



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**JR. APPLICATION NO. 1 OF 2020**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. THE NATIONAL LAND COMMISSION**

**2. CABINET SECRETARY MINISTRY OF LANDS & HOUSING**

**PHYSICAL PLANNING & URBAN DEVELOPMENT**

**3. THE ATTORNEY GENERAL**

**4. THE COUNTY GOVERNMENT OF KWALE.....RESPONDENTS**

**AND**

**DIANI SCHEME RESOURCE CENTRE.....EX-PARTE**

**JUDGMENT**

1. Pursuant to leave granted by the court on 15<sup>th</sup> January, 2020, the Ex-parte Applicant herein, Diani Scheme Resource Centre filed the Notice of Motion dated 17<sup>th</sup> January, 2020 brought under Order 53 Rule 3 and 4 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya. The Ex-parte Applicant seeks the following orders:

**1. Spent**

**2. That this honourable court be pleased to issue orders placing a moratorium on the transfer of, and/or registration or otherwise of any parcel of land that is within what is known as KWALE/DIANI SETTLEMENT SCHEME pending the hearing and determination of this Judicial Review.**

**3. That an order of prohibition does issue to prohibit the respondents herein from further causing the alienation by transfer and/or registration of any land that is situated within Kwale/Diani Settlement Scheme through the current survey plan to wit dated 4<sup>th</sup> February, 1992.**

**4. That an order of mandamus does issue to compel the respondents herein to adopt the initial Part Development Plan (PDP) Ref. No.413.CT.2.82, used to award allotment letters to the settlers on Diani Settlement Scheme and from the same generate and gazette a new survey plan.**

**5. Costs of the application be provide for.**

2. The application is based on the grounds set out in the statutory statement dated 13<sup>th</sup> January, 2020 and the verifying affidavit of Mwafumbiri Bakari Matatizo sworn on 18<sup>th</sup> December, 2019 and the documents annexed thereto. It is averred that the applicants' membership and their forefathers have been in occupation and possession of the suit premises heretofore known as Kwale/Diani Settlement Scheme since time immemorial. That sometime in the year 1977, the Government of the Republic of Kenya, in a bid to recognize the proprietorship rights of the applicant's membership established the said KWALE/DIANI SETTLEMENT SCHEME as an adjudication block. That the Government from the process created a Part Development Plan (PDP) Ref:No.413.CT.2.82 that made allocation as hereunder:

1. 446 plots were adjudicated each measuring approximately 5 acres.
2. Of the 446 plots, the applicant's membership were already in occupation of 169 of the said plots.
3. 46 plots were allocated to individuals who obtained direct approval from the minister for Lands and Settlement.
4. 182 plots were allocated to applicants through secret ballot.
5. 17 plots set aside for the Kaya Forest and Social amenities.

3. It is averred that the applicant's membership having been identified as settlers, requisite survey were completed and the applicants' membership were identified as successful candidates/allottees and were then required to collect their respective letters of offer over the respective area they occupied. That the process was however marred by irregularities from inception resulting into missing names, double allocation, lack of transparency in the process, titling and inconsistent land reference numbers. It is the applicant's contention that the inconsistencies and problems came about as a result of the use of a different PDP dated 4<sup>th</sup> February, 1992. That the adoption of the survey plan of 4<sup>th</sup> February 1992 created a conflict with the actual position on the land as it purported to cancel the parcels earmarked for the Kaya forest and other social functions and that the said survey plan contradicted the allotment made with reference to the PDP thereby occasioning conflict as to the position of the parcels of land boundary limits. That as a result of the said survey plan of 4<sup>th</sup> February, 1992, subsequent purchasers relying on the said survey plan have had conflicts with the current occupants as the instruments used to assign land to the two parties are completely different. That the applicant's membership have sought intervention from all the requisite Government Officers responsible but have not been able to come up with a solution. That as a result of the current situation, the applicant's membership are plagued by a myriad of issues thus necessitating these judicial review proceedings. The applicants have annexed a copy of the Part Development Plan No. 413. CT.42.82, copy of list of its members, a copy of letter dated 20<sup>th</sup> June 1977, affidavits attaching other documents, correspondence and letters and newspaper cuttings.

4. None of the Respondents filed any response to the application even though they were duly served and granted several opportunities to do so.

5. I have considered the application. The issue that arises for determination is whether the orders sought herein should be granted or not. It is the applicants' case that the applicant's membership and their forefathers have been in occupation and possession of the suit premises known as KWALE/DIANI SETTLEMENT SCHEME since time immemorial. That in the year 1977, the Government, in a bid to recognize the proprietorship rights of the applicant's membership established the said parcel of land as adjudication block and created a Part Development (PDP) Ref: 413.CT.2.82 in which it allocated 169 plots to applicant's membership who were already in occupation; 48 plots were allocated to individuals who obtained direct approval from the Minister for Lands and Settlement, 182 plots were allocated to the applicants through secret ballot, 25 plots were allocated to a group of Tanzanian Immigrants and 17 plots were set aside for the Kaya Forest and social amenities. The applicants state that the surveys and allocation were completed and that allottees were only required to go and collect their respective letters of offer over their respective plots. The applicants, however state that the process was marred with various irregularities, including missing names, lack of transparency, and inconsistent land reference numbers. According to the applicants, these problems emanated from the use of a survey plan dated 4<sup>th</sup> February, 1992. Among the documents exhibited by the applicants are the said PDP and survey plan, correspondences and letters, minutes, letters of offer, allocation letters, mutation forms, certificates of outright purchase and title deeds. I have perused these documents and note that some of them are in the names of persons who are not parties to these proceedings, either as applicants or even as interested parties.

6. In the case of **Municipal Council of Mombasa –v- Republic & Umoja Consultants Ltd (2000) eKLR**, the Court of Appeal stated as follows:

**“Judicial review proceedings is concerned with the decision making process, not with the merits itself; the court would concern itself with such issues as to whether the decision of the decision makers had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a court of appeal over the deciders which would involve going into the merits of the decision itself as whether there was or there was no sufficient evidence to support the decision.”**

7. In the case of **Republic – v- Kenya National Examinations Council Ex Parte Geoffrey Gathenji and 9 Others, Nairobi Civil Appeal No. 266 of 1996**, the Court of Appeal stated as follows:

**“The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatments.”**

8. In the case of **Mwau –v-Principal immigration Officer (1983)KLR**, it was stated:

**“Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in interferences by the judicial department with the management of the executive department of government. The courts will not intervene to compel action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory. ”**

9. In the instant case, the ex-parte applicants confirmed that they benefited from the adjudication process over the suit parcel of land when they were allocated plots in areas they were in occupation and possession and also through secret ballot. Although the applicants have complained that the adoption of the survey plan dated 4<sup>th</sup> February, 1992, created some conflicts, in my considered view, such conflicts ought to have been taken up by the individuals affected through the normal dispute resolution mechanisms for relevant remedies and not by judicial review. Further, in the instant case, the applicants have not convinced this court that the respondents have declined to perform their duties imposed by the law. From the material placed before the court, it is clear that there have been several attempts made by the respondents to resolve the dispute. Moreover, granting the order sought would no doubt affect third parties, some of whom hold title deeds and who have not been joined in these proceedings either as respondents or even interested parties. The applicants were therefore under a duty to ensure that all persons who are likely to be affected by the orders sought herein were enjoined in these proceedings in order to be afforded an opportunity of being heard before any decision is taken. Under the law, and in particular Section 26 of the Land Registration Act, the Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to challenge on grounds of fraud or misrepresentation to which the person is proved to be a party or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. There is no evidence or material that has been placed before this court proving fraud on the part of the persons who told title and who in any case are not parties to these proceedings.

10. The upshot is that I find that the Notice of Motion dated 17<sup>th</sup> January, 2020 is devoid of merit and I decline to grant the orders sought. The application is dismissed. Since the respondents did not file any responses, I order that each party to bear their own costs.

11. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 15<sup>th</sup> day of February, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant