



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JR MISC APP NO.7 OF 2019

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF: TITLE NO. KILIFI/JIMBA/1125

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF SURVEY.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

SEVEN ISLAND WATAMU LIMITED.....EX PARTE

RULING

1. By a Notice of Motion application dated 22nd May 2019, Seven Island Watamu Ltd(the Ex-Parte Applicant) prays for:-

a. An order of mandamus ordering and compelling the 1st Respondent himself, his servants or agents and/or persons directly working under him to immediately amend the survey records of Register Index Map No. 12 for Kilifi/Jimba Registration Section and include Title No. Kilifi/Jimba/1125;

b. Any such order or relief as the Honourable Court may deem just, fit and appropriate in the circumstances of this matter; and

c. Costs of this application be provided for.

2. That application is supported by a Statutory Statement dated 16th May 2019 as filed with the application for leave together with a

Verifying Affidavit sworn by Roberto Lenzi, a director of the Ex-parte Applicant.

3. It is the Ex-parte Applicant's case that he is the registered proprietor of the said parcel of land known as Kilifi/Jimba/1125. Despite the existence of the parcel of land on the ground and the fact that the Applicant runs a hotel thereon, the Registry Index Map No. 12 for the Kilifi/Jimba registration area has never been amended to include it.

4. The Ex-parte Applicant avers that the Director of a Surveys (the 1st Respondent) is the only party statutorily mandated to amend the Register to include all plots in existence but despite various requests made, the 1st Respondent has refused and failed to do so insisting that the Applicant do obtain a Court order for the amendment to be effected.

5. In a Replying Affidavit filed in response to the application and filed herein on 29th July 2019, the 1st Respondent through its Land Surveyor Priscilla Njeri Wango admits that even though the title deed for the suit property was duly issued, the said property does not appear on the Registry Index Map 12 or any other Map delineating and/or demarcating the Kilifi/Jimba Registration Section.

6. The 1st Respondent avers that the omission seems to emanate from the failure of the Ex-parte Applicant's Surveyor to forward to the 1st Respondent all requisite mutation documents after he conducted the mutation.

7. I have perused and considered the application as well as the response thereto. An order of mandamus is as it were a prerogative order issued in certain cases to compel the performance of a duty. It issues from this Court where the injured party has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the Respondent.

8. Thus an order of mandamus as sought herein is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by an Act of Parliament for the benefit of an individual. The person or authority to whom the order is issued must be either under a statutory or legal duty to do or not to do something, the duty itself being of an imperative nature.

9. In the matter before me, the Ex-parte Applicant craves an order of mandamus to compel the 1st Respondent to amend its record in regard to the Registry Index Map No. 12 for the Kilifi/Jimba registration Section to include the Ex-parte Applicant's Title No. Kilifi/Jimba/1125.

10. From the material placed before me, the Ex-parte Applicant was issued with the said Title Deed in its name on 17th March 2003. The Ex-parte Applicant avers that despite such registration, and the fact of the existence of the parcel of land on the ground, the Register for the said Adjudication Section had never been amended to include it.

11. It was the Ex-parte Applicant's case that the 1st Respondent is the only authority statutorily mandated in law to effect such an amendment and that the continued non-existence of its property in the Registry Index Map jeopardises the authenticity of its Title Deed and constitutes a fetter on its right to property as guaranteed under Article 40 of the Constitution.

12. The 1st Respondent while conceding that it is the only body mandated in law to carry out such an amendment however suggests that the said omission must have arisen from the failure of the Surveyor who carried out the mutation of the parcel to forward to the 1st Respondent all the requisite mutation documents.

13. Given the Respondents concession I will allow the Ex-parte Applicant's application on condition that it shall cause to be forwarded to the 1st Respondent the said requisite mutation documents from the Surveyor within 30 days from today and to pay any fees that may be required for such exercise to the 1st Respondent.

14. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 5th day of December, 2019

J.O. OLOLA

JUDGE