



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

JUDICIAL REVIEW NO. 9 OF 2011

**IN THE MATTER OF: AN APPLICATION BY FAROOQ IMTIAZ MOHAMED MALIK
FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES CAP 21 LAWS OF
KENYA**

AND

**IN THE MATTER OF: SECTION 3, 5, 6, 7, 9 OF THE GOVERNMENT LANDS ACT CAP
280 AND SECTION 22 AND 23 OF**

THE REGISTRATION OF TITLES ACT CAP 281 LAWS OF KENYA

BETWEEN

THE REPUBLIC

VERSUS

1. THE ATTORNEY GENERAL GENERAL

2. MUNICIPAL COUNCIL OF MALINDI....RESPONDENTS

VERSUS

EX PARTE:

FAROOQ IMTIAZ MOHAMED MALIKAPPLICANT

JUDGMENT

1. Pursuant to leave granted by this court on 9th March, 2011 Farooq Imtiaz Mohamed Malik, hereinafter the applicant, filed a Notice of Motion on 18th March, 2011. The Notice of Motion is

brought under Order 53 rule 3(1, 2, 3, 4) of the Civil Procedure Rules. It seeks two key prayers:

- a) *That the applicant be granted leave to apply for orders of certiorari by way of judicial review to remove into this court and quash the decision of the 2nd respondent requiring the applicant to stop from peacefully using his parcel of land and more particularly in erecting a perimeter wall around the said parcel of land to wit plot no. 7547 CR No. 21816 situated at Malindi.*
 - b) *That the applicant be granted leave to apply for orders of prohibition by way of judicial review to remove into this court and prohibit the DCIO and the OCOD Malindi Police station and the officials of municipal council of Malindi in their agents and or employees from stopping the application from unconditionally accessing his parcel of land to wit plot no. 7547 Cr. No. 21816 situated at Malindi and or from using his parcel of land and more particularly in erecting a perimeter wall around the said parcel of land.*
2. The grounds upon which it is based are on the face of the Notice of Motion and further expanded in the supporting affidavit (sic) of the applicant sworn on 14th March, 2011. The said grounds are erroneously numbered from numeral six as follows:
6. *“That the applicant is the owner of plot No. 7457 CR No. 23816.*
 7. *That the applicant has applied for the approval to erect/build boundary wall around his plot which approval was duly granted.*
 8. *That the applicant and his contractor have been stopped on from building the perimeter wall notwithstanding the applicant providing proof of ownership to the respondents and the approval form and by the 2nd respondent.*
 - 9 *That the respondents have acted unconstitutionally without any color of right to interfere with the applicant right to property as envisaged under article 40 of the Constitution and section 23 of the Registration of Titles Act.*
 10. *That the applicant is suffering a lot as his constitutional right has been infringed and will suffer irresponsible costs if the orders sought will not issue.”*
3. Two replying affidavits were sworn in opposition to the notice of motion. One is sworn by Ahmed M. Hemed the Town Clerk of the Municipal Council of Malindi sued as the 2nd respondent. The Attorney General who has been sued as the 1st Respondent also filed a replying affidavit sworn by David Kerina the OCPD Malindi.
4. The undisputed backdrop to the suit is as follows:

The applicant purporting to lay claim to the land parcel no. 7547 CR 23816 measuring 0.5274ha did in the year 2011 apply to the 2nd respondent for approval to put up a boundary wall around the property. The approval was granted on 10th February, 2011 vide the 2nd respondent's letter of 14th February, 2011 annexed to the affidavit of the Applicant. However the 1st respondent, subsequently acting on a complaint by the OCPD Malindi served the Applicant with an Enforcement Notice under the Physical Planning Act. The notice required the applicant to “*stop the erection of the wall immediately in order to pave way for further and accurate confirmation of ownership documents*”. The notice is dated 2nd March, 2011 and a copy thereof is also annexed to the applicant's affidavit. The applicant moved to court by way of judicial review on 9th March, 2011.

5. From the affidavits and the submissions on record the dispute is self evident: while the applicant asserts ownership of the suit property, the right to access and develop the same, the respondents dispute the same and assert that the property is public land which has always been reserved for and occupied by government officers *inter alia* the DCIO, the District Commissioner and Prisons

Department. That is the gist of the replying affidavit of David Kerina filed on 21st June, 2011 in response to the notice of motion.

6. It is the contention of the two respondents that the suit property was public utility land which was illegally acquired. The 2nd respondent further asserts that the development approval was subject to several conditions including one to the effect that the suit property was not part of public utility land. That at any rate the approval was based on ownership documents presented by the applicant to the 2nd respondent which, was not involved in land allocation. That the stop order was given to pave way for inquiries into the bonafides of the title, following a complaint.
7. The parties' submissions also fall in line with their respective affidavits. It must be noted however, that the submissions of the applicant seem to press a case that is not quite pleaded in the notice of motion and the affidavits. I will be returning to this aspect.
8. I consider that the first issue that requires determination is the competence of these proceedings. In this regard, the 2nd respondent has correctly submitted that the applicant's remedy lay in an appeal to the National Liaison Committee under Section 38(4) of the Physical Planning Act. The letter of approval of development clearly stipulated the conditions subject to which it was granted. It stated *inter alia*:

“TO: Farooq Imtiaz Mohamed

PO Box

MALINDI

Your application, numbered as above, submitted on 1st February 2011 refers.

Permission for proposed boundary wall plot no. 7547 situated in Silversands Road N/A has been approved on 10th February, 2011 subject to the following appended condition(s):-

1. *Starting your construction and completing within six (6) months otherwise this approval lapses.*
 2. *That the council will not accept any responsibility for stability or any work or other shortcoming in the building (legal notice no. 135 Regulations 38 of 1998)*
 3. *Wall to be of sound material, well supported and truly vertical.*
 4. *Maintenance of boundary beacons by yourself during and after erection.*
 5. *Wall to be of maximum height 1.829m (6ft)*
 6. *The land not constituting part of the disputed public utility land/allocation or disputed private land.*
 7. *Satisfying all other lawful requirements of your proposal*
 8. *Developer to maintain a 60m riparian reserve.”(sic)*
9. The subsequent Enforcement Notice states the action required (stoppage) and reason (ascertainment of ownership documents). But more importantly, item 5 thereof states:

“If you are aggrieved by this notice you may appeal to the liaison committee or High Court as the case may be under provisions of Part III of the Act before the aforesaid 3rd day of March, 2011 in which case the notice shall be suspended pending the final determination of withdrawal of the appeal” (sic).

Under Section 38 (4) of the Physical Planning Act the Applicant had sixty days from the notice date to file an appeal to the Liaison Committee and thereafter to the National Liaison Committee, and ultimately to the High Court. It appears that the applicant did not appeal to the liaison committee

but rather came directly to this court.

10. This raises the twin question whether the judicial review relief sought by the applicant is available to him. There is a long line of authorities to the effect that the existence of an alternative remedy is not a bar to commencement of Judicial Review proceedings, because judicial review does not deal with the merits of the impugned decision. However, it is also trite law that:

“Where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure it was only Unexceptionally that judicial review would be granted. In determining whether an exception should be made and judicial review granted, it was necessary for the court to look careful at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory power was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it”

See R v BIRMINGHAM CITY COUNCIL ex parte FERRERO LTD (1993) 1 ALLER 530.

The Court of Appeal has held in **Speaker of the National Assembly v Karume (2009) KLR 425** that:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. Order 52 cannot oust clear constitutional and statutory provisions”

11. And in considering the appropriateness of a judicial review order against an alternative remedy, the court will consider whether:

“1. ...the alternative remedy will resolve the question in issue fully and directly

2.the statutory procedure would be quicker or slower than the procedure by way of Judicial Review

3.the matter depends on some particular technical knowledge which is more readily available to the body

4. Lastly, the court should bear in mind the purpose of Judicial Review and the essential differences between appeal and Judicial Review”Halsbury's Laws of England 4th Ed. Vol.1(1).

12. In addition to the fact that the applicant did not at the initial stage disclose to the court that an alternative remedy was available under the Physical Planning Act, it is my considered view that the twin issues underlying this dispute are:

1. Ownership of the suit property

2. Whether the 2nd respondent was entitled to stop the development after giving approval for the same.

Regarding the first question I agree with the submissions of the 1st respondent that judicial review proceedings are not the appropriate forum for the determination of questions of land ownership, which requires *viva voce* evidence. See **Sanghani Investment Ltd vs Officer in-charge Nairobi Remand and Allocation Priston (2007)eKLR.** - whose facts are very comparable to the instant case.

13. It is now settled law that the grounds upon which judicial review proceedings will successfully be

brought constitute the three I's namely, illegality, impropriety and irregularity (see **African Auto Supplies Ltd vs Attorney General [2006]eKLR.**

As pleaded, the applicant's case is primarily that he is the registered owner of the suit property and is entitled to develop the same without interference from the respondents. This is the substance of the grounds contained in the Notice of Motion, the affidavit and statement.

14. Apart from ground No. 4 in the statement and also replicated as ground no. 9 in the Notice of Motion, which vaguely alludes to the 3 I's, the gist of the applicant's complaint as laid out does not accord with the submissions of the applicant's counsel. That particular ground is to the effect that the actions of the respondents were “*unconstitutional, without color of right and a violation of the applicant's right to property under Article 40 of the Constitution.*” With respect, the applicant's proceedings are not by way of a Constitutional Petition even though it is recognized that all proceedings in one way or other are underguarded by some constitutional provision.

15. The submissions of the applicant mention for the first time that the applicant was denied a fair hearing and that the decision of the 2nd respondent was unfair. That complaint is nowhere reflected in his pleadings. The submission therefore that the 2nd respondent's notice “*is manifesting of prejudice motive and an outright violation of the rule of natural justice*” (sic) has no factual basis in the pleadings. As counsel for the 2nd respondent has correctly argued the Notice of Enforcement states the reasons thereto and opened the way for an inquiry – i.e a hearing – regarding the title of the applicant. It is not clear what the applicant did in pursuit of that inquiry. It appears that he made a bee line to the court instead of appealing to the liaison committee.

I have already discussed the statutory provision for appeal under Section 38(4) of the Physical Planning Act which the applicant eschewed.

16. Finally, even if the applicant had otherwise persuaded this court, the order of certiorari is discretionary. According to **Halsbury's Laws of England 4th Ed. Vol. II page 805 paragraph 1505:**

“Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining...”

One of the things to be weighed in this case would be public interest: the respondents assert that the suit property is public land which was irregularly acquired by the applicant. This was a question examined in the case of **John Peter Mureithi and 2 others vs AG & 4 others [2006]eKLR** see also **Kenya Guards and Allied Workers Union v Security Guards Services & 38 Others (Nrb. HCC. MSC. 1159 OF 2003) unreported** where the following question was posed:

“How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of grabbed land and loudly plead the principle of indefeasibility of title?”

17. I make no conclusions by so saying, that the suit land was indeed grabbed property. The purpose of this discussion is only to demonstrate that this matter evidently involves a justiceable public interest/trust dilemma that requires deeper examination.

For all the foregoing reasons, I have found no merit in the applicant's notice of motion and I will dismiss it with costs.

Delivered and signed at Malindi this **2nd** day of **April, 2013** in the presence of Mr. Bosire for applicant, Ms. Lutta for the 1st respondent, Ms. Mwanja for Mr. Kibaara for 2nd respondent. Court clerk – Evans

C. W. Meoli

JUDGE