



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. 560 OF 2004 (OS)**

**JUMAA CHENGO KASHASHA**

*(administrator of Estate of Chengo*

*Kashasha Mangi Deceased-Substituted)*

**OMAR SALIM CHENGO.....PLAINTIFF**

**-versus-**

- 1. REGISTRAR OF TITLES MOMBASA**
- 2. PERCY DALRYPLE TOWNSEND**
- 3. ROBERT LUNAN**
- 4. GWENDOLEN AGNES BRANDY**
- 5. GEORGE TAYLOR**
- 6. JOSEPH LEWART TORR.....RESPONDENTS**

**RULING**

**BACKGROUND**

1. JUMAA CHENGO KASHASHA instituted these proceedings by Originating Summons dated 2<sup>nd</sup> July 2004 in which he sought the following two main orders:
  - i. That the Registrar of Titles, Mombasa be compelled to register Plot Nos. 324 and 334 MN/KILIFI/MTWAPA in the names of the Applicant.
  - ii. That the Applicant be declared the rightful and exclusive owner of the Plots Nos. 324 and 334 MN/KILIFI/MTWAPA.
2. The original Applicant, JUMAA CHENGO KASHASHA died on 3<sup>rd</sup> November 2004 and, with leave of the court, was substituted by OMAR SALIM CHENGO.
3. The matter proceeded to full hearing by way of *viva voce* evidence in addition to the affidavits on record.
4. On 30<sup>th</sup> March 2012, Justice Edward M. Muriithi delivered a judgment and dismissed the Originating Summons.
5. In his judgment, Justice Muriithi held that Plot Nos. 324 and 334 MN/KILIFI/MTWAPA are Government Land by virtue of either surrender or by operation of the law under Article 62 of the Constitution.
6. Justice Muriithi directed that the parcels of land be held by the Government upon trust for the Applicant and other residents in possession

thereof in accordance with Article 62 of the Constitution.

7. The decree ensuing from the judgment was extracted and issued on 6<sup>th</sup> December 2012.

8. On 26<sup>th</sup> November 2013, the Applicant, OMAR SALIM CHENGO, appearing in person and MS. KITI, appearing for the Respondents, recorded a consent as follows:

- i. That the Registrar of Titles do reconstruct parcel files for Mtwapa/Kilifi/324 Sec. III MN and Mtwapa/Kilifi/334 Sec. 111 MN.
- ii. That after the said reconstruction a search for the two titles do issue to the Applicant on payment of prescribed fee.

### **THE PRESENT APPLICATIONS**

9. Aggrieved by the judgment of justice Muriithi, the consequent decree and the consent order of 26<sup>th</sup> November 2013, various persons have filed respective applications in which they seek the setting aside of the judgment and the consequent decree and orders.

10. There are a total of five (5) applications seeking to set aside the said judgment. However, only three (3) of those applications proceeded to hearing on 29<sup>th</sup> May 2018 and therefore are the subject of the court's ruling. These applications are as follows:

- i. The Notice of Motion dated 28<sup>th</sup> July 2017 filed by WAMEYO ONYANGO & ASSOCIATES on behalf of AGRICULTURAL HANDLING SERVICES LTD (for ease of reference herein simply referred to as "the 1<sup>st</sup> Applicant").
- ii. The Notice of Motion dated 28<sup>th</sup> February 2018 filed by STANLEY HENRY ADVOCATES on behalf of MTWAPA HOLDINGS LIMITED (for ease of reference herein simply referred to as "the 2<sup>nd</sup> Applicant").
- iii. The Notice of Motion dated 26<sup>th</sup> April 2018 filed by KHALID SALIM & COMPANY ADVOCATES on behalf of WEISBADEN DREAM VILLAS LIMITED (for ease of reference herein simply referred to as "the 3<sup>rd</sup> Applicant")

11. There are two other applications on record; the one dated 18<sup>th</sup> April 2018 and filed by KIARIE KARIUKI & COMPANY ADVOCATES and the other dated 4<sup>th</sup> May 2018 and filed by KAMOTI OMOLLO & COMPANY ADVOCATES both of which seek the setting aside the judgment. However those two applications have not been heard. On 29<sup>th</sup> May 2018, this court directed that those two applications be held in abeyance pending the outcome of this ruling.

12. There are two substantial prayers common to all the three applications under consideration; that the respective Applicants be joined to this suit as interested parties and that the judgment of 30<sup>th</sup> March 2012 and the consequent decree and orders be set aside.

13. The gravamen of the three applications is that **Plot Nos. 324 and 334 MN/KILIFI/MTWAPA** (hereinafter "Plot Nos. 324 and 334") no longer exist as the same had been divided into several parcels which had exchanged hands over time and the Applicants have acquired interest in some of the resultant plots.

### **THE 1<sup>ST</sup> APPLICANT'S APPLICATION DATED 28/7/2017**

14. The 1<sup>st</sup> Applicant's application is supported by the Affidavit of LATIMO OCHANDA sworn on 28<sup>th</sup> July 2017. The substratum of the 1<sup>st</sup> Applicant's case is largely two-fold. The first ground is that the 2<sup>nd</sup> to 6<sup>th</sup> Respondents were all deceased at the time this suit was filed and therefore the entire proceedings as relate to the 2<sup>nd</sup> to 6<sup>th</sup> Respondents were null and void. The 2<sup>nd</sup> ground is that Plot Nos. 324 and 334 do not exist as the 2<sup>nd</sup> to 6<sup>th</sup> Respondents had surrendered their titles to the Government and therefore Plot Nos. 324 and 334 became government land. That Plot Nos. 324 and 334 were both re-planned and subdivided into Plot Nos. **MN/III/515** and **MN/III/527**.

15. The 1<sup>st</sup> Applicant stated that subdivision no. MN/III/515 was subsequently allocated to one PHILEMON MWAISAKA and was also later subdivided into several plots one of which is **MN/III/5533** which now belongs to the 1<sup>st</sup> Applicant after it purchased it from PHILEMON MWAISAKA.

16. The 1<sup>st</sup> Applicant therefore contends that to allow the judgment and decree to stand would amount to sanctioning breach of the 1<sup>st</sup> Applicant's constitutional right to property.

### **THE 2<sup>ND</sup> APPLICANT'S APPLICATION DATED 28/2/2018**

17. The 2<sup>nd</sup> Applicant's application is supported by the Affidavit of LAWRENCE NGINYO KARIUKI sworn on 28<sup>th</sup> April 2018. The substance of the said application is that the 2<sup>nd</sup> Applicant is the registered owner of Land Reference Numbers MN/III/517, MN/III/518, MN/III/519, MN/III/521 and MN/III/524.

18. The 2<sup>nd</sup> Applicant contends that its said parcels of land were carved from the land arising from amalgamation of Plot Nos. 324 and 334 which was then subdivided into several plots ranging from Nos. 515 -527. The 2<sup>nd</sup> Applicant's position is similar to that of the 1<sup>st</sup> Applicant that Plot Nos. 324 and 334 ceased to exist upon amalgamation and subsequent subdivision.

19. The 2<sup>nd</sup> Applicant pleaded that the consent order of 26<sup>th</sup> November 2013 for the reconstruction of parcel files for Plot Nos. 324 and 334 is irregular *ab initio* since the said parcels do not exist.

### **THE 3<sup>RD</sup> APPLICANT'S APPLICATION DATED 26/4/2018**

20. The 3<sup>rd</sup> Applicant's application is supported by the Affidavit of MARGARET WACHIRA WANJIKU sworn on 26<sup>th</sup> April 2018. The 3<sup>rd</sup> Applicant contends that it is the registered owner of Sub-Division No. 7946 (Original No. 7947/2) Section III Mainland North and Sub-Division Number 7948 (Original No. 7945/4/0 Section III Mainland North which were carved out and sub-divided from subdivisions done on Plot No. 526 Section III Mainland North which had been acquired by the 3<sup>rd</sup> Applicant from the then owner, JULIUS KARIUKI GECAU. That parcel No. 526, which was carved out of the parcel of land arising from amalgamation of Plot Nos. 324 and 334, was granted to JULIUS KARIUKI GECAU by the Government in 1972. That the amalgamation and sub-division of Plot Nos. 324 and 334 was done by the Government after the said parcels were surrendered back to the Government by the then Lessees.

