



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

JUDICIAL REVIEW NO. 3 OF 2018

MARY ODHIAMBO AND ANTONY OMONDI DOSIO

(Suing as representatives of the Estate of the late

JEFITHA GEORGE ODHIAMBO DOSIO.....APPLICANTS

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

JUDGMENT

1. This matter was initially filed on 29th August 2017 in the Constitutional and Human Rights Division of the High Court of Nairobi as JR Misc Application No. 536 of 2017. On 30th August 2017, the matter was placed before the Honourable Mativo J who granted leave to the Ex-parte Applicants herein Mary Odhiambo and Anthony Omondi Dosio suing as representatives of the Estate of the late Jefitha George Odhiambo to institute Judicial Review proceedings seeking for orders of Certiorari and Prohibition to issue against the Respondent-the National Land Commission.

2. The said Order required the Ex-parte Applicant to file and serve the substantive Motion within 15 days from the date of the order.

3. On 12th September 2017, the Ex parte Applicant filed the substantive Notice of Motion dated 11th September 2017 seeking the following orders:-

1. That this Court be pleased to grant an Order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent, as published in the Kenya Gazette Notice No. 6866 Vol. CXIX No. 97 dated 17th July 2017, cancelling the Applicant's title to the parcel of land known as Plot No. 433-Watamu Township in Kilifi County and re-allocating it to one Nelson Mathenge Kirimire.

2. That this Honourable Court be pleased to grant an Order of Prohibition prohibiting and/or restraining the Respondent by itself, its agents or persons acting on its behalf, from doing anything to cancel or in any other way interfere with the Applicants' ownership of the parcel of land known as Plot No. 433-Watamu Township in Kilifi County.

3. That the costs of this Application be awarded to the Ex-parte Applicants.

4. The application is grounded upon the facts set out in the Statutory Statement and the Verifying Affidavit accompanying the application for leave sworn by Mary Odhiambo one of the Ex-parte Applicants on 25th August 2017.

5. The application was placed before the Honourable Odunga J on 6th March 2018 who upon considering the issues raised therein transferred the matter to the Environment and Land Court at Nairobi for hearing and disposal. On 21st March 2018, the Honourable Obaga J of the Environmental and Land Court Nairobi in consideration of the location of the subject matter further transferred the matter to this Court for hearing and disposal.

6. It is the Ex-Parte Applicants case that in the year 1992, the deceased acquired ownership of the parcel of land known as Plot No. 433-Watamu Township after the Commissioner of Lands allocated it to him vide an allotment letter dated 8th June 1992. As a condition for the said ownership he was directed to comply with certain conditions including payment of various amounts of money as indicated in the allotment letter.

7. The Ex-parte Applicants further assert that the deceased complied with all the terms and conditions of allotment and as a result the Commissioner of Lands vide a letter dated 4th June 1998 acknowledged the compliance and directed the Director of Surveys to carry out a

survey of the land so as to facilitate registration of a title. The deceased thereafter started paying annual rent and other necessary outgoings on the parcel of land as required and the Ex-parte Applicants as representatives of his estate have continued to do so after his death.

8. The Applicants aver that while they were following up and waiting for registration and issuance of title documents they came to learn that vide Gazette Notice No. 6866 Vol. CXIX-No. 97 dated 17th July 2017, the Respondent has taken away the suit property and given it to one Nelson Mathenge Kirimire. They assert that they had no prior knowledge of any process that would lead to the purported acquisition of their land as such and accuse the Respondent of taking away their land arbitrarily without any lawful cause and without following any lawful process.

9. In view of the foregoing, the Ex-parte Applicants accuse the Respondent of violating their right to property, acting illegally and ultra vires its powers and violating the Fair Administrative Action Act, 2015. They therefore urge this Court to grant the orders sought in their application.

10. Despite being served and granted time within which to file a response, the Respondent failed to do so and did not participate at the hearing hereof.

11. I have considered the application and the submissions made thereon by Ms Fundi, Learned Counsel for the Ex-parte Applicants. I have also considered the authorities to which Counsel referred me.

12. As was held in **Republic –vs- Attorney General & 4 Others exparte Diamond Hashim Lalji & Another (2014) eKLR:-**

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, Judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the maker took into account irrelevant matters.....”

13. In the matter before me, the Ex-parte Applicants are the widow and son respectively and the legal representatives of one Jefitha George Odhiambo Dosio (deceased). It is their case that the deceased was lawfully allocated Plot No. 433 Watamu Township within Kilifi County and further, that the deceased complied with all the terms and conditions of the allotment letter issued to him by the Commissioner of Lands dated 8th June 1992.

14. The Applicants aver that they were in the process of pursuing registration and title for the said parcel of land when they came to realise that by a Gazette Notice dated 17th July 2017, the Respondent had taken away the land and given it to one Nelson Mathenge Kirimire. It is their case that by so doing, the Respondent violated their rights to property, acted illegally and ultra vires its powers and violated their rights to fair administrative action.

15. As it were Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.

16. In support of their case, the Applicants have annexed a Copy of the Letter of Allotment dated 8th June 1992 wherein the Commissioner of Lands allocated to them an unsurveyed Plot No. 433-Watamu Township measuring approximately 0.039 Ha. They have also annexed two letters addressed to the Respondent dated 26th June 2014 and 18th July 2016 indicating that they had issues of access to the said Plot and asking that they instead be allocated Plot No. 468 which was vacant.

17. In its impugned Gazette Notice No. 6866 of 17th July 2017, the Respondent Commission indicates that the Plot No. 433 was registered in the name of one Nelson Mathenge Kirimire and that there was no appearance when the matter came up for hearing. It was thus their determination that the parcel of land be regularized in the name of the said Nelson Mathenge Kirimire.

18. As it were, while the Applicants accuse the Respondent of denying them natural justice, it would appear to me that there was nothing on the records of the said parcel of land to reflect that the Ex-parte Applicants and or the deceased for that matter was the owner of the said parcel as at the time the decision was made. Indeed while they deny being invited to give their position on the land, it is apparent from the impugned Gazette Notice that the Commission put out public notices in the national dailies inviting all interested parties to the properties advertised to appear before it to inspect documents and make written and oral submissions thereon. It is after those hearings held between 7th September 2015 and 5th February 2016 that those determinations were made by the Respondent.

19. Indeed while the Applicants seek orders to quash the Respondent’s decision and to prohibit any interference with Plot No. 433- Watamu, they have for one reason or the other not enjoined in these proceedings the said Nelson Mathenge Kirimire who according to their own documents was given the land by the Respondent.

20. The grant of the Orders of Certiorari and Prohibition as sought herein is discretionary. Before granting the same, the Court is entitled to take into account the nature of the process against which the orders are sought and to satisfy itself that there is a reasonable basis to justify the grant thereof.

21. In the circumstances before me, the grant of those orders is likely to adversely affect a third party whose interest the Applicants were aware of but whom they chose not to enjoin in these proceedings.

22. Accordingly I decline to exercise my discretion in favour of the Ex-parte Applicants. The Motion dated 11th September 2017 is dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE