REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 1599 of 2005

KUYA OLE MASIKONDE & 11 OTHERS…....APPLICANTS

Versus

THE ATTORNEY GENERAL……..……..…RESPONDENT

JUDGMENT

The Notice of Motion dated 23rd November 2005 is brought pursuant to Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules. The Application is brought by 12 persons named in the Notice of Motion as Interested parties. They seek the following orders:-

1) That the Honourable Court do issue orders of mandamus, prohibition and certiorari by way of Judicial Review, directed to the Land Control Board and the Registrar of Lands Narok, from registering the subdivision and the same be quashed;

2) That the orders of certiorari to quash the orders by the Narok Land Control Board, and the Narok Land Registrar, be prohibited from registering the illegal, and fraudulent subdivisions by the Respondents, and the Respondents be restrained from continuing with the subdivision surveying and registering of the subdivision till the parcel reference Nairobi/C\S Mara/Rotian 8-149 be surveyed a fresh and the acreage be ascertained for fresh subdivision; and

3) Costs of the Application be provided for.

The Application is grounded on the affidavit of Simon Ole Masikonde dated 23rd November 2005 and a statutory statement dated 7th November 2005.

The Respondents are named as Nkuruna Ole Masikonde, Tipapa Ole Narishet, Lemeria Ole Nerishet, Moses Ole Masikonde, Samaine Ole Masikonde, Lesinko Ole Masikonde, Manile Ole Masikonde, Lesire Ole Masikonde, Mapely Ole Otuni,Rotian – Masikonde OlMukongo Group Ranch; The Land Registrar Narok, The Registrar of Group Representatives, the Hon the Attorney General.

Mr. Eredi who represented the 11th to 13th Respondents filed Notice of Preliminary Objection dated 16th June 2006 and skeleton arguments dated 7th July 2006, Mr. Agina representing the 1st to 10th Respondents also filed skeleton arguments dated 1st February 2007 and grounds of objection dated 20th December 2005, Notice of Preliminary Objection dated 6th June 2006 and a Replying Affidavit by Nkuruna Ole Masikonde dated 5th May 2006.

Briefly the case of the Applicants (Interested Parties) is that they are members of the 10th Respondent Group Ranch. They held the properties of the 10th Respondent in equal shares with the other

shareholders and members. The Applicants filed HCC 1669/94 which was struck out by J. Ojwang on 23rd September 2005. The suit had been filed because the Respondents who were appointed as trustee of the 10th Respondent had allocated land to non-members, and to themselves large pieces of land of upto 400 acres while other members were allocated only 4 acres. They want the orders of the Registrar to register the sub-division stopped and the consent of the Narok Land Control Board set aside. That since the orders of injunction are not in place HCC 1669/94 having been dismissed, the Respondents are likely to move and register the titles and illegal allocations of land. That is why they seek the above orders of Judicial Review.

The 11th to 13th grounds of objection to the Application are as follows:-

1. The Application is incompetent bad in law and should be struck out;

2. The Application is an appeal in disguise from the ruling of Justice Ojwang dated 23rd September 2005;

3. The application is incompetent and incapable of being relied upon thereby prejudicing the parties;

4. The Application does not comply with provisions of Order 53 Civil Procedure Rules;

5. That the Application is time barred.

Basically, the Affidavit of Nkuruna Ole Masikonde, the chairman of the Rotian Olmukongo Group Ranch reiterated the grounds of objection raised. He also deponed that the said Olmukongo Group Ranch was dissolved in August 1989 pursuant to the consent of the Group Ranches and this suit comes 16 years after the said dissolution, and that consent to subdivision LR Narok Cis-Mara Rotian 1 was on 14th July 1991 and cannot be set aside after 14 years. That subsequently there was consent to transfer the parcels curved out of Narok Cis-Mara/Rotian in 1994 and the same cannot be reversed so late in the day.

The 1st to 10th Respondent reiterate some of the grounds raised by the 11th to 13th Respondents and I will list those not listed above. They are as follows:-

3) That the Narok District Land Control Board is not a party to the suit hence no orders can be made against it;

4) That the decision of the Narok District Land Control Board was made over 10 years ago and cannot be quashed by certiorari;

5) That the Applicants have all along been aware that the Narok District Land Registrar was to issue title deeds after consent of the Land Control Board of 5th July 1994 and that they did nothing for over 10 years and are therefore guilty of laches;

6) There are no continuing subdivisions or surveying to be stopped;

7) The suit is a representative suit brought without leave of the court;

8) 1st to 9th Interested Parties are official of the 10th Interested Party which is a corporate body capable of suing and being sued in its own name and the officials should not have been sued;

9) The issue of the accounts of the 10th Interested Party ought to have been raised at the meeting in which the ranch was dissolved; and

10) The issue of the acreage of the land owned by the 10th Interested Party was known to the public all the while by a search at the Land Registry and ignorance of the law is not a defence.

Before considering the merits of this Application I think it proper to consider the various objections raised. Both Mr. Eredi, for 11-13th Respondents and Mr. Agina for 1st to 10th Respondents urged that the Application is fatally defective as it is not clear who the Applicants are, who the Interested Parties are. Indeed the Applicant is named as the Republic. However, the persons who seemed to be making the Application are named as the Interested Parties whereas the persons against whom orders are sought are 13 Respondents. The Application is in a mess. The People named as Interested Parties should actually be the ex parte Applicants, those named as 1st to 10th Respondents are private individuals upon whom orders of Judicial Review cannot issue and should only have been named as the Interested Parties.

The 11th to 13th Respondents are public bodies and were properly named as Respondents. The Application was quite mixed up and one may not have been clear against who orders were being sought. Such an Application should be clear as to the parties to enable the opposing parties respond to the claims. The Application was indeed defective as drawn.

Objection was raised regarding the prayers sought, as they were said to be vague and incomprehensible. In prayer 1, the Applicant prays for the three orders of mandamus, prohibition and certiorari. It is not clear at whom each prayer is directed as required in Judicial Review.

Similarly in prayer 2, an order of certiorari is sought together with an order of prohibition. The prayers cannot have been sought as prayed because each prayer is supposed to be specific since each order performs a distinct function and they cannot be mashed together as was done in this case. The case of KENYA

NAL EXAMINATION COUNCIL V REP CA 266/00 sets out the scope and efficacy of each of the three Judicial Review orders.

Of prohibition the court said:-

"what does an order of prohibition do and when will it issue? It is an order from the High Court directed on an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it, but also for a de[artire 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……. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision."

Of Mandamus, the Court said:-

"**What is the scope and efficacy of an order of mandamus? (quoting Halsburys Laws of England 4th Ed Vol I) ……. "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."**

Of Certiorari the Court said:-

"Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

Having set out the functions and scope of the three orders of Judicial Review; it is obvious that they

should be specifically and separately sought. At prayer 2, an order of prohibition is sought against all Respondents yet the 1st to 10th Respondents are private individuals against whom Judicial Review orders cannot issue being public law remedies. The prayers are vague, a total muddle and cannot be issued by any court. A Respondent or Interested Party wanting to oppose or respond thereto would have no idea what to respond to.

I have also noted that though the Applicant sought the three orders of mandamus, prohibition and certiorari in the Notice of Motion, in the statutory statement, only two orders of Judicial Review are sought at para 4 (a). It reads:-

"An order of mandamus to compel the Narok Land Registrar from registering and/or issuing orders on the allocations illegally done".

There is no prayer for certiorari. Under Order 53 Rule 4 (1) Civil Procedure Rules no relief shall be sought at the hearing of the Motion except that set out in the statement. It means that even if the court were to consider any prayers, it would only be the prayer for mandamus and prohibition but not certiorari since it is not sought in the statutory statement.

I have seen the other prayers set out in the statement. They are not included in the Notice of Motion. Prayer 4(b) in the Statement seeks the recalling of the survey done and revocation of the same;

Prayer 4 (c) seeks an order that the Respondents do not dissolve until the properties owned by the group ranch has been equally shared and equitably distributed as per the list of the members;

4 (d) seeks an order restraining the Land Registrar Narok from registering the titles that were fraudulently acquired as a result of the fraudulent subdivision.

Prayers 4 (b), (c) and (d) cannot issue because they do not lie in Judicial Review. S. 8 of the Law Reform Act which donates power to Order 53 Civil Procedure Rules to issue Judicial Review Orders provides for only 3 orders of mandamus, prohibition and certiorari which can issue in Judicial Review. Injunctions or other orders as prayed for cannot issue. Even prayer 4(a) just like the prayers in the Notice of Motion is a muddle and I find and hold that the prayers as framed are vague, incomprehensible and are incapable of being granted.

In prayers 1 and 2 of the Notice of Motion the Applicants seek prayers against the Land Control Board Narok. The same is not a party to these proceedings and so the orders cannot issue on a non-suited party.

It is not in dispute that on 23rd September 2005, Justice Ojwang struck out HCC 1669/1994, a suit filed by the Applicants. The basis of the striking out the suit was that it was time barred having been filed outside the limitation period of 3 years for a tort, that it had not complied with S.13 A of the Government Proceedings Act and that there was no evidence that the group ranch was still in existence. It was Mr. Eredi and Agina's submission that these Judicial Review proceedings were an appeal in disguise against Justice Ojwang's ruling. Justice Ojwang having found that the Group Ranch did not exist, then the Applicants are trying to bring the same suit through the back door by seeking to stop its dissolution or quash the orders made when it was in existence. I do uphold that objection.

The Respondents Counsel also submitted that an order of certiorari cannot issue having been sought 15 years after the orders were made. Order 53 R 2 Civil Procedure Rules provides that an order of certiorari will not be granted unless the Application for leave is made not later than 6 months after the date of the proceeding, judgment, order, decision, conviction being made. The Applicant should demonstrate that the decision of the Land Control Board or Land Registrar was a nullity was made ultra vires or without jurisdiction, and does not fall under the category listed under Order 53 R 2 Civil Procedure Rules, so that if the decision was made without jurisdiction or in excess thereof it can still be quashed even after the 15 years.

I have noted above that an order of certiorari cannot issue in this matter having not been prayed for in the

statement and the prayers in the Notice of Motion being vague and mashed together.

It was submitted that the 1st to 9th Respondents are sued as representatives of the Group Ranch contrary to Section 13 of the Land (Group Representatives) Act, Cap 287 Laws of Kenya. Section 13 of that Act provides for Application for amendment or dissolution by the Group Representatives and it is the contention of the Respondents that the Ranch was dissolved in 1989. Unfortunately the Respondents did not avail any evidence to that effect save that in Justice Ojwang's ruling in HCC 1669/94 on 23rd September 2005, he found that there was no evidence that the Group Ranch was still in existence.

That having been determined by that court, the issue of the existence of the Group Ranch cannot arise again. Since the Group Ranch is non existent no orders can issue against it.

Further to the above, the 1st to 9th Respondents are sued in their personal capacities yet they were only representatives of a Group Ranch which is a corporate body under S.8 of Cap 287 Laws of Kenya and has powers to sue and be sued. The orders sought could not lie as against them.

For all the reasons considered in this judgment, the upshot is that this Application was muddled up, some of the prayers sought cannot be issued in Judicial Review, an order of certiorari cannot be issued so late in the day and the Application is all together unmeritorious and it is hereby dismissed with costs to the Respondents.

Dated and delivered this 4th day of May, 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr. Osoro for the Applicants

Respondents absent

Daniel: Court Clerk