



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JR MISC. APPLICATION NO. 48 OF 2015**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER  
ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: AN APPLICATION BY: AMRITLAL VIRA SHAH FOR THE GRANT  
OF LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW AGAINST THE DECISION BY  
THE MINISTER IN CHARGE OF LAND ADJUDICATION IN AN APPEAL IN RESPECT OF  
PLOT NO. 3 KAWALA "B" ADJUDICATION SECTION, KILIFI COUNTY, KALOLENI  
DISTRICT HEARD ON 10<sup>TH</sup> JULY, 2013**

**REPUBLIC.....NOMINAL APPLICANT**

**VERSUS**

**MINISTERIAL APPEAL TRIBUNAL.....RESPONDENT**

**EX PARTE APPLICANT: AMRITLAL VIRA SHAH**

**RULING**

**The Application**

1. The Notice of Motion application before the court is dated 28<sup>th</sup> October, 2015 filed under Order 53 rules 1, 2, 3 and 4 of the civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. The Applicant prays for the following orders:

(a) An order of certiorari to remove into the high court for purposes of quashing the decision by the Minister and/or District Commissioner Kaloleni District contained in the decision and Ruling certified by the Director of Land Adjudication Nairobi on 3<sup>rd</sup> August, 2015 dismissing the Applicant's appeal to the Minister regarding proprietorship of Plot No. 3 Kawala "B" Adjudication Section Kilifi County Kaloleni District between the Applicant herein as Appellant and Shariff A. Abdullah Hussein.

(b) An order of prohibition to prohibit Al-Itgan Investment Company Limited and/or Shariff A. Abdullah Hussein together with his gents or the Land Registrar Kilifi from registering or causing to register Al-Itgan Investment Company Limited and/or Shariff A. Abdullah Hussein as proprietor of Plot No. 3, Kawala "B" Adjudication Section Kaloleni District, Kilifi Country pursuant to the decision contained in the certified copy dated 3<sup>rd</sup> August, 2015 of Ruling of the Minister and or District Commissioner, Kaloleni District.

(c) That the costs of this application be provided for.

2. The application is premised on the grounds set out in the statutory statement dated 23<sup>rd</sup> October, 2015 and the verifying affidavit of **MAYUR AMRITLAL SHAH** sworn on 22<sup>nd</sup> October, 2015 and a further affidavit sworn on 15<sup>th</sup> July, 2016.

3. The Applicant's case is that he is the owner and proprietor in possession, use and occupation of a parcel of land known as plot No. 3 Kawala "B" Adjudication Section Mariakani Kilifi County measuring about 9 acres which the Applicant purchased in 1987 from Jumaa Dzombo and two others. The said parcel of land was unsurveyed and unadjudicated at the time of the purchase in 1987 and the Applicant formally applied to the Town Council of Mariakani to set it apart and consequently the application was approved and a survey was done by the Ministry of Lands and Settlement. In about 2005 one **Purshottam Govind Parmar** and **Somchand Mulji Shah** trespassed and unlawfully entered upon the Applicant's said land claiming ownership and the Applicant filed claims at the Kilifi District Lands Disputes Tribunal at Kaloleni Case Number LND/KAL/29/2005 and after trial and hearing the Tribunal allowed the Applicant's claim of ownership and proprietorship of the parcel of land on **12<sup>th</sup> March, 2007** and the decision of the Lands Tribunal was affirmed and adopted as a Decree of the Court in **SRM Court at Kaloleni Land Case No. 9 of 2007**. The Applicant subsequently filed a suit in Mombasa High Court Civil Case No. 324 of 2007 against **Purshottam Govind Parmar** and **Somchand Mulji Shah** seeking *inter alia* a declaration that the aforesaid land was the property of the Applicant and Judgment was entered in favour of the Applicant as sought on **26<sup>th</sup> June 2008**. The area where the Applicant's land is situate was later proclaimed and declared an adjudication area before the process of setting apart was completed and one **Shariff A. Abdullah Hussein** claimed that he had purchased a portion and/or all the Applicant's land measuring approximately 9 acres from Chirunga Dzombo and four others in 1996 or thereabout. The adjudication Board after a full hearing awarded the portion of land to the Applicant and another portion measuring approximately 6 acres to Shariff A. Abdullah Hussein. Thereafter the Applicant appealed to the Minister of Lands pursuant to the provisions of **Section 29 of the Lands Adjudication Act Cap 284 Laws of Kenya**. The Minister of Lands through the District Commissioner Kaloleni District on 3<sup>rd</sup> August 2015 notified the Applicant that the Applicant's Appeal had been dismissed and the entire plot measuring 9 acres would be awarded to Al-Itgan Investment Company Limited an entity that was not party to the Appeal. The Applicant states that the Minister's appeal panel ignored the Judgment of Kaloleni Senior Resident Magistrate Land Case Number 9 of 2007 which had awarded the portion of land to the Applicant on 12<sup>th</sup> March, 2007. The Minister's panel further ignored the order and decree of Mombasa High Court Civil Case Number 324 of 2007 which confirmed that the portion of land claimed by **Shariff A. Abdullah Hussein** belonged to the Applicant. The High Court declared so in Mombasa HCC Case Number 324 of 2007. The Applicant had been in continuous possession, occupation and use of the portion of land since 1987 when he purchased the land. The ruling of the Minister's Panel was undated and signed by only one member of the Panel namely **FREDRICK AYIEKO**. The other members of the panel did not sign. The Applicant states that the decision of the Minister was consequently invalid and void because the Minister's Panel Members as constituted took into consideration other information beyond what was presented before it by the parties and thus acted

ultra vires contrary to the due process of law and the provisions of the Land Adjudication Act. The Applicant states that since buying the portion of land, Mariakani County Council has demanded and the Applicant has paid land rates to the Council as the proprietors of the portion. The Applicant's case is that the decision of the Minister certified and communicated to the Applicant on 3<sup>rd</sup> August 2015 is consequently:

- a. An abuse of statutory power, unreasonable and irrational;
- b. Made without jurisdiction and in breach of the provisions of the Land Adjudication Act Cap. 284 Laws of Kenya;
- c. In bad faith and error of fact and in breach of natural justice;
- d. An abuse of statutory discretion;
- e. Biased, oppressive and unlawful;
- f. Arbitrary and unprocedural and ultra vires the Provisions of the Lands Adjudication Act;
- g. Unfair and unjust in all circumstances of the case.

4. The application is opposed by the Respondent through Grounds of Opposition filed on 7<sup>th</sup> December, 2015. The Respondent's case is that the Motion is improper, baseless and does not raise any grounds to warrant Orders of judicial review or any other Orders for this Court's determination. The Respondent states that the Motion has no basis in law and thus it is misconceived and an abuse of the process of court. The Motion is unmerited as the relief sought is improper, incapable and untenable and that the application is frivolous, vexatious and an abuse of the process of the court. The Respondent's case is that the Ministerial decision in favour of Shariff Abdullahi and/or his agents or company was proper and well within their powers as provided by law and that no rules of Natural Justice are demonstrated to have been breached, and also that the Respondents acted in accordance with the Law and the orders made were not *ultra vires*.

5. The application is also opposed by the Interested Party vide a Replying Affidavit of **Shariff A. Abdullah Hussein** sworn on 18<sup>th</sup> February, 2015. The Interested Party's case is that it is not true that the Applicant Purchased Plot Number 3 Kawala B and the annexed sale agreement indicates otherwise. The Interested Party states that Plot Number 3 Kawala B belongs to him and he purchased it on 7<sup>th</sup> May, 1996. It is 9 acres at Kwachikololo area and the Plot which the Applicant purchased in the year 1987 as alleged is indicated to be 5 Acres at Kabenderani. The Interested Party further states that it is not true the Applicant purchased a house on the suit Plot. At the time the Interested Party purchased the suit Plot in 1996, the said Plot was vacant without any developments and he is the one who built a house on the suit Plot in the year 1996 after purchasing the Plot and also connected water supply for the Plot. That contrary to the allegations on paragraph 6 of the verifying affidavit, the Applicant has never been in occupation or use of the suit Plot. The Interested Party states that he is the one who has been occupying the suit Plot and even built a house on the same and fenced it off. He also recently subdivided the said Plot which has acquired a different Number hence Plot Number 3 Kawala B is no longer in existence. The Interested Party states that during the adjudication process which took place in the year 2010, he was the one in possession and use of the Plot hence the registration of his name as the proprietor thereof. He also employed a helper to look after the Plot since 1996 to 2013. The Interested Party states that following the decision by the land Adjudication Arbitration Board he did not appeal against the said decision but reluctantly agreed to give the Applicant 3 acres of his plot for the sake of peace of mind and to avoid unnecessary litigation. However, the Applicant appealed against the decision claiming all the 9 acres of the Plot despite him having Purchase 5 acres of another Plot in 1987. That it is therefore interesting how the Applicant is adamant in taking possession of all 9 acres of his Plot yet his own sale agreement which he annexed makes reference to 5 acres. The Interested Party states that the Applicant and him both bought different Plots and the Applicant definitely did not purchase Plot Number 3 Kawala B as the Interested Party purchased the same. Further, the Interested Party states that he has never been

involved in any dispute of the suit Plot with the Applicant prior to the objection and the Appeal to the minister. The Court cases were therefore certainly not in reference to Plot Number 3 Kawala B as the Interested Party was in occupation of the same at the time. The Interested Party states that due process has been undertaken and he should be allowed to enjoy his Plot peacefully as the rightful owner of the same. The Interested Party states that the Applicant has been the one infringing on his proprietary rights by bringing unnecessary suits against him knowing very well that the Plot he purchased is different from the Interested Party's plot. The Interested Party states that it is in the interest of Justice that the Applicant's Application be dismissed with costs.

6. The Interested Party also raised a Preliminary Objection to the application. The Preliminary Objection was filed on 9<sup>th</sup> November, 2016.

### **Submissions**

7. Parties filed submissions which were highlighted orally in court.

8. Mr. Asige counsel for the Applicant submitted that on 3<sup>rd</sup> August 2015 the Minister of Lands through the District Commissioner Kaloleni District made a decision contained in the ruling certified by the Director of Land Adjudication on 3<sup>rd</sup> August 2015 dismissing the Applicants Appeal to the Minister of Lands regarding the proprietorship of Plot No. 3 Kawala "B" Adjudication Section Kilifi County, Kaloleni District between the Applicant herein who was the Appellant and one Shariff Abdullah Hussein who was the Respondent therein and an Interested Party in the present Motion.

The decision dismissing the Appeal was expressed as under:

#### **"Decision**

**In view of the above findings and other confirmed information provided in the proceedings, this case is hereby dismissed. The objections ruling which lead to sub-division and creation of new numbers should be cancelled. Parcel No. 3 originally containing nine (9) acres should be registered in the names of the Respondent's company as AL-ITGAN INV. CO. LTD"**

Signed: District Commissioner

**KALOLENI.**

Fredrick Ayieko

District Commissioner

**KALOLENI SUB-COUNTY"**

9. Mr. Asige submitted that the Applicant herein had appealed to the Minister against the decision of Kawala Land Adjudication Arbitration Board who had ruled that land being Plot Number 3 Kawala "B" Adjudication Section Kilifi County Kaloleni District measuring about 9 acres be sub-divided into 3 and 6 acres respectively and 3 acres be given to the Applicant and 6 acres be awarded to Shariff A. Abdullah Hussein (the Interested Party in this Motion). It is the Minister's aforesaid decision that is the subject matter of this motion and which is sought to be quashed. Counsel submitted that the Appeal to the Minister was filed by the Applicant on 5<sup>th</sup> July 2013 and heard on **10<sup>th</sup> July 2013.**

The Applicant was present at the hearing on 10th July 2013. He was sick. He applied to have his son Mayur A. Shah to testify in witness on his behalf. The Minister's Tribunal allowed the application and Mayur A. Shah who has sworn the verifying affidavit in support of this motion proceeded to testify. He was duly cross examined.

The Interested Party herein who was the Respondent in the Appeal before the Minister also gave evidence and he was cross examined. He called a witness whose name was not disclosed in the proceedings before the panel. The unnamed witness testified and was cross examined. The proceedings were then closed.

Mr. Asige referred to **page 44** of the record under the sub-paragraph “**OBSERVATION**”, where the Minister’s Tribunal has recorded as follows:-

**“The Chairman released both parties and promised to read judgement to them after investigation. The panel carried out independent investigations in absence of both parties. The panel visited the site aiming to know the difference between the two villages; Chikololo stage, Kabenderani Village where the defendant claimed his land to be and Katudini Village where the Appellant claims his land to be as stated in the sale agreement.**

**During the visit (at the site of the disputed land) one of the village members came and questioned our presence on the site. In our introduction we realized that he was the Chairman of the adjudication committee.**

**We asked him the difference between the villages. He showed us the two villages whereby Katudini is away from the Mombasa-Nairobi Road, while Chikokolo Kabenderani Village is along Mombasa-Nairobi Highway. He also confirmed the existing of one of the sellers who sold this land and other family members who are still alive and stay near the village. He showed us physically where each plot is located. We came back in the office and reached on the following findings”**

10. Mr. Asige submitted that arising from the above it becomes clear that:-

(a) The disputed land was physically identified by the Minister’s Tribunal when the tribunal confirms that they visited the “**site**” of the disputed land;

(b) That one of the village members came and questioned the Tribunal Members on the “**site**” of the disputed land;

(c) The village member who was the Chairman of the adjudication committee confirmed the existence of one of the sellers who had sold the land and other family members were still alive.

11. Mr. Asige submitted that accordingly, the identity of the land in dispute was identified and is known. Its physical presence was confirmed. It did not matter therefore that the name of the village where the land was situate is called Kafaduni or Kabenderani. The land had been physically identified. Its physical place and presence was indisputable.

12. Mr. Asige referred also to the Interested Party’s witness at **page 32** of the record where the witness had also confirmed in his testimony that “**the disputed parcel of land belonged to us and originally belonged to Mr. Shah (the Applicant herein). It was resolved that the parcel be sold again because it had been sold erroneously and Shah’s money be returned”**.

13. It is to be noted that the Interested Party at **page 29** of the record had told the Adjudication Board Tribunal whose decision gave rise to the appeal before the Minister’s Tribunal as follows:-

**“I came to Mariakani and brought Chief Kahindi and asked him to help me get a parcel of land as he was the local leader. He informed me that there was a land of approximately 9 acres whom the owners wanted to sell and told me that the owners had sold the parcel to Mr. Shah (the Applicant herein) for KShs. 115,000/= and Mr. shah had paid them KShs. 90,000/= but for the last 10 years Mr. Shah was yet to come out and I have his money which the sellers have requested me to refund him.**

**I asked him of the price they wanted and he told me that the price was KShs. 657,000/=.**

**told him to draft an agreement between me and other sellers which he did according to the agreement made and all the sellers consented and I gave them their money (Agreement of sale dated 7/5/1996 presented – executed before the Chief Mariakani”.**

14. Mr. Asige submitted that accordingly, the Interested Party herein knew and was aware that the parcel of land he was purchasing, whatever name of the place where it was situate was, was the land Mr. Shah (the Applicant herein) had initially purchased which was about nine acres by measurement. Counsel submitted that the question as to the name of the village where the land was situate was and is immaterial. Counsel submitted that the Interested Party’s argument that the parcel of land he purchased is different from that the Applicant purchased is therefore false and grossly misleading. The parcel of land the Applicant and Interested Party purchased was the same. Counsel submitted that the Applicant herein was never refunded the money he had paid and did not admit having received or taken any such money from the Chief, one Mr. Kahindi.

15. Mr. Asige submitted that the proceedings before the Minister’s Tribunal is wrought with numerous illegalities and violations of law. These include .....that the Minister’s Tribunal totally ignored to consider or at all address its mind prior to the decision the grievances that were contained in the Applicant’s grounds of Appeal marked as **exhibit “MC5”** which appear at **page 35 and 36** of the record. This was an omission and error in law that entitles the Applicant the orders of certiorari and prohibition as sought in this motion. None of the 5 grounds of appeal were addressed, considered or answered by the Minister’s Tribunal. Instead the Tribunal embarked on dealing with issues and taking steps which were ultra vires its appellate mandate and improper in substance and procedure.

16. Mr. Shimaka for the Interested Party submitted that a Preliminary Objection is premised on the main ground that the Judicial Review Application offends section 9(3) of the Law Reform Act and order 53 rule 2 of the Civil Procedure Rules, 2010. Both provisions of the Law provide that no application for leave can be entertained unless it is made within 6 months of the date of award or order to which the application for the review is sought. The Interested Party relies on the following authorities;

**Rosaline Tubei & 8 others vs. Patrick K. Cheruiyot & 3 others [2014]eKLR, Kimanzi Mboo vs. David Mulwa [1997]eKLR and; Wilson Osolo vs. John Ojiambo & Another [1996]eKLR**

17. Mr. Shimaka submitted that the decision of the Minister and/or District Commissioner Kaloleni District which the Applicant challenges was heard and determined in the year 2013. However, the Applicant filed the Application for Judicial Review on 5<sup>th</sup> November 2015 over 2 years later. The Applicant in his submissions attempts to address the issue by alleging that the decision was certified on 3<sup>rd</sup> August, 2015. Mr. Shimaka urged this court to distinguish between the date the appeal was heard and determined which was in 2013 and the date the decision was certified which was 2015. The Court should understand that the decision was only certified on the 3<sup>rd</sup> August, 2015 when the Applicant sought to have a copy and its trite law that such decision or order would be certified and dated upon issuance. Mr. Shimaka further submitted that the application should be dismissed since the same is frivolous, vexatious and an abuse of the Court process. This is so because the Applicant seeks orders to quash and prohibit a decision that does NOT EXIST at all. Counsel submitted that the court cannot even extend the time as that would still be in breach of **Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules 2010.**

18. Mr. Shimaka submitted that the Interested Party has demonstrated to this Court that the Applicant bought a different plot from the Interested Party’s plot. The Interested Party’s plot was vacant and it is the Interested Party who fenced the same and built a house thereon. As at the time of adjudication the Interested Party is the one who was still in occupation and possession of the Plot hence the same was registered to him as has been confirmed by the Respondent.

### **Determination**

19. From the foregoing, it is clear to this court that both the Applicant and the Interested Party bought the same plot. The Applicant was the first to buy 5 acres of the plot, and he did not complete payments for

the same immediately. Later, the Interested Party came by and offered to buy 9 acres which included the Applicant's 5 acres. Indeed he paid much more money than the Applicant had paid, and it was even agreed that the seller would refund the Applicant the purchase price for the part payment for the 5 acre. I am not sure whether this was done. What is clear is that for whatever reason the Interested Party was able to be registered as the owner of the entire 9 acres after a process of adjudication. This was done after the Minister dismissed the Applicant's appeal. Now, the property has since been registered and divided into two plots being Plot No. Mariakani/Kawala B/1370 and Plot No. Mariakani/Kawala B/1371, and are registered under Land Registration Act. The Interested Party herein made sure that as the parties were disputing ownership, the adjudication was going on, and he ensured that upon the completion of that process, he or his company was duly as first proprietor of the land.

20. What was going on was a process without any transparency. The Minister's Tribunal whose decision is sought to be quashed decided to ignore valid court orders in which a determination of ownership of the property had been made. The Minister's decision was therefore a faulty process. It could not purport to decide on an issue which had already been decided on. The Minister's panel disregarded the Ruling of the High Court which had ruled that the plot belonged to M/s Swaleh Squared Limited who were the predecessors in title to the ex parte Applicant herein. The Minister's panel disregarded the said Ruling when it awarded and ordered the land to be registered in favour of Al-Itgan Company Limited. Further, the Minister's decision dated 3<sup>rd</sup> August, 2015 was signed by only one person, and does not even state who were the other members.

21. As to whether the Judicial Review proceedings herein are time barred, it is the finding of this court that the Minister's decision is not dated. Although the Interested Party alleges that the decision was made in 2013, there is no evidence of that allegation. The only date visible on record is 3<sup>rd</sup> August, 2015. It is the date the decision was certified. For all practical purposes and applications, that is the relevant date. Who said a decision cannot be certified on the same date it is issued? The submissions by the Interested Party that the decision sought to be quashed is time barred is therefore not correct since the decision is certified and dated 3<sup>rd</sup> August, 2015 while the current proceedings are dated 28<sup>th</sup> October, 2015. The proceedings herein are within the time limit under the Civil Procedure Act and under the Law Reform Act.

22. Accordingly, therefore, it is the finding of the court that the Minister's decision certified and communicated to the Applicant on 3<sup>rd</sup> August, 2015 is an abuse of statutory power, unreasonable, and irrational and made without jurisdiction and in breach of the provisions of the Land Adjudication Act, was made in bad faith and in error of fact and in breach of natural justice. Accordingly, the Notice of Motion dated 28<sup>th</sup> October, 2015 is allowed as prayed with costs to the ex parte Applicant.

Orders accordingly.

**Dated, Signed and Delivered in Mombasa this 6<sup>th</sup> day of June, 2017.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Asige for Ex parte Applicant

Mr. Shimaka for Interested Party

Mr. Makuto for Respondent

Mr. Kaunda Court Assistant