



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC CIV APPLI 547 OF 2007

BONDO COUNTY COUNCIL.....APPLICANT

Versus

COMMISSIONER OF LANDS.....1ST RESPONDENT

SIAYA COUNTY COUNCIL.....2ND RESPONDENT

RULING

Before me is the Chamber Summons dated 24th May 2007, in which the Applicant, Bondo County Council, seeks leave of this court to commence Judicial Review proceedings against the Commissioner of Lands, the Respondent herein and the Siaya Country Council, which was named as an Interested Party. The Applicant seeks the following orders;

- (b) that the Applicant be granted leave to apply for an order of certiorari to remove into the High Court for purposes of being quashed, the decision of the Commissioner of Lands contained in Gazette Notice Nos 9819, 9820, 9821 and 9822;
- (c) That the Applicant be granted leave to apply for an order of prohibition to prohibit the Commissioner of Lands from implementing his decision contained in Gazette Notice No. 9819, 9820, 9821 and 9822 and from issuing a certificate of lease to Siaya County Council or to anyone else;
- (d) That the leave do operate as stay of the Commissioner's decision;
- (e) Costs of the Application be provided for.

The Application is supported by the Verifying Affidavit and Supporting Affidavit of Richard Odindo, the County Clerk of Bondo County Council, dated 17th May 2007 and 24th May 2007 respectively and a Statement of facts dated 17th May 2007.

When this matter came before the court ex parte it was ordered that the same be heard inter partes and in opposition, a Replying Affidavit was filed by Joseph M. Njenga, the Clerk to the County Council of Siaya.

The Respondents, represented by Mr. Makongo of the Attorney General's Office, did not file any papers nor did they offer any submissions. Mr. Makongo informed the court that they had no objection to either leave or stay being granted because the Commissioner of Lands would not take any action in the

disputed land till this case was determined.

Mr. Mwamu appeared for the Applicants while Mr. Madialo urged the Application on behalf of the Interested Party.

At the centre of this controversy is Yala Swamp which is said to lie partially in Bondo County Council and Siaya County Council. Bondo County Council was hived off Siaya County Council in the 1990s. Mr. Odindo

deposed that by an Memorandum of Understanding dated 20th May 2003 (RJOG 2), it was agreed that 3200 hectares of Yala Swamp be annexed by Bondo County Council and the Interested Party, who were to share cess, rent and infrastructural facilities, constructed by Dominion Farms Ltd. That the boundary between Siaya and Bondo County Council has never been determined but some areas of Bondo fall within the Yala Swamp and the Interested Party cannot claim the whole of the 3200 Ha of Yala Swamp. That the Interested Party has fraudulently misrepresented to the Commissioner of Lands that the 3200 Ha wholly belongs to them and caused the land to be registered in their name exclusively vide gazette Notice 9819-9822 (R 50 3 (a) and (b)) and that the Interested Party failed to disclose to the Commissioner about that Memorandum of Understanding between them. That the Residents of Bondo will suffer since they will be denied of their trust land, revenue, infrastructural facilities and benefits generated by Dominion Farms Ltd. The Applicants want Dominion Farms Ltd. to be restrained from paying proceeds of the Memorandum of Understanding.

Mr. Mwamu submitted that though the Commissioner of Lands was aware of the Memorandum of Understanding, she neither gave the

Applicants Notice of the setting aside of the 3200 Ha nor were the Applicants given a hearing. That the decision making process is flawed and the orders sought should be granted. He relied on the decision in **MISC APPLICATION 1025/03 R V JSC ex parte PARENO.**

That the matter before court involves both private and public law and that this court can therefore intervene. Counsel also relied on the decision in **MISC APPLICATION 1235/98 REP V COMMISSIONER OF LANDS Ex parte LAKE FLOWERS LTD** where the court observed that the Judicial Review jurisdiction is developing and the courts should use it as a tool for justice to serve the needs of the society.

In opposing the Application, Mr. Njenga the Clerk of County Council of Siaya deponed that vide Gazette Notice 2570 of 25th August 1970, the Commissioner of Lands acting pursuant to Trust Lands Act Cap 288 Laws of Kenya and the Constitution, constituted all that parcel of land covered by Yala Swamps and vested it in Siaya County Council (JNN 1). That the trusteeship has never been vested in Bondo County Council since its creation and vide gazette Notices 9819-22 of 1st December 2006, the Commissioner in exercise of her powers under Cap 288 Laws of Kenya, set

aside portions of the swamps for purposes contained in the Notice. That

the laid down procedure was followed in so doing under the Trust Land Act, (See JNN 2) Land Control Act and Land Control Regulations, 1968 and that the Land Control Board gave consent for the setting apart before the Commissioner dealt with the land. It is the Respondent's contention that orders of certiorari or prohibition cannot issue because the Application is brought outside the 6 months period and the setting apart has already taken place.

The Interested Party also contends that this Application is an abuse of the court process because the same issues have been raised in KSM HCC 30/07 where there is an interlocutory Application seeking prohibitory orders and the matter is yet to be determined. Further, that the Memorandum of Understanding between the two Councils did not confer the trust to the Applicant Council nor did it provide that the Respondent needed the Applicant's permission to transact with the Swamp.

Mr. Madialo submitted that the Applicants are asking the court to interpret the Memorandum of Understanding between the parties yet Judicial Review is concerned with the decision making process of the setting apart but not the merits of the decision.

Having considered submissions of both Counsels, at this stage all that the court is concerned with is whether the Applicants have demonstrated that prima facie they have an arguable case so that leave can be granted. In the case of **NJUGUNA V MINISTER FOR AGRICULTURE (2000) IEA 184**, the court held that the test as to whether leave should be granted to an Applicant for Judicial Review is whether without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application. I have no intention of overstepping those bounds.

On the issue raised by Mr. Madialo that the Judicial Review Application has been brought outside the 6 months period contrary to Order 53 Rule 2 Civil Procedure Rules. The gazette notices were gazetted on 1st June 2006. Under Chapter 2 Laws of Kenya, Interpretation and General Provisions Act, S 27 provides that subsidiary legislation shall take effect from the date of publication unless otherwise provided that it will take effect on some other day. The notices took effect on 1st December 2006 and when the Chamber Summons was filed on 24th May 2006 the Applicants were still within the 6 months period allowed under Order 53 Rule 2 Civil Procedure Rules.

In this matter it is apparent there is a controversy over ownership of Yala Swamp and there is pending in court, KSM High Court HCC 30/07 filed by the Applicant against the Respondent.

In the above mentioned case, the Applicant seeks a prayer for injunction to restrain the Respondent from obtaining the title deed of the Yala Swamp in its name; a declaration that the gazette notice was obtained contrary to the Memorandum of Understanding signed on 20th March 2003; a declaration that Yala Swamp is owned jointly by the Applicant and Respondents; and damages. That suit is brought pursuant to the Memorandum of Understanding signed between the Applicant, Respondent and Dominion Farms Ltd. Dominion Farms Ltd. are not a party to these proceedings. The said Memorandum of Understanding came into question when the Commissioner of Lands gazetted Notices 9819, 9820, 9821 and 9822 setting apart 3200 Ha to the Interested Party for purposes of farming. In my considered view, among the issues to be determined is who owns the 3200 Ha of Yala Swamp, the Applicant, or Interested Party or do they own it jointly; Another issue that would need determination would be the interpretation of the Memorandum of Understanding that was signed between the Applicant, Interested Party and a 3rd Party; did it

transfer the ownership of the land to the Applicant and did it supersede Gazette Notice 2570 of 25th August 1990 vesting the Trust Land 'Yala Swamps' in Siaya County Council? Those are issues that would need to be resolved before an Application for Judicial Review challenging the process by which the Commissioner of Lands set aside the Swamp can be considered. All these issues can only be determined in a Civil Court where evidence will be adduced by the parties in support of or against the Trust and the Memorandum of Understanding and the court can then make a determination as to who the owner of Yala Swamp is.

The Applicant sought interlocutory orders in the Civil Suit by way of Chamber Summons, restraining the Registration of the 3200 ha in the names of Siaya County Council pending hearing and determination of the suit. Before these issues are determined it would not be worth the while allowing a Judicial Review Application to proceed. It is not denied that the filing of Judicial Review proceedings are not a bar to any other alternative remedy. This is because Judicial Review is concerned with review of the decision making process as opposed to the merits of the decision. However, in the instant case, there is need to consider the issue of

ownership of Yala Swamps first which goes to the merits of the title and

that is outside the purview of Judicial Review. Even if leave were to be granted to bring Judicial Review proceedings, the court would still need to enquire into the ownership of the title before considering

whether the Commissioner of Lands had the jurisdiction to set aside the Yala Swamp to the Interested Party Siaya or not. In my considered view all the issues raised can be dealt within the Civil Suit.

Though the Applicant did not seek this as a substantive prayer in the Affidavit of Mr. Odindo, it is prayed that Dominion Farms Ltd. which was mentioned as a party to the Memorandum of Understanding be restrained from paying rents and proceeds to the Interested Party. That is not a prayer that this court can grant in a Judicial Review Application. Dominion Farms Ltd. is not a party to these proceedings and no order can be made against them. I agree with Justice Nyamu's finding in the recent decision in **H MISC CA 1078/07 HON PETER ANYANG NY'ONG'O & OTHERS V MINISTER OF FINANCE MISC APPLICATION** where he said that leave and stay cannot be given where proper parties are not before the court.

For all the reasons given in this ruling I decline to grant leave to the Applicant to bring Judicial Review proceedings and the Chamber Summons dated 20th March 2007 is hereby dismissed with costs to the Interested Party.

Dated and delivered this 26th day of October 2007.

R.P.V. WENDOH

JUDGE

Read in the Presence of

Mr. Madialo for the Interested Party

Daniel: Court Clerk