



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. MISC. NO. 33 OF 2018**

**REPUBLIC.....APPLICANT**

**VS**

**LAND ADJUDICATION & SETTLEMENT**

**OFFICER AND 3 OTHERS.....RESPONDENTS**

**AND**

**CLAY PASCAL MWANDAMBO.....EXPARTE APPLICANT**

**JUDGMENT**

1. The ex-parte applicant pursuant to leave granted on 3<sup>rd</sup> September, 2018 filed the substantive motion dated 19<sup>th</sup> September, 2018 and filed on 5<sup>th</sup> October, 2018. The application is brought under Sections 7, 8, 9, 10 and 11 of the Fair Administrative Action Act and Order 53 Rule 3(1) of the Civil Procedure Rules and sought the following orders:

**1. An order of certiorari to remove into the Environment and Land Court for the purpose of it being quashed, the decision made by the Land Adjudication and Settlement Officer, Taveta District on 27<sup>th</sup> June 2018, whereby it was decided that the ex-parte applicant should go back to the Chief Magistrate's Court at Mombasa for the determination of the issue of his ownership of PLOT NO. 687/CHALLA/NJUKINI, a matter which the said court has conclusively determined.**

**2. A declaration that the ex-parte applicant is the rightful and legal owner of PLOT NO. 687/CHALLA/NJUKINI.**

**3. An order of mandamus directed to the Land Adjudication and Settlement Officer, Taveta District to compel the said officer to cause the ex-parte applicant's ownership of plot No.687/Challa/Njukini to be recorded in the relevant adjudication register.**

**4. An order of mandamus compelling the District Land Registrar, Wundanyi District to issue to the ex-parte applicant title to PLOT NO. 687/CHALLA/NJUKINI.**

**5. Costs of the application.**

**6. Such further orders and reliefs that the Honourable Court may deem just and expedient to grant.**

2. The motion is premised on the statement dated 6<sup>th</sup> August 2018 and is supported by the affidavit of Clay Pascal Mwandambo. The ex-parte applicant deposed that he bought the suit property from the 2<sup>nd</sup> respondent's father in the year 1978 while the 2<sup>nd</sup> respondent was still a child. That on becoming an adult and after the death of his father, the 2<sup>nd</sup> respondent made claims over the suit property and the ex-parte applicant instituted a suit being Mombasa SRMCC No. 4627 of 1994 against the 2<sup>nd</sup> respondent and one Mwaingo Mcharo. That by consent of all the parties, the matter was referred by the court on 4<sup>th</sup> September 2000 to Taveta Division Land Disputes Tribunal for determination.

3. The ex-parte applicant states that the Taveta Division Land Disputes Tribunal decided in favour of the ex-parte applicant and ordered that Alfred Mwasaru, Mwaingo Mcharo, Mwakitau Moto and Musa Njore be removed from the suit property. That on 15<sup>th</sup> July 2002, the court (J.S. Mushelle, SPM) entered judgment in terms of the Tribunal's award. The ex-parte applicant avers that despite serving the order, the 2<sup>nd</sup> Respondent and the other persons named in the order refused to vacate the suit property and the ex-parte applicant sought for eviction orders

from the court. That the court on 23<sup>rd</sup> February 2006 issued orders of eviction against the 2<sup>nd</sup> respondent and the other 3 persons. That on 28<sup>th</sup> February 2006, the court further issued a warrant to the court Bailiff to give possession.

4. The ex-parte applicant states that despite serving the 2<sup>nd</sup> respondent and the other persons with the orders they refused to vacate from the suit property and the ex-parte applicant sought orders for police assistance to execute the said orders, which the court issued on 28<sup>th</sup> July 2006. The ex-parte applicant states that having utilized the legal process referred to hereinabove, he has been vindicated as the legal owner of the suit property, but that the 2<sup>nd</sup> respondent and the other persons referred to and their agents have frustrated the enforcement of the said orders.

5. The ex-parte applicant states that subsequent to the vindication of his legal rights over the suit property, the Land Adjudication Section identified the suit property as PLOT NO.687/CHALLA/NJUKINI. That upon proceeding to the provisional surveyor's office, the verification did not proceed on the basis that there was a dispute over the property. That the ex-parte applicant's advocate wrote to the surveyor informing him of the court orders granting the applicant legal rights to the property and attached copies of the said orders. That despite the information given, the dispute was referred to the Land Adjudication and Settlement Office, Taveta where the objectors were Alfred Mwasaru (the 2<sup>nd</sup> respondent herein and 2<sup>nd</sup> defendant in Mombasa SRCC NO. 4627 of 1994), Williamson Moses Njuri, Mwaingo Mcharo (the 1<sup>st</sup> defendant in Mombasa SRMCC No. 4627 of 1994), and Dorah Maika Moto.

6. It is the ex-parte applicant's contention that the proceedings before the Land Adjudication and Settlement Office amounts to re-litigation of issues already determined conclusively by the court. The ex-parte applicant argues that the Adjudication office's decision to subject the facts of the matter to further inquiry when they had been finally determined by the court is an illegality and procedural impropriety. That re-opening of the litigation is an unfair decision depriving the applicant of his constitutional rights to property. That as a matter of principle and fairness, litigation must come to an end. The ex-parte applicant therefore wants the decision of the Land Adjudication and Settlement Officer, Taveta be quashed and the said officer to be compelled to direct the Recording Officer to enter into the Adjudication Register the interest of the applicant. The ex-parte applicant has annexed copies of the Tribunal Award, orders, warrant, letters and proceedings.

7. None of the Respondents filed any response to the application. Indeed the 2<sup>nd</sup> respondent informed the court through his advocate on record, Mr. Oddiaga, that he does not oppose the application. Only the ex-parte applicant filed written submissions. It is the ex-parte submission that the action by the 1<sup>st</sup> respondent by purporting to re-open the litigation was unfair, irrational, unreasonable and an abuse of his office. Counsel for the ex-parte applicant relied on the case of **William Koross (Legal Personal Representative of Elijah C. A. Koross) –v- Hezekiah Kiptoo Komen & 4 Others (2015)eKLR** where the court was dealing with attempts to resuscitate issues that had been conclusively determined. That the resuscitation attempt ran afoul of the principle of res judicata. The ex-parte applicant further submitted that the court had conclusively determined the question of rights to the parties and was *functus officio*. He relied on the case of **Telkom Kenya Limited –v- John Ochanda (suing on his own behalf and on behalf of 996 formers employees of Telkom Kenya Limited) (2014)eKLR**.

8. I have considered the application. The issue that arises for determination is whether the orders sought herein should be granted or not. The purview of judicial review was clearly set by Lord Diplock in the case of Civil Services (1985) AC 374 at 401 D when he stated that:

*“Judicial review has I think developed to a stage today when....one can conveniently classify three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegally, the second irrationality, and the third “procedural impropriety....” by illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it... By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.... I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision”*

9. Article 47 of the Constitution provides that:

**1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –**

**a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal;**

**b. Promote efficient administration**

10. Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court of law, or if appropriated, another independent and impartial tribunal or body while Section 4 of the Fair Administrative Action Act provides inter alia, that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

11. In the case of **Municipal Council of Mombasa –v- Republic & Umoja Consultants Ltd (2002)eKLR**, the Court of Appeal stated as

follows:

***“Judicial review proceedings is concerned with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a court of appeal over the deciders which would involve going into the merits of the decision itself as whether there was or there was not sufficient evidence to support the decision.”***

12. In this case the ex-parte applicant avers that he has a decree or orders in Mombasa SRMCC 4627 of 1994 in his favour over the suit property PLOT 687/CHALLA/NJUKINI. The applicant has exhibited the orders issued by that court in his favour including orders of eviction and warrant to the court bailiff to give possession. There is no doubt that the Land Adjudication and Settlement Officer had jurisdiction under the Land Adjudication Act to hear objections over land under adjudication sections. However, in this particular case, the dispute had been heard and determined by a court of competent jurisdiction. Indeed the matter is at execution stage. I have perused the proceedings that were undertaken before the 1<sup>st</sup> respondent. Indeed the 1<sup>st</sup> respondent appreciated that the case was already before a court of law and rightly found it difficult to make a decision on the issue of ownership. Indeed the 1<sup>st</sup> respondent found that it had no jurisdiction to entertain the matter. In my considered view, the moment 1<sup>st</sup> respondent found that it had no jurisdiction in the matter, it ought to have downed its tools as per the principle in the favour case of **Owners Of Motor Vessel ‘Lillian S’ –v- Caltex Oil (Kenya) Ltd (1989)KLR**, and struck out or dismiss the objections for lack of jurisdiction. In my view, 1<sup>st</sup> respondent had not business referring the objection, which in any case involved third parties who were not parties to **Mombasa SMRCC 4627 of 1994**.

13. From the evidence on record, the court is satisfied that the decision made by the 1<sup>st</sup> respondent whereby it referred the ex-parte applicant to the Chief Magistrate’s Court for determination of the issue of ownership of PLOT NO. 686/CHALLA/NJUKINI is liable for quashing by an order of certiorari.

14. Turning now to the prayer for a declaration that the ex-parte applicant is the rightful and legal owner of PLOT NO.687/CHALLA/NJUKINI and an order for mandamus directed to the 1<sup>st</sup> respondent to compel and cause the ex-parte applicant’s ownership of the suit land to be recorded in the relevant adjudication register and to compel the 3<sup>rd</sup> respondent to issue the applicant with title to the said land, it is my view that the applicant has not laid a basis for the issuance of such orders. The applicant has stated that he has orders in his favour issued in Mombasa SRMCC No4627 of 1994. I have perused that order and it states in part:

**“IT IS HEREBY ORDERED: -**

**a. That the defendants herein namely MWAINGO MCHARO ALI, ALFRED MWASARU MWAKITAU MOTO and MUSA NJORE be evicted from the plaintiff’s parcel of land at Taita-Taveta the subject matter of Taveta Land Disputes Tribunal Reference No. land 4 VOL IV.III adopted on the 15<sup>th</sup> day of May 2002.**

**b. That the defendants be condemned to pay the costs of this application.”**

15. The court finds that there was no order directed at the 1<sup>st</sup> and 3<sup>rd</sup> respondents herein. Moreover, it has not been shown that the 1<sup>st</sup> and 3<sup>rd</sup> respondents have declined to perform their functions or duties to the detriment of the applicant. I also find it illogical that the applicant is seeking an order declaring him as the rightful and legal owner of the plot while in the same breath avers that the court in Mombasa SRMCC No.4627 of 1994 has already determined so in his favour. In my view, the applicant should simply go ahead and execute the decree and orders in SRMCC No.4627 of 1994. The ex-parte applicant can also seek other relevant orders from that court to enforce the orders issued by that court. In the case of **Mwau –v- Principal Immigration Officer (1983) KLR**, it was stated

***“Mandamus does not lie against a public office as a matter of course. The courts are reluctant to direct a writ of mandamus against executive act officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in interferences by the judicial department with the management of the executive department of government. The courts will not intervene to compel action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory.”***

16. In the instant case, the ex-parte applicant has not convinced this court that the 1<sup>st</sup> and 3<sup>rd</sup> respondents have declined to perform their duties imposed by the law. Accordingly I decline to grant the order for mandamus and a declaration. However, this application for judicial review is allowed in terms of prayer (1) of the motion. I order that each party to bear their own costs.

It so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 6<sup>th</sup> day of February, 2020.**

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**C. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Mwanzia holding brief for Oddiaga for 2<sup>nd</sup> respondent

Ms. Onesmus holding brief for Gachiri Kariuki for Ex-parte Applicant

Makuto for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**