



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC (JR) 11 OF 2017

ALEXANDER MUTISYA KATUVYA

(suing on behalf of the ESTATE OF

JOSEPH KATUVYA MAVUTI).....APPLICANT

VERSUS

CABINET SECRETARY

MINISTRY OF LANDS NAIROBI.....1ST RESPONDENT

COUNTY COMMISSIONER MAKUENI.....2ND RESPONDENT

LAND REGISTRAR MAKUENI.....3RD RESPONDENT

AND

WILLIAM VELENZA MANYALA.....1ST INTERESTED PARTY

BENJAMIN MAWEU MANYALA.....2ND INTERESTED PARTY

RULING

1) There is before me a chamber summons application expressed to be brought under order 53 rules 1 and 2 of the Civil Procedure Rules for orders that:-

1. That this honourable court be pleased to grant leave to the applicant to apply for an order of certiorari quashing the decision of the Deputy County Commissioner in Land Adjudication appeal No. 334 of 1997 concerning Plot no. MBOONI/MUTITU/3522.

2. That this honourable court be pleased to grant leave to the applicant to apply for an order of prohibition directed to the respondents restraining them from implementing the decision of the Deputy County Commissioner in Land Adjudication Appeal No. 334 of 1997 concerning Plot No. MBOONI/MUTITU/3522.

3. That this honourable Court be pleased to grant leave to the applicant to apply for an order of Mandamus directed to the 3rd respondent compelling him to quash and/or cancel the certificate of title issued to the interest parties herein in implementing of the decision of the Deputy County Commissioner in Land Adjudication appeal No. 334 of 1997 concerning Plot No. MBOONI/MUTITU/3522.

4. Cost of this application be provided for.

2) The application is dated 18th December, 2017 and was filed in court on the 19th December, 2017 by the applicant, Alexander Mutisya Katuvya.

3) The application is predicated on the grounds of its face and is further supported by the statement of facts dated 18th December, 2017 and

the verifying affidavit sworn by the applicant on the 18th December, 2017.

4) The application is opposed by the interested parties vide the replying affidavit of Alindan Kioko Valenza filed in Court on the 23rd January, 2018. The replying affidavit is indicated.

5) On the 15th January, 2018, the interested parties filed a preliminary objection on a point of law dated the 11th January, 2018.

6) The grounds in the preliminary objection are that:-

1. The suit is statute barred as it offends the mandatory provisions of order 53 rule 2 of the Civil Procedure Rules 2010 in that no leave to file an application was sought to apply for orders of certiorari within 6 months of the judgement as the application is time barred.

2. That the suit is time barred as it offends the mandatory provisions of section 9(3) of the Law Reform Act Chapter 26 in that no leave to file the application was sought within 6 months of the judgment.

3. That the suit is statute barred as it offends the mandatory provisions of section 13 of the Environment and Land Court Act No. 19 of 2011, in that only the Environment and Land Court has original and appellate jurisdiction to hear and determine all disputes regarding land .

7) On the 18th January, 2018 the court directed that the preliminary objection be disposed off by way of written submissions. As at the time of writing this ruling, only the applicant had filed his submissions.

8) The applicant's submissions are that the proposed administrator does not have locus under the law to defend this case on behalf of the estate of William Valenza Manyala. The applicant's counsel relies on the case of Virginia Edith Wamboi Otiemo Vs Joash Ochieng Ougo and Omollo Siranga [1982-1988] where the court of appeal held that;

“But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception”

9) In my view the issues for determination are :-

1. Whether or not Alindan Kioko Valenza has the capacity to defend this suit

2. Whether or not there is a prima facie point of law

CAPACITY TO DEFEND SUIT

10. Alindan Kioko Valenza has deposed in paragraph 1 of his replying affidavit that he has petitioned the Senior Resident Magistrate's Court in Tawa for grant of letters of administration ad litem.

11. In the case of Rajesh Pronjivan Chudasama Vs Sailesh Pronjivan Chodasama Civil Appeal No. 30 of 2013, the Court of Appeal sitting in Mombasa expressed itself as follows;

“A litigant is clothed with locus standi, upon obtaining a limited or a full grant of letters of administrator in cases of intestate succession”

12. The learned judges of appeal, Okwengu, Makhandia and Sichale JJA agreed with the sentiments expressed in Virginia Edith Wamboi Otiemo Vs Joash Ochieng Ougo & Omollo Siranga (Nyarangi, Platt and Gachohi JJA)

13. Evidently, Alindan Kioko Valenza is without the limited grant and as such he has no locus standi. Guided by the two Court of Appeal decisions, it is clear that the preliminary objection has no merits. The interested party cannot purport to approach the court on the basis of that which he does not have. i.e grant of letters of administration ad litem.

PRIMA FACIE POINT OF LAW

14. The case of Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696 sets out the nature and basis of what a preliminary objection is. In the above case, the court held as follows;

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

15. The application for leave to institute judicial review proceedings raises a clear point of law namely whether it has been brought within the time prescribed by statute .

16. The decision sought to be quashed in the event leave is granted is that of the Deputy County Commissioner in land adjudication appeal number 334 of 1997 concerning plot number Mbooni/Mutitu/3522 which is annexture AMK5. It was delivered on 11th November, 2015.

17. Section 9(3) of the Law Reform Act Chapter 26 of the Laws of Kenya Provides as follows ;

In the case of application for an order of certiorari to remove any judgement, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgement, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgement, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

18. Order 53, Rule 2 of the Civil Procedure Rules 2010 states as follows;

Leave shall not be granted to apply for an order of certiorari to remove any judgement, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

19. In the case of Milka Nyambura Wanderi & Another Vs Principal Magistrate's Court, Murang'a & 4 others [2014] e KLR the Court of Appeal sitting in Nyeri (Visram, Gatembu, Odek JJ.A) affirmed a High Court decision which stated as follows:-

“ the court finds that the application for leave is time barred as it was made more than six months after the decision sought to be quashed. I agree with the argument by the interested party that judicial review orders operate within certain confines of specified laws which must be strictly followed. Failure to follow this time limits deprives the judicial review remedies.”

20. In the application before me, it is clear that the same is time barred as it was made more than six months after the decision sought to be quashed was made. Persuaded by Milka Nyambura case, the application for leave must fail.

21. Arising from the reasons that I have given herein above, the preliminary objection is hereby dismissed. I also decline to grant leave for judicial review remedies. It is so ordered .

Signed, delivered and dated at Makueni this 23rd day of April, 2018

MBOGO ,C.G

JUDGE

In the presence of:

Mr. Hassan holding brief for Mrs Mutua for the interested party

No appearance for the Ex-parte applicant

Mr. Kwemboi Court Assistant .

MBOGO C.G , JUDGE

23/4/2018