



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Miscellaneous Civil Application 5 of 2008

IN THE MATTER OF: ORDER LIII OF THE CIVIL

PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL

REVIEW BY KASIWA NGOWA

MWAKALE AND KAHINDI KAINGU

JANGAA FOR LEAVE TO APPLY FOR

ORDERS OF MANDUMUS

CERTIORARI AND PROHIBITION.

AND

IN THE MATTER OF: THE LAND DISPUTE TRIBUNAL

PROCEEDINGS BETWEEN DHAHABU

NGOWA MWAKALE, KARISA KENGA

KAZUNGU, KAHINDI KENGA

KAZUNGU, CHENGO KENGA

KAZUNGU, SAFARI KENGA

KAZUNGU, SAID KASIWA NGOWA

AND KAHINDI KAINGU JANGAA

BEFORE THE MAGARINI DIVISION

LAND DISPUTES TRIBUNAL

GONGONI IN RESPECT OF PLOT

NO.MALINDI/KAKUYUNI/MANDUNGUNI/265.

AND

IN THE MATTER OF: THE SENIOR PRINCIPAL

MAGISTRATE'S COURT AT

MALINDI. LAND CASE NO. 16

OF 2007.

R U L I N G.

By a chamber summons, under Order LIII Rules (1) and 4 of the Civil Procedure Rules and section 3A of the civil Procedure Act, the applicant seeks orders:-

- 1.The applicants **KASIWA NGOWA MWAKALE** and **KAHINDI KAINGU JANGAA** be granted leave to apply for orders of Mandamus and prohibition to stop the Malindi Senior Principal Magistrates from proceeding with hearing of the Land "Dispute Case Nos. 16 of 2007 and 3 of 2008 and the grant of leave do operate as a stay of execution of the Senior Principal Magistrate Order dated 17th January, 2007 (error, instead of 17th January, 2008) until determination of the application or until the Honourable judge orders otherwise.
- 2.The applicants be granted leave to apply for an order of certiorari for the purposes of quashing the judgment of the Magarini Division Land Disputes Tribunal dated 23rd day of August, 2007 and the subsequent orders issued by the Malindi Senior Principal Magistrate's court dated 17th January, 2007 (error, instead of 17th January, 2008).
- 3.That costs of this Application be costs in the cause.

The application is based on the grounds:

1. That the land in question is parcel No. **MALINDI/KAKUYUNI/MADUNGUNI/265** and is situated within Malindi Municipality and is NOT within the description of land envisaged by Section 2 of the Land disputes Tribunal Act (No. 18 of 1990) as read with section 2 of the Land Control Act (Cap 302)
- 2.That by the reason of the foregoing, the Magarini Land disputes Tribunal had no jurisdiction to hear or adjudicate on such a dispute.
- 3.That the land in question being land Registered under the Registered Land Act (Cap 300) Laws of Kenya is governed by the Transfer of Property Act as the substantive law and not by Customary Law as provided for by Section 3 (7) of the Land Disputes Tribunal Act and hence the Magarini Division Land Disputes Tribunal is incompetent to adjudicate over the same.
4. That the Respondents herein had and have no legal right of ownership of the land in dispute, as they are not the Registered proprietors of the parcel No. **MALINDI/KAKUYUNI/MADUNGUNI/265** and neither do they have any letters of Administration of the estate of the late **KENGA KAZUNGU** who they allege to have been their father and husband to the 1st Respondent and neither have probate letters for purposes of suing have been issued.

The application is predicated upon the statutory statement dated 21st February, 2008 and the affidavit of **KASIWA NGOYA MWAKALE** and **KAHINDU KANGU JANGA** sworn on 21st February, 2008.

At the hearing the first applicant urged that he purchased a portion of land parcel No. Malindi/Kakuyuni/madungumi/265 measuring approximately 6 acres from one Kenga Kazungu, since deceased, at a consideration of Ksh. 3,000/= sometime in 1974. That the second applicant equally bought a portion of parcel No. Malindi/Kakuyuni/Madungumi/265 also measuring about 6 acres from Kenga Kaingu at a consideration of Ksh. 6,000/= sometime in 1976.

Both applicants had enjoyed quiet possession of their respective portions of land for over 30 years, though no formal transfer had been effected in their respective names.

On the premises they had acquired the subject parcels by way of adverse possession. They are innocent purchasers for value, a fact not disputed by the respondents.

That in any event the respondents herein, are not the registered proprietors of the property in dispute. Moreover, they have not obtained letters of administration hence have no *locus standi* to sue on behalf of the estate of the deceased.

The land in issue is within Malindi District and Magarini Division Land Dispute Tribunal has no jurisdiction to hear and determine the dispute.

In any event the land in dispute being registered under the Registered Land Act (Cap 300) Laws of Kenya the Magarini Land Dispute Tribunal had no jurisdiction over the same.

Accordingly, the applicants prayed for leave to apply for orders of Mandamus and Prohibition to stop the Malindi Senior Principal Magistrates to proceed with the hearing of the Land Disputes cases No. 16 of 2007 and 3 of 2008. That the grant of leave do operate as a stay of execution of Malindi Senior Principal Magistrates order dated 17th January, 2008 until the hearing and determination of the application.

Certiorari orders a decision of a public body to be brought before the High Court for judicial Review, and if contrary to the law, quash it.

For a party to qualify for the grant of such an order he/she must show:-

- (i) By affidavit and statutory statement that at least some of his/her rights have not been observed in some particular manner.
- (ii) That he/she has been unfairly treated which could be the subject of a Judicial Review.
- (iii) That the subject decision has been made by a judicial or quasi judicial body.

The law relating to leave is now well settled. The application for leave is “**By statement**” the facts relied upon should be stated in the affidavit (**see Wendersworth JJ Exp. – Read (1942) 1K.B. 281**). The statement should contain nothing more than the relief sought and the ground on which it is sought.

In case of certiorari, leave shall not be granted unless the application for leave is made not less than six (6) months after the date of the proceedings, or such shorter period as may be prescribed by any Act.

The decision sought to be quashed was made, on the available evidence, on 23rd day of August, 2007 and this application filed on 21st May, 2008. That is in excess of six (6) months.

Accordingly, I am disinclined to grant the orders of certiorari since it is sought after 6 months after the 23rd of August, 2007 when the decision sought to be quashed was made.

Having refused an order of certiorari, this judgment of the Magarini Division Land Disputes Tribunal dated 23rd day of August, 2007 stands. Accordingly, the prayer for leave to apply for orders of mandamus and prohibition to stop the Malindi Senior Principal Magistrate for proceeding with the hearing of the Land Disputes Tribunal case No. 16 and 3 of 2008 fails and is dismissed.

Dated and delivered at Malindi this 8th day of May, 2009.

N.R.O. OMBIJA.

JUDGE.