



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CONSTITUTIONAL PETITION NO. 1 OF 2017

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AS
ENSHRINED UNDER ARTICLES 47 & 50 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: THE LAND ADJUDICATION ACT CHAPTER 284

AND

**IN THE MATTER OF: DECISION OF THE DISTRICT ADJUDICATION & SETTLEMENT
OFFICER MALINDI DISTRICT DATED 11TH NOVEMBER 2014 IN OBJECTION NO. 2
BETWEEN MOHAMED SHAHID MOUGHAL –VS- SAID BWANAMKUU**

AND

**IN THE MATTER OF: PLOT NO. 30 AND PLOT NO. 31 MEASURING APPROXIMATELY 20
ACRES SITUATE WITHIN KIREPWE “A” ADJUDICATION SECTION IN MALINDI
DISTRICT**

BETWEEN

MOHAMHED SHAAHID MOUGHAL.....PETITIONER

VERSUS

1. THE MALINDI DISTRICT LAND ADJUDICATION

OFFICER..... 1ST RESPONDENT

2. THE CHIEF LAND REGISTRAR.....2NDRESPONDENT

3. IBRAHIM BWANAMKUU..... INTERESTED PARTY

RULING

1. Before me for determination are two applications. The first Application is the Petitioner’s Notice of Motion brought pursuant to Rules 4 and 23 of the Constitution of Kenya (Protection and Fundamental Freedoms) Practice & Procedure Rules 2013. It is dated 20th January 2017. The second Application is

another Notice of Motion brought by the Interested Party dated 1st February 2017. On 9th February 2017, this Court directed that the two applications be heard and be disposed of together.

2. In the Petitioner's Motion dated 20th January 2017, the following Prayers are made:

1. *That for reasons to be recorded in writing, the Application herein be certified as urgent and service be dispensed with in the first instance.*
2. *That pending the hearing and determination of the Application herein, the Interested Party or anyone acting on his behalf or direction be restrained by way of an injunction from interfering in any way with the Petitioner's servants, employees and/or agents use and occupation of Plot No. 30 and 31 measuring 20 acres situate within Kirepwe "A" Adjudication Section in Malindi District.*
3. *That leave be granted to the Petitioner to apply for an order of Prohibition directed against the 2nd Respondent not to enforce the 1st Respondent's decision dated 11th December 2014 in Objection No. 2 Kirepwe 'A'; Mohammed Shahid Moughal –vs- Ibrahim Bwanamkuu pending the hearing and determination of the Petitioner's intended Appeal against the same or further Orders of this Honourable Court.*
4. *That the grant of leave to apply for the Order of Prohibition does operate as a stay of enforcement of the 1st Respondent's decision dated 11th December 2014 in Objection No. 2 Kirepwe 'A'; Mohammed Shahid Moughal –vs- Ibrahim Bwanamkuu pending the hearing and determination of the Petitioner's intended Appeal against the same or further Orders of this Honourable Court.*
5. *That pending the hearing and determination of the Petition herein, the Interested Party or anyone acting on his behalf or direction be restrained by way of an injunction from interfering in anyway with the Petitioner's person, his servants, employees and/or agents use and occupation of Plot No. 30 and 31 measuring 20 acres situate within Kirepwe "A" Adjudication Section in Malindi District.*
6. *That costs be provided for.*

3. The Application is supported by the Petitioner's Affidavit sworn on 19th January 2017 and is premised on the grounds set out on the face thereof as follows:-

- (i) *That the Petitioner has been in lawful possession and ownership of Plot Nos 30 and 31(the subject properties) situate on Kirepwe Island within the Kirepwe "A" Adjudication Section.*
- (ii) *The Petitioner's caretaker, one Hassan, has been resident on the subject property.*
- (iii) *Sometime in the year 1997, one Said Bwanamkuu, then the Petitioner's neighbor laid claim to the subject properties.*
- (iv) *The Said Bwanamkuu subsequently resorted to the use of violence and the police to harass the Petitioner into forceful submissions and eviction. The Petitioner was forced to file Nairobi Msc. Civil Application No. 5 of 2014 to restrain the Police from harassing him.*
- (v) *On 11th June 2014, the Petitioner lodged an Objection to the 1st Respondent's decision to register the said Said Bwanamkuu as the owner of the subject property-The 1st Respondent signified receiving of the Petitioner's Objection by issuing an Official Receipt.*
- (vi) *That the 1st Respondent heard the Objection Proceedings on 15th October 2014. The Petitioner was not aware of any determination arrived at until sometime in January 2017 when the employees of the Interested Party invaded the subject properties and the Petitioner's trees.*

(vii) That Said Bwanamkuu passed away in 2014 and his heirs failed to substitute him forcing the Petitioners cases filed in Court to abate.

(viii) The Petitioner accordingly submits that the failure to notify him and other parties of the decision in the Objection Proceedings which he came to learn was rendered on 11th December 2014 is a violation of the Petitioner's right under Article 47 and 50 of the Constitution.

(ix) As a result of the 1st Respondent's inaction, the Interested Party had on 19th January 2017 through his agents invaded the subject property and chased away the Petitioner's caretaker with the help of the Police from Watamu Police Station. In addition, they burned and razed down the Petitioner's developments thereon, cut down all mature trees and uprooted the perimeter fence.

4. On 30th January 2017, the Petitioner's application was placed before the Honourable Justice Angote ex-parte. Having considered the same, the Learned Judge granted Prayers 2, 3, and 4 thereof pending hearing inter-partes.

5. Feeling aggrieved by the grant of the said Orders, the Interested Party Ibrahim Said Bwanamkuu filed the second Application dated 1st February 2017 seeking the following orders:-

1. That the application be certified urgent.

2. That pending the hearing and determination of this Application inter-partes, the Orders issued on 30th January 2017 be and are hereby stayed.

3. That pending the hearing and determination of the Petition, the injunctive Orders granted on 30th January 2017 be and is set aside and vacated forthwith.

4. An Order that the Applicant is entitled to pecuniary compensation in terms of damage, on account of the emotional turmoil and psychological suffering that the Petitioner's suit has cost him.

5. The Petition be struck out with costs.

6. The costs of this application to abide the final outcome of the substantive Motion.

6. The Interested Party's application is supported by his own affidavit sworn on 1st February 2017 and is premised on the grounds that:-

(i) The Interested Party is the rightful owner of Parcel Nos 30 and 31 Kirepwe 'A' located at Kilifi, Malindi. Plot No. 30 measures 1.6 Hectares while No. 31 measures 4.4. Hectares.

(ii) The Orders issued herein on 30th January 2017 were obtained by way of fraud and non-disclosure of material facts which would have helped the Court in making a fair Order.

(iii) Both the Interested Party and the Petitioner were given a fair chance and actively participated in canvassing their cases before the 1st Respondent. Thereafter the 1st Respondent gave directions that a Ruling would be delivered on 18th November 2014 and that all parties can get a copy thereof from the Lands Registry at Malindi upon payment of the requisite fees.

(iv) Instead the Petitioner filed two Civil Suits, Nos 86 of 2014 and 120 of 2014 all touching on the parcel of land but all were dismissed after they abated by operation of the law.

(v) The injunctive orders granted on 30th January 2017 have not served the ends of justice, as the same fly against the rules of natural justice as they are not properly granted and the Court ought to have listened to the other side, and no date for inter-partes hearing was given hence defeating the

urgency and interests of justice.

(vi) The Petition be struck out as it is a nullity and it should not be heard by the High Court for being res judicata and purporting to re-open a case which has been resolved by a Court of competent jurisdiction.

7. The Respondents are equally opposed to the Petitioner's Application. In a Replying Affidavit sworn by one Gabriel Musyoki, a Land Adjudication and Settlement Assistant on 24th March 2017, the Respondents aver that the Petitioner was notified by the 1st Respondent that the Judgment and proceedings would be available for collection at a fee from the 1st Respondent. The Respondents further aver that the Petitioner had a 60 day window as from 11th December 2014 within which to file an Appeal after the decision was rendered but he failed to do so.

8. I have considered the two Applications and the Respondent's Replying Affidavit. I have equally perused the written and oral submissions placed before me by the respective Learned Advocates for the parties herein.

9. Both the Petitioner and the Interested Party herein lay a claim of ownership of Plot No.s 30 and 31 situated on Kirepwe Island within what is described as the Kirepwe'A' Adjudication Section. According to Gabriel Musyoki the Land Adjudication Settlement Assistant for the Area, both the Petitioner Mohamed Shahid Moughal and the Interested party Ibrahim Said Bwanamkuu were summoned to appear before the Malindi District Land Adjudication & Settlement Officer-the 1st Respondent herein on 15th October 2014 after the Petitioner filed an Objection against the Adjudication Register for Plot No. 31 in the said Adjudication Section.

10. It is the Respondent's and the Interested Party's case that the Petitioner fully participated in the Objection Proceedings which were conducted by the 1st Respondent and were subsequently dismissed for lack of merit on 11th December 2014. From the Affidavits placed before me, the Petitioner does not indeed deny participating in the proceedings. At paragraphs 10 and 12 of the Affidavit supporting the Petition he actually states that he participated in the proceedings at which the Interested Party herein testified on behalf of his father Said Bwanamkuu who passed away mid 2014. The Petitioner's claim herein is that he was never notified of the date of Ruling and that he only came to learn about the decision some three years later after it was made.

11. The Land Adjudication Act (Cap 284 of the Laws of Kenya)applies to the circumstances of this case and provides an elaborate procedure that ought to be followed in the event of a dispute. Under Section 6 of the Act, the Adjudication Officer together with the District Commissioner of the area are required to appoint an Adjudication Committee for the area under adjudication. Under Section 13 of the Act, every person who considers himself to have an interest in land within the adjudication section makes his claim to the recording officer and points his boundaries to the demarcation officer. If there are two or more conflicting claims to an interest in land as in the case herein, and the recording officer is unable to resolve the conflict, this dispute is submitted to an adjudication committee as provided under Section 19 of the Act. The adjudication Committee is meant to hear the conflict and issue a decision.

12. Section 12 of Cap 284 provides the procedure to be followed before the Adjudication Officer as follows:-

“12(1). In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion, he may admit evidence which would not be admissible in a Court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord. (Emphasis mine).

13. The Civil Procedure Act (Cap 21 of the Laws of Kenya) makes provision for procedure in civil

Courts in Kenya. In respect to Judgments and decisions in such civil proceedings, Order 21 Rule 1 of the Civil Procedure Rules Provides thus:-

“In suits where a hearing is necessary, the Court, after the case has been heard, shall pronounce Judgment in open Court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the Parties or their Advocates.”

14. Accordingly it would appear to me that Section 12 of the Land Adjudication Act envisages a situation where parties are given notice prior to the pronouncement of decisions made by the Adjudication Officer. This position is indeed made clear by obligations placed on the Adjudication Officer in the absence of a party under Section 11 of Cap 284. Section 11(c) of the Act provides that:-

“11. In the course of the adjudication, the adjudication officer shall have the following powers:-

(a-b)

(c) He may make a claim or otherwise act on behalf of a person who is absent or under a disability if he considers it necessary to avoid injustice.

15. I do not therefore agree with the Respondents that there is no requirement in the Land Adjudication Act that the 1st Respondent notifies the concerned parties to attend during the delivery of the decision. A perusal of the Objection Proceedings (annexure ‘JGK 2’ of Gabriel Musyoki’s Replying Affidavit) show that they commenced on 15th October 2014 in the presence of the Petitioner(referred to as Plaintiff) and the Interested party(Defendant) together with their witnesses. The Decision is however made at the end of it all on 11th December 2014 and there is no indication whether any of the Parties was present and/or had been notified to attend.

16. Article 47 of the Constitution of Kenya provides as follows:-

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

17. In my mind, in discharging the duties conferred upon him

under Section 9(2) (b) of the Land Adjudication Act, the 1st Respondent was exercising a quasi-judicial function. The law required him to hear and determine matters on any objection to the adjudication register. Section 29 of the Act requires that any person aggrieved by the determination of an objection made under Section 26 of the Act may within 60 days after the date of the determination appeal against the determination to the Minister. Given the dire implications of his decision, it cannot be enough for the 1st Respondent to just wake up one day and record his decision on the proceedings and proceed to quietly file it away without any notification and/or communication made to the parties. The law in my view imposes an obligation on the 1st Respondent to at least take some reasonable steps to ensure that their determinations are received by the parties litigating before them.

17. For the foregoing reasons, I find merit in the Petitioner’s Application dated 20th January 2017. The same is accordingly allowed. The Interested Party’s Application dated 1st February 2017 is dismissed.

18. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 15th day of November, 2017.

J.O. OLOLA

JUDGE