue of section 159 of the Registered Land Act.

Further that there is no provision for adoption of a decision of the Registrar by the subordinate court and the adoption here, contravened the provisions of the Registered Land Act and therefore null and void. Mr Anyanzwa points out that the Registrar (1<sup>st</sup> Respondent) purported to sit as the Land Disputes Tribunal which was a clear abuse of power and she used the powers conferred on the Land Disputes Tribunal to make a decision with far reaching consequences and so that decision should not be implemented and should be prohibited.

4<sup>th</sup> Respondent submits that the sale of the land was proper and Title was properly issued – the 4<sup>th</sup> Respondent's title is marked KKG3 dated 20/3/08. 4<sup>th</sup> Respondent's states that, it is when the Title Deed was issued that the exparte applicant refused to comply with the terms of the agreement and attempted to resell it to another party.

He finds fault with the Notice of motion which he submits violates Order 53 Rule 2 of the Civil Procedure Rules in that application for Judicial Review should be made not later than six months after the date of the decision yet in the present situation the exparte applicant did not file any appeal against the said decision and instead filed the application for Judicial Review almost a year after the decision was made.

Further that applicant did not obtain leave of the court to file the application for to institute judicial review and thus failed to adhere **to Order XLIX Rule 5 CPR** and so this court has no jurisdiction to entertain the prayers or even grant them and the same should be dismissed. He also points out that the exparte applicant failed to serve all the persons named in the notice of motion thus offending Order 53 Rule 3 (3).

He also points out that there is no affidavit of service on record to prove that the 1<sup>st</sup> Respondents have been served. 4<sup>th</sup> Respondent also takes issue with the content of the applicant's statement saying it is wrong to state all the facts in the statement, then verify them by an affidavit and he seeks to rely on the decision in **Commissioner General KRA V Silvano Owaki CA No. 45 of 2000 page 7** which demonstrated how judicial review should be treated, with regard to statements of facts and affidavits and held that:-

***“The application for leave “by a statement” the facts relied on should be stated in the affidavit “the statement should contain nothing more than the name and the ground in which it is sought. It is not correct to lodge a statement of all the facts verified by an affidavit”***

4<sup>th</sup> Respondent further submits, that when the applicant was aggrieved by the Land Registrar's decision and which was adopted by the Principal Magistrate's Court, he filed a Civil Appeal No. 40 of 2007 (Malindi High Court) on 1<sup>st</sup> November 2007 yet he had already filed the judicial review application on 10/8/07 against the same decision. It is 4<sup>th</sup> Respondent's contention that the exparte applicant is abusing the court process and for that reason, this application should be dismissed.

He also points out that the 4<sup>th</sup> defendant now has a separate Title deed and the whole matter has been overtaken by events. In response to this, Mr Anyanzwa submits that the issue of being overtaken by events cannot sustain since Registrar was aware of the order which was served on 11/10/07 and that 4<sup>th</sup> Respondent was also aware of existence of that order, as he too was served on 11/10/07. He insists that the acts of Respondent constitute contempt of court orders.

Further that applicant has complied with provision of Order 53 Rule 3 (3) Civil Procedure Rules as the facts are full set in the affidavit by the exparte applicant and are not in the statement, as the cited case of

**Commissioner General KRA** does not apply here. What about the pending appeal? Mr Anyanzwa submits that the existence of any other proceedings is no bar to commencing judicial review process as the test the court considers in hearing judicial review proceedings is whether the applicant has sufficient interest. It is his contention that the exparte applicant has clearly demonstrated that he has sufficient interest as he is the registered absolute proprietor of the land to which the Registrar made decision now being challenged – reference is made to Order 53 of the Rules of Supreme Court of England.

I will deal with the issue of procedure first. The same is threefold;

(a) Does the statement filed herein include facts which are the verified by an affidavit? If that is the case then does it offend the provisions of Order 53 Rule 3 (3)?

(b) Is the Notice of motion defective for being filed against the Republic.

(c) Is the application bad for having been made later than six months from the contested decision and thus offending Order LIII Rule 2.

Order LIII Rule 3 (3) states as follows;-

***“An affidavit giving the names and addresses of, and the place and date of service on all persons who have been served.....the affidavit shall state the fact and reason why service has not been effected”***

Is this the applicable provision? Rule 4 provides that the notice of motion shall be accompanied by the applicant’s statement which shall contain the grounds and relief sought. 4<sup>th</sup> Respondent’s position is that it is wrong to state all the facts in the statement then attempt to verify them by an affidavit. In this regard the case of **Commissioner General KRA V Silvano Owaki CA No. 45 of 200 page 7** drawing from a passage from the Supreme Court Practice 1979 Vol 1 at paragraph 53/1/7 stated as follows;-

***“.....The facts relied on should be stated in the affidavit.....`The statement should contain nothing more than the name and the description of the applicant the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts verified by an affidavit”***

I think the relevant provision is not Order LIII Rule 3 (3) as cited by 4<sup>th</sup> respondent. It is actually Order 53 Rule 1 (2) Civil Procedure Rules which states as follows;-

***“An application for such leave as aforesaid shall be made exparte to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought and by affidavits verifying the facts relied on”***

It would appear that all evidential facts should be set in an affidavit and not in a statement. It is the verifying affidavit and not the statement to be verified, which is of evidential value in an application for judicial review. I have also referred to the text by P.L.O Lumumba and P.O Kaluma on “**JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS IN KENYA**: Law and Procedure (Jomo Kenyatta Foundation), and indeed the jurispendence which emerges is that all evidential facts should be set out in an affidavit, not in the statement.

What is the prevailing situation here? Does it offend what is now the recognized form of approach in judicial review. I have read through the statement by the exparte applicant, it bears the name and description of the applicant and the relief sought and the grounds on which it is sought. The facts are actually contained in the verifying affidavit. To that extent then the same does not offend Order LIII Rule 1 (2) it is not denied that there is a pending appeal in this matter should that be a bar to Judicial review

proceedings? Strictly speaking no, the fact that one has filed an appeal should not itself be a bar to Judicial Review proceedings, although courts generally direct a party to make a choice on which avenue to pursue.

I fail to comprehend what “Republic” means in this instance, but if the 4<sup>th</sup> respondent is opposed to the other Respondents being joined in this matter by virtue of being officer holders in Government then he is off target – the contested decision was made by the Land Registrar Kilifi and is therefore sought for Judicial Review. It was adopted by the Principal Magistrate who is the 2<sup>nd</sup> Respondent – and AG is the legal representative of Government Officers in decision made in their official capacities- so that limb of the 4<sup>th</sup> respondent contention cannot stand. It is not denied that the application was made more than six months after the contested decision.

Order LIII Rule 1 provides that;-

***“No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule”***

That leave was granted on.

However Order LIII Rule 2 address the issue of time for applying for certiorari in certain case and states that;-

***“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any set, and where the proceedings is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”***

In the present case what is sought are not orders of certiorari, but prohibition – which does not seem to be covered by that provision. What I notice is that the effect of the prayers sought would actual be to quash the decision of the Land Registrar which was adopted as judgment of the Principal Magistrate’s Court. Is an order of prohibition available to cater for the prevailing situation?

In the case of **Kenya National Examinations Council V R** exparte **Geoffrey Gathangi Njoroge and Others** CA No.266 of (1996) a bench consisting Omolo, Tunoi and Shah(JJA) in considering the remedy drawn from Halsbury’s Laws of England, 14<sup>th</sup> Edition Vol 1 at page 37 paragraph 121.

“What does an **ORDER OF PROHIBITION**” do and when will it issue? It is an order from the High Court directed at an inferior tribunal or body which forbids that tribunal or body to **continue** proceedings therein in excess of its jurisdiction and in contravention of the Laws of the land. It lies, not only for excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.

In this instance, the power has already been exercise(albeit in excess), a decision has been made, whether it was in excess or lack of jurisdiction and an order for prohibition would not be effective against that decision. As the judges in the Kenya National Examination case noted;-

***“Prohibition cannot quash a decision which has already been made, it can only prevent the making of a contemplated decision”***

To that extent then the exparte applicant’s prayers must fail as the relief sought is inappropriate. I think

an order for certiorari would have been the appropriate one to seek but which again would have to be considered in the context of Order LIII Rule 2.

Consequently the application cannot succeed and I need not delve into the merits of arguments raised regarding the actions by the Lands Registrar and the Principal Magistrate Malindi. The application is dismissed with costs to be borne by the ex parte applicant.

***Delivered and dated this 29th day of October 2009 at Malindi***

**H.A. OMONDI**

**JUDGE**

Mr Anyanzwa for ex parte applicant, 4<sup>th</sup> Respondent in person.