



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

JUDICIAL REVIEW CASE NUMBER 15 OF 2019

IN THE MATTER OF: AN APPLICATIN BY DR. SUSANNE REAUER FOR AN ORDER OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: LAND REGISTRAR, KILIFI AND THE DISTRICT SURVEYOR MALINDI/MAGARINI

AND

**IN THE MATTER OF: GEDE DABASO 679, 736 AND 937 AND THE 1ST, 2ND, 3RD, 4TH AND 5TH INTERESTED PARTIES
PROPERTIES KNOWN AS GEDE DABASO 363 (NOW 1114 AND 1115), GEDE DABASO 292 (NOW 1201 AND 1202) AND
GEDE DABASO 936 (NOW 1249, 1250, 1251, 1252 AND 1253) RESPECTIVELY**

AND

REPUBLIC.....APPLICANT

AND

1. LAND REGISTRAR, KILIFI DISTRICT

2. DISTRICT SURVEYOR,

MALINDI/MAGARINI DISTRICT.....RESPONDENTS

AND

1. RICHARD ANTHONY MOLLER

2. SWAHILI CONNECTIONS LTD

3. STAMORE LIMITED

4. MUILEY PROPERTY INVESTMENT LIMITED

5. SHAURI KADENGE POLA.....INTERESTED PARTIES

AND

DR. SUSANNE REUER.....EXPARTE APPLICANT

RULING

1. By a Substantive Notice of Motion dated 29th October 2019, Dr. Susanne Reuer (the Ex-Parte Applicant) prays for the following:

1. That an order of certiorari do issue to remove into this Court and quash the decision and/or determination of the Land Registrar, Kilifi District dated 26th January 2018 that parties should sit down with the Surveyor to implement the findings (while) at all times failing to supply the District Surveyors report dated 15th January 2018 which was to be implemented;

2. That an Order of Mandamus do issue compelling the 1st Respondent to release the District Surveyors Report dated 15th January 2018;

3. That an Order of Mandamus do issue compelling the 1st and 2nd Respondents to immediately, as more provided for under Section 19 of the Land Registration Act, cause to be defined by survey, the precise position of the boundaries in respect of the Ex-Parte Applicant suit property in question known as Gede Dabaso 679, 736 and 937 and the 1st, 2nd, 3rd, 4th and 5th Interested Parties Properties known as Gede Dabaso 363 (now 1114 and 1115), Gede Dabaso 292 (now 1201 and 1202) and Gede Dabaso 936 (now 1249, 1250, 1251, 1252 and 1253) respectively and file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the said parcels;

4. That an Order of Mandamus do issue compelling the 1st and 2nd Respondent to immediately cause boundary features to be fixed to demarcate the Exparte Applicant's suit property known as Gede Dabaso 679, 736 and 937 and the 1st, 2nd, 3rd, 4th and 5th Interested Parties properties known as Gede Dabaso 363 (now 1114 and 1115), Gede Dabaso 292 (now 1201 and 1202) and Gede Dabaso 936 (now 1249, 1250, 1251, 1252 and 1253) respectively; and

5. That the costs of this application be provided for.

2. The application is supported by an Affidavit sworn by the Ex-Parte Applicant Dr. Susan Reuer and a Statutory Statement filed herein with the application for leave on 3rd October 2019.

3. In response to the Motion and by Notice of Preliminary Objection dated and filed herein on 27th November 2019, Richard Anthony Moller, Swahili Connections Ltd, Stamore Ltd, Muiley Property Investment Ltd and Shauri Kadenge Pola (the 1st to 5th Interested Parties) urge the Court to strike out the Motion on the grounds that: -

1. Judicial Review is a procedure sui genesis and the rules governing the drawing, filing and service of the same are clear and must be obeyed. The proceedings herein violate all the substantive and procedural rules under Order 53 Civil Procedure Rules;

2. That the action as explained in the Notice of Motion relates to proceedings and or findings dated 26/1/2018. Pursuant to the Provisions of Section 8, 9(2) and (3) of the Law Report Act, Cap 9 of the Laws of Kenya as read together with Order 53(2) of the Civil Procedure Rules, a challenge by way of certiorari of any decision taken cannot be mounted after the expiry of six months and accordingly, these proceedings are null and void ab initio.

3. That the Honourable Court has no jurisdiction to entertain proceedings that are contra statute. No leave ought to have been given in the circumstance of this case and the grant of leave did not operate as a cure for the otherwise void proceedings.

4. That circumstances of the claim are not amenable for the orders of mandamus in the manner claimed or at all and the Court would not have the jurisdiction to issue the orders as prayed.

5. Section 86 of the Land Registration Act provide a clear and more efficacious remedy and an Order of Mandamus will not issue in the circumstances of this case as prayed or at all.

6. The application raises very complex issues of survey and access. The Court may have to visit and or need to have witnesses to appear and be cross-examined. These proceedings cannot therefore be a proper action for resolution of this dispute.

7. That where issues of discretion arise, an order of mandamus would not issue.

4. Filed contemporaneously with the Notice of Preliminary Objection is a Replying Affidavit sworn by Richard Anthony Moller (the 1st Interested Party) giving a factual background to the dispute and reiterating the position of the Interested Parties as stated in the Notice of Preliminary Objection.

5. When the matter came up in Court on 3rd December 2019, the parties agreed to dispose of the Preliminary Objection first by way of Written Submissions. I have considered the Preliminary Objection, as well as the written submissions and authorities placed before me by Mr. Ole Kina, Learned Counsel for the Interested Parties. I did not see any submissions filed by the Ex-parte Applicants. The Land Registrar Kilifi and the District Surveyor, Malindi/Magarini sued herein as the Respondents neither entered appearance nor filed a response to the Motion.

6. The first point of objection raised by the Interested Parties is that the proceedings herein violate all the substantive and procedural rules under Order 53 of the Civil Procedure Rules. It is the Interested Parties' case that a party seeking leave is required to file a Chamber Summons accompanied by a Statement setting out the name and the description of the applicant, the relief sought and grounds on which it is sought as well as by affidavits verifying the facts relied on. The Interested Parties assert in this regard that no verifying affidavit was filed at the commencement of the proceedings contrary to Rule 53 (1) (2) of the Civil Procedure Rules.

7. A perusal of the proceedings herein reveal that they were commenced by an ex-parte Chamber Summons application dated 2nd October 2019 as filed herein on 3rd October 2019. A further perusal of the Court file reveals that contrary to the averments by the Interested Parties, on the same day that the Chamber Summons was filed, a Statutory Statement dated 2nd October 2019 and a verifying affidavit sworn on the same day as the date on the Statement were filed herein by the Ex-parte Applicant.

8. The 21-paragraph Verifying Affidavit has annexed a number of documents upon which the Ex-parte Applicant intends to rely and I was therefore unable to discern the basis for that first ground of the Preliminary Objection.

9. The second ground of the Objection is that the action as explained relates to proceedings and or findings dated 26th January 2018 and that pursuant to the provisions of the Law Reform Act a challenge thereto cannot be mounted after the expiry of six months. Section 9(3) of the Law Reform Act, Cap 26 of the Laws of Kenya provides thus: -

“In the case of an application for an order of certiorari to remove any Judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that Judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law, and where that Judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the Court or Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

10. That provision is equally echoed in Order 53 Rule 2 of the Civil Procedure Rules as follows: -

“Leave shall not be granted to apply for an order of certiorari to remove any Judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time of appealing has expired.”

11. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of six months of the making of that decision. The decision of the 1st Respondent sought to be quashed herein is said to be dated 26th January 2018. That is the time when the cause of action accrued and the six months must have expired on or about 25th July 2018. Accordingly, I am in agreement with the Interested Parties that as at the time these proceedings were instituted on 3rd October 2019, they were late by more than a year.

12. In the circumstances, I am persuaded that the Ex-parte Applicant has been extremely indolent and that no basis has been made out for the grant of either an order of certiorari or mandamus as sought in the Motion dated 29th October 2019. The same is hereby struck out.

13. Given the circumstances herein, each party shall bear their own costs.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE