



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
MISC. CIVIL APPLICATION NO. 13 OF 2013

REPUBLIC.....APPLICANT

=VERSUS=

THE CHAIRMAN -NATIONAL LAND COMMISSION

LAMU DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER.....RESPONDENTS

AND

EXPARTE APPLICANT.....MOHAMED A. HARON

RULING

1. On 29th October, 2013, the *Ex-parte* Applicant moved this court seeking for leave to apply for judicial review orders in the nature of Certiorari to bring to this court and quash the decision of the Manda Land Committee for irregularly and unprocedurally allocating land in Manda Settlement Scheme – Lamu. The *Ex- parte* Applicant also sought for the said leave to operate as a stay of the Manda Island land adjudication process pending the hearing and determination of the main motion.
2. The court granted to the *Ex-parte* Applicant both prayers. The Interested Party, Manda Surveying Project Committee, subsequently filed the Application dated 11th December 2013 which is the subject of this Ruling. The Intended Interested Party is seeking for the following reliefs:
 - a. **That the Intended Interested Party, Manda Surveying Project Committee, be granted leave to appear and be heard in opposition to the Notice of opposition to the Notice of MotionApplication dated 7th November 2013.**
 - b. **That the order staying the Manda Island Adjudication process be discharged *ex-debito justitiae*.**
 - c. **That the costs be provided for.**
3. According to the Affidavit of the Secretary of the Intended Interested Party, (the Local Committee),

the Local Committee is comprised of Manda Island's local Chiefs which has been central in the adjudication and settlement process by identifying and vetting the true beneficiaries of the scheme.

4. It is the deposition of the Secretary of the Local Committee that the *ex-parte* Applicant did not enjoin the Local Committee in the suit and only came to learn about it from the Respondents; that the residents being beneficiaries of the scheme have a right to be heard in these proceedings and that the adjudication process is at an advanced stage.

5. According to the Local Committee, the *Ex-parte* Applicant is seeking for orders to quash unspecified titles and that the *ex-parte* Applicant's sole evidence of the purported irregular registration is a Certificate of Lease issued to himself and his family; that the said registration did not arise out of the adjudication process and the said land does not fall within the scheme in question.

6. The Secretary of the Local Committee further deponed that the order of Certiorari cannot be granted because it is time barred and that the stay order should be vacated to allow the adjudication process to proceed.

7. In his Replying Affidavits, the *Ex parte* Applicant stated that the land in Manda Island is community land; that certain individuals have been issued with title documents within the scheme without following due process and that Manda Island is Government land and anybody purporting to have a title deed on the Island must have obtained it fraudulently and illegally.

8. The *Ex-parte* Applicant further deponed that although he was not opposed to the inclusion of the "Local Committee" in the suit as an interested party, he was opposed to the setting aside of the orders of stay; that the substratum of the suit should be maintained; that there have been massive grabbing of land on Manda Island and that the "Local Committee" has been acting in bad faith and should not be allowed to engage in any process of settling the local inhabitants because they are bent to acquiring land themselves and their families.

9. Dr. Khaminwa, counsel for the Intended Interested Party, submitted that his client should be included in this proceedings and the orders staying the adjudication process on Manda Island be set aside.

10. Mr. Ojode, counsel for the *Ex-parte* Applicant, submitted that he was not opposed to the joinder of the Intended Interested Party in the suit. He however maintained, as shown in his client's Affidavits, that the orders of stay should remain in force pending the hearing of the main Motion.

Analysis and findings:

11. The only issue before me for determination is whether I should set aside the order staying the adjudication process on Manda Island pending the determination of the Motion.

12. The order staying the adjudication process on Manda Island was issued by this court *ex-parte* pursuant to the provisions of Order 53 Rule 4 which states as follows:

"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise".

13. The words "*or until the judge orders otherwise*" in the Rule presupposes that the court may set aside the order staying the proceedings at a later stage if satisfied that such an order should not have been granted in the first place.

14. Indeed in the case of **Njuguna -Vs- Minister of Agriculture (2000), EA**, the Court of Appeal held that the appropriate procedure for challenging an order of leave which has already been granted to an Applicant *ex-parte* is to apply under the inherent jurisdiction of the court to the Judge who granted leave

to set it aside.

15. In the case of **Aga Khan Education Service Kenya -Vs- R. through Ali Seif, Benson Nairagu, Joseph Ngethe Gitau and the AG, Civil Appeal No. 257 of 2003**, the Court of Appeal held as follows:

*“So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the Matter in depth. Again by their very nature, **ex-parte** orders are provisional and can be set aside by the Judge who has granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reasons or another, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the Superior Court.”*

16. It is therefore clear that this court can set aside any *ex-parte* orders granted pursuant to Order 53 Rule 3 in appropriate circumstances. The circumstances for setting aside will vary from one case to another and would include material non-disclosure or where the *ex-parte* Applicant intentionally misleads the court on matters of fact and or law.

17. The Application that gave rise to the *ex-parte* orders in this matter sought for leave to apply for judicial review orders in the nature of certiorari to bring to the High Court and quash the decision of the “Manda Land Committee” in allocating land irregularly and un-procedurally. The Applicant also sought for leave to apply for judicial review in the nature of prohibition to prohibit the Respondent from further proceedings with the adjudication process on Manda Island.

18. It was the Applicant's prayer that the leave so granted should operate as a stay of the Manda Island Land Adjudication process pending the hearing and determination of the suit.

19. It may be true that there is no decision by the Local Committee to be questioned as argued by the Interested Party's advocate. However, that is an issue that should be raised in opposition to the main motion considering that the said local committee had admitted in its affidavits that it has been involved, on behalf of the residents of Manda-Island, in the land adjudication process.

20. The Respondents in this matter are the ones mandated by the Constitution, the Land Act and the National Land Commission Act to settle people on public land which includes unalienated Government land.

21. The *Ex-parte* Applicant is opposed to the manner in which the Respondents, together with the Interested Party, have gone about in settling the residents of Manda Island and issuing to them the title documents. That process, which is alleged to be ongoing, should be stayed pending the determination of the issues that have been raised by the *Ex-parte* Applicant.

22. In the circumstances, the *ex-parte* Applicant was entitled to the orders that this court granted to him *ex-parte* staying the adjudication process on Manda Island until the main Motion is allowed. The merits and demerits of the Applicant's case can only be determined after trial.

23. In the circumstances and for the reasons I have given, I allow the Intended Interested Party's Application dated 11th December 2013 in terms of prayer (1) only.

24. The order staying the Manda Island Adjudication process shall remain in place until the suit is heard and determined. Each party shall bear his costs.

Dated and delivered at Malindi this 20th day of June, 2014.

O. A. Angote

Judge