



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MACHAKOS**

**ELC. MISC. JUDICIAL REVIEW APPLN. NO. 69 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA**

**AND**

**ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF ARTICLES 10, 23, 40, 47, 50 & 159 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF THE LAND ACT, ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF THE REPORT BY THE TASK FORCE ON KATELEMBO ATHIANI MAPUTI FARMING AND RANCHING CO-OPERATIVE SOCIETY LIMITED (KATELEMBO TASK FORCE)**

**AND**

**IN THE MATTER OF L.R. NO. ATHI RIVER/ ATHI RIVER BLOCK 1/1139**

**BETWEEN**

**KANAN DAIRY LIMITED.....APPLICANT**

**VERSUS**

**THE TASK FORCE ON KATELEMBO ATHIANI MAPUTI FARMING**

**AND RANCHING CO-OPERATIVE SOCIETY.....1<sup>ST</sup> RESPONDENT**

**KATELEMBO ATHIANI MAPUTI FARMING AND RANCHING**

**CO-OPERATIVE SOCIETY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Pursuant to leave granted by this Court on 5<sup>th</sup> December, 2019. The Applicant filed a Notice of Motion dated 18<sup>th</sup> December, 2018 seeking for the following orders:

***a) That an order of certiorari to issue to bring into this Honourable Court for quashing the findings, Ruling, recommendations and Report of the Task Force on Katalambo Athiani Muputi Farming and Ranching Co-operative Society Limited made on 22<sup>nd</sup> August, 2019 relating to the Applicant's Title Deed over property L.R No. Athi River/ Athi River Block 1/1139.***

***b) An order of prohibition to issue against the Respondents prohibiting them from implementing or enforcing the offensive recommendations and Ruling contained in the Report by the Task Force on Katalambo Athiani Muputi Farming and Ranching Co-operative Society Limited made on 22<sup>nd</sup> August, 2019 relating to the Applicant's Title Deed over property L.R No. Athi River/ Athi River Block 1/1139.***

***c) Costs be provided for.***

2. The Application is supported by a Statutory Statement and a Verifying Affidavit sworn on 3<sup>rd</sup> December, 2019 by Daniel Zuriel Mbithi, the Applicant's Director. The Applicant's Director deponed that the Applicant is the registered and lawful owner of land known as Athi River/Athi River Block 1/1139 ("*hereinafter referred to as the "suit property"*") and in occupation thereof.

3. The Applicant's Director deponed that the Applicant purchased the suit property in April 2014 from one Joseph Muthama and immediately took vacant possession thereof; that the Applicant has since developed the suit property into a dairy farm and that the 4<sup>th</sup> Respondent and her late husband have never held title to the suit property.

4. The deponent averred that sometimes in 2016, the 1<sup>st</sup> Respondent invited the Applicant for a public hearing before it and that during the hearing, the Applicant was informed that the 4<sup>th</sup> Respondent who is a widow of one John Makau (*deceased*), had made a claim to the suit property on the ground that it had been allocated to her late husband by the 2<sup>nd</sup> Respondent prior to his death way back in 1999.

5. The Applicant's Director deponed that when he appeared before the 1<sup>st</sup> Respondent, he explained how he acquired the suit property from one Joseph Muthama and that it emerged during the proceedings that the previous owner, Joseph Muthama, had acquired the suit property from one Agnes Mutindi Makau, a widow and personal representative of the Estate of one John Makau (*deceased*) who also died in 1999.

6. The deponent averred that the evidence exhibited at the hearing by the 2<sup>nd</sup> Respondent showed that there were two separate members under a similar name John Makau in its register; that the 2<sup>nd</sup> Respondent's register showed that the two John Makau were allotted parcels of land by the 2<sup>nd</sup> Respondent and that they both died in 1999.

7. It was deponed by the Applicant's Director that notwithstanding the dispute concerning who of the two deceased John Makau's was the rightful allottee of the suit Property, the 1<sup>st</sup> Respondent went ahead and made its decision without hearing Agnes Mutindi Makau, the widow and personal representative of John Makau, who sold the property to Joseph Muthama prior to the transfer of the same to the Applicant.

8. The deponent pointed out that the 1<sup>st</sup> Respondent was appointed by the 3<sup>rd</sup> Respondent pursuant to the Gazette Notice No. 1949, Vol. CXIX-No. 27 of 3<sup>rd</sup> March, 2017 for a term of three (3) years; that according to the Gazette Notice, the Terms of Reference for the 1<sup>st</sup> Respondent were limited to: Firstly updating the Members Register and compiling a list of all *bona fide* members of the Society; Secondly, establishing the total original acreage of the Society's land prior to sub-division; Thirdly, establishing how many plots were demarcated from the Society's land (*20.4 acres and 0.5 acre plots*); Fourthly, ascertaining what land was due to each of the members (*both 2.04 and 0.5 acre*); Fifthly, establishing what specific parcels of land each member of the Society was allocated; Sixthly, establishing and identifying what public utilities were set aside and the current status of each; and finally, establishing if any land was left in the name of the Society after the sub-division and its current status.

9. The Applicant's Director deponed that on 22<sup>nd</sup> August, 2019, the 1<sup>st</sup> Respondent, in excess of powers vested in it, released its Report and made drastic recommendations concerning the suit property; that the 1<sup>st</sup> Respondent, *inter alia*, purported to revoke the Title Deed held by the Applicant over the suit property and that the Applicant was ordered by the 1<sup>st</sup> Respondent to immediately vacate the suit property and hand over vacant possession to the 4<sup>th</sup> Respondent.

10. The Applicant's Director deponed that in view of the Ruling and recommendations by the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent infringed on the Applicant's right to property; that the 1<sup>st</sup> Respondent failed to hear and or call Agnes Mutindi Makau to testify and that the 1<sup>st</sup> Respondent acted in excess and went far beyond the mandate and terms of reference of the Task Force as contained in the Gazette Notice.

11. In opposition, the 4<sup>th</sup> Respondent swore a Replying Affidavit on 28<sup>th</sup> February, 2020 in which she deponed that the land known as Athi River/Athi River Block 1/1139 (*also known as Plot 519*) was allocated to her late husband, John Makau, who was member number 2384 of Katalambo Society Limited.

12. The 4<sup>th</sup> Respondent admitted that the 1<sup>st</sup> Respondent was appointed vide Gazette Notice 1949 and conducted a hearing in respect of a dispute relating to the suit property and that in its report, the 1<sup>st</sup> Respondent found that she was the lawful owner of the suit land and ordered the Applicant to vacate the suit land. It was her deposition that the Applicant was not entitled to the orders sought; that the Applicant obtained the suit land unlawfully and fraudulently and that the Title Deed held by the Applicant was illegally processed.

13. The Application was canvassed vide written submissions. According to submissions filed by the Applicant's advocate, the three issues for determination by the court are: whether the 1<sup>st</sup> Respondent acted within its powers; whether the 1<sup>st</sup> Respondent had jurisdiction to decide on the validity of the Title Deed held by the Applicant; whether the procedure adopted by the 1<sup>st</sup> Respondent in arriving at its Ruling and recommendations was legal and whether the Applicant is entitled to the reliefs sought.

14. On the first issue, learned counsel for the Applicant submitted that pursuant to the Gazette Notice No. 1949, Vol. CXIX-No. 27 of 3<sup>rd</sup> March, 2017, through which members of the 1<sup>st</sup> Respondent were appointed, the 1<sup>st</sup> Respondent's terms were limited to issues concerning: land owned by the Society; register of members of the Society; updating the register of the *bona fide* members of the Society; parcels of land allocated to members of the Society; and parcels of land due to members of the Society.

15. According to counsel, the suit property was occupied, owned and registered in the name of the Applicant herein; that the suit property did not form part of the assets of the 2<sup>nd</sup> Respondent (*the Society*) or its membership and that the 1<sup>st</sup> Respondent did not have jurisdiction to revoke the Applicant's title to the suit property.

16. The Applicant's counsel relied on the provisions of Section 26(1) of the Land Registration Act, 2012, which provides that a title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements, restrictions and conditions contained or endorsed in the certificate; that such a title can only be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme and that the suit property having been transferred by the 2<sup>nd</sup> Respondent to Joseph Muthama and title issued, it ceased to be the property of the 2<sup>nd</sup> Respondent capable of adjudication by the 1<sup>st</sup> Respondent.

17. The Applicant's counsel took issue with the Chief's letter identifying the 4<sup>th</sup> Respondent as a wife of the late Mr. Muthama. Counsel relied on the case of *Njuwangu Holdings Ltd vs. Langata KPA Nairobi & 5 others [2014] eKLR* where the court rendered itself as follows:

*"As matters now stand, the Plaintiff who has a registered title over the suit property has a superior title to the 1<sup>st</sup> Defendant who only holds a letter of allotment...it is my view that a letter of allotment cannot override a duly registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of the party who holds the registered title have crystallized as opposed to that of the party holding a letter of allotment which is yet to crystallize."*

18. On the issue of jurisdiction, the Applicant's counsel cited the case of *Job Muriithi Waweru vs. Patrick Mbatia [2008] eKLR* where the court stated that: *"Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity..."*

19. It was submitted that the 1<sup>st</sup> Respondent lacked jurisdiction to render the decision that it made because the Applicant is a non-member of the Society; that the Applicant is the registered owner of the suit property with a validly registered title and that the Applicant's title was issued under the Land Registration Act, 2012.

20. Counsel cited the provisions of Section 25 of the Act on the rights of a proprietor which provides as follows:

*"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..."*

21. According to the Applicant's counsel, the Applicant's proprietary rights over the suit property can only be defeated through a procedure provided for under the Act and that the Applicant's title can only be cancelled by the Registrar of Land or the court.

22. On the second issue, the Applicant's counsel placed reliance on Article 47(1) of the Constitution and Section 4 of the Fair Administrative Actions Act that provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Reliance was also placed on Article 50(1) of the Constitution that grants every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.

23. Counsel cited the Court of Appeal case of *Municipal Council of Mombasa vs. Republic and Umoja Consultants Ltd. Civil Appeal No. 185 of 2001* and the Ugandan case of *Pastoli vs. Kabete District Local Government Council & Others (2008) EA 300*, that rendered opinions on procedural impropriety as follows:

*"Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."*

24. Counsel pointed out that the mandate and the procedure to cancel and or revoke a validly registered title is provided for in Sections 79, 80 and 87 of the Land Registration Act, 2012. It was therefore counsel's position that the 1<sup>st</sup> Respondent failed to adhere to and observe the procedural rules expressly laid down in the statute on cancellation of Title Deeds. None of the Respondents' submissions are on record.

25. Having considered the pleadings and the submissions on record, the issues for determination are whether the 1<sup>st</sup> Respondent acted within its powers; whether the 1<sup>st</sup> Respondent had jurisdiction to decide on the validity of the Title Deed held by the Applicant; whether the procedure adopted by the 1<sup>st</sup> Respondent in arriving at its Ruling and recommendations was legal and whether the Applicant is entitled to the reliefs sought.

26. Under Order 53 Rule 2 of the Civil Procedure Rules, a decision made by a public body or any decision maker can only be challenged by an aggrieved party. For one to succeed under Judicial Review, it is trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

27. The tests to be met and considered by a Judicial Review court were rendered by *Hilary Delany* in his book "*Judicial Review of Administrative Action*" 2001 Sweet and Maxwell at pages 5 and 6 as follows:

*"...Judicial review is concerned not with the decision, but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner... not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality..."*

28. In addition, the Learned Authors *De Smith* and others in their book *Judicial Review of Administrative Action* at Para 16-008 wrote as follows:

*"...The prerogative orders may be granted either singly or in combination..."*

29. The first, and which might be the only issue, for determination is whether the 1<sup>st</sup> Respondent had the requisite jurisdiction to make the findings it made on 22<sup>nd</sup> August, 2019.

30. The Applicant produced in evidence Gazette Notice No. 1949, Vol. CXIX-No. 27 of 3<sup>rd</sup> March, 2017 appointing members of the 1<sup>st</sup> Respondent for a term of three (3) years. The Terms of Reference for the 1<sup>st</sup> Respondent were limited to: *updating the Members Register and compiling a list of all bona fide members of the Society; establishing the total original acreage of the society land prior to sub-division; establishing how many plots were demarcated from the Society lands (20.4 acres and 0.5 acre plots); ascertaining what land was due to each of the members (both 2.04 and 0.5 acre); establishing what specific parcels of land each member of the Society was allocated; establishing and identifying what public utilities were set aside and the current status of each; and establishing if any land was left in the name of the society after the sub-division and its current status.*

31. The 1<sup>st</sup> Respondent was also required to establish if there are any squatters in the land; propose the way forward regarding the squatters; where an illegality has occurred, to pin point the persons culpable and propose an appropriate action to be taken and to make findings and compile a report for presentation to the CEC Member of the Machakos County Government.

32. The impugned Report of the 1<sup>st</sup> Respondent is dated 22<sup>nd</sup> August, 2019. The Report is titled as follows:

***"THE TASK FORCE IN THE MATTER OF LAND DISPUTE BETWEEN JOHN MAKAU, MARTINISHI WAMBUA (CLAIMANTS) VS KANA DAIRY (DR. DANIEL ZURIEL MBITHI) AGNES MITINDI MAKAU JOSEPH MUTHAMA (RESPONDENTS)."***

33. The Report shows that the "Task Force" – the 1<sup>st</sup> Respondent - sat at Machakos Co-operative Board Room to deliberate over the Land Dispute relating to parcel number Athi River/ Athi River Block 1/1139 (*the suit property*). After hearing the claimants and the ex-parte Applicant on the said date, the 1<sup>st</sup> Respondent made the following "Taskforce Decision":

*i. Kanan Dairy vacate plot 519 also known as Athi River/ Athi River Block 1/1139.*

*ii. Athi River/ Athi River Block 1/1139 be revoked and revert back to Katelembo Society.*

*iii. Beatrice Nzakwa Makau take possession of her land immediately.*

*iv. Kanan Dairy (Dr. Zuriel Mbithi) take legal action against Agnes Mutindi Makau and Joseph Muthama to get compensation in terms of money or land.*

*v. Kanan Dairy (Dr. Zuriel Mbithi) follow up with the person (Joseph Muthama) who sold him the land."*

34. From the above decision, it is obvious that the 1<sup>st</sup> Respondent purported to revoke the Title Deed in respect to the suit property, and ordered for the eviction of the registered proprietor of the suit property, the Ex parte Applicant, from the said land.

35. In *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1* Nyarangi, JA expressed himself on the issue of jurisdiction as follows:

*"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

36. Similarly, the Supreme Court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR* expressed itself as follows:

*"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of Law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."*

37. From the above decisions, it is trite that the jurisdiction of a Court, Tribunal or anybody exercising quasi-judicial or public functions flows from the Constitution or legislation or both. A court or Tribunal cannot confer on itself jurisdiction.

38. It is not in dispute that the proceedings before the 1<sup>st</sup> Respondent was in respect of a Land Dispute. Indeed, the nature of the proceedings before the 1<sup>st</sup> Respondent can be described as having been a hearing and determination on the question of occupation, title and use of land known as Athi River/Athi River Block 1/1139 (*the suit property*). The said dispute was eventually decided in favour of the 4<sup>th</sup> Respondent wherein the 1<sup>st</sup> Respondent ordered for the eviction of the Ex parte Applicant and for the cancellation of the Ex Parte Applicant's title.

39. The only organs authorized by the Constitution and statute to hear disputes concerning the use and occupation of, and title to land, are the Environment and Land Court and the Magistrate's Court, and not a Task Force appointed by the County Executive Member of the County Government of Machakos.

40. Article 162 (2) (b) of the Constitution provides as follows:

*"(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

*(b) the environment and the use and occupation of, and title to, land."*

41. The statutory mandate of this court and the Magistrate's Court is provided for by the Environment and Land Court Act. Section 13(1) of the Environment and Land Court Act provides as follows:

*"Jurisdiction of the Court*

*(i) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land."*

4. Section 9 (a) of the Magistrates Act provides as follows:

*"9. A Magistrate's Court shall-*

*(a) In the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act and subject to the pecuniary limits Cap. I2A under section 7(1), hear and determine claims relating to —*

*(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, chores in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.”

43. To the extent that the County Government of Machakos does not have any mandate under the Co-operative Societies Act to establish a Task force to resolve land disputes involving the Respondents and the Ex parte Applicant, or at all, and in view of the constitutional and statutory provisions giving such jurisdiction to only the Environment and Land Court and the Magistrate’s Court, I find that the decision of the 1<sup>st</sup> Respondent dated 16<sup>th</sup> May, 2018 was *ultra vires*, null and void.

44. Having found that the 1<sup>st</sup> Respondent did not have jurisdiction to arrive at the findings of 22<sup>nd</sup> August, 2019, and having declared the said decision null and void for want of jurisdiction, I will not delve into the other issues raised by the Ex-parte Applicant.

45. For those reasons, I allow the Notice of Motion dated 18<sup>th</sup> December, 2019 as follows:

***a) An order of certiorari be and is hereby issued to bring into this Honourable Court for quashing the findings, ruling, recommendations and Report of the Task Force on Katalembo Athiani Muputi Farming and Ranching Co-operative Society Limited made on 22<sup>nd</sup> August, 2019 relating to the Applicant’s Title Deed over property L.R No. Athi River/ Athi River Block 1/1139.***

***b) An order of prohibition be and is hereby issued against the Respondents prohibiting them from implementing or enforcing the offensive recommendations and ruling contained in the Report by the Task Force on Katalembo Athiani Muputi Farming and Ranching Co-operative Society Limited made on 22<sup>nd</sup> August, 2019 relating to the Applicant’s Title Deed over property L.R No. Athi River/ Athi River Block 1/1139.***

***c) Each party to pay its own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2020.**

**O.A. ANGOTE**

**JUDGE**