



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MISC. CIVIL APPLICATION (J.R.) NO. 6 OF 2017**

**IN THE MATTER OF: AN APPLICATION OR JUDICIAL REVIEW OF PROHIBITION**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT**

**AND**

**IN THE MATTER OF: THE LAND ACT**

**AND**

**IN THE MATTER OF: ARTICLE 10, 23(3) F 40(1), (3) (A) and 64**

**OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT,**

**ORDERS 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**MANSUR NAJI**

**ABBAS ABDALLA OMAR**

**ABDULKARIM OMAR.....APPLICANTS**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....RESPONDENT**

**AND**

**RASHID KAJELA NGOLO.....INTERESTED PARTY**

**JUDGMENT**

1. Before me for determination is a Notice of Motion application dated 18<sup>th</sup> April 2017. By the said Motion, Mansur Naji, Abbas Abdalla

Omar and Abdulkarim Abdalla Omar(hereafter the Ex-parte Applicants) pray:-

- 1. That an order of Prohibition do issue prohibiting the Respondent from hearing and determining claims in respect of Plot Nos 4416, 4417, 5465 and 5466 within Malindi County in the Coast Region(herein referred to as the Suit Properties);**
- 2. That an order of Prohibition do issue prohibiting the Respondent from further hearing and determining of claims and in particular hearing and determining of a complaint lodged by Rashid Kajela Ngolo the Interested Party herein before the Respondent alleging double allocation and fraudulent activities on Plot Nos. 4416, 4417, 5465 and 5466; and**
- 3. That the costs of this application be provided for.**

2. The said application is made pursuant to leave granted by this Court to the Ex-parte Applicants on 30<sup>th</sup> March 2017 and is supported by the lodged Statutory Statement and the Verifying Affidavit of Abbas Abdalla Omar sworn on 30<sup>th</sup> March 2017.

3. The gist of the application as can be discerned from the documents filed at the leave stage are:-

**a) That in Mombasa HCCC No. 121 of 1994, the Interested Party herein and 14 others made a claim in respect of the suit properties against Abdalla Omar Mohamed and the Commissioner of Lands;**

**b) That during the pendency of the said suit, the Interested Party together with the other Plaintiffs, in total abuse of the Court Process, instituted HCCC No. 513 of 1995 in respect of the suit properties against the 1<sup>st</sup> Ex-Parte Applicant together with 11 Other Defendants;**

**c) That the Interested Party and the other Plaintiffs in the two Mombasa cases then applied for consolidation of the two. The application was allowed and the parties proceeded under HCCC No. 121 of 1994 which was later transferred to Malindi. On 20<sup>th</sup> September 2004, the consolidated suit was struck out;**

**d) Subsequently the Interested Party and the other Plaintiffs in the consolidated suit filed a Constitutional Petition being Nairobi High Court Petition No. 58 of 2008(Rashid Ngolo & 18 Others. The Petition was heard and was struck out on 18<sup>th</sup> January 2013. The Plaintiffs preferred an appeal against the decision which remains pending hearing and determination to-date;**

**e) That in total abuse of the Court Process, the Interested Party has subsequently vide a letter dated 25<sup>th</sup> March 2013 lodged a Complaint with the National Land Commission (the Respondent herein). Pursuant to the said complaint, the Respondent has commenced a hearing in respect of the suit properties alleging double allocation and fraudulent activities on the suit properties;**

**f) That the Respondent's actions are in abuse of its Powers as Section 14 of the National Land Commission Act does not empower it to review freehold titles and/or Certificates of Ownership in fee simple as is the case in the purported review of the title proceedings;**

**g) That the Respondent's act of summoning the Ex-parte Applicants is ultra vires as the Respondent does not have the appellate jurisdiction to sit on appeal in respect of decisions of the High Court.**

4. In a Replying Affidavit sworn on 7<sup>th</sup> August 2017 and filed herein on 10<sup>th</sup> August 2017, Rashid Ngolo Mwajoha (the Interested Party) avers that the present application is misconceived and amounts to an abuse of the Court Process as the Ex-parte Applicants have concealed crucial evidence from the Court. He concedes that Mombasa HCCC No. 121 of 1994 and HCCC No. 513 of 1995 were consolidated and were later struck out on a technicality. He further admits that they filed Nairobi Petition No. 58 of 2008 which was also struck out on grounds of being res judicata.

5. The Interested Parties further admits that aggrieved by the decision in Nairobi Petition No. 58 of 2008, they did file Nairobi Civil Appeal No. 197 of 2013. The said Appeal was however subsequently withdrawn vide a Notice of Withdrawal of Appeal dated 23<sup>rd</sup> March 2015 and filed in Court on 25<sup>th</sup> March 2015.

6. It is accordingly the Interested Party's case that there is no matter pending in the Court of Appeal as alleged. He asserts that the earlier striking out of the consolidated cases on a technicality and for being res judicata does not amount to the matters being heard and determined on its merit.

7. The Interested Party asserts that the Respondent has the power to hear and determine his rights in respect to this matter as there is no Judgment which has been pronounced by any Court which would bar the Respondent from hearing the matter.

8. I have considered the Motion and the Interested Party's response. The Respondents did not file any response to the application. I have equally perused and considered the Written Submissions and the authorities to which I was referred by the Learned Advocates for the Parties.

9. The scope of the judicial review remedy of prohibition was the subject of the Court of Appeal decision in the oft-cited **Kenya National Examinations Council –vs- Republic Ex-Parte Geoffrey Gathenji Njoroge & Others, Civil Appeal No. 266 of 1996(CAK)(1997)eKLR** in which the Court held inter alia as follows:-

***“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedures of an inferior tribunal, or a wrong decision on the merits of the proceedings.....”(Emphasis added).***

10. In the matter before me, the Ex-parte Applicants crave the issuance of the order of Prohibition to stop the Respondent National Land Commission from hearing and determining claims in respect of the suit properties particularly as relate to a complaint lodged by the Interested Party herein.

11. The basis of the Ex-parte Applicants’ prayers before me is their contention that they are the registered owners of the suit properties, otherwise known as Plot Nos 4416, 4417, 5465 and 5466 Malindi. It is their case that they have each been in actual possession of their respective parcels of land since they became registered as the owners between the years 1990 and 1994.

12. The Ex-parte Applicants are aggrieved that from around the time they purchased the suit properties to-date, they have faced a barrage of lawsuits orchestrated by a number of individuals, key among them the Interested Party herein. The first of those suits was Mombasa HCCC No. 121 of 1994 which was filed by the Interested Party and 14 other individuals.

13. The Ex-parte Applicants assert that during the pendency of the first suit, the Interested Party together with 11 other claimants instituted a second suit being Mombasa HCCC No 513 of 1995 in respect of the same properties. The two suits were thereafter consolidated. On 20<sup>th</sup> September 2004, Justice William Ouko (as he then was) struck out the consolidated suit.

14. The Applicants are unhappy that while the Plaintiffs in the consolidated suits never appealed the decision, they moved to Nairobi where they instituted a fresh Petition being ***Nairobi High Court Petition No. 58 of 2008; Rashid Ngolo & 14 Others –vs- Mansur Naji and 18 others***. That Petition was heard by Majanja, J. who on 18<sup>th</sup> January 2013 proceeded to strike it out on the grounds that it was res judicata.

15. Aggrieved by the decision striking out their Petition, the Interested Party and his colleagues proceeded to file Nairobi Civil Appeal No. 197 of 2013. Subsequently and by a letter dated 25<sup>th</sup> March 2013, the Interested Party lodged a complaint with the Respondent Commission. The Ex-parte applicants by this Motion protest and seek to bar the proceedings before the Commission arising from the complaint lodged by the Interested Party in respect of the suit properties.

16. The Interested Party does not deny that they filed the matters complained of before lodging a complaint with the Respondent. It is however their position that there is no appeal pending before the Court of Appeal as they withdrew the same. It is accordingly their case that there can be no bar to the proceedings before the Respondent Commission as the suits they had filed were merely struck out on technicalities and had never been heard and determined on merit.

17. Indeed while the EX-parte Applicants lawyers may not have been served with the Notice of Withdrawal of the Appeal, it is evident from annexure RNM1 of the Interested Party’s Further Affidavit sworn on 25<sup>th</sup> September 2017 and filed herein on 26<sup>th</sup> September 2017 that a number of the parties cited in the Appeal appeared before the Court of Appeal on 23<sup>rd</sup> April 2015 where the Appeal was deemed to have been withdrawn pursuant to Rule 96(1) of the Court of Appeal Rules.

18. That being the case, the Interested Party urges that there is no bar to the proceedings before the Respondent as there was no matter pending before a Court of Law as at the time the Respondent summoned the Ex-parte Applicants to appear before it vide their letter dated 28<sup>th</sup> September 2016.

19. On the other hand the Ex-parte Applicants contend that the issues being raised by the Interested Party were settled in the cases that they filed previously in Mombasa and Nairobi. Essentially, the Ex-parte Applicants are once again raising a plea of res judicata.

20. As it were, I have little doubt in my mind that it was not the intention of the Kenyan people and the Kenyan Parliament, in promulgating the Constitution and granting power to the Respondent to review Grants that it should review Judgments and decisions of Courts of Law. By the same vein as well, I have little doubt that it was also not the intention of the people of Kenya and Parliament that whenever an issue involving any parcel of land had passed through the Courts, the Respondent’s jurisdiction over such land was crippled. Each case, in my view, has to be looked at in its own unique circumstances.

21. What then are the circumstances in the case before me? From annexure AAR5 of the Verifying Affidavit, it is evident that in Mombasa HCCC No. 121 of 1994 (later on transferred to Malindi as HCCC 121 of 2001) the Interested Party and the other Plaintiffs sought a declaration by way of adverse possession that the suit properties belonged to them and that all the titles issued by the Commissioner of Lands in regard thereto be declared null and void. In a Ruling delivered on 20<sup>th</sup> September 2004, Ouko J (as he then was) struck out the same on the basis that the same was not commenced by way of originating Summons as required under the then Order 36 Rule 3D of the Civil Procedure Rules.

22. The Interested Party did not contest the said decision. Instead, they filed Nairobi Constitutional Petition No. 58 of 2008 seeking inter alia the nullification of titles in respect of the suit properties. In a determination delivered on 18<sup>th</sup> January 2013, Honourable Justice David Majanja rendered himself as follows at paragraphs 7 to 10 of his Ruling:-

7. I have considered the arguments raised by the parties and I think that in view of the order made by Justice Ouko on 20<sup>th</sup> September 2004 striking out the previous suit dealing with the subject land and between the same parties cannot be re-litigated in the manner proposed by the Petitioners.

8. Justice Ouko in his decision addressed himself to the nature of the Petitioners' claim and the manner in which it should be pursued as provided for by the Civil Procedure Rules. In summary he clearly stated that a claim for adverse possession ought to be brought by way of originating summons. This Petition is an attempt to litigate the issue of adverse possession contrary to the "existing legal framework." In the case of *Joseph Ihungo Mwaura & 82 Others –vs- Attorney General, Nairobi Petition No. 498 of 2009(Unreported)*, I observed that, "The Constitution and more specifically Section 75( of the former Constitution) does not create proprietary interests nor does it allow the Court to create such rights by Constitutional fiat. It protects proprietary interests acquired through the existing legal framework." The proprietary rights of the Petitioners are to be addressed within the framework determined by Hon. Justice Ouko and this suit is an attempt to avoid the consequence of the decision. It is a collateral attack on that decision which cannot be permitted."

9. Furthermore the Court had the jurisdiction to address any Constitutional issues which the Petitioners now claim and which were incidental to the matter. A Claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the Court in the earlier proceedings arising out of the same facts. Parties are expected to bring the whole case to the Court and will in general not be permitted to re-open the same litigation in respect of a matter which might have been brought forward but(was) not, whether from negligence, inadvertence or even accident(see *Halsbury's Laws of England, 5<sup>th</sup> Edition, Paragraph 1167*).

10. The Petition is a clear abuse of the Court Process. Being such a Petition, it is hereby struck out with no order as to costs."

23. Arising from the foregoing, it is evident that a Court of Competent jurisdiction had not only adjudicated on the matter revolving on the ownership of the suit properties but also that another Court, had declared the Interested Party's attempt to re-litigate the same as being res-judicata. In their submissions filed before me on 9<sup>th</sup> February 2018, the Interested Party avers at paragraph 19 thereof as follows:-

**19. The truth however is that the matter has never been heard and determined on its merits as it was struck out on procedural technicalities during the first instance and erroneously on grounds of res judicata during the second instance after which it was withdrawn on the third instance during Appeal."**

24. In my mind, upon the withdrawal of the Appeal, the Honourable Justice Majanja's decision as rendered on 18<sup>th</sup> January 2013 remains valid and binding upon the parties. If as the Interested Party states in his submissions they consider the decision to be erroneous, this Court is not the right forum to deal with the purported errors therein.

25. I think there is no harm when the Respondent receives complaints from the public concerning any parcel of land be it public or private. The Respondent is then obligated to look into the complaint to determine whether prima facie it is a complaint worth being pursued. This is a Constitutional duty that the Respondent may not abdicate from.

26. However, where as in this case it is drawn to the Respondent's attention that the Court has already exercised jurisdiction over that same matter, it is my view that the Respondent must not proceed one more step. It cannot review that which a competent Court has returned a judicial verdict on. That is tantamount to second guessing the Court. In this regard, I find and hold that the Notice of Intention to review the Grants of the Suit Properties and the Summons issued to the Ex-parte Applicants are misconceived and an exercise that exceeds the mandate and powers of the Respondent.

27. As the Court of Appeal stated in the *Independent Electoral and Bondaries Commission –vs- Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017(2017) eKLR*;-

**'The rule of doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a Pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end in litigation, and the Judicial Process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.'**

28. In the matter before me, the Ex-parte Applicants have been hounded from one Court and/or tribunal to the other beginning the year 1994 over the ownership of the self-same suit properties. They crave an order of Prohibition to bring this hitherto endless litigation to an end. I am satisfied that they deserve the orders they crave from this Court. This Court accordingly grants them the orders as sought in their Motion dated 18<sup>th</sup> April 2017.

29. The Ex-parte Applicants shall also have the costs of this judicial review application.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**