REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA/

AT MOMBASA

MISC. CIVIL APPLICATION NO 19 OF 2012

IN THE MATTER OF: AN APPLICATON FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF MANDAMUS AGAINST THE COMMISSIONER OF LANDS AND THE CHIEF LAND REGISTRAR

AND

IN THE MATTER OF: THE LOCAL GOVERNMENT ACT, CAP. 265 AND THE LAND REGISTRATION ACT NO. 3 OF 2012 AND REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA AND THE CONSTITUTION OF KENYA, LAW REFORM ACT AND CIVIL PROCEDURE ACT, 2010

AND

IN THE MATTER OF: THE REGISTRATION OF LAND KNOWN AS PLOT NO. LR. 12224 SITUATED AT VANGA LOCATION,KIWEGU SUB-LOCATION, BONDENI MTUNGONI IN KWALE DISTRICT, UNDER KWALE COUNTY COUNCIL

KARSAN VELJI VELANI (SUING AS THE ADMINISTRATOR

OF THE ESTATE OF VELJI PARBAT) ..... EX PARTE APPLICANTS

-VERSUS-

COUNTY COUNCIL OF KWALE

CHIEF LAND REGISTRAR

COMMISSIONER OF LAND ..... RESPONDENTS

1. **RASHIDI JUMA**
2. **MWAMBEGAHA HASSANI BAKARI**
3. **OMAR JUMA NGANZI**
4. **ZAID ALI HURU .....mukunya.....INTERESTED PARTIES**

JUDGEMENT

[1] The applicant filed a judicial review dated 6th August 2012. he prays for the following orders

1. *That the matter be certified as urgent.*

2. *That the applicant be granted leave to apply for an Order of Certiorari to quash the decision of the 1st Respondent's Planning, Trade and Market Committee dated the 20th December, 2010 which decided that the Applicant would be granted a lease for 33 years commencing on 1.1.2009 for a portion of 400 acres of land being a portion of the land contained in Plot No. LR. 12224 situated at Vanga Location,Kwale instead of the Applicant being granted a lease for 66 years commencing on 1.1.2009 over a portion of 1200 acres of land as contained in Deed Plan No.284111 which is a portion of land contained in Plot No. LR. 12224 situated at Vanga Location, Kwale County as per the resolution of the 1st Respondent contained in Minute No. 28/93 of the 1st Respondent's full council meeting held on 21.07.1993.*

3. *That the Applicant be granted leave to apply for an order of Mandamus to compel the 2nd and 3rd Respondents to forthwith register the land contained in Deed Plan No. 284111 in the name of the Applicant and to also issue a certificate of Title thereof in the name of the Applicant for a term of 66years from 01.01.2009 as per the 1st respondent's resolution in Minute No. 28/93 of the full council meeting held on 21.07.1993.*

4. *That the grant of leave to apply for the judicial review orders herein applied for do operate as a conservatory order over the land contained in Deed Plan No. 284110 so as to prevent any further dealings on the same by the Respondents.*

5. *That the costs be provided*

[2] The applicants case is that he was granted a lease of 1500 acres of land by the first respondent contained in plot 12224 which lease was 33 years. He argues that the land was a jungle and he developed the land and heavily invested in agricultural crops, dug a canal from Umba River and has a ranch therein. The applicant states that he applied for an extension of lease on 1st June, 1980 and was granted an extension for 27 years 6 months which was duly registered by the 1st and 2nd respondents. During the period he filed seven (7) suits Mombasa Civil suits No. 630 - 687 of 1979 and the result of those suits were that the court ordered 185 acres of the leasehold property to be hived off and be distributed to the 37 squatters on the suit property while the rest of the property remained with the applicant.

The applicant further argues that in 1993 the applicant applied for renewal of lease and the applicant in its full council meeting held on 21st July 1993 approved the extension vide minute 28/93. the extension for 66 years commencing on 1st January 2009 was made subject to the applicant hiving off 115 acres to the council. The total acres hived of being 300 acres and leaving the applicant with 1200 acres. It is argued that the applicant accepted the conditions and the 2nd and 3rd respondents approved the subdivisions and extension of lease. Three deed plans were made as a result and the applicant argues that the leases have not been registered as a result of the unreasonable conduct of the respondents. The applicant states that on 20th December 2010 the 1st respondent through its Trade Planning and Markets Committee held a meeting and passed a resolution to the effect that the applicant be granted 400 acres of the aforesaid land for 33 years. It is argued by the applicant that this resolution was made and was in conflict to the full Councils resolution aforesaid to grant the applicant 1200 acres for a period of 66 years.

[3] The applicant argues that the respondent is estopped from reneging from that it asserted that the applicants lease for 1200 acres would be renewed for 66years from 1st January 2009. The applicant relied on ***Doge v Kenya Canners Limited Civil Case No. (1989) KLR 127*** which says that it is a principle of justice and equity that when a man by his own words or conduct has led another to believe on the promise that he may safely act on the faith of the representation and the other does act on that promise, the promisor will not be allowed to go back on what he said or done when it would be unjust or inequitable for him to do so. He also relied on ***Kenya Roads Board v National Bank of Kenya Limited***

(2012) eKLR where the court referred to Halisbury's Laws of England where it is stated;

"*. . .estoppel arises against the party who made representations and he is not allowed to aver that the fact is otherwise than he represented it to be . . ."*

The applicant argues that he has already accepted the resolution by the 1st respondent and acquired proprietary rights to the property and that those rights cannot be taken away by the respondents.

The applicant states that he has already obtained legitimate expectations that he would have a lease for 66 years from the 1st respondent. The other argument set forth is that a resolution of planning, Trade of Markets Committee cannot override a decision of he full council of the respondent. He argues that Part 2 of the second schedule of the Local Government Act Cap. 265 confirms that such a committee is a creature of the 1st respondent. That the created committee therefore cannot overrule its creator, the 1st respondent.

The applicant argues that he was given notice of the decision of the full committee. However, he was not given the notice of change of that resolution. The applicant relied on Article 42 of the Constitution of Kenya on fair administrative action. The applicant argues that the 1st applicant flouted the rules of natural justice by not notifying the applicant of the decision on that score, he relied on ***Nyongesa & 4 Others VS Egerton University (1990) KLR 692***. The applicant urged the Court not to dismiss the case as it was filed after 6 months and argued that the 6 months should be reckoned from the date when the party learns of the decision. On this score he relied on ***Nuru Mohammed Omar & another vs Kilifi District Land Registrar HCCC.Misc. App. No. 2 of 2012.***

[4] Finally the applicant argued that the 2nd and 3rd respondent approved the subdivisions of the land into 1200 acres 115, and 185 acres and received all statutory fees for the exercise and were fully aware of the full council's decision of 21st July 1993 and that they had a duty to register the 1200 in favour of the applicant for 66 years from 1st January 2009 and that therefore an order of mandamus should issue against the respondents.

[5] The first respondent opposes the orders sought herein. It argued that leave to file the application dated 6th July 2012 herein was a nullity. That the lease granted to the applicants on 16th February, 1985 for 27 years and 6 months lapsed on 1st June 2007 and that the land reverted to the County Council of Kwale. That the land upon which the present dispute relates is not subject to any lease. That the land has reverted to the 1st applicant and that the applicant has not suffered any loss since the terms of the lease was that the land was to revert to county council of Kwale at the expiration of the lease. That the applicant is without any claim to the land. The 1st respondent argues that it has carried out investigations on the land and found out that the applicant complied with the terms of the lease and that he had only used 400 acres sparingly. The 1st respondent through its Town Planning Committee resolved to grant the applicant a lease over the 400 acres occupied by him vide minute no. 54/TPHTMC/2010 dated 20th December 2010 for 33 years. It argues that the applicant is not left destitute. The 1st respondent further argues that the applicants application for leave vide Chamber Summons dated 6th August 2012 was filed over 30 months after the decision sought to be quashed was made. That leave granted was contrary to section 9(3) of the Law Reform Act chapter 26 Laws of Kenya1. It argued that leave is expressly prohibited by statute and that the same can only be shorter but not longer. It relied on ***Ako v Special District Commissioner Kisumu & another (1989)KLR*** which stated that leave shall not be granted unless application for leave is made inside six months after th date of judgment. He further cited various authorities that followed that decision with approval2, He further argued that leave should not be granted to register a non-existent lease. That the 1st defendant is ready and willing to grant a lease of 33 years for 400 acres to the applicant.

[6] That finally the applicant has taken no action since 21st July 1993 since the resolution he alleges gave him extension of lease and that he suffers from latches and that the Court should not exercise its discretion to and that equity does not favour the indolent. He urged the Court to dismiss the applicants motion dated 14th August, 2012 and allow the 1st respondents Notice of Motion dated 27th September 2012.

The 2nd and 3rd respondent also opposed the judicial review application dated 6th August 2012. In their submissions the 2nd and 3rd respondents narrowed the issues into two categories.

(a) Whether the application is time barred?

(b) Whether the application established a case for intervention by way of an order of certiorari against the 1st respondent and mandamus against the 2nd and 3rd respondent.

[7] The 2nd and 3rd respondent admit that it is clear that the applicant lease over the suit property was extended in 1980 for a period of 27 years which period expired in 2007. That it is also uncontroverted that the 1st respondent's full council meeting held on 21st July 1993 approved the extension of the applicants lease for a period of 66 years subject to him relinquishing a further 115 acres back to the 1st respondent and that it was unclear when the said extension was to commence.

The 2nd and 3rd in their background to the case also admit that the 1st respondent Town Planning,Trade and Markets Committee held on 20th December, 2010 visited the suit property on 30th November and 1st December 2010 and resolved to give the applicant 400 acres for a period of 33 years and that it is not clear whether the applicant was notified of the visit to the land and that this is the decision the applicant seeks to quash.

The 2nd and 3rd respondents argued the application by the applicants is time barred since it is not made within six months. They relied on ***Lactf Nazarari & Another vs Commissioner of Lands and another [2012] EKLR*** which said the six months rule is a statutory requirement and not a procedural technicality which the court can disregard in the spirit of assisting the applicants to access substantive justice through the courts judicial review jurisdiction. the 1st and 2nd respondents submitted that leave was granted in error and without disclosing all the facts to court. Further that it was not disclosed to the Court that the lease had lapsed

[8] On the Court not granting an order of mandamus the 2nd and 3rd respondents relied on ***Kenya National Examination Council v Republic Ex - parte Geoffrey Gathenji Njoroge & 9 others***. The 2nd and 3rd respondents further argued that the consent of the Minister of Local Government in compliance with Section 144 (5) (a) and (b) was no complied with. Mr. Ngare Learned State counsel pleaded with the court to take judicial notice of the 2nd respondent under Article 67 (2) and (3) of the Constitution and Section 5(1) and (2) of the National Land Commission Act 2012 and a memo dated 10th February 2012 by Cabinet barring renewal of leases until the Land Commission and other appropriate County Governments are in place.

The issue for determination in this application can be termed as follows

(a) Was the application herein filed within six months of the date of the decision sought to be quashed.?

(b) Was there a lease subsisting between the applicant and the 1st respondent capable of being registered by the 2nd and 3rd respondents

(c) Can the application for judicial review be granted?

(d) What orders should be issued under the circumstances

Was the application filed within time?

There is no dispute that the decision of the 1st respondents Trade, Planning and Markets Committee to grant the applicant 400 acres for 33 years was of 20th December 2010. The application to quash the decision of that Committee was not filed until 6th August, 2012. this would translate to some 30 months since the decision was made. This on the face of it would appear to be hopelessly out of the 6 months statutory limitation period. To my mind this would be so, if all the parties to this application, were put on notice and/or were well aware or ought to have known of the decision. But was the applicant aware of

this decision by the 1st respondents Trade, Planning and Markets Committee? There is absolutely no evidence tendered to Court by the respondents to show that the applicant was aware or ought to have known of the decision. The Committee is a creation of the first respondent. It acts and reports to the 1st respondent. Its actions are subject to approval of the full Council of the first respondent. Its actions are an in house arrangement of the 1st respondent. It is not within the control of the applicant. The 2nd and 3rd respondent have admitted in their submissions that it is not clear whether the applicant was notified of the visit to his farm by the 1st respondent officials. The 1st respondent tendered no evidence that it ever notified or served the applicant with any notice of visiting his farm and the decision arrived at after such visit.

[9] Would time of six months since such decision then ran under Sec. 9(3) of the Land reform Act under the circumstances?. I have no difficulties in holding that in the interest of justice it would not ran against the applicant until he is notified of the decision. I am buttressed in my such holding by ***Mombasa High Court Misc. No. 2 of 2010 Nuru Mohamed Omar & Another*** where the Learned Judge Francis Tuiyott faced with a similar situation held;

"On my part I have little difficulty reckoning the time the day the decision was brought to the attention of the applicants. The applicant did not participate in the proceedings and could not have been aware of the decision until it was brought to their attention. To hold that time runs from the date of the decision itself would be to work a definite injustice as the applicants were not aware of it and could not therefore have moved to challenge it promptly".

The applicant argues that this decision of the Trade, Planning and Markets Committee was not brought to his knowledge until 20th June,2012, he filed this case in August 2012. This would clearly bring the application for judicial review within time.

Was there a lease subsisting at the time the application was filed?

The applicant had a lease of 27 years 6 months with effect from 1st June 1980. The lease was supposed to lapse on 1st June 2007. The land was then supposed to revert to the 1st defendant absolutely.

Did that happen?

On 21st July, 1993 before the expiry of the lease, the full Council of the 1st defendant held a Council meeting. One of the issues dealt with at that meeting vide Minute No. 28/93 was the extension of the lease of the applicant. The extension of the lease was approved and it was resolved;

"(i) That Kwale County Council do hereby approve the application for extension of lease on plot no. 12224 Kidomaya Lunga Lunga for a period of 66 years by Mr. Velji Parbat"

by Resolution No. 19/93 it was resolved that

"i That Kwale County Council do hereby approve that Mr. Velji Parbat should relinquish another 115 acres of land to be returned to the Council after expiry of the period of the present lease"

"ii That Clerk to Council contacts the Commission of Lands with a view to undertaking new valuation of the land for higher rates."

[11] On 3rd September 1993, the first respondent wrote to the 3rd respondent enclosing the extract of the full Council Meeting of 21st July 1993 whereby the lease of the applicant had been extended for a term of 66 years after expiry of the current land lease. *(underlining mine)*

There was a provision in that letter that the land be reduced to exclude a total 300 acres being 185 for the squatters and 115 for council future plans. The 3rd respondent was to review the valuation of land

with a view to increase the land rates of the 1st respondent. On 4th January 1996 the 3rd respondent wrote to the applicant and the letter stated,

"This is to inform you that your request on extension of term lease for above parcel has been approved for a further unexpired term of 50 years with effect from 1st December 1995. But subject to your surrender of 300 acres as per Kwale County Council resolution of 21st July 1993. You will be required to submit plans showing the intended subdivision for the land to be surrendered to facilitate revaluation for enhanced rent."

Previously the District Land Officer Mombasa/Kwale had written to the 3rd respondent in regard to the extension of lease for LR. NO. 12224 - Kwale and said;

Reference is made to your letter Ref. 8884/118 of 24th June 1992 and I hereby inform you that I have no objection to the applied lease as the owner(s) has done extensive development on the plot under reference."

[12] On 7th September, 2007 the clerks to the 1st respondent wrote to the District Commissioner Kwale in regard to Plot No. Kiwega/12224 Wayombo group.

Reference is made to your letter dated 15/8/2007 on the above and status of the land is as follows

(i) The owner is Velji Parbat of P.O.Box 81027 Mombasa having acquired the land through extension of lease approved by this Council vide minute no. 19/93 (i) of a full council sitting held on 21st July, 1993 which approved extension of the lease for a further 66 years and conditions stated therein.

Mr. Parbat has legally proceeded to have the lease renewed by Commissioner of Lands as required by the law, the said lease was granted by the Commissioner of Lands as required by the law, vide letter Ref. 88881 dated 18th November, 1993. Enclosed are relevant copies of the same transaction".

[13] On 4th September 2008 the 1st applicant wrote to the 3rd respondent in regard to subdivisions and extension of lease of LR.No. 12224, Velji Parbat.

"Please refer to our earlier letters on the above subject matter. Further to the said letters we wish to clarify that the subject was vide minute no. FC.7/93 of 21st July 1993 discussed and resolved that the above lease subject to various conditions which conditions have since been met by Mr. Velji Parbat.

The position as taken then has not been changed, altered or rescinded by the Council. it is important to note that the Council is desirous to have the exercise finalized to enable the settlement of squatters on a portion of the above parcel for clarity and avoidance of doubts. The misunderstanding occasioned by the Council's complaint to the Minister for Lands during his coastal tours has since been sorted out by both parties. The Council and Mr Velji Parbat.

In view of the above, proceed to finalise his application to lease extension and subdivision of the parcel under reference."

[14] Following the above correspondences the original lease of 27 years and 6 months had by conduct and agreement of parties herein been waived and the suit land subdivided and a new 66 years agreed on a new portion of 1200 acres. All the necessary consents had been obtained from the parties herein. The applicant was in possession of the 1200 acres and had the original land subdivided and deed plans were duly approved by the parties herein as follows:

(a) Deed plan No. 189817 Made up of 185 acres of land

(b) Deed plan no. 284110 made up of 115 acres of land

(c) Deed plan no. 884111 made up of 1200 acres of land

The land in (a) being for squatters and land in (b) being for the 1st defendant.

The applicant continues to pay the rates and ground rent. The term of the new lease is 50 years from 1st December 1995 as per letter of 4th January 1996 by the 3rd respondents. All these facts were not denied or contradicted by the respondents herein. All that remain in this matter is for registration of the respective parcels.

The beneficial interest in the lease for 1200 acres has duly passed onto the applicant.

The Court of Appeal in ***Registered Trustees Anglican Church of Kenya, Mbere Diocese v Rev. David Waweru Njoroge1*** held in a similar circumstance that once all the parties have done what they are supposed to do and only registration is left beneficial interest passes.

The Court of Appeal quoted heavily from the case of ***Pennington vs Waine [2002] 1WLR 2075*** where Arden L.J. at page 2083 para 30 stated;

"In Mascall vs. Mascall 50 P & CR 119, the question was whether a Gift of land was completely constituted by delivery of the land certificate and a form of transfer. Brown Wilkinson L.J. HELD AT page 126:

"*The basic principle underlying all the cases is that equity will not come to the aid of a volunteer. Therefore, if a donee needs to get an order from a court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle which is laid down in (Rose vs. Inland Revenue Comrs [1952] Ch 499) that in equity it is held that a gift is complete as soon as the settler or donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, the donee to complete his title'.*

The Court of appeal went further to quote from SNELL's Equity 29th Edition, the authors, state at page 122 paragraph (3);

.....where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Thus, in Re Rose, Midland Bank Executor & Trustee Co. Ltd vs Rose [1949] Ch. 78 the donor executed a transfer of shares in a private company and handed it with share certificate to the donee who died before it had been registered. Although the donee's legal title would not be perfected until the company had passed the transfer for registration or at least until the donee had an unconditional right to be registered, it was held that the gift was good because the donor had done all that was necessary on his part. *Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor'. (Emphasis ours)*

In the instant case, the County Council of Kwale vide Resolution No. 19/93 in a full council meeting approved the applicant's application for extention of lease on plot no. 12224 Kidomoya Lunga Lunga for a period of 66 years. It informed the 3rd respondent the Commissioner of Lands of the said resolution on 4th September 2008 and asked the 3rd respondent to finalize the extension of lease. The District Land Officer wrote to give his consent for the extension.

The County Council of Kwale , the 1st respondent herein, had done all in its power to divest itself of all its legal and equitable interest in the land for 66 years from 1st December, 1965. There remained nothing to be done by the 1st respondent to complete the transaction. The registration of the lease was not within the power of the 1st respondent and the applicant does not need any assistance from the Court. It follows therefore from the foregoing that the lease was complete and finalized and cannot be recalled or revoked

in law.

The answer as to whether there was a lease between the parties is therefore in the affirmative.

[15] The 1st respondents committee on Planning, Trade and Market is itself a sub committee of the 1st respondent could not make a decision contrary to the earlier decision of the full committee to give the applicant a 66 year lease for 1200 acres. The said sub committees decision can never stand without the ratification of the full council. Their recommendation to the full council to give the applicant 400 acres for 33 years was an exercise in futility as the Council had already dealt with the matter and all necessary consents and approval obtained from the Commissioner of Lands, the 3rd respondent and the equitable interest in that leased land had passed to the applicant long before they purported to interfere with the legal interests of the applicant in the leased land.

[16] In any case, the 1st applicant vide letters quoted herein had re-emphasised that the lease for 1200 acres had been given to the applicant for 66 years. The argument by the 1st respondent that the lease expired in the year 2007 is not supported by the facts, agreements (s) and conduct of the parties. If that were so, why was the Trade Planning and Markets sub committee giving the applicant a lease of 33 years for 400 acres? Were they obliged to do so in 2010 when the lease had expired in 2007 as alleged? The 1st respondent should not be allowed to hide under the actions of its Planning and Marketing Committee or its recommendations of 20th December 2010 to renege on a lease they took part in formulating and a lease whose existence they have severally acknowledged to the 3rd respondent, DC Kwale and the applicant.

[17] *Should the orders prayed herein be granted?* My answer to this question is in the affirmative. I grant the applicant the relief he seeks in his application dated 24th August, 2012 with costs.

Dated and delivered at Mombasa in open court this 14th day of February, 2014.

S.N. MUKUNYA

JUDGE14.2.2014

In the presence of:

Gikandi Advocate for the applicant

Njoroge Mwangi Advocate for the respondent

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1 Sec.9(3) - In the case of an application for an order of certiorari to remove any judgment, order, decree conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later then six months after the date of that judgment, order,decree,conviction or other proceeding or such shorter period as may be prescribed under any written law, and where that judgment, order, decree, conviction or other proceeding is subject to appeal and a time is limited by law for the bringing of the appeal,the court or judge may adjourn the application for leave until the appeal is determined or the the time for appealing has expired.

2 i. Aga Khan Education Service Kenya -v- Republic and others [2004] 1EA 1 (CAK) a court of appeal decision

ii High Court in Misc. Application No. 260/2001, between Kenya Breweries Ltd and Municipal Council of Mombasa & others;

iii. In HCCC. MISC. APPL.NO. 93 of 2010 Republic - v Chairman Gatundu south Land Dispute tribunal & 3 Others, Ex-parte Lazaro Nduati Gitau (2012) eKLR, a high court decision

iv. In HCCC. Misc. Appl. No. 159 of 2008, Republic -vs- Land Disputes Tribunal, Mathioya & Another Exparte Bhilha Njeri Kamwitha (2010) Eklw, a high court decision

v. In HCC. Misc.. App. No.. 244 OF 2001, Kenya Breweries Ltd and Municipal Council of Mombasa & others (2009) eklr, a high court decision.

1 CA Nyeri civil Appeal No. 108 of 2002