



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

JUDICIAL REVIEW NO. 1 OF 2020

REPUBLIC.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE ASSISTANT COUNTY

COMMISSIONER WEBUYE..... 2ND RESPONDENT

THE LAND REGISTRAR BUNGOMA..... 3RD RESPONDENT

THE COUNTY SURVEYOR..... 4TH RESPONDENT

EX - PARTE

FREDRICK WEKESA MACHASIO..... 1ST RESPONDENT/APPLICANT

PATRICK WANJALA MACHASIO.....2ND RESPONDENT/APPLICANT

VERSUS

1. ALEXANDER MUKHWANA MACHASIO

2. JANEMARY MACHASIO

3. MARGARET TINDI MACHASIO

4. PETER MUMELA MACHASIO

5. JOSEPH WAMALWA MACHASIO....APPLICANTS/INTERESTED PARTIES

6. MAURICE MACHASIO

7. PETER WANDERA

8. GRABRIEL MUMELA MACHASIO

9. THOMAS MACHASIO

J U D G M E N T

Having obtained leave of this Court on 29th June 2020, **FREDRICK WEKESA MACHASIO** and **PATRICK WANJALA MACHASIO** (the 1st and 2nd Applicants respectively), filed this Judicial Review Application on 21st July 2020 seeking the following orders: -

- 1. An order of certiorari be issued to remove to this Honourable Court and quash the cancellation order by the 1st**

Respondent dated 11th September 2019 ordering cancellation of registration of interests in title NO NDIVISI/MUCHI/2111 and also to remove to this Court and quash the letter of the 2nd Respondent which complied with the orders of the 1st Respondent stopping registration of interests in title NO NDIVISI/MUCHI/2111.

2. That the 2nd Respondent to accept forthwith documents presented by the Applicants to effect registration of title NO NDIVISI/MUCHI/10442, 10443 and 10444 being sub – division of NDIVISI/MUCHI/2111.

3. That the Respondents do pay costs of these proceedings.

The basis of the application as can be gleaned from the grounds set out therein as well as the statement and verifying affidavit is that following the Judgment of the **COURT OF APPEAL** in **CIVIL APPEAL No 41 of 2017** delivered on 7th December 2018, the land parcel **NO NDIVISI/MUCHI 2111** (the suit land) was registered in the names of **GABRIEL MUMELA MACHASIO** (herewith **MACHASIO**) the Applicants' father. Thereafter, on 3rd February 2019, **MACHASIO** sought and obtained the consent to sub – divide and transfer the suit land as follows: -

1. **Title NO NDIVISI/MUCHI/10442 to the 1st Applicant.**
2. **Title NO NDIVISI/MUCHI/ 10443 to the 2nd Applicant.**
3. **Title NO NDIVISI/MUCHI/10444 to remain with MACHASIO.**

The titles were issued in the names of the Applicants in respect of their portions. However, by a letter dated 11th September 2019, the **ASSISTANT COUNTY COMMISSIONER WEBUYE** instructed the **LAND REGISTRAR BUNGOMA** to cancel the consent issued in respect to the sub – division and transfer of the suit land. That letter was not copied to **MACHASIO** or the Applicants. The **LAND REGISTRAR BUNGOMA** (the 3rd Respondent herein) wrote to the **ASSISTANT COUNTY COMMISSIONER WEBUYE** (the 2nd Respondent herein) confirming that the registration of parcels **NO NDIVISI/MUCHI/10442, 10443 and 10444** had been cancelled. It is the Applicants' case that the said cancellation which was done without giving them a hearing infringed on their property rights protected by **Article 40 of the Constitution** and was also not procedurally fair contrary to the requirement of **Articles 47 and 50 of the Constitution**.

By a replying affidavit dated 28th September 2020 and sworn by **PENINAH KUTTOH**, the 2nd Respondent averred, inter alia, that she never directed the 3rd Respondent to cancel the title to the suit land but only directed for the cancellation of the consent for the sub – division that resulted in parcels **NO NDIVISI/MUCHI/10442, 10443 and 10444**. That the letter was informed by complaints raised both by **MACHASIO** and his other 9 children. That **MACHASIO** had written to her disowning the purported sub – division of the suit land. The 2nd Respondent's letter was therefore meant to allow **MACHASIO** and his children solve the dispute on how to share the suit land. However, notwithstanding her letter, titles were issued to the Applicants. That her letter was issued under her powers and in good faith. Annexed to the said affidavit is a copy of the letter dated 23rd December 2019 and addressed to the 2nd Respondent by **MACHASIO**.

By an application dated 17th August 2020 and filed herein on the same day, the following 9 persons including **MACHASIO**, applied to be enjoined herein as Interested Parties: -

1. **ALEXANDER MUKHWANA MACHASIO** - 1st Interested Party
2. **JANEMARY MACHASIO** - 2nd Interested Party
3. **MARGARET TINDI MACHASIO** - 3rd Interested Party
4. **PETER MUMELA MACHASIO** - 4th Interested Party
5. **JOSEPH WAMALWA MACHASIO** - 5th Interested Party
6. **MAURICE MACHASIO** - 6th Interested Party
7. **PETER WANDERA** - 7th Interested Party
8. **GRABRIEL MUMELA MACHASIO (MACHASIO)** - 8th Interested Party
9. **THOMAS MACHASIO** - 9th Interested Party

That application was not contested and was allowed on 21st September 2020.

The Interested Parties through the affidavit of **ALEXANDER MUKHWANA MACHASIO** (the 1st Interested Party) avers, inter alia, that they are the sons and daughters of **MACHASIO** the registered proprietor of the suit land and the Applicants are their siblings. That the suit land does not belong to the Applicants and the 1st Applicant is infact their former Assistant Chief. That the Chairman of their clan one **WILSON WEBI** and the 1st Applicant were present when the suit land was distributed among the siblings and their respective portions

demarcated. That in spite of the Judgment by the Court of Appeal directing that the suit land be transferred to **MACHASIO**, the Applicants fraudulently sub – divided it into 3 portions namely **NDIVISI/MUCHI/10442, 10443 and 1044** but that was later cancelled following the intervention of the County Commissioner. That if the orders sought by the Applicants are granted, the Interested Parties will suffer irreparable damage.

The application was canvassed by way of written submissions which have been filed by **MR WASILWA** instructed by the firm of **BMS ADVOCATES** for the Applicants and by **MR ATEYA** instructed by the firm of **ATEYA & COMPANY ADVOCATES** for the Interested Parties.

I have considered the application, the rival affidavits and the submissions by Counsel.

This is a Judicial Review application and as was held in **MUNICIPAL COUNCIL OF MOMBASA .V. REPUBLIC & UMOJA CONSULTANTS LTD C.A CIVIL APPEAL No 185 of 2001**, the Court will be concerned not with the merits of the decision itself but whether the decision makers had the jurisdiction, whether the people 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 not take into account relevant matters. In **COMMISSIONER OF LANDS .V. KUNSTE HOTEL LTD 1997 eKLR** the Court of Appeal stated as follows:

“But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

The broad grounds upon which a Court may grant prerogative remedies were stated in the case of **PASTOLI .V. KABALE DISTRICT GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300** as follows: -

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety

Illegality is when the decision – making authority commits an error of law in the process of taking or making the act, the subject of the complaint.

Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards

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.”

The remedies sought by the Applicants are two – fold: -

1. An order of certiorari to remove to this Court for quashing the cancellation order by the 1st Respondent dated 11th September 2019 ordering cancellation of interest in title NO **NDIVISI/MUCHI/211** and also remove to this Court for quashing the letter of the 2nd Respondent which complied with the orders of the 1st Respondent stopping registration of interests in title NO **NDIVISI/MUCHI/211**.
2. That the 2nd Respondent to accept forthwith documents presented by the Applicants to effect registration of titles NO **NDIVISI/MUCHI/10442, 10443 and 10444** being sub – divisions of **NDIVISI/MUCHI/211**.

The two letters in question are: -

1. The letter dated 11th September 2019 and addressed to the **LAND REGISTRAR BUNGOMA** (the 3rd Respondent) by **PENINAH KUTTOH** the **ASSISTANT COUNTY COMMISSIONER WEBUYE DIVISION** (the 2nd Respondent).
2. The letter dated 26th November 2019 and addressed to the **LAND REGISTRAR BUNGOMA** (the 3rd Respondent) by the **COUNTY SURVEYOR BUNGOMA**.

With regard to the letter dated 11th September 2019, it was addressed to **LAND REGISTRAR BUNGOMA** by the **ASSISTANT COUNTY COMMISSIONER WEBUYE DIVISION**. It reads as follows: -

*“RE: **NDIVISI/MUCHI/211***

*The above parcel of land is registered in the name of **GABRIEL MUMELA MACHASIO** who resides in my area or jurisdiction.*

The purpose is to request your office to cancel all consents and mutations submitted to your office until I arbitrate the matter surrounding the said parcel.

Thank you for your continued support.

PENINAH KUTTOH

ASSISTANT COUNTY COMMISSIONER WEBUYE DIVISION.” Emphasis added.

Order 53 Rule 2 of the civil Procedure Rules provides as follows in so far as is relevant for purposes of this Judgment.

“Leave shall not be granted to apply for an order of certiorari to remove any Judgment, order decree, conviction or other proceeding for the purpose of its being quashed”

It is doubtful, in my view, if the above letter is amenable for quashing by the writ of certiorari. It does not appear to me to be an “order” compelling the LAND REGISTRAR BUNGOMA to take any action. Rather, it was a request which was left to the LAND REGISTRAR to consider even as the ASSISTANT COUNTY COMMISSIONER WEBUYE DIVISION took steps to “*arbitrate the matter surrounding the said parcel.*” In any event, it would be superfluous to quash both that letter and the second letter dated 26th November 2019. I do not discern any illegality, irrationality or procedural impropriety in the 2nd Respondent’s letter dated 11th September 2019.

The 4th Respondent’s letter dated 26th November 2019 and addressed to the 3rd Respondent reads as follows: -

“RE: CANCELLATION OF PARCEL NUMBERS NDIVISI/MUCHI 10442, 10443 & 10444

Kindly not that this office has cancelled parcels numbers NDIVISI/MUCHI/10442, 10443 & 10444 and subsequently recalled mutation serial numbers 04413998.

The decision to cancel the same was based on the letter from Deputy County Commissioner Webuye Sub – County REF LND/WBY/WEST/16/32/VOL.1/127 dated 25.11.2019.

Please re – enstate (sic) parcel NDIVISI/MUCHI/2111 to it’s original status.

SIMIYU W. AMOS

COUNTY SURVEYOR

C.C GABRIEL MUMELA MACHASIO.”

It is instructive to note that by the time the above letter was being issued, the titles to the parcels **NO NDIVISI/MUCHI/10442** and **10443** which had been issued on 7th November 2019 were both registered in the names of **GABRIEL MUMELO MACHASIO** the registered proprietor of the suit land and the 8th Interested Party herein. It is not clear in whose names the parcel **NO NDIVISI/MUCHI/10444** was registered. What is clear from the second prayer of the application is that the Applicants seek the registration of the parcels **NO NDIVISI/MUCHI/10442** and **10444** in their names while the 8th Interested party retains parcels **NO NDIVISI/MUCHI/10443**.

In the second prayer of the application, the Applicants seek what is essentially an order of mandamus to order the Respondents to forthwith accept the documents presented by them to effect the registration of parcels **NO NDIVISI/ MUCHI/10442, 10443** and **10444** being sub – divisions of parcel **NO NDIVISI/ MUCHI/10444**.

It is clear to me that what the Applicants are ventilating in these proceedings is the ownership of the suit land. That is not the forum for which Judicial Review proceedings were meant. In **R. V. CHAIRMAN AMAGORO LAND DISPUTES TRIBUNAL & ANOTHER EX – PARTE PAUL MAFWABI WANYAMA C.A CIVIL APPEAL No 41 of 2013 [2014 eKLR]** the Court of appeal stated the following: -

“Judicial review applications do not deal with the merit of the case but only with the process. For instance, Judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did not take into account irrelevant (sic) matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suit.”

The remedy of judicial review is a discretionary one. The Court may decline to grant the orders of certiorari or mandamus even where the requisite grounds for such remedies have been established if such remedy is not the most efficacious. In **SANGHANI INVESTMENT LTD .V. OFFICER – IN – CHARGE NAIROBI REMAND AND ALLOCATION PRISON 2007 1 E.A 354**, the Court held

“..... It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the Court will grant an order of Judicial review even though it is deserved. Judicial

review being a discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy which a Court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a Judicial one must be exercised on the basis of evidence and sound legal principles”

In this case, and as Counsel for the Applicants **MR WASILWA** has rightly submitted, the **LAND REGISTRAR BUNGOMA** had no jurisdiction to purport to cancel any titles. Indeed, if the **LAND REGISTRAR** was minded to exercise his powers under Section 79 of the **LAND REGISTRATION ACT**, he was required to give the Applicants an opportunity to be heard. That is what the Rules of Natural Justice demand. Further, Section 4(3) of the **FAIR ADMINISTRATIVE ACTION ACT 2015** provides that where an administrative action is likely to adversely affect the rights of a person, he must be given an opportunity to be heard. See also **Article 47(2) of the Constitution**. However, is the remedy of certiorari the most efficacious in the circumstances of this case? I do not think so. The simmering dispute involving the applicants and the Interested Parties over the sharing of the land parcel **NO NDIVISI/MUCHI/211** will not properly be determined by the Judicial review remedy of certiorari. That dispute will best be determined through a civil suit.

The up – shot of the above is that the application is dismissed. As the main protagonists are a man and his children, the order that commends, itself to me is that there shall be no orders as to costs.

Boaz N. Olao.

J U D G E

15th October 2020.

Judgment dated, signed and delivered at **BUNGOMA** this 15th day of October 2020 by way of electronic mail. This is in keeping with the **COVID – 19** pandemic guidelines and as was advised to the parties on 21st September 2020.

Boaz N. Olao.

J U D G E

15th October 2020