REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. NO. 43 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND OFFICER, KILIFI

THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT

THE CHIEF LAND REGISTRAR.....RESPONDENTS

EX-PARTE

MOHAMEDMENZA YAMA

JUDGMENT

1. The Ex-parte Applicant pursuant to leave granted by the court on 28th October, 2019 filed the substantive motion dated 14th November, 2019. The application is brought under Sections 1A & 1B of the Civil Procedure Act, Order 51 Rule 1, and Order 53 Rule 3 of the Civil Procedure Rules and all other enabling powers and provisions of law and is seeking the following orders:-

> **(a) That this Honourable Court be pleased to grant an order of certiorari to quash the decision of the Respondents of 6th March, 2013 of acknowledging, approving and issuing title to (sic) with regard to L.R No. 29600.**
>
> **(b) That the Honourable Court be pleased to grant an order of Mandamus to issue directed at the 3rd Respondent to release the title for parcel No. MADZIMBANI/MITANGONI/PLOT NO. 185, KILIFI COUNTY in favour of the Ex-parte Applicant.**
>
> **(c) That any other order as this Honourable Court may deem fit and just to grant.**
>
> **(d) That the costs of this application be provided for.**

2. The motion is premised on the grounds set out in the motion and supported by the grounds set out in the statement of facts dated 28th October, 2019 2019, the verifying affidavit sworn by Mohamed Menza Yama and the documents annexed thereto. The ex-parte Applicant has deposed that he is the proprietor of the suit property vide Declaration Notice dated 7th June, 2012 as per the Land Adjudication Act Cap 284 Laws of Kenya. He deposed that he is also a member of the Wachanda clan that enjoys ancestral rights of the land underlying the MARIAKANI/MADZIMBANI/MITANGONI area as confirmed in the ruling in Land Case No. 23 of 1966; ALI MWADZAYA –V- DUNDA S/O KASITU. A copy of the said judgment has been annexed.

3. The Ex-parte Applicant has deposed that MADZIMBANI/MITANGONI in Kilifi County was declared to be an adjudication section on 7th June, 2012 by the Land Adjudication Officer and the declaration was made at a public baraza at Shingia Primary School. He has annexed a copy of the notice dated 7th June 2012 for the establishment of the said adjudication section, and a copy of the survey sheet delineating the boundaries and indicating the areas set apart. The Ex-parte Applicant's case is that he is a beneficiary of the said land adjudication process and was legally allocated MADZIMBANI/MITANGONI/PLOT NO. 185 and was issued with a temporary plot certificate. He has annexed a copy of the certificate dated 19th August, 2012. The Ex-parte Applicant has deposed that prior to the commencement of the adjudication process, the committee confirmed the authenticity of the claimant's interest and arbitrated over any disputes arising from the process. He deposed that during the exercise, one Mr Mulwa Mnyalo Kithiaka registered his interest to a plot adjacent to the Ex-parte Applicant's plot. The Ex-parte Applicant states that the said Mr Mulwa Mnyalo Kithiaka never registered any claim, interest nor filed any complaint regarding

Plot No. 185 and was surprised that a non-existent entity known as Mariakani County Council purported to have set apart and unilaterally registered and issued a Title Deed to Mr Kithiaka over parcel No. LR No. 29600 which parcel overlapped on a section of the Ex-parte applicant's plot. The Ex-parte Applicant has disposed that his Temporary Certificate has never been cancelled and survey carried out following his request established the coordinates and beacons of his plot. He has annexed a certificate dated confirming his ownership over Plot No. 185 MADZIMBANI/MITANGONI ADJUDICATION SECTION and that he is only awaiting the issuance of the Title Deed. The Ex-parte Applicant has also annexed other documents, including a decision by the National Land Commission recognizing the Ex-parte Applicant as the rightful owner of the plot.

4. The 3rd Respondent filed a replying affidavit sworn by Edwin Wafula, the Chief Land Registrar at the office of the 3rd Respondent on 25th July, 2019. He has deposed that the Ex-parte Applicant is beneficiary of the Land Adjudication process declared on 7th June, 2012 vide declaration of an Adjudication Section Ref. DLAS/KFI/GEN/MKI/VOL/18 dated 17th October, 2011, and approved by the Director of Adjudication Ref. No. DLAS/KFI/ADM/1/207/VOL 1 /2 dated 7th June, 2012 and thereafter was legally allocated MADZIMBANI/MITANGONI/PLOT No. 185, Kilifi County and on 19th August, 2012 was issued with a Temporary Plot certificate. He has further deposed that the Ex-parte Applicant enjoys community land rights in the area as he is a member of the Wachanda Clan that enjoys community land rights in the area. He deposed that there was a major oversight done in the setting a part lodged by Mariakani County Council unilaterally and in the registration and issuance of the Title Deed to parcel No. LR. No. 29600 which parcel overlapped on a section of the Ex-parte Applicant's already adjudicated and allocated plot. From the replying affidavit, it is clear that the Respondents do not oppose the application herein. Indeed, the Respondents counsel, informed the court that they do not oppose the application.

5. I have considered the application. The only issues to consider is whether the judicial review orders sought should be granted or not. The purview of Judicial review was clearly set by Lord Diplock in the case of Council for Civil Service Unions –v- Minister for Civil Service 1985 AC 374 at 401 D when he stated:

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

6. In the case of Republic –v- Kenya National Examinations Council ex-parte Geoffrey Gathenyi and others, the Court of Appeal held as follows:

> **"The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatments."**

7. In the case of **Mwau –V- Principal Immigration Officer (1983) KLR**, it was stated:

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

8. In this case, it is admitted that the ex-parte applicant is the beneficiary of the Land Adjudication process declared on 7th June, 2012 and thereafter was legally allocated parcel MADZIMBANI/MITANGONI/PLOT NO. 185, Kilifi County. On 19th August 2012, the Ex-parte Applicant was issued with a Temporary plot certificate for the said plot. It is also common ground that the ex-parte applicant herein enjoys community land rights in the area as he is a member of the Wachanda Clan that enjoys community land rights in the area. The ex-parte applicant has exhibited documentary evidence to show that he was the beneficiary of the suit plot pursuant to the Land Adjudication process. There is no evidence availed that show that there was any objection raised over the land that was lodged with the Land Adjudication and Settlement Officer as provided under the Act. However, in this particular case, there is evidence that a non-existent entity by the name Mariakani County Council unilaterally purported to grant and issue title to parcel LR NO. 29600 which overlapped on a Section of the Ex-parte Applicant's already adjudicated and allocated plot. Moreover, the Respondents and any other body were under a duty to ensure that their action was lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. In this case, it is clear that the Ex-parte Applicant was not afforded a hearing before the decision that affected his interest in the land was affected.

9. In the case of **Onyango Oloo –v- Attorney General (1989) EA 456**, the Court of Appeal held:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard…. There is presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice… A decision in breach of the rules of**

natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at….."

10. It is therefore my view that as the rules of natural justice were flouted, all actions taken pursuant thereto were null and void. As was rightly observed by the National Land Commission, the Ex-parte Applicant did not participate in the decision taken that would dispose him of his rights to the suit land. He was also not formally informed of how his name was removed, if so, from the register. And as already stated, even the entity that purported to alienate the Ex-parte's applicant's land did not exist in law. From the material on record, the entity that was in existence as at 1st September, 2012 was called "Town Council of Mariakani" and not "County Council of Mariakani."

11. Consequently, I find merit in the Notice of Motion dated 14th November, 2019 and grant the orders as prayed. Since the Respondents did not oppose the application, I order that each party to bear their own costs. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29th day of September, 2020.

.....

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE