



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 2 OF 2019

LAMARINA LIMITED.....PETITIONER

VERSUS

NATHAN KAHARA.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AS CONSOLIDATED WITH

JUDICIAL REVIEW CASE NO. 2 OF 2019

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: JUDICIAL REVIEW ORDERS OF PROHIBITION

AND

**IN THE MATTER OF: DETERMINATION OF REVIEW OF GRANTS IN RESPECT OF LT. NO. CHEMBE
KIBAMBAMSHE/375-KILIFI COUNTY BY THE NATIONAL LAND COMMISSION**

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

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

REPUBLIC.....APPLICANT

VERSUS

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

2. CHIEF LAND REGISTRAR.....2ND RESPONDENT

3. LAND REGISTRAR KILIFI.....3RD RESPONDENT
4. NATHAN KAHARA.....4TH RESPONDENT
- KAHINDI NGOWA JOGOLO.....EX PARTE APPLICANT

RULING

1. By the Petition instituted herein on 8th February 2019, La Marina Ltd (the Petitioner) prays for a declaration that it has a right to be heard in regard to a complaint touching on Plot Nos Chembe/Kibabamshe/646 and 665. It also seeks an order of Judicial Review quashing the decision of the National Land Commission (the 2nd Respondent) granting Plot No. Chembe/Kibabamshe/375 to Nathan Kahara (the 1st Respondent).
2. In addition, the Petitioner prays for an order of Mandamus compelling the Land Registrar Kilifi to cancel title deed for the said Parcel No. 375 and an order for compensation for breach of its rights under Article 47 and 50 of the Constitution.
3. On 25th March 2019, some one month after the Petition was filed, Kahindi Ngowa Jogolo (the Ex-Parte Applicant) filed a Judicial Review application against the National Land Commission, the Chief Land Registrar, the Land Registrar Kilifi and the said Nathan Kahara vide ***Malindi ELC Misc. Civil Application No. 2 of 2019*** seeking leave to apply for an order of Certiorari, Mandamus and Prohibition against the Respondents. The first order of certiorari is to quash the same decision of the National Land Commission directing that the said LR No. Chembe/Kibabamshe/375 belongs to the said Nathan Kahara.
4. In addition, the Ex-Parte Applicant sought an order quashing the decision of the Land Registrar to issue title for the said property to Nathan Kahara as well as an order of mandamus to compel the Land Registrar to revoke the title deed. He further sought an order of prohibition inter alia to stop the National Land Commission from investigating and adjudicating on claims in regard to the said LR No. Chembe/Kibabamshe/375.
5. The Ex-Parte Applicant's application for leave was granted on 25th March 2019 and the Substantive Motion was subsequently filed on 11th April 2019.
6. On 12th June 2019, the Petition and the Judicial Review application were consolidated with the consent of all the parties involved.
7. Contemporaneously filed with the Petition was a Notice of Motion dated 7th February 2019 wherein the Petitioner prays for an order as follows:-
 - 3. That pending the hearing and determination of this suit the Court be pleased to issue a conservatory order to maintain the status quo which existed as at 30th November 2018 and restrain the 1st Defendant by himself, his agents and servants from constructing, excavating, leasing, sub-dividing, selling, transferring, charging or in any other manner whatsoever parting with Title No. Chembe/Kibabamshe/375.**
8. The said application is supported by an affidavit sworn by the Petitioner's Director Philip Munge Ndolo and is based on the grounds that:-
 - a) *Prior to November 2018, the Petitioner was the sole registered proprietor of all those parcels Nos. Chembe/Kibabamshe/646 and 665 being the sub-divisions of an original Plot known as Chembe/Kibabamshe/375;*
 - b) *Sometimes in November 2018, unknown to the Petitioner, the National Land Commission issued a new title deed to the 1st Respondent over Plot No. Chembe/Kibabamshe/375;*
 - c) *The said Plot No. Chembe/Kibabamshe/375 cannot exist at the same time with Plot No. 646 and 665 because on the ground they refer and relate to the same land;*
 - d) *As from December 2018, the 1st Respondent has moved and evicted the Petitioner's caretaker over the suit property and commenced excavation and construction of some structures thereon.*
9. In response to the Petition and the Motion, Nathan Kahara (the 1st Respondent) swore and filed a lengthy Replying Affidavit in which he avers that the two have no merit and that they have been filed in gross abuse of this Court's process and urges the Court to dismiss the same "in limine".
10. The 1st Respondent avers that Philip Munge Ndolo who has sworn the Affidavit in support of the Petition is not a director of the Petitioner as alleged or at all and hence the Petition ought to be struck out.
11. The 1st Respondent avers that he is the registered proprietor of the parcel of land known as Chembe/Kibabamshe/375 measuring approximately 10.8 Ha. He asserts that the said property was initially registered on 14th July 1978 in the name of Robert Githinji Mureithi and that he purchased the same through a public auction on 25th August 1982 when the said Robert defaulted in payment of a loan extended to him by the National Bank of Kenya.

12. The 1st Respondent avers that the Petitioner had filed **Mombasa High Court Miscellaneous Civil Application No. 770 of 2004** seeking similar orders in respect of the Parcel No. 375. That suit was dismissed on 24th November 2009. The dismissal order has neither been reviewed, set aside and/or appealed.

13. The 1st Respondent further avers that the National Land Commission (the 2nd Respondent) subsequently in the exercise of its Constitutional mandate under Article 67(2) of the Constitution reviewed grants issued over the subject property. Contrary to the Petitioner's assertions, the 1st Respondent avers that all parties in the dispute including the Petitioner were heard before the 2nd Respondent arrived at its determination dated 17th July 2017 to the effect that the suit property belongs to the 1st Respondent.

14. In addition to the Replying Affidavit, the 1st Respondent also took out a Notice of Preliminary Objection dated 15th March 2019 wherein he objects to the hearing of the Petition and the Motion on the grounds:-

1. *That there existed a previous suit between the same parties over the same subject matter Title No. Chembe/Kibabamshe/375 and which matter was determined by way of dismissal on 24th November 2009 which dismissal order was not challenged by the Petitioner and the present Petition is thus a gross abuse of Court process.*

2. *That matters regarding Title No. Chembe/Kibabamshe/375 being raised by the Petitioner in the present Petition were similarly raised in the previous matter (Malindi HC Miscellaneous. Application No. 72 of 2006, which matter was dismissed on 24th November 2009 and the Petition is thus statutorily barred.*

3. *That the 2nd Respondent communicated its decision on Title No. Chembe/Kibabamshe/375 by way of Notice in the Kenya Gazette dated 17th July 2017 and a challenge against the said decision through the present Petition is statutorily time barred.*

4. *That the Petition and application as drawn and filed is incompetent, bad in law and a nullity ab initio and the same ought to be struck out and dismissed in limine as Philip Munge Ndolo who has sworn the Affidavits in support of the Petition and the Application is not a director of the Petitioner.*

15. The 2nd Respondent Commission is equally opposed to both the Petition and the Motion. In a Replying Affidavit sworn and filed on its behalf by its Acting Director, Legal Affairs and Enforcement Brian Ikol, the Commission avers that in line with its mandate under Section 14 of the National Land Commission Act, it went to the ground in a bid to identify the root cause of the underlying problems of land ownership within Kilifi/Chembe/Kibabamshe area and sought to review all grants and dispositions of interest in land in the area.

16. The 2nd Respondent avers that before commencing review of the grant over Chembe/Kibabamshe/375, it caused to be published notices in various dailies on 1st and 2nd September 2015, informing members of the public of its intention. The notices required all interested parties to tender their written representations and documentations before attending a public hearing on 16th September 2017 at the Red Cross Hall Malindi.

17. In that respect, the 2nd Respondent avers that the Petitioner fully participated in the hearing and was given an opportunity to be heard. The 2nd Respondent did not however make any specific determination in regard to the suit property for a while as it was informed that there was **Malindi High Court Miscellaneous Application No. 72 of 2006** that was pending. However upon being informed of the dismissal of the suit, it made a determination in favour of the 1st Respondent.

18. Following the consolidation of the suits, directions were given that the Petitioner's application and the 1st Respondent's Preliminary Objection be disposed of together. In this respect, all parties were given a chance to respond to the application and the objection and to file submissions thereon. I have had time to consider the Motion, the Preliminary Objection and the submissions placed before me by the Learned Advocates for the parties.

19. Section 7 of the Civil Procedure Act provides as follows:-

“7. Res Judicata

No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under, whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

20. From the foregoing, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be by the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly, that the Court or tribunal before which the former suit was litigated was competent and determined the suit or issue finally (*see Karia & Another –vs- The Attorney General and Others (2005) 1EA 83*).

21. Simply put res judicata is essentially a bar to subsequent proceedings involving the issue as had been finally and conclusively decided by a competent Court in a prior suit between the same parties or their representatives. *Hasbury's Laws of England (4th Edition, Vol. 16 paragraphs 1527-1529)* opines that in deciding what questions of law and fact were determined in the earlier Judgment, the Court is entitled to look at the Judge's reasons for his decision, and his notes of the evidence and is not restricted to the record.

22. In its Supplementary Affidavit filed herein on 9th April 2019, the Petitioner does not deny that it had filed the said **Mombasa High Court Miscellaneous Civil Application No. 770 of 2004 (later Malindi Application No. 72 of 2006)**. It is however its case that the said matter was not heard on the merits and that it was instead dismissed on a technicality.

23. I have perused the pleadings filed in the said Judicial review application as annexed to the 1st Respondent's affidavit and it is evident that the dispute was largely between the parties herein and that it was over the same subject matter. The Petitioner herein who was infact the Applicant was named as the Respondent in those proceedings while the Chief Land Registrar and the Land Registrar Kilifi were named as the 4th and 5th Interested Parties. The 1st Respondent herein was in those proceedings named the 6th Interested Party.

24. In a Ruling delivered on 24th November 2009, the Honourable Justice Hellen Omondi dismissed the Petitioner's Substantive Motion for Judicial review dated 29th October 2004 on the ground of want of form in that it was made in the name of the Republic and not the Applicant as provided under Order 53 of the Civil Procedure Rules. In the penultimate paragraph of the Court's Ruling, the Learned Judge stated thus:-

“I think it will be pointless delving into this because the application in its form and substance is defective, and to begin analysing the substantive issues on a defective application would be totally misplaced.

The upshot is that the application is dismissed for being defective and incompetent.”

25. From the foregoing, it was clear to me that the substantive issues raised in the Petitioner's application which are indeed similar to those raised herein had not been considered and finally determined. On that note, the objection by the 1st Respondent on the ground of res judicata must fail.

26. The second ground of the objection as I understand it was that the Petition and the application for conservatory orders were statutorily time-barred. The historical background leading to the institution of the Petition is provided at paragraphs 5 and 6 thereof as follows:-

5. The Petitioner is the registered proprietor of all the following properties:-

a) Chembe/Kibabamshe/646

b) Chembe/Kibabamshe/665

It is the Petitioner's position that it acquired the above properties lawfully and it holds valid title to those plots.

6. The Petitioner further states that:-

a) In 1970s, the Government of Kenya erroneously adjudicated and registered through the Department of Land Adjudication and Settlement in Chembe/Kibabamshe, Kilifi District (sic);

b) Among a Settlement Scheme the Plots produced through the erroneous adjudication was Plot Title No. Chembe/Kibabamshe/375. For purposes of this Petition, this property is referred to as the Original Plot;

c) The Government of Kenya through Gazette Notice No. 26 of 20/6/1986 cancelled the title to the original plot and the land became Government land;

d) The Original Plot was thereafter subdivided through mutation No. 976279 dated 1st December 2000 and created five(5) resultant plots namely, Chembe/Kibabamshe/646, 665, 666, and 725. Out of these resultant plots, the Petitioner was allocated Plot Title Nos. Chembe/Kibabamshe/646 and 665;

e) Since the Petitioner became the registered proprietor of Plot Title No. Chembe/Kibabamshe/646 and 665 on 17th April 2001, its title has not been challenged until 2017;

f) A report done by the 3rd Defendant through Mr. K. Kariuki then District Criminal Investigation Officer (DCIO) Malindi confirmed the cancellation of title to Plot No. Chembe/Kibabamshe/375 by the Government and closed the Police file. This was on 19/4/1995 and the 1st Defendant was notified.

For the above reasons, Plot No. Chembe/Kibabamshe/375 did not exist prior to 22nd November 2018.”

27. The Petitioner avers that it was then surprised to learn that a title deed had been prepared and issued to the 1st Respondent on 22nd November 2018. It is further the Petitioner's case that using the said title deed, the 1st Respondent moved in and occupied part of the said Chembe/Kibabamshe/646 and 665 in December 2018 and commenced developments thereon. As a result the Petitioner's title and right to own and use the land as guaranteed under Article 40 of the Constitution is now severally threatened.

28. It was however difficult to buy the Petitioner's contention that the dispute herein started in 2018 following the issuance of the said title deed. As it were, the Petitioner admits that it did file **Mombasa High Court Miscellaneous Civil Application No. 770 of 2004 (later Malindi High Court Miscellaneous Application No. 72 of 2006)**.

29. As I have already stated, the subject matter of that dispute was the same parcel of land herein. In its aforesaid Notice of Motion dated 29th October 2004 which was dismissed, the Petitioner herein had sought an order of certiorari to quash the directive made by the Ministry of Lands, the Commissioner of Lands and the Chief Land Registrar cancelling a number of titles in which the Petitioner had an interest, including the subject property herein. From the record, that application was indeed premised on the grounds that:-

a) The *ex parte* applicant, La Marina Ltd is the registered proprietor of Plot Nos. Chembe/Kibabamshe/635, 637, 641, 644, 646, 651, 652, 655 and 665;

b) The various Plots aforementioned were curved from Plot No. Kilifi/Chembe/Kibabamshe/393 and 381 after the latter were sub-divided through mutation while others were curved from Plot No. Chembe/Kibabamshe/391, 398, 375 and 424;

c) After the sub-division of Plot No. Kilifi Chembe/Kibabamshe/393, 391, 398 and 424 into the plots set out in paragraph (a) these plots ceased to exist.

d) The 2nd, 3rd and 4th Respondents have purported to issue a Title Deed to the 1st and 2nd Interested Parties as Plot No. Chembe/Kibabamshe/393 and 381 respectively even when these titles do not exist;

e)

f) The 6th Interested Party is also claiming ownership of Plot No. 375 which no longer exists.

30. In his response to the application, filed by the Petitioner in that 2004 case, the 1st Respondent herein had gone ahead to give an account similar to the one in his Replying Affidavit herein indicating that he had purchased the suit property at a public auction conducted on behalf of the National Bank of Kenya in August 1982. As at the time the property known as Chembe/Kibabamshe/375 was registered in the name of one Robert Githinji Mureithi who had defaulted in a loan repayment.

31. Arising from the foregoing, it was clear to me that while the present Petition is purported to have been precipitated by a determination made by the 2nd Respondent Commission as published in Gazette Notice Volume No. CXIX-No. 97 dated 17th July 2017, that was but a red herring as the Petitioner and indeed the Ex-Parte applicant in the JR Application were merely looking for a means of re-instituting the dispute they already had with the 1st Respondent which had been dismissed on 24th November 2009 as aforesaid.

32. That dispute was and remains the one concerning the ownership of the parcel of land invariably described as Chembe/Kibabamshe/375 on the one hand and Chembe/Kibabamshe/646 and 665 on the other.

33. The decision of the Petitioner in filing the earlier suit had been precipitated by a directive made by the Land Adjudication and Settlement Office as well as the Chief Land Registrar dated 30th June 2004 to cancel inter alia, LR No. Chembe/Kibabamshe/646 and 665 and to have the 1st Respondent's title for Chembe/Kibabamshe/375 retained as the lawfully recognised title for the land. By that decision, the Ex Parte Applicants title was equally cancelled.

34. As it were the Petitioner was unsuccessful in challenging the same as its application was dismissed albeit on a technicality on 24th November 2009. After the dismissal of its case, the Petitioner waited another ten years before filing the present Petition in yet another attempt to dislodge the 1st Respondent from his proprietorship and recognition given to him by the Chief Land Registrar as per the directive dated 30th June 2004. This Petition was thus being filed some sixteen years after that decision was made.

35. In respect to recovery of Land, Section 7 of the Limitation of Actions Act provides as follows:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.”

36. Limitation of actions by the law was intended to bar claimants from instituting claims that are stale and protecting defendants against unreasonable delay. In this respect I am in agreement with the 1st Respondent's submissions that the issue of limitation goes to the jurisdiction of a Court to entertain a claim and therefore where the matter is statute-barred, the Court has no jurisdiction to entertain the same.

37. Indeed, even if it could be taken that the Petitioner's cause of action arose from the decision of the 2nd Respondent as published in the Gazette Notice of 17th July 2017, directing that the suit property be regularized in favour of the 1st Respondent, there was no reason adduced why the challenge was not brought within the six months stipulated under Order 53 Rule 2 of the Civil Procedure Rules.

38. In *Republic –vs- Kenya National Highways Authority & 2 Others ex-parte Amica Business Solutions Ltd (2016) eKLR*, the Court of Appeal observed as follows:-

“There has been debate as to whether the six months limitation envisaged in Order 53 Rule 2 of the Civil Procedure Rules applies strictly to “any Judgment, order, decree, or conviction, or other proceedings”, or whether this also includes decisions of other kinds, or letters such as the one that is in the subject of this case.

In our considered view, Order 53 Rule (2) was meant to cover both Judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a Judgment or decision

capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.”

39. The 2nd Respondent as it were has quasi-judicial powers pursuant to Section 14 of the National Land Commission Act. Having “regularized” the suit property to the 1st Respondent on 17th July 2017, the Petitioner and the Ex-Parte Applicant in the Judicial Review application had six months within which to challenge the same. They did not do so until some twenty months later and no application was made to this Court for extension of time.

40. In the circumstances herein, I am persuaded that both the Petition and the Judicial Review application are misconceived and without merit. In that regard, I uphold the 1st Respondent’s Preliminary Objection and strike out the consolidated Petition and Judicial Review application with costs to the 1st and 2nd Respondents.

Dated, signed and delivered at Malindi this 27th day of May, 2020.

J.O. OLOLA

JUDGE