



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JUDICIAL REVIEW APPLICATION NO. 7 OF 2018

IN THE MATTER OF: A JUDICIAL REVIEW APPLICATION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE JUDICATURE ACT (CHAPTER 8) LAWS OF KENYA

AND

IN THE MATTER OF: THE REFORM ACT (CHAPTER 23) LAWS OF KENYA

AND

IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT NO. 11 OF 2011

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: AN APPLICATION BY SAID MBILI ADAM AND 23 OTHERS FOR LEAVE

TO APPLY FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

SAID MBILI ADAM & 23 OTHERS.....EX PARTE APPLICANTS

VERSUS

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

THE CHIEF LANDS REGISTRAR.....2ND RESPONDENT

AND

BAJABER SALT WORKS LIMITED.....INTERESTED PARTY

JUDGMENT

1. By this Notice of Motion application dated 17th December 2018 and brought under the provisions of Order 53 Rules 3, 4, 5 and 6 of the Civil Procedure Rules, the 24 Ex-Parte Applicants pray:-

1. That an Order of Certiorari do issue directed against the 1st Respondent to bring into the Environment and Land Court and quash the determination contained in the Kenya Gazette Notice No. 11714 dated 9th November 2018 with respect to Land Reference Numbers 12852/311-434 and Land Reference Number 2678(CR 36668).

2. That an order of Prohibition do issue prohibiting the 1st and 2nd Respondents from revoking the Applicants Certificates of Title for Land Reference Numbers 12852/311-434 on the basis of the Kenya Gazette Notice Number 11714 dated 9th November 2018.

3. That the costs of the Motion be provided for.

2. The application is supported by Grounds set out in a Statutory Statement dated 6th December 2018 and the Verifying Affidavit sworn by Said Mbili Adam (the 1st Ex-parte Applicant) accompanying the application for leave as filed herein on 6th December 2018.

3. The Ex-Parte Applicants are residents of Lamu County and claim to be the registered proprietors of all those Parcels of land known as LR Nos. 12852/311-434. It is their case that by a determination dated 28th March 2018, the National Land Commission (the 1st Respondent) purported to carry out a review of the Grants for the aforesaid parcels of land as well as LR No. 26781 belonging to an entity known as Bajaber Salt Works Ltd (the Interested Party).

4. By the said determination published vide Gazette Notice No. 11714 dated 9th November 2018, the 1st Respondent revoked the Ex-parte Applicants' titles while upholding the Certificate of Title for the Interested Party and directed the Chief Land Registrar (the 2nd Respondent) to implement the decision.

5. It is the Ex-Parte Applicant's contention that the 1st Respondents determination is illegal and irrational and that it was arrived at without due process for the reasons that:-

i) There is pending Malindi ELC No. 362 of 2016; Bajaber Ltd & Another –vs- The Chief Land Registrar and 29 Others in which the 1st Respondent is a party and wherein the validity of the Certificate of Title for the said LR Nos 12852/311-434 and LR No. 26781 is directly in issue;

ii) The 1st Respondent is aware of the existence of the said suit pending in Court and has even filed pleadings therein;

iii) The determination arrived at is totally different from the position taken by the 1st Respondent in the said suit;

iv) The purported determination is signed by a single Commissioner and is not signed by the Chairperson of the 1st Respondent as is required by law;

v) The determination made by the 1st Respondent is ultra vires the provisions of Section 14(1) of the National Land Commission Act, 2012;

vi) The 1st Respondent is guilty of arbitrary and mala fide use of power which it does not have and which it has exercised in breach of existing law.

6. The Application is opposed. In a Replying Affidavit sworn and filed herein on 25th January 2019 by its director Swaleh Bajaber, the Interested Party avers that it is aware that sometime in the year 2013, a complaint was made by one Abdulwahid Mahmoud on behalf of a group known as Jamii ya Mkunumbi na Koreni (also known as Bajuni/Orma Community) to the 1st Respondent Commission alleging that LR Nos. 12852/311-434 had been fraudulently acquired by the Interested Party.

7. Following the complaint, the 1st Respondent went ahead to make a decision dated 28th March 2018 which decision was later gazetted vide the Gazette Notice dated 9th November 2018 being challenged herein.

8. The Interested Party avers that the said decision is lawful and regular as it was arrived at by the 1st Respondent after it reviewed the legality of the Certificates of Title in question. The Interested Party asserts that there is no law that requires that a decision by the 1st Respondent be signed by its Chair for it to be regular or lawful and avers that the decision "challenged herein was lawfully executed on behalf of the 1st Respondent."

9. The Interested Party further avers that both parties fully participated in the proceedings before the 1st Respondent and that the 1st Respondent only made a determination after hearing the evidence from both sides of the dispute. It is their case that failure to implement the decision contained in the Gazette Notice dated 9th November 2018 will greatly prejudice it as it has owned the land in dispute since 1st

March 1999.

10. The Chief Registrar of Lands (the 2nd Respondent) is equally opposed to the application. In Grounds of Opposition filed on its behalf by the Honourable the Attorney General, the 2nd Respondent opposes the application on the following grounds:-

1. That whereas the Ex Parte Applicants are seeking an order of prohibition against the 2nd Respondent they have not alleged any procedural or substantive irregularity occasioned by the 2nd Respondent herein as to support the issuance of the same as against him;

2. That the 2nd Respondent has by dint of Section 14(5) of the National Land Commission Act been directed to revoke Certificates of Title for LR Nos. 12852/311-434 and to that extent did not act ultra vires;

3. That the 2nd Respondent has the jurisdiction to revoke titles upon receiving directions from the 1st Respondent and no evidence has been adduced to demonstrate that the 2nd Respondent lacks the said jurisdiction; and

4. That no allegation of irregularity, ultra vires or irrationality has been made or can be contrived from the pleadings and evidence adduced against the 2nd Respondent.

11. I have considered the application and the responses by the 2nd Respondent as well as the Interested Party. The 1st Respondent did not file any response to the application.

12. The Ex-Parte Applicant have moved this Court seeking orders of certiorari and Prohibition against the 1st Respondent's decision to revoke their titles over LR Nos 12852/311-434 as well as the decision to uphold the Interested Party's title over LR No. 26781. That determination as well as the directive issued to the 2nd Respondent to implement the same were gazetted by the 1st Respondent vide Gazette Notice No. 11714 dated 9th November 2018.

13. According to the Ex parte Applicants that determination by the 1st Respondent was illegal, irrational and arrived at without due process in that the 1st Respondent was inter alia, aware of the pendency of a civil suit being **Malindi ELC No. 362 of 2016; Bajaber Ltd & Another – vs- The Chief Land Registrar and 29 Others**. The Ex-parte Applicants asserted that the 1st Respondent was not only aware of the existence of the said suit but had also filed pleadings therein.

14. The Ex-Parte Applicants have in support of their contention annexed a number of documents in regard to the said suit. Annexure "5MA3" indicates that the Interested Party herein and another party known as Bajaber Ltd filed the said suit on 2nd December 2016 against a number of parties including the Ex-Parte Applicant's herein. The 1st Respondent herein is sued as the 2nd Defendant in the said suit.

15. It is also evident at Annexure 'SMA5' that the 1st Respondent filed a Statement of Defence in the said suit on 28th March 2017 wherein they disputed the Interested Party's case.

16. As it were despite entering appearance herein, the 1st Respondent did not file any response to the Ex-Parte Applicants Motion. Their entire decision dated 28th March 2018 was however attached to the Replying Affidavit of Swaleh Bajaber filed herein on behalf of the Interested Party on 25th January 2019. (Annexure SB 3). It is clear from that Report that in rendering their decision, the 1st Respondent was indeed cognisant of the existence of the said suit.

17. This can be discerned from paragraph 29 of the Report in which the Commission states as follows:-

"29. On 26th September 2017 Miller & Company Advocates advised the Commission not to proceed with hearing this matter as there was a case pending in the Malindi Court, ref; ELC No. 328 of 2016 and urged that status quo be maintained."

18. It is however apparent that the advise offered by the said Advocates was not adhered to as the Commission went ahead to hear some of the parties and to render the impugned decision. In my view however having been made aware of the dispute pending in Court and having participated in the same by filing its own pleadings, it was no longer open for the 1st Respondent to purport to hear and determine the complaint placed before it.

19. Under Article 159(1) of the Constitution, Judicial authority vests in and is exercised by the Courts and tribunals established by the Constitution. It is trite that under Article 162(2) (b) of the Constitution, it is this Court that is mandated to hear disputes relating to the environment and the use and occupation of, and title to land.

20. Accordingly once a dispute has been filed before this Court relating to the environment and the use and occupation of, and title to land, the 1st Respondent herein having been informed of the same and having filed its Statement of Defence was only obliged to participate in those proceedings but could not be allowed to open its own parallel proceedings and purport to render its own decision thereon.

21. As it were an order of certiorari is used to bring to this Court the decision of some inferior tribunal or authority for quashing, that is to be declared invalid for having been made ultra vires. Given that this matter was already before this Court for a determination of title, the proceedings before the 1st Respondent amounted to an abuse of process and were clearly sub-judice.

22. Accordingly I find merit in the Ex-Parte Applicant's Motion dated 17th December 2018. The same is allowed as prayed with costs.

Dated, signed and delivered at Malindi this 23rd day of January, 2020.

J.O. OLOLA

JUDGE