



**Malindi Musketeers Limited v Kenga & 4 others (Environment & Land
Case E013 of 2024) [2025] KEELC 4078 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E013 OF 2024**

**FM NJOROGE, J
MAY 28, 2025**

BETWEEN

MALINDI MUSKETEERS LIMITED APPLICANT

AND

LEONARD KARISA KENGA 1ST RESPONDENT

GEORGE TSANGWA KITSAO 2ND RESPONDENT

SANITA MUMBA HINZANO 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

THE LAND REGISTRAR KILIFI 5TH RESPONDENT

JUDGMENT

1. The Chamber Summons application dated 9/9/2024 has been brought under Section 8 and 9 of the [Law Reform Act](#), Cap 26 Laws of Kenya Order 53 Rule 1, 2, 3 and 4 of the Civil Procedure Rules 2010. The Applicant prays for Orders verbatim as follows:
 - a. That A Certiorari Order do issue to move into the High Court and quash the decision of the National Land Commission on the interest of the parcel of land known as Chembe/ kibabamshe/3X3 without further gazettelement.
 - b. That An Order Of Mandamus do issue to compel the National Land Commission to delete forth with the Kenya Gazette Notice No. 11714 of 2018 and reinstate the earlier Kenya Gazette Notice No. 5182 of 2023 touching on the suit parcel.
 - c. That costs of this application be borne by the Respondents
2. The application is supported by the Affidavit of Daniel Ricci sworn on the 9th day of September 2024 and is based on the following grounds, also set out verbatim:



1. That at all material times prior to this application, the Applicant is the registered owner of all that parcel of land known as Chembe/kibabamshe/3X3 by didn't of title deed that was issued on 8th January 2007;
2. That prior to acquisition of the said property the same was given to one Kenga Hinzano as the first allottee but he failed to pay and/or meet the laid down requirements for letters of allotment that led the same to be cancelled and was allocated to Mawaki Investments who also failed to meet the requirements hence the same was cancelled again and was allocated to Mathenge Wachira;
3. That Mathenge Wachira met all the required procedures as per the letter of allotment and became the legal/bonafide allottee and the proprietor of parcel number Chembe/kibabamshe/3X3;
4. That Later Mathenge Wachira Transferred The Interest On The Said Property To Omar Khamis Belleth Who Then Transferred The Same To Lifespan Tours And Safaris Limited And Finally Lifespan Tours Limited Transferred The Same To Malindi Musketeers Limited The Applicant Herein;
5. THAT upon the applicant's application acquisition of the suit property, the 1st, 2nd and 3rd Respondent trespassed and/or took possession of the same illegally although the issue was solved amicably between the applicant and the 1st, 2nd and 3rd Respondents pursuant to a mutual agreement dated 30th April 2007 and proceeded to take vacant possession of the suit property;
6. THAT without any color of rights, the 1st, 2nd and 3rd Respondents herein for their own selfish reasons illegally persuaded the offices of the 4th Respondent who unprocedurally proceeded to publish and/or issue the Kenya Gazette Notice No. 5182 of 2023 regarding Plot No. 3X3 and to reinstate its earlier Gazette Notice No. 11714 of 2018;
7. THAT the 4th Respondent having done so, the applicant herein moved this court for a leave to file this application before the High Court of Kenya having been aggrieved with the decision to alter the Gazette Notices as far as the suit parcel is concerned;
8. THAT the applicant herein was granted leave by this court through an order of this court dated 21st August, 2024 granting the said leave;
9. THAT the actions of the 1st, 2nd and 3rd Respondents are intentional and of selfish in nature, that even after knowing that the Applicant is registered and in full occupation of the said piece of land proceeded to the offices of the 4th Respondent and concealed the material facts which resulted into the 4th Respondent reaching into an unlawful and unjust decision;
10. That this instant application has been brought to this court without any inordinate delay whatsoever;
11. That it is in the ability of jurisdiction of this Honourable Court to consider the application by the Applicant and grant the orders sought herein;
12. That the applicant is likely to suffer great prejudice if the application herein is not considered and allowed;
13. That the Respondents herein shall not be prejudiced in any other way if the orders herein are granted.



3. On 20th august 2024 this court, after considering an application dated 19/8/2024 in Malindi ELCLMISC E033 OF 2024 granted leave to Malindi Musketeers Ltd, the present applicant, in the following terms:
 - a. That prayers no 2 and 5 of the application are granted as prayed;
 - b. That the applicant shall file and serve the substantive judicial review notice of motion within 21 days of the date of this order and an affidavit of service shall be filed and the respondent shall file a response thereto within 21 days of service.
 - c. That the application shall be listed for mention for directions on 2/10/2024.
4. The present application which was evidently filed pursuant to that order is certainly flawed in certain defects of procedure and form which militate against the grant of the orders it seeks.
5. First, in its orders of 20/8/2024, this court envisaged that the applicant would file a substantive Judicial Review Notice of Motion and not a Chamber Summons. A Chamber Summons is utilized to seek leave and can not be employed to apply for substantive prerogative orders as has been done by the applicant herein.
6. Secondly, perchance the court were to assume for argument's sake that it may ignore the apparent technicality and proceed with the substance of the Chamber Summons application, a further hurdle would be encountered in that the applicant in the application for leave has, instead of substituting the Republic for itself as required, named itself as the applicant in the present proceedings. Prerogative orders in a traditional judicial review application can not be obtained in the name of the applicant but only in the name of the Republic. Form is crucial in judicial review in so far as it relates to the applicant in whose name the application is made and the respondent against whom the orders are sought.
7. In Republic Vs Attorney General [2001] eKLR the court stated as follows:

“This is an application for judicial review. However, before I go into the substance of the application, it is quite clear, as counsel for the Respondent pointed out, that it is wrongly intituled as it is not directed at the officer against whom the orders are sought.

The body of the application however, seeks an order of certiorari to quash the decision of the commissioner of Lands and the Director of Surveys and orders of Mandamus and Prohibition against them. Clearly the application is not against the Attorney General. The intituling of this application is clearly wrong and cannot be dealt with in its present form.”
8. The court Republic Vs Attorney General [2001] eKLR in proceeded to state further as follows:

“The Plaintiff's (sic) Advocate argued that the defect in form did not invalidate this application. About two months ago, I had the opportunity to deal with this question in Matic General Contractors Ltd. V. The Attorney General NAIROBI H.C.C.C. NO. 1614 of 1994 (Unreported) and for good reason, I am compelled to reproduce what I said in that case here:

“Several issues were raised in view of the submissions made by counsel. However, going to first principles first, I must accept Mr. Njoroge's objection that there is an irregularity in form apparent from the record of the Plaintiff's application. [I]n the case of Farmers Bus Service & Others v. The Transport Licensing Appeal Tribunal [1959] E.A. 779 (FORBES, Ag. P., WINDAM, J.A. & TEMPLETON, J.) the Court of Appeal at Nairobi commented on the form of proceedings and the healings of applications for Judicial Review and held



that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled...”

9. Republic V National Environment Management Authority Ex parte Coral Drive Luxury Homes Ltd [2012] eKLR held as follows:

“Of course, the objection as to the incorrect intitlement of the Chamber Summons in the name of the Republic as Applicant may be erred by amendment (sic) without any prejudice to the parties. Further the matter is past that post because leave of the court has been granted and all that remains is for the Applicant to file the Notice of Motion in the name of the Republic which is deemed to have an interest in the lawful administration of the organs of the State.”

10. However, the court in that case also observed that the non-observance of the rule that the application ought to be brought in the name of the Republic was not fatal, stating as follows:

“However, I am unable to accept that non-compliance with that requirement was fatal to the whole application sufficient to warrant it to be struck out. [W]hat can this court do in the circumstances of this case? The matter of the application for judicial review is important. The Plaintiff has obtained a lawful judgment and it has been denied the fruits of that judgment. That judgment was obtained more than 6 years ago. The Plaintiff, in an attempt to enforce that judgment, has brought this application. It is incorrectly intitled as has been seen. That omission is NOT fatal. But it is an omission that can be cured by amendment. The ends of justice will be better served if the omission is rectified and the parties are enabled to be heard on merit.”

11. However, it is noteworthy that there was no application to amend the title before the hearing and the matter is now at the judgment stage. Had an application for amendment been made, which has not been done, this court would have considered it in the light of earlier case law including the renowned *Farmers Bus Service & Others v. The Transport Licensing Appeal Tribunal* [1959] E.A. 779.

12. Thirdly, the orders of leave issued on 20/8/2024 were accompanied by the stricture that the substantive Judicial Review Notice of Motion should be lodged and served within 21 days of the grant of the order of leave. That was not done and the applicant ended up filing the present application 23 days after the order was issued and after the order of leave had lapsed. The orders of leave having lapsed, no fresh leave was obtained for the filing of the present application. The implication of the foregoing is that had an application to amend the title been made to substitute the Republic as the applicant, the present application would still be null for lack of leave.

13. On the above grounds, I find no reason to delve into the merits of the orders sought by the applicant and I hereby strike out the Chamber Summons application dated 9/9/2024 with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 28TH DAY OF MAY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

