



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JUDICIAL REVIEW CASE NO. 4 OF 2017

MAUREEN NDUNGE MUSOMI.....APPLICANT

VERSUS

CHIEF LANDS REGISTRAR.....1ST RESPONDENT

LAND REGISTRAR, MAKUENI LAND REGISTRY.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

ANN WAYUA COMET.....INTERESTED PARTY

RULING

1) What is before this court for ruling is the Interested Party's notice of preliminary objection dated 14th December, 2017 and filed in court on even date.

2) The grounds raised in the notice are that;

- 1. The application offends Order 53 rules (2) and (3) of the Civil Procedure Rules 2010 and ought to be dismissed.**
- 2. The application does not disclose a cause of action as against the Respondents and the Interested Party herein.**
- 3. The application is frivolous, vexatious and otherwise an abuse of the court process.**

3) On the 19th February, 2018 the court directed that the notice of preliminary objection be disposed off by way of written submissions.

4) By the time of writing this ruling it is only the Interested Party who had filed their submission in respect of the notice of preliminary objection.

5) In their submissions, Kenya and Associates Advocates for the Interested Party framed two (2) issues for determination. These were:-

- i. Whether the circumstances herein warrant the granting of the orders sought by the Ex-parte Applicant in the notice of motion application dated 31st May, 2017;**
- ii. Whether the Respondents' decision issued on the 9th May, 2016 was capable of being quashed through an order of certiorari as envisaged under Order 53 of the Civil Procedure Rules 2010 and the Law Reform Act.**

Whether the circumstances herein warrant the granting of the orders sought by the Ex-parte Applicant in the notice of motion application dated 31st May, 2017

6) The Interested Party's counsel submitted that the notice of motion application seeks Judicial Review orders of certiorari, prohibition and mandamus against the Respondents. The counsel pointed out that in particular, the Ex-parte Applicant seeks to quash the decision made on the 9th May, 2016 by the Chief Land Registrar Nairobi and the Land Registrar Makueni which revoked the Applicant's title deed and established that the Interested Party was the bona fide registered owner of the suit property.

7) The counsel went on to submit that from the documents adduced before court, it is manifestly clear that the underlying issue herein is on

ownership of all that parcel of land known as Land Reference number Makueni/Mubau/57 the suit property herein.

8) The counsel further submitted that issue of who is the rightful owner of the suit property cannot be determined through Judicial Review Proceedings as it requires adducing and hearing of viva voce evidence. The court cited the case of **Sanghani Investment Ltd V Office in Charge of Nairobi Remand and Allocation Prison [2007]EA 354** where the court held thus,

“Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a form where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. 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 the witnesses which is not available in judicial review proceedings. Even if the Respondents had filed documents, there would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced..... It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstance obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles 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 efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts”[emphasis ours]

9) The counsel also cited the case of **Republic Vs Registrar of Titles & Ex-parte Kenya Shell Limited [2003]eKLR** where Odunga, J held;

“ Where the determination of the dispute the court requires the court to make a resolution on conflicting issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are mandamus, certiorari and prohibition. In order to determine the questions in this dispute, it is my view that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the same reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before the rights of the parties herein. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Here there are serious factual issues which require to be resolved and which go beyond the Court’s jurisdiction in judicial review proceedings.”

Whether the Respondents’ decision issued on the 9th May, 2016 was capable of being quashed through an order of certiorari as envisaged under Order 53 of the Civil Procedure Rules 2010 and the Law Reform Act Cap 26 of the Laws of Kenya.

10) The Interested Party’s counsel submitted that the decision sought to be quashed was made on the 9th May, 2016 yet the application is dated 31st May, 2017 which is nearly one(1) year since the decision impugned was made.

11) The counsel referred the court to Order 53 Rule 2 of the Civil Procedure Rules which provides as follows:-

“ leave shall not be granted to apply for an order of certiorari to remove any judgment 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 proceeding or such shorter period as may be prescribed by any Act.”

12) He also cited section 9(3) of the Law Reform Act which provides that;

“ In the case of an application for an order of certiorari to remove any judgment, 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 judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law;”

13) The counsel further cited the case of **Republic V County Council of Kwale & Another Ex-parte Kindo & 57 others [1995] 1KLR [E&L]** where the court held;

“Order 53 rule 2 of the Civil Procedure Rules is a mandatory provision prohibiting the grant of an order of certiorari unless the application is made not later than six months after the date of the proceedings against which it is to be issued.”

14) The counsel submitted that the court cannot be called upon to exercise its judicial discretion on the decision of the Respondents as the Applicants brought application out of statutory timeline as enshrined in law governing Judicial Review proceedings and urged the court to dismiss it with cost for being frivolous, lacking merit and for being an abuse of the court process.

15) The Respondent's counsel supported the preliminary objection by the Interested Party. The counsel framed two issues for determination namely :-

i. **Whether the application offends the provisions of order 53 Rule (2) and (3) of the Civil Procedure Rules 2010?**

ii. **Whether the application discloses a cause of action against the Respondents and the Interested Party.**

16) I need not repeat the submissions by the counsel herein save to say that she too urged the court to dismiss the application proceedings are incompetent as the application offends the provisions of order 53 Rule (2) and (3) of the Civil Procedure Rules.

Whether the application discloses a cause of action against the Respondents and the Interested Party.

17) The Respondents' counsel cited section 61 of the Land Registration Act, 2012 which provides the manner in which transmission upon death of a sole proprietor how an application to the Registrar is made by his/her personal representative. The counsel referred the court to the Ex-parte Applicants annexures MNN-2 a-b and MNN 5 a-b entry number 16 and 17 which outline the date in which the registration was done by way of transmission. The counsel pointed out that the Land Registrar Makueni having received confirmation of grant issued to the Interested Party and Jane Mbithe Comet, went ahead to register the same as it is indicated on the face of it.

18) I have looked at the notice of motion application dated 31st May, 2017 and filed in court on 9th June, 2017. While applying for orders of certiorari, prohibition and mandamus, the Ex-parte Applicant has accused the Land Registrar Makueni of unlawfully and wrongfully interfering with the records whereby he caused the certificate of title deed to all that parcel of land known as Makueni/Mbau/57 be revoked and registered in the name of the Interested Party and another.

19) In Judicial Review proceedings such as this one, what is usually involved is the assessment of manner in which decision is made and the jurisdiction exercised to ensure that public powers are exercised in accordance with the basic principles of legality, fairness and rationality.

20) It seems to me that the Ex-parte Applicant does not complain of having not been afforded to be heard before the Respondents made their decision on the 19th October, 2016. She has not complained of the decision of the 19th October, 2016 having arrived at in contravention of basic principles of legality, fairness and rationality but she instead appears to raise the issue of ownership of land parcel number Makueni/Mbau/57.

21) I would agree with the counsel the Interested Party and the Respondents that the issue of ownership cannot be determined in Judicial Review Proceedings. That can only be done by way of viva voce evidence as was correctly submitted by the Interested Party's Counsel.

22) Secondly, I am in agreement with the counsel for the Interested Party and the Respondents that the application seeks impugn a decision that was made on 19th May, 2016 and 19th May, 2016 yet the Ex-parte application is dated 31st May, 2017 which is more than the 6 months as is provided for under Order 53 Rule of the Civil Procedure Rules and Section 9(3) of the Land Reform Act cap 26 of the Laws of Kenya. Suffice it to say, the application was filed outside the 6 months window period.

23) Arising from the foregoing, my finding is that the notice of preliminary objection has merits and I accordingly dismiss the Ex-parte Application dated 31st May, 2017 with costs to the Interested Party and the Respondents. It is so ordered.

Signed, dated and delivered at Makueni this 22nd Day of November, 2018

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

1. Mr. Wanyonya holding brief for Mr. Mambiri for the interested party.
2. Mr. Muthiani holding brief for Mr. Naukuni for the Ex-parte Applicant
3. Mr. Kwemboi Court Assistant.

No appearance for the Respondent

MBOGO C.G, JUDGE

22/11/2018