



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JR. MISC. CIVIL APPLICATION NO. 118 OF 2010

(CONSOLIDATED WITH JR NO. 65 OF 2011)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE LAND ADJUDICATION ACT, CAP 282 OF THE LAWS OF
KENYA

AND

IN THE MATTER OF: KAWALA 'B' ADJUDICATION SECTION KILIFI ADJUDICATION
AREA

BETWEEN

1. ATHMAN MBOSIO MWAKULU

2. KIMANZI ELIJAH MWAKULU.....APPLICANTS

AND

THE COMMISSIONER OF LANDS.....RESPONDENT

AND

1. ANTONY MTEKE MUDACHI

2. RICHARD KALUNDU MDACHI

3. AMOS KILONGO KATETEI

4. ABSAL & SONS ENTERPRISES.....INTERESTED PARTIES

RULING

1. ATHMAN MBOSIO MWAKULU and KIMANZI ELIJAH MWAKULU (hereinafter jointly called

“the ex parte Applicants”) filed a Notice of Motion dated 22nd October, 2010 in which they seek an **order of certiorari** to remove to the High Court for the purposes of quashing the decision of the Respondent contained in the Grant registered as C.R. No. 47848 dated 23rd April, 2010 in respect of LR No. 28164.

2. The Application is supported by the Verifying Affidavit of ATHMAN MBOSIO MWAKULU sworn on 19th October, 2010 and the Statutory Statement dated 19th October, 2010.

3. The case was consolidated with Mombasa Miscellaneous Application No. 65 of 2011 (JR) (hereinafter “J.R No. 65 of 2011”) which is also between the same parties save that the Respondent in J.R No. 65 of 2011 is the Director of Land Adjudication and Settlement and not the Commissioner of Lands.

The Ex-Parte Applicants' Case

4. The ex parte Applicants' case, in a nutshell, is that the Government of Kenya, on 9th April 2010, declared **Kawala “B”** to be an Adjudication Section after which the ex parte Applicants were adjudicated as owners of **Plot 10** in the said Adjudication Section.

5. The ex parte Applicants argue

(a) that on 23rd April, 2010, the Respondent issued a Grant for 99 years to the 1st 2nd and 3rd Interested Parties herein over **LR. No. 28164** which is part of the Adjudication Section yet the portion demarcated for the said LR. No. 28164 was never exempted from the adjudication process.

(b) that the only parcels that had been exempted from the adjudication process by the Commissioner of Lands in his letter dated 4th February 2010 were plots L.R No. 23914, L.R. No. 21623, L.R. No. 27243 and L.R. No. 7242.

(c) that LR. No. 28164 was not among the exempted parcels.

(d) that indeed, the Kilifi District Land Adjudication and Settlement Officer in a letter dated 12th October 2010 confirmed that parcel LR. No. 28164 was not excluded from the notice which had declared Kawala B to be an Adjudication Section.

6. The ex parte Applicants contend that the Respondent's action to issue the Grant for a parcel of land that is part of the larger Adjudication Section without the said portion having been exempted from the adjudication process is unlawful, illegal, null and void for being: *ultra vires* the Land Adjudication Act and the Government Lands Act; in breach of the rules of natural justice; contrary to the legitimate expectation of the ex parte Applicants; contrary to public policy and interest; made in bad faith; and abuse of power.

7. The ex parte Applicants submit that while these proceedings were pending determination, the Respondent wrote a letter dated 21st April 2011 to the Director of Land Adjudication and Settlement advising that parcel LR. No. 28164 be exempted from the adjudication process of Kawala 'B' because the Respondent did not accord the ex parte Applicants an opportunity to be heard yet the Plot No. 10 from which LR. No. 28164 was carved out had been registered in favour of the ex parte Applicants through the adjudication process. The ex parte Applicants also argued the failure to notify and accord the ex parte Applicants a hearing was in bad faith, in breach of the rules of natural justice as well as in breach the ex parte Applicants' legitimate and reasonable expectation. The ex parte Applicants relied on the case of **COMMISSIONER OF LANDS v. KUNSTE HOTEL LIMITED [1997] eKLR** where the Court of Appeal (AKIWUMI, PALL, J.J.A. & BOSIRE AG.J.A) stated as follows:

“The issue we are concerned with here, and which is the crux of the matter in this appeal, is not whether Kunste Hotel Ltd has any right to the plot, but whether its interest in the subject plot was sufficient and, in the circumstances of this case so obvious that the appellant was obliged to consult or hear it prior to his decision to allot the plot to the interested party.

There is material on record to show that the appellant consulted various parties before he decided to allot the plot to the interested party. It was common ground before the superior Court, and even before us, that Kunste Hotel Ltd. was not one of the parties which were consulted. So the issue which immediately presents itself is whether it should have been consulted...

The appellant was exercising his statutory powers under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision (see, Mirugi Kariuki v. A.G.) Civil Appeal No. 70 of 1991 (unreported). It is, therefore, our view and we so hold, that the appellant should have consulted the hotel along with the other parties before he decided to allot the plot to the interested party.”

8. The ex parte Applicants also contend that the Respondent's letter dated 21st April 2011 to the Director of Land Adjudication and Settlement advising that parcel LR. No. 28164 be exempted from the adjudication process of Kawala 'B' was a clear manoeuver intended to defeat these proceedings by seeking to sanction the illegal process that had been committed by the Respondent.

9. It is the ex parte Applicants' submission that sections 5 to 29 of the Land Adjudication Act which set out the procedure to be followed in declaring an area to be an adjudication section do not reserve any residual right to the Respondent and the Director of Land Adjudication and Settlement to deal with land declared as an adjudication section in any manner other than as stipulated in the said Act. In the circumstances therefore, from 9th April, 2010 when Plot No. 10 Kawala 'B' was declared as an adjudication section any dealings in respect of it was supposed to be guided by the provisions of the said Act which required all claims of rights or interest thereof to be lodged with the recording officer. In conclusion the ex parte Applicants argued that the procedure adopted by the Respondent in exempting LR. No. 28164 from the adjudication process is not recognized by the Land Adjudication Act and is therefore *ultra vires* and/or without jurisdiction.

The Respondent's Case

10. The Respondent did not file any response to the application or participate in these proceedings.

The Interested Parties' Case

11. The 1st and 2nd Interested Parties filed a joint Replying Affidavit sworn by ANTHONY MTEKE MUDACHI on 11th February, 2011 and a Further Replying Affidavit sworn by the same deponent on 30th September, 2014.

12. The Interested Parties stated that they are the registered trustees of the land known as LR. No. 28164 which they hold on behalf of the Mwakulu family that comprise of nine brothers. They deponed that the 3rd Interested Party is now deceased.

13. It is the Interested Parties' case that LR. No. 28164 had already been registered prior to the adjudication process of Kawala 'B'. They deponed that the entire Kawala 'B' originally comprised of 38 acres but 12 acres had been curved out and registered as LR. No. 28164 leaving only 26 acres as subject of the adjudication process.

14. The deponent stated that the Interested Parties started the process of obtaining Grant No. 47848 in respect of LR. No. 28164 way back in 2002, and that the Deed Plan No. 2983/6 in respect of the same was approved by the Director of Surveys on 26th June, 2009 and the Title Deed issued on 23rd April, 2010 for a 99 year lease from 1st June, 2008, the date the said parcel was registered by the Ministry of Lands. They argued that LR. No. 28164 is not part of the adjudication process as it was already registered when the greater area was declared an adjudication section on 9th April, 2010. Further that even though

the Adjudication Officer declared and set aside the portion known as Kawala 'B' for adjudication, the said declaration cannot override the rights of registered owners of the land.

15. The Interested Parties submitted that LR. No. 28164 was set apart in accordance with the provisions of **Trust Land Act** [Cap. 288 of the Laws of Kenya] and the procedure was duly followed, that the procedure under the Trust Land Act is totally different from the one under the Land Adjudication Act and does not involve the District Adjudication and Settlement Officer.

16. The Interested Parties further argued that the setting apart of LR. No. 28164 was published under Gazette Notice No. 2458 dated 27th February 2008 but the ex parte Applicants did not raise any objection. They also argued that since the ex parte Applicants have not questioned the procedure of setting apart LR. No. 28164 under the Trust Land Act, they have not established any procedural defects on the part of the Respondent, that by reason of **Section 58** of the Trust Land Act, any parcel of land that has been set apart in accordance with the Act cannot be subject of adjudication under the Land Adjudication Act. Section 58 of the Trust Land Act provides that:

“Save where provision to the contrary is expressly made in this Act, no appeal shall lie from any decision given, order made or matter or thing done under this Act.”

17. Further, the Interested Parties submitted that the provisions of Land Adjudication Act are only applicable to un-adjudicated land yet LR. No. 28164 had already been allocated to the Interested Parties by the time the area was declared an adjudication section and that a title already issued under the Trust Land Act cannot be canceled by a mere declaration of an area as an adjudication section.

18. Further, that there is no legal provision in the Land Adjudication Act that specifically refers to the term or document called **“exemption”** hence the exemption referred to by the Respondent in the letter dated 21st April 2011 was no more than simple information that the subject land had been set apart and the procedure for issuance of title initiated under Trust Land Act; that since the setting apart of LR. No. 28164 had been gazetted, the same should have been excluded from the adjudication process as a matter of course, that this is especially so because the setting apart of LR. No. 28164 was done in 2002 yet the declaration of Kawala 'B' as an adjudication section was done in 2010.

19. The Interested Parties therefore submit that the actions of the Respondent cannot be held to be *ultra vires* since they were done in strict compliance with the provisions of the Trust Land Act and the ex parte Applicants have not alleged that the process under the Trust Land Act was unlawful or procedurally flawed.

20. The 3rd Interested Party did not file any response to the application or participate in the proceedings. He is deceased.

21. The 4th Interested Party filed a Replying Affidavit sworn by ABSALAM HASSAN ISMAIL on 15th June 2011 and a Further Replying Affidavit sworn by ABDUL SALAAM on 21st April 2015.

22. The gist of the 4th Interested Party's case is that on 30th April, 2010, it purchased from the ex parte Applicants part of Plot No. 10 Kawala 'B' measuring 20 acres for a consideration of Kshs. 6,000,000.00, that the purchase was referred to the Land Adjudication Department of the Ministry of Lands who verified the same and designated the purchased portion as parcel No. 309. That thereafter, upon completion of the adjudication process, a title for parcel No. 309 was to be issued in the name of the 4th Interested Party.

23. Although not pleaded directly, it appears that the 4th Interested Party is supporting the application as it pleads that the First and Second Interested Parties are engaged in various manoeuvres to deprive it of its portion of the land.

The Issue for Determination

24. Having carefully perused the application, the statutory statement, the affidavits in support and in opposition thereto, the documents filed by the parties as well as the parties' written submissions, it is my view that the issue for the court's determination is whether the application merits the granting of judicial review remedy of certiorari as sought by the ex parte Applicants.

Analysis

25. The ex parte Applicants are aggrieved by the Respondent's decision to grant to the First, Second and Third Interested Parties parcel LR. No. 28164 which they claim is part of the Kawala 'B' Adjudication Section, without the said parcel having been exempted from the adjudication process. They claim that the issuance of the title for LR. No. 28164 was erroneous and in breach of the provisions of the Land Adjudication Act and the same should be quashed.

26. The First and Second Interested Parties on the other hand contend that the process leading to the issuance of the Grant for LR. No. 28164 was undertaken under the Trust Land Act and not the Land Adjudication Act. Therefore they contend the process cannot be nullified on the basis that the Respondent did not comply with the provisions of the Land Adjudication Act.

27. I wish to start by referring to the holding in the case of **COMMISSIONER OF LANDS vs. KUNSTE HOTEL LIMITED [1997] eKLR** where the Court of Appeal discussed the purpose of judicial review as follows:

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See; R v. Secretary of State for Education and Science ex parte Avon County Council [1991] 1 ALL ER.282, at p. 285.). The Point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155, by Lord Hailsham of St. Marylebone, thus:

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."

28. In the case of **REPUBLIC V ISAAC THEURI GITHAE & ANOTHER [2007] eKLR**, it was held that:

“The purpose and purview of judicial review proceedings is confined to the decision making process. The Court in an application for an order of judicial review is not concerned with the merits or otherwise of the decision or threatened action. It is intended to ensure that an inferior tribunal or authority he has been subjected to has given the individual affected fair treatment. The authority is the one mandated to make a decision on the merits and the court should not attempt to substitute its decision or opinion in place of that of the tribunal or authority constituted by law to decide the matters in issue.

The court intervenes where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law on the face of the record, where it has failed to observe rules of natural justice or where the authority has acted unreasonably. In those circumstances the court will call for the decision for purposes of quashing it by an order of certiorari. But normally where there is a threatened breach of any of the foregoing principles the court will issue an order of prohibition to prevent the threatened breach.” (underlining mine)

29. The tussle between the parties herein is that one side (the ex parte Applicants' side) contends that the Respondent, in issuing the title for LR. No. 28164, violated the provisions of the Land Adjudication Act while the other side (the First and Second Respondents' side) contends that the applicable law is the Trust

Land Act and which the Respondent complied with.

30. To address the issue, I must refer to the definition and the regime governing Trust land at the material time. **Section 3** of the Interpretation and General Provisions Act [Cap. 2 of the Laws of Kenya] defines Trust land as “**land which is for the time being and for the purposes of the Constitution Trust land**”. The applicable Constitution at the time was the repealed Constitution of Kenya which provided at **Section 115 (1)** that “**all Trust land shall vest in the county council within whose area of jurisdiction it is situated.**”

31. **Section 117** of the repealed Constitution provided in relevant part that:

“(1) Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation -

(a) ...

(b) ...

(c) by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

(2) Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

(3) Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.”

32. For purposes hereof, the Act of Parliament referred to in Section 117 (1) of the repealed Constitution is the Trust Land Act, [Cap. 288 of the Laws of Kenya] which provides in **Section 13** that:

“(1) In pursuance of section 117 (1) of the Constitution, a council may set apart an area of Trust land vested in it for use and occupation—

(a) by any public body or authority for public purposes; or

(b) for the purpose of the extraction of minerals or mineral oils; or

(c) by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.

(2) The following procedure shall be followed before land is set apart under subsection (1) of this section—

(a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the

meeting;

(b) the council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;

(c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

(d) the recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council:

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.

(3) Where the council approves a proposal to set apart land in accordance with subsection (2) (d) of this section, the council shall cause a notice of the setting apart to be published in the Gazette.”

33. The First and Second Interested Parties have adduced evidence indicating that:

(a) On a date not specified, the First, Second and Third Respondents applied for the setting apart of the subject land.

(b) On 7th June, 2002, the Town Council of Mariakani discussed the setting apart and approved the same.

(c) On 17th July, 2007, the Divisional Board discussed the matter under Minute No. 14 of 2007 and approved the setting apart.

(d) On 26th July, 2002, the Town Council of Mariakani approved the setting apart.

(e) On 14th November, 2007, the Clerk, Town Council of Mariakani wrote to the Commissioner of Lands requesting for the processing of the Letter of Allotment and the Title Deed in favour of the First, Second and Third Interested Parties.

(f) On 27th February, 2008, the Commissioner of Lands published Gazette Notice No. 2458 indicating that the land was set apart by the Commissioner of Lands in accordance with the provisions of Part IV of the Trust Land Act for commercial purposes.

34. Section 53 of the Trust Land Act provides as follows:

“The Commissioner of Lands shall administer the Trust land of each council as agent for the council, and for that purpose may—

(a) exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13 (2) (d) of this Act; and

(b) execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient:

Provided that—

(i) the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him; and

(ii) the Minister may, by notice in the Gazette, terminate the Commissioner of Land’s power to act under this section in relation to the Trust land of any particular council, where the Minister is satisfied that the council has made satisfactory arrangements to administer its Trust land itself.”

35. By publishing Gazette Notice No. 2458, the Respondent acted on behalf of the Town Council of Mariakani as provided in the above section.

36. The Letter of Allotment of the said land was issued to the First, Second and Third Interested Parties on 5th June, 2008. However, the Grant was **not issued until 23rd April, 2010**. By the time the Grant was issued however, the larger area where the subject land is located, Kawala 'B' Plot 10, had been declared an Adjudication Section on 9th April, 2010.

37. The ex parte Applicants have not challenged the process leading to the setting apart of LR. No. 28164. Their only complaint is that the Grant should not have been issued because the land was part of the larger Kawala 'B' Plot 10, which had been declared an Adjudication Section on 9th April, 2010 and was therefore not available for setting apart.

38. The documents produced in court show that the process of setting apart the subject land started in 2002. The ex parte Applicants have not disputed the said fact or presented contrary evidence. The question is, was parcel number LR. No. 28164 available for adjudication as at 9th April, 2010?

39. **Section 117 (2)** of the repealed Constitution quoted above provided that where a county council has set apart an area of land in accordance with the said section 117, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished. Clearly therefore, immediately the Town Council of Mariakani concluded the process of setting apart the subject land culminating with the registration of the same in favour of the First, Second and Third Interested Parties and the issuance of the Letter of Allotment on 5th June, 2008, the rights of any other person, including the ex parte Applicants over the said land were extinguished by express provision of the law. The said land was therefore not available for adjudication.

40. By including LR. No. 28164 as part of Plot 10 in the notice of 9th April, 2010, the District Land Adjudication and Settlement Officer made a mistake. Indeed the mistake was discovered by the Commissioner of Lands who by a letter dated 21st April, 2011 corrected the error and advised that LR. No. 28164 be exempted from the adjudication process.

41. I do not think that either the Commissioner of Lands (Respondent in JR. No. 118 of 2010) or the Director of Land Adjudication and Settlement (Respondent in JR. No. 65 of 2011) can be faulted for excluding LR. No. 28164 from the adjudication process and issuing a Grant in favour of the First, Second and Third Interested Parties.

42. The Respondents followed the law and corrected the mistake that had been made in including LR. No. 28164 as part of the Adjudication Section of Plot 10 Kawala 'B'. They did not breach any law by doing so, act in excess of any jurisdiction or without jurisdiction, or fail to observe any rule of natural justice or act unreasonably to attract or warrant remedy through judicial review.

43. Finally, section 53 of the Trust Land Act provides that unless with express provision in the Act, no appeal shall lie from any decision given, order made or matter or thing done under the Act. Therefore, the moment the process of setting apart the subject land was procedurally concluded in accordance with the Trust Land Act, the same was not amenable to appeal.

44. For all these reasons, I find no merit in both Applications in this case and Judicial Review No. 65 of 2011 are both dismissed with costs to the First, Second and Estate of the Third Interested Parties.

45. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 4th day of March, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Mogaka for Applicants

Miss Lutta for Respondent

No Appearance for 1st, 2nd and 3rd Interested Parties

Miss Obura for 4th Interested Party

Mr. Kaunda Court Assistant