



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC MISC. APPLICATION NO.29 OF 2014

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: THE SURVEY ACT CAP 299

AND

IN THE MATTER OF: AN APPLICATION BY KIDZIZI PROPERTIES LIMITED FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN ACCORDANCE TO WITH ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE DIRECTOR OF SURVEY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE: KIDZIZI PROPERTIES LIMITED

AND

ADOLFO GUZZINI.....1ST INTENDED INTERESTED PARTY

ANNA TACCALITIN GUZZINI.....2ND INTENDED INTERESTED PARTY

RULING

1. On the 24th November, 2015, the Interested Parties filed an Application dated 23rd November, 2015 in which they sought for leave to be enjoined these proceedings and also to have the orders that were issued on 13th February, 2015 by this court discharged.
2. Before the said Application could be heard, the Ex-parte Applicant filed Grounds of Opposition and a Notice of Preliminary Objection dated 20th April, 2016. This Ruling is in respect to the said Notice of Preliminary Objection.
3. In the Notice of Preliminary Objection, the Applicant has averred that this court lacks the jurisdiction to entertain the Application dated 23rd November, 2015 and that this court is functus officio.
4. The parties agreed to dispose off the Preliminary Objection by way of written submissions.
5. Applicant's counsel submitted that under Section 8(3) as read together with Section 8(5) of the Law Reform Act, this court lacks the jurisdiction to review, set aside and or discharge its final order of judicial review granted on 13th February, 2015. Counsel relied on the decisions of Omondi J. and Wendoh J. in the cases of **R vs Kilifi Land Registrar, Malindi H.C Misc. Application No. 31 of 2008 and Menca Francisco vs Registrar of Titles, Nairobi Misc. Application No. 7 of 2007** respectively.
6. The Applicant's counsel submitted that the jurisdiction conferred to the High Court under Sections 8 and 9 of the Law Reforms Act and Order 53 of the Civil Procedure Rules is not a jurisdiction which the court can exercise in its Civil and Criminal jurisdiction.
7. The Applicant's counsel submitted that even if this court had jurisdiction to entertain the Interested Party's Application, the court is functus officio because under Order 53 Rule 6, the Interested Party's Application can only be heard during the substantial hearing of the Judicial Review Application but not after the final orders have been granted.
8. The Interested Parties' advocate submitted that the orders of this court directly and substantially affected the Interested Party; that the primary dispute revolves round parcels of land known as L. R. No. 945 and Kilifi Jimba 1126 and that in Judicial Review No. 12 of 2011, this court held that the dispute between the parties should be addressed in an ELC court.
9. Counsel submitted that the issues pending in the Environment and Land Court have been pre-empted and determined in a summary fashion; that the Ex-parte Applicant has now finalized processing of the title document and that the orders should be set aside.
10. The Respondents' counsel submitted that Order 53 Rule (2) and 6 of the Civil Procedure Rules require that all persons interested or to be affected by the outcome of Judicial Review proceedings should be heard and that this court is clothed with the jurisdiction to correct the illegality and the injustice occasioned to the Interested Party.
11. Counsel relied on several English authorities on the issue of the inherent jurisdiction of the court to enforce the rules of justice and to suppress any abuses of its process. The cases that counsel relied on included **Connely vs D.P.P (1964) 2 ALLER 401, Taylor & Another vs Lawrence & Another (2002) 2 ALLER and Bremer Vulcan vs South India Shipping Corp (1981) 1 ALLER 295.** 12. The interested Parties' advocate also relied on the local authorities in which it was held that Judicial Review Orders can be reviewed.

13. The Interested Party's counsel finally submitted that the decisions relied upon by the Applicant are distinguishable because the parties in those cases had a recourse in filing an appeal; that the Interested Parties herein cannot file an Appeal because they were not parties in these proceedings and that the Interested Parties should be afforded an opportunity of being heard.

14. It is not in dispute that on 13th February, 2015, this court allowed the Ex-parte Applicant's Notice of Motion dated 2nd December, 2014.

15. By allowing the said Motion, the court directed the Respondents, by way of Mandamus, to amend the survey record and include in the Register Index Map Sheet No. 12 plot number Kilifi Jimba/1126.

16. The Intended Interested Parties were not Parties to the Motion, neither are they the registered proprietors of parcel of land number Kilifi Jimba/1126.

17. In their Application seeking to set aside the orders of this court, the Intended Interested Parties have averred that they are the proprietors of L.R. No. 945; that there is a dispute in respect of L. R. No. 945 and Kilifi Jimba/1126 and that the Ex-parte Applicant is aware of the various suits which are pending in this court in respect to the two suit properties.

18. This Ruling is not in respect to the Intended Interested Parties Application to set aside the orders of 13th February 2015, but rather, whether the court has the jurisdiction to entertain that Application in the first place.

19. Basing the arguments on the provisions of Section 8 (3) and (5) of the Law Reform Act, the Ex-parte Applicant's counsel wants this court to dismiss the Interested Parties Application dated 23rd November, 2015 in limine. Section 8(3) of the Laws Reforms Act provides as follows:

"S. 8 (3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection 5".

20. Section 8 (5) of the same Act on the other hand provides as follows:

"S. 8 (5) Any person aggrieved by an order made in exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal."

21. The Applicant's counsel urged, and rightly so, that Judicial Review Proceedings are *sui generis* proceedings which are neither civil nor criminal and that ordinary orders which are civil in nature cannot be obtained before a court while exercising judicial review jurisdiction.

22. While submitting that a judicial review court cannot review its orders, the Applicant's counsel relied on the decisions of Omondi J. and Wendo J. in the cases of **Hajila Bajila Guyo** (Supra) and **Mence Francesco** (Supra).

23. In the **Mence Francesco** (Supra) case, the court quoted with approval the decision Mbitio and Mango JJ in **Kuria Mbae Vs. the head Adjudication officer, Chuka Misc Application No. 257 of 1987** where it was held as follows:

"However, according to Section 8(3) of the Act, court orders on such application is final and cannot be the subject of pleading or prohibition. There is also no provision in the said Act or any other law making such prerogative order of this court subject to the usual pleadings available in proceedings under the Civil Procedure Rules. In our view therefore, it would appear that this court has no jurisdiction to stay, recall, review or set aside or grant an order of judicial review once it has made it"

The judges went ahead to make the following findings:

“Though I sympathize with the situation the Interested Party finds himself and though he may have a good case and taking into account that the order challenged relates to land, this courts’ hands are tied on account of jurisdictionreview is not available to him and there is none envisaged under the Law Reform Act and Order 53 Civil Procedure Rules”.

In the **Hajila Bajila Guyo** case, Omondi J held as follows:

“Now from the provisions of Section 8 above, it would appear that once the parties entered into the consent and the same became orders of the court, they were deemed to be final orders and that there can be no revisit of whatever reason to the High Court, it would only qualify to proceed to appeal before the Court of Appeal. I am in agreement with Justice Wendo that “RETURN” would include Review and even setting aside.....”

24. The Court of Appeal has however taken a different view from what I have quoted above.

25. In the case of **Aga Khan Education Services Kenya VS. R, Civil Appeal No. 257 of 2003**, the Court of Appeal expressed the view that review jurisdiction in Judicial Review may be exercised but sparingly and in very clear cut cases.

26. In the case of **Nakumatt Holdings Ltd VS Commission of Value Added Tax (2011) eKLR**, the Court of Appeal held as follows:

“While we agree with him that judicial review is a special Jurisdiction, we do not agree that in clear cases courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is otherwise not to blame for the circumstances he finds himself in”.

27. The court of Appeal decisions that I have quoted above are in tandem with the cherished maxim that a party should not be condemned un heard.

28. The Court of Appeal decisions quoted above also reaffirmed the inherent powers of the court to correct wrong decisions, if any, so as to ensure justice between the parties involved in a suit is done.

29. The issue as to whether the Intended Interested Parties Application to set aside the orders of this court is one that falls in the category of “ clear cut cases” and whether the Interested parties should have been heard in the first place can only be determined after the said Application has been heard inter-partes, and not at this stage.

30. For those reasons, I dismiss the Ex-parte Applicant’s Notice of preliminary Objection dated 20th April, 2016.

31. The costs to await the outcome of the Application dated **23rd November,2015**.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE