



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT MALINDI

JR MISC 7 OF 2015

REPUBLIC.....APPLICANT

=VERSUS=

CABINET SECRETARY MINISTRY OF LAND,

HOUSING & URBAN PLANNING.....1ST RESPONDENT

LAND REGISTRAR, KILIFI.....2ND RESPONDENT

ANTONY M. MUDACHIINTERESTED PARTY

EXPARTE APPLICANTS: LOYCE KASYULA JEREMIAH MASHA

HADIJA JUMA AHMED

R U L I N G

1. Before me is a Notice of Motion Application dated 7th December 2015 and amended on 26th September 2016. The Motion brought under the provisions of Order 53 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act as well as Sections 8 and 9 of the Law Reforms Act seeks for orders: -

1. THAT the ex-parte applicant be granted judicial review orders of: -

(a) *Certiorari* removing to this court and quashing the decision of the Respondents to issue Title Deed to ANYTHONY M. MUDACHI in respect of Plot No. Mariakani/Kawala “B”/310(formerly Kawala ‘B’ Adjudication Section Plot 310);

(b) *Prohibition* restraining the Respondent and Interest(ed) Party, their servants,agents or representatives from selling, transferring, sub-dividing, building and/or developing Plot No. Mariakani/Kawala ‘B’/310(formerly Kawala’B’ Adjudication Section Plot 310);

(c) *Mandamus* to compel the Respondents by themselves, servant and/or agents to delete any entry on the Parcel File of the Suit Property either by way of transfer, sub-division,caution and/or charge made as a consequence to or in furtherance of the decision of the 1st Respondent aforesaid.

2. The application is premised on a number of grounds and is supported by an affidavit of Loyce Kasyuka Jeremiah Masha, the 1st Ex-Applicant herein sworn on 26th September 2016. The gist of the application may be summarized as follows.

(i) The 1st ex-parte applicant is the legal and beneficial owner of all that Parcel of land known as Mariakani/Kawala "B"/310 which she inherited from her mother. The said parcel of land was allocated to the Applicant during adjudication after successful objection proceedings she filed against the Interested party on 13th September 2012.

(ii) The 1st Ex-parte Applicant has been pursuing the processing of a title deed since the close of the Adjudication Register on 28th January 2014 after the Interested Party failed to appeal the determination by the Land Adjudication Arbitration Board.

(iii) The 1st Ex-parte Applicant continued using the land until she entered into a sale Agreement with the 2nd Ex-Applicant on 23rd September 2014 and sold the land to the 2nd Ex-Applicant for a consideration of Kshs 5.5 Million. A title deed for Mariakani/Kawala'B'/310 was eventually issued in the name of the 1st Ex-parte applicant on 3rd November 2014.

(iv) To their shock and dismay, the Ex-parte Applicants have recently discovered that the Cabinet Secretary Ministry of Land Housing & Urban Planning (named herein as the 1st Respondent) has ordered that the parcel of land Mariakani/Kawala'B'/310 be registered in the name of the Interested Party and the Land Registrar Kilifi(the 2nd Respondent) has already issued another title deed for the said land in the name of the Interested Party without due process.

(v) The Applicants contend that their interests in the suit property were validly, properly and legally obtained and the Respondents' act of revoking the 1st Ex-Applicant's title without due process and /or compensation is illegal, high handed, null and void and should not be condoned by this court as the right to property is one of the fundamental rights enshrined in Article 40 of the Constitution and one cannot be deprived of the same without due compensation.

3. The Application for Judicial Review orders is opposed both by the Respondents and the Interested Party. In Grounds of Opposition dated 21st June 2016 filed before the Motion was amended and Further Grounds of Opposition dated 18th November 2016 filed after the amendment of the motion by the Attorney General, the 1st and 2nd Respondents oppose the application on grounds, inter alia that;

(i) The Motion is misconceived, frivolous and an abuse of the process of the court.

(ii) The actions by the Respondents were proper and within their powers and mandate.

(iii) The issues of ownership of the suitland were conclusively dealt with by the Ministerial Panel appointed in Appeal Case No. 285 of 2015 which appointed in accordance with the Land Adjudication Act.

(iv) All concerned parties were given a fair hearing and the Ministers' decision was lawful, reasonable and fair in the circumstances; and

(v) The Applicants claim to the suit property is based on contested evidence and can only be adequately redressed by way of a civil suit for each party to prove their rights or claim and not in the manner brought herein.

4. On his part, the Interested Party Anthony Mudachi swore an Affidavit filed herein on 16th August 2016 contesting a number of assertions made by the Applicants and has urged this court to reject the application. It is the Interested Party's case that the issues raised herein have been the subject of proceedings before a land disputes tribunal culminating in the decision rendered in the Appeal to the

Minister in case No. 285 of 2015. According to the Interested Party, the Applicants' claim that the Appeal to the Minister was lodged after the expiry of 60 days is without any basis as the same was lodged within the allowed timelines.

5. The Interested Party avers that the suit property is owned by the Mwakulu Family which family has resided on the land since the 1890s. He further avers that the appeal to the Minister was made pursuant to the Land Adjudication Act and that the same was heard on 25th August 2016 in the presence of the 1st Ex-parte Applicants who participated and even called a witness to testify in the proceedings. In the circumstances, it is the Interested Party's case that these present proceedings are no more than a backdoor attempt by the applicants to amount an appeal against the decision made by the Minister.

6. I have perused the application and the Grounds of Opposition as well as the Replying Affidavit filed in opposition thereto. I have also studied the written and oral submissions made before me by various counsels appearing for the parties herein. I have in addition studied the lists of authorities supplied to me. At the very onset, I must state that when the matter came before me for hearing, the Ex-Applicants abandoned the prayer for the judicial review order of Mandamus, I suspect as a concession properly on their part that no such prayer was sought during the leave application stage. Accordingly, all that remained for determination by this court as regards the orders sought is the issue as to whether the Applicants are deserving the orders of certiorari and prohibition as sought in Prayer 1(a) and (b) of the application.

7. In their Written Submissions filed herein on 9th March 2017, the Interested Party has however raised certain fundamental objections to the application which I must of necessity consider first. It is the Interested Party's case that the Amended Notice of Motion as presently filed "remains largely null and void" in view of the orders of leave granted by this court on 2nd December 2015. As it were, on the said date, this court granted the ex-parte Applicants leave to apply for Judicial Review Orders of Certiorari and Prohibition. The application for leave was titled and framed as follows: -

Republic.....Applicant

Versus

Appeals to the Minister Panel of

Rabai Adjudication Area.....1st Respondent

Land Registrar Kilifi.....2nd Respondent

Anthony M. Mudachi..... Interested party

1. Loyce Kasyula Jeremiah Masha

2. Hadija Juma Ahmed.....Ex-parte Applicants

8. All the parties named thereafter filed their responses with the Honourable the Attorney General entering appearance for the 1st and 2nd Respondents as named. However, on or about 27th September 2016, the Ex -Parte applicants herein filed an Amended Notice of Motion in which the 1st Respondent's name as indicated in the leave application was now cancelled and replaced with the words:

"Cabinet Secretary, Ministry of Land Housing and Urban Planning."

9. The new Motion also introduced some explanation on the grounds on which the application is said to be premised even though the subject matter thereof in my view largely remains as earlier pleaded. When the matter came up for hearing before me, the Interested Party urged this court to ignore the Amended Motion as the Statement itself had not been amended and the applicant had not obtained the Court's leave

to file further affidavits. It was further the Interested Party's position that the parties in the Statement and verifying affidavits as well as the order for leave were at variance with the parties in the amended motion and hence the amended motion had no legs to stand on and should be dismissed with costs.

10. I am in agreement with the Interested Party that Judicial review proceedings are Sui generis in nature and are neither criminal nor civil strictly speaking. I am however unable to agree with the Interested Party that the amendment of the motion in this particular case without corresponding amendment of the Statutory Statement renders the amendment superfluous to the extent that it should be dismissed. It is a requirement under Order 53 of the Civil Procedure Rules that the Motion filed be served upon all persons directly affected by the application so that they may have an opportunity to be heard. Order 53 Rule 4 provides as follows: -

(1) Copies of the Statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall subject as hereafter in provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits or any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement and shall supply on demand copies of any such further affidavits.

(3) Every Party to the Proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.

11. As I pointed out the Amended Motion other than substituting the name of the Cabinet Secretary for a panel which acted under the Cabinet Secretary's direction introduced nothing new by way of substance. In my view the Cabinet Secretary is the proper person to be heard in these proceedings and clarification of the title of the 1st Respondent does not in any way deviate from the Original Statutory Statement filed in support of the application for leave. This must have been what informed the reasoning behind the agreement to have the amended application filed by consent when the parties appeared in court on 13th September 2016. It must also be the reason why Ms Munyony who appears for the 2nd Respondents on behalf of the Honourable the Attorney General had no issue with the Amended Motion. I therefore find and hold that the Amended Notice of Motion is properly before this court.

12. As I understood it the, dispute in this matter has its background in a tussle between two cousins, the 1st Ex-Parte applicant and the Interested Party herein regarding ownership of a parcel of land formerly known as Kawala "B" Adjudication Section Plot No. 310. From the record, it is apparent that they both trace their ownership of the land to one Mohamed Mwakulu who was their grandfather and the original owner of the land. As I understood it, the 1st Ex-Parte Applicant's mother was a sister to the Interested Party's father. It is common ground that the Applicant's Mother's marriage at a place called Kadzonzo failed and she returned home to live with her brothers whereupon she was showed a piece of land for her use. The 1st Ex-parte Applicant's mother and her brother are now dead and the 1st Ex-parte applicant is now married in a place called Mwereni even though it is apparent that she continued using the portion that her mother had built a house on and had all along been using.

13. During the time for land adjudication in the area, the Interested Party had the suitland registered under his name. When the 1st Ex-parte Applicant learnt of this, she filed Objection Proceedings before the Land Disputes Tribunal. In their determination dated 13/9/2012, the tribunal found that the 1st Ex-parte Applicant had some structures on Plot No 310 and proceeded to order that her name be included for that portion in the Adjudication Register. The Parties had a right to appeal the decision within 60 days.

14. In order to succeed in an application for Judicial Review, an applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. It is the Ex-parte

applicants case that despite the clear indication that parties could only appeal within the said 60 days, no such appeal was filed and/or served upon them and yet the Ministerial Panel Proceeded to hear an appeal and make a determination. Section 29(1) of the Land Adjudication Act provides as follows: -

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may within 60 days after the date of the determination appeal against the determination of the Minister.”

15. It was the Ex-parte applicants position that before the Minister’s panel could sit, there ought to have been an appeal stating the grounds why an objection should be set aside and/or struck out. It is their case that the Ex-parte Applicants did not know of any proceedings pending against them until on 22/9/15 when the 1st Ex-parte Applicant was served with a Notice requiring her to appear before the Appeals Panel the following day on 23/9/2015. Even when she appeared before the Panel, she was not served with any appeal but was only told to avail her witnesses. This according to the Applicants can only mean that the Minister sat in exercise of the original jurisdiction meant for the Disputes Tribunal and not in the exercise of the appellate jurisdiction as it was meant to be.

16. Addressing me on the issue of whether or not the Appeal was filed out of time, both the Respondents and the Interested Party herein appeared to pass the buck to the Ex-parte applicants to prove that indeed the Appeal was filed out of time. It was the respondents’ case that the Applicant ought to have annexed the Interested Party’s appeal to their affidavit in order to demonstrate if indeed it was filed out of time. On his part, the Interested Party relies on a receipt dated 25th September 2012 annexed to their pleadings to show that they paid for the appeal then and hence that is the date when the Appeal should be deemed to have been filed.

17. I **have** looked at the Land Adjudication regulations 1970, enacted pursuant to the Land Adjudication Act. Regulation No. 4 thereof provides as follows:

(1) Any person submitting an appeal to the Minister under Section 29 of the Act shall attach to his appeal a tracing from the demarcation map of the boundaries of the holdings in dispute.

(2) A fee shall be payable in respect of each appeal at the rate specified in the Second Schedule to these Regulations.

18. From the Regulations, it is evident that some form of a formal appeal ought to have been filed most certainly indicating the grounds thereof but at any rate attaching the demarcation map of the boundaries in dispute. Why the Interested Party who is responsible for the Appeal could not produce this document despite the claim that the Appeal was filed out of time is only a matter of conjecture. What is clear to me however is the fact that the Appeal has the Serial No. 285 of 2015. Even though it is not indicated when the appeal was filed, I think the date speaks for itself. It can only mean in my view, unless otherwise demonstrated, that the Appeal when filed was Number 285 amongst the Appeals filed with the Minister in the year 2015. As we have seen, Section 29 provides that a party aggrieved by the determination of the objection under Section 26 may within 60 days of the determination appeal to the Minister. The period allowed by statute was therefore 60 days from 13/9/2012. This must have lapsed sometimes on or about 13/11/2012. The 1st Respondent therefore had no jurisdiction to hear an appeal filed more than two years later and all that was done was ultra vires the 1st Respondent.

19. In the event I worryThe second issue I would like to consider is the procedure followed in revoking the ex-parte applicant’s interests in the Suitland. From the affidavits filed it is evident that both the 1st ex-parte applicant and the Interested Party were at one point or the other issued with title deeds to the self-same parcel of land. While the 1st ex-parte applicant’s title deed is shown to have been issued on 3rd November 2014, the one for the Interested Party was issued after the purported Appeal hearings on 16th October 2015. Although Ms Munyuny for the Attorney General cast doubt on the authenticity of the title in the name of the 1st ex-parte applicant, nothing was put before me to demonstrate that the said title was procured in a manner otherwise than is lawful. Given that the title was in place before the time the appeal

was filed if my finding on the same is correct, it was not open for the Respondents to purport to revoke the same and issue another title in the manner in which they did.

20. In *Kuria Greens Ltd -vs- Registrar of Titles & Another (2011) eKLR* Olao J., dealing with a near similar issue stated as follows: -

In my view therefore, the Registrar of Titles exceeded his power and thus acted ultra vires in purporting to revoke the Petitioners title. There can be no dispute that an ultra vires act by a public authority is unlawful. In *Republic -vs- Kisumu District Lands Officer & Another*, the court held that “it is clear that it is only the court that can cancel or amend a title where the court is of the view that the registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration.”

21. Similarly, in *Josphat Nyaga Mukembo & 21 Others -vs- Attorney General & 4 Others (2016) eKLR*, Olao J., dealing with a matter where the Minister proceeded with a hearing after title was issued observed as follows: -

“It is clear from the above that even as the District Commissioner was hearing the appeal, it was made known to him that titles had been issued to some of the land parcels in dispute and he was advised by none other than the Director, Land Adjudication to suspend the hearing of these appeals and return the files to the Department. That advise was ignored with the result that the District Commissioner proceeded to make the orders that he did which were ultra vires because he had no jurisdiction to revoke titles.”

22. It is indeed interesting to note the haste with which the Respondents proceeded to revoke the first title and re-issue another one. While the 1st ex-parte applicant was summoned to attend the reading of the award, on 23/9/2015 vide a letter dated 22/9/2015, it is evident from annexures of the Interested Party’s Replying Affidavit that as early as 8/9/2015, a decision had been made and the Director Land Adjudication had already written to the Chief Land Registrar asking him to remove a restriction placed on the land and have the Interested Party registered as the owner and trustee of other unnamed family members. As we have seen in the decisions cited above, there was at the time already in existence a title deed to the property and the Registrar lacked powers to revoke the same as he purported to do herein.

23. The above findings should suffice to conclude this matter. However, I wish to comment also on the manner in which the decision to deprive the 1st ex-parte applicant of her title was arrived at. First and foremost, it is evident from the proceedings that when he appeared before the Appeals panel the Interested Party upon cross examination duly informed the panel that he had heard that the land had been sold. In spite of this important information, the panel did not find out if its decision would affect any 3rd party who may have purchased the land for value without notice of the pending Appeal before them. As a result of this decision, the 2nd Ex-parte applicant was neither given notice of the proceedings nor heard in the course of the appeal. She is therefore perfectly in order to complain that her rights were violated. Secondly, I think the decision arrived at by the panel was quite irrational in the circumstances. *In Pastoli -vs- Kabale District Local Government Council & Others (2008) 2 EA 300*, the court defined “irrationality” as follows: -

“Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.”

24. It is clear from the findings of the panel as summarized by the Deputy County Commissioner, Rabai in their report that, among other things, they found as follows:

“The Respondent (1st ex-parte Applicant herein) is a relative by blood to the Appellant (Interested Party herein) but they cannot share things like land in common like brothers too, thus she is a woman married elsewhere and entitled to own properties at her marital place... The Respondent is

settled in her own land elsewhere at Mwarareni with her family members including her two sons and five daughters. If they were to claim any share, then she could claim at Kadzonzo where her mother was married and not at Kawala B where her mother was born.”

25. A look at the Panel’s findings seem to vindicate the 1st Ex-parte Applicant’s contention that she was being denied her inheritance on the sole basis that she is a woman. The preamble to the Constitution of Kenya 2010 indicates that the said Constitution was founded on the recognition of “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social Justice and the rule of law.” Among the national values and principles of governance in the Constitution is the rule of law. Article 27 of the Constitution guarantees every person a right to equality and freedom from discrimination. Article 27(3) of the Constitution provides that: -

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

26. From the foregoing, it is clear that even in matters inheritance, a man does not have any superior right over women. Article 22 of the Constitution vests the court with jurisdiction for enforcement of fundamental rights and freedoms as set out in or recognized in the Bill of Rights. Under Article 47 of the Constitution, every person has the right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

27. As I have outlined above, the manner in which the ex-parte applicants have been deprived of their property is neither lawful, nor procedurally fair. In the result, I find and hold that they are entitled to and I do grant them:

(a) Judicial review orders of Certiorari removing to this court and quashing the decisions of the Respondents to issue Title Deed to Antony M Mudachi in respect of Plot No Mariakani/Kawala’B’/310 (formerly Kawala’B’ Adjudication Section Plot 310) and

(b) Judicial review Orders of prohibition restraining the Respondents and the Interested Party, their servants, agents or representatives from selling, transferring, subdividing, building and/or developing Plot Number Mariakani/Kawala’B’/310(formerly Kawala’B’ Adjudication Section Plot 310).

28. I also award the costs of this application to the ex-parte applicants.

Dated, signed and delivered in Malindi this 12th day of May 2017.

J. O. OLOLA

JUDGE