



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 50 OF 2019

**HUMANITY, ACTIVISM, KNOWLEDGE AND INTEGRITY TRUST
(HAKI AFRICA) & 5 OTHERS.....APPLICANTS**

VERSUS

1. HON. ATTORNEY GENERAL

2. THE MINISTRY OF TOURISM & WILDLIFE.....RESPONDENTS

AND

1. COUNTY GOVERNMENT OF MOMBASA

2. NATIONAL MUSEUMS OF KENYA

3. NATIONAL LAND COMMISSION.....INTERESTED PARTIES

RULING

The Application

1. The *Ex-parte* Applicant's case for Judicial Review orders is contained in the reinstated Notice of Motion dated 8/11/2019 and filed in court on the same day pursuant to leave granted by the court on 1/11/2019. The motion prays for the following orders that:

a) This Honourable Court do grant the Applicants herein an order of Certiorari to bring to this Honorable Court the decision of the cabinet secretary for Tourism and Wildlife appointing the Mama Ngina Waterfront Management Board contained in the Gazette Notice No. 8552 published in the Kenya Gazette Volume CXXI-No 122 dated 13th September, 2019 and have the same quashed.

b) This Honourable Court do grant the Applicants herein an order of Prohibition against the Cabinet Secretary for Tourism and Wildlife prohibiting him from appointing a Management Board for the Management of the Mama Ngina Waterfront and from taking over the management of the Mama Ngina Waterfront from the County Government of Mombasa.

c) The Respondent to pay costs of this Application.

2. The motion is premised on the grounds set out therein and is supported by other documents as follows:

a. Verifying Affidavit deponed on 1/11/2019

b. Statement dated 1/11/2020.

c. Further Affidavit sworn on 6/5/2020

3. The *ex-parte* Applicant's case is that on 13/9/2019, the Cabinet Secretary for Tourism and Wildlife appointed the Mama Ngina Waterfront Management Board vide Gazette Notice No 8552 published in the Kenya Gazette Volume CXXI-No. 122, which in essence means that the 2nd Respondent has taken over the management of the Waterfront which is public land as described under the Constitution of Kenya, 2010 and vested in and held by the Mombasa County Government in trust for the people resident in the County and under the administration of the National Land Commission.

4. The ex-parte Applicant's case is that the Mama Ngina Waterfront includes historical sites and monuments that capture our heritage and its management is vested on the National Museums of Kenya by operation of law, and Mombasa County Government is obligated to oversee the planning of all development projects in the County particularly to ensure, inter alia, to protect the historical and cultural heritage, artifacts and sites within the County. Therefore, it was the duty of the Ministry in charge of heritage to protect the monument, and that the declaration of the site as a monument did not grant the Ministry of Tourism the powers to dispose, transfer, and or lease the monument to any third party including the Ministry of tourism.

5. It is the ex-parte Applicant's case that the Cabinet Secretary for Tourism and Wildlife has no legal, constitutional and or policy basis to seek to manage the Mama Ngina Waterfront in Mombasa. Therefore, the intended development by the Ministry of Tourism is illegal as they lack the mandate to do so, and should the impugned decision be implemented, then the purpose of the Constitution and devolved Government will be defeated.

The Response

6. On 29/9/2020, **Mr. Nguyo** Learned Counsel for the Respondents relied on the Respondents' Application dated 18/9/2020 as a response to the substantive motion and the same was treated by the Court as the Respondents response to the application. The Supporting Affidavit to the said application was sworn on 18/9/2020 by **Hon. Safina Kwekwe Tsungu** the 2nd Respondent's Principal Secretary.

7. It is the Respondents' case that vide letter dated 17/8/2017, the then Cabinet Secretary for Sports, Culture and Arts, and pursuant to a directive from His Excellency the President, authorized and/or granted permission to the Ministry of Tourism and Wildlife to develop, for recreation and tourism use, Mama Ngina Drive, which is a Historical Site gazetted vide Gazette Notice No. 9494 of 8/12/2004 and so confirmed under legal Notice No. 79 of 15/7/2005 as a Gazetted site under the meaning of the provisions of the National Museums and Heritage Act 2006. Therefore, the National Museum of Kenya is legally mandated to ensure preservation of the heritage value and integrity of the site.

8. The Respondents State that the National Museums of Kenya retains the legal mandate to ensure that the heritage value of the site is preserved at all times. Therefore, the National Government stands to lose millions of shillings since the parcel of land MOMBASA/BLOCK XXVI/1175 popularly known as Mama Ngina Waterfront is under construction and the stay orders earlier issued affect the ongoing developments at the Waterfront.

9. It is the Respondent's case that there were consultation done before the Cabinet Secretary for Tourism and Wildlife issued the Gazette Notice 8552 dated 28/8/2019 and that the County Secretary Mombasa County is a Member of the Mama Ngina Waterfront Management Board. Therefore, the ex-parte Applicants and the 1st Interested Party have not disclosed to the Court that the National Government is the registered owner of the suit parcel through the Cabinet Secretary to the National Treasury as a trustee to the Ministry of Tourism and Wildlife, and there were consultations before the Gazette Notice was issued. Consequently, the ex-parte Applicants were not entitled to the ex-parte order sought over property that was alienated and registered in the name of the National Government.

10. It is also the Respondents case that the ex-parte Applicants deliberately failed to serve the affected parties with the substantive motion because they wanted to have an undue and improper advantage against the Respondents.

The Interested Party's Case

11. The 1st Interested Party in support of the ex-parte Applicant's case filed a Replying Affidavit sworn on 9/11/2020 by **Jimmy Waliuala** who is the Interested Party's Director Legal Services. He avers that pursuant to the Fourth Schedule Part 2, Section 4(i) and Article 186 of the Constitution, the functions of managing Mama Ngina Waterfront which is a County park and a recreational facility, is bestowed upon the 1st Interested Party. Therefore, the 1st Respondent cannot purport to expand its mandate as there are no functional gaps justifying the 1st Respondent's involvement in the managing of Mama Ngina Drive.

12. It is the 1st Interested Party's case that public land cannot be held by the Cabinet Secretary of the National Treasury as a trustee to the 2nd Respondent. On the contrary, Article 62(2) of the Constitution provides that public land shall vest in and be held by a County Government, in trust for the people resident in the County and shall be administered on their behalf by the 3rd Interested Party the National Land Commission, since one of its functions under Article 67 include management of public land on behalf of the National and County Government, and Article 67(3) of the Constitution has been given effect by Section 3 of National Land Commission Act and Section 5 (2) of the National Land Commission Act assign and mandates the 3rd Interested Party to dispose public land on behalf of the National and County Governments. However, in this case the 1st Interested Party never gave any consent for disposal of Mama Ngina Waterfront which is Public Land. Therefore, the 3rd Interested Party needs to be held accountable to the 1st Interested Party for the fraudulent alienation of Mama Ngina Waterfront.

13. It is the 1st Interested Party's case that under Section 6(2) of the Cabinet Secretary to the Treasury (Incorporation Act), land vested in the corporation shall not be deemed to be Government land except for the purposes of any law relating to rating for the time being in force in Kenya.

14. The 1st Interested Party also states that **Hon. Safina Kwekwe Tsungu**, Lacks capacity to swear an Affidavit on behalf of the Respondents, since the corporation may sue or be sued in the corporate name.

15. The 2nd and 3rd Interested Parties did not participate in these proceedings.

Submissions

16. The Application was canvassed through written submissions. The *ex-parte* Applicant filed submissions on 10/12/2020; the Respondents filed their submission on 7/12/2020; while the Interested Party's submissions were filed on 10/12/2020. **Mr. Aboubakar** learned counsel for the *ex-parte* Applicants reiterated the contents of the *ex-parte* Applicants' Verifying Affidavit and submitted that the Gazette Notice Number 8552 of 13/9/2020 was not based on any provision of law giving authority to the Respondents to take over the development and management of Mama Ngina Waterfront.

17. Counsel further submitted that there was no public participation before the decision to develop the Mama Ngina Waterfront was arrived at. Further, Counsel submitted that there is an attempt to introduce a lease showing that the land which is subject matter of these proceeding is leased to the Cabinet Secretary of the National Treasury. However, the gazetted area as a historical site does not include Plot No. 1175, and there is no grant issued by the ministry of lands to the said Cabinet secretary and the lease is not signed, nor is it registered by the Registrar of Lands.

18. **Mr. Wachira** learned counsel for the Respondents reiterated the contents of the Respondents' Application dated 19/9/2020, and submitted that the Mama Ngina Waterfront is one of the flagship projects in the National Tourism Blueprint, 2030 under the Beach Strategy and also as stipulated in the "THE Report" it aims at repositioning Mombasa as one of the premium and iconic beach destinations in the world.

19. Counsel further submitted that the Cabinet Secretary to the 2nd Respondent formally applied for allocation of Mama Ngina Waterfront and the subject land was by lease dated 1/9/2019 leased to the Cabinet Secretary Ministry of Tourism for a term of 99 years. Therefore, the Lease Certificate is sufficient proof of ownership and as such the 2nd Respondent has an indefeasible title to Mama Ngina Waterfront. Therefore, the land in question is not available for alienation, allotment or allocation and the 1st Interested Party cannot have any interest in it.

20. **Ms. Nyobo** learned counsel for the Interested Party reiterated the contents of its Replying Affidavit and submitted that there was no public participation and that the consent of the Interested Party was not sought before the Mama Ngina Waterfront was leased to the Cabinet Secretary for the 2nd respondent

Determination

21. I have considered all pleadings, affidavits, submissions, case law, and statute. In my view, the following issues arise for determination.

a. Whether due process was followed before Mama Ngina Waterfront was allocated to the Cabinet Secretary for 2nd Respondent

22. The general rule on judicial review was stated in **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR**, the Court of Appeal expressed itself as follows:

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was sufficient evidence to support the decision –and that, as we have, is not the province of judicial review".

23. However, the scope of Judicial Review proceedings has since expanded under the new constitutional order, and in appropriate cases, the court will enter into the merits of a decision made by an inferior body. The Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KLR** held as follows ...

"that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator."

a) Whether due process was followed before Mama Ngina Waterfront was allocated to the Cabinet Secretary for 2nd Respondent

24. It is evident from the submissions by counsel herein that the issue for determination has shifted. Previously, the *ex-parte* Applicant together with the 1st Interested Party were challenging the impugned Gazette Notice No. 8552 published in the Kenyan Gazette Volume CXXI-NO. 122 on the management of the Waterfront, which they alleged was a public land held by the Mombasa County Government in trust for the people resident in the county. However, vide application dated 18/9/2020 the Attorney General attached a copy of a Certificate of lease for the suit parcel of land Number xxvi/1175 and it was averred that the National Government is currently the registered owner of the suit parcel through the Cabinet Secretary to the National Treasury as a trustee to the 2nd Respondent herein.

25. It is noteworthy that the Respondents have averred that the Mama Ngina Waterfront is alienated land and to support their allegations, a Certificate of Lease for Mombasa Municipality /Block XXVI/1175 in the name of the Cabinet Secretary National Treasury, a body corporate incorporated under the Cabinet Secretary Act Cap 101 of the Laws of Kenya was annexed.

26. The upshot of the above is that the orders of certiorari and prohibition cannot issue since the Mombasa Municipality /Block XXVI/1175 is no longer public land vested in and held by the Mombasa County Government in Trust for the people resident in the County, the same

having been alienated to a body corporate incorporated under the Cabinet Secretary Act. Therefore, the Cabinet Secretary to the National Treasury as a trustee to the 2nd Respondent herein has the right to utilize the Mama Ngina Waterfront to the exclusion of the 1st Interested Party.

27. The issues of public participation and the regularity of the allocation of Certificate of Lease for Mombasa Municipality /Block XXVI/1175 issued to the Cabinet Secretary to the National Treasury and public participation are not properly before this Court since they are not anchored in the prayers sought in the Judicial Review application. Even though the ex-parte Applicants and the 1st Interested Party have extensively submitted on the same, there is no prayer seeking to quash the alienation of the Mama Ngina Waterfront to Cabinet Secretary to the National Treasury as a trustee to the 2nd Respondent herein.

28. Accordingly, therefore, I find that the ex-parte Applicant's Notice of Motion dated 8/11/2019 is devoid of merit and the same is dismissed with no orders as to costs.

DATED, SIGNED, AND DELIVERED AT MOMBASA THIS 3RD DAY OF MAY, 2021.

E. K. OGOLA

JUDGES

Ruling delivered via MS Teams in the presence of:

Ms. Ochoo holding brief Aboubakar for Applicants

Mr. Makuto holding brief Mr. Wachira for Respondents

Ms. Peris Court Assistant