



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. 16 OF 2017**

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

**AND**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF MANDAMUS AND PROHIBITION AND CERTIORARI AGAINST THE NATIONAL LAND COMMISSION AND COUNT SURVEYOR**

**AND**

**IN THE MATTER OF: THE CIVIL PROCEDURE RULES, THE REGISTRATION OF TITLES ACT CAP 281 AND THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE REGISTRAR OF TITLES.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**MOHAMED HASSAN MWARUMBA.....EX-PARTE APPLICANT**

**ABUBAKAR KAIM ABDALLA.....1<sup>ST</sup> INTERESTED PARTY**

**ABASS MUHAMED MBARAK.....2<sup>ND</sup> INTERESTED PARTY**

**ALI BOA SHALLO.....3<sup>RD</sup> INTERESTED PARTY**

**TAWKELL SAID MOHAMED.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

**1.** This ruling is in respect of a preliminary objection dated 10<sup>th</sup> May 2018 raised by the Interested Parties. The objection is that the applicant has no locus standi to institute these proceedings and that this court lacks jurisdiction to hear and determine this matter.

**2.** In their submissions in support of the preliminary objection, counsel for the Interested Parties M/s Balala & Abed Advocates submitted that the ex-parte applicant has no locus standi to institute this suit. That the Ex-parter Applicant, Mohamed Hassan Mwarumba, in his supporting affidavit sworn on 13<sup>th</sup> July 2018 described himself as the administrator of the Estate of his late father, Hassan Rajab Mwarumba and annexed a copy of a Grant of Letters of Administration dated 19<sup>th</sup> September, 2013 in High Court Succession Cause No.343 of 2011 (Mombasa). It is their submission that the said Grant of Letters of Administration that the Ex-parte Applicant has relied on has been revoked and the file closed. Citing Section 45 of the Law of Succession Act, the Interested Parties submitted that the Ex-parte Applicant has no valid

grant of representation since the one relied on in the application has been revoked by an order of the court and as such cannot purport to institute this suit on behalf of the estate of his late father. Counsel relied on the case of **Peter Kiruri Mumbwa – v- Pauline Muthoni Kinyanjui & 2 Others (2018) eKLR.**

3. Further, it is submitted that the latest postal search conducted at the Land Registry on 11<sup>th</sup> May 2018 reveals that the Ex-parte applicant's deceased father is not among the registered owners of the suit property. It is therefore their submission that the ex-parte applicant has no locus whatsoever to institute any proceedings over the suit property as his late father does not appear among the list of registered owners of the **SUIT PLOT NO.313/11/MN.**

4. M/s Mouko & Co. Advocates for Ex-parte applicant opposed the preliminary objection and submitted inter alia, that the court has jurisdiction, this being a land matter. They further submitted that the Ex parte applicant has come to court in his capacity as the administrator of the estate of the late Hassan Rajab Mwarumba having obtained a Grant of Letters of Administration Intestate on 29<sup>th</sup> September 2013 in **Mombasa Succession Cause No.343 of 2011**, a copy of which is attached to the affidavit in support of the application herein. In that regard, was submitted that the applicant has the necessary locus standi.

5. The advocates for the respondents supported the preliminary objection but did not file any submission although they were granted time to do so.

6. I have considered the preliminary objection as well as the submissions by counsel. The issues that the court is called to determine are whether the court has jurisdiction to determine the matter before court and whether the Ex parte applicant has the necessary locus standi to bring this suit on behalf of the estate of his late father.

7. In the famous case of **Owners of Motor Vessel “Lillian S” – v- Caltex Kenya Ltd (1989) KLR 1**, Nyarangi J.A. stated that:

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis of a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”***

8. The Interested Parties have submitted that this court, the Environment and Land Court (ELC) has no jurisdiction to handle this matter. In the Chamber Summons dated 19<sup>th</sup> December, 2017, the Ex-parte applicant is seeking leave to institute judicial review proceedings to quash the proceedings of the 2<sup>nd</sup> respondent, the National Land Commission conducted on 26<sup>th</sup> October, 2016, October 2017 and the report arising therefrom dated 3<sup>rd</sup> April 2017. The ELC is anchored in the constitution. Article 162 (2) of the constitution provides as follows:

***“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –***

***a) Employment and labour relations; and***

***b) The environment and the use and occupation of, and title to, land. ”***

9. It will be seen from Article 162 (2)(b) that the constitution mandated parliament to create a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Parliament did create the ELC through the Environment and Land Court Act, No.19 of 2011. The jurisdiction of the ELC is provided under Section 13 (7) states as follows:

***“(7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just including –***

***a) Interim or permanent preservation orders including injunctions;***

***b) Prerogative orders;***

***c) Award of damages;***

***d) Compensation;***

***e) Specific performance;***

***f) Restitution;***

***g) Declaration; or***

***h) Costs.”***

10. Section 13(1) of the Act emphasizes that the ELC has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2)(b) of the constitution relating to environment and land. It will be seen from Section 13(7) (b) that the ELC

has jurisdiction to grant prerogative orders. The dispute before this court relates to land **PARCEL NO.MN/II/313, UTANGE** and the Ex – parte applicant is seeking judicial review orders that were made in relation to the said land. It is clear beyond peradventure that the constitution and the Act does give this court the jurisdiction to hear a dispute such as this. This court therefore has jurisdiction to hear a dispute such as this. This court therefore has jurisdiction to entertain the dispute.

11. The other objection raised is that the Ex-parte applicant has no *locus standi* to institute this suit because the Grant of Letter of Administration he is relying on was allegedly revoked.

12. In the case of **Mukisa Biscuits Manufacturing CO. Ltd –v- West End Distributors Ltd (1969)EA**. Sir Charles Newbold, President stated as follows :

***“A preliminary objection is in the nature of what used to be demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

13. The Interested Parties do not seek the exercise of judicial discretion. What the preliminary objection seeks is to have the application struck out because the Ex-parte applicant allegedly does not have *locus standi*, the Grant of Letters of Administration relied on having been revoked. The Interested Parties have not filed an affidavit attaching the alleged revocation. They have only raised the issue in submissions. The Ex-parte Applicant, on the other hand, has not admitted the alleged revocation. The objection in this regard raises issue of fact which have to be ascertained. In line with the decision in above cited case, the preliminary objection on this ground also fails.

14. The upshot of the above is that I find no merit in the preliminary objection. It is hereby dismissed. Each party to bear their own costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 11<sup>th</sup> day of February 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Said for interested parties

Wachira holding brief for Mouko for applicant and for respondents

Yumna Court Assistant

**C.K. YANO**

**JUDGE**

**11/2/19**