



**REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT MOMBASA  
Judicial Review 8 of 2008**

**IN THE MATTER OF: AN APPLICATION BY MDIGO NGAO RAMADHAN NGAO BEMUNGA & ELIAS NZAKA  
MAGWAM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS  
AGAINST THE REGISTRAR OF TITLES  
AND**

**THE MATTER OF: ALL THE PIECE OF LAND IN KALIA KAGOMBE AREA IN MARIAKANI MEASURING APPROXIMATELY 10  
ACRES OR THEREABOUTS CONTAINED IN TITLE  
THE LAWS OF KENYA**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF TITLES..... RESPONDENT**

**KAVEE QUARRIES LIMITED.....INTERESTED PARTY**

**JUDGMENT**

On 29<sup>th</sup> April 2008, Mdigo Ngao, Ramadhan Ngao Bemunga and Elias Nzaka Magwama (hereinafter “the applicants”) were granted leave by Njagi J, to bring judicial review proceedings by way of an order of mandamus directed against the Registrar of Titles to forthwith cancel all that Title in Grant Number 31661 in S. E. Mariakani trading Centre in Kilifi District (hereinafter “the suit property”) containing by measurement fifty point naught four hectares (50.04 ha) or thereabouts that is to say Land Reference Number 22912 delineated on Land Survey Plan Number 220347 in the name of the 1<sup>st</sup> Respondent.

Pursuant to that leave, the applicants lodged this Notice of Motion under Order LIII Rule 1 (2) of the Civil Procedure Rules seeking the order for which leave had been obtained. The main grounds for the application are that the Interested Party, Kavee Quarries Limited (hereinafter “Kavee”), a former tenant of the applicants, obtained a lease over the suit property through fraud and misrepresentation and that the respondent, (The Registrar of Titles) and Kavee contravened the doctrine of *lis pendens* and adversely dealt with the suit property in order to defeat the applicants’ claim through fraud, misrepresentation and/or concealment of fact.

The Notice of Motion is supported by an affidavit sworn by the 1<sup>st</sup> applicant, Mdigo Ngao and a statutory statement of facts filed by the Advocates for the applicants. From the statement and affidavit the case of the applicants is briefly as follows: The applicants and members of their families and clan have been in occupation of about 10 acres of the suit property since time immemorial. In 1978 the said portion was leased to the Interested Party for 10 years after which it failed to yield up possession which action triggered the filing of Misc. Application No. 283 of 2005 by the 1<sup>st</sup> applicant against the Interested Party seeking vacant possession of the said portion. During the pendency of the said proceedings, the Interested Party obtained a certificate of Title by means of fraud, misrepresentation and concealment of fact which in turn provoked the filing of these proceedings.

The application is opposed by the Interested Party which has filed an affidavit in opposition through Hemant Desai, its Manager. In the said affidavit, it is deponed, *inter alia*, that the applicants have abused the process of the court by filing these proceedings during the

pendency of other proceedings over the same property, (HCMA NO. 283 of 2005 (OS) and HCCC No. 298 of 2007). It is further deponed that the Interested Party was lawfully granted a lease over the suit property for, *inter alia* quarrying, building stones and that the applicants' claim should be made against the Government which granted the said lease.

When the application came up before me for hearing on 1<sup>st</sup> March 2009, counsel agreed to file written submissions which were duly filed by 14<sup>th</sup> October 2009. The submissions merely elaborate the parties' stand-points taken in their respective affidavits. I have considered those submissions as well as the pleadings filed by the parties. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of the matter. The applicants seek only one order of the court and that is an Order of Mandamus directed against the Registrar of Titles to forthwith cancel all the suit title registered in the name of the Interested Party. Grounds (a) and (b) of the Notice of Motion suggest that the applicants' claim is a representative one. In ground (a) the applicants state as follows:-

**“(a) The applicants and their families are members of the Rabai Community and have been in occupation and living since time immemorial on approximately 10 acre property.....which is now contained under Certificate of Title described as Grant Number C.R. 31661, Land Reference Number 22912.”**

AND in ground (b) the applicants state as follows:-

**(b) That sometime in the year 1978, the 1<sup>st</sup> Ex Parte Applicant together with one Ngao Digwanga and Bemunga Ngao as representative elders of their clan did lease to the Interested Party 10 acres or thereabouts of their property.....”**

As already observed above, the basis of the applicants' claim as pleaded in ground (i) and (j) is the obtaining of title to the suit property irregularly through fraud and misrepresentation. The relief sought is expressed in as follows:-

**“1. That the Respondents actions have necessitated the Ex Parte Applicants to seek redress of this Honourable Court in order to assert their rights and claim to the 10 acre property unlawfully deprived from the Applicants by the Interested Party because of their peasant ordinary folk status.” (Emphasis supplied).**

I have anxiously considered the applicants' claim and how it has been pleaded and must address the remedy of the order of mandamus. In the case of The Kenya National Examinations Council – v – Njoroge & Others [CA No. 266 of 1996] (UR), the Court of Appeal outlined the scope of judicial review remedies and held that judicial review is solely concerned with the decision making process and not with the merits of the decision itself. In that case the applicants had sought, *inter alia*, the following relief:

**“(b) An order of mandamus do issue directing the Kenya National Examinations Council to forthwith release the 1994 K.C.P.E. examination results.....”**

The applicants did not also seek an order of certiorari. The Court of Appeal held that without an order of certiorari quashing the council's decision which cancelled the results, the order of mandamus could not issue as prayed. An order of mandamus compels a public body to perform a duty imposed upon it by law where the public body has refused to perform the duty. However, once a decision has been made or duty performed the remedy of mandamus would not be available. An order of certiorari would however be available where the decision or performance of a duty has not been made or duty performed in conformity with the Law and the rules of natural justice.

In the case at hand, the Respondent is said to have issued and registered a grant of the suit property in favour of the Interested Party. The registering of grants and issuing of certificates of title to land under the Registration of Titles Act is the Respondent's duty imposed upon him by Law. If the Respondent had not performed his duty of registration, an order of mandamus would lawfully issue to compel him to do so. The remedy of mandamus looks at the present and aims at enforcing a duty which has not been performed. It cannot quash that which has been performed (see Welamondi – v – The Chairman Electoral Commission of Kenya [2002] 1 KLR 486).

Ringer J, as he then was, also held in the Welamondi case (supra) that a representative suit can only be brought in an ordinary action under the Civil Procedure Act and Rules. That is because, Judicial Review Procedure is a special procedure (see Commissioner of Lands – v – Kunste Hotel Limited [CA No. 234 of 1995] (UR)). Even if a representative action can be brought under the Judicial Review Procedure, and that the provisions of the Civil Procedure Rule apply, there is no evidence that the applicants have complied with provisions relating to representative actions.

In the end, even though the Respondent did not oppose this Notice of Motion, the applicants have not persuaded me that the relief of mandamus is available to them. They have not properly invoked the court's jurisdiction. Their Motion is therefore dismissed. With regard to costs, I order that each party bears their own costs of these proceedings.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF NOVEMBER 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Dr. Khaminwa for the Applicants and Mr. Khagram for the Interested Party.

**F. AZANGALALA**

**JUDGE**

**6<sup>TH</sup> NOVEMBER 2009**