



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CIVIL APPLICATION JR ELC NO. 11 OF 2012**

**IN THE MATTER OF ORDER 53 RULES 1, 2, 3 OF THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF THE ESTATE OF HEMED KALE HEMED**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF MANDAMUS**

**MARIAM HEMED KALE.....**

**APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LANDS REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 18<sup>th</sup> October, 2012, the *ex parte* applicant herein, **Mariam Hemed Kale**, seeks the following orders:
  1. **That the court orders by way of Judicial Review orders of Mandamus against the Chief Lands Registrar compelling him:**
    - a. **To register land parcel No. 576 and 577 Registered as Ngomeni/Gongoni/576 and Ngomeni/Gongoni/577-Ngomeni Settlement Scheme Malindi Kilifi County in respect of Maryan Hemed Kale as an administrator of the Estate of Hemed Hale Hemed as confirmed in the Certificate of Confirmation issued on the 2<sup>nd</sup> March 2011.**
    - b. **To cancel Ngomeni/Gongoni/576 and Ngomeni/Gongoni/577 entries in the register, registered fraudulently in the names of Herbert James Andrew Title No. Ngomeni/Scheme/576 and Robin Angus Paul Ngomeni/s/Scheme/**
  2. **Cost of this Application be provided for.**
2. The Motion is based on the grounds set out in the Statement and verifying affidavit filed herein on 16<sup>th</sup> October 2012.

3. According to the *ex parte* applicant, she is the daughter of the deceased and the Grant of letters of administration were granted to her on the 17<sup>th</sup> August 2010 which grant was Confirmed on the 3<sup>rd</sup> March 2010 and parcel numbers 576 and 577 Ngomeni Settlement Scheme were distributed to all the dependants being **Esha Hemed Kale, Maryam Hemed Kale, Kale Hemed Kale, Mwanahawa Mohamed Kale, Mohamed Hemed Kale** and **Omar Hemed Kale** as per Islamic Sharia. On the 12<sup>th</sup> July 2011 Deputy Registrar High court of Kenya at Malindi wrote to the Land Registrar Kilifi land registry directing the registrar to register the properties on behalf of **Mariam Hemed Kale** as indicated in the said Grants. The said registrar of lands however refused to register the land as directed by the court prompting the applicant to complain to the Permanent secretary Ministry of Lands and on the 1<sup>st</sup> march 2011 the Permanent secretary ministry of lands wrote to the district lands officer ordering the district lands Registrar to investigate and report back to the Permanent secretary.
4. However, the district lands registrar did not respond to the letter despite a reminder. On the 15<sup>th</sup> May 2012 the District Land Registrar was directed by the Permanent Secretary to obey the court order and implement it by transferring the Parcels to the Administratrix but the said District Lands Registrar replied on the 24<sup>th</sup> May 2012 disputing that the confirmation of the letter of administration do not offer any basis for registration under the **Registered Lands Act Cap 300** claiming the deceased had no interest on the said properties. It is averred that after the Petitioners petitioned the court for letters of Administration through petition number 11 of 2010 in the matter of the estate of **Hemed Kale Hemed** one **Athman Bwana Mbwana** applied to revoke the grant of letter of Administration on reasons that the beneficiaries **Kingfisher boats Ltd, Robin Angus Paul** and **Herbert James A Andrew** had bought the properties from the deceased but the said claim was dismissed vide a ruling issued on the 19<sup>th</sup> July 2012.
5. According to legal advice from the applicant's advocate, the beneficiaries allegation that the properties were sold to them by her father and the registrar's assertion that the two parcels were registered under the Settlement Scheme and registered under **Herbert James Andrew Paul** and **Robin Angus Paul** cannot be true as the two contradicting narrations are clear the titles were obtained fraudulently and to confirm this the district Commissioner Malindi District issued a stop order on the 3<sup>rd</sup> September 2010 against Angus Robin Paul.
6. Following a complaint by the applicant on the 20<sup>th</sup> April 2011 to the Kenya Anti Corruption Commission, the Commission ordered the Provincial Criminal Investigation Officer to investigate as the two persons purporting to be beneficiaries vowed to use their financial prowess to frustrate the applicant's efforts to reclaim the land.
7. It is the applicant's position that the two applicants have tried all means to frustrate her family and including filing a Criminal case no 181 of 2011 - **Republic versus Kale Ahmed Kale, Mohamed Ahmed Kale** which case the director of Public Prosecutions entered a *nolle prosequi*.
8. In reply to the application, **Robin Angus Paul**, the 1<sup>st</sup> Interested Party herein swore a replying affidavit on 23<sup>rd</sup> November 2012 in which he deposed that the interested parties are the registered proprietors of the suit property namely Ngomeni Settlement Scheme/576 & 577 and exhibited copies of certificates of title and their respective searches. According to the deponent, the property was sold to them by the father of the ex-parte applicant when he was alive and of sound mind and copies of the alleged agreements are similarly exhibited. It is further contended that the Interested Parties purchased the said property only when it was confirmed that the same had been adjudicated in the deceased's name for /577 and his nominee **Kale Shebwana** for /576 and exhibits the relevant copy of the adjudication register numbered 11. Consequently, it is deposed that their names were removed from the adjudication register and replaced with the names of the Interested Parties and in fact after the death of her father, the ex-parte applicant together with her fellow siblings appointed an agent to follow up on the balances that could still be outstanding. Their said agent, it is deposed, who was appointed in writing, **Dilmua Mohamed**, negotiated an additional payment of Kshs. 1,050,000/= which the interested parties paid in cash to the members of the family of the seller **Mr. Hemed Kale Hemed**. He, it is contended, pleaded with the Interested Parties to help the family as the outstanding balance then due was so meagre, a proposal which the Interested Parties acceded to.
9. It is averred that the *ex parte* applicant and all her family members were very much aware of the sale and at one time she wrote and pleaded with the Interested Parties not to pay any money to her

- brother **Mohamed Hemed** whom she claimed was misusing it and a copy of a letter is exhibited to prove this allegation.
10. The matter, according to the deponent, was settled and the Interested Parties had no problem having taken possession of the same as early as 2005 until 2010 when the Interested Parties suddenly started hearing rumours that some of the family members wanted them to pay more money in respect of the purchase, although a member of the family **Mohamed Hemed** when asked about the rumours denied and signed a document confirming the sale. Soon thereafter, the Interested Parties learnt that the ex-parte applicant had obtained a grant of letters of administration to administer the very property the family had sold to us and she proceeded to the registry at Kilifi hoping to use the confirmed grant to administer and distribute the suit property, but failed. It is contended that since that time, the applicant has approached various authorities to get herself registered proprietor, a demand that could not be carried out without prejudicing the Interested Parties' interests.
  11. The applicant then reported the matter to the Kenya Anti-corruption Commission to intimidate the Interested Parties who were after thorough investigation cleared of any wrong doing and the file closed by the DCIO Malindi. Thereafter, the applicant instituted suit by way of originating summons being HCC No 37 of 2011 seeking for orders to direct that she be registered proprietor which suit is still pending before the High Court at Malindi for determination. However, while her said suit was awaiting hearing and disposal, she moved the court again by way of notice of motion in succession cause No 11 of 2010 seeking orders to be registered proprietor. While that application was pending, she on 27<sup>th</sup> July 2012, yet again filed another application by way of an undated chamber summons seeking the same orders before the same court. In both applications, the Interested Parties contend that the *ex parte* applicant she relies on the confirmation of the grant to seek removal of the Interested Parties' names from the register and insert her name instead. According to the deponent, both applications are pending for hearing and determination in the High court at Malindi and the applicant has not even moved the court to hear and dispose of the same hence this Notice of Motion ought to be viewed in the context of the other suits and/or applications that are still pending.
  12. According to the Interested Parties, it is the law that a party cannot pursue two remedies at the same time in the same court by another suit and that it is also the law that a party cannot institute suit involving the same parties and the same issues, while a previously filed suit or application is still pending. It is further deposed that the remedy which the applicant seeks herein is a special remedy that cannot be invoked once a party has opted to pursue another remedy towards the same goal and that in view of the foregoing, it is clear that this suit is a gross abuse of the process of the court, is misconceived and should be struck out with the costs to us. Besides everything else, it is contended by the Interested Parties that it is not possible to grant the orders sought on the basis of a confirmed grant alone.
  13. There was a further affidavit sworn by the applicant on 15<sup>th</sup> March 2010 in which she admitted that the 2<sup>nd</sup> interested party is the administrator of the estate of Herbert James Andrew Paul. While conceding that the interested parties are the registered proprietors of the suit property namely Ngomeni Settlement Scheme 576 and 577, she deposed that the said registration was fraudulently done. She, however, admitted that the Notice of Motion must be viewed in the context of the other suits and/or applications that are still pending. She further conceded the legal position that a party cannot pursue two remedies at the same time in the same court by another suit and that one cannot institute another suit during the pendency of other suits and that the remedy sought herein being a special remedy cannot be invoked once a party has opted to pursue another remedy towards the same goal.
  14. Apart from that the applicant has denied the averments made by the interested parties and states that the interested parties' objection to the grant of letters was dismissed.
  15. Although on 4<sup>th</sup> February 2013 directions were given with respect to filing of submissions on the Interested Parties filed submissions. According to the interested parties the disputed property is in the name of the 2<sup>nd</sup> interested party whose estate is being administered by the 1<sup>st</sup> interested party. It is further submitted that whether the same were so lawfully registered as proprietors is not relevant to these proceedings because this court, whose mandate is limited to finding whether there is statutory duty which the respondents are obliged to carry but have without any reasonable or lawful cause refused and or neglected to do, cannot determine the same. Since the disputed

property is in the names of the interested parties, it is submitted that the same is not part of the estate of the applicant's father. Any challenge to the interested parties' title, it is submitted ought to be by way of a suit for the same and not in these proceedings.

16. It is also submitted that the *ex parte* applicant having instituted other suits in respect of the ownership of the suit property, she cannot seek the remedies sought herein hence this application ought to be dismissed with costs.
17. Having considered the application, the affidavits both in support of and in opposition to the application, this is the view I form of the matter. The jurisdiction of the Court with respect to grant of judicial review orders of mandamus which are the orders sought herein was restated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** where the Court of Appeal expressed itself as follows:

**“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal**

**remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

18. The *ex parte* applicant's case in short, is that the grant of letters in respect of the estate of her late father having been confirmed by the Court, the 2<sup>nd</sup> Respondent is under a legal duty to register. Section 32(1) of the repealed Registered Lands Act, Cap 300 Laws of Kenya provided as follows:

***The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.***

19. The effect of the foregoing provision is that the Registrar was under a statutory obligation to issue a title deed or certificate of lease to a proprietor thereof on request. If the applicant was the proprietor of the suit parcels she was entitled to be issued with the title deed and if the Registrar declined to do so mandamus could properly issue to compel the Registrar to do so.
20. Section 119 of Cap 300 provided as follows:

**1) If a sole proprietor or a proprietor in common dies, his personal representative, on**

application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words “as executor of the will of ..... deceased” or “as administrator of the estate of ..... deceased”, as the case may be.

(2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission –

(a) any transfer by the personal representative;

(b) any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

21. Therefore if the late **Hemed Kale Hemed** was the proprietor of the suit parcels of lands, the *ex parte* applicant herein being his personal representative, was entitled to be registered by transmission as the proprietor thereof.
22. It is however not contested that the registered proprietors of the suit parcels of lands are the Interested Parties. Accordingly, the provisions of section 119 of Cap 300 was not available to the *ex parte* applicant herein and without proof that the suit lands were the properties of the late **Hemed Kale Hemed**, the Registrar was not bound to register the applicants as the proprietors thereof unless there was a Court order issued pursuant to section 143 of Cap 300.
23. The *ex parte* applicant contends that the registration of the suit parcels in the names of the Interested Parties was procured by fraud. That may be so. However, that is an issue that could only be held in properly be determined under the aforesaid section 143. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons 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...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

15. Accordingly, in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that:

**“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.”**

24. Judicial review applications do not deal with the merits of the case but only with the process. In other words 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 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 where an applicant brings judicial review proceedings with a view to determining contested

- matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.
25. In my view the issue of fraud raised by the *ex parte* applicant herein is not an issue that goes to the process but the merits. It is a matter which will necessarily require viva voce evidence to be adduced before the court can determine whether or not the Interested Parties' registration as the proprietors of the suit parcel of land was procured by fraud can be made. It is only thereafter that the Court can properly make an order for the cancellation of the Interested Parties title and direct that the *ex parte* applicant be registered as the proprietor thereof.
26. It is also noteworthy that the orders sought by the applicant herein are limited to mandamus. However as was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) like an order of prohibition, an order of *mandamus* cannot quash what has already been done. Accordingly the order of mandamus would not quash the registration of the Interested Parties as the proprietors of the suit parcels of lands. The effect of issuing the orders sought herein would consequently be that there would be in existence two valid titles to the same parcel of land.
27. However, it is trite that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
28. Again it is trite that the remedy will not be granted where there are alternative legal remedies which are more convenient, beneficial and effectual. In this case, it is admitted that there are pending suits in which the issues of ownership of the suit parcels of lands may be properly disposed of. In my view the issue of fraud alleged herein may be effectually determined in the said suits since the orders sought herein will not have the effect of determining the thorny issues of ownership and fraud which are at the core of the dispute between the parties herein. In other words the orders sought herein will not in the circumstances of this case be efficacious.
29. Accordingly, I decline to grant the orders sought in the Notice of Motion dated 18<sup>th</sup> October 2012. As the Interested Parties seems to have not taken serious steps to challenge the confirmation of grant of letters in favour of the *ex parte* applicant and may have by their omission unwittingly encouraged the *ex parte* applicant to institute these proceedings, I will make no orders as to costs.

**G V ODUNGA**

**JUDGE**

**Dated at Nairobi this 6<sup>th</sup> day of June 2013**

**JUDGE**

**Delivered in the presence of:**