



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LANDS COURT

AT MALINDI

MISC APPLICATION NO. 5 OF 2016(JR)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE LAW REFORM ACT (CAP 26), LAWS OF KENYA

AND

IN THE MATTER OF: SECTION 29 AS READ WITH SECTIONS 26 AND 27 OF THE LAND ADJUDICATION ACT (CAP 284)

LAWS OF KENYA

IN THE MATTER OF: A DECISION BY THE MINISTER IN APPEAL CASE NO. 2 of 2015 INVOLVING PLOT NOS. 680 AND 681

KADZONZO/MADZIMBANI ADJUDICATION SECTION

REPUBLIC OF KENYA.....APPLICANT

VERSUS

CABINET SECRETARY, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, KILIFI

THE DISTRICT AND REGISTRAR, KILIFI

THE CHIEF LAND REGISTRAR.....RESPONDENTS

AND

NGONGO ISIKA.....INTERESTED PARTY

EX-PARTE WATUKU MUTSIEMI WATUKU

NZOVI MULU KYENGO

JUDGEMENT

1. Before me is a Notice of Motion Application dated 9th August 2016. The ex-parte applicants Watuku Mutsiemi Watuku and Nzovi Mulu Kyengo pray for the following: -

1. THAT Judicial Review Orders of Certiorari do issue to remove and/or bring into this Honourable Court and quash the decision of the 1st Respondent made on 22nd March 2016, allowing the Interested Party's appeal in Appeal Case No. 2 of 2015 involving Plot Nos 680 and 681 Kadzonzo/Madzimbani Adjudication Section.

2. THAT Judicial Review Orders of Mandamus do issue, compelling the 2nd, 3rd and 4th Respondents to register the ex-parte Applicants as Owners of Plot No.s 680 and 681 Kadzonzo/Madzimbani Adjudication Section, respectively and consequently issue them with Title Deeds for the said parcels of land.

3. THAT Judicial Review Orders of Prohibition do issue, prohibiting the 2nd, 3rd and 4th Respondents from further acting on the decision of the 1st Respondent made on 22nd March 2016 in Appeal Case No. 2 of 2015 involving Plot No.s 680 and 681 Kadzonzo/Madzimbani Adjudication Section.

4. THAT the costs of the Judicial review application at the leave stage and at the substantive motion stage be borne by the Respondents and the Interested party.

2. The Application is supported by the two applicants' affidavits both sworn on 25th July 2016 and filed in support of the Chamber Summons filed at the leave stage as well as the Statement of Facts dated 25th July 2016 also filed at the leave stage. The gist of the application as brought out in the grounds thereof can be summarized as follows: -

i. That on 29th November 2007, Plot No.s 680 and 681 Kadzonzo/Madzimbani Adjudication Section were demarcated and allocated to the 1st and 2nd Ex-parte Applicants respectively;

ii. That the Interested Party thereafter lodged an objection against the allocation first on 11th April 2008, secondly on 28th April 2010 and a third and final one in the year 2011. All these objections were dismissed by the Land Adjudication Committee acting pursuant to Section 26 of the Land Adjudication Act;

iii. That the Interested Party's third objection was dismissed on 5th December 2011 and in line with Section 29 of the Land Adjudication Act, the Interested Party was required to file an Appeal to the Minister within 60 days. The Interested Party did not do so but waited until the 23rd day of February 2012, some 18 days beyond the prescribed period, before lodging an Appeal to the Minister;

iv. That since the Appeal was filed out of time, the Cabinet Secretary, Ministry of Land, Housing and Urban Development -the 1st Respondent herein-acted ultra vires when he entertained and/or heard the Appeal and thus his decision allowing the Interested Party's Appeal was a nullity and/or unlawful, illegal, unprocedural and void *ab initio*; and

v. That the Minister's decision should accordingly be quashed forthwith and the Land Adjudication Officer's decision confirming ownership of the aforementioned parcels of land in favour of the ex-parte applicants should be upheld.

3. The Application is opposed. In a Replying Affidavit sworn by the Interested Party Ngongo Isika and

filed herein on 27th September 2016, she avers that the Application herein is defective as it lacks a Supporting Affidavit and other mandatory pleadings and thus the same is not properly before the court and should thus be dismissed.

4. In regard to the issue of the Appeal being filed out of time, it is her case that the same is not sufficient ground for the court to interfere with the decision arrived at by the Minister on merit as the ex-parte applicants participated at the hearing before the Minister and did not raise any objection to his jurisdiction but waited until after the award was made in her favour. It is her case that she filed the Appeal three days after being supplied with the proceedings and the decision and that if there was any delay in filing of the Appeal, the same should be attributed to the Adjudication Committee which took long in typing and compiling the proceedings.

5. It is further her case that there was a decision of the Land Disputes Tribunal which had given an award in her favour but the same was ignored by the ex-parte applicants who proceeded to have the land demarcated and allocated to them and her protests since then have not borne fruit.

6. On their part, the Respondents have through the Honourable the Attorney-General lodged Grounds of Opposition herein on 11th November 2016 wherein they opposed the Application on the Grounds *inter alia*: -

i. That the Respondents acted within their authority and mandate when they heard and determined the Appeal to the Minister.

ii. That if the Appeal was filed outside the period prescribed by the law which is denied, the Ex-parte Applicants failure to raise(an) objection to the admissibility of the Appeal before the Minister constituted acquiescence and waiver of their right to raise the same.

iii. That the Applicants are estopped from raising the issue of limitation of time for filing appeal by reason of their participation in the Appeal proceedings.

iv. That the objects of the court which are to dispense proportionate substantive and equitable justice were achieved in the Appeal to the Minister notwithstanding any technical defects in the proceedings.

v. That the threshold for the grant of Judicial Review Orders has not been met by the Applicant hence the Application lacks merit and ought to be dismissed with costs.

7. I have considered the Application before me as well as the Replying Affidavit and the Grounds of Opposition filed in objection thereto. I have also considered the submissions and authorities filed by both the Applicant and the Interested party.

8. As I perused through this file, my attention was drawn to Paragraphs 10, 11 and 12 of the Interested Party's Replying Affidavit in which she makes reference to an award issued by the Land Dispute Tribunal in her favour. Annexed to the Replying Affidavit and marked as annexures NI 2, NI 3 and NI 4 are copies of the proceedings of the Tribunal and a decision endorsing the same by the Resident Magistrate's Court at Kaloleni. I note that the Ex-parte Applicants did not touch on this subject either by way of a Supplementary Affidavit and/or in their submissions.

9. From the records availed herein, however, it is apparent that sometime in 1999, a dispute arose between the ex-parte Applicants and the Interested Party's husband one Isika Tunzi. Arising from the dispute, the 2nd Ex-parte Applicant Nzovi Mulu Kyengo filed a Land Disputes Tribunal Case, Reference No. LND/KAL. 173/99 at Kaloleni. Having heard the case, the Tribunal made a determination on 9th February 1999 to the effect that the land belongs to the Interested Party's husband Isika Tunzi, now deceased. It is evident that thereafter, the said award by the Tribunal was transmitted to the Resident Magistrate's Court at Kaloleni. On 7th April 1999, the Tribunal's decision was adopted as an order of the

court in the presence of the 2nd Ex-parte Applicant. No appeal was ever made against the decision and in my view the Judgement of the Resident Magistrate's Court in Kaloleni Land Award Case No. 6 of 1999 as it were remains valid and binding to-date.

10. That being the position, the subsequent decision by the Land Adjudication Officers to demarcate the land and register the same in the names of the ex-parte Applicants six years after the death of Isika Tunzi flew in the face of the Court Order and amounted to an attempt to subvert the course of justice. Any subsequent attempt to deliberate over the status of the ownership of the suitland as the Land Adjudication Committee sought to do at the instigation of the ex-parte applicants was in my view, illegal and in contempt of the court decision rendered on 7th April 1999.

11. The 1st Respondent was thus right in stating in the decision sought to be quashed that the adjudication process was wrong in overlooking at an existing decision of the court.

12. Arising from the foregoing, the application before me is a clinical case of an applicant concealing material facts and seeking to wrongly benefit from the Court Process. To entertain this application would amount to a reward to impunity and according assistance to those in contempt of court.

13. In order to uphold the honour and dignity of our courts, I hereby dismiss the Motion dated 9th August 2016 with costs.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J.O. OLOLA

JUDGE