



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MISCELLANEOUS CIVIL CAUSE NO. 10 OF 2019 (JR)**

**IN THE MATTER OF: AN APPLICATION BY JAMBO FONDO GONA AND GEORGE KIRATU GITHINJI FOR LEAVE TO  
APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS, CERTIORARY AND PROHIBITION**

**AND**

**IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORMS ACT, CAP 26 LAWS OF KENYA**

**IN THE MATTER OF: ORDERS 53 RULE 1 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ADJ SECTION KADZONZO/MADZIMBANI PLOT NOS 176**

**BETWEEN**

**JAMBO FONDO GONA.....1<sup>ST</sup> APPLICANT**

**GEORGE KIRATU GITHINJI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE MINISTRY OF LANDS & SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND ADJUDICATION AND**

**SETTLEMENT OFFICE, KILIFI.....2<sup>ND</sup> RESPONDENT**

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

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**KADENGE KENGA KOI.....5<sup>TH</sup> RESPONDENT**

**CHARO CHULA KIDHONGO.....6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**RULING**

1. By this Chamber Summons application dated and filed herein on 24<sup>th</sup> June 2019, Jambo Fondo Gona and Geoge Kiratu Githinji (the

Applicants) pray for leave to be granted to them to apply for: -

**a) An order of Certiorari directed at the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Respondents to remove to this Court and quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents directing that Plot No. Adj.(sic) Section Kadzonzo/Madzimbani/176 be registered in the names of the 5<sup>th</sup> Respondent.**

**b) An order of Prohibition to prohibit the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from registering or causing to be registered the 5<sup>th</sup> and/or 6<sup>th</sup> Respondents as proprietors of Plot No. Adj. Section Kadzonzo/Madzimbani/176 pursuant to the decision contained in the certified copy dated 11<sup>th</sup> October, 2018 of the ruling of the Appeal to the Minister, the 1<sup>st</sup> Respondent; and**

**c) An Order of Mandamus compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to issue title for the property known as Kadzonzo/Madzimbani/176 to the 2<sup>nd</sup> Applicant, the 3<sup>rd</sup> Party purchaser for value without notice.**

2. In addition to the prayer for leave, the Applicants urge that the grant of the leave do operate as stay of any of the acts by the Respondents to occupy, dispose, alienate, transfer or in any way interfere with ownership and occupation of the said property pending the hearing and determination of the Substantive Motion.

3. When the matter was first placed before this Court on 24<sup>th</sup> June 2019, the Court directed that the application be served on the Respondents and that a date be fixed therefor through the Court Registry. Accordingly, the Application was served upon the listed Respondents for hearing on 30<sup>th</sup> July 2019 as per the Affidavit of Service filed herein on 26<sup>th</sup> July 2019.

4. While the Attorney General filed a Memorandum of Appearance on 25<sup>th</sup> July 2019 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants, none of the Defendants and/or their representatives appeared in Court on 30<sup>th</sup> July 2019 when the matter came up and/or filed any objection to the application. The Applicants accordingly urged this Court to allow the application.

5. As it were Order 53 Rule (1) and (2) of the Civil Procedure Rules require the application for leave to be made Ex parte to a Judge in Chambers and there was therefore no obligation for the application to be served upon the parties.

6. In directing that the application be served, however this Court was giving the Respondents a chance to comment on the possible consequences of the grant of the orders sought herein given that the main decision which was appealed to the Minister had been rendered way back in 2012 and further that a title deed for the concerned parcel of land had been issued way back in the year 2016.

7. In *Meixner & Another –vs- A-G (2005) 1KLR 189*, it was held that the leave of the Court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of Judicial discretion with the test to be applied being whether or not the applicant has an arguable case. Thus the leave stage is used to identify and filter out, at an early stage, claims which may be trivial or without merit.

8. In the matter before me, the 1<sup>st</sup> Applicant and the 6<sup>th</sup> Respondent had a dispute in regard to the parcel of land known as Kadzonzo/Madzimbani/176. During the land adjudication and demarcation process in the area in 2007 the said parcel was adjudicated to the 1<sup>st</sup> Applicant.

9. Shortly thereafter the 1<sup>st</sup> Applicant moved in February 2011 to sell the property to the 2<sup>nd</sup> Applicant for a sum of Kshs 960,000/-. Thereafter the 2<sup>nd</sup> Applicant fenced off the parcel of land and started cultivating maize and rearing livestock thereon. This appears not to have gone down well with the 6<sup>th</sup> Respondent.

10. Thus in or about November 2011, the 6<sup>th</sup> Respondent filed an Objection with the Kadzonzo Madzimbani Land Adjudication Committee. On 20<sup>th</sup> January 2012 after listening to the parties, the 6<sup>th</sup> Respondent's Objection was dismissed and he was given 60 days within which to appeal the decision if he so desired.

11. From the material placed before me, it is apparent that the 6<sup>th</sup> Respondent appealed the decision to the Minister pursuant to Section 29 of the Land Adjudication Act. That Appeal lodged on or about 14<sup>th</sup> February 2012 would not be heard until the 8<sup>th</sup> of August 2018 when the Ministerial Panel chaired by the Deputy County Commissioner Kaloleni heard the parties. The Panel on 19<sup>th</sup> September 2018 allowed the 6<sup>th</sup> Respondent's Appeal and ordered that the 6<sup>th</sup> Respondent be registered as the proprietor of the said Land Parcel No. Kadzonzo/Madzimbani/176.

12. As it turned out, as the matter dragged on awaiting hearing by the Ministerial Panel, the parcel of land said to be measuring 4.7 Ha was on 31<sup>st</sup> October 2016 registered and a Title Deed was issued in the names of the two ex-parte Applicants herein.

13. It is apparent that the 6<sup>th</sup> Respondent came to learn of the fact that a title deed was issued to the Applicants herein before the Ministerial Panel issued its verdict. Accordingly, on or about 17<sup>th</sup> July 2018, the 6<sup>th</sup> Respondent moved to the Kilifi Senior Principal Magistrates Court in Land Case No. 227 of 2018 and filed a suit seeking inter alia an order directing the District Land Registrar Kilifi to rectify the register by deleting and or cancelling the registration of the Applicants herein as proprietors of the land and another order directing that the matter be referred to the Ministerial Appeal Panel for disposal.

14. The Applicants upon being served with the suit papers also filed a Counter Claim before the Kilifi Court seeking an order of injunction

against the 6<sup>th</sup> Respondent, an order declaring that the 2<sup>nd</sup> Applicant be declared to have acquired the property as an innocent third party purchaser for value without notice as well as an order directing the District Land Registrar, Kilifi to issue a title deed to the 2<sup>nd</sup> Applicant.

15. In the application for leave before me, the Applicants aver that they have already obtained orders staying the decision of the Ministerial Panel in the Kilifi Magistrates Court but are apprehensive that even though they were granted the orders, the Kilifi Court may not have the requisite jurisdiction to handle the matter at hand.

16. The apprehension on the part of the ex-parte Applicants is in my view, well founded. A perusal of Section 29(1) of the Land Adjudication Act reveals that the Minister's decision in such matters is final and one can therefore only challenge the same by way of a Judicial Review application to this Court.

17. As it were, by its very definition Judicial Review is the means through which the Courts supervise the actions or decisions of administrative bodies or tribunals. In the English decision of *Council for Civil Service Unions –vs- Minister for Civil Service (1985) AC 374*, the Court classified Judicial review under three heads, viz; illegality, irrationality and procedural impropriety. While admittedly the scope of Judicial review has been expanded in this country, more so with the advent of the Constitution of Kenya 2010 and the coming into force of the Fair Administrative Actions Act, its main thrust remains the decision-making process and not the merits of the decision itself.

18. In the matter before me, the Applicants assert that while this matter was pending before the Kilifi Magistrates Court as aforesaid, the 5<sup>th</sup> and 6<sup>th</sup> Respondents herein colluded and started the Appeal before the Minister for Lands and Settlement (named herein as the 1<sup>st</sup> Respondent). It is further their case that on the date when the matter came up for hearing, they informed the 1<sup>st</sup> Respondent that the matter was pending in Court but the 1<sup>st</sup> Respondent proceeded to hear the matter and thereafter to make findings that the land in question be registered in the name of the 6<sup>th</sup> Respondent.

19. A perusal of the Land Adjudication Act reveals that the Act provides a self-evolving mechanism for land adjudication in all areas that are declared adjudication areas. That process begins with land demarcation and adjudication and terminates after a determination of the Appeals resulting from the objections filed and the Director of Lands Adjudication certifies the process as complete under Section 29(3) thereof.

20. In the matter before me, I am not persuaded that the 1<sup>st</sup> Ex-parte Applicant had been finally adjudicated as the proprietor of the land when he purported to dispose of the same in February 2011 to the 2<sup>nd</sup> Ex-parte Applicant. Neither am I persuaded on the material placed before me that the Ministerial Panel was improperly moved by the Respondents when the matter was pending in Court or that it conducted itself in a manner that was illegal, irrational, procedurally improper or that impeded the Applicants right to fair administrative justice.

21. Accordingly, I find no merit in the Application and I decline to grant leave to the Applicants to apply for the Judicial Review orders of certiorari, prohibition and mandamus as sought herein.

22. I make no order as to costs.

23. Orders accordingly.

**Dated, signed and delivered at Malindi this 3<sup>rd</sup> day of October, 2019.**

**J.O. OLOLA**

**JUDGE**