



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**JR MISC APP NO. 14 OF 2011**

**IN THE MATTER OF: APPLICATION ANTIOCHA LIMITED FOR LEAVE TO APPLY  
FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA -THE REGISTERED LAND ACT,  
CAP 300**

**AND**

**IN THE MATTER OF: PLOT NO. CHEMBE/KIBABAMSHE/409**

**IN ACCORDANCE WITH: ORDER 51 RULE 1(1) (3) & (4) OF THE CIVIL PROCEDURE  
RULES**

**AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**REPUBLIC**

**=VERSUS=**

**1. THE COMMISSIONER OF LANDS**

**2. THE CHIEF LAND REGISTRAR**

**3. THE KILIFI LAND REGISTRAR.....RESPONDENTS**

**=VERSUS=**

**1. FIDELITY EXPORT & IMPORT LIMITED**

**2. NEEMA ALI MRAMBA.....INTERESTED PARTIES**

**AND**

**ANTIOCHA LIMITED.....EXPARTE APPLICANT**

**J U D G M E N T**

## **Introduction**

1. In his Notice of Motion dated 24<sup>th</sup> May, 2011, the Ex-parte Applicant is seeking for the following orders:-

**(a) THAT Judicial Review orders of Mandamus do issue directed against the Respondents jointly and severally compelling themselves, their servants, agents and/or employees to revoke, annual and/or cancel the leasehold interest of title to plot No. Chembe/Kibabamshe/409 granted to the 2<sup>nd</sup> Interested Party on the 1<sup>st</sup> September 2010 and subsequently transferred to the 1<sup>st</sup> interested party on the 28<sup>th</sup> April 2011 and to further compel Respondents by themselves, their servants, agents and/or officers jointly and severally to forthwith reinstate and/or retain the Exparte Applicants records of ownership and title to Plot No.Chembe/Kibabamshe/409 at Kilifi District Land Registry.**

**(b) THAT Judicial Review orders of prohibition to issue against the Respondents and the interested parties prohibiting them jointly and/or severally either by themselves, their servants, employees and/or agents from interfering with the Exparte Applicant's occupation, possession, ownership and use or dealing with plot No. Chembe/Kibabamshe/409 and to further prohibit the said Respondents and interested parties from registering any dealings whatsoever with regard to the title to plot No. Chembe/Kibabamshe/409.**

**(c) 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 Parties.**

### **The Ex-parte Applicant's case:**

2. According to the Affidavit of the Applicant's director, the Applicant is the absolute registered proprietor of parcel of land known as Chembe/Kibabamshe/409 (the suit property) having purchased it from Farouk Swaleh Baya, Baya Kadenge and Joyce Sidi Chome who were the first registered owners.

3. It is the Applicant's case that the government has on various occasions investigated the validity of its title and made findings in its favour; that the Applicant's right to the suit property is a subject of proceedings in Malindi HCCC No. 31 of 2008 and that when the Applicant conducted a search on 29<sup>th</sup> April, 2011, it discovered that its plot had been allocated to Neema Ali who transferred it to the 1<sup>st</sup> Interested Party on 29<sup>th</sup> April, 2011.

4. The Ex-part Applicant's director deponed that at no time was the Applicant notified by the Respondents that its title has been cancelled; that the Respondents have no authority to issue a second title in favour of the Interested Parties and that the Leasehold title that is held by the Interested Parties is a nullity.

### **The Respondent's case:**

5. The Attorney General filed Grounds of Opposition on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

6. In the Grounds of Opposition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that the orders sought by the Applicant are untenable and a nullity; that the issues for determination of ownership of the suit property were conclusively dealt with in HCCC No. 21 of 2008 and that the issues raised in the Motion are res judicata.

### **The Interested Parties' case:**

7. The Interested Parties' advocate filed a Notice of Preliminary Objection in which he averred that the suit is incompetent because it has been commenced without a resolution by the Plaintiff. The said Preliminary Objection was dismissed by Omondi J.

8. The Interested Parties never filed Grounds of Opposition or a Replying Affidavit.

### **Submissions:**

9. The Ex-parte Applicant's counsel submitted that the Applicant holds a valid title; that the validity of the title can only be challenged after due process and that it is illegal for the Respondents to have issued the Certificates of Title to the Interested Parties for the same property.

10. Counsel submitted that the action by the Respondents in cancelling the Applicant's title was an administrative action and as such, the Respondents were under a duty to ensure that their actions complied with the rules of natural justice.

11. Counsel submitted that the Respondents should have afforded the Applicant a hearing before issuing a Certificate of Lease to the 2<sup>nd</sup> Interested Party.

12. The Attorney General submitted that there is no proof of illegality in the actions of the Respondents; that the issues touching on matters of ownership of the suit property can only be addressed adequately by way of Civil Suit and that the current Motion is unmerited.

13. The Interested Parties' advocate submitted that the Applicant has chosen the wrong forum; that an order of Mandamus cannot issue in the circumstances of this case and that the appropriate order was that of certiorari.

### **Analysis and findings:**

14. The undisputed facts in this matter are that on 13<sup>th</sup> August, 2001, the Applicant was registered as the proprietor of the suit property after purchasing it from three individuals.

15. The Applicant produced in evidence the Agreement that it entered into with the three individuals together with a copy of the Transfer, the Title Deed and the official search as at 30<sup>th</sup> November 2005 and 2008.

16. The Applicant also produced an official search that he conducted on 29<sup>th</sup> April 2011 in respect to parcel of land known as Chembe/Kibabamshe 409 which showed the registered owner of the land to be the 2<sup>nd</sup> Interested Party.

17. The Applicant's case is that he was never notified by the Respondents that its title to the land had been cancelled or revoked; that in any event the Respondents have no legal mandate to cancel his Title Deed and that their actions are a nullity.

18. Neither the Respondents nor the Interested Parties filed Replying Affidavits to challenge the Applicant's depositions. Consequently, the facts as pleaded by the Applicant have not been controverted.

19. It is true, as submitted by the Applicant's counsel, that the Respondents do not have the legal mandate to cancel or revoke a title which has been registered under the repealed Registered Land Act.

20. It is even worse that while purporting to exercise the powers that they did not have, the Respondents did not inform the Applicant of their intended action of cancelling the Applicant's Title Deed and issuing another Title Deed to the 2<sup>nd</sup> Interested Party who then transferred the land to the 1<sup>st</sup> Interested Party.

21. The importance of the doctrine of natural justice was captured well by the Court of Appeal in the case of **Onyango Oloo Vs Attorney General (1986-1989) EA 456** where it was held as follows:-

**“The Principle of natural justice applies where ordinary people would reasonably expect those making decisions will affect others to act fairly.....a decision in breach of the rules of**

**natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”**

22. The failure by the Respondents to invite the Applicant to defend its title, after giving it sufficient reasons and documents as to why they think they should cancel the title, falls a foul the provisions of Article 47 of the Constitution and the rules of natural justice.

23. It is now settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason **(See R vs Nairobi City County Ex parte ELMC LTD (2014) eKLR)**.

24. Consequently, the decision by the Respondents to cancel the Applicant's Title Deed and then issue another Title Deed to the Interested Parties was illegal and ultra vires.

25. The Respondents are the custodian of the register in respect to the suit property, which register has “defects of justice” occasioned by the Respondents' unilateral actions of cancelling the Applicant's title and issuing another title to the Interested parties.

26. For those reasons, I allow the Ex-parte Applicant's Application dated 24<sup>th</sup> May, 2011 as prayed.

Dated, signed and delivered in Malindi this 24<sup>th</sup> day of **June**, 2016.

**O. A. Angote**

**Judge**