



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JR MISC APPLICATION NO. 7 OF 2019

REPUBLIC.....APPLICANT

VERSUS

- 1. THE DIRECTOR OF SURVEYS.....1ST RESPONDENT**
- 2. THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**
- 3. WATAMU MENS FRIDAY LIMITED.....1ST INTERESTED PARTY**
- 4. ALYVIDZA INVESTMENT LIMITED.....2ND INTERESTED PARTY**
- 5. SEVEN ISLAND WATAMU LIMITED.....EX-PARTE APPLICANT**

RULING

1. Before me for determination are two applications. By the first application dated 20th December 2019 as filed herein on 28th January 2020, Alyvidza Investments Ltd (hereafter Alyvidza Ltd) prays for an order that this Court be pleased to set aside the Ruling and Order of this Honourable Court dated 5th December 2019 and grant leave to the applicant to file a response and participate in the hearing.

2. The application which is supported by an affidavit sworn by Alyvidza Ltd's Managing Director Philip Obanda Arunga is premised on the grounds that: -

i) There is Malindi ELC Case No. 4 of 2019 pending for hearing and determination between itself and the Ex-parte Applicant wherein Alyvidza prays for the following Orders: -

- a) A declaration that the Plaintiff has valid Titles to Plot Nos. LR 96 and 110 Watamu, Kilifi;***
- b) An order that the 1st Defendant do give vacant possession of the area comprised in LR Nos. 96 and 110;***
- c) An order of Mandatory injunction compelling the 2nd and 3rd Defendants to rectify Title No. Kilifi/Jimba/1125 by cancellation of the portion relating to Plot Nos. 96 and 110;***
- d) An order that the 2nd and 3rd Defendants do re-establish the beacons in respect of Plot Nos. 96 and 110;***
- e) An order of injunction restraining the 1st Defendant by itself, its agents or otherwise from constructing on, occupying, accessing, selling, leasing and charging or in any other manner dealing with Plot LR Nos. 96 and 110 Watamu; and***
- f) Costs of the suit.***

ii) Alyvidza Ltd is of the view that: -

- a) One central issue for hearing and determination in the said suit is the validity of the Register Index Map (RIM) No. 12 for Kilifi/Jimba registration Section.***

b) The second issue is the process used in the acquisition of the Title Deed held by the ex-parte applicant being Title No. Kilifi/Jimba/1125.

iii) On 5th December 2019, this Court issued orders which have the ability to undermine the foundation of the existing suit. The Ex-parte Applicant has failed to disclose the existence of the said suit before obtaining the orders sought herein.

iv) This matter was meant to steal a march on Alyvidza Ltd which hence wishes to be heard on the issues raised before a determination is arrived at; and

v) There is another suit filed by the Ex-parte Applicant being ELC JR Misc. Application No. 14 of 2019 where the Ex-parte Applicant is seeking orders of certiorari to quash a survey report which is the subject of this suit and also ELC 14 of 2019.

3. The second application dated and filed on 17th January 2020 has been filed by Watamu Men's Friday Ltd (Watamu Mens Ltd) and is seeking similar orders that the orders made herein on 5th December 2019 be set aside and/or reviewed and that Watamu Mens Ltd be granted leave to file a response and participate in the hearing. Watamu Mens Ltd is also praying that this suit be consolidated with **Judicial Review No. 14 of 2019 and Judicial Review No. 108 of 2004.**

4. The second application is also supported by Watamu Mens Ltd's Managing Director Prashant Ramesh Kukadia and is premised on the grounds that: -

i) The said orders were obtained upon concealment of important material facts as there are several pending suits before this Court between Watamu Ltd and the Ex-parte Applicant touching on the same issue. These are ELC 104 of 2019 and JR No. 108 of 2004.

ii) There are in existence stay orders issued on 25th February 2004 at Mombasa staying any transfer or dealings in respect of Kilifi/Jimba/1125;

iii) There is a Ruling delivered on 8th July 2011 by Justice JB Ojwang directing that all Judicial Review application related to the property Title No. Kilifi/Jimba/1125 and the Jimba Registration Section be heard in Mombasa;

iv) That Watamu Mens Ltd is the registered owner of Plot Nos. 100, 101, 102, 105 and 106 which were consolidated to form Plot No. 696 Watamu; and

v) Watamu Mens Ltd has now established that on 5th December 2019, this Court issued orders which have the ability to undermine the foundation of the existing suits due to the nature of the orders issued.

5. Seven Island Watamu Ltd (the Ex-parte Applicant) is opposed to both applications. In a Replying Affidavit sworn by one of its directors Roberto Lenzi and filed herein on 25th September 2020, the Ex-parte Applicant avers that there is no litigation between the parties as regards the ownership of the parcel of land known as Kilifi/Jimba.1125. The Ex-parte Applicant further avers that the existence of the matters listed has no nexus with the administrative action sought to be challenged vide the Judicial Review application that was argued before this Court and which was determined on 5th December 2019.

6. The Ex-parte Applicant asserts that the proceedings before this Court pertain to the 1st Respondent's failure to amend the Registry Index Map (RIM) and that the same was premised on the fact that despite the subject title being in existence, the RIM for the registration section has never been amended to include the subject property. The Ex-parte Applicant avers that the proceedings were necessitated by the 1st Respondent's failure to amend the RIM despite numerous demands and the order directing the amendment thereof does not in any way interfere with the existing suits which challenge the existence of the duality of registration regimes.

7. The Ex-parte Applicant further asserts that the issues raised by the Interested Parties herein cannot be determined in Judicial Review proceedings and urges the Court to dismiss the same with costs.

8. I have given full consideration to the two applications and the response thereto by the Ex-parte Applicant. I have also perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the Parties.

9. The genesis of these proceedings can be traced to a Notice of Motion application dated 22nd May 2019 wherein the Ex-parte Applicant sought against the two Respondents named therein as the Director of Survey and the Honourable the Attorney General, the following orders:

a) An order of mandamus ordering and compelling the 1st Respondent himself, his servants or agents and/or persons directly working under him to immediately amend the survey records of Register Index Map No. 12 for Kilifi/Jimba Registration Section and include Title No. Kilifi/Jimba/1125; and

b) Any such order or relief as the Honourable Court may deem just, fit and appropriate in the circumstances of this matter.

10. In a Replying Affidavit filed in response to the application, the Respondents conceded that even though the title deed for the suit property had been issued, the subject property does not appear on the RIM 12 or any other map delineating and/or demarcating the Kilifi/Jimba Registration Section. Having considered the application by the Ex-parte Applicant and the response thereto by the two Respondents, this

Court allowed the same and granted the Ex-parte Applicant's prayers in the Ruling delivered on 5th December 2019.

11. The two Applicants herein now both contend that as at the time the Ex-parte Applicant moved this Court in these Judicial Review proceedings, it was aware of the existing cases which had been filed between itself and the two Applicants and that having been a participant in the said cases, it had a responsibility to disclose to this Court the existence of those cases before proceeding to obtain the orders granted herein in their absence.

12. In response, the Ex-parte Applicant asserts that there is no litigation between the parties as regards the ownership of all that parcel of land known as Kilifi/Jimba/1125 and that there however seems to be an issue of duplicity in the registration regimes (being the now repealed Registration of Titles Act and the Registered Land Act) over several parcels of land in dispute in the area.

13. It is further the Ex-parte Applicant's case that the substantive motion does not delve into the issue of ownership and that it only sought an order compelling the 1st Respondent to amend the RIM to include the property known as Kilifi/Jimba/1125.

14. Considering the question of joinder of parties in *JMK –vs- MWW & Another (2015) eKLR*, the Court of Appeal observed as follows: -

“Order 1 Rule 10 (2) of the Civil Procedure Rules empowers the Court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the Court is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit to be added as a party. Commenting on this position, the Learned Authors of Sarkar’s Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that: -

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.

This Court adopted the same approach in Central Kenya Ltd –vs- Trust Bank & 4 Others, CA No. 222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

15. Dealing with the same question in *Francis Kariuki Muruatetu & Another –vs- Republic & 5 Others (2016) eKLR*, the Supreme Court identified the following elements to be considered in an application for joinder: -

i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii) Lastly, a party must in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

16. From the material placed before me, it was evident that the existence of the said Title No. Kilifi/Jimba/1125 is a matter that is heavily contested in the suits cited by the two Interested Parties herein. In *Malindi ELC No. 4 of 2019* instituted by Alyvidza Ltd and in which the Ex-parte Applicant is the 1st Defendant, Alyvidza Ltd avers at paragraphs 14, 15 and 16 thereof as follows: -

“14. The Plaintiff states that the 1st Defendant has all along been aware of the existence of its properties and the disputed ownership of its property Kilifi/Jimba/1125 in so far as it subsumes the Plaintiff’s property and that;

15. Currently, the area on the ground which the Plaintiff knows to be its Plot LR Nos. 96 and 110 Watamu is part of Plot Title No. Kilifi/Jimba/1125. The Plaintiff states that the process of creation of Kilifi/Jimba/1125 was found by the Court of Appeal in CA No. 47 of 2017 to be irregular, unlawful, null and void. For the same reason the Plaintiff states that the existence of Plot Title Kilifi/Jimba/1125 in so far as it covers the area occupied by Plot LR Nos 96 and 103 Watamu is null and void.

16. By its Judgment in Civil Appeal No. 67 of 2016, the Court of Appeal identified and determined various acts of irregularity and fraud concerning the impugned Title No. Kilifi/Jimba/1125.

Particulars of Irregularities and Fraud identified and settled by the Court of Appeal in Civil Appeal No. 67 of 2016

a) While the 2nd, 3rd and 4th Defendants were aware about the existence of Survey Plot No. 133/46, they proceeded to create a settlement scheme known as Kilifi/Jimba. This resulted in the creation (of) the impugned Plot Title No. Kilifi/Jimba/1125 measuring approximately 6.2 Ha and a title deed issued under the Registered Land Act Cap 30 (now repealed). Plot LR Nos 96 and 110 Watamu were subsumed by the creation of Kilifi/Jimba/1125.

b)

c)

d) The Survey Plan No. 133/46 establishing the foundation of Plot LR No. 96 and 110 Watamu is valid and has never been nullified. For that reason, Plot Title No. Kilifi/Jimba/1125 was not available for allocation as a Settlement Scheme.

e) Title Deed of Plot Title Kilifi/Jimba/1125 was issued on a Faulty Survey Plan.

17. Similar contestations are evident in **Malindi ELC 104 of 2019** which was instituted by Watamu Mens Fridays Ltd and in which the Ex-parte Applicant is sued as the 5th Defendant. At Paragraph 10 of the Complaint, Watamu Mens Ltd avers as follows: -

“10. The Plaintiff maintains that the said land, purported to be comprised in the fraudulent and illegal title Number Kilifi/Jimba/1125, not being a first (1st) registration offends the provisions of the law and by reason the Title is null and void ab initio for reasons, inter alia:

a) The area covered by the Title No. Kilifi/Jimba/125 being land which had already been surveyed by the 2nd Defendant (Director of Surveys) as a Government land could not and or ought not or should never have been adjudicated and/or registered to become freehold and brought under the provisions of the Registered Land Act, Chapter 300 of the Laws of Kenya (now repealed). By reason the 2nd Defendant (Chief Land Registrar), the 3rd Defendant (Director of Surveys) and the then Commissioner of Lands together with the 4th and 5th Defendants breached the law.

b) The purported registration of the 6.2 hectares of land comprised in Kilifi/Jimba infringes and denies the Plaintiff the sanctity of first registration title (in respect of Plot LR No. 696 Watamu) which had been issued to the Plaintiff by the 2nd Defendant (Chief Land Registrar) with the approval of the defunct Commissioner of Lands.

c) The parcel of land that the 5th Defendant purportedly acquired was already a government block that had been surveyed in the year 1984 under the Registration of Titles Act.

18. Watamu Mens Ltd then goes ahead to pray for Judgment against the Defendants and makes the following prayers in respect of the said property: -

c) A declaration do issue to the effect that the Title Deed Number Kilifi/Jimba/1125 issued to the 5th Defendant is null and void and the same be and is hereby nullified and be cancelled forthwith.

f) A declaration that Plot No. Kilifi/Jimba/1125 is null and void and an order directed to the 2nd Defendant for rectification of Kilifi/Jimba/1125 by the cancellation of the same or of the portion relating to Plot No. 696 subsumed under Kilifi/Jimba/1125.

g) A permanent injunction restraining the Defendants and especially the 4th and 5th Defendants by themselves, their agents, servants or lawyers from transacting, trespassing into, alienating, developing and/or in any manner dealing with the land comprised in Title Number Kilifi/Jimba/1125 that would in any manner whatsoever prejudice the Plaintiffs rights over Plot Number 696 Watamu Malindi; and

i) An order or orders directing the 3rd Defendant for rectification of the beacons in respect of Plot No. 696 Watamu to its status quo.

19. Arising from the foregoing, it was apparent to me that the issues for determination in these Judicial Review proceedings and the two previous suits between the parties were rather common and intertwined. If indeed as stated by the two Applicants the Court of Appeal had found the process of creation of the said Plot No. Kilifi/Jimba/1125 to be irregular, unlawful, null and void, its existence was in doubt and any amendment of the Register Index Map on the ground was prima facie, likely to prejudice the two Interested Parties/Applicants herein.

20. As was stated by the Court in **Mai Mahiu Kijabe/Longonot Co. Ltd –vs- Ayub Mugo Njoroge & 5 Others (2001) eKLR: -**

“It is a cardinal rule of procedure that any party who stands to be directly affected by any orders that may be made in any suit and or whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit or at least be notified about the existence of the suit.”

21. By the time the Ex-parte Applicant filed these Judicial Review proceedings, it was aware of the existence of the suits previously filed by the Interested Parties. Surprisingly the Director of Surveys and the Honourable Attorney General sued as the Respondents herein are also parties in the two suits and they chose for some reason not to disclose the existence thereof and went ahead to concede to the amendment of the Register Index Map.

22. As was stated by Mbari J in **Aviation & Airport Services Workers Union (K) –vs- Kenya Airports Authority & Another (2014) eKLR: -**

“.....when a party comes to Court on an application supported by an Affidavit under oath and fails to outline and disclose matters

that are material to the granting of orders, such a party is acting in a manner suggesting that they are peddling falsehoods while under oath. The consequences of such conduct are well-settled in law. Any advantage gained by such non-disclosure, the grant of ex-parte orders, will be taken away from the offending party.”

23. Echoing similar sentiments in *Arthur Wamiti Njoroge –vs- The Disciplinary Tribunal & Another (2017) eKLR*, Mativo J pronounced himself as follows: -

“I would be failing in my solemn duty if I do not mention that it is settled law that a person who approaches the Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the Court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his/or her knowledge or which he/she could have known by exercising diligence expected by a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making any attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such person.”

24. In the matter before me, it was perfectly clear to me that the two Interested Parties/Applicants stand to be affected by the orders issued herein on 5th December 2019. The Ex-parte Applicant when it did file these Judicial Review proceedings was aware of their interests in the subject matter as they were already engaged in litigation over the same. In failing to disclose those interests to the Court, the Ex-parte Applicant is guilty of non-disclosure of material information and can only be said to have obtained the impugned orders in abuse of the process of this Court.

25. In the circumstances, I find merit in the two applications and have no hesitation in setting aside and discharging the orders issued herein on 5th December 2019.

26. In view of the already existing suits and having found that the substantive Motion was filed in abuse of the Court process, I hereby strike out the Ex parte Applicant’s Motion dated 22nd May 2019 with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE