



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

JUDICIAL REVIEW NO. 10 OF 2017

IN THE MATTER OF: AN APPLICATION BY DOUGLAS TSUMA MUMBA FOR JUDICIAL REVIEW

AND

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

AND

IN THE MATTER OF: MGUMO PATSA/MAZERAS ADJ SECTION PLOT NOS. 97

BETWEEN

DOUGLAS TSUMA MUMBA.....APPLICANT

VERSUS

1. NATIONAL LAND COMMISSION

2. LAND REGISTRAR KILIFI

3. DISTRICT LAND ADJUDICATION AND

SETTLEMENT KILIFI.....RESPONDENTS

AND

GARERO CHITUKU MWAWAZA alias MWAWORA....1ST INTERESTED PARTY

ESMAIL EBRAHIM ABBA.....2ND INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion application dated 26th May 2017, Douglas Tsuma Mumba prays for orders: -

2. That an Order of Certiorari do issue to remove into the High Court and quash all the Adjudication proceedings and the consequent Adjudication register for Mgumo Patsa/Mazeras/97 to include any other orders decisions, records or proceedings made concerning the said property by the Respondents.

3. That an order of mandamus do issue to compel the Respondents to rectify their Records and Adjudication Register relating to Mgumu Patsa/Mazeras/97 by removing the names of Esmail Ebrahim Abba therefrom as the owners of the said parcel of land.

4. That an order of Mandamus do issue to compel the 1st, 2nd and 3rd Respondents to commence investigation in regard to the register and ownership of Parcel No. Mgumo/Patsa/Mazeras/97 particularly with regard to the fraudulent claim and registration of Esmail Ebrahim Abba as the owner of the land in the said Adjudication proceedings, records and register.

5. That an order of mandamus do issue to compel the 1st, 2nd and 3rd Respondents to issue the Applicant with grant or Certificate (of) Ownership or Deed depicting the Applicant as the registered proprietor of the said Mgumo/Patsa/Mazeras/97.

6. That an order of Prohibition do issue to prohibit the Respondent from issuing to either the Interested Party herein or any other person whomsoever and whatsoever with grant or title deed or certificate of ownership howsoever and whatsoever except the Applicant herein as the registered owner pending the hearing and determination of this suit or other than as directed and ordered by this Honourable Court; and

7. That the costs of this application be provided for.

2. The application which is supported by the Applicant's Affidavit is premised on the grounds that:

i) The Applicant is the beneficial owner of the said property situated in Kilifi having acquired the same from his grandparents since 1962;

ii) The Applicant has a prima facie chance of success and the Respondent will suffer no prejudice if the orders sought are granted.

iii) The Interested Parties have wrongfully and illegally commenced construction of buildings on the suit property thus interfering with the Applicant's quiet enjoyment of the suit premises.

iv) The Respondents omitted to identify the Applicant as the legal/beneficial owner having been allocated the same; and

v) The Applicant stands to suffer loss and damage and it is in the interest of justice that the orders prayed for be granted.

3. The application is opposed. By Grounds of Opposition dated 28th May 2017 as filed herein on 31st July 2017 by the Honourable the Attorney General on their behalf, the Land Registrar Kilifi (the 2nd Respondent) and the District Land Adjudication & Settlement Officer Kilifi (the 3rd Respondent) oppose the Motion on the grounds: -

1. That the 2nd Respondent acted within their authority and mandate when they heard and determined the Appeal to the Minister.

2. That the objects of the Court which are to dispense proportionate, substantive and equitable justice were achieved in the appeal proceedings before the Minister.

3. That there is absolutely no proof of illegality, bias and/or irregularity in the action by the 2nd and 3rd Respondents in exercising (their) duty to warrant the grant of the prerogative orders sought for.

4. That based on the pleadings and the Applicant's depositions it is patently clear that the application is an appeal brought in form of Judicial Review as the Applicant(is) urging the Court to evaluate the merits of the findings by the Minister.

5. That the Applicants' claim to the suit property is based on contested evidence and can only be adequately redressed by way of a civil suit for each party to prove their rights or claim to the suit property; and

6. That the threshold for grant of Judicial Review orders has not been met by the Applicant hence the application lacks merit and ought to be dismissed with costs.

4. Esmail Ebrahim Abba, the 2nd Interested Party is equally opposed to the Motion. In a Replying Affidavit sworn on 27th March 2018 but filed herein on 3rd May 2018, the 2nd Interested Party avers that he attended the hearing during the appeal to the Minister and that the Applicant evidence was that Ganero Chituku (the 1st Interested Party) was the one who was registered as the owner of the suit property during demarcation.

5. The 2nd Interested Party further states that it is on record in the appellate proceedings that the suit property was sold to him through the 1st Interested Party. He avers that the decision by the Minister was final and the Applicant has no locus to bring this suit.

6. In further response to the application and by way of a Notice of Preliminary Objection dated 1st December 2017, the 2nd Interested Party raises a Preliminary Objection to the same on the grounds that: -

1. The Applicant has no locus standi to institute this suit;

2. The Appeal to the Minister has been determined and the decision reached is final;

3. All rights, interests and privileges that the Applicant may have had over the suit property ceased to exist on the 17th July 2017;

4. The 2nd Interested Party's title is indefeasible the same being a first registration; and

5. The entire application herein is bad in law and defective and an abuse of the process of the Court.

7. I have perused and considered the application as well as the respective responses thereto by the 2nd and 3rd Respondents as well as the 2nd Interested Party. I have similarly perused the submissions and authorities placed before me by the parties.

8. It is the Applicant's case that he is the lawful owner of all that parcel of land known as Mgumo Patsa/Mazeras/97 having acquired or inherited the same from his grandparents who occupied the land many years back. The Applicant told the Court that he has occupied the land from the time he was born in 1962 to-date.

9. The Applicant told the Court that at the time his grandparents occupied the land, neither the Interested Parties nor their families were in occupation and or possession of the suit property. He submitted that the Respondents and the Interested Parties had no colour of right over the suitland and faulted them for their failure to call any evidence to rebut the Applicant's claim thereto.

10. Unfortunately, and with respect, those submissions are misconceived and unhelpful to the Applicant. I say so because the Applicant has come to this Court invoking its Judicial Review jurisdiction and seeking an orders of certiorari, to remove into this Court and quash the Adjudication Proceedings that led to the suit property being registered in the names of the Interested Parties. In addition, he prays for an order of mandamus to compel the Respondents to rectify the records and Adjudication Register by removing the name of the 2nd Interested Party as well as an order of prohibition to restrain the Respondents from issuing a Certificate of title to the Interested Parties or any other person.

11. In seeking those orders, the Applicant accused the Respondents of, inter alia, omitting to identify him as the legal or beneficial owner of the suit property and thereby proceeding to allocate the same to the Interested Parties. The 2nd and 3rd Respondents in particular denied the accusations and asserted that they had only exercised their mandate in the adjudication process in accordance with the law.

12. As it were, Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by Constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the Courts in evaluating whether a decision is illegal, unprocedural or ultra vires is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker.

13. Thus, Judicial Review is about the decision making process, not the decision itself. The role of the Court in Judicial Review is supervisory. It is not an appeal. It is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As was held in **Republic –vs- Attorney General & 4 Others ex Parte Diamond Hashim Lalji & Another (2014) eKLR: -**

“Judicial review applications do not deal with the merits of the case but only with the process. In other words Judicial review only determined whether the person affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that when an Applicant brings Judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a Judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, Judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute Judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the Judicial process. The Court in Judicial review is mainly concerned with the question of fairness to the applicant.....”

14. In the matter before me, the Applicant acknowledges at paragraphs 9 to 11 of the Supporting Affidavit that the allocation of the suit property to the 1st Interested Party came out of a land adjudication process conducted in the Kaloleni Adjudication Section where the suitland is situated. At paragraph 10 of that Affidavit, he avers that his father lodged an appeal to the Minister on 18th May 1998 and that the Ministerial Panel decided the dispute in favour of the 2nd Interested Party who, according to him, was not a party to the said proceedings.

15. A perusal of the Record of Proceedings of the Appeal to the Minister attached to the Applicant's Supporting Affidavit reveals that when the Panel visited the suitland, the family of the 1st Interested Party whom the Applicant had sued did indicate that they had sold the suit property to the 2nd Interested party. The 1st Interested Party despite being sued herein had already passed away by then and his family insisted that the land belonged to the buyer who is the 2nd Interested Party herein and hence the decision to award him the same.

16. As it were, the Land Adjudication Act (Cap 284 of the Laws of Kenya) which is the applicable law in the adjudication process complained about provides an elaborate procedure that ought to be followed in the event of a dispute arising from an adjudication process. That procedure terminates with an appeal to the Minister whose decision under Section 29 of the Act is final.

17. It is evident from the material placed before me that all the relevant parties appeared before the Ministerial Panel following the Appeal lodged to the Minister by the Applicant's father. The Applicant has neither complained nor demonstrated any irregularity or illegality committed in the course of the proceedings to warrant the Judicial Review orders sought herein.

18. The upshot is that I find no merit in the Notice of Motion dated 26th May 2017 and I dismiss the same with costs.

Dated, signed and delivered at Malindi this 15th day of October, 2020.

J.O. OLOLA

JUDGE