



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 29 OF 2019

MALINDI MUSKETEERS LIMITED.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF REGISTRAR.....2ND RESPONDENT

THE COUNTY LAND REGISTRAR, KILIFI.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JOHNSON KAZUNGU NYAO.....5TH RESPONDENT

ALLEN PATRICK NGOBBA.....6TH RESPONDENT

RULING

1. By this Notice of Motion dated and filed herein on 2nd October 2019, Malindi Musketeers Ltd (the Petitioner) prays for orders that: -

3. Pending the hearing and determination of the Petition herein, a Conservatory Order do issue to restrain the Respondents, their servants and/or agents from interfering with the Petitioner's use, ownership and utility of Plot Numbers Kilifi/Chembe Kibabamshe/268, 269, 362 (now sub-divided into Plot Nos. Kilifi/Chembe Kibabamshe 1179, 1181, 1288 and 1289), 371, 372 and 373;

4.

5. Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue inhibition orders against the titles of Plot Numbers Kilifi/Chembe Kibabamshe/268, 269, 362 (now sub-divided into Plot Nos. Kilifi/Chembe Kibabamshe 1179, 1181, 1288 and 1289), 371, 372 and 373;

6.....

7. Pending the hearing and determination of this Petition herein, a permanent injunction be issued restraining the Respondents either by himself or through his employees, servants and/or agents from dealing with Plot Numbers Kilifi/Chembe Kibabamshe/268, 269, 362 (now sub-divided into Plots Nos. Kilifi/Chembe Kibabamshe 1179, 1181, 1288 and 1289), 371, 372 and 373 in any manner whatsoever;

8. This Honourable Court do grant leave to the firm of A.O. Hamza & Company Advocates to serve the 5th and 6th Respondents herein by way of substituted service through advertisement in daily newspapers;

9. This Honourable Court do order the 5th and 6th Respondents to enter appearance within fifteen (15) days from the date of the advertisement; and

10. Costs of this application be granted.

2. The application is supported by an affidavit sworn by a director of the Petitioner Daniel Ricci and is based on the grounds that: -

i) The Petitioner is the registered proprietor of the listed parcels of land having bought the same on diverse dates between the years 2002 and 2007;

ii) The Petitioner carried a search on the suit properties prior to purchasing the same and there was neither a caveat nor a caution registered thereon;

iii) On 17th July 2017, the 1st Respondent caused to be published Gazette Notice No. 6866 on the Determination of Review of Grants and Dispositions of Public Land, lifting the restriction on Plot No. Kilifi/Chembe Kibabamshe 362 and directing the 2nd Respondent to revoke the Petitioner's title and issue a new one in favour of the 5th Respondent as the Administrator of Nyau Wanje Walungo to hold in trust for the family and it also revoked the Petitioner's title in respect of Plot No. 372 and ordered a title to be issued in the name of the 6th Respondent as the first allottee.

iv) The suit properties having been owned privately are not government land and thus are not available for allocation and the allotment and subsequent registration of Plot Nos 362 and 372 in favour of the 5th and 6th Respondents was thus irregular, null and void and the Gazette Notice is ultra vires as the 1st Respondent donated unto itself powers that it did not possess;

v) Pursuant to the said Gazette Notice, the 2nd Respondent revoked the title deeds in respect of Plot Numbers Kilifi/Chembe Kibabamshe 362 and 372. As a result of the revocation, the 5th Respondent sub-divided Plot No. 362 into four plots, namely: -

a) Kilifi/Chembe/Kibabamshe 1179

b) Kilifi/Chembe/Kibabamshe 1181

c) Kilifi/Chembe/Kibabamshe 1288; and

d) Kilifi/Chembe/Kibabamshe 1289

vi) The 5th Respondent's acts of appearing before the 1st Respondent and subsequently getting title deeds in his favour from the 2nd and 3rd Respondents is illegal and offends the principle of finality of Court decisions as the 5th Respondent had earlier filed two suits against the Petitioner being Malindi ELC Case No. 42 of 2011 and 232 of 2013 which were dismissed by this Court;

vii) The Petitioner thus fears that the 6th Respondent will also sub-divide and subsequently sell Plot No. 372;

viii) Further, the 2nd and 3rd Respondents acts of registering Plot Nos 362 and 372 in favour of the 5th and 6th Respondents are inconsistent with this Honourable Court's Ruling delivered on 31st October 2018 in Malindi ELC Petition No. 19 of 2017; Likizo Ltd -vs- Nasib Kashuru Mumbo & 4 Others whereby there are conservatory orders restraining the Respondents from enforcing the said Gazette Notice;

ix) All efforts to trace the 5th and 6th Respondents have been fruitless; and

x) Unless this Honourable Court intervenes, the Petitioner shall suffer incalculable and irreparable loss at the hands of the Respondents and the Petition and this application will be rendered nugatory.

3. While the suit was initially filed against the 1st to 6th Respondents, two more parties applied and were enjoined herein as the 7th and 8th Respondents by consent on 22nd January 2020. Prayer Nos 8 and 9 of the application were also dispensed with after the Petitioner was granted leave to effect substituted service on 25th November 2019. The 5th Respondent subsequently entered appearance and responded to the application while the 6th Respondent is yet to enter appearance herein.

4. The National Land Commission (the 1st Respondent) neither entered appearance nor filed a response to the application. On the other hand, the Chief Land Registrar, the County Land Registrar Kilifi and the Honourable the Attorney General sued herein as the 2nd, 3rd and 4th Respondents respectively did file a Memorandum of Appearance herein dated 24th October 2019 through the Attorney General but did not file any response to the application.

5. On his part, John Kazungu Nyau (the 5th Respondent) filed a lengthy Replying Affidavit herein on 22nd October 2019 in opposition to the application. The 5th Respondent avers that both the Petition and the application herein have no merit whatsoever and that the Petition as filed is a gross abuse of this Court's process.

6. The 5th Respondent avers that the 1st Respondent was established under Article 67 of the Constitution and that it is clothed with power to deal with historical land injustices. Such outstanding injustices affecting the Coastal Region informed the 1st Respondent's concern on the need for a plot verification exercise in three land registration sections being Kilifi/Chembe/Kibabamshe, Kilifi/Jimba and Kilifi Madeteni within Kilifi County where land adjudication and registration had taken place.

7. The 5th Respondent avers that vide Gazette Notice No. 155 of 1970, the Minister for Lands and Settlement had applied the Land Adjudication Act to the said registration Sections. Accordingly, the adjudication process within Chembe/Kibabamshe commenced on 2nd October 1974 and was concluded on 26th May 1978 with title deeds of 400 parcels of land issued to individuals under the then Registered Land Act. Chembe/Kibabamshe/362 is amongst the parcels that arose from this process.

8. The 5th Respondent further avers that following the conclusion of the adjudication and issuance of titles, the Commissioner of Lands through a Gazette Notice No. 2505 of 30th May 1986 declared the concluded adjudication areas as Government land and therefore not subject to the Land Adjudication Act, (Cap 284). Subsequently the Commissioner instructed the District Land Registrar Kilifi to cancel the already registered titles and a Government embargo was then placed on the titles restricting any dealings therewith.

9. The 5th Respondent asserts that following the Government's action, land parcels within Chembe/Kibabamshe were consequently allocated under the provisions of the Government Lands Act thereby creating multiple titles. In 1998, following numerous complaints by the local communities, the Government sought to establish a Settlement Scheme within the area and a total of 443 parcels of land were allocated to various individuals.

10. The 5th Respondent avers that following the establishment of the 1st Respondent, it proceeded to the ground in a bid to identify the root cause of the underlying problems of ownership within Chembe/Kibabamshe. It is against that background that the 1st Respondent published a public notice in the Daily Nation on 10th November 2014 indicating its intention to undertake a ground verification exercise in the three registration sections.

11. The 5th Respondent asserts that pursuant to the notices, all parties who appeared before the 1st Respondent with claims over their parcels of land were accorded an opportunity to put forward their case and present all relevant documents for inspection. In this respect, the Petitioner and the 5th Respondent fully participated in the proceedings before the 1st Respondent and were given an opportunity to be heard.

12. The 5th Respondent avers that thereafter the 1st Respondent determined: -

i) That all parcels of land falling within the Chembe/Kibabamshe area were trust lands and not Government land;

ii) That consequently, the Commissioner of Lands had no authority to issue titles either under the Registration of Titles Act or the Registered Land Act;

iii) That Chembe/Kibabamshe/362 was pursuant to the adjudication process first allocated by way of adjudication to Nyau Wanje Mwalungo but the allottee was not issued a title deed despite being the occupant of the property;

iv) That there were other parties equally laying claim to the parcel including Taiwa Agencies Ltd, Daniel Ricci, Samuel Charo and Malindi Musketeers who had a title pursuant to an allocation made by the Commissioner of Lands and a Certificate of Title issued in 2002.

13. The 5th Respondent further avers that the 1st Respondent then proceeded to make a determination that the said Plot No. 362 legally belongs to and should be registered in the 5th Respondent's name as the Administrator of the Estate of Nyau Wanje Mwalungo to hold in trust for the family. That determination was published vide the Gazette Volume CXIX No. 97 of 17th July 2017.

14. The 5th Respondent thus asserts that the Petitioner was accorded the right to a fair hearing before the determination was made and that the Petition herein is incompetent as the same is statutorily time-barred by the laws of limitation. The 5th Respondent asserts that the 1st Respondent by virtue of Section 14 of the National Land Commission Act has quasi-Judicial powers which gives finality to its decisions. Therefore, if dissatisfied with its determination, the Petitioner's only recourse was to appeal and not to try to substitute the 1st Respondent's findings with another decision as the Petitioner has done herein.

15. The 5th Respondent further avers that the 1st Respondent's decision has since been implemented and that Plot No. 362 was registered in his name before subsequently being sub-divided into four sub plots and hence the orders sought are incapable of being granted as Title No. 362 no longer exists. The 5th Respondent asserts that the Petitioner is fully aware that some of the plots have since been transferred to third parties who are not parties in this Petition and who are bound to be affected by any orders issued herein.

16. The 5th Respondent avers that it is pure lack of candour for the Petitioner to allege that *Malindi ELC No. 42 of 2011* and *232 of 2013* were dismissed. The same were only struck out on technicalities and no determination was made on the ownership of the properties. The 5th Respondent further avers that he was not a party in *Petition No. 19 of 2017* and the Court could not have issued conservatory orders in respect of Plot No. 362.

17. In addition to the said Replying Affidavit, the 5th Respondent filed a Notice of Preliminary Objection herein dated 21st November 2019 objecting to the Petition and the application on the grounds: -

1) That the 1st Respondent communicated its decisions on Title No. Chembe/Kibabamshe/362 by way of notice in Kenya Gazette Volume CXIX No. 97 dated 17th July 2017 and a challenge against the said decision through the present Petition is statutorily time barred;

2) That the 1st Respondent fully heard the dispute relating to the Title No. Chembe/Kibabamshe/362 in the presence of all parties including the Petitioner and rendered a determination as communicated vide Kenya Gazette Volume CXIX No. 97 dated 17th July 2017 and the present Petition is therefore res judicata;

3) That in as far as the Petition seeks orders of Judicial review the same is statutorily time barred the decision of the 1st Respondent having been communicated on 17th July 2017; and

4) That the Petition is time barred as no appeal against the decision was filed to this Honourable Court within 14 days from the date of the decision in contravention of the provisions of the National Land Commissions Act (No. 5 of 2012) as read together with the National Land Commission (Review of Grants and Dispositions of Public Land) Regulation 30 thereof.

18. Truswan Limited (the 7th Respondent) is equally opposed to the application. By a Replying Affidavit sworn on its behalf by its director Anne Wanjugu Kinyanjui and filed herein on 10th February 2020, the 7th Respondent avers that it is the lawful proprietor of the properties known as Kilifi/Chembe/Kibabamshe/1179 and 1288 which titles have since been amalgamated to one title being Kilifi/Chembe/Kibabamshe/1358 after purchasing the same from the 5th Respondent.

19. The 7th Respondent avers that it did undertake due diligence which revealed that the properties were in the names of the 5th Respondent before it purchased the same.

20. Similarly opposed to the application is Maysea Ltd (the 8th Respondent). In a Replying Affidavit sworn on its behalf by its director D'angelo Saverio, the 8th Respondent avers that it is the registered proprietor of a freehold interest in Title No. Chembe/Kibabamshe/1181 having purchased the same on 2nd November 2018 from the 5th Respondent at a consideration of Kshs 5,000,000/-.

21. The 8th Respondent avers that as at the time it bought the said property, he carried out a search thereon and there was no caveat or caution registered against the title. Ever since, the 8th Respondent has been in quiet occupation and possession thereof and has been meeting all the requisite land rates due to the County Government of Kilifi.

22. The parties agreed to have both the Petitioner's application and the 5th Respondent's Notice of Preliminary Objection disposed off together. I have accordingly given full consideration to both the application and the objection. I have similarly perused and considered the rival submissions and authorities as placed before me by the Learned Advocates for the parties.

23. As I understood them, the four points raised in the 5th Respondent's Notice of Preliminary Objection in actual sense raise only two issues; the first being that both the Petition and the application for conservatory orders are statutorily time-barred and secondly, that the Petition is res judicata the decision of the 1st Respondent Commission.

24. The basis for the Petition before this Court can largely be discerned from the grounds on which the Petitioner's Motion dated 2nd October 2019 is based. It is the Petitioner's case that it is the registered proprietor of all that parcel of land known as Kilifi/Chembe/Kibabamshe/362 having purchased the same on 19th January 2002. It is also the registered proprietor of Kilifi/Chembe Kibabamshe/372 having purchased the same on 8th January 2007.

25. The Petitioner avers that on 17th July 2017, the 1st Respondent caused to be published a Gazette Notice Number 6866 contained in Volume CXIX No. 97 under the title "Determination of Review of Grants and Dispositions of Public Land." By that notice, the 1st Respondent lifted the restriction earlier placed by the Government on the said Title No. Kilifi/Chembe/Kibabamshe/362 and directed the Chief Registrar of Lands (the 2nd Respondent) to revoke the Petitioner's title and issue a new title in favour of the 5th Respondent as the Administrator of the Estate of Nyau Wanje Mwalungo to hold in trust for the family. That notice also revoked the Petitioner's title in respect of Title No. Kilifi/Chembe/Kibabamshe/372 and directed that a title be issued to the 6th Respondent as the first allottee thereof.

26. The Petitioner contends that having been owned privately, the suit properties were not part of Government land and thus were not available for allocation. The allotment and subsequent registration of the two parcels of land in favour of the 5th and 6th Respondents was therefore irregular, null and void. Despite that irregularity, the Petitioner told the Court the 5th Respondent had since proceeded to sub-divide parcel number Kilifi/Chembe Kibabamshe/362 into four (4) other parcels now known as Kilifi/Chembe/ Kibabamshe/1179, 1181, 1288 and 1289.

27. At paragraph 15 of the Petition, the Petitioner asserts that the cancellation of his title by the 2nd and 3rd Respondents and the subsequent allocation of the same to the 5th and 6th Respondents was illegal for the reasons inter alia that the 2nd and 3rd Respondents did not give prior notice of cancellation to the Petitioner. Two of the sub-divisions were subsequently sold to the 7th and 8th Respondents.

28. From the material placed before me, it was evident the cancellation of the two titles arose from the directive of the 1st Respondent Commission as published in the impugned Gazette Notice dated 17th July 2017. In his Replying Affidavit file herein on 22nd November 2019, the 5th Respondent after recounting the history of land disputes in the area gives a background to the Gazette Notice at paragraph 19 to 24 as follows: -

"19. That it is against the aforesaid background that the 1st Respondent published a public notice in the Daily Nation on 10th November 2014 indicating its intention to undertake a ground/plot verification exercise in Kilifi/Chembe/Kibabamshe, Kilifi/Jimba and Madeteni (in) Kilifi County.

20. That by the said public notice, the 1st Respondent notified all the members of the public that it intended to undertake the plot verification exercise which exercise would entail verifying all letters of allotment, titles issued and documents pertaining ownership of the parcels in the mentioned areas with a view of lifting the embargo placed by the government and to include the registration exercise. The notice further advised land owners not to undertake any dealings on the said plots until completion of the exercise.

21. That by the said public notice, all land owners with interest on the said land were notified to present their documents during the exercise and that all plots would be visited. The notice further set out the various dates when the exercise would be carried out for the specific areas.

22. That I am further aware that before commencing review of the grant over Chembe/Kibabamshe/362 the 1st Respondent further caused to be published notices as appearing on 1st and 2nd September 2015 in the various dailies, informing members of the public of the 1st Respondent's intention to review the legality of the grants contained therein in the notice. The notices also required all interested parties to tender their written representations and documentation to the 1st Respondent. The Title Number Kilifi/Chembe/Kibabamshe/362 was amongst the listed properties and scheduled for hearing at the Red Cross Hall Malindi.

23. That pursuant to the notices, all parties who appeared before the 1st Respondent with claims over the said suit property, were accorded an opportunity to put forward their case and present all the relevant documents in their possession for inspection by the 1st Respondent.

24. That the Petitioner and myself fully participated in the proceedings before the 1st Respondent and were given an opportunity to be heard."

29. The Petitioner has not denied that prior to that determination the 1st Respondent Commission issued the said notices. Nor does the Petitioner deny that it fully participated in the proceedings leading to that determination. As it were, the 1st Respondent is established under Article 67 of the Constitution which clothes it with power to amongst other functions, initiate investigations on its own initiative or on a complaint, into present or historical land injustices and to recommend appropriate redress.

30. In the exercise of its functions under Section 14 of its constitutive National Land Commission Act (No. 6 of 2012), the 1st Respondent exercises quasi-judicial powers. In this respect, Rule 30 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017 provide thus:

"A person aggrieved by the decision of the Commission may, within fourteen days, of the Commission's decision, appeal to the Court."

31. The Petitioner did not prefer any such appeal. By this Constitutional Petition filed some two (2) years after the 1st Respondent's determination, it is seeking a declaration that it remains the rightful proprietor of the two properties and orders of Judicial Review to quash the cancellation of the titles and compel the reinstatement of its name in the Register.

32. As it was stated in ***Beatrice Wanjiru & 2 Others –vs- Attorney General & Another (2017) eKLR: -***

"The law as set out in that case appears to be that in cases for enforcement of rights and fundamental freedoms, time of limitation may not apply provided it is established that the Petitioner did not ignore the enforcement of his rights or freedoms under the general principles of law (say common law or equity or statutory law) with a calculation to convert his claims or grievance into a "Constitutional issue" after the expiry of the time of limitation; and the Petitioner must offer an acceptable explanation or demonstrate a justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. Thus a claim may not be bound by the prescribed period of limitation if, there exist a genuine constitutional issue (meaning an issue not properly enforceable by ordinary action under prevailing laws); and, the Petitioner explains the delay or belated filing of the claim as per the circumstances of the case."

33. In a claim such as this one where the Petitioner invokes the Judicial review powers of the Court, Order 53 Rule 2 of the Civil Procedure Rules require that the challenge to any decision be made within six months. The Petitioner herein has however neither explained the two years delay nor demonstrated some justification for the same.

34. As the Court of Appeal observed in ***Republic –vs- Kenya National Highways Authority & 2 Others exparte Amica Business Solutions Ltd (2016) eKLR: -***

"There has been debate as to whether the six months limitation envisaged in Order 53 Rule 2 of the Civil Procedure Rules applies strictly to "any Judgment, order, decree, or conviction, or other proceedings", or whether this also includes decisions of other kinds, or letters such as the one that is the subject of this case.

In our considered view, Order 53 Rule (2) was meant to cover both Judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a Judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the

case here.”

35. As we have found earlier, the 1st Respondent was exercising quasi-judicial powers pursuant to Section 14 of the National Land Commission Act when it directed the revocation of the titles in the name of the Petitioner. The Petitioner having participated in the proceedings leading to the determination neither appealed nor sought the orders of judicial review within the stipulated timelines. The Petitioner waited for two years before instituting this Petition and no application was made for enlargement of time.

36. As was stated in *Diana Kethi Kilonzo –vs- Independent Electoral & Boundaries Commission and 2 Others (2014) eKLR*: -

“.....the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and Institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The Courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

37. In the premises, I am persuaded that there is merit in the objection as both the Petition and the application before me are statutorily time-barred. Having so-found, I did not think there was need to consider whether or not the Petition was res judicata.

38. Both the Petition and the application are accordingly hereby struck out with costs.

Dated, signed and delivered at Malindi this 28th day of May, 2021.

J.O. OLOLA

JUDGE