



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC JR MISC. APP. NO. 9 OF 2013**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF  
CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF: SALIENT PRINCIPLES OF LEGITIMATE EXPECTATION  
AND REASONABLENESS**

**BETWEEN**

**KALUME DERI MUMBO.....APPLICANT**

**=VERSUS=**

**DISTRICT SURVEYOR, KILIFI.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF LANDS, KILIFI.....2<sup>ND</sup> RESPONDENT**

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

**AND**

**JUMA NYIRO NYOKA.....INTERESTED PARTY**

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

**Introduction:**

1. The Ex-parte Applicant (the Applicant) is seeking for the following Judicial Review Orders:
  - (a) That an order of prohibition be issued prohibiting the 1st Respondent from effecting and or causing to be effected a subdivision of the Applicant's parcel of land known as plot number Mwapula/Magogoni/458.

**(b) That this Honourable Court be inclined to issue an order of mandamus directed at the 2nd Respondent to release to Applicant the title deed in respect of plot number 458 Mwapula/Magogoni.**

2. The Respondents and the Interested Party have opposed the Application.

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

3. According to the Affidavit of the Applicant, he has lived on the suit property since the year 1938.

4. The Applicant has deponed that the Interested Party who hails from his lineage has engaged him in a land tussle for many years; that he inherited the suit property from his forefathers and that the suit property was once utilised by Deri Kamta Mumbo.

5. The Applicant has deponed that Deri Kamta Mumbo brought his brother, Deri Kadza on the suit property and that in 1888 Deri Kudza stayed on the land with his grandfather Chundo Deri. His father, Deri wa Chundo was born on the suit property in 1904.

6. According to the Applicant, his brother died in 1954 and 1962 respectively and were buried on the suit property. However, his grandfather who died in 1984 was buried at Keya Kauma in accordance with the Kauma culture.

7. The Applicant has deponed that in 1993, the area in which the suit property falls was declared an adjudication section and that he was registered as the proprietor of the suit property.

8. It is the Applicant's case that during demarcation, Nyoka Mwadoro raised an objection and the committee dismissed his objection; that he gave his uncle, George Stephen Yugo a part of plot number 458 which was registered as plot number 636 and that he lost the case before the Arbitration Board.

9. The Applicant has deponed that he is aggrieved with the decision of the Minister thus this suit.

**The Respondent's case:**

10. The Attorney General, on behalf of the Respondents, filed his Grounds of Opposition in which he averred that the Application is incompetent.

11. According to the Respondents, the decision of the Minister is final; that prayer number 2 is incapable of being granted as it exceeds the scope of mandamus and that the Application is frivolous, vexatious and an abuse of the process of the court.

**The Interested Party's case:**

12. According to the Interested Party's Replying Affidavit, the Applicant has never been registered as the proprietor of plot number 458; that after the Minister heard the appeal, the Applicant was awarded 1/3 of the suit property and that the applicant has not appealed against the said decision.

13. Although the Applicant was only awarded 1/3 of the suit property, the Interested Party has deponed that he went ahead and subdivided the land and sold a portion thereof to one George Stephen Guyo.

**Submissions:**

14. The ex-parte's Applicant's advocate filed his submissions and reiterated the Applicant's

averments. The Respondents and the Interested Party did not file submissions.

### **Analysis and findings:**

15. What is before me is an Application for Judicial Review for orders of Prohibition and Mandamus. In a nutshell, the Applicant is seeking to stop the Respondents from implementing the decision of the Minister that was given pursuant to the provisions of Section 29 of the Land Adjudication Act.

16. Section 29 of the Act states as follows:

**“Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within 60 days after the date of the determination, appeal against the determination of the Minister.**

17. The Minister allowed the appeal by the Interested Party on 18<sup>th</sup> December 2009 as follows;

**“the appeal is allowed plot 458 to be registered in the name of the Appellant (the interested party) and his clan members, but a portion be extracted from site where the Defendant's (the Applicant's) family are staying measuring 1/3 and be registered in the name of the Defendant and his family members and be issued with a new number.”**

18. The Applicant is opposed to the sub-division of plot number 458 in the manner proposed by the Minister. However, the Applicant is not seeking to quash the said decision in the current Application probably because of the limitation of time. All the Applicant is asking for is an order of mandamus directed at the 2<sup>nd</sup> Respondent to release to him the title deed for the entire plot number 458 Mwapula/Magogoni.

19. The efficacy and scope of an order of mandamus and prohibition was set out by the Court of Appeal in the case **Kenya National Examination Council –Vs- Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996**. The court quoted with approval **Halsbury's Laws of England, 4<sup>th</sup> edition, volume 1** at page 111 from paragraph 89 as follows:

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his office and is in the nature of a public duty..... The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way. If the complaint is that the duty has been wrongly performed, i.e that the duty has not been performed according to law, then mandamus is a wrong remedy to apply because, like an order of prohibition, an order of mandamus cannot quash what has already been done...”**(emphasis mine).

20. I have not been told which statute imposes on the Respondent a duty to release to the Applicant the title deed to the suit property without implementing the decision of the Minister.

21. It is clear from the decision in the Kenya National Examination Council Case (Supra) that an order of prohibition or mandamus cannot quash what has already been done. It is only the writ of certiorari that deals with the quashing of decisions of bodies and persons and not the writ of mandamus or prohibition.

22. The only options that were available to the Applicant after the decision of the Minister was to file an appeal by way of an ordinary suit or by praying for the quashing of the said decision.

23. Having failed to do so, the 2<sup>nd</sup> Respondent has no option but to implement the decision of the Minister.

24. In the circumstances, I find the Applicant's Application dated 16<sup>th</sup> September 2013 is unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this 20<sup>th</sup> day of **February**, 2015.

**O. A. Angote**

**Judge**