



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 91 OF 2017

BIDIKA MZUNGU MLEWA.....PLAINTIFF/APPLICANT

VERSUS

THE LAND REGISTRAR KILIFI.....1ST DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

RULING

1. For determination before me is a Notice of Motion Application dated 21st April 2017. The Applicant Bidika Mzungu Mlewa prays for 8 Orders listed as follows:-

i) THAT the Honourable Court do certify the matter as urgent;

ii) THAT this Honourable Court be pleased and/or do hereby adopt or confirm the decision of the Principal Magistrate's Court Malindi in Land Case No. 6 of 2005 to the extent that the transfer of land referenced Kilifi/Jimba/42 from Mzungu Mwatete to Robert Mureithi Githinji be and is hereby declared illegal and therefore is hereby nullified and the land to revert back to the original owners Kazungu Mwatete and Kalume Yaa Baya;

iii) THAT this Honourable Court be pleased and do hereby adopt/confirm the decision of the Principal Magistrate's Court Malindi in Land Case No. 6 of 2015 to the extent that the subdivision of the suit land to portions 472, 473, 474 and/or any portions created and sold to other parties is therefore nullified;

iv) THAT this Honourable Court do and hereby order/direct/declare the impugned Title Deeds herein cancelled being the Title issued to Robert Mureithi Githinji and the sub-division thereof.

v) THAT this Honourable Court be pleased to order or direct the Land Registrar Kilifi to proceed to reconstruct or reopen a new file or green card to record and proceed (to) cause an entry and register Kazungu Mwatete and Kalume Yaa Baya without gazettment as the registered owners;

vi) THAT this Honourable Court be pleased to order/direct the Lands Registrar Kilifi to dispense with the production of the original title documents and all other relevant legal documents to be produced in compliance with the Orders;

vii) THAT this Honourable Court do hereby order/direct that Kazungu Mwatete and Kalume Yaa Baya are the legal/beneficial /registered owners of the property known as Kilifi/Jimba/42 and thereafter be issued with a title document without gazettment;

viii) THAT (the) costs of this application be in the cause.

2. The Application is supported by the annexed affidavit of the said Bidika Mzungu Mlewa sworn on 21st April 2017. It is the Applicant's case that in the year 2012, the Kilifi Jimba Settlement Scheme Land Committee confirmed and/or allotted to Kazungu Mwatete Mlewa the parcel of land known as Kilifi/Jimba/42 measuring 12 acres. The Applicant further avers that the said Kazungu Mwatete Mlewa who had occupied the land since 1979 was surprised in the year 1997 when he was trying to transfer 6 acres of the land to Kalume Yaa Baya to learn that the land had been transferred to one Robert Mureithi Githinji who went further and subdivided the said land into 3 portions namely 472 comprising 4.01 Ha; 473 comprising 1.06 Ha and 474 comprising 0.20 Ha.

3. That in the year 2005, Kazungu Mwatete Mlewa together with Kalume Yaa Baya filed Land Dispute Case No. 6 of 2005 against the said Robert Mureithi Githinji. The Tribunal decided that all fraudulent entries on Plot No. Kilifi/Jimba/42 be expunged and the land be returned to its original status. It is further the Applicant's case that the said documentation was adopted at the Principal Magistrate's Court at Malindi under Land Case No. 6 of 2005. The Applicant therefore makes this application to have Kazungu Mwatete and Kalume Yaa Baya declared as the registered owners of the suit property-Kilifi/Jimba/42.

4. The Land Registrar and the Honourable Attorney General named herein as the 1st and 2nd Respondent respectively have jointly filed Grounds of Opposition stating as follows:-

- 1. That the Plaintiff has no legal interest in the suit properties.**
- 2. That no evidence has been adduced to support the Plaintiff's claim over the suit properties.**
- 3. That (the) Orders sought for cannot be granted as it will be a miscarriage of justice if parties involved in the dispute are not enjoined in these proceedings.**
- 4. That the application is mischievous and (an) abuse of (the) Court process.**
- 5. That the mandate and jurisdiction of the Land Disputes Tribunal is otiose; and**
- 6. That the property Kilifi/Jimba/42 is non-existent.**

5. At the hearing hereof, the Applicant contended that the Application was unopposed as the Grounds of Opposition had been filed too late in the day and in violation of Order 51 Rule 16. It is however my view that the same be deemed to have been duly filed in light of the overriding objective of this Court to facilitate the just, expeditious, proportionate and affordable resolution of the dispute as set out under Section 1A and 1B of the Civil Procedure Act.

6. The matters in dispute before me relate to the enforcement of orders issued by the Malindi Land Disputes Tribunal in Land Dispute Case No. 6 of 2005. The said case was filed by one Kazungu Mwatete Mlewa. The Applicant herein holds a Power of Attorney from the said Kazungu Mwatete Mlewa dated 15th December 2015 and authorizing the donee to file the present application.

7. From the records herein, it is evident that in its decision rendered on 21st November 2006, the Tribunal made the following Orders:-

- 1. That the Transfer of land referenced Kilifi/Jimba/42 from Kazungu Mwatete to the Claimant No. 1 to Robert Mureithi Githinji the Objector is hereby declared illegal and therefore is hereby nullified and the land do revert back to the original owner Kazungu Mwatete and the 2nd Claimant Kalume Yaa Baya and take possession and occupation of the suitland.**
- 2. That the sub-division of the suitland to portions 472, 473 and/or 474 or other portions created and sold to other parties is hereby declared illegal and is hereby nullified.**
- 3. The Objector is hereby ordered to pay the Claimant Kshs 2,000/= a year from the date of his action.**
- 4. The Claimants are hereby advised to move to the High Court for cancellation of all titles arising from the Objector's action.**

8. On or about 4th December 2006, the said Order was adopted in Malindi Principal Magistrates Court in Land Dispute Case No. 6 of 2005. In my view and by dint of Section 7(2) of the (now repealed) Land Disputes Tribunal Act, once the Court entered Judgment in accordance with the decision of the tribunal, a decree would issue which would be enforceable in the manner provided under the Civil Procedure Act.

9. A perusal of the Order as adapted by the Magistrate Court however reveals that the last direction which advised the Claimants to move to the High Court for cancellation of the titles arising from the Objector's action was not made part of the Court Order.

10. Whether or not in adopting the Order the Principal Magistrate's Court was right to leave out a section thereof is a matter subject to debate. What is however clear that is the present application is brought pursuant to the findings of the Land Disputes Tribunal.

11. The jurisdiction of the Land Disputes Tribunal was set out in section 3 of the repealed Land Disputes Tribunal Act under which it was provided that:-

- 1. Subject to this Act, all cases of a civil nature involving a dispute as to-**
 - a) The division of, or the determination of boundaries to land, including land held in common;**
 - b) A claim to occupy or work land or**
 - c) Trespass to land,**
- Shall be heard and determined by a Tribunal established under Section 4.**

12. Arising from the foregoing, it would appear to me that the Tribunal in this case went out of its way to purport to nullify the titles for Kilifi/Jimba/472, 473 and 474 as contained at paragraph 2 of its decision. Given that the Tribunal was clearly informed during the proceedings that the aforementioned titles were created and sold to third parties, there should have at least been some attempt to notify the concerned parties before the purported nullification.

13. In filing the present application, the Applicants have neither enjoined the Objector nor the other parties whose titles were to be cancelled and/or rectified. As it were, Section 79(2) of the Land Registration Act gives the Registrar power to rectify or direct the rectification of a register or document if the same has been obtained by fraud. This must however be done within certain confines of the law which ensure the affected parties are notified. In this regard, Section 79(4) of the Act provides:-

(4) The (National Land) Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection(2) and without prejudice to the generality of the foregoing regulations may provide for:-

a) The process of investigation, including notification of affected parties;

b) Hearing of the matters raised; and

c) The criteria to be followed in coming up with the decision.

14. In my mind, the rectification required herein has not been ordered by a Court of Law under Section 80 of the Land Registration Act and must therefore be subject to the rules of natural justice including the notification of the affected parties as stipulated under Section 79(4) of the Act. Having failed to enjoin and/or notify the affected parties of the intended rectification and/or revocation of their titles, this Court is unwilling and will decline to grant the Orders sought.

15. The upshot is that I do not find merit in the application dated 21st April 2017 as presently filed. The same is dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE