



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC. CIVIL APP NO. 5 OF 2017

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER SECTION 8 AND 9 OF THE LAW
REFROM ACT CAP 27 LAWS OF KENYA AND ORDERS 53 OF THE CIVIL PROCEDURE RULES, 2010**

AND

**IN THE MATTER OF AN APPLICATION BY ARIF BAYUSUF FOR JUDICIAL REVIEW ORDERS OF CERTIOTARI AND
PROHIBITION**

AND

**IN THE MATTER OF THE UNLAWFUL, IRREGULAR AND IMPROPER SUMMON TO APPEAR BEFORE THE NATIONAL
COMMISSION ON LR NOS. 29156, 27378, CR NO. 41945**

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO 5 OF 2012

AND

IN THE MATTER OF ARTICLES 25(C), 35, 40, 47, 50, 60, 62 AND 64 OF THE CONSITTUTION OF KENYA 2010

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

ARIF BAYUSUF.....EX-PARTE APPLICANT

AND

LUCY TOFANI.....INTERESTED PARTY

JUDGEMENT

1. Before me for determination is a Notice of Motion application dated 17th March 2017. The Ex-Parte Applicant Arif Bayusuf prays for Orders that:-

1. An order of Certiorari to issue to remove and to bring before this Honourable Court for purposes of quashing the Respondents' decision dated 21st February, 2017 summoning the Ex-Parte Applicant to appear before the National Land Commission at a public hearing in respect of LR 27378 CR No. 41945(hereinafter referred to as the "Suit Premises") to be conducted on Monday 13th March, 2017;

2. An Order of Certiorari to issue to remove and to bring before this Honourable Court for purposes of quashing the

Respondents' decision to summon the Ex-Parte Applicant and subject the ownership, Title and proprietary status of the Suit Premises known as LR 27378 CR No. 41945 to a public hearing before the National Land Commission;

3. An Order of Certiorari to issue to remove and to bring before this Honourable Court for purposes of quashing any proceedings, authority, ruling, decision and or order of the Respondent and or their officers, servants, agents, subordinates and or employees together with any issuance of land or publication of any notice emanating from the National Land Commission touching on and or affecting or otherwise in reference to the Suit Premises known as LR 27378 CR No. 41945;

4. An Order of Prohibition do issue prohibiting the Respondent and or their officers, servants, agents, subordinates and or employees from taking any further steps or action in furtherance of the intentions to summon and hear representations to be made with respect to the Suit Premises known as LR 27378 CR No. 41945 on 13th March 2017 pursuant to their directions of 21st February 2017 and or any other future date as they may thereafter determine and or on any other date, time and place whatsoever;

5. An Order of Prohibition do issue prohibiting the Respondent and or their officers, servants, agents, subordinates and or employees from taking any further steps or action in furtherance of the intentions to hear, consider, deliberate on, discuss and or make any decisions, issue instructions, directions and or otherwise attempt to either conclusively or in any other manner deal with the matter; or investigate, view, consider, compel or require any further or any submissions, documentary evidence and or any other means of collection of evidence with respect to the question of ownership and or registered proprietorship, allotment; assignment or any other means of proprietary disposal surrounding the Suit Premises known as LR 27378 CR No 41945;

6. The costs of this Application be provided for.

2. The said application is based on the grounds set out in the Statutory Statement and Verifying Affidavit of the said Arif Bayusuf both dated 6th March 2017 accompanying a Chamber Summons of even date filed at the Leave Stage of these proceedings. The gist of the Statutory Statement and Verifying Affidavit is that:-

i. The Applicant is and was at all material times the registered, legal and beneficial owner and entitled to possession of all that piece of land situate in South West of Lamu Township containing by measurement 5.896 hectares or thereabouts and more particularly known as L.R. No. 27378, CR No 41945(the Suit Premises);

ii. The Suit Premises is the subject matter of an intended public hearing to be conducted before the National Land Commission (the Respondent) on 13th March 2017, contrary to law, procedure and the rules of natural justice unless stopped by an Order of this Court;

iii. That the dispute relating to the suit premises between the Applicant and Lucy Tofani(the Interested Party) has been heard and determined finally by this Court in a Judgment that culminated in the hearing and disposal of three separate suits between the parties being:-

a) CMCC No. 372 of 2004; Arif Bayasufu –vs- Lucy Tofani;

b) Mombasa HC Misc Civil Application No. 28 of 2012(JR): Republic –vs- The Chief Magistrate & Arif Bayasuf Ex parte Lucy Tofani; and

c) Malindi ELC No. 99 of 2012; Arif Bayasuf –vs- Lucy Tofani;

iv. That the intended public hearing seeks to subject the suit premises and the Applicant to re-litigation by opening up a matter already decided upon by the Court in several other suits wherein Judgment was entered in favour of ex-parte Applicant;

v. That the Respondent actively seeks to hear afresh a dispute in respect of which this Court has pronounced itself conclusively and which is therefore res judicata;

vi. The intended public hearing amounts to the Respondent sitting on appeal with respect to this Court's decision which is an outright and blatant abuse of power, office and authority and which also is an illegality as the Respondent cannot review or sit on appeal over the decisions of this Court;

vii. That the intended hearing may result in a different outcome from that which was reached by this Court and should such outcome be effected, it would result in the setting aside and/or varying of this Honourable Court's Orders by a lesser authority, which would be an outright illegality, ultra-vires and embarrassing outcome;

viii. That the Respondent has despite intimate knowledge of the conclusive Judgment and Orders of this Court continued to summon the Applicant to public hearings attempting to determine ownership of the suit premises;

ix. That the Ex-Parte Applicant has the right not to be subjected to multiple proceedings in relation to the same parties and the same subject matter and to never ending litigation;

x. That despite several requests and letters, the Respondent has refused to inform and/or communicate to the Applicant the substance of the accusation(s) made against him and/or the evidence tendered in support of the complaint; and

xi. That generally the Respondent's intended action is illegal, unreasonable and procedurally improper and this Court ought therefore to intervene and bring the same to an end.

3. In a Replying Affidavit sworn by its Acting Director Legal Affairs and Enforcement one Brian Ikol on 6th December 2017 and filed herein on 7th December 2017, the National Land Commission sued herein as the Respondent avers that it is an independent Commission under Article 67(1) of the Constitution and is operationalized by the National Land Commission Act No. 5 of 2012 with the fundamental functions of management of public land on behalf of both the National and County Governments.

4. The Respondent further avers that pursuant to Article 68(c) (v) of the Constitution, Parliament enacted Section 14 of the National Land Commission Act which confers the Respondent with the authority and mandate to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. In exercise of this mandate, the Respondents states that it operates as a quasi-judicial body and is not bound by the strict rules of evidence and its proceedings are inquisitorial in nature.

5. The Respondent states that subject to its said mandate, it has commenced review proceedings seeking to establish the legality of the grant issued over LR No. 27378(the suit premises), among other parcels of land. It is their case that the review process commenced following receipt of a complaint from the Interested Party herein who requested them to review the legality of the said grant on grounds that it was unlawfully acquired. It is further their case that the purpose of the proceedings before them is not to sit on appeal over the decision of this Court in HCCC No. 99 of 2012 but rather to determine the legality of the Grant held by the Applicant.

6. Supporting the Applicant's case, Lucy Tofani, the Interested Party herein avers that she moved to Kipini, Tana River County in the early 1970s after gaining employment with one Vittorio Tofani who ran a camping site on the suit property. It is her case that she later married the said Vittorio Tofani who informed her that when he went to the area, he had sought approval from the then village elders to establish and run the camping site and the elders gave him permission to do so. It is her case that even after her said husband died, she continued to stay on the land and run the business and still does so to-date.

7. The Interested Party avers that sometime in November 1981, she submitted an application to the then District Commissioner Tana River requesting to be formally allocated the property on which she ran the camping site. It is, her case that in late 1993, the first letters of Allotment were issued but since she was not issued with one, she continued pursuing her case with the relevant government authorities.

8. The Interested Party states that in 2004 when the Applicant herein first moved to Court claiming ownership of the suit premises and accusing her of trespass, the Applicant did not have any title document over the said land. She asserts that the Applicant only obtained title in 2007 through what she terms as "questionable means".

9. Further and in addition to the foregoing, the Interested Party avers that the accusation by the Applicant in HCCC No. 99 of 2012 that she had encroached on his land was based on a false allegation. She states that during the hearing of the said case, for reasons unknown to her, her advocate on record never called any of the witnesses that she had submitted to him and neither did the advocate produce documents that were in his custody to defend her.

10. The Interested Party contends that for the above reasons, amongst others, she lodged a complaint with the Respondent with the intention that the Respondent does conduct an inquiry to determine once and for all the true position of her parcel of land **vis-à-vis** that of the Applicant. It is therefore her case that the Respondent has jurisdiction to do what it is doing and this Court has no jurisdiction to restrain a lawful exercise of jurisdiction by the Respondent.

11. I have considered the application and the response thereto. I have equally considered the oral submissions made by the respective Learned Advocates for the parties herein.

12. Article 47 of the Constitution of Kenya 2010 provides as follows:

1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

13. Commenting on the import of Article 47(1) of the Constitution in **Judicial Service Commission –vs- Mbalu Mutava & Another (2015)eKLR**, the Court of Appeal observed that:-

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a Constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the Principle of Constitutionality rather than to the doctrine of ultra vires from which administrative law and the common law was developed.”

14. The Fair Administrative Action Act, No. 4 of 2015 is an Act of Parliament enacted pursuant to Article 47 of the Constitution. Section 9 thereof provides as follows:-

“9 (1) Subject to Subsection (2) a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a Subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a Subordinate Court under Sub-section(1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in Sub-section (2) have been exhausted direct that the applicant shall first exhaust such remedy before instituting proceedings under Sub-section (1).

15. Under Section 2 of the said Fair Administrative Actions Act, “administrative action” is defined as including:-

i) The powers, functions and duties exercised by authorities or quasi-judicial tribunal; or

ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

16. At paragraph 3 of the Respondent’s Replying Affidavit filed herein, the Respondent is described as an independent Commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act No. 5 of 2012. The Respondent further avers at paragraph 5 of the said Replying Affidavit that pursuant to Article 68(c) (v) of the Constitution, Parliament enacted Section 14 of the National Land Commission Act which confers the Respondent with the authority and mandate to review all grants and dispositions of public land. The Respondent can do so either on its own motion or upon receipt of a complaint.

17. In the exercise of this mandate, the Respondent avers that it operates as a quasi- judicial body within the full meaning of Article 169(1) of the Constitution and the procedure of carrying out this mandate is clearly set out under Section 14 of the said National Land Commission Act. It is the Respondent’s case that review of grants and dispositions of public land simply entails the Respondent analyzing the process under which public land was converted to private land and making findings of the legality or irregularity of the grants in question. It is this exercise that the Respondent intended to undertake herein after receiving a complaint from the Interested Party.

18. From a perusal of the record herein, it is apparent that the said complaint by the Interested Party was received by the Respondent sometime in the year 2014. Subsequently by a letter dated 17th November 2014, the Respondent’s Vice Chair Abigael Mbagaya Mukolwe wrote to the Ex –Parte Applicant herein as follows:-

“RE: LR NO 27378 KIPINI

The above matter refers.

The Commission is investigating the above title to determine its legality and propriety as provided for under section 4 of the National Land Commission Act, following a complaint received from members of the public.

The purpose of this letter is to ask you to cease any further dealings on the above property and to stop interfering with the people in physical occupation of the land until this matter is fully determined by the Commission.

However, the Commission proposes that an alternative dispute resolution mechanisms way be found on how to address the matter amicably without unnecessary legal tussles. In this regard, the Commission asks that you surrender your title for amendments.

You may contact the undersigned for more information on the matter.

Signed”

19. In a strongly worded 5-page response dated 21st November 2014, the Ex-Parte Applicant’s Advocates Taib A Taib objected to the Respondent’s jurisdiction to handle the matter and went ahead to state in the relevant part thereof as follows:-

“ In addition, it is clear to us that you also do not seem to be aware that the dispute involving the above property has already been the subject of litigation and determination in three different Court cases being:-

1. CMCC No. 372 of 2004; Arif Bayusuf –vs- Lucy Tofani and thereafter in;

2. HC Miscellaneous Civil Application No. 28 of 2012(JR) Republic –vs- The Chief Magistrate & Arif Bayusuf Ex-Parte Lucy Tofani which resulted in the third and final case and in which the matters in dispute were conclusively and finally determined by the High Court of Kenya sitting at Malindi in;

3. HCC No. 99 of 2012 Arif Bayusuf –vs- Lucy Tofani and in which Judgment was entered in favour of and the property held to have been properly issued to and belonging to our client, Arif Bayusuf;

The fact that you are now attempting to subject our client to a further investigation and to reopen the already adjudicated issues afresh indicates the absence of a grasp of the basic salient facts of the matter and your ill-advised directions to our client to surrender his title are not only un-procedural and ultra –vires, they are in fact illegal and unlawful and they indicate the presence of either partisanship, prejudice, ill-motive and or malice on the part of the Commission.....”

20. It would appear that the Advocates letter aforesaid elicited no response from the Respondent and on 23rd January 2015, the said Advocate wrote another letter to the Respondent demanding to be furnished inter alia, with the identity of the complainant and copies of documents if any that had been lodged with the Respondent in support of the complaint. It would appear that this letter did not also elicit a response from the Respondent. Indeed at the hearing hereof, the Respondent denied being in receipt of the said letter.

21. It is however apparent that at some point in time, the Respondent became aware of the Ex-Parte Applicant’s representation by Messrs Taib A Taib Advocates for on 23rd July 2016, they not only issued summons to the Applicant through the said law firm but also disclosed the identity of the Applicant’s accuser. The said letter reads in part as follows:-

“RE: SUMMONS TO APPEAR BEFORE THE COMMISSION ON LR NO. 29156 AND LR NO. 27378 CR NO 41995

The above matter refers.

The Commission received a complaint from Mrs Lucy S.N. Tofani dated 12th May 2014 regarding suspected double allocation and fraud activities on the above property that was allocated to her.

The Commission has launched investigation into the above matter. In this regard, the Commission pursuant to the requirements of Section 14(3) of the National Land Commission Act, the Commissions (sic) hereby summons you to attend the public hearing on Friday 22nd July 2016 at ACK Garden Annex Building, 7th Floor, 1st Avenue Ngong Road next to Ardhi House at 10.00 a.m. to make representation on how you acquired the above property.”

22. By a letter dated 22nd July 2016 (annexure “AB 006”) the Applicant’s Advocates once again objected to the summons citing the fact that the subject matter of the investigations had also been the subject of three separate law suits. In the last two paragraphs of the letter, the Applicants Advocates enclosed a copy of the Judgement delivered in one of the suits and stated as follows:-

“ Kindly find enclosed herewith a copy of the Judgment delivered by the Honourable Justice O.A. Angote in the Malindi HC ELC No. 99 of 2012 Arif Bayusuf –vs- Lucy Tofani for your information and records and note that the Defendant Lucy Tofani did not file any Appeal thereto. The matter is therefore determined in its entirety and the Court itself is now functus officio.

We should be grateful in the circumstances if you would confirm that bearing in mind the determination of the High Court in its Judgment, this matter will be allowed to rest.”

23. From the material placed before me, it is evident that the respondent were of a different view and continued to summon the ex-parte Applicant to appear before them for purposes of a determination of the complaint raised by the Interested Party. That apparently is the situation that precipitated the filing of the application before me.

24. I have perused the Judgment of the Honourable Angote J delivered in Malindi ELC NO 99 of 2012. At paragraph 1 to 9 thereof, the Learned Judge has summarized the subject matter of the dispute which was between the Ex-parte Applicant herein (as the plaintiff) and the Interested Party (as the Defendant).

25. It is apparent therefrom that the Applicant sought a permanent injunction to restrain the Interested Party herein from encroaching upon LR No. 27378 situate South West of Lamu Township which is the same subject matter herein. The Defendant’s position is summarized and captured at paragraphs 5 to 9 of the Judgement as follows:-

“5. The Defendant filed her Defence on 29th August 2012 in which she averred that the Plaintiff was allotted parcel of land number 27378. However, the Defendant stated in her defence, that the Plaintiff was allotted by the Tana River District DDC a plot of land measuring 15 hectares and described as Plot Number 1F.

6. The Defendant further averred in her Defence that if indeed the plaintiff was issued with a letter of offer by the Government then the same lapsed after 30 days from the date of its issuance because the Plaintiff failed to pay the premium stated therein; that the subsequent title issued to and held by the plaintiff does not refer to the suit property and that the suit property has been continuously held and possessed by the Defendant since the year 1971.

7. The Defendant denied that she has unlawfully encroached upon and trespassed on the suit premises and set up tents thereon or at all. According to the Defendant’s Defence, she has been periodically from the year 1971 been putting up tents on the suit property as a tourist camp with the knowledge of the local residents, the provincial administration and local authorities.

8. The Defendant finally averred that although the plaintiff was allotted an unalienated land measuring 15 acres, he maliciously pursued the suit property which was occupied by the Defendant since the year 1971 for its unique scenic beauty.

9. According to the Defendant’s case, her claim on the piece of land in question is based on the fact that the said land is still

“Government trust land” which to date has not been alienated and that she has been in possession thereof since the year 1971 through recommendations of the elders of the area as well as the relevant local authority.

26. Having considered the evidence presented before him by both the Applicant and the Interested Party together with their witnesses, the Learned Judge pronounced himself as follows at paragraphs 103, 104, 105 and 107 of the Judgment:-

“103. The Defendant acknowledged in evidence that she has not been issued with a letter of allotment either for (the) portion of land known as 1(F), the suit property, or at all. There was no evidence to show that the Commissioner of Lands or the County Council of Tana River issued to the (Defendant) a letter of allotment.

104. In the circumstances, the Defendant’s rights over the suit property do not arise. Indeed, and as I have already stated, the Defendant’s claim, if at all, can only be in respect of a portion of land known as 3b which was identified by PW4 in 1996 in his survey plan and not the suit property.

105. The title document in respect of the suit property was issued to the Plaintiff in the year 2007. The Defendant has not proved that the title document was fraudulently issued to the plaintiff. The Defendant has also not prayed for the cancellation of the said title in her Defence.

107. As I have stated above, the plaintiff has proved that the title document (that) was granted to him by the government lawfully. There is no evidence that the same was fraudulently procured and this Court has the Constitutional mandate to protect the said title.

27. At paragraph 112 of the decision, the Learned Judge having cited with approval two Court of Appeal decisions in reference to the position taken by the Defendant in those proceedings concluded that:-

“112. The Court is bound by the above decisions of the Court of Appeal and by the provisions of the law. It does not matter that the Defendant has been using the suit property since 1971 or put up structures as alleged. As a Squatter, or a temporary allottee on Government land, the Defendant cannot defeat the title that was issued to the Plaintiff lawfully. Indeed the Defendant has been on the suit property unlawfully since 2007 when the Plaintiff was issued with the Grant in respect to the suit property.”

28. The said Judgement was delivered on 16th May 2014 and has not been appealed to date. Instead, as can be seen from the Respondent’s letter to the Ex-parte Applicant’s lawyers dated 23rd July 2016 (Annexure “AB005” of the Applicant’s Supporting Affidavit), the Interested Party complained to the Respondent via a letter dated 12th May 2014 (some 4 days before the Judgement was pronounced) regarding suspected double allocation and fraud activities on the same property which, according to the Respondent’s letter, was allocated to her.

29. Both Mr. Wahome, Learned Counsel for the Respondent and Mr. Ole Kina, Learned Counsel for the Interested party asserted that the issues before the Courts in the three cases cited by the Ex-parte Applicant were not on the legality of the title and that the Respondent was properly seized of the matter and should therefore not be restrained in any manner in dealing with the matter before it.

30. That position is clearly not in consonance with what is stated at paragraphs 9 and 107 of the Judgment cited hereinabove. It was clearly the Learned Judge’s finding that parcel of land was granted by the Government to the Plaintiff lawfully and further that there was no evidence that the same was fraudulently procured.

31. As it were, having ventilated her case and participated fully in the proceedings before the Court in Malindi ELC 99 of 2012, I do not think it was open for the Interested Party to purport to re-open the issue of whether the title deed issued to the Ex-parte Applicant was obtained illegally or irregularly before the Respondent.

32. Under Article 162 (2) of the Constitution, the Environment and Land Court is mandated to hear disputes relating to the environment and the use and occupation of, and title to land. In that vein having been notified of the Judgment of this Court delivered on 16th May 2016, in ELC 99 of 2012, I think it was extremely improper and unreasonable of the Respondent herein to purport to continue re-open the issue of the propriety or legality of the title whose acquisition this Court had found a few days earlier to be lawful and to invite the Applicant to present evidence before it.

33. In my considered view, the only recourse that the Interested Party had after the said decision was to appeal against the same. As a quasi-judicial tribunal, subordinate to this Court, the Respondent cannot be allowed to second guess the decision of this Court by purporting to review the legality of the Grant whose issuance this Court has already found to be lawful.

34. As was held in **Noor Maalim Hussein & 4 others –vs- Minister of State for Planning, National Development and Vision 2030 & 2 Others(2012) eKLR:-**

“If Statutory Power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. This irrationality and unreasonableness would play a major role and we shall as Courts continue to assert our traditional duty and intervene in situations where authorities like the Minister and (other) persons, act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations.”

35. By continuing to summon the Ex-parte Applicant to appear before it for purposes of the review of a Grant and disposition of LR No. 27378(CR 41945), in spite of the glaring evidence that the matter had recently been the subject of a determination by the Court in ELC 99 of

2012, the Respondent had clearly not only failed to take into account relevant considerations but also continued to act contrary to legitimate expectations.

36. As was stated in *R-vs Electricity Commissioners, Ex parte London Electricity Joint Committee Company (1924)1KB 171* at 206, where proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed, an order of prohibition will lie to restrain such body from undertaking such proceedings.

37. In the matter before me, where the Respondent were to proceed with the intended hearing and reach a different result from that which was reached by this Court, it would be surreptitiously result in the setting aside and/or varying of the orders of this court by a lesser authority. Such an outcome would be outrightly embarrassing, ultra-vires and illegal.

38. Accordingly, I find merit in the Notice of Motion dated 17th March 2017 and allow the same as prayed.

39. The Ex-parte Applicant shall also have the costs of this Application.

Dated, signed and delivered at Malindi 19th day of April, 2018

J.O. OLOLA

JUDGE