



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 18 OF 2017

FORMERLY MOMBASA ELC PETITION NO 18 OF 2017

IN THE MATTER OF ARTICLES 22, 25(C), 27, 40, 47, 50(1) 162(2) (B) AND 165(5) (B) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 22, 25(C), 27, 40, 47, 50(1) 162(2) (B) AND 165(B) B OF THE CONSTITUTION

BETWEEN

MERRY BEACH LIMITED.....APPLICANT

VERSUS

- 1. WANJE NYAU MWALUNGO**
- 2. ALES KAHINDI NYAU**
- 3. KAINGU NYAU WANJE**
- 4. JOHNSO KAZUNGU NYAU**
- 5. NATIONAL LAND COMMISSION**
- 6. CHIEF LAND REGISTRAR.....RESPONDENTS**

RULING

1. By a Chamber Summons application dated 7th September 2017, the Petitioner/Applicant prays for Orders that:-

e) *The 1st to 4th Respondents by themselves, servants, agents, brokers and employees be restrained from selling or offering for sale the property comprised in title number Chembe/Kibabamshe/374 pending the hearing and determination of this Petition.*

f).....

g) *The 1st to 4th Respondents by themselves, servants, agents, brokers and employees be restrained from entering or trespassing upon the property comprised in title number Chembe/Kibabamshe/374 pending the hearing and determination of this Petition.*

h).....

i) *The 6th and all Land Registrars be restrained from revoking the Petitioner's Certificate of Lease over title Chembe/Kibabamshe/374 pending the hearing and determination of this Petition.*

j)...

k) The 6th Respondent and all Land Registrars be restrained from issuing any title in favour of the 4th Respondent on plot number Chembe/Kibabamshe/374 pending the hearing of this Petition.

l).....

m) In the event that any title was issued or has been issued to the 1st to 4th Respondents or either of them in or at any time after December 2014(as alleged in the email sent to Minou Mowlazadeh, a Director of the Petitioner on 23/9/2015) or at any time after 17/7/2017 such title be held in obeyance and be declared to have no effect until the hearing and determination of the Petition.

o) The costs of this application be paid by the 1st to 5th Respondents jointly and severally.

2. The application is supported by the annexed affidavit of Walter Kilonzi, the Petitioner's Company Secretary and is premised on the grounds that:-

a) The 5th Respondent has purported to revoke the Petitioner's title to land and has directed that the 4th Respondent be issued a title to the same property.

b) The 1st to 4th Respondents have previously attempted to sell the suit premises even before any decision was made by the 5th Respondent or by any Court as the suit premises are the subject matter in Malindi ELC Case No. 53 of 2014. The Petitioner will suffer severe loss of land and improvements done at the cost of Kshs 600,000,000/- should the Orders sought herein not be granted urgently.

c) The Petition will be defeated and rendered nugatory unless conservatory orders are issued to preserve ownership of the property pending the hearing and determination of the Petition.

3. In response to the application, the 1st to 4th Respondents raised a Preliminary Objection on a point of law to the effect that:-

1. That the dispute as pleaded by the Petitioner falls squarely within the provisions of the National Land Commission Act (No. 5 of 2012) as read together with Legal Notice No. 71 (The National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017 to the effect that any party aggrieved by the decision of the National Land Commission may appeal to Court within 14 days.

2. That (the) Petition seeks to sneak an appeal against the decision of the 5th Respondent which appeal is time barred.

4. In addition, John Kazungu Nyau, the 4th Respondent swore a Replying Affidavit filed herein on 7th November 2017 stating that there was an alternative remedy available to the Petitioner in the form of an appeal but the Petitioner has failed to disclose that fact to the Court. It is accordingly the 4th Respondent's case that this Petition seeks to appeal the 5th Respondent's determination through the back door. The Respondents thus term this Petition an abuse of the Court Process and urge the Court to strike out the same.

5. In the alternative the Respondents aver that due process was followed and the Petitioner/Applicant was afforded the right of hearing in the review of grants and disposition of public land in Kilifi Chembe- Kibabamshe region.

6. The Respondents further aver that Malindi ELC No. 53 of 2014 was presented by one of the administrators Wanje Nyau Mwalungo on behalf of the Estate of the Late Nyau Wanje Mwalungo against the Petitioner and sought a number of prayers. As it were, prayers A, B & C of the Plaintiff in the said suit have since been affirmed by Gazette Notice No. 6866 and issuance of title to the 1st to 4th Respondents who by operation of Section 26 of the Land Registration Act 2012 are now the registered proprietors and the said prayers in the suit have hence been overtaken by events.

7. It is the Respondents position that the 5th Respondent in its decision affirmed the land tenure system in the region by declaring that the land in question is trust land and not Government land and the Petitioner's registration thereof as proprietor as Lessee is an illegality which cannot be cured by this Petition and the Court. If the Court were to do so, it would be sanctioning an illegality. Accordingly they urged the Court to dismiss both the application and the entire Petition.

8. I have considered the application and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates acting for the parties herein.

