



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

JUDICIAL REVIEW APPLICATION NO. 25 OF 2017

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF TANA RIVER.....RESPONDENT

DALANA ONGESA DIKAY.....INTERESTED PARTY

ABDISALANI HUSSEIN IBRAHIM.....EXPARTE APPLICANT

JUDGEMENT

INTRODUCTION

In an Exparte chamber summons brought under certificate of urgency dated 18th December 2017, the exparte applicant moved this Honourable Court for the following orders;

1. (Spent)

2. Leave be granted for the applicant to apply for the following orders;

(a) An order of certiorari to remove into this court and quash the decision made by the respondent on 29th November 2017 relinquishing ownership and demanding halting of the on-going construction on parcel No. TRCC/MDG/C/1949A.

(b) An order of prohibition directed at the respondent, his officers and agents from issuing such orders as the one of 29th November 2017 purporting to revoke ownership and/or halt constructions on the above mentioned parcel No. TRCC/MDG/C/1949 A.

(c) The leave so granted do operate as a stay of the respondents decision dated 29th November 2017 and any other order made in consequence to it pending hearing and determination of this matter.

(d) Costs of and incidental to the application be provided for.

(e) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

When that application was placed before me sitting as the duty court, I certified the same urgent to be heard exparte in the absence of the respondent and directed the substantive Notice of Motion to be filed within 21 days from that date. The court also ordered the leave so granted do operate as a stay of the respondents decision made on 29/11/2017.

When the matter came up for interparties hearing the parties were granted leave to file replying affidavit and any other documents in opposition to the Notice of Motion with corresponding leave to the exparte applicant to file further affidavit thereto.

The parties also agreed that in addition to the pleadings filed both in support and in opposition to this Judicial Review application they will file written submission to bring out the issues raised in their respective pleadings. On 18/04/2018 the exparte applicant filed his submissions. The respondent did not file any submissions.

EXPARTE APPLICANT'S CASE

The exparte applicant in his verifying affidavit sworn on 18/12/2017 stated that he bought the suit property measuring 28 ft x 42 ft in Madogo, Tana River County from one Dalana OngesaDikayu on 3rd March 2016. He attached a copy of the said sale agreement and marked "H1001". The exparte applicant further stated that on 11th January 2017, the respondent wrote him a letter referenced TRCG/TP/Vol.1A(288) confirming his ownership of the said plot and advising him to submit application for land allocation to County Land Management Board (CLMB), obtain a part development plan from the County physical planner and beacon certificates from the County Surveyor. The letter also advised him to produce certificates for building plan approved by all relevant authorities and an annual payment of rent. Pursuant to those directions he proceeded and obtained Part Development Plan and a Beacon Certificate from the District Surveyor on 10th October and 17th October 2017 respectively. He also paid the annual rent and was issued a receipt number TRCG/MDG/C/1949A for the year 2017.

He thereafter obtained an approval to develop commercial plot on the suit property and a certificate of compliance from the National Construction Authority giving him a go ahead in the construction of the said project. After obtaining all the necessary approvals he started construction of the suit property. On 29th November 2017, he received a letter from one Justus J. Mwanachui stopping the construction and cancelling plot ownership based on a letter of complaint by one said Gohana who also claims right of ownership over the same property dating back from 2010. Upon receipt of that letter, he wrote a demand letter demanding the withdrawal of the said letter as the same did not show or disclose of the complainant's plot or size. The exparte applicant contends that the respondents decision to revoke ownership and demand stoppage of the construction without giving sufficient reasons is ultra vires (substantive) and clearly indicates bad faith and abuse of office.

The exparte applicant also averred that the decision to stop the construction was made unilaterally and that the same is tainted with mala fides, unmeritorious and in flagrant disregard of the rules of natural justice.

RESPONDENTS CASE

The respondent on the other hand issued a Notice of preliminary objection stating that this court has no jurisdiction to hear and determine this matter in that the exparte applicant seeks to adjudicate land matters in a Judicial Review Court. The respondent relied in Article 162 (2), 162(2)(b), 165 (5) (6) and (7) and the Environment and Land Court Act No. 19 of 2011. The respondent further contends that the subject matter of the dispute before court is a parcel of land which has a dispute between two parties and that that dispute can only be resolved on merit through adducing of evidence and nothing to do with a procedural nature to warrant the involving of Judicial Review Law. The respondent argued that the application as couched is omnibus in nature, unconstitutional, incompetent and an abuse of court process in so far as it seeks to adjudicate land matters in a judicial review court. The same grounds raised in the notice of preliminary objection are almost similar to those raised in the replying affidavit.

EXPARTE APPLICANTS SUBMISSIONS

The firm of Garane & Associates instructed by the exparte applicant stated that their client started construction of the suit property after obtaining all the necessary approvals and permits which include an approval to develop commercial plot, certificate of compliance from the National Construction Authority annual rent and part development plan and a Beacon Certificate from the District Surveyors, Tana River District. The Learned Counsel submitted that the letter from one Justus J. Mwanachui stopping the construction and cancelling plot ownership based on a letter of complaint by one Said Godhana who was claiming ownership of the suit property through purchase was unprocedural and unconstitutional as the rules of natural justice was not observed. The exparte applicant was not given a fair hearing before the draconian order was issued against their client stopping and cancelling his letter of allotment. They cited the following cases;

- 1. Commissioner of Lands –Vs- Hotel Kunste CA No. 234/95.**
- 2. Suchan Investment Ltd –Vs- Ministry of Natural Heritage & Culture & 3 Others. (2016) KR at page 55.**
- 3. R –Vs- Home Secretary Exparte Daly (2001) 2AC 532.**
- 4. Communication Commission of Kenya and Others –Vs- Royal Media & Others Petition No. 14 of 2014.**
- 5. Seven day Adventist Church (EA) –Vs- Permanent Secretary Ministry of Nairobi Metropolitan Development & Another 92014) eKLR.**

RESPONDENTS SUBMISSION

The counsel for the respondent M/s Nyabuti filed the following list of authorities on 24/05/2018.

- 1. Suchan Investment Limited –Vs- Ministry of Natrual Heritage & Culture & 3 Others [2016] eKLR.**
- 2. Sanghani Investiment Limited –Vs- Officer in Charge Nairobi Remand & Allocation Prison 92007) eKLR.**
- 3. Republic –Vs- Chief Land Registrar & 3 Others 92014) eKLR.**
- 4. Funxi Island Development Limited & 2 Others –Vs- County Council of Kwale & 2 Others 920140 eKLR.**
- 5. Republic –Vs- Registrar of Titles & Another Exparte David Gichina Muriithi & Another 920140 eKLR.**

6. Ahmed Siad Mohammed –Vs- Municipal Council of Garissa & Another (2014) eKLR.

ANALYSIS AND DECISION

It is clear from the pleadings that the underlying dispute in this case is the ownership of land. The respondent which is the County Government of Tana River in a letter addressed to the Exparte applicant dated 11/01/2017 had confirmed the existing status of plot No. TRCG/MDG/C/1949A as being registered in his name and required certain documents for verification. In a subsequent letter dated 29th November 2017 which is the subject of this Judicial Review, the respondent purported to stop the construction activities and cancelling the ownership document ref No. TRCG/TP/6/386 dated 13th October 2017. The author of that letter one Justus J. Mwanachui who was writing for the County Secretary directed the respondent to sit with the relevant County Divisional Officers at Madogo and address the dispute then follow the laid down procedure in effecting any change of ownership. That letter aggrieved the exparte applicant who filed this Judicial Review case. The respondent has filed a replying affidavit and a Notice of Preliminary objection in opposition to this Judicial Review.

The main ground of objection by the respondent is that this Honourable Court has no jurisdiction to hear and determine the matter for the reason that it is premised on violation of alleged rights and procedures arising out of the environment and the use and occupation of and title to land. The respondent also relied in Article 162 (2) (162) (2) (b) of the Constitution of Kenya, 2010. Article 165 (5) (6) and (7) of the Constitution of Kenya 2010 and Section 13 (7) (b) of the ELC Act. Where a preliminary objection is raised as to the court's jurisdiction to handle an issue, such a court shall down its tools to inquire as to whether it has the requisite jurisdiction to determine the issue at hand. Looking at the facts leading to the issuing of the impugned decision by the respondent and the Notice of preliminary objection by the respondent, it is imperative to see the nature of orders that this court can issue in Judicial Review proceedings. That issue is well captured in the case of Ahmed Siad Mohammed –Vs- Municipal Council of Garissa & Another CA No. 214 of 2012 (2014) eKLR, where the court held as follows;

“Judicial review proceedings are not concerned with the merits of a particular decision whether it is the appellant or the deceased Mohammed Hussein Hajji or the 1st respondent who is entitled to ownership of the suit property is not a matter to be determined by way of judicial review. In the case of R –Vs- Luncashire County Council Exparte Gayer (1980) IWL R 1024 it was stated that courts should be acutely conscious that they do not misup the role of the Administrator by assuming the task of deciding how resources are to be allocated as between competing claims. The Judicial remedy of certiorari and mandamus were neither created nor established to settle ownership disputes, not to create and confer title to land.”

The same court also referred to another case being Republic –Vs- Director General of East African Railways Corporation Exparte Kaggwa 1977, KLR 194 where they held;

“It was correctly stated that in Judicial Review, the courts discretion would not be exercised if to grant the order would constitute judicial interference with the executive arm of Government. It is our considered view that in the present case, an order for certiorari or prohibition if granted would be contrary to the process and procedure outlined for setting aside and dealing with trust land.”

The letter by Justus Mwanachui dated 29th November purport to stop construction on plot PDP No. TRC/232/2016/08 Madogo and also cancel plot ownership document ref No TRCG/TP/6/386 dated 13th October 2017. The same officer in the same letter directed the addressee to sit with the relevant County Divisional Offices at Madogo and address the dispute then follow the laid down procedure to effect the change. The author of that letter in my view should have directed their officers based at Madogo to conduct investigations and make a report to him before issuing the drastic orders of cancelling the documents of ownership.

Having said that, I note that the underlying dispute in this proceedings is ownership of trust land. Judicial Review proceedings in my understanding is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the name of the applicant and whether some laid down procedures were followed or not. While faced with a similar issue in Republic –Vs- Exparte Karia Misc. Application No. 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhanda held as follows;

“In cases where the subject matter or the question to be determined involves ownership of land and the rights to occupy land, namely occupation and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents they would be copies that would not be sufficient to establish authenticity of title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

It may be true that the impugned letter dated 29th November 2017 is irregular or unlawful and an order of certiorari would be appropriate, but it is not in every case that the court will grant an order of Judicial Review even though it is deserved. Judicial Review is a discretionary remedy which can only issue if it will serve some purpose land the court may refuse to grant even when the requisite grounds for its grant exist. In determining whether or not to grant Judicial Review orders, the court has to weigh one thing against another to see which of the two options is the most efficacions in the circumstances obtaining. The discretion of the court must be exercised on the basis of evidence available and sound legal principles. In Sangharic Investment Limited –Vs- the Officer in Charge Nairobi Remand & Allocation Prison (2007) eKLR, Justice Wendoh (as she then was) in a similar situation held;

“So that in this case, even though this application were properly before this court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacions in the circumstance. Even if the Notice under challenge is quashed, the issue over the ownership of the land still stand. It will still require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.”

The circumstances obtained in that case are similar in all respect with the instant case. I wish to state that even if I were to exercise this court's discretion and have the Notice dated 29th November 2017 quashed, the order will not resolve the issue of ownership of the land in question. The issue in my view will be resolved by filing pleadings and adducing viva voce evidence before this court or the magistrate's Court exercising Environment and Land Court jurisdiction where viva voce evidence will be adduced and witnesses cross examined.

In the upshot, I find the preliminary objection merited and the same is hereby upheld. Consequently the notice of motion dated 5th January, 2018 be and is hereby struck out with no order as to costs.

I so order.

Read, Delivered and Signed in the open court this 27th day of June 2018.

Hon. Justice E. C. Cheron

ELC JUDGE

In the presence of:

1. Mr. Faruq for Exparte Applicant
2. Mr. Nyaga holding brief Nyabuti for respondent.
3. Court Clerk: Ijabo