



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Misc Appli 272 of 1994**

**IN THE MATTER OF: FUNZI ISLAND DEV.LTD.**

**J.B. HAVELOCK & M.E. HAVELOCK**

**AND**

**IN THE MATTER OF: THE CIVIL PROCEDURE RULES O.L111 R.1, 2**

**THE TRUST LAND ACT SEC. 12.**

**J U D G E M E N T**

These proceedings were commenced under Order 53 Civil Procedure Act Rules which provides for procedure concerning applications for Judicial Review Orders. Leave was granted as required and Notice of Motion was filed but amended several times. The last amendment was dated 30.6.1999 accompanied by an amended statement of the same date. As a result of the amendments the application for judicial review is in addition brought under the provisions of Forest Act Section 4, Cap. 385 Laws of Kenya. The amendments are reflected in the statement where there is an addition ground number (h) (i) and (ii). The matter came up for hearing first on 15.11.2000. Mr. Khanna for the applicants made submissions in support of application and prayer sought which are set out.

- 1. That the Gazette Notice No. 3831 dated 24.6.1994 setting apart Land on Funzi Island and letter dated 27.7.1994 addressed to interested party PATI LIMITED relating to the allotment of unsurveyed plot of 0.1. ha for the purpose of boat landing base issue by the Commissioner of Lands be quashed and or set aside being null and void.**
- 2. That the grant issued CR 106 under Registration of titles Act to the PATI LIMITED by respondents be quashed and or set aside as being null and void.**
- 3. That Pati Limited, its employees, servants and agents be prohibited from having any dealings whatsoever, or to carry out any development, or occupation entry upon or any access or otherwise on the said land on Funzi Island.**
- 4. That the costs of an incidental to this application be the applicants and be paid by respondents.**

Mr. Khanna submitted that the original land allocated by Kwale County Council as Trust Land set apart under Section 7 of Trust Land Act Cap. 288 and allocated to the interested party was at all material times Forest Land as opposed to Trust Land. Under Forest Act Cap. 385 Proclamation No. 44/32 and legal

Notice no. 174 of 1964 the suit premises was declared to be forest area. Under Cap. 385 the Minister was to declare boundaries and seizure of such forest areas Section 4(2) of the Act provides that before such declaration a 28 days Notice must be published, once it is Forest Land no allotment could have legally taken place on the land unless there was a declaration it had ceased to be a forest land. The land so allocated and title issued is null and void and therefore the grant issued to interested party ought to be quashed and declared null and void. Mr. Khanna referred to affidavits of Anthony Duckworth and J.B. Havelock and also of C. Kariuki sworn on 28.4.97. there is a Deed Plan no. 189993 surveyed on 22.9.1994 showing high water marks. Gazette Notice 3831 was published under the Trust Land Act Cap. 288. the purpose prescribed in the Gazette Notice is that of boat landing only. There is material discrepancy to the use of land as per Gazette Notice and in size 0.7 ha and 3.126 ha. These discrepancies are material misdescription and the title should be annulled. Alternatively should the court find that the land is Trust land the title is still defective. The court (Commissioner of Assize P.M. Tutui) visited the site and recorded the court observations. The area in question has constructions on it and therefore is not under water during high tide. There are mangrove trees around 50 metres wide in the area between the two properties. The interested parties land is a small island in front of the main island where the applicant has two pieces of land. The interested party has put up a hotel – main building and separate cottages. Access to applicant's property was noted.

On behalf of the respondents Ms. Mbiyu filed written submissions and expounded on them orally in court. Her main submission was that Funzi Island and the part that interested party claims is under the jurisdiction of Kwale County Council and is Trust Land. According to letter of allotment these land was intended for a purpose specified under Section 117 (c) of the Constitution which allows setting a part land for use and occupation by any person or persons for purposes which in the opinion of that County council is likely to benefit the person ordinarily resident in that area or any other area of Trust Land vested it that County Council either by reasons of the use to which the area so set apart is to be put or by reasons of revenue to be derived from rent in respect thereof. Sub-section 4 thereof

*“No setting apart in pursuance of this Section shall have effect unless provision is made by the law under which the setting apart takes place for prompt payment of full compensation to any resident of the land so set apart.”*

In this case there were no persons to be replaced. The applicants do not say that the new Title is over their land. In fact the court found that there is a space of 200 metres between the applicants lands and that in dispute. Counsel submitted that the all legal procedures required under the Trust Land Act were complied with before the interested party was allotted the plot and issued with a grant. She asserted that the land in dispute is not forest land as there was no evidence put forward to support this allegation save a bare affidavit of Mr. C. Kariuki who described himself as a forester employed with the Ministry of Environment and Natural Resources in charge of Buda Forest Station at Msabweni. He did not show the authorization to make affidavit on behalf of the Ministry. He simply stated that the whole of the land granted to (Pati Ltd.) interested party between high mark and low water mark is a mangrove forest which had been declared a protected forest area by Proclamation no. 44 of 1932. He had no documentary evidence with him and despite the very long lapse of time from 1932, he simply relied on his belief that the are was not degazetted.

Mr. Kiarie Kariuki also submitted on behalf of interested party at great length. That the prohibition cannot serve as the acts to be prohibited were already completed by the time the applicants extracted the court order on 20.12.1994. Also that the applicants had no locus standi in the matter since they did not fall under Section 117 (4) of the Constitution. And also that the proper procedures under the Trust Land Act were complied with respect to the allotment and issuing of the grant. And furthermore the interested party fell under Section 117 (1) (c) of Constitution as:-

*“any person or persons for a purpose which in the opinion of that Council is likely to benefit the persons ordinarily resident in that area ....., either by reason of the use to which area so set apart is to be put or by reason of revenue to be derived from rent in respect thereof.”*

He said that the local residents would be employed in the hotel and rent is being paid to the Council by

the interested party. On the issue of the land being forest land submissions were similar to those made by Ms. Mbiyu mainly that no evidence at all that the land is forest land was put forward by applicant.. The said proclamation 44 of 1932 was headed:-

**“Mangrove Swamp Forest Reserve”**

defined as:-

*“All land between the High water and low water marks (ordinary spring tides) in the localities as described below on the mainland and islands adjacent to the Coast from Chale Point in the North to the boundary of trust territory of Tanganyika in the South”.*

He said the land in dispute is not a mangrove swamp.

It is for the court firstly to decide whether the land in dispute is :-

**1. Trust Land covered under the Constitution and the Trust Land Act**

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Or

**2. whether it is forest land falling under the provisions of Forest Land Act. Thereafter the court will proceed to decide on the application.**

At the time these proceedings were commenced it was assumed that the land was Trust Land which being in the jurisdiction of Kwale County Council was held in trust by the Council for the specific purposes set out under the contribution and the Trust Lands Act.

It was much later that the applicant says, it was found that the land was a forest covered under a Proclamation no. 44 of 1932. This necessitated amendment of the Motion and statement and filing of other affidavits. Apart from the statements sworn by deponents including one C. Kariuki forester at Msabweni no conclusive evidence was tendered. Even the Proclamation itself was not produced for court to see. It is Mr. Kiarie for interested party who showed the court what the Proclamation states. It is my view that the applicants have not made any effort to prove that the land in dispute is covered by the Proclamation. It remains therefore to consider whether in the allocation for the disputed land to the interested party and in the granting of title the decision making process was fair and in accordance with the provisions of law. The law provisions concerned are the Constitution and Trust Lands Act (Cap. 288).

All parties have filed list of authorities featuring the statutory provisions and decided authorities. The court has already referred to the relevant provisions of the constitution. A perusal of affidavit sworn by Enos L. Gamsae Kadain on 24.4.1997 attaches documents which shows the proper procedure followed in setting apart the disputed land in accordance to the requirements of the Trust Land act. Cap.. 288. There was request for setting aside, Land Board Control consent issued and although the consent was for 0.7 hectares of unsurveyed land, it was upon survey, found to be 3.126ha. in measurement. The most important requirement was the Gazettment Notice no. 3831 dated 24.....1994 which was addressed to the public with the intention that any person concerned could raise objections. It is clear no objections were raised except for this suit. I have perused the written submissions of State Counsel and I am satisfied the procedure set out under the Trust Land Act was followed.

On the examination for the authorities, the applicant rely on the case of Town Council of Ol Kalau –vs- Nganga General Hardware Civil Appeal no. 269 of 1997. In that case the allocation was of a public land namely, bus stop, and the court held that a title issued in such circumstances can be challenged. In the present case there is no evidence that the disputed land was reserved for public use.

There is a point raised that the applicant had no locus standi in this suit. Applicant is not claiming title to this property. The court visiting the site found the applicant's properties are separated by about 200 metres from the disputed property. I do not find that the applicant has any interest in the applicants disputed land at all. If the land was forest land it is not the applicants who would come forward to defend it but the authorities in the Ministry in charge of the forest lands.

On the issue whether orders of prohibition and certiorari can issue in the circumstances of this case the Court of Appeal discussed the scope of these orders at length in the case of Kenya National Examination Council –vs- Republic in ex parte Gathienji and other in Civil Appeal no. 266 of 1996 (unreported)-

*“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 .”*

*“Prohibition is an order of the high court directed to an inferior statutory body which prohibits continued proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It was not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice .....*”

*“Prohibition looks to the future ..... where a decision has been made whether in excess or lack of jurisdiction an order of prohibition would not be efficacious against the decision so made..... It can only prevent the making of an contemplated decision .....*”

*“an order of prohibition is powerless against a decision which has already been made before such an order is issued”.*

I have already said that in my view all the legal requirements were complied with. Considering all the above I am convinced and I find this application not proved and I decline to issue orders sought. The application is dismissed with costs.

Dated this 14<sup>th</sup> day of October, 2004.

**J. KHAMINWA**

**JUDGE**

**14.10.04**

J. Khaminwa – Judge

Cege – Court Clerk

Mr.Khanna for ex parte applicant

Mr. Mutungi for State

Mr. Kiarie Kariuki for interested party.

Judgment read in their presence

J. KHAMINWA

**JUDGE**