REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 314 of 2000

DANIEL M CHRISTOPHER & OTHERS ………..……… PLAINTIFFS

VERSUS

THE ATTORNEY GENERAL.

COMMISSIONER OF LANDS …………….................................…………… DEFENDANTS

J U D G E M E N T

By court order granted on 22.11.2000 the exparte applicant took out a notice of motion in courts Judicial Review Jurisdiction on 14.12.2000. the application seeks orders of certiorari to call up and quash all allocations of plots in a settlement scheme known as Mwembelegeza located in Plot No. GL337/R/MN Mombasa.

Secondly, an order of prohibition from issuing title deeds or to deal with the land save to reopen adjudication register of the said plot so as to settle the landless squatters residing thereon. The application is supported by affidavit of Daniel Muzungu Christopher sworn on 14.12.2000 with annextures and another affidavit filed on 22.11.00 (not sworn) with annextures and another affidavit sworn on 22.11.2000. The application is also accompanied by statutory statement dated and filed on 22.11.00.

Hearing of the motion commenced on 18.3.03. the grounds upon which arguments of the applicants are based are stated in the statutory statement that

1) applicants have resided on the land for periods totaling over 50 years and have resided there and cultivated and made the land their homes for many years and that the applicants were promised by the Government of the day that they would be settled on the land and be issued with title deeds to the land they had possessed and that subsequently the land was subdivided into uneconomical portions measuring 50 by 100 feet which is uneconomical for supporting the applicants subsistence living and that over 300 squatters were not allocated the land and have been rendered landless – while outsiders were allocated the said land and those landless were arrested for resisting to move out of their homes.

2) The adjudication officer failed to investigate the true squatters before allocating land to outsiders. That the court had to do justice and grant orders sought.

There is a verifying affidavit sworn on 22.11.200 which confirms the facts contained in the statement to be true. There is a document purporting to be an affidavit but not commissioned filed on 22.11.00 where some 13 exhibits are stamped by the Commissioner of Oaths. There is omission in failing to commission the affidavit.

However, another affidavit was filed in support of this application (Notice of Motion) on 14.12.2000 attaching annextures similar to those accompanying the Chamber Summons for leave. These annextures are correspondents by residents of the land in question and various government agencies, block diagram of the land measuring 357 acres, a list of the residents "**HM3".**

In reply the respondents raised technical objections saying that the affidavits filed by the applicants were irregularly on record and ought to be expunged. In the affidavit of Walter M Mwachoki sworn on 21.6.2002 and filed on the same date paragraph 4, thereof it is admitted that the applicants have "**lived in the subject suit land."** It is also admitted that the said land is unalienated government land. It is also admitted that it was government intention to establish the Mwembelegeza settlement scheme as a pilot project as the land had the highest number of squatters with approximately 1500 families. It is admitted that a list of persons to be considered for settlement totaling 1,516 was made.

A further affidavit was filed by Feliz Mwawasi Kiteto who succeeded Mr. Walter Mwachoki as District Land Adjudication and Settlement Officer Coast Province which was sworn on 24.7.2004 added that the land was not subject to provisions of Trust Land Act or the Land Adjudication Act. It was government land registered as GL 337 aforesaid. That the government demarcated and registered various plots for various uses and purposes. The government gave settlement fund trustees the land to administer it on behalf of the government to collect registration fees and do the necessary physical planning.

Paragraph 7 of the affidavit states "**any eligible Kenyan"** would apply to the local committees and be allocated a plot but due consideration and priority was given to the squatters. Rachel Hamisi, Daniel Muzungu Christopher, Omar Machangame & late Hamisi Mbaruk were allocated several plots. Exhibit EMK1 gives particulars of the plots allocated to the applicants and their families.

In reply to these affidavits filed for Respondents DANIEL MUZUNGU purported to swear an affidavit on 6.10.2004 showing that the allocation was irregularly carried out. Several allottees were related to prominent politicians and other non residents. A list of people who were residing on the land were never allocated land. Unfortunately, neither the affidavit nor the exhibits were sworn. A glance of the list exhibited by the state shows the names of Mayor Najib Balala as allottee plot No. 243, Joanne Siganga SRM Kibera Plot No. 363, W W Mwachoki plot NO. 643 (deponent herein as adjudication officer in Ministry of Lands). Others were pointed out by counsel in submissions.

The court made a site visit on 23.4.2001 and met some of the squatters. The complaints were that the boundaries of subdivisions crisscrossed settlers homes and portions of land cultivated by squatters have been reduced in size. All plots were reduced in size. Some boundaries passing through the squatters houses.

The visit was attended by the court advocates for Applicants Mr Munyithia and Mr Wameyo and state counsel Mr Okello.

Later in court Mr Wameyo leading Mr Munyithia submitted that under the Constitution the government has no beneficial ownership of land but that government land is for the benefit of people and when alienating land the public consideration must be reflected in the allocation. In this case, the persons allocated plots include the Mayor of Mombasa then, and other government and prominent personalities. This is an abuse of office and the error can be rectified by an order of certiorari. The scheme recommended by the task force to start a pilot scheme to settle the squatters who petitioned the government not to turn the scheme into a residential and commercial estate.

Counsel cited authorities in the case of **AMBALE – VS MAKOLIA** where the effect of first registration under Registered Land Act (Cap 300) Section 143 arose and whether the plaintiff had exercised his rights under land adjudication. In the present case, the land was registered under government Lands Act which sets out how government land is to be allotted.

The applicant's also relied on an article authored by a Kenyan prominent lawyer and advocate Mr A D Rachier headed "**The Law Relating to issuance and Nullification of Land Titles in Kenya."** The

quoted passage states "**where the law governing land alienation was breached, then such allocation is void ab initio and the land must be repossessed and titles thereto be declared null and void".** Notwithstanding the doctrine of the sanctity title guaranteed by the government. Also cited is the decision of Court of Appeal in Civil appeal No.13 of 1980 **M'IKIARA M'RINKANYA & ANOTHER – VS – GILBERT KABEERE M'MBIJIWE.** That case was dealing with Trust Land Act Cap 288. however the Court of Appeal expressed the same principal that once land has been allocated under provisions of law, the interest cannot be terminated except under the provisions of the said law. The court held also that in the case there was trespass for violating the right of possession of the respondent it did not matter whether they believed it was theirs or not.

In this case, the squatters were never allocated the land under any law but the respondents (government) had promised to settle them on the land where they occupied. It was the process of settling them that is complained of.

The other case brought to the attention of court is also a Court of Appeal judgment in Civil Appeal No. 12 of 1982 reported in IKAR (1982 – 88) at page 42. This was a case involving a claim for declaration of trust of land registered in the name of one member of the family. The court held among other things that it is not essential that adverse possession should be of the whole or of a defined portion of land. The case of **KISEE MAWEU & 19 OTHERS – VS – KIU RANDING CO-OP SOCIETY LTD** reported in IKAR (1982 – 99) at page 746 was between squatters and private body as opposed to government. And the land was subject to provision of the Limitations of Actions Act which is not the case here.

On behalf of the respondents Mr Ousa Okello made submissions and cited authorities. The state counsel pointed out some errors in the pleadings of the applicant. The Chamber Summons seeking leave talked of WRIT instead of order contrary to Law of Act Cap 26. The interested parties who we said to have been issued with titles were not served. No order was sought against the A.G. but he was asking for his costs, the decision to be quashed was not exhibited, no title deeds were exhibited and there as non-compliance of rule 7 Order 53, there is no definitive date when the decision to be quashed was made, it could have been beyond limitation period. Proceeding in his arguments that the Commissioner of Lands was wrongly sued for issuing title deeds not acting judicially as shown in the case of the Kenya National Examination Council Court of Appeal decision in Civil Appeal No. 266 of 1996, where the only orders sought were prohibition and mandamus.

In the present case, even the order of certiorari is sought. He submitted further that the Commissioner of Lands was not shown to be acting or threatening to act "**prohibition looks to the future."** On the issue of mandamus order sought to compel the Commissioner of Lands it was not shown that the Commissioner for lands had such duty. State counsel relied on the case of Dida Bonaya Halake court of Appeal in Civil Appeal No. 27 of 2001 where the court held that in order for order of mandamus to issue there must be existing a legal obligation on respondent to perform the duty requested. He further pointed out that affidavit in support of motion is not filed with leave only verifying affidavit should be relied upon. The newspaper report attached is hearsay as the DC Lukalo was not Commissioner of Lands. Furthermore, the Land Adjudication was not under Commissioner of Lands. He also pointed out that the land was not Trust Land under the Constitution, as it was not vested in a county council.

Firstly, it is important to establish whether the complaints by the respondents are fatal to this motion. The first objection is that the prayers under Chamber Summons for leave under Order 53 (1) CPC seeks a "**WRIT of prohibition, mandamus and certiorari."** The statutory authority namely Law Reform Act Cap 26 Section 8(1) prohibits the court to issue writs. The Act empowers the court to issue orders of certiorari, prohibition and mandamus only.

The Notice of Motion filed however prayed for orders and not writs. Is this an excusable omission? When perusing the proceedings in order to make this judgment I note that the provisions of Order 53 (2) is not complied with "**the application for such leave shall be made exparte and shall be accompanied by statement setting out the name and description of the applicant, the relief sought and the grounds upon which it is sought and by affidavit verifying the facts relied."**

Here the application is accompanied by a short "**verifying affidavit"** without annextures relied upon. However there is also an affidavit filed on 22.11.2000 what purports to be an affidavit in support and where facts (42) paragraphs of the dispute and exhibits are attached but the original as per the court file is not commissioned. It is only signed by the first applicant. An affidavit not commissioned under the Oaths and Statutory Declarations Act is not an affidavit.

Coming to the notice of motion dated and filed on 14.12.2000 it is supported by what purports to be affidavit filed on the same date and attached therefore is a bundle of 13 exhibits. The objection here is that no leave was granted to file that affidavit. Order 53 rule 4(2) "**the High Court may on the hearing of the motion allow the statement to be amended and may allow further affidavits ….."** The respondents seeks to expunge the affidavit with exhibits.

The other objection is that the interested parties, who are listed as having been allotted plots on the land in dispute do not appear to have been served with application. According to the record only one person BAMBA DHIDHA MJIDHO, who applied to be added as a party represented by J J Weloba & Co Advocates. However at the hearing of the motion he did not appear.

Again, on 6.10.2004 what purports to be an affidavit signed by Daniel Mzungu in reply to respondent's affidavit by Mr. Kiteto, the court file copy is not commissioned and even the annextures were not marked or stamped. This is another omission by the applicants.

For all these commissions the applicants had nothing to say in reply to the state counsel.

Upon perusal of record, no leave was applied for or was granted to file further affidavits by the applicants.

The duty of the court is to do justice between the parties that come before it. The duty is performed with the rules of law. The court's jurisdiction in Judicial Review is granted by statute namely Law Reform Act Cap 26 Laws of Kenya and the rules of procedure are set out under Order 53 Civil Procedure Rules. This is a special procedure. The rules must be followed strictly so that when provisions of law prohibit issue of WRITS, the court would not contravene the law by issuing WRITS meaning in this case leave granted as prayed was for WRIT and it follows the Notice of Motion which sought "**orders**" was filed without leave as required under Order 53 (1). On this issue, I accept the argument of state counsel Mr Okello. The result is that the Notice of Motion is not properly before the court. Again, if the supporting affidavit to the Notice of Motion is expunged as having been filed without leave, the Notice of Motion shall be left standing with statutory statement and no verification of the facts by exhibits. Meaning there is no evidence supporting the motion. The affidavits which are not commissioned must be expunged as they do not comply with he law relating to the form of affidavit. See Oaths and Statutory Declarations Act.

It is my considered view that those omissions and irregularities are fatal to the application for Judicial Review and to excuse the omissions would be contravening the law.

On the merit of the application, the respondent has conceded that after the petition was made by the squatters on the government land, the government did set up a Task Force which recommended that a pilot scheme be established on this government land which had the highest number of squatters. And the squatters were promised land titles upon the land they occupied. As it is, the good intentioned project was hijacked by government officers. Government land is not dealt with under Land Adjudication since there were no rights to be adjudicated upon. It comes directly under the Commissioner of Lands. See the provision of Government Lands Act. As it is, the Government officers in an abuse of their powers entered into the land carried out survey of the 376 acres into small plots ignoring completely the requirements of the squatters who were using the land as their homes and also as a source of their livelihood by cultivating their portions and growing cash crops.

On the other hand, the respondent had shown in their affidavits of

1. Mr Walter M Mwachofi shows a list given on 21.6.2002 with annextures including a list of the

persons allocated plots by government including himself at plot No. 643 and one time Mayor of Mombasa Najib Balala at plot No. 243. The further affidavit sworn by Felix Mwanasi Kiteto sworn on 26.7.04 indicates that the applicants who made this application were allotted plots thus:

a) Rachel Hamisi alias Kariro Karisa and his relatives received plots 641, 640, 634, 639, 577, 578, 579, 228, 1021 & 998.

b) Daniel Muzungu Christopher and his close relatives plots 827,828, 829, 722, 832, 844, 844, 840, 493, 838, 839, 990, 991, 993, 1063, 992, 994, 1062, 997.

c) Omar Mchangamwe and his relatives received plots No. 1429, 1430, 1431.

d) The late Hamis Mbarus & relatives Plots 719, 555, 556, 554, 553, 552, 551, 550 & 549.

The said affidavit also attaches a list of 81 squatters who were allotted plots see exhibit "**EMKI**" but who are not part of this suit. There is no evidence contradicting this affidavit. The affidavit which was supposed to reply to this evidence filed on 6.10.2004 purportedly signed by Daniel Mzungu first applicant was not commissioned and therefore it is not admissible as evidence.

I am therefore satisfied that the applicants benefited from the scheme. It is argued that the Commissioner of Lands was wrongly brought to court as he only did administrative duties and not judicial decisions. However, the Commissioner of Lands is a statutory authority when allocating land makes decisions whether a person will or will not be allocated land which is a valuable commodity in this country. His decisions affect the rights of people and unless he performs them in a just manner his decisions are amenable to judicial review.

In conclusion, I find that the applicants were allocated plots in Mwembelegeza 39 scheme and they have no reason to complain. The process of the allocation of plots and the whole scheme was abused by the government officers in that there was deviation from the original intention by the government. However, this was meant to be a pilot scheme recommended by the Task Force for resolving the squatter problems in Coast Province by starting with a pilot scheme on the government plot No. GL 337/4/MN referred to as Mwembelegeza.

However as stated above this application is defective incurably so by the omissions and irregularities outlined above and that it is for dismissal which I hereby do.

I order that each party do pay its own costs. The respondent is quite clearly with dirty hands and is not entitled to costs.

Orders accordingly.

Dated the 15th September 2006.

J KHAMINWA

<u>JUDGE</u>