



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

JUDICIAL REVIEW APPLICATION NO. 4 OF 2018

IN THE MATTER OF AN APPLICATION BY PEIPEI OLE MOSOIKO FOR JUDICIAL REVIEW

(CERTIORARI AND PROHIBITION)

AND

IN THE MATTER OF SECTION 79 (2) OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF REVOCATION /CANCELLATION OF TITLE BY THE LAND REGISTRAR

AND

IN THE MATTER OF L.R NO. TRANSMARA/ MOITO/488

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

LAND REGISTRAR TRANSMARA

EAST/WEST SUB-COUNTIES.....RESPONDENTS

AND

MOSES MEIBAKO

KOYAGI NGATUNY ALIAS

KOIYAKI TOBIKO ATETI SITONY NGATUNY.....INTERESTED PARTIES

PEIPEI OLE MOSOIKO.....EX-PARTE

RULING

Introduction

1. This Ruling is in respect to the Preliminary Objection dated 14th August 2018 filed by the Interested Party pursuant to the Notice of Motion dated 18th July 2018. In the said Notice of Motion the Applicant seeks the following orders:

a) An order of certiorari to remove into the High Court and quash the 1st Respondent's decision made on 15th March 2018, revoking and/or cancelling the ex-parte applicant's title L.R No. TRANSMARA/MOITA/488.

b) An order of prohibition prohibiting the Respondent's and Interested Parties from implementing the decision of 1st Respondent

made on 15th March 2018 in respect of L.R No. TRANSMARA/MOITA/488.

2. A brief background of this matter is that on the 21st March 2018 the Ex-parte Applicant filed an application to commence Judicial Review proceedings against the Respondents and Interested Party touching on the decision of the 1st Respondent which was rendered on 15th March 2018 with regard to the ownership of L.R No. TRANSMARA/MOITA/488.

3. The application for leave was placed before the Environment and Land Court in Narok which proceeded to grant leave to the ex-parte applicant. However, the Court deferred the aspect as to whether the said leave ought to operate as a stay and ordered that it be canvassed inter partes. Before this could be done, the Ex-parte applicant applied for the Honourable Judge to recuse himself as he had rendered himself in a similar matter. The Honourable Judge recused himself and had the matter transferred to this Honourable court.

4. The Ex-parte Applicant then filed the substantive Notice of Motion after which the Interested party filed a Replying Affidavit and the Notice of Preliminary Objection which is the subject of this Ruling.

5. The said Preliminary Objection raises the following points:

i. *The instant Notice of Motion and the issues raised therein are res judicata.*

ii. *Besides the instant application is consequently barred and/or prohibited by dint of section 7 of the Civil Procedure Act Cap 21 of the laws of Kenya.*

iii. *The instant application is barred by the provisions of section 6 of the Civil Procedure Act Cap 21 of the Laws of Kenya.*

iv. *The Honourable court is devoid of jurisdiction to entertain and/ or adjudicate upon the subject proceedings, either as mounted or at all.*

v. *The instant proceedings amount to and/or constitute an abuse of the due process of the court.*

vi. *In any event the application for leave herein together with the substantive Notice of Motion application dated 18th July 2018 are premature, misconceived and otherwise mounted in a vacuum. Consequently, the entire proceedings are a nullity ab- initio.*

vii. *On the other hand, the order for Judicial Review in the nature of Prohibition has been made/ mounted in a vacuum, the same not having been captured and/or alluded to in the statement of facts.*

viii. *In the premises the ex-parte applicant herein is non-suited.*

6. The Preliminary Objection was canvassed by way of written submissions with brief oral highlights by counsel for the Applicant.

7. The starting point is to define what a Preliminary point of law is. In the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd 1969 EA 696** the court held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues that

A preliminary objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion”

8. In his submissions Counsel for the Ex-parte Applicant has faulted the Interested party for filing the Preliminary Objection together with a Replying affidavit raising similar issues which ought to have been canvassed purely as points of law. This goes against the principle in the **Mukisa Biscuit** case (supra).

9. I have read the Replying affidavit sworn by Koiyagi Ngatuny Alias Koiyaki Tobiko Ateti and indeed at paragraphs 18 and 19 thereof he has alluded to the fact that this application is *res judicata* as the it seeks to address the issue of section 79g (2) of the Land Registration Act, No. 3 of 2012 yet the same issue was deliberated upon before the Environment and Land Court at Narok.

10. Additionally, one of the points raised in the Preliminary Objection is that the application for Judicial Review has been made in a vacuum as the order for Prohibition has not been captured in the statement of facts. In order to make a determination on this the court would have to examine the pleadings so as to ascertain this fact.

11. Similarly, in order for the court to make a determination on whether the application is an abuse of the process of the court, it would have to look at the previous suits filed by the Ex-parte applicant which have been alluded to in the Replying Affidavit.

12. From the foregoing it is clear that the Preliminary objection is not based on pure points of law but rather is one that contains a mixture of

points of law and facts. On this ground alone, I am constrained to dismiss the Preliminary objection.

Dated, signed and delivered at Kericho this 16th day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Sagwe for Mr. Ogutu for the Interested Parties
2. No appearance for the Ex-parte Applicant
3. Court assistant - Rotich