9. As I understood it the gist of the Petition and the Application before me revolves around the decision of the National Land Commission (the 5th Respondent herein) in regard to the ownership and the right to possess and use all that property comprised in L.R. No. Chembe/Kibabamshe/374. As it were, the 1st Respondent herein Wanje Nyau Mwalungo had initially filed Malindi ELC Case No. 53 of 2014 against the Petitioner herein and other parties. In the said case, the 1st Respondent as the Plaintiff avers that at all material times the subject parcel of land was his family's ancestral land and that his father the late Nyau Wanje Walungo was the first squatter to live on the land and was in actual possession thereof for a very long time and using it to the exclusion of any other person.

10. The 1st Respondent states further in the said case that at some point in time the Government declared an embargo against any registration of land in the area but later on they came to discover that the suit property had been registered in the name of the Petitioner herein who is the 1st Defendant in the said suit. Accordingly the 1st Respondent sought for:-

a) ***A declaration that the registration of the parcel Chembe/Kibabamshe/374 in the names of other people other than the late Nyau Wanje Mwalungo and subsequently to Merry Beach Ltd is null and void.***

b) ***A declaration that any dealings and/or registration of land parcel known as Chembe/Kibabamshe/374 during the active period the embargo was pending prohibiting any dealings within the Chembe/Kibabamshe area is null and void.***

c) ***An order directing the land registrar Kilifi to cancel all entire land registration of the title (sic) in the names of the 1st Defendant Merry Beach and rectify the register by inserting the names of the Plaintiff in place of the Defendant.***

d) ***Vacant possession.***

e) ***Demolition (sic).***

11. From annexure JKN 3 of the 4th Respondent's Replying Affidavit filed herein, it is apparent that at some point in time, the 1st Respondent herein and other members of his family decided to seek recourse from the 5th Respondent herein to resolve the dispute. Thus by a letter dated 18th January, 2016, the 1st to the 4th Respondents herein wrote to the 5th Respondent asking them to carry out a review of grants and dispositions to "public land" in Kilifi County in regard to various plots of land which they stated belonged to their family. The suit property herein was one of the plots so submitted for a review.

12. It is evident that the 5th Respondent proceeded to carry out the review as urged and by Gazette Notice No. 6866 of 17th July 2017, the 5th Respondent "revoked" numerous titles including the Title held by the Petitioner over the suit premises. Subsequently by a letter dated 28th July 2016, addressed to the Acting Chief Land Registrar, the 5th Respondent proceeded to direct the 6th Respondent to revoke the Petitioner's title over the suit premises and to issue a new one in the name of the administrator of the estate of the said Nyau Wanje Mwalungo.

13. It is the Applicant's case that the entire process including the public hearings held at the Red Cross Hall, Malindi on 16th September 2015 ran afoul of the dictates of the Constitution as the Commission did not allow the Applicant sufficient time to prepare for the hearing and to inspect any documents and/or to present their own witnesses. As it were, despite being served, the 5th Respondent did not enter appearance and/or file any documents in reply to the Petition and the application before me.

14. The 5th Respondent is an Independent Commission established under Article 67(1) of the Constitution. Its fundamental functions include the management of public land on behalf of the National and County Governments. In addition to its functions set out in the Constitution, Section 14 of its Constitutive Act, the National Land Commission Act mandates it 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 the exercise of this mandate the 5th Respondent operates as a quasi-judicial body within the full meaning of Article 169(1) of the Constitution and the procedure for carrying out this mandate is clearly set out under Section 14 of the Act.

15. According to the 1st -4th Respondents, the 5th Respondent took into consideration historical injustices on land ownership in the Coast and duly followed its mandate under both the Constitution and the Act in arriving at its determination. The issue of what the 5th Respondent can and cannot do has been the subject of a number of pronouncements by this Court.

16. The jurisdiction of the Environment and Land Court is provided under Article 162(2) and (3) of the Environment and Land Court Act. On issues touching on private land Sections 101 of the Land Registration Act No. 3 of 2012 and Section 150 of the Land Act No. 6 of 2012 donate exclusive jurisdiction to this Court. The Land Registration Act deals with and applies to the registration of interest in all public and private land. In this regard, Section 26(1) of the Land Registration Act provides that:-

"26(1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.....

17. Quite evidently, a challenge to a title as well as a grant or disposition of land on the basis that it was obtained unprocedurally or illegally or through a corrupt scheme fall within the jurisdiction of this Court. The dispute in Malindi ELC Case No. 53 of 2014 turns on the legality of the title held by the Petitioner herein and this Court was already fully seized of the matter when on 18th January 2015, the 1st to 5th Respondents decided to refer the same to the 5th Respondent. By a lengthy letter dated 7th September 2015, the Petitioner's Advocates Messrs Kinyua Muyaa & Company advocates brought to the 5th Respondent's attention the fact that the subject matter was already the subject of proceedings in the said Malindi ELC Case No. 53 of 2014.

18. In my view, where a party has commenced proceedings before this Court challenging title, it would amount to abuse of the Court Process for the same party to refer the same to the 5th Respondent. As it were, any matter pending in Court is sub judice and the 5th Respondent could not properly proceed to hear and purport to determine the same.

19. Accordingly, I do find merit in the Petitioner's application. The same is allowed with costs.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE