



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Miscellaneous Application 72 of 2006

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300 LK

A N D

IN THE MATTER OF: CHEMBE/KIBAMBAMSHE/393, 381, 391, 395, 635, 637, 638, 641, 644,
646, 651, 652, 655 AND 665

A N D

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL
REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND
MANDAMUS AGAINST DIRECTIVE BY THE LAND ADJUDICATION SETTLEMENT AND
THE CHIEF LAND REGISTRAR DATED 30TH JUNE, 2004 AND/OR ANY OTHER FUTURE
DIRECTIVE

REPUBLIC OF KENYAAPPLICANT

V E R S U S

LA MARINA LIMITEDRESPONDENT

A N D

1. WALADI AHMED1ST INTERESTED
PARTY

2. JOSEPH KASHURU MUMBO2ND INTERESTED PARTY

3. THE COMMISSIONER OF LANDS3RD INTERESTED PARTY

4. THE CHIEF LAND REGISTRAR.....4TH INTERESTED PARTY

5. THE DISTRICT LAND REGISTRAR,KILIFI ..5TH INTERESTED PARTY

6. NATHAN KAHARA6TH INTERESTED PARTY

R U L I N G

By a Notice of Motion dated 29th October 2004, made under Order LIII Rule 3 (1) Civil Procedure Rules and Section 80 and 3A of the Civil Procedure Act, Section 8 and 9 of the Law Reform Act, (Cap 26); the applicant seeks that an order of Certiorari do issue for purposes of quashing the directive made by the Ministry of Lands and Settlement, the Land Adjudication and Settlement Department, the Commissioner of Lands, and the Chief Land Registrar, dated 30th June 2004 and a prohibitory order to prevent such future directives, and a mandatory order, to compel the Chief Land Registrar to cancel Title Deeds or Letters of Allotment/offer issued to Waladi Ahmed, Joseph Kashuru Mumbo and Nathan Kahara.

It is premised on grounds that:

- a) The exparte applicant, La Marina Ltd is the registered proprietor of Plot Nos Chembe/Kibambamshe/635, 637, 638, 641, 644, 646, 651, 652, 655 and 665.
- b) The various plots aforementioned were curved from Plot No. Kilifi/Chembe/Kibambamshe/393 and 381 after the latter were sub-divided through mutation while others were curved from plot No. Chembe/ Kibambamshe/391,398, 375 and 424.
- c) After the subdivision of Plot No. Kilifi/Chembe /Kibambamshe/393, 391, 398 and 424 into the plots set out in paragraph (a) these plots ceased to exist.
- d) The 2nd, 3rd and 4th respondents have purported to tissue a Title deed to the 1st and 2nd interested parties as Plot No. Kilifi/Chembe/Kibambamshe/393 and 381 respectively even when these titles do not exist.
- e) The 3rd, 4th and the interested parties have further purported to stop all transactions on original plot No. 393 – Chembe/Kibambamshe Scheme on 30th June 2004
- f) The 6th interested party is also claiming ownership of plot No. 375 which no longer exists.
- g) The exparte applicant states that the actions by the interested parties are illegal and ultra vires the powers of the 3rd, 4th and 5th interested parties.

The exparte applicant is a limited liability company who states that land parcels whose original numbers were Kilifi Chembe/Kibambamshe 375, 381, 391, 393, 38 and 394, are subdivided to create new plots No. 635, 637, 638, 641, 644, 646, 651, 652, 655 and 665.

In relation to that, the original Chembe/Kibambamshe/381 measuring 5.4Ha was a part of government land. The exparte applicant states that it was erroneously adjudicated and registered into freehold titles by the Department of Land Adjudication and Settlement in the 1970's but the titles were cancelled, thus reverting the land back to the Government in the year 1986.

The government created a settlement scheme for the purpose of re-settling squatters on the land in Kibambamshe in 1986. The scheme was managed by the Settlement Fund Trustees.

Waladi Ahmed (the 1st interested party) was issued with a letter of offer Ref DS/002/JE/6 on 30th June

1999 in respect of Plot No. 381 with the condition that the offer was valid for 90 days from the date of the letter within which he was supposed to deposit 10% of the total price for the plot and failure would lead to cancellation of the offer without further notice.

The 1st interested party, again secured another letter of offer ref. DS/0021/JE/247 on 19th August 1999, for the same plot 381. No explanation was given for the double issuance of a letter of offer to the 1st interested party.

The Permanent Secretary, Secretary to the Cabinet and Head of Public Service, wrote a letter Ref O.P. 213/001/4 on 29th March 2000, to the Commissioner of Lands recommending the allocation of the plot 381 to the 1st interested party.

The 1st interested party paid the chargeable fees kshs. 24,564/- for plot 381, vide receipt No. 054458 on 31st July 2001 (i.e after the expiry of the time limit given for the validity of letter of offer)

The title No. 381 was closed on subdivision into new title No. 633, 635, 636, 644 and 721, on 11th April 2001, long before the time the 1st interested party paid the shs. 24,564/-.

The resultant titles Chembe/Kibambamshe/635 and 644, were transferred to the exparte applicant named La Marina Ltd on 17th August 2001, several months before the 1st interested party paid for the original Plot No. 381 (as per the certified copies of the registers)

With regard to Plot 393, exparte applicant states that it was initially measuring approximately 4.0 Ha as at 22nd December 1986, and was registered in the name of Government of Kenya.

As at 30th April 1988, the said plot existed physically on the ground without anyone occupying it. Between 1998 and 2001, subdivided plots in Chembe- Kibambamshe area were allocated to successful applicants being numbers 381, 393 424, 391, 298, 396 and 374. Plot 393 was subdivided into new parcels being Nos. 722, 649, 650, 651 and 652. It was closed, and green cards were opened in the name of Settlement Fund trustees. On 11th April 2001, Plots No. 651 and 652 were registered in the names of Lucas Kadenge and Japheth Charo respectively. On 17th April 2001, Lucas Kadenge and Japheth Charo, transferred plots 651 and 622 to la Marina Ltd – which is the position to date.

Notwithstanding, the closure of plot No. 393 as stated by applicant, a new title bearing the name Chembe/ Kibambamshe/393 measuring 4.0 Ha was issued in the name of Joseph Kashuru Mumbo (2nd interested party) on 9th January 2003. Applicant contests this second issuance saying it was irregular and ultra vires the powers of 3rd, 4th and 5th interested parties. While the stated situation was obtaining, the 3rd, 4th and 5th interested parties issued a letter dated 30th June 2004, stopping all transaction on any land falling within the original Chembe/Kibambamshe Scheme.

It is the applicant's contention that plots 635, 637, 638, 64, 644, 646, 651, 652, 655, 665 are entirely private properties belonging to it and the 3rd, 4th and 5th interested parties have no power to suspend operations to cancel the titles and/or in any manner whatsoever deal with those properties without the consent of the exparte applicant.

Further that the said directive has adversely affected the right of the exparte applicant to own and deal with its private property within the rights conferred upon proprietors of land by the Registered Lands Act (RLA) Cap 300 and to that extent their actions are illegal, void and ultra vires their powers.

In relation to plot No. 375, the exparte applicant states that it was initially Government Land, and was subdivided through mutation No. 976279 dated 1st December 2000 creating Plot no. Chembe/Kibambamshe/665, 725, 666, 667 and 646. Out of these, the exparte applicant was allocated plots No. Chembe/Kibambamshe 665 and 646.

The 3rd, 4th and 5th interested parties have purported to issue titles to other people subsequent to 17th April 2001 and it is the applicant's contention that these subsequent allocations are illegal. Further that there are other attempts by 3rd, 4th and 5th interested parties, to interfere with regulations and ownership of plots No. 635, 637, 638, 641, 644, and 655 to the detriment of the exparte applicant.

The 6th interested party claims ownership of plot No. 375 which no longer exists.

It is for these reasons that the exparte applicant prays for orders of:

- (a) Certiorari to quash the decision by 3, 4, and 5th interested parties suspending all transactions in the suit plots dated 30th June 2004, setting up of the task force on Chembe – Kibambamshe area.
- (b) Prohibition to prohibit the interested parties by themselves, their agents/servants and/or assignees from dealing, allocating, conveying ownership and/or occupying and/or in any manner detrimental to the rights of the exparte applicant as proprietor of the mentioned plots.
- (c) An order of Mandamus compelling the 3rd, 4th and 5th interested parties to cancel all other title Deeds and Letters of Allotment/offer issued to the 1st, 2nd and 3rd interested parties and/or any other persons subsequent to the issuance of Title Deeds to the exparte applicant. In response, the 1st interested party filed a replying affidavit stating that he has lived on the parcel No. 381 since the 1950's and continues living and having physical possession of the said land – a copy of the area chief's letter o confirm that is marked WA1. he has developed the land by planting trees, keeping livestock and erecting a permanent and semi-permanent house – a ground report on the plot is annexed as WA II

In 1974, he avers, that the plot was misallocated to other individuals but the same was returned to him after he raised the issue with the relevant authorities and he was advised to apply for official allocation. So he applied for plot no. 381 and a letter of offer was issued to him on 30th day of June 1999 – annexed as WA III. That letter offered him 0.6Ha, yet he occupied 13.6 acres, so he took up the matter with the relevant government authorities vide letter WA IV and got to learn that his land had also been allocated to people who were not living on the plot.

His complaint was duly considered and hence the re-issue of a letter of offer dated 19-8-99 for 13.6acres.

Thereafter he sought to effect payment of the dischargeable fees before the expiry of the stipulated 90 days and to his surprise was informed that he could not make payments as there was a 99 year lease issued in favour of Western Sunshine Co. Ltd. He immediately took up the matter with the Director of Land Adjudication and Settlement and the latter requested for a report on the allocations as per copies of letters dated 3-12-99, 5-1-00 and 13-2-00.

The District Land Registrar then wrote the letter dated 27th January 2000 (WA III) to the Chief Land Registrar informing him that the title issued to Western Sunshine in respect of plot 381 had been cancelled.

1st interested party still met resistance and hostility from Government Land Officials in Kilifi with the result that it was not until 21st February 2001 when he was allowed to pay the deposit price as per receipts marked WA VIII. He was advised to collect land transfer documents from Ministry of Lands on a date to be communicated to him, but he later got to learn from the Lands Registry that his Plot no. 381 had been sub-divided and other plots number 632 – 636 allegedly curved out. So he reported the matter to the Department of Lands Nairobi and a letter dated 29-4-03 (WA IX) was written to the District Land Registrar, Kilifi.

On 16th October 2003, the District Land Registrar wrote to the Chief Land Registrar Nairobi WAX stating that there were no Green Cards for the resultant number. It is therefore 1st interested party's contention that the subdivision of plot no. 381 was unprocedural and issuance of the resultant title was

unlawful as he is the owner of plot no. 381 and the Title purportedly issued to other parties should be cancelled.

The 2nd interested party (Joseph Kashuru Mumbo) has stated in his replying affidavit urges the court to dismiss the application saying that the land in question is formerly government land which was intended for resettlement of the landless squatters who were the actual inhabitants and natives of the said locality. However following previous erroneous allocations in the 70's and subsequent complaints by the locals, that their interest was not fully considered in the exercise as some outsiders and officials of adjudication committee were allocated some plots, led to the revocation of the title deeds and subsequent imposition of embargo on any further dealings with the said plot – a letter from the District Officer Malindi to the District Commissioner Kilifi is annexed and marked JKM 1.

2nd interested party is the owner of plot no. 393 – Chembe/Kibambamshe Scheme by virtue of it being ancestral property handed over to him by his late father Charo Kambiti Musembi and which legally devolves and vests on his heirs. So it came as a surprise, that in the process of resettlement exercise which was purely meant for the landless, some companies managed to dodge the government's noble objective and acquired land within the settlement scheme. He disputes the exparte applicant's assertion that plot no 393 was not being occupied by anyone as at 30-4-98, saying they have been living on the said land since time immemorial, having been born and brought up in the said place and there are developments made by their forefathers especially coconut trees which have now matured.

On 22nd September 1999, he applied for allocation of plot no. 393, and received a letter of offer from the Director of Land Adjudication and Settlement dated 30-6-99 and requiring him to make 10% deposit.

On the strength of that letter of offer, he paid the deposit, completed all the required procedures via exhibit JKM 2 and was issued with a Title Deed on 9-1-03. Just prior to the issuance of the title deed, he conducted an official search and was issued with a search certified dated 10-1-03 showing that he was the registered proprietor of plot 393. Later in the year 2003, there emerged parallel claims to the plot and he carried out another search JKM 3 which confirmed he was still the registered owner of the plot.

In mid 2004, having heard about the exparte applicant's claims, the 2nd interested party inquired from Director of Land Adjudication and Settlement the position of his plot and was informed by a letter dated 10th June 2004, JKM 4, that their records show the plot still belonged to him.

So he is the bona fide owner although in his last effort to establish the status vide official search from the Registrar of Lands Kilifi yielded a lack of co-operation from the said office. On 25-3-04, he applied on behalf of the estate of his late father Charo Kambiti Musembi, for allocation of plot no. 398 vide JKM 6, having obtained full authority from his father's widows namely Dama Kapasi Singa and Sadaka Charo Kambiti, but so far there has been no response from the Director of Land Adjudication and Settlement. He objects to the claim that plot 398 was subdivided and plot no. 641 carved out of it.

The 3rd, 4th and 5th interest party filed replying affidavit sworn by Rufus Karume Kalama, the Land Registrar – Kilifi in which he stated that the original plot number was Chembe/Kibambamshe 375, which title was cancelled after the expiry of the notice as per gazette notice No. 25050 of 30th may 1986 (annexure JEM 1- 3 refers).

All the titles that had been issued under Land Adjudication Act, Cap 284 in respect of Chembe/Kibambamshe, Kilifi Jimba, Madeteni and Matsangoni were cancelled and the first edition registers were expunged from the records. This meant that the titles reverted to the government and were available for re-allocation. A new process of allocation and registration of titles was started under Cap 280 (Government Lands Act) and Settlement Fund Trees, under the Agriculture Act.

The new process of allocation and registration was carried out by the Commissioner of Lands and the Settlement Fund Trustee, after the interested parties and the squatters had been identified.

The 6th interested party (Nathan Kahara) claims plot 375 and in response to the ex parte applicant's motion states that in 1981, on a visit to Malindi, a Bank Manager informed him that there was a 27 acre prime beach plot up for sale.

The said property was to be sold by private treaty by Datoo Auctioneers on behalf of the National Bank of Kenya, to recover a loan from Robert Githinji Mureithi.

Later, National Bank, through their lawyer, Jones and Jones of Nakuru wrote a letter, threatening to auction the property, at whatever price as per the annexed letter marked NK 1.

The bank gave a notice in a letter ref. NBK 30658/78 addressed to Mr. Mureithi for the auction unless 100% of the loan, interest and other costs were cleared. Thereafter, Datoo Auctioneers placed an advertisement with regard to the property (NK 2) – the advertisement was made on 24-8-82 and the auction was to take place on 25-8-82. The 6th interested party borrowed a high interest loan from Pan African Finance to enable him purchase the property from Robert Mureithi, with the approval of the same lawyers and auctioneers. Mr. Mureithi then wrote a letter dated 15th December 1981 (NK 3) to the lawyers of National Bank of Kenya confirming that he had sold the property to the 6th interested party.

The firm of Jones and Jones (i.e National Bank of Kenya's lawyers) wrote to the 6th interested party K. Mwaura & Co. Advocate a letter (NK4) forwarding

- (a) The land Title No. Chembe/Kibambamshe/375 dated 14th July 1978,
- (b) Discharge of charge in triplicate, duly executed but unregistered with copies to Managing Director National Bank of Kenya.

This letter was written after the 6th interested party had cleared the bank loan along with interest, legal fees and auctioneers and fees. The delay in transferring the proper to the 6th interested party's here, was occasioned by an embargo by the Government that sought to avoid further transfer and irregularly allocated land. He was however assured that his land was not subject to, nor affected by the embargo because it had been the subject of mortgage and its allocation could not have been irregular.

Later the District Land Officer Kilifi, wrote to the Commissioner of Lands Nairobi NK5 requesting him to assist the 6th interested party to apply for a title deed for parcel no. 375.

The Kilifi/Malindi District Lands Officer then wrote a letter dated 30-4-98 (NK6) confirming that the plot had deep bush with no sign of human habitation. Then came the Likoni clashes, which scuttled the 6th interested party's investment plans on the land, and come the year 2004, he realized that there were certain individuals laying claim to his portion and had even acquired tiles.

He contests a letter written by the then Land Registrar on 17-5-00 (NK7) purporting that land allocation in the area had been nullified, saying there is no proof to that and alleged fraud on the part of Chivatsi including altering records to the 6th interested party's disadvantage. It is this action by Mr. Chivatsi that led to the latter signing a mutation form No. 076219 (NK9) subdividing the 6th interested party's parcel of land into five (5) portions and points out that the said form was unilaterally signed by Mr. Chivatsi without the proprietor's signature as is legally required, and oddly enough, honoured by his servants, who were interested parties. This created portions No. 725, 65, 666, 667 646, which were allocated to

- 1) Kahindi G. Jogolo
- 2) Peris Dama
- 3) Cripus Singo

4) Joel Komen

5) La Marina Ltd

Thereafter Mr. P. K. Mwaniki (then Malindi Lands Adjudication Settlement officer) wrote a letter (NK 10) to the Director of Lands, Nairobi, seeking authority for new allottees of plots 646 and 665 to make payments in Nairobi while the actual sub-division on the ground was actually done on 14th October 2004 and he wonders how plot 646 and 665 could have been registered, one and half years before permission to sub-divide plot no. 375 had been obtained. To further this illegality, one Mr. Gachathi of Land Adjudication and Settlements Department Nairobi wrote (NK 11) to the District Land Settlement Officer, Malindi, requesting for documents in respect of Land parcels inter alia 646 and 665 for discharge of charge, long before mutation was submitted for approval. Subsequently, a title (NK 12) for plot no. 742 was issued in the names of Kahindi Jogolo, Pepris Damah, Crispin Singo and Joel Komen.

Titles for plot 665 (NK 13) and plot 664 (NK 14) were issued in the name of La Marina and 6th interested party says these titles were fake.

On 14th October 2004, the 6th interested party, commissioned a private surveyor Mr. A. Thayu and G. K. Thairu to identify beacons on the land and they confirmed that the land was bush and not inhabited – no surveyor’s report is annexed.

On the same date, one Mr. Adnan Dae of Malindi District Survey, led about 30 people using government vehicles to descend on the land i.e plot 373 and they subdivided it and placed fresh beacons - the new subdivisions are contained in the mutation forms marked NK15.

He therefore contests the claim by the exparte applicant’s director saying by 17-4-01, plot 375 was in existence way back in 1981 being in the name of Robert Githinji.

In the written submissions filed by Mr. Munyithya on behalf of the respondent/applicant, he contends that the 1st interested party has never held Title deed over the disputed land – having only been an applicant.

Further, that the 1st interested party confirms that the land was subsequently subdivided (albeit unprocedurally). He urges this court to rely on the replying affidavit sworn by Rufus Kalama, and quash the documents held by the 1st interested party.

Mr. Munyithya has made reference to section 14 of the Registered Lands Act (RLA) – Cap 300 which provides as follows:

“14) - The date of land, the subject of a grant or lease under the Registration of Title Act, be deemed to be the date on which this Act applied to the land concerned.

b) In the case of land registered under the Land Registration (Special Areas) Act, be deemed to be the date on which it was first registered under that Act.

c) In the case of land, the subject of grant, lease or certificate of ownership registered under the Government Lands act or the Land Tiles Act, be the date on which this Act applies hereto by virtue of section (1) (1) (b).

d) In any other case be the date on which the land, first came on to the land register.

Mr. Munyithya asks this court to consider the explanation of the process of acquisition as given by the applicant stating that by 9th January 2003 when the 2nd interested party was getting his title deed, the applicant has already acquired his titles. He also seeks to rely on the provisions of section 27 and 28 of

the Registration of Lands Act which provide as follows:

“Section 27:

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.**

Section 28: The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register: and**
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

As for the 2nd interested party, Mr. Munyiya submits that he has never applied for the applicant's titles to be declared null and void or even be quashed nor did he allege existence of any fraud, forgery, or theft.

He is silent regarding the portion of 6th respondent's assertions.

Mr. Gunga Mwinga (the 1st interested party's Counsel) stated in his written submission that the latter has clearly shown how he was allocated the land No. 381 and that it has not been established how that allocation was irregular or unlawful. Furthermore the allocation was due on 30-6-99 before the subdivision of the plot into title No. 633 and 644 on 11th April 2001 and subsequent issuance of the Titles to the exparte applicant on 17th April 2001. He wonders why the exparte applicant does not complain against the cancellation of title No. 381 in 1970 after it was discovered that the land was erroneously adjudicated upon by the department of land adjudication and settlement, and titles issued thereto; yet is now complaining against the actions of the 3rd, 4th and 5th interested parties who after discovery of more errors, have taken steps to rectify the same by cancelling the titles issued to the exparte applicant. It is his contention that the entire process leading to the exparte applicant obtaining title was flawed since it was as a direct result of the cancellation of title 381 in the year 1970.

Mr. Gunga also argues that the exparte applicant has not explained why title NO. 381 was subdivided, who was the owner of the title at the time of the sub-division and who transferred title No. Chembe/Kibambamshe/635 and 644 to it or even who applied for the subdivision since 1st interested party's allocation had not been cancelled. It is his contention that, the issue of first registration does not arise with respect to titles No. 635 and 644 because they are subdivisions of 381.

Mr. Gunga also takes issue with the exparte applicant's statement, saying it violated the provisions of order LIII Rules 1 (2) and 4 (1) of the Civil Procedure Rules in that it does not contain the grounds on which relief is sought; which therefore renders the application incompetent and it should be dismissed with costs.

Mr. Odongo on behalf of the 2nd interested party submits that procedurally an application of this nature

can only be instituted after leave of the court has been obtained pursuant to Order LIII Rule 1. He faults the format of the application saying it does not show that the respondent against whom the order should be issued is La Marina itself, pointing out that the heading reflects the Republic as the applicant, La Marina as the respondent, and interested parties include both the Commissioner of Land, Chief Land Registrar and the District Land Registrar, Kilifi.

Mr. Odongo argues that the application is not proper as Judicial review is a prerogative order which is issued in the name of the Republic at the instance of the applicant, but not at the instance of the respondent as is the case here. He refers to the case of **Mohammed Ahmed v R (1957) EA 523** which pointed out that the crown cannot be both the applicant and respondent in the same matter.

With regard to the prayers for certiorari and prohibition, Mr. Odongo submits that La Marina has not shown the court the alleged directive dated 30th June 2004 which is sought to be quashed neither did the applicant's counsel make submissions in that regard and so the prayer should fail.

As for the prayers of mandamus to compel the Chief Land Registrar to cancel the title deeds, Mr. Odongo's contention is that the Chief Land Registrar does not have such powers under the Registration of Land Act to cancel, arguing that it is only the court which has power under section 143(1) to cancel any registration. To that extent, Mr. Odongo submits that the prayer is inherently misdirected and is an abuse of the court process as the court cannot direct the Chief Land Registrar to do what the law does not allow.

The existence of La Marina is also an issue, Mr. Odongo argues that it has not been established that such a company exists since nothing has been duly exhibited to show that it is a company with corporate status capable of owning property in Kenya or whether it is a company which can be given consent under section 9 of the Land Control Act Cap 302 to own or acquire agricultural land.

Mr. Odongo further argues that there is no evidence to confirm that plot 393 was ever sub-divided and it is his contention that the same remains intact and registered in the name of the 2nd interested party. He pokes holes at the mutation form relied on to support the claim regarding subdivision, saying that it is not dated, not signed by the proprietor, does not indicate the persons interest in the same and their addresses; it is not registered and no consent from the Land Control Board to subdivide is attached. He points out that there are several disputed facts, which cannot be determined by way of Judicial Review.

Mr. Odongo also takes issue with the purported transfer of the two subdivisions by Lucas Kadenge and Japheth Charo saying that such transactions can only be evidenced by a copy of duly registered transfer and consent from the Land Control Board since the land in question is agricultural land yet no such documents have been availed. It is argued that 2nd interested party has demonstrated clearly how he obtained title after making an application and his averments are supported by documentary evidence; and he is the rightful beneficiary of Chembe/Kibambamshe Settlement Scheme, which was meant for squatters and not companies.

He contends that 3rd, 4th and 5th interested parties could not have acted ultra vires their powers as section 32(1) of the RLA empowers the Registrar of issue title deeds or certificates of titles if requested by the proprietor.

He requests this court to consider that up to the last search carried out by 2nd interested party the record clearly shows that plot Chembe/Kibambamshe 393 is his, consequently the applicant is not entitled to any of the prayers sought and the same should be dismissed with costs.

Mr. Mwadilo for the 6th interested party, adopted the submissions made by 2nd interested party's counsel.

I will first deal with the issue of form and procedure. Whether the exparte applicant's statement is defective. The relevant procedural law for Judicial Review is contained in order 53. An application for leave to file an application for any of the judicial review orders is made on behalf of the aggrieved applicant by a chamber summons supported by a statement of facts and verifying affidavit. The statement

as the pleading and must contain:

a) The description of the applicant

The grounds for which the relief is sought.

The relief sought.

The application for leave must be in the name of the applicant and not the Republic and if it is made in the name of the Republic, it should be struck out.

All evidential facts should be set in an affidavit, and not the statements so that the verifying affidavit is the one which has evidential value. In this regard the case of **Commissioner General KRA v Silvano Owaki CA No. 45 of 2000 at pg 7** offers a useful guide Order LIII Rule 1 (2) Civil Procedure Rules provides that:

“An application for such leave as aforesaid shall be made ex parte 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”

In the present case Mr. Odongo points out that the heading of the application reflects the Republic as the applicant I have considered the decision in **Mohammed Ahmed v R (1957) EA pg 523** where the court stated:

“The appellant’s advocate appears to have failed entirely to realize the prerogative orders, like the old prerogative writs, are issued in the name of the Crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. ...the crown cannot be both applicant and respondent in the same matter.”

A more recent decision is the case of **Welamondi v Electoral Commission of Kenya 2000 KLR** which recognized that an application for judicial review must be made in the name of applicant and not the Republic and if it is made in the name of the Republic then such an application must be struck off. It is correct that the present application offends what I have alluded to as the Republic is named as the Applicant herein and also the respondent interested party) through its servants. It goes against what is anticipated as discussed in **Ahmed’s case** and **Welamodi’s case**. The application is incurably defective and incompetent.

Then there is the content of the ex parte applicant’s statement to the effect that it does not contain the grounds on which relief is sought.

The statement herein contains:

- 1) name of the ex parte applicant
- 2) nature of the claim
- 3) facts relating to the claim
- 4) relief sought

that certainly leaves out part of what is provided under Order 53 Rule 1 (2) i.e grounds on which the relief is sought and this again Punctures the application.

Then there are prayers sought to which Mr. Odongo submits that applicant has not shown the court the

alleged directive dated 30th June 2004 which is to be quashed, nor did the ex parte applicant's Counsel make any submissions on it and also that orders sought for mandamus are not available.

I think it will be pointless delving into this because the application in its form and substance is defective, and to begin analyzing the substantive issues on a defective application would be totally misplaced.

The upshot is that the application is dismissed for being defective and incompetent.

I award costs of this application to the interested parties herein.

Delivered and dated this **24th** day of **November 2009** at Malindi.

H. A. OMONDI

JUDGE