21. The 3<sup>rd</sup> Applicant contended that the decree dated 30<sup>th</sup> March 2012 and issued on 6<sup>th</sup> December 2012 declaring Plot Nos. 324 and 334 which are non-existent as Government land was made in error and due to lack of information and records.

22. The 3<sup>rd</sup> Applicant argued that the suit was instituted against parties who were deceased and there were no attempts to include their legal representatives.

### **GROUND OF OPPOSITION**

23. The Applicant, OMAR SALIM CHENGO, did not file any response to the applications. The 3<sup>rd</sup> to 204<sup>th</sup> Co-Plaintiffs/Respondents, through STEVE KITHI & COMPANY ADVOCATES, filed Grounds of Opposition to the applications on 29<sup>th</sup> May 2018. When the matter came up for hearing of the applications on 29<sup>th</sup> May 2018, Mr. Oduor holding brief for Mr. Kithi for the 3<sup>rd</sup> to 204<sup>th</sup> Respondents sought adjournment and more time to file response. That application was declined by the court for the reasons given on the said ruling.

24. Mr. Makuto appearing for the 1<sup>st</sup> Respondent also sought more time to file response but his application was equally declined by the court. Notably, the Attorney General through Litigation Counsel- Richard Ngari- had also filed an application dated 28<sup>th</sup> November 2014 in which they sought review of the judgment. That application was however withdrawn by Mr. Makuto on 29<sup>th</sup> May 2018 during the hearing of these applications.

25. The gist of all the Grounds of Opposition filed in response to the three applications, which are nearly similar, is that the applicants have no *locus standi* to bring the applications as they have not been granted leave to appear in this matter. That the applicants were not a party to this suit and cannot therefore seek review as review is limited to those persons who had right of audience during the trial. The 3<sup>rd</sup> to 204<sup>th</sup> Respondents also contended that the applications failed to meet the threshold for review.

### **SUBMISSIONS BY COUNSELS**

#### **Submissions by Counsel for the 1<sup>st</sup> Applicant**

26. Mr. Wameyo appeared for the 1<sup>st</sup> Applicant submitted that the entire suit is a nullity because the suit was brought against deceased persons. Mr. Wameyo relied on the judgment in **Mombasa Court of Appeal Civil Appeal No. 125 of 1997: Mwinyi Hamisi Ali vs. the Attorney General & Another** to submit that this suit is incompetent for failure to join the personal representatives of the 2<sup>nd</sup> to 6<sup>th</sup> Respondents.

27. Counsel told court that the two titles for Plot Nos. 324 and 334 were surrendered to the Government and are therefore non-existent. He stated that following the surrender, the Commissioner of Lands had *de facto* control of Plot No. 334 and therefore had capacity to allocate it to private persons.

28. Counsel concluded by urging the court to grant the orders sought because although the 1<sup>st</sup> Applicant was never joined in these proceedings, execution of the order issued herein will effectually cancel its title without being given an opportunity to be heard.

#### **Submissions by Counsel for the 2<sup>nd</sup> Applicant**

29. Mr. Stanley appearing for the 2<sup>nd</sup> Applicant submitted that the 2<sup>nd</sup> Applicant bought its plots from Hamilton Harrison & Mathews Advocates and Daily & Figgis Advocates who were administrators of the estates of the 2<sup>nd</sup> – 6<sup>th</sup> Respondents. Counsel urged that even without relying on the Court of Appeal decision (**Civil Appeal No. 125 of 1997**), there is evidence that the 2<sup>nd</sup> to 6<sup>th</sup> Respondents are long deceased and the application should succeed *ex debito justitiae*.

#### **Submissions by Counsel for the 3<sup>rd</sup> Applicant**

30. Mr. Khalid appearing for the 3<sup>rd</sup> Applicant associated himself with the submissions of Mr. Wameyo and Mr. Stanley. Counsel submitted that **Order 45** of the Civil Procedure Rules allowed any person aggrieved to apply for review.

31. Mr. Khalid submitted that when Justice Muriithi delivered his judgment he did not have all the facts as to whether the suit land had

remained with the Government for lack of records which the 1<sup>st</sup> Respondent was the custodian of. Counsel submitted that new fundamental evidence has been brought to court to warrant review.

### **Submissions by Counsel for the 3<sup>rd</sup> to 204<sup>th</sup> Respondents**

32. Mr. Oduor, holding brief for Mr. Kithi, appeared for the 3<sup>rd</sup> to 204<sup>th</sup> Respondents submitted that a deceased person is not immune to litigation. That the administrators of the Deceased's estates ought to have applied to be a party to these proceedings because there was substituted service by advertisement.

33. Mr. Oduor submitted that the Applicants are strangers to these proceedings and they were not a party to the proceedings after judgment was entered. That no leave was obtained to file these proceedings and that the applications were filed after six months had lapsed.

34. Counsel submitted that **section 80** of the Civil Procedure Act and **Order 45** of the Civil Procedure Rules only allow parties who took part in the proceedings to enjoy remedies available under those provisions.

35. Mr. Oduor submitted that the evidence filed by the applicants was there all along and predates the judgment. He submitted that although this Court has the discretion to grant review, such discretion must be exercised judiciously. To buttress that argument, Mr. Oduor relied on the case of **Faba Motors Limited vs. Nesbitt, Nairobi HCCC No.1403 of 1967.**

36. Counsel contended that the supporting affidavit of the 2<sup>nd</sup> Applicant is executed by a person who did not annex searches to reveal the nature of the entity that gave him authority to swear the affidavit. That there are no board resolutions giving the deponent power to plead.

37. Counsel submitted that the court became *functus officio* after it delivered the judgment and that the only remedy available to the parties would be an appeal.

### **Submissions by Counsel for the 1<sup>st</sup> Respondent (the Registrar of Titles, Mombasa)**

38. Mr. Makuto, learned counsel for the 1<sup>st</sup> Respondent submitted that the first point of call is to make the Applicants interested parties. That the court cannot grant the other prayers sought before the Applicants are joined to this suit.

39. Mr. Makuto contended that Plot Nos. 324 and 334 were surrendered to the Government hence the executors of the estates of the registered owners could not sell the same parcels. He also submitted that no new material had surfaced that were not in the Applicants' custody and that the Applicants were not a party to the suit.

40. Mr. Makuto submitted that the applications can only be granted to the extent of the order to join the applicants to this suit and not in respect of the rest of the prayers. Counsel therefore prayed that only the order for joinder be granted.

### **Rejoinder by 1<sup>st</sup> Applicant's Counsel**

41. In rejoinder, Mr. Wameyo for the 1<sup>st</sup> Applicant submitted that under **Section 1A** of the Civil Procedure Act, matters are determined expeditiously and therefore it is only prudent that all the prayers be granted in one hearing. Counsel pointed out that there was admission by Mr. Oduor that the 2<sup>nd</sup> to 6<sup>th</sup> Respondents are deceased.

42. Mr. Wameyo also relied on the case of **Faba Motors Limited** and submitted that this court, exercising its discretion judiciously, should grant the prayers.

43. On the contention by Mr. Oduor that six months had lapsed, Mr. Wameyo responded that these are not judicial review proceedings which are limited by the six month period.

44. Counsel urged that **Order 45** of the Civil Procedure Rules allows any person considering himself aggrieved to apply for review. That the 1<sup>st</sup> Applicant is aggrieved the judgment, if put into effect, will cancel the 1<sup>st</sup> Applicant's title without being afforded a hearing. Further that since **Order 45** of the Civil Procedure Rules allows review for "sufficient reason", the court has discretion to grant review. That there are several errors on the face of the record, facts not presented during trial and sufficient reason.

### **Rejoinder by the 2<sup>nd</sup> Applicant's Counsel**

45. Mr. Stanley for the 2<sup>nd</sup> Applicant submitted that the error manifest on the record has been demonstrated, to wit, that instead of the right proprietors being sued, the Applicant sued deceased persons.

46. On the issue of affidavit being sworn by board resolution, Mr. Stanley stated that the issue is neither here nor there and can be cured under Article 159 of the Constitution.

### **Rejoinder by Counsel for the 3<sup>rd</sup> Applicant**

47. Mr. Khalid for the 3<sup>rd</sup> Applicant stated that the *locus standi* of his client is derived from **Order 45** of the Civil Procedure Rules since the

3<sup>rd</sup> Applicant has an interest in the suit parcels. Counsel stated that there was admission that the judgment noted that there was uncertainty on the status of the land due to absence of records.

48. Mr. Khalid concluded by submitting that a decree can be reviewed under **section 2** of the Civil Procedure Act and a decree includes a judgment.

#### **Determination of the Court**

49. Do the applicants have locus standi to bring the present applications taking into account they were not parties to the original suit? Section 80 of the Civil Procedure Act provides that, **“Any person who considers himself aggrieved:-**

**(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of the judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.**

50. The applicants have explained that they aggrieved by the impugned decree and /or order by virtue of the implementation of the said order infringing on their right to land and without giving them an opportunity to be heard. Secondly no appeal has been filed against the two orders sought to be reviewed and or set aside. For the reason that the applicants will be affected by the orders, it is my considered view and I so hold that they have locus to bring the applications for review.

51. For the orders of review to be granted, an applicant must meet the conditions set under order 45 of the Civil Procedure Rules which are that such an applicant must prove and demonstrate that:-

**(i) The order sought to be reviewed has not been appealed from**

**(ii) There has been discovery of new and important matter or evidence which was not available and could not after exercise of due diligence have been available at the time the ruling/order was made; or**

**(iii) There was a mistake or error apparent on the face of the record; or**

**(iv) There is some other sufficient cause, and**

**(v) The application has been made without unreasonable delay.**

52. Condition (i) is already fulfilled as there is no appeal filed. The Respondents have submitted that all the issues raised by the applicants were always available thus there was nothing new. Condition (ii) is easy to determine where the applicants were parties to the suit. In this instant, all the applicants submit they were unaware of the existence of this suit. The Respondents did not file replying affidavits to contest the facts set forth in the applicants affidavits in support of the motions on the issue whether the applicants were diligent.

53. The Rules however give the Court discretion to allow review for any sufficient cause. The applicants have demonstrated the sufficient cause to include the suit being filed against parties who were deceased (2<sup>nd</sup> -6<sup>th</sup> defendants). Further the Applicants also stated that the consent was entered in respect of titles numbers 324 &334 which had ceased to exist following the amalgamation and the same having left the hand of the persons sued. In par 12 of the judgement, Mureithi J. observed that it was unclear what happened to the two titles after they were surrendered to the government- whether the same were re-issued to the original owners or to 3<sup>rd</sup> parties.

54. The trial Judge went further to state that the onus was on the Respondents to establish the titles remained in the names of persons sued as 2<sup>nd</sup>- 6<sup>th</sup> Defendants. He found in par 15 of the judgement that the claimant before him failed to discharge this burden. He therefore dismissed the suit for want of proof. The respondents to the present applications did not appeal this judgment and they have neither denied that the titles had ceased to exist nor whether at the time the suit was filed the named 2<sup>nd</sup> -6<sup>th</sup> defendants had passed on. If this was the true position, then there is sufficient cause that requires the orders of review to be granted as the proceedings before the judge were a nullity. Further; it is clear that the orders if executed will result into issuance of double titles over the same parcels of land to different persons (i.e the 3<sup>rd</sup> -204<sup>th</sup> Respondents and the current holders of the titles some of whom have brought these applications).

55. Mr Oduor for the co-plaintiffs submitted that the applications were time barred because they were filed after six months. Both sections 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules do not impose timelines within which applications should be made. It only requires a party to move the court without unreasonable delay. Consequently the submission that the applications were filed outside the six months thus filed out of time is not grounded in the law.

56. In conclusion, I find the applications have merit because of the inconsistencies outlined above. It is in the interest of justice that the persons holding the titles to the suit land be accorded an opportunity to present their case. Accordingly I grant the following orders;

**i) The judgement of the court delivered on 30<sup>th</sup> March 2012 be and is hereby set aside together with all consequential orders flowing therefrom more particularly the orders given on the 26<sup>th</sup> Nov 2013 & 11<sup>th</sup> April 2017 in ELC Case no 166 of 2015.**

ii) The applicants herein are joined as defendants with leave to defend the suit.

iii) Each party shall meet its costs of the respective applications

Dated, Signed and Delivered at Mombasa this 5<sup>th</sup> day of July 2018

A. OMOLLO

JUDGE