



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MALINDI
MISC CIVIL APPLICATION NO. 13 OF 2019

DR. JOEL RICHARD WAMBWA.....EX PARTE APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION

THE CHIEF LAND REGISTRAR

THE ATTORNEY GENERAL.....RESPONDENTS

FATUMA SHEE.....1ST INTERESTED PARTY

CHIODI PIERINA.....2ND INTERESTED PARTY

RULING

1. By the Chambers Summons application dated 5th August 2019 and initially filed at the High Court at Nairobi, Dr. Joel Richard Wambwa (the Ex-Parte Applicant) prays for orders framed as follows:

1. That this application be certified urgent and prayer Nos. 1 and 2 be granted ex-parte in the first instance:

a) That the Applicant be granted leave to apply for an order of certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent made vide Kenya Gazette Notice No. 21 Vol. CXXI awarding the parcel of land to the Interested Parties herein;

b) That the Applicant be granted leave to apply for an order of certiorari to remove into this Honourable Court and expunge all registry entries entered or delivered by the 1st Respondent and effected by the 1st Respondent Chief Land Registrar before or after the publication in the Gazette Notice;

c) That the Applicant be granted leave to apply for an order of prohibition to prohibit the 2nd Respondent, Chief Land Registrar from registering, entering or in any other manner interfering with the records of the parcel pursuant to the decision of the 1st Respondent, while ELC No. 13/2018 is pending in Court;

d) That the Applicant be granted leave to apply for an order of Mandamus directing the 1st and 2nd Respondents to restore status quo ante prior to the decision of the 1st Respondent made vide Kenya Gazette Notice No. 21Vol. CXXI- awarding the parcel of land to the Interested Parties herein.

2. That the leave so granted operates as a stay of any action or process on the part of the 1st and 2nd Respondents in dealing with the parcel pending the hearing and determination of the application; and

3. That the costs of this Application be provided for.

2. The application which is supported by a Statement of Facts and a Verifying Affidavit sworn by the Applicant is premised on the grounds:

i. That around 29th March 2019, the Ex-parte Applicant was informed by his Advocates that the 1st Respondent had vide the said Gazette Notice awarded LR No. Kilifi/Jimba/386 which he owned to the Interested Parties herein;

ii. That the said decision came as a surprise as the Ex-parte Applicant had neither been served with a complaint from the Interested Parties nor was he afforded an opportunity to be heard or to counter allegations made in respect of the ownership thereof;

iii. That despite his protests, the Ex-parte Applicant has learnt that the agents of the 1st Respondent are now coercing the 2nd Respondent to effect the decision to award the property to the Interested Parties;

iv. That unless the said decision is quashed by this Court, the Applicant's right to a fair hearing and ownership of the suit property shall continue to be violated.

3. Upon being filed, the matter was placed before the Honourable Mativo J at the Judicial Review Division in Nairobi on 6th August 2019 whereupon an order was made that the matter be transferred to the Environment and Land Court at Nairobi for hearing. On 7th August 2019 however, on noting the description of the suit property, the Honourable Justice Kossy Bor of the ELC Nairobi transferred the matter to this Court for hearing and disposal.

4. When the file was placed before the Honourable Yano J on 2nd September 2019 as the duty Judge during the vacation, the Learned Judge declined to grant leave ex-parte and ordered the Ex-parte Applicant to serve the other parties.

5. Subsequently all the parties save for the National Land Commission (the 1st Respondent) entered appearance and objected to the grant of leave as sought.

6. By their Grounds of Opposition dated 18th October 2019, the Chief Land Registrar and the Honourable the Attorney General (the 2nd and 3rd Respondents) jointly state:

1. That the prayers sought in the application are not available to the Ex-parte Applicant since the Court lacks the jurisdiction to try this suit by dint of the provisions of Section 6 of the Civil Procedure Act as there is a suit between the same parties on the same subject matter pending in the same Court.

2. That the application is an abuse of the Court process since there are already in force orders of inhibition on the suit property.

3. That the application is misconceived and lacking in merit as all the issues raised have been

canvassed in Petition No. 13 of 2018 and which is still pending before Court; and

4. That the Application is incompetent and devoid of any merit since the present application seeks to embarrass the Court by seeking issuance of conflicting orders on the same subject matter which is actively before Court.

7. On their part, Fatuma Shee and Chiodi Pierina (the 1st and 2nd Interested Parties) assert in their Grounds of Opposition dated and filed herein on 15th October 2019 that:

a) The Motion is subjudice Malindi ELC Petition No. 13 of 2018; Fatuma Shee and Another –vs- National Land Commission & 4 Others where the same issues are being litigated and where all the parties herein are participating and which cause was filed prior to this Motion;

b) There is an alternative beneficial remedy available for the adjudication of the issues raised by the Applicant being the said Malindi ELC Petition No. 13 of 2019;

c) Leave ought not to issue as the issues contemplated in the instant Motion cannot be beneficially and effectively ventilated, adjudicated and determined by way of prerogative orders for which leave is being sought but rather through an action of Constitutional Petition and which forum is being explored by the parties in the said Malindi ELC Petition No. 13 of 2018 where in the Ex-parte Applicant herein is the 4th Respondent; and

d) The Notice of Motion is an abuse of the process of the Court and is devoid of merits in the sense that the Applicant himself petitioned the 1st Respondent to determine the validity and legality or otherwise of Plot No. Kilifi/Jimba/386 which was heard and determined hence no basis for the said application.

8. In addition to the said Grounds of Opposition the 1st Interested Party has also sworn and filed an Affidavit herein on 14th October 2019 reiterating the issues in their Grounds of Opposition and annexing a copy of their Petition in **Malindi ELC Constitutional Petition No. 13 of 2018.**

9. I have perused the Chambers Summons application as filed by the Ex-parte Applicant and the response thereto by both the Respondents and the Interested Parties. I have equally taken into account the submissions and authorities placed before me by the Learned Advocates for the parties.

10. As it were, Order 53 Rule 1 of the Civil Procedure Rules provides that no application for judicial review orders should be made unless leave of the Court was sought and granted. The reason for this requirement of the leave was explained by Waki J (as he then was) in **Republic –vs- County Council of Kwale & Another Ex-Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows;

“The purpose of application for leave to apply for Judicial review is firstly to eliminate at an early stage any applications for Judicial review which are either frivolous, vexatious or hopeless, and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the Court from being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative actions while proceedings for judicial review of it were actually pending even though misconceived....Leave may only be granted therefore if on the material available the Court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the judicial review. It is an exercise of the Court’s discretion but as always it has to be exercised judicially.”

11. Similarly in ***Republic –vs- Land Disputes Tribunal Court Central Division & Another Ex-Parte Nzioka (2006) 1EA 321***, Nyamu J (as he then was) held that leave should be granted, if on the material available the Court considers, without going into the merit in depth, that there is an arguable case for granting leave and that the leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the Courts and the needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending Court action which might turn out to be unmentorious.

12. In the matter before me, the Ex-parte Applicant craves leave to commence the Judicial review proceedings herein against the National Land Commission, the Chief Land Registrar and the Honourable Attorney General as the 1st, 2nd and 3rd Respondents. He accuses the 1st Respondent in particular of making a determination vide the impugned Gazette Notice wherein the 1st Respondent has proceeded to award Land Parcel No. Kilifi/Jimba/386 to Fatuma Shee and Chiodi Pierina named herein as the 1st and 2nd Interested Parties.

13. At Paragraphs C1 to 4 of his Statement of Facts, the gist of the Ex-parte Applicant's complaint herein is captured thus:

1. Around the 29th March 2019, the Ex-parte Applicant was informed by one of his Advocates M/s Alfred Wanga & Company Advocates that the 1st Respondent had vide Gazette Notice No. 21 Vol CXXI awarded, Land Reference No. Kilifi/Jimba/386 which the Ex-parte Applicant legally and legitimately owns, to the Interested Parties;

2. That the said decision of the 1st Respondent came as a surprise as the Ex-parte Applicant had neither been served with a complaint from the Interested Parties nor afforded an opportunity to be heard or to counter allegations made in respect to ownership of the parcel;

3. That despite protest from the Ex-parte Applicant (he) has learnt that the agents of the 1st Respondent are coercing the 2nd Respondent to effect the decision of the 1st Respondent to award the parcel to the Interested Parties; and

4. That unless the said decision is quashed by this Honourable Court, the Applicant is apprehensive that his right to a fair hearing and right to ownership of the parcel (of land) shall continue to be unabatedly violated.”

14. At paragraph 2(c) of his prayers herein, the Ex-parte Applicant refers to the existence of ***Malindi ELC Petition No. 13 of 2018***, which is pending in Court and he seems to fault the 1st Respondent and to demand that its decision be halted pending conclusion of the said matter in Court. From a perusal of the material placed before me it is evident that the said suit was instituted on 24th September 2018 by the Interested Parties herein against the same Respondents herein and two others. The Ex-parte Applicant is named in those proceedings as the 4th Respondent.

15. A further perusal of those pleadings in ***Malindi ELC Petition No. 13 of 2018*** reveals that contrary to his claims that he was unaware of the proceedings before 1st Respondent Commission and that he only learnt about the same from his Advocates, it is the same Ex-parte Applicant who initiated the proceedings before the 1st Respondent through a letter written by his then Advocates Messrs Khaminwa & Khaminwa on 2nd March 2017 which sought to have the title deed for the suit property which was already in the name of the Interested Parties herein to be revoked and or cancelled.

16. It is also evident that pursuant to the said complaint by the Ex-parte Applicant, the Respondents in the said Petition had purported to cancel and or revoke the title in the name of the Interested Parties and hence the Petition dealing with the issue of the ownership of the property whose existence the Ex-parte Applicant was aware of before he instituted this present application.

17. As was stated in *Agutu Wycliffe Nelly –vs- Office of the Registrar Academic Affairs Dedan Kimathi University of Technology (2016)* eKRL:

“.....At the leave stage, the applicant has the burden of demonstrating that the decision is illegal, unfair and irrational as described above. The applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the Judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the Judicial review application. If the Court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.”

18. In the matter before me, it is clear beyond per-adventure that the Ex-parte Applicant is being less than candid in his claim that he was unaware of the proceedings before the 1st Respondent Commission and that the 1st Respondent did not give him a hearing. He is the very one who initiated the hearing before the Commission and the fact that its decision went against him cannot on its own be a reason to seek for Judicial review proceedings.

19. On the material placed before me, there is absolutely no demonstration that any of the Respondents herein have made a decision which is illegal, unfair and or irrational.

20. The result is that the Chamber Summons application dated 5th August 2019 is misconceived and instituted in abuse of the Court process. It must fail. I hereby dismiss it with costs.

Dated, signed and delivered at Malindi this 13th day of November, 2020.

J.O. OLOLA

JUDGE