



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ELC. PETITION NO. 9 OF 2015**

**MAISHA BORA LIMITED.....PETITIONER**

**VERSUS**

**THE LAND REGISTRAR, KILIFI COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**HAJILA BAJILA GUYO.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. In the Petition dated 2<sup>nd</sup> July, 2015, the Petitioner averred that it is the registered proprietor of parcels of land known as Chembe/Kibabamshe/397 and 440 which it purchased for value in the year 2009; that in the year 2015, it received a letter from the 1<sup>st</sup> Respondent requesting it to surrender the Title Deeds for the two parcels of land for cancellation and that it was not a party to Judicial Review Miscellaneous Application No. 31 of 2008.
2. It is the Petitioner's case that the intended action of cancelling Title Deeds in respect to the suit land is in contravention of Articles 27 of the Constitution as to equality before the law, Article 47 as to fair administrative action, Article 50(1) as to the right to be heard and Article 40 which provides for the right to own property.
3. The Petitioner has prayed for a declaration that the two suits, Malindi Judicial Review Miscellaneous Application No. 31 of 2008 and HCCC No. 12 of 2009 having been finalized without any determination against the Petitioner are of no effect with regard to its constitutional rights to hold property. The Petitioner is also seeking for a declaration that being a purchaser for value without notice of any defect in title, it is the lawful owner of the suit land.
4. In the Replying Affidavit, the 3<sup>rd</sup> Respondent deponed that where a transfer has been effected during the active prosecution of a suit, such a transfer is subjected to the Judgment of the court and that the Petitioner is bound by the order of 18<sup>th</sup> November, 2008 in Judicial Review Miscellaneous Application No. 31 of 2008.
5. According to the 3<sup>rd</sup> Respondent, because the Petitioner and Western Sunshine Company Limited were aware of the pendency of the Judicial Review Application, the sale of the suit land to the Petitioner during the pendency of the suit is impeachable; that the Application by the Western Sunshine Company Limited to be enjoined in the Judicial Review Application was dismissed by the court and that the Petition is frivolous, vexatious and an abuse of the process of the court.
6. The Petitioner's advocate submitted that the order of the court in Judicial Review Application No. 31 of 2008 and issued on 18<sup>th</sup> November, 2008 is not binding on the Petitioner; that the Petitioner was neither a party to the suit nor aware of the same and that the Petitioner has a right to be heard.
7. Counsel submitted that the doctrine of *lis pendens* only applies in cases where a party to a suit transfers the suit land to a third party and that Western Sunshine Company Limited was not a party in Malindi Judicial Review Application No. 31 of 2008. Counsel relied on several authorities which I have considered.
8. The 3<sup>rd</sup> Respondent's advocate submitted that the Petitioner was aware and actually participated in Malindi High Court Judicial Review Miscellaneous Application No. 31 of 2008; that the doctrine of *lis pendens* is applicable in this matter and that the doctrine overrides a title obtained during the pendency of proceedings.
9. The 3<sup>rd</sup> Respondent's advocate submitted that the doctrine of *lis pendens* is not based upon notice, but upon the ground that neither party to a suit can alienate the property in a pending suit so as to defeat the rights of the other party. Counsel relied on several authorities which I

have considered.

10. The documents before me shows that by way of Transfers dated 9<sup>th</sup> February, 2009, the Petitioner was registered as the proprietor of the suit properties on 12<sup>th</sup> February, 2009, having purchased them from Western Sunshine Company Limited. The Title Deeds in respect of the two suit properties were issued to the Petitioner on the same day the Transfers were registered.

11. The Respondents have not denied that vide a letter dated 22<sup>nd</sup> May, 2015, the 1<sup>st</sup> Respondent requested the Petitioner to surrender the Title Deeds in respect to the suit properties for cancellation with a view of registering the 3<sup>rd</sup> Respondent as the absolute proprietor of the two suit properties.

12. According to the Petitioner, it was not a party to Judicial Review Application No. 31 of 2008 in which the court directed the 1<sup>st</sup> Respondent to register the 3<sup>rd</sup> Respondent as the absolute proprietor of the suit properties.

13. The order that gave rise to the letter dated 22<sup>nd</sup> May, 2015 by the 1<sup>st</sup> Respondent reads as follows:

**“UPON READING the letter of consent dated 18<sup>th</sup> November, 2008. IT IS HEREBY ordered:-**

**a. THAT Judicial Review orders of mandamus do issue directed against the Respondent compelling and commanding the Respondent by himself, employees and/or agents to forthwith register the ex-parte Applicant as the absolute proprietor of Plot Nos. Chembe/Kibabamshe/397 and Chembe/ Kibabamshe/440.”**

14. The above consent order in Judicial Review Miscellaneous Application No. 31 of 2008 was granted on 18<sup>th</sup> November, 2008. In the said matter, the only parties were the 3<sup>rd</sup> Respondent *herein (who was the ex-parte Applicant)* and the 1<sup>st</sup> Respondent *herein*. Neither Western Sunshine Company Limited nor the Petitioner were parties to the suit.

15. Indeed, when the then registered proprietor of the suit land learnt about the consent order of 18<sup>th</sup> November, 2008, it applied to be joined in the concluded matter. However, the Applicant’s Preliminary Objection was allowed by the court because the court could not issue an order for “review” in a concluded Judicial Review matter. The court held as follows:

**“Now from the provision of Section 8 above, it would appear once the parties entered into the consent and the same becomes orders of the court, they were deemed to be final orders and that there can be no revisit for whatever reason, to the High Court it would only qualify to proceed to appeal before the Court of Appeal.”**

16. It is therefore obvious that the then registered proprietor of the land, Western Sunshine Company Limited, was not a party to the consent Judgment that was entered into by the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent *herein*. Indeed, the Respondents have not denied that Western Sunshine Company Limited was already the registered proprietor of the suit land when the said consent Judgment was entered into, meaning that it was condemned unheard.

17. Although the 3<sup>rd</sup> Respondent has argued that the Petition is an abuse of the court process because the Petitioner bought the suit land *pendente lite (during the pendency of the suit)*, the evidence before me shows that the person who sold the suit land was not a party to the Judicial Review Miscellaneous Application No. 31 of 2008.

18. In the case of the *Carol Silcock vs. Kassim Sharif Mohamed (2013) eKLR*, this court held that under the common law doctrine of *lis pendens*, where a party to a suit transfers the suit property to a third party, such a transfer shall be null and void, and the transfer cannot affect the rights of a decree holder.

19. The doctrine of *lis pendens* therefore only applies where one of the parties to the suit transfers the suit property to a third party during the pendency of the suit, and not otherwise. Neither Western Sunshine Company Limited, the then registered proprietor of the suit land, nor the Petitioner, were parties in Judicial Review Application No. 31 of 2008.

20. In any event, the 3<sup>rd</sup> Respondent has not denied that after the consent Judgment, he sued Western Sunshine Company Limited and the Petitioner *herein* in Malindi HCCC No. 12 of 2009 in which he wanted to be declared the owner of the suit property. The said suit was later on withdrawn. The filing of the suit by the 3<sup>rd</sup> Respondent was an admission that Western Sunshine Company Limited had the right to be heard on the proprietorship of the suit land.

21. It is trite law that Judicial Review is concerned with whether the process and the law has been correctly applied by a public body exercising a public function. Judicial Review is not concerned with the merits of the decision or the legality of the title to land. Consequently, the issue of who is entitled to the suit land was not determined with finality in the consent Judgment that was entered into by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in Judicial Review Miscellaneous Application No. 18 of 2008. That is an issue that can only be determined after all the parties have been heard.

22. In the circumstances, the court finds that the Petitioner has the right to be heard in regard to proprietorship of the suit land pursuant to Articles 27, 47 and 50 of the Constitution. The court further finds that the doctrine of *lis pendens* is not applicable in this case.

23. For those reasons, the Petition is partially allowed in the following terms:

*a. A conservatory order be and is hereby issued restraining the 1<sup>st</sup> Respondent from canceling the Petitioner's title to land known as Chembe/Kibabamshe/397 and Chembe/Kibabamshe/440;*

*b. A declaration be and is hereby issued that the Petitioner has the right to be heard in regard to the issue of ownership of parcels of land known as Chembe/Kibabamshe/397 and Chembe/Kibabamshe/440.*

*c. The Respondents to pay the costs of the Petition.*

**DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 19<sup>TH</sup> DAY OF APRIL, 2018.**

**J.O. OLOLA**

**JUDGE**