REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL SUIT NO 982 OF 1997

SEA STAR MALINDI LTD.....APPLICANT

VERSUS

KENYA WILDLIFE SERVICES .....RESPONDENT

DAVID WESTERN.....RESPONDENT

B.K. MWAKAU.....RESPONDENT

RULING

The applicant, Sea Star Malindi Limited, filed Notice of Motion dated 7th November 1997 against three Respondents, namely Kenya Wildlife Services, Dr. David Western who was the Director Kenya Wildlife Services and B.K. Mwakau, who was then the Warden, Malindi Marine Park and Reserve in which it was seeking mainly four orders and an order for costs.

The orders sought were as follows:

> "1. AN ORDER OF *CERTIORARI* to remove into the High Court and quash the decision of Dr. David Western the Director of Kenya Wildlife Service and B.K. Mwakau the warden, Malindi Marine Park and Reserve dated 20th August 1997 restricting, banning and/or restricting the applicant from constructing a hotel on its parcel of land known as plot number 3170 Malindi in accordance with the building plans approved by Malindi Municipal Council on plot No. 3170 Malindi.
> 2. AN ORDER OF PROHIBITION prohibiting Dr. David Western, the Director, Kenya Wildlife Service and B.K. Mwakau, the Warden Malindi Marine Park and Reserve, their servants and/or agents from further proceedings with their decision to restrict, ban and/or restrain the applicant from constructing a hotel on its plot number 3170 Malindi in accordance with the building plans approved by Malindi Municipal Council and further proceedings with the decision to station armed game warden on the applicant's said plot.
> 3.AN ORDER OF *CERTIORARI* AND PROHIBITION do operate as a stay of all proceedings in question that is the stationing of armed warden on the plot No. 3170 Malindi by Dr. David Western, the Director Kenya Wildlife Services and B.K. Mwakau the Malindi Marine Park and Reserve their servants, and/or agents to restrict and/or restrain the construction of the hotel in any way the applicant want, subject to Malindi Municipality building by-laws
> 4. AN ORDER OF *MANDAMUS* directed to the Director, Kenya Wildlife Services, Dr. David Western, and B.K. Mwakau, the Warden Malindi Marine Park and Reserve, their servants and/or agents commanding them to remove the armed game wardens, stationed at the applicant's plot No. 3170 Malindi and cease forthwith from interfering with the applicant's construction of the Hotel on its plot."

As I have stated above, its last order sought was that costs be paid by the respondents. The application was supported by statement of facts which was amended later and there were also affidavits in support of it and several annextures to it. On 7th May 2002, Mr. Ritho the learned counsel for the applicant did apply to withdraw the suit against the second respondent, Dr. David Western as the same second respondent was no longer serving the first respondent. He also applied to withdraw the suit against the third respondent B.K. Mwakau who is now deceased. As there were no objections to the same, the suit as against the second and third respondents were marked as withdrawn. This in effect means that this ruling will be confined mainly to the orders sought directly or indirectly against the first respondent herein but will not touch on the orders sought directly against the second and third respondents who are no longer parties in the case.

The brief facts as contained in the amended statement of facts are that the applicant, Sea Star Malindi Limited is the registered proprietor of the parcel of land known as plot No. 3170 Malindi, having bought the same piece of land from one Gaetano Bortoloti for a sum of Ksh. 4,000,000/= on 10th August 1994.

Applicant maintains that its title is valid and gives a detailed history of the land from the year 1895 in statement of facts detailing all actions taken on the land upto 1994 when it landed into its hands. According to this detailed historical dates, the applicant maintains that there is no evidence in the Kenya Official Gazette from 1902 to date that the suit land No. 3170 Malindi has ever been acquired by the Government for public purposes and there is no evidence that the area has ever been gazetted to be Government land. The affidavit maintains that even the area between the high water mark of 100 ft and the actual plot in question cannot be a Government land as the boundary of the suit land extends upto the high water mark. It maintains that at all material times from 14th December 1895 to present day, the suit land covers the area situated upto the high water mark and has been a private freehold land and has never been either crown land during the colonial times or Government land in the present times. Thus the registered proprietor of the same land has a free hand to do whatever it wants with the land so long as it does comply with lawfully enacted building by laws of Malindi Municipal Council. Sometimes in the year 1995, the applicant constructed a house on the same land and in the year 1996, it decided to build a modern hotel on the same plot No. 3170 Malindi. The hotel is known as Hotel Orologio. It was to cost Ksh. 70,000,000/= when completed. It is estimated to have bed capacity of about 50 and have facilities such as restaurant and swimming pool and to employ 150 persons staff members. By 1997, April, the construction of the same hotel had been 40% complete. The same hotel was being constructed with the consent of the Malindi Municipal Council.

On 21st April 1997, the first respondent wrote a letter to the applicant stating that the applicant was building the hotel within the 100 ft from high water mark which is a Government zone under the Respondent's jurisdiction. The applicant replied to this letter and stated that it was constructing the same hotel within the beacons of plot No. 3170 Malindi and denied any encroachment on any other land. After several correspondences, Respondent allowed the applicant to complete the hotel but only on condition *inter alia* that only the construction already started would be completed and no further new construction would be allowed. On 20th August 1997, the applicant received a letter from Dr. David Western the Director of the First Respondent advising the applicant to stop any construction within the 100 feet zone from the high water mark. The applicant felt aggrieved by this letter as the banning is illegal because, according to the applicant its title to the land extends to high water mark and his title is not subject to any other condition except the Malindi Municipality Building by-laws as the title is freehold.

It is according to the applicant protected, indefeasible under chapter 281 and Indian Transfer of Property Act 1882 and under the Constitution of Kenya and was not obtained through fraud or misrepresentation. It contends that as the land has never been a council land at any time the provisions of Survey Act Chapter 299 which provides for leaving of 100 feet of land as crown land from the high water mark does not apply to this land. The area in question was surveyed long before the act declaring the 100 feet of crown land to remain Government land ever came into effect and therefore the act is not applicable to this land. The land has always remained freehold private land and there is no record in the history of the suit land showing that the area where the suit land is situated has ever been acquired by the Government for any public use. The suit land had never been gazetted by the Government of Kenya between 11th June 1963 and 11th December 1963 to be declared to be Government land under Section 195(2) of the second

schedule by L.N. NO. 245 of 1963 and Section 205 of the second schedule of L.N. 718 OF 1963. The applicant ends evidential part of the statement by stating as follows at paragraph 42:

> "42. The Respondent's purported banning and/or restraining the applicant's construction of the hotel in plot No. 3170 Malindi is not only unconstitutional, illegal and unlawful but also of no legal effect and therefore null and void ab initio under the provisions of Laws of Kenya. The applicant had tried to get an injunction granted by the Mombasa Court against the Kenya Wildlife Services in H.C.C.C. No. 274 of 1997 but injunction could not be granted against Government organization and the suit was withdrawn, hence the need for miscellaneous application to apply for *Certiorari*, Prohibition and *Mandamus* Orders."

The relief sought set out in the statements which are the same as are spelt out of the Notice of Motion, i.e. seeking an order of *Certiorari* to quash that decision of the Kenya Wildlife banning and/or restraining the applicant from constructing hotel on its property, orders of prohibition against Kenya Wildlife Service from proceeding with its decision to restrict, ban and/or restrain the applicant from constructing hotel on its plot No. 3170 Malindi in accordance with the building plans approved by the Malindi Municipality and order of *Mandamus* directed to the Kenya Wildlife Services Director and/or Warden Malindi, their servants and/or agents to cease forthwith restricting, banning, restraining the applicant from developing the hotel in plot No. 3170 Malindi in accordance with the approved building plans.

The other relief sought is that the grant of the same order of *Certiorari* and Prohibition do operate as stay of all proceedings by the Director, Warden and their servants till determination of this matter. The grounds of the application are also set out in the same statement of facts and are mainly the same as ones in the body of the statement. The thrust of them is that the Kenya Wildlife Services has no power to restrict, ban and/or restrain the applicant from developing its freehold plot No. 3170 at Malindi, that the applicant's title is protected by the provisions of ITPA 1882 and Registration of Titles Act Cap 281 Laws of Kenya, and that the actions by the Kenya Wildlife Services amounted to compulsory acquisition of the applicant's land and is contrary to the provisions of the Constitution of Kenya section 75. The other grounds cited in the same statement are that the first respondent acted without following any provisions of its laws; the same action was a breach of natural justice and constitutional rights of the applicants; that the first respondent had no jurisdiction to make the same decision and acted against the interest of the applicant without giving the same applicant opportunity to be heard or without giving him opportunity to make representation before making the same decision.

There were several affidavits in support of the application. Some sworn by the Directors of the applicant and some sworn by Mr. J.D. Obel who was at the time this suit was filed a licensed land surveyor. He was also formerly Deputy Director of Survey. There is also an affidavit sworn by S.K. Ritho the applicant's counsel in reply to replying affidavit. There were also annexed to the application and to the affidavits, several annextures. I will refer to the same whenever necessary later in the ruling.

The Respondents opposed the application and filed eight grounds of opposition. These were in brief that the issues and matters raised in this application are substantially similar to the issues and matters raised in Mombasa HCCC No 274 of 1997 involving the same parties. The same issues had been heard, determined and ruled upon by the court sitting at Mombasa and so this suit and application are bad in law, misconceived, frivolous and embarrassing and its institution is tantamount to an abuse of the court process; that the application is incurably defective as the statements originally used to obtain leave to institute it have since been modified and altered such that the application does not comply with the provisions of the law under which it is brought; that the application and the cause are based on distortions of facts, misrepresentation, frivolous and irrelevant matters and the applicant is coming to court with unclean hands; that the applicant's construction had encroached onto the legally protected Malindi Marine Natural Park and Reserve, hence interfering with and adversely affecting the coastal marine Eco-system which the first respondent is mandated by law to conserve, manage and protect; that applicant's construction in its alleged plot No. 3170 Malindi had a direct adverse effect on a very fragile coastal marine and whose conservation, management and protection falls under the legal jurisdiction of the first respondent, and further destruction by which shall spell doom and ecological disaster in the area which is otherwise very essential for the benefit of the entire public; that the threatened destruction, if allowed,

would lead to irreversible consequences and a complete loss of this essential natural resource. The other two grounds were that the application lacks merit as against the respondents who are simply carrying out their statutory duties as conferred upon the first respondent; namely to protect, conserve, and manage the public natural resource in the form of a marine Park. The applicant is on the other hand merely pursuing its private and narrow individual interests which have already had and will continue to have far reaching adverse consequences against public interest and that the application is bad in law, frivolous, misconceived and in incompetent.

The affidavit in support of the same grounds and which is the Replying Affidavit is sworn by J M Mburugu, who is the first respondent's officer in charge of land matters states in brief that matters raised in this application are *res judicata* as the same had been canvassed in HCCC No 274 of 1997 and had been determined in a ruling delivered on 23rd October 1997 at Mombasa Court; thus according to the Ruling, the first respondent has legal authority, duty and rights to conserve, protect and manage the area in dispute and control all activities in the area measuring 100 feet above the highest water mark on the mainland adjoining the Indian Ocean in the suit premises area which falls within Malindi Marine Park and Reserve. The respondents stated further that although the applicants in this suit filed Notice of Appeal against the same decision in Mombasa HCCC No 274 of 1997, it did not proceed with the appeal but filed this suit which is now *res judicata* and is a gross abuse of the court's process. They continued that the strip of land measuring 100 feet wide on the adjoining mainland parallel to the Indian Ocean from the high water-mark to the Malindi coastline comprises of Malindi Marine Natural Reserve and Park which is duly declared and gazetted as such and legally placed under the respondents for appropriate conservation and management under and pursuant to the provisions of the Wildlife (Conservation and Management) Act, Cap 376 Laws of Kenya; that such areas had been declared as National Park and Reserves under the National Parks of Kenya Act cap 377 and was automatically decreed to be declared to continue under the same legal status upon the coming into operation of Chapter 376 on 13th February 1976, and so Malindi Natural Reserve and Park falls under the jurisdiction of the first respondent to be conserved and managed under and pursuant to the provisions of the prevailing wildlife legislation in Kenya. They maintained that when the first respondent became aware that the applicant's construction encroached on the protected wildlife conservation and management area, it stopped the applicant's destructive activities in the said area in April 1997 but on an appeal being made by the applicant, the first respondent did give permission to the applicant to complete only the structures already started and which were already in construction as at June 1997 and no more. However, the applicant failed to honour the same conditions and constructed waste disposal facilities including attempting to install a septic tank. These activities caused a very real great threat to conservation and management of the entire coastal marine ecosystem and biodiversity sustenance in the Malindi area and so the first respondent withdrew the permission. They further stated that there is real threat that the applicant's intended construction works within the protected fragile marine area which stands on a cliff would lead to a collapse of the natural resources that used to be conserved and protected for productivity and thus lead to ecological disaster and it is therefore essential that the decision of Mombasa Court made earlier on by Hon. Lady Justice Ang'awa should be upheld as the intended construction activities by the applicant are a real threat to marine life and may end in permanent, irreparable damage to coastal ecological balance which is for the interest of the wider public. This affidavit also had several annextures to it. I will refer to some of them as may be necessary in this ruling.

Although there were many preliminary issues that were raised in this matter, I was during the hearing addressed at length by both Mr. Ritho, the learned counsel for the applicant and Mr. Muthoga, the learned counsel for the first respondent. Mr. Ritho contended in his submissions that the land in question belongs to the applicant and there are documents to prove the same. That being the case, the Constitution protects the applicant's right to it and that if the respondent wanted to interfere with the applicant's right to enjoy the same property, it had to involve the provision of Land Acquisition Act. In any case, Mr. Ritho continued the gazette notice relied on by the respondents was not relevant as far as the applicant's land was concerned. He referred me to several documents of title including the survey map and plans, all annexed to the applicant's affidavit and gave a narrative history of the suit land right from colonial days to date. The boundary of the suit land, according to the documents of title and survey records, do extend upto high water mark and the applicant purchased the suit land with the boundary upto high water mark.

The property is a freehold private land and this being the case the competent authority under section 29(a)

of chapter 377 National Parks of Kenya Act is the applicant who is the owner of the subject land and not the Minister as the Minister would only be a competent authority when one is dealing with a Government land not a private property such as the suit property. He contended that the Minister had no authority to make any decision on the suit land, as the suit land is a private property. He maintained that as the suit land is surveyed, provisions of the Survey Act Chapter 299 do not allow it to be taken away by mere colouring of the general areas. According to Mr. Ritho the land marked by the Respondent as showing 100 feet is not the land of the applicant and that without proper acquisition, the respondents claim that there is 100 feet within the suit land is unmaintainable. He referred me to the Deed plan No. 15100 drawn in 22.12.92 in his contention that the applicant is the owner of the subject land and that there is no 100 feet high water mark attached to the same land which is part of Government land. As far as the suit land is concerned, seaward boundary extends upto high water mark. He submitted that if the Government wanted to control the suit land as part of National Park Land then it should have proceeded under section 6 of Chapter 376 Laws of Kenya, and so long as that has not been done, the area's development should not be interfered with by any authority except the local authority – concerned. He emphasized that the suit land is not near or at the area referred to by the legal notice No. 99/68 in the boundary plan No. 216/17. It appears that the respondent did until February 2000 believe that the suit land was the one referred to in the legal notice No. 99/68 and thus believed it was Government land which is not the case at all. Legal notice No. 98/ 68 is again referring to boundary plan No. 204/39 which borders the suit land but is not the suit land. The suit land has no reference to 100 feet above high water mark area. Thus the respondent's action which was taken in 1997 to stop the applicant from developing his land had no legal basis and was taken as a result of mistaken facts as to the lands annexed by the legal notice No. 98/68 and 99/68. He submitted that that being the case, all actions taken by the respondents were taken without jurisdiction and he ended his submissions by stating that since 1914, the suitland has never been Government land and has always remained a private land and hence no interference should be entertained.

On his part Mr. Muthoga the learned counsel for the respondent submitted that eight reasons militated against the grant of the orders sought. These were, that there is not sufficient evidence before the court to enable it make a determination in favour of the applicant; that an order of *Certiorari* cannot be issued in favour of the applicant as he has not verified the decision to be quashed; that remedy sought is available through alternative remedies and in fact applicant has sought alternative remedies as he has started a suit for damages in tort for the same matter he is pleading for in this application; that remedies against the second and third respondents are no longer available as the suit against the same second and third respondents have been withdrawn; that the applicant is raising constitutional rights without joining the Attorney General who is the custodian of the Constitution; that judicial review is inappropriate in a matter of this nature where the facts are seemingly in dispute; that interest of the public ought to take priority over private interests, and lastly that the issue as to whether the respondent should exercise jurisdiction over 100 feet off the water mark has been decided in H.C.C.C. No. 274 of 1997 between the same parties and is therefore now *res-judicata*.

He expounded on these grounds by saying that the matter was *res judicata* as the Hon. Lady Justice Ang'awa had heard a similar matter between the same parties and made a decision on it. Further on evidence, he contended that after several parts of the supporting affidavit had been struck out, what remained would not sustain the case. He said:

> "Respondent's claim is that it manages the parks under section 3(a)(b) & (c) to manage Natural Parks. It has never claimed to own the land. Respondent has always said that the land may be owned by the applicant but the land is contiguous to Marine Natural Park."

He further referred me to rule 7 of Order 53 of the Civil Procedure Rules and maintained that these provisions had not been complied with by the applicant as the court must be told which decision and which proceeding needs to be quashed. He contended that if the offending decision is the decisions contained to the letter dated 24.4.1997, then no Order of *Certiorari* could be made on it as the suit was filed after six months had elapsed since the letter was written as leave could not be granted after six months had expired. He contended that no copy of the proceedings or decision had been verified by the Registrar as is required by the Civil Procedure Rules. Verifying affidavit filed with the application is there but it does not verify the decision sought to be quashed. On availability of alternative remedies, he

conceded that in law availability of alternative remedies was not a bar to a review application but he maintained that when such alternative remedies existed, the court's jurisdiction would be discretional and the court should take that fact into consideration when deciding the review application. He referred me to HCCC No 579 of 1998 as the case in which the applicant is seeking the same remedy.

He contended further that judicial review is not a proper way of solving a problem such as this where facts are seriously contested and when evidence may be required to determine the issues between the parties. One of the contested facts is in the question of the boundary and that other is the extent of the construction that was actually being stopped. He maintained that public interest should take priority over private interest and thus private interest should not override public interest, and he ended by stating that the question as to whether the respondent should control the relevant suit land had been decided in the ruling of Hon. Justice Ang'awa in HCCC No. 274 of 1997 and that the matter is no longer available for decision. It is *res judicata.*

The above, represent a brief summary of the matters that were covered in the statement of facts, affidavits and submissions by the learned counsels. It would be wrong to state that the above reflect the entire matters that were before me. This application had several affidavits, more than one statement of facts, as the original statement of facts was amended. There were several annextures by both sides and the submissions were fairly lengthy. I cannot pretend to have covered everything that was adduced in the entire case. I can however state that the above reflect a fair summary of the salient matters that were canvassed in the entire case.

I have considered the same as well as the law involved plus the authorities to which I was referred. As I have indicated hereabove, the orders sought directly against Dr. David Western and the late Mr. Mwakau cannot stand as the same David Western and Mwakau are no longer parties to these proceedings and were for part of the proceedings not parties to the suit. The prayers affected were prayers 2 and 4. Prayer 2 is asking an Order of Prohibition to prohibit Dr. David Western, the Director of Wildlife Services and B.K. Mwakau the Warden, Malindi Marine Park and Reserve, their servants and/or agents from proceeding with the decision to restrict, ban and/or restrain the applicant from constructing a hotel on its plot No. 3170 Malindi and further proceeding with the decision to station armed game wardens in the applicant's said plot. That prayer sought orders to issue against Dr. David Western and B.K. Mwakau as individuals. As the suit against the two was withdrawn, that order cannot be issued. In the same vein prayer 4 which is also seeking an Order of *Mandamus* directed to Western and Mwakau cannot also stand. The two are dismissed.

However, first prayer is still available for consideration as though Western and Mwakau are not parties, and no orders directing them to do or to cease to do certain acts can be issued against in the suit, nonetheless, the letters they are alleged to have written were written in their capacities as Director of Kenya Wildlife Services and Warden Malindi Marine Park and Reserve respectively and those letters still have the legal force against the applicant and the suit property. I will consider the same prayer. In my mind prayer 3 was only a holding prayer which was only available while the hearing lasted. Immediately this ruling is delivered it will no longer be available. I need not consider it in the ruling as it is no longer available.

I will first consider those issues raised by Mr. Muthoga, the learned counsel for the respondent, which I do feel are matters bordering on the Preliminary issues though raised in the main submissions. These are the issues that the matter before me is *res judicata* as a similar matter between the same parties had been raised in HCCC No 274 of 1997 and Hon. Lady Justice Ang'awa had determined it in her ruling given in that case. The second one was that no *Certiorari* Order can be issued as the decision sought to be quashed had not been verified as is required by Order 53 Rule 7 of the Civil Procedure Rules. The third point raised was not raised directly but I did understand Mr. Muthoga to contend in his submissions that leave to file the Notice of Motion should not have been granted as the application was not filed within six months of the date the decision sought to be quashed was made and that Order 53 Rule 2 was not complied with. I view these as matters that need to be disposed of first before deciding on the other matters as the decision made on any of them may very well determine whether the other points are to be gone into or not.

First, is this matter *res judicata*? I have perused the entire record in this matter. Earlier on 19.12.1997 and on 26.2.1998, the respondent had given Notice of two Preliminary objections. One Notice of Preliminary Objection was on this same point of *res judicata* and the second point was on jurisdiction and on rule 3(2) of Order 53 and in respect of prayer for *Certiorari* on rule 7 of Order 53 and that the application made in the motion was inconsistent with the leave obtained. These Preliminary points were argued on 29th April 1998 and it would appear from the records that they were argued exhaustively.

After full hearing, the learned Judge, Hon. Justice Kuloba delivered a fairly lengthy ruling in which he also noted at the very beginning of the same ruling that the same Preliminary Objections were also in the grounds of opposition dated 9th December 1997 and were in the additional grounds of Preliminary Objection. In a well considered opinion the Honourable Judge stated as follows having considered Section 7 of the Civil Procedure Act:

> "The first condition is not satisfied. The matter in issue in the former suit was whether a temporary injunction would issue in those proceedings. That is not the matter in issue in this suit. The second and third conditions are not satisfied."

He then analyzed the decision of Ang'awa Judge and ended as follows on that issue of *res judicata*:

> "That could not have been a conclusive decision of the case so as to constitute a *res judicata.* These considerations above are sufficient to dispose of the Pleminary Objection based on *res judicata*. It cannot be sustained."

On the question of the faults alleged under Order 53 Rule 3(2) and Order 53 Rule 7 he stated as follows:

> "The procedural Objections do not raise faults which are incurable, and no injustice is cited to be likely to occur as a result of failure to comply with a rule of procedure or the alleged inconsistency between the Notice of Motion and the application for leave to seek judicial review. A failure of justice is the guiding principle; and not a mere procedural lapse. For these reasons the Preliminary Objections are dismissed. No order as to costs. Order accordingly."

No appeal was preferred against these decisions. They stand. Mr. Muthoga argued that the same decisions were not binding on me as they were not final decisions on the matter before the court and that as I was hearing the entire matter fully, I still had the jurisdiction to make my own decision on the same. That argument is indeed attractive and tempting but, I do not think it is valid in this particular case. I do agree that decisions such as on injunction etc can be overturned by the final trial court, but that is only because such decisions are not final in themselves as they are made on *prima facie* evidence only. Here however, the respondent sought a final decision from Hon. Justice Kuloba as to whether this matter was *res judicata* or not and whether as a result of non compliance with Order 53 rule 3(2) and 7, the application was competent. The court gave those answers in a ruling that was in my view final as to those issues. I would be sitting on an appeal upon a fellow Judge in such a ruling were I to rule otherwise at this stage as in any case no extra evidence has been adduced before me on the two issues. In any case, I do agree with his decisions on those matters that were raised before him and which were in any event also in the grounds of opposition. Further, as to six months limit, I do feel respondent cannot be right as the letter dated 20th August 1997 is also being challenged and by October 1997 when this suit was filed six months had not elapsed from the date of that letter.

I do find that the points raised to the effect that this matter is *res judicata*; that the Order of *Certiorari* cannot be raised as the decision sought to be quashed has not been verified and that the Attorney General should have been served are matters that had been raised before Hon. Justice Kuloba and had been adequately and finally dealt with by the same court. They are no longer available before me for consideration. I do reject the same. I will now consider the application on substance.

There does not appear to be any dispute as to the fact that the suit land belongs to the applicant. Mr. Muthoga in his submission part of which I have reproduced herein above already says that the first respondent has never claimed to own the land. Although in the Replying Affidavit and in the Grounds of

opposition, the first respondent maintains that the offending construction being carried out by the applicant on plot No. 3170 Malindi encroaches onto the legally protected wildlife conservation and management area, the learned counsel in his lengthy address to the court did not canvass that aspect notwithstanding, that the learned counsel for the applicant's main argument was that the suit land belongs to the applicant; and extends 100 feet upto high water mark and that the respondent's action was based on misapprehension that the Government had control over part of the land. On my own, having seen the survey records annexed, the documents of title, and having perused all and having perused letter dated 24th April 1997 from Malindi Municipality which was not challenged, the affidavit and listened to the submissions, I am satisfied that the suit property belongs to the applicant and is a private land.

The applicant's complaint is that as he set out to develop the same land and in the course of developing the same land he received communication from the Respondent. The first communication was a letter dated 21st April 1997 written to the applicant by the late B.K. Mwakau, Warden Marine Park and Reserve. It stated as follows:

> **"Sea Star Limited,**
>
> **Malindi.**
>
> **CONSTRUCTION WITHIN K.W.S. AREA**
>
> **We have noted with concern that you are constructing a permanent building within the Kenya Wildlife Service (KWS) zone.**
>
> **Your permanent construction is within the 100 feet from the high water mark (HWM). The area in question is a Government zone under KWS jurisdiction. You are hereby instructed to stop that construction as from today.**
>
> **You should note that, in future do not do any constructions within 100 feet from the (HWM) without consulting our office. There is no need to continue constructing because we shall order you to demolish that foundation.**
>
> **Please oblige.**
>
> **Signature**
>
> **B.K. Mwakau**
>
> **WARDEN MALINDI MARINE PARK & RESERVE"**

The applicant replied to that letter and stated that the offending construction was within the beacons of plot No. 3170 and had not in any way encroached the Government zone and was being carried out on a private property. That was in a letter dated 22nd April 1997. That stand was confirmed by the letter from the Malindi Municipality dated 24th April 1997 to which I have referred to herein above. That letter from the Municipality was addressed to the applicant and it stated as follows:

> **"Sea Star Limited**
>
> **P.O. BOX 482**
>
> **MALINDI**
>
> **RE: DEVELOPMENT ON PLOT NO. 3170 – MALINDI**
>
> **We have received your letter dated 24.4.97 with enclosures therein, and following an inspection on the site to verify the extent of the plot boundaries as per the title deed, we are**

satisfied that the approved development is within boundaries of the registered plot.

In view of the fulfillment of the requirement by the Council's building by-laws more particularly within the identification of the plot boundaries a matter which had raised concern, the council has no objection for you to proceed with the project in accordance with the approved plans until otherwise restricted to do so by any other law.

Yours faithfully,

Signature

FRED K.J. DINDI

TOWN ENGINEER

For TOWN CLERK"

That letter was copied to warden in charge KWS Malindi. Notwithstanding, these clear statements made it clear that the applicant's development was within the boundaries of his private land, and that the Municipality concerned was a witness to the same, the first respondent through its servant, B.K. Mwakau wrote yet another letter dated 24th April 1997 stating as follows:

"Sea Star Limited,

P.O. BOX 482

MALINDI

CONSTRUCTION WITHIN K.W.S. AREA

I am in receipt of the letter reference number MMCDVTE 9/Vol.VII 50 dated 24th April 1997 from the Engineer Municipal Council.

Please refer to my Ref. KWS/Mld Conf 5044 of 21st April 1997. I still emphasize that do not do any construction within 100 feet zone. This will be against the rules.

SIGNED

B.K. MWAKAU WARDEN,

MALINDI MARINE & RESERVE"

No reason was given for this order. All that was said is that would be against the rules to continue with construction which was proceeding in a private land within the boundaries of the same land. No rules were spelt out to the applicant. The applicant then appealed in a letter to the Minister and on 6th June 1997, the Director of Kenya Wildlife Service allowed him a limited permission to complete the construction that was already started on the land but such was to be done with the supervision of the first respondent.

However on 20th August 1997 in a letter dated the same day, the permission was withdrawn and a decision was conveyed to the applicant vide that letter that no development was to be allowed within 100 feet from the high water mark as the area had been conserved for the benefit of the present and future generations. I will reproduce the same letter here as it conveyed the main directive which it sought to be removed to this court and to be quashed according to prayer 1 of the Notice of Motion. That letter states as follows:

"August 20, 1997

Sea Star Malindi Limited

P.O. BOX 482

MALINDI

Dear Sir,

HOTEL CONSTRUCTION ON PLOT NO. 3170 IN MALINDI MARINE NATIONAL RESERVE

Further to our letter reference number KWS/CONF/ 5044 Vol.1 (171) dated June 06.1997 through which we gave you "special permission under very exceptional circumstances to complete only the already started but incomplete construction." Subject to very strict clearly spelt out condition, it has come to our notice that you proceeded, in contradiction of that special permission to construct waste disposal facilities including a septic tank on porous coral reefs in the fragile cliff on which the above hotel construction is located, hence endangering the protected area's ecosystem.

When you realized that your irregular construction works had come to our notice, you covered the excavated areas, further endangering the ecosystem. You did not refer to or seek authorization from KWS before undertaking these clearly irregular works into legally protected area which falls within 100 feet from the high water mark.

In view of the above, it has been decided that in order to ensure the protection of the fragile ecosystem of the area that falls under our legal jurisdiction, the special permission we granted to you be withdrawn with immediate effect and the prohibition that was issued earlier on be reinstated. Please note that no development shall be allowed within 100 feet from the high water mark, as this area has to be conserved for the benefit of present and future generations.

By copies of this letter, other relevant Government authorities are informed of the decision and requested to take further necessary action to ensure full compliance.

Yours faithfully,

SIGNED

DR. DAVID WESTERN,

DIRECTOR"

As I have stated above, it is clear to me that this letter and the letters of 21st April 1997 and 24th April 1997 represented a decision by the first respondent, Kenya Wildlife Service to stop the applicant from developing his private land in the best way he felt and not only that but they were stopping the applicant from developing the same land in accordance with the approved development plan as approved by the Malindi Municipal Council and the same decision was stopping the applicant from developing the same land when the same developments were being carried out within the boundaries of the land allocated to its predecessors and which it bought from the same with the same boundary marks intact (beacons intact). Under what powers was the first respondent making the same decision?

First, the first respondent says that there is 100 feet space between the applicant's land and the high water mark and that that100 feet space is under its jurisdiction and control, under the Wildlife Conservation and Management Act Chapter 376 Laws of Kenya. That is in any case what appears in the letters to the

applicant conveying the first respondent's decision. That contention cannot stand because, it is clear to me and a look at the boundary plan No. 216/17 annexed by the respondent shows clearly that the suit land plot No. 3170 Malindi extends upto the high water mark such that the alleged 100 feet space does not exist as far as this plot is concerned and clearly the area which was gazetted under gazette notice No. 99 of 1968 is not affecting this piece of land. First respondent cannot therefore in law claim jurisdiction on this piece of land under that argument because the land in question extends upto high water mark and thus remains applicant's land upto high water mark. In my humble opinion, if there was a 100 feet space between the suit land and the high water mark, there would have been nothing easier for the Ministry of Lands to say so and the beacons marking the boundaries of the suit land would have made that clear. The first respondent also cites Chapter 376 Laws of Kenya and says that the suit land extends to a land area "which is legally protected under the provisions of the same Act." As I have found, the suit land extends upto high water mark and not upto another area protected under the Act. That it could not in law extend its jurisdiction to the suit land (as it was a private property) without first taking other action to enable it exercise the same jurisdiction. Mr. Muthoga, the learned counsel for the first respondent submitted as one of the respondent's grounds of objection that this was done in the interest of the public and that public interest takes priority over private interest. That is all very valid and I do agree with him that in a number of cases private individuals have to sacrifice their interests for the good of many. I also readily agree with what is stated in the letter dated 20th August 1997 that there may be need to conserve the area for the benefit of the present and future generations. However, the question which one has to solve is before the private interest is sacrificed for the general good whether present or future, are there not laws and rules to be followed so that in getting the private interests sacrificed, decency and fair play is assured? The answer to that question is, as far as the situation before me is concerned there are laws to be followed. Section 6 (1) of Chapter 376 Laws of Kenya (Wildlife Conservation and Management) states as follows:

> "6(1) the Minister, after consultation with the competent authority, may by order declare any area of land to be a National Park. Provided that, where the competent authority does not consent to the declaration, no order shall be made unless
> a) The National Assembly has, by resolution approved a draft of the order, whether with or without modification; and
> b) In the case of Trust land, the area annexed has first been set apart in accordance with section 118 of the constitution; or
> c) In the case of private land, the area concerned has first been acquired under the Land Acquisition Act."

And the Land Acquisition Act is very clear on the procedure to be adopted when acquiring land. As this was a private land, if the first respondent wanted to have control over it, it had to comply with the procedure clearly spelt out in the Wildlife Conservation and Management Act and the Land Acquisition Act Chapter 295. I do agree with Mr. Ritho that in this case of private land, applicant is the competent authority for purposes of seeking consent.

In my humble opinion, unless and until the first respondent complied with those legal requirements, its actions and its decisions over the suit land such as the decision that was conveyed vide a letter dated 20th August 1997, the subject of this application were *ultra vires* its powers. Not only that but the same action also went against section 75 of the Constitution. Much as I would encourage any activities that seek to preserve nature such activities must however comply with the laws of the land. In this case, if the first respondent was of the opinion that the suit land being contiguous to Marine Park, activities on it such as constructing septic tank on it might seriously interfere with the ecosystem in the area, all it needed to do was to convince the Minister concerned to have the land acquired with consent of the owner who is the competent authority – or by way of Land Acquisition Act. Having so acquired the land, the Minister would declare it a marine Park or a National Park and then proceed to ensure the conservation of the area.

From what I have stated above, it will be clear that the evidence adduced in this matter by way of affidavits, and exhibits is sufficient to convince me that the decision by the first respondent was *ultra vires* its powers. It was manifestly unjust and presented in my considered opinion an undue interference with the applicant in the enjoyment of his property. If such is allowed to continue, ownership of any immovable property would cease to have any meaning at all and the same properties would have no value

at all as they would be subject to the whims of those in power and as such no bank or any loans body would put any reliance on them.

The respondent stated through its learned counsel Mr. Muthoga that the remedy sought here cannot be issued because the applicant has alternative remedy available and it has indeed sought the same alternative remedy = H.C.C.C. No. 579 of 1998. That suit, I understand is seeking damages but is not seeking the removal to this court and quashing the decision conveyed to the applicant vide the letter 20th August 1997. In any case in law the mere fact that another remedy is available is no ground for my refusing to grant the order sought if it is truly deserved. Here however, the alternative remedy will not resolve the question at issue here fully. I cant therefore stop my granting the orders sought.

I was also urged to refuse granting the application on grounds that Judicial Review order is not appropriate in matters where the facts are seemingly in dispute. I was referred to a smaller form of a map I have referred to hereinabove in which it was alleged showed the boundary to be 100 feet away and parallel to high water mark and I was told that that was an issue that could not be resolved at this level.

The applicant clearly showed through its annextures, and documents of title that, that map was not reflecting the truth of the matter and Mr. Muthoga did submit as I have stated and reproduced that the ownership of the suit land was not in dispute meaning that the area which was being developed and where the offending construction took place was applicant's land and there was no dispute on that. The Municipal Council also confirmed that in their letter I have referred to herein above.

Further when the applicant stated that the suit land is not at the area marked in yellow by the respondent and that their map was not reflecting the true position as the suit land was in a square area and not at the area marked, the respondent never disputed that. Where then is the serious dispute on facts? In my mind, while I do agree that where facts are seriously in dispute review remedy may not be appropriate, here there is no dispute that the applicant is the rightful owner by the suitland. There is no dispute that the land extends upto high water mark. There is no dispute that legal notice No. 99 of 1978 does not cover this land. There is no dispute that the land has not been acquired either by consulting the competent authority who in this case is the owner or through Land Acquisition Act. I do not think mere saying that certain facts are in dispute would be enough. They must be shown to be really in dispute before a court of law can act on that allegation to refuse the orders sought. In the same way, whether the letter sought to stop any part of the construction or whole of it is in my humble opinion neither here nor there and is not a serious dispute as to the facts as the fact remains that whether part or whole construction, the respondent is seeking to stop the applicant from the enjoyment of his property to the full. That is not a material serious dispute. The dispute on facts must be material as well as serious.

The sum total of all the above is that upon the above reasons, I do consider this application a suitable application for the exercise of my discretion. I do grant prayer one of the application.

The decision dated 20th August 1997 restricting, banning and/or restraining the applicant from constructing a hotel on its parcel of land known as plot No. 3170 Malindi in accordance with the building plans approved by Malindi Municipal Council in plot No. 3170 Malindi is hereby removed into this court and is quashed.

The applicant will have costs of this application which will be paid by the first respondent.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of November, 2002

J.W.O OTIENO

JUDGE