



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISCELLANEOUS CIVIL APPL NO. 12 'B' OF 2012

**IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES
SECTIONS 1A & B , 3, 3A OF THE CIVIL PROCEDURE ACT, CAP 21,
SECTIONS 8 CHRISTOPHER IDDI MOTO & 15 OTHERS AND 9 OF
THE LAW REFORM ACT, CAP 26 AND ALL OTHER ENABLING
PROVISIONS OF LAW**

IN THE MATTER OF: APPLICATION BY:

- 1. SHAHIBU SIZI BAHERO**
- 2. HASSAN MOTE MBWARAHAJI**
- 3. MOHAMMED SHEE BWANA DUME** (in their representative capacity for and on behalf of the residents of **Mtanagwanda Island, Lamu East District**)

**FOR JUDICIAL REVIEW AND FOR ORDERS OF MANDAMUS, CERTIORARI,
PROHIBITION AND QUO WARRANTO**

**IN THE MATTER OF: OF CONYEANCE/LEASE OR LICENSE OF OR FOR OCCUPATION
OF PATE ISLAND (VILLAGE OF PATE MTANGAWANDA AND BORI)**

REPUBLICAPPLICANT

VERSUS

- 1. THE HON. ATTORNEY GENERAL**
- 2. THE COMMISSIONER OF LANDS**
- 3. MINISTRY OF LANDS DEPARTMENT OF SETTLEMENT**

(LAMU EAST DISTRICT PATE/MTANGAWANDA/BORI AREA)

- 4. DIRECTOR OF SURVEYRESPONDENTS**

AND

1. **SHAHIBU SIZI BAHERO**
2. **HASSAN MOTE MBWARAHAJI**
3. **MOHAMMED SHEE BWANA DUME** (in their representative

capacity for and on behalf of the residents of

Mtanagwanda Island, Lamu East District)INTERESTED PARTIES - EXPARTE

1. **SHAHIBU SIZI BAHERO**
2. **HASSAN MOTE MBWARAHAJI**
3. **MOHAMMED SHEE BWANA DUME** (in their representative

capacity for and on behalf of the residents

of **Mtanagwanda Island, Lamu East District)**

JUDGMENT

1. The Notice of Motion application dated 10th April, 2012 seeks the following key prayers:

“(a) THAT an order of prohibition/certiorari and or Mandamus do issue directing the Respondents to desist from proceeding with demarcation, survey, conveyance, leases/licenses and or issuance of any Title to land in respect of Pate island and in particular Mtangawanda Village or in any village of Pate, Mtangawanda and or Bori. AND OR

(b)THAT, this honourable court do order or direct, the 2nd Respondent to bring before this court any order, directive and or command for demarcation, survey, lease, license or conveyance in respect of land comprised of Pate Island with a view to familiarising itself with its propriety, regularity, legality and constitutionality thereof and to quash the same ex debito justitiae AND OR

(c) THAT, this honourable court do declare any demarcation, survey, conveyance, leases, licenses and or any other document of Title in respect of Pate Island or any other dealing in respect of land affecting Pate Island and in particular Mtawagawanda Village as having been done in rash, improper, irregular and in contravention of the law and constitutional requirement, hence null and void ab initio.”

2. There are twelve grounds cited in support of the application, which can be summarised as follows:

1. The impugned exercise is being conducted in violation of Article 60(1) of the Constitution and an attempt to preempt the work of the National Land Commission.
2. The Commissioner for Lands has by disallowing the participation of the local people is facilitating the demarcation and alienation of public land to non-residents of Pate, Mtangawanda and Bori Adjudication sections.
3. Proper notices were not issued to the concerned residents to declare their interest.
4. The composition of local committees formed to facilitate the exercise were not proportionately representative of all the villages.
5. Mtangawanda residents were treated to dismiss intimidation and violence by the majority of committee members drawn for Pate.
6. The exercise is a sham intended to benefit the provincial administration and influential persons.

Two replying affidavits were filed, by Bakari Mohamed Abdulrahman the Chairman of the Pate Location squatter Settlement Committee and by Ahmed Hassan Mohamed the District Land Adjudication and Settlement Officer. The sum total of these affidavits is a rebuttal of the grounds advanced by the *ex parte* applicant. It is contended that the impugned process was not a regular adjudication process but an exercise to identify and settle squatters on demarcated land through the respect Squatter Settlement Committee.

That the exercise was well publicised through *barazas* and should proceed to enable the people concerned to obtain titles to land they consider their ancestral inheritance.

3. The *ex parte* Applicants are seeking Judicial review remedies which are in essence prerogative powers donated to the courts via Section 8 of the Law Reform Act and Order 53 of the Civil Procedure Rules empower to the courts to supervise public bodies. The aim being to ensure that such bodies observe substantive principles of public law. These powers are discretionary in nature. See **Peter Bogonko vs National Environment Management Authority (2006) Eklr.**
4. Regarding the prayers, firstly, under Order 53 of the Civil Procedure Rules, there is no provision for an order of *quo warranto* and such cannot therefore issue. Moving on to the other prayers, it is to be noted that the purpose of certiorari is to quash a decision made by a public body or a body performing public duties where the decision is rendered illegal as the body in reaching it exceeded its jurisdiction or broke the rules of natural justice or applied a wrong legal test or failed

to take into account relevant considerations and/or based the same on legally irrelevant considerations - see Anisminic Ltd vs Foreign Compensation Commission [1969] 2 A.C. 147, [1969] 1All E.R 208 and Republic vs. Kajiado Disputes Tribunal & Others Exparte Joyce Wambui & Another Nairobi High Court Misc. Appeal No. 689 of 2001).

5. The objective of an order for prohibition is to stop that body from making such a decision while an order for mandamus compels that body to make its decision based on rules of natural justice or to compel it to apply relevant principles of law and/or to act within or as per its jurisdiction - see Kenya National Examinations Council And Republic Ex-Parte Geoffrey Gathenji Njoroge Nairobi Civil Appeal NO. 266 OF 1996 , eKLR.

6. An order of certiorari cannot be sought after six months since the date of the proceeding/ decision in question. The decision to determine and the process of determination of propriety rights in the area in issue commenced in year 2006. Hence the second prayer is a non-starter as it is time barred. Similarly a declaratory order is not available in Judicial Review proceedings.

7. Respondent's replying affidavit the demarcation exercise first involved the clustered villages and fields while the uninhabited areas remained pending. The minutes of the meeting of 4th may, 2006, annexed to the Respondent's replying affidavit, indicate that Mtangawanda falls under Lamu East. Several persons were listed in attendance from Lamu, though it is not indicated whether they were from Lamu East or West. The minutes dated 15th , May, 2012 , also annexed to the Respondent's replying affidavit indicates that a register of squatters was to be opened and all persons above the age of 18 resident in the area would be registered as a potential beneficiaries. That each village was to form its own squatter identification team. The minutes indicate that the Chief of Pate was present. The minutes dated 22nd March, 2012, annexed to the Respondent's replying affidavit indicate that a Mr. Shahibu Sibhi was present at the 'DCs Baraza at Mtangawanda which discussed, the squatters' regularization programme'. He attended as a member of Pate Lands Committee, Mtawaganda. From the minutes, the views of the residents of Mtangawanda on the allocation of land were received. It was eventually resolved that 4 additional people from Bori and Mtangawanda would be included in the committee. It is clear that the *audi alteram partem* rule of natural justice was applied.

8. The *ex parte* Applicants appeared to treat the exercise of identification and settlement of squatters as land adjudication proper under the Land Adjudication Act which is erroneous. According to the annexure II of the Respondent, (the minutes dated May, 2006) the agenda as set out by the District Commissioner Lamu was that the exercise was intended to address the endemic land problems in the Province. This court takes judicial notice of this fact: that within the coastal area many people are in possession of land without title. On exercise aimed at addressing of this issue is therefore an exercise in public interest. In the case of Peter Bogonko V National Environment Management Authority (2006) eKLR, the court held that:

“The remedy of Judicial Review being a public law remedy, the court would obviously weigh Public interest vis a vis the rights of the applicant”

9. The grounds on which the application is grounded includes the complaint that the Commissioner of Lands has failed the test of the principles of land policy as enshrined under *Article 60 (1)* of the Constitution. At this juncture it is important to point out that this provision of the law was not in force as at the time the decision to demarcate land was formulated in 2006. The Applicant further claims that residents of the area were not identified. However the annexures on the replying affidavit bear a list entitled 'provisional Pate Settler List', which seems to negate this assertion.

10. After a careful consideration of the pleadings, annexures and submissions, I find that the prayers sought cannot be granted. The application has no merit and is dismissed with costs.

Delivered and signed at Malindi this **10th** day of **May, 2013** in the presence of:

Court clerk - Evans

C. W. Meoli

JUDGE