



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CONSTITUTIONAL PETITION NO. 24 OF 2016**

**IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: IN THE MATTER OF CONTRAVENTION OF**

**BREACH OF THE CONSTITUTION, TO WIT, ARTICLES 35, 40, 47,**

**50,238 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: OF ARTICLES 2, 3, 10, 19, 20, 21, 22,**

**23, 24, 25, 27, 28, 35, 39, 40, 42, 48, 50, 64, 70, 162,**

**258, & 259 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**MWIKALI MUTINDA WAMBUA.....PETITIONER**

**VERSUS**

**1. THE COUNTRY SURVEYOR-KILIFI COUNTY....1<sup>ST</sup> RESPONDENT**

**2. THE DISTRICT LAND REGISTRAR**

**KILIFI COUNTY.....2<sup>ND</sup> RESPONDENT**

**3. THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**4. THE CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....4<sup>TH</sup> RESPONDENT**

**AND**

**RULING**

1. Before me for determination is the Petitioner's Notice of Motion application dated 10<sup>th</sup> November 2016. The Petitioner Mwikali Mutinda Wambua prays for an order:-

***4. THAT pending the hearing and determination of the substantive Constitutional Petition herein, a Conservatory Order and/or injunction be issued restraining and prohibiting the Respondents and the Interested party whether by themselves, their employees, servants or agents or any other person or body of persons from wasting, alienating, meddling in, transferring, attempting to transfer, holding themselves out as owners, dealing with and/or in any other manner howsoever and whatsoever interfering with the parcel of land known as Kilifi/Kadzonzo Madzimbani 198 pending the hearing and determination of the Petition herein.***

***5. THAT this Honourable Court be pleased to give directions as to the hearing of the Petition herein and that the same be set down for hearing and determination on a priority basis.***

***6. THAT the costs for this application be provided for.***

2. The Application is supported by the Applicant's annexed affidavit sworn on 10<sup>th</sup> November 2016 and is premised on the grounds that:-

*(i) The Petitioner is and was at all material times the registered proprietor of the suitland which measures 0.55 Ha and is situated within Mariakani in Kilifi County;*

*(ii) On or about 2/6/2016 the Respondents encroached upon the land and commenced sub-divisions thereof purporting to implement the Appeal to the Minister in Appeal Case No. 278 of 2015;*

*(iii) The Petitioner stands to suffer incalculable and irreparable loss at the hands of the Respondents unless this Court promptly intervenes.*

3. The District Surveyor, Kilifi County named herein as the 1<sup>st</sup> Respondent is however opposed to the grant of the Orders sought. In a Replying Affidavit sworn by one Athman Ngoka, a Survey Assistant at the 1<sup>st</sup> Respondent's office on 6<sup>th</sup> December 2016, the 1<sup>st</sup> Respondent states that on 4<sup>th</sup> September 2015, they received a letter dated 8<sup>th</sup> July 2015 from the Director of Land Adjudication and Settlement urging them to implement the decision of the Minister in Land Appeal Case NO. 78 of 2015 where it was held that Plot No. 98 Kadzonzo/Madzimbani Adjudication Section be sub-divided into two equal portions so that the Appellant in that case could be issued with a new number.

4. The 1<sup>st</sup> Respondent further avers that in April 2016, the Interested Party herein followed up on the issue and they accordingly wrote a letter on 22<sup>nd</sup> April 2016 to the Area Chief notifying him that a Survey team would visit the ground on 4<sup>th</sup> May 2016 to implement the order. The Chief was accordingly asked to ensure all Interested Parties would avail themselves to witness the exercise.

5. It is the 1<sup>st</sup> Respondent's case that when they visited the ground as arranged, the exercise was halted after the Petitioner complained that the notice given was short. Subsequently, the exercise was re-scheduled for 2<sup>nd</sup> June 2016 when it was carried out but in the absence of the Petitioner who had however been notified of the exercise.

6. Ms Mtswili Ngolanye the Interested Party herein has also by a Replying Affidavit sworn on 8<sup>th</sup> May 2017 opposed the Application. The Interested Party avers that the Petitioner is her neighbor at home and that the Petitioner's husband was previously employed by her husband to take care of the Interested Party's and her husband's cows and goats. Later the Petitioner claimed that she had bought 1 acre of the

land from a certain Mr. Kitao Zia a person unknown to the Interested Party. Later on the Petitioner started claiming the whole 3 acre piece of land.

7. The Interested Party stated that following their dispute during the land adjudication exercise, it was decided that the land be sub-divided into 2 equal portions. The Surveyor then went into the land and sub-divided it. Accordingly, the Interested Party supports the position taken by the Respondents and urges that this case be dismissed.

8. I have considered the Application and the response thereto both by the Respondents and the Interested Party herein. I have equally considered the submissions and the authorities referred to me by the Learned Counsels for the Parties.

9. It is the Petitioner's case that she is the registered proprietor of all that parcel of land known as Kilifi/Kadzongo/Madzimbani/98 situated at Mariakani within Kilifi County. It is further her case that the Interested Party has without any lawful justification or her consent and/or authority encroached upon the land which measures 0.55 Ha following an unlawful sub-division of the land by the Respondents. In support of her case, she has exhibited an official search dated 1<sup>st</sup> July 2016 that shows that she is the registered proprietor of the land. It is accordingly her case that she has a prima facie case with a probability of success and that unless the Conservatory Orders are granted, there is a real danger that she would suffer prejudice as a result of what she terms violation or threatened violation of the Constitution.

10. From the material placed before me the gist of the Petitioner's case against the 3 Respondents and the Interested party is the claim that the District Surveyor, Kilifi County (the 1<sup>st</sup> Respondent) encroached upon the Petitioner's piece of land and proceeded to sub-divide it into two equal portions while purporting to implement the decision of the Minister in Appeal Case No. 78 of 2015. As correctly set out in the Petition, the 1<sup>st</sup> Respondent is mandated by law with the power of marking, supervising and affixing any survey marks, settling new survey marks, altering and putting up any survey marks under the Survey Act.

11. The 2<sup>nd</sup> Respondent is the District Land Registrar Kilifi County presumably enjoined herein to stop the issuance of a new title to the Interested Party, while the Honourable Attorney General (the 3<sup>rd</sup> Respondent) is sued in his capacity as the Chief Legal Adviser of the Government of the Republic of Kenya vested with legal authority to defend such suits against the Government.

12. In a Replying Affidavit sworn by one Athman Ngoka, a Surveyor Assistant in the 1<sup>st</sup> Respondent's Office, the Respondents explain that the sub-division of the suit property was conducted pursuant to the decision of the Land Adjudication Appeals Board in Appeal Case No. 78/2015. They state that the 4<sup>th</sup> Respondent herein, the Cabinet Secretary, Land Housing and Urban Development heard and determined an Appeal to his office as required under the Land Adjudication Act and made a finding that the parcel of land in contention be sub-divided into two equal portions. It is this decision that the Respondents enforced leading to their being sued herein.

13. I have looked at the Proceedings and the Decision made in the said Appeal to the Minister Case No. 78 of 2015 annexed to the Petitioner's Supporting Affidavit marked "MMW2". The record shows that Matswili Ngolanye (the Interested Party) had appealed against the decision of the Land Adjudication Officer in the case where Mwikali Mutinda (the Petitioner) is named as the Respondent. Both the Petitioner and the Interested Party are shown to have actively participated in the Proceedings. At the end of the proceedings the Panel chaired by the Deputy County Commissioner Kaloleni Sub-County has recorded its findings and decisions as follows:-

### ***Findings***

*1. Both parties are staying on the same piece of land, and they have buried their dead people on the same land.*

2. *The Respondent bought an acre from the father- in -law of the appellant before he died, but later she is claiming to have added two acres which was not documented anywhere.*

3. *Both parties being widows confirmed that, they do not own land anywhere else apart from this one in dispute.*

***Decision***

*In view of the above findings and other confirmed information as stated in this case proceedings, this case is partially allowed, Plot No. 98 to be sub-divided into two equal portions, so that the appellant be issued with a new number.”*

14. Arising from the foregoing, it is clear to me that the survey process which led to the sub-division of the suit property was done pursuant to a decision of a public authority with the mandate to determine the appeal. Section 21 of the Land Adjudication Act, provides as follows:-

*'21 (3) Any person named in or affected by a decision of the (Land Adjudication) Committee who considers the decision to be incorrect may, within 14 days after the decision, complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.*

*(4) Upon receipt of a complaint under sub-section (3) of this section, the executive officer of the Committee shall refer it with all the particulars of the case to the executive officer of the (Arbitration) Board, who shall submit it to the Board.*

15. In the matter before me, the Petitioner has not come to court to challenge any procedural improprieties on the part of the Appeal Committee. Instead, she is here in my understanding, to challenge the decision requiring the disputed parcel of land to be divided into two equal portions. The procedure of challenging that decision is clearly provided in law and the application before me is therefore premature.

16. The Survey in issue was lawfully done and the decision of the 4<sup>th</sup> Respondent cannot be challenged or varied through this application. I am indeed unable to see how the implementation of the 4<sup>th</sup> Respondent's decision has infringed on the Petitioner's rights more so given that the Petitioner was informed in two different occasions before the sub-division was carried out.

17. Accordingly, I find no merit in the application dated 10<sup>th</sup> November 2016. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of November, 2017.**

**J.O. OLOLA**

**JUDGE**