



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

JUDICIAL REVIEW NO. 7 OF 2017

(Formerly Machakos JR Misc. Civil Application No. 162 Of 2016)

IN THE MATTER OF APPLICATION BY SALIM MOHAMMED SALIM & 6 OTHERS BY WAY OF JUDICIAL REVIEW FOR ORDERS OF PROHIBITION & MANDAMUS

BETWEEN

REPUBLIC APPLICANT

-VERSUS-

DEPUTY COUNTY COMMISSIONER

KIBWEZI WEST SUB COUNTY..... 1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

GOVT. OF MAKUENI COUNTY.....INTERESTED PARTY

EX-PARTE

SALIM MOHAMMED SALIM

KIMWELI MUTIE

JOEL MUEMA NYAMI

PETER MBITHI MWOLOLO.....APPLICANTS

MOHAMMED ABUD SAID

TITUS K. MUTEMI

JUDGMENT

1. The ex-parte applicants moved this Court through a notice of motion application dated 01/08/2016 and brought under Order 53 rule 3 of the Civil Procedure Rules, 2010, sections 8 and 9 of the Law Reform Act. The orders sought are;

a) An order of prohibition do issue prohibiting the 1st Respondent or any other officer from trespassing, fencing off, occupying, carrying on development or in any other manner howsoever from interfering with the Applicants peaceful occupation and use of their ancestral land in Manyatta Location near the Makindu Law Courts.

b) An order of mandamus do issue to compel the Respondents to remove the fence erected thereon on directions of the 1st

Respondent and maintain the *status quo* obtaining immediately before the 1st Respondent purported to claim ownership of the Applicants' ancestral land the subject of this application.

c) Costs of the application be provided for.

2. The application is supported by the statement of Salim Mohammed Salim dated 28/06/2016, his verifying affidavit sworn on even date and the supplementary affidavit sworn on 29/06/2020 by Ramadhan Hamisi. He has exhibited a written authority to appear, plead and swear affidavits as **SMS-1**. He deposed that the Applicants, their fathers and forefathers have been in actual occupation and use of the land in Manyatta location near Makindu Law Courts since time immemorial.

3. He also deposed that the 1st Respondent purported to acquire the land on behalf of the central Government and undertook wrongful developments thereon thus depriving them of their rights over the land. He exhibited a letter from the County Government of Makueni (*County Government*) as **SMS-2** which, he deposed, is a confirmation of their ownership. It was also his deposition that the Respondents are relying on a part development plan (PDP) which has been disowned by the County Government.

4. The application is opposed by the Respondents through the replying affidavit sworn on 10/10/2017 by Peter M. Nkunga, the Deputy County Commissioner of Makindu Sub County. There is also a supplementary affidavit sworn on 12/05/2020 by James G. Kamau, the former Deputy County Commissioner of Makindu Sub County. Mr. Nkunga deposed that the land in question is about 8.18 Ha and was set aside more than 20 years ago to host National Government departments. He deposed that the part development plan was drawn by the Makueni County Council to demarcate the suit land which is currently hosting Makindu Law Courts and other National Government departments.

5. He also deposed that the suit is home to Government departments whose functions have not been devolved hence giving credence to the assertion that it is National Government land. He further deposed that most of the land in Makindu is not adjudicated thus an easy target for land grabbers.

6. On his part, Mr. Kamau deposed that the suit land is home to 31 departments for both the National and County Governments as well as the official residence of the County Commissioner. Photos of various departmental offices are exhibited as **JGK-1**. He deposed that the PDP originated from Makueni County Department of planning and it clearly shows the layout of various Government offices. The PDPs for Makindu Law Courts, Kibwezi District Headquarters and Meteorological Observatory are exhibited as **JGK-2** (a), (b) & (c).

7. Further, he deposed that the suit land lacks individual allotment letters because it was set apart for public use. The demarcation plan of LR No. 9/3 is exhibited as **JGK-3**. It was also his deposition that the Ex-Parte Applicants have never produced any land ownership document and that their customary land rights claim cannot be litigated under judicial review.

8. In rejoinder, the Ex-Parte Applicants reiterated that the suit land is ancestral land which was acquired by the Government without consulting them. They deposed that the PDP was disowned by the County Government and cannot confer any right of ownership.

9. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

10. The Ex-Parte Applicants submissions were that the Respondents perform public duties hence subject to judicial review. They submitted that public powers should be exercised in accordance with the basic principles of legality, fairness and rationality.

11. They also submitted that the Respondents acted unreasonably, irrationally and unfairly by failing to consider that they have been in occupation of the suitland since time immemorial, that the County Government recognizes them as the true owners and that the County Government has denied the PDP relied on by the 1st Respondent.

12. They went on to submit that the Respondents were biased and failed to give them a fair hearing by fencing off the suitland without their participation. They relied on **Ridge vs. Baldwin (1964) AC 40** where it was held that;

“the body with the power cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.”

They have also cited **Republic vs. Commissioner of Lands & 2 Others Ex-Parte Antiocha Limited & 2 Others (2016) eKLR** where the Court stated that;

“The failure by the Respondents to invite the applicant to defend its title, after giving it sufficient reasons and documents as to why they think they should cancel the title falls afoul against the provisions of Article 47 of the Constitution and the rules of natural justice.”

13. They further submitted that failure by the Respondents to accord them a fair hearing went against the rules of natural justice. They relied on the case of **Onyango Oloo vs. Attorney General (1986-1989) EA 456** where it was held that;

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions that will affect others to act fairly...a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

14. They also submitted that due to their long occupation, they have a legitimate expectation that the suitland will remain theirs and no adverse decision would be made without their involvement. They cited the **Halsbury's Laws of England, 4Edn, Vol.1, Paragraph 81 at Pg 151** where legitimate expectation is outlined as follows;

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice.”

15. Further, they submitted that the Respondents' supplementary affidavit is clear that the constructions are still ongoing hence the prayer for prohibition is in order. They cited **Nrb Civil Application No.97 of 1998; Bahaji Holding Ltd vs. Abdo Mohammed Bahaji & Company Ltd & Another** where the Court of Appeal held that the limit of judicial review continues to expand so as to meet the changing conditions and demand affecting administrative decisions.

16. In their submissions, the Respondents identified the following as the issues for determination;

a) Whether, on a balance of convenience, the public interests within the instant application outweighs the Applicants' private interests.

b) Whether the suit land was reserved for public utility.

c) Whether the reliefs sought should be granted.

17. On the first issue, they submitted that in giving effect to rights, Courts must balance fundamental rights of individuals against the public interest. In the current case, they contend that the same tilts in favor of dismissal of the application as the public interest overrides individual rights. They relied on **R vs. Kenya National Commission on Human Rights ex-parte Uhuru Muigai Kenyatta Misc. Civil Appeal No.86 of 2009 (2010) eKLR** where it was held that;

“This Court has the onerous task of maintaining the delicate balance between an individual right and those of the public. Sometimes private rights have to bow to public interest. Putting all facts together, this Court is of the view that in the circumstances of this case, public interest far outweighs the right of the ex-parte applicant and in considering all the above, balancing and putting all matters to scale, this Court in exercising its discretion declines to give an order for certiorari and the application therefore fails.”

18. On the second issue, they submitted that the exhibited annexures show that the land was reserved for Government use to serve the public. Accordingly, they contend that the same could not be available for allocation to any other party. They rely *inter alia* on **HCCC No. 1814 of 2002: Norbixin Kenya Ltd –vs- The Hon. A.G** where the Court held that;

“Once the suit property was designated as a police station, it ceased to be unalienated government land, as it was set aside for use as a public utility for the general public. The Commissioner of lands henceforth became a trustee with regard to this public utility plot on behalf of the public until such time as the police station was developed as envisaged or title issued to the police...the allocation of the said property to the allottees and subsequent issuance of a title with respect to the property to the plaintiff was therefore irregular, unlawful and illegal...”

19. On the third issue, they submitted that judicial review applications deal with the decision making process and not the merits of a decision. They contend that the Court lacks jurisdiction where contested matters of facts are involved. They submitted that most of the land in Makindu is not adjudicated and there are no ownership documents hence the Ex-Parte Applicants' claim is nothing but a mere attempt to secure rights over a prime piece of land. They rely on **Nrb HC Misc. JR No. 157 of 2012 (2012) eKLR** where it was held that;

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent.

Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”

20. They also submitted that the suitland was alienated in the years 1990-1992 and was informed by the need to have Government offices in the area to enhance service delivery. It was their submission that upholding public interest must occupy centre stage in Courts.

21. Further, they submitted that an order of prohibition would be unsuitable where inaction or omission is alleged. They contend that the suit land had already been fenced off and there were buildings in existence prior to the filing of the suit. They rely on **R vs. Kenya National Examination Council ex-parte Gathenji & Others (1996) eKLR** where the Court of Appeal stated as follows;

“prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of

prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.”

22. They also submitted that although Article 40 of the Constitution guarantees the right to acquire and own property, clause 6 does not protect property found to have been unlawfully acquired. They cite the case of **Eunice Njambi Kamau & Anor vs. A.G & 5 Others (2013) eKLR** where the court stated that;

“Having regard to the interpretation that the Courts have variously given to Article 40 of the Constitution, I take the view that Article 40 of the Constitution upholds and protects the sanctity of property and that the primary consideration is that the title to the property is lawfully obtained. The only instance where title to property cannot be protected is where it is shown that the title was unlawfully acquired and or procured such that under article 40 (6), such title cannot be protected.”

23. The Respondents contend that the Applicant’s claim over the suit land is baseless and unlawfully acquired hence cannot be protected by Article 40 of the Constitution.

24. Having looked at the application, affidavits in support, responses and rival submissions, it is my view that the only issue for determination is whether the Ex-Parte Applicants have made out a case for judicial review.

25. The Respondents correctly submitted that judicial review looks at the decision making process and not the merits of a decision. The Ex-Parte Applicants are aggrieved by the decision to fence off the suit land and the 1st Respondent’s claim of ownership on behalf of the National Government. The Ex-Parte Applicants agree that they do not have ownership documents for the suit land.

26. The Respondents asserted that the suit land was set apart for Government offices more than 20 years ago and that the part development plan was drawn by Makueni County Council. Indeed, the exhibited photographs show that there are Government offices on the suit land and the Ex-Parte Applicants have not denied the existence of the said offices. On the other hand, the County Government, which took over the functions of the defunct County Council, has disowned the PDP and it is noteworthy that despite being served, the County Government did not participate in these proceedings.

27. Annexure SMS-2 is dated 16/06/2016 and was addressed to the Deputy County Commissioner of Kibwezi West Sub- County. It was authored by the County Government’s executive committee member for lands, mining and physical planning. The relevant extract states as follows;

“This office has in the past investigated this matter and established that although the Manyatta area is indicated as part of the area set apart for Makindu Township, this area was already settled at the time of the purported setting apart and it therefore should have been properly acquired and the owners thereof compensated. To date this has never been done nor have the owners ever given up their claim to the said parcels but have indeed made repeated requests for compensation if the land is to be taken up for public purposes.

With regard to the current situation, the undersigned has had the occasion to peruse the part development plan (PDP) that your office is purporting to rely on to justify the alienation and established that the same is not properly authorized and/or approved by the relevant authorities and cannot therefore be used to confer rights to land.”

28. From the letter, it is evident that even the County Government acknowledges that the suit land was set apart for Makindu Township. The question which arises is whether the area was already settled when it was set apart as such. There could be an ownership dispute that would require to be determined and the jurisdiction to do that does not vest in a Judicial Review Court. In the case of **Ransa Company Ltd vs. Manoa Francesco & 2 others [2015] eKLR**, the Court of Appeal expressed itself thus: -

“As we all appreciate a court sitting on Judicial Review exercises a sui genesis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.”

29. Arising from the above, my finding is that the application herein lacks merit and same is dismissed with costs to the 1st and 2nd Respondents.

Signed, dated and delivered at Makueni via email this **8th** day of **October, 2020**.

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka