



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 2012**

**IN THE MATTER OF:      APPLICATION BY MOHAMED MBWANA SHEE**  
  
**FOR LEAVE TO APPLY FOR AN ORDER OF**  
**CERTIORARI AND PROHIBITION**  
  
**AND**

**IN THE MATTER OF :    LETTER DATED 23.8.12 BY THE LAMU COUNTY**  
  
**COMMISSIONER**  
  
**AND**

**IN THE MATTER OF:    SECTION 5, AND 10 OF THE LAND ADJUDICATION**  
  
**CAP 284 LAWS OF KENYA, SECTION 21 OF THE**  
**CONSTITUENCIES DEVELOPMENT FUND ACT**  
  
**No. 10 OF 2003, ARTICLES 62 AND 67 OF THE**  
**CONSTITUTION OF KENYA**  
  
**AND**

**IN ACCORDANCE WITH:    ORDER 53 RULES 1, 2, 3 AND 4 OF THE CIVIL**  
  
**PROCEDURE RULES, 2010**  
  
**BETWEEN**

**REPUBLIC.....APPLICANT**  
  
**=VERSUS=**

**1. LAMU COUNTY COMMISSIONER**

## **2. LAMU DISTRICT LANDS ADJUDICATION AND SETTLEMENT OFFICER**

### **3. THE CHAIRMAN**

**LAMU EAST CONSTITUTENCY DEV. COMMITTEE.....RESPONDENTS**

**EX PARTE APPLICANT.....MOHAMED MBWANA SHEE**

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

1. This is one of the many disputes that have arisen within Lamu County in respect to the adjudication of land within the county.
2. The Ex parte Applicant was granted leave by Honourable Justice Meoli to apply for Judicial Review Orders in the nature of certiorari to bring before the High Court and quash the directions made by the 1<sup>st</sup> Respondent as contained in the letter dated 23<sup>rd</sup> August 2012.
3. The Ex-parte Applicant was also granted leave to apply for Judicial Review Orders in the nature of Prohibition to prohibit the 2<sup>nd</sup> Respondent from further proceeding with the Mvundeni Land Adjudication process as well as prohibiting the 3<sup>rd</sup> Respondent from releasing Kshs.1,500,000/- for financing the Mkokoni Community Land Adjudication process or in any other way financing the Land Adjudication process. The leave was to operate as a stay.
4. What is before me is the substantive Notice of Motion seeking the confirmation of the above Judicial Review orders.
5. According to the verifying affidavit by the ex parte Applicant sworn on 23<sup>rd</sup> October 2012, the Applicant is a resident of Mvundeni area within Mkokoni location which is situated in Kiunga Division within Lamu County.
6. The Ex parte Applicant has deponed that part of Mvundeni Community land was leased out to investors for purposes of generating an income for the community; that the issue of land ownership in the larger Lamu District as a whole has been subject of litigation in may courts and that on one occasion, the High Court in Mombasa issued an order in H.C.C.C No.622 of 1996 maintaining the existing status quo in respect of all unadjudicated land within Lamu county pending the determination of the suit.
7. The Ex-parte Applicant further deponed that the adjudication process within the larger region has been completely abused in the past and the same thing is likely to be replicated in Mvundeni and that numerous titles were cancelled in the region because the land had been grabbed by private individuals.
8. After giving a brief history of what the ex-parte applicant believes are injustices which have been perpetrated against the Mvundeni community, the Ex-parte Applicant deponed that the 1<sup>st</sup> Respondent issued a directive by way of a letter dated 23<sup>rd</sup> August 2012, addressed to the 2<sup>nd</sup> respondent to the effect that the Mvundeni Community land should be subdivided and given to private individuals.
9. The Ex-parte Applicant also took offence with the allocation of Kshs.1,500,000/- from the constituency development fund kitty to finance the cost of the proposed “unlawful” land adjudication process.
10. The Ex-parte Applicant finally deponed that the Mvundeni area falls within the mandate of the National Land Commission and it ought to be managed by the National Land Commission as provided for in the Constitution and that the action of the 2<sup>nd</sup> Respondent in proceeding with the adjudication process is in excess of his jurisdiction and therefore null and void.
11. The 2<sup>nd</sup> Respondent swore his Replying Affidavit on 14<sup>th</sup> January 2013.
12. The 2<sup>nd</sup> Respondent deponed that following a stakeholders meeting held in Mombasa on 26<sup>th</sup> April, 2006 and which was attended by a delegation of leaders from Lamu, it was resolved that the landless problem in the coastal region, including Lamu, should be resolved by the Government by carrying out land demarcation and adjudication.
13. Before the commencement of the process of demarcation and adjudication, the 2<sup>nd</sup> Respondent deponed that each village or settlement area was to select representatives to the settlement committee whose task was to assist the settlement officers in picking individual rights and vetting

- genuine settlers to guide, identify and verify those to be registered.
14. According to the 2<sup>nd</sup> Respondent, Mkokoni squatter settlement scheme is within Government land measuring 6,000 acres and affecting about 2,000 people; that the project was initiated following a request by the community leaders and the residents to the Director of Adjudication and Settlement and an approval was given by way of a letter dated 20<sup>th</sup> February 2012.
  15. The 2<sup>nd</sup> Respondent finally deponed that there is nothing wrong with the land in Mvundeni area being subdivided, allocated and registered in the names of the local residents and that the financing of the settlement project using the CDF funds is in fact one of the projects envisaged by the CDF Act.
  16. The 3<sup>rd</sup> Respondent filed his Replying Affidavit on 11<sup>th</sup> February 2013 and deponed that the Ex-parte Applicant is not a resident of Mvundeni area; that the land in question is Government land and the said land has not been designated as community land by virtue of any enacted law and that the alleged status quo order in Mombasa H.C.C.C No. 622 of 1996 was an interim order that has since technically lapsed pursuant to the provisions of the new Civil Procedure Rules.
  17. The Ex-parte Applicant's advocate filed his written submissions on 15<sup>th</sup> May 2013 while the Attorney General, on behalf of the Respondents filed his submissions on 29<sup>th</sup> April 2013. I have considered the written submissions.
  18. I should start by observing that neither the Ex-parte Applicant nor the Respondents annexed on their affidavits the pleadings and the order that is purported to have been issued in Mombasa HCCC No. 622 of 1996 in respect to the adjudication of land in Lamu.
  19. In the circumstances, I am unable to express my views on the alleged order that was issued by the High Court in Mombasa or whether indeed the proceedings in that case would have had a bearing on the outcome of this matter.

### **Locus standi**

20. The Respondents have deponed that the Applicant has no locus standi to institute the present suit because there is no proof that he hails from the area under adjudication.
21. According to the submissions filed by Mr. Eredi, counsel for the Respondents, the Ex-parte Applicant has no authority and has not been authorised to speak on behalf of the people of Mvundeni.
22. The Ex-parte Applicant deponed that he is a resident of Mvundeni area within Mkokoni location which is situated in Kiunga Division within Lamu County.
23. The Applicant having stated on oath that he hails from Mvundeni, it was upon the Respondents to disapprove that assertion by obtaining documents from the Registrar of Persons or the Registrar of Births or from any other Government agency to show that the Ex-parte Applicant does not hail from the said location.
24. Even if it is true that the Ex-parte Applicant is not a resident of Mvundeni, it cannot be said, as claimed by the Respondents, that he does not have the locus standi to inquire into the process of allocation of government land in Mvundeni area or Mkokoni squatter settlement scheme or in any other area for that matter.
25. The agitation by an individual for the due process to be followed in the allocation of government land, public or trust land as defined in the Constitution is in the nature of public interest litigation.
26. It is true that the traditional function of a lawsuit as understood in common law jurisprudence is that it is a means of settling disputes between private parties about private rights.
27. However the dispute before me is not between private parties and private rights; the dispute is about whether the Respondents, who are holders of public offices, followed the due process in the demarcation and adjudication of unalienated government, which, as I have stated above, is in the nature of public interest litigation and can be commenced by any person.
28. Public interest litigation has been defined as litigation that is instituted with a desire that the court would be able to give effective relief to the whole or a section of society, and this is one such litigation.
29. The Applicant therefore has the locus standi to institute this suit, just like any other public spirited individual would have done on behalf of the general public for the purpose of protecting that which is deemed to be in the general interest of the community.

## **Mandate of the National Land Commission**

30. The Ex parte Applicant's main prayer is for an order of certiorari to bring before the High Court and quash the directive made by the 1<sup>st</sup> Respondent as contained in the letter dated 23<sup>rd</sup> August, 2012.
31. The letter authored by the 1<sup>st</sup> Respondent and addressed to the 2<sup>nd</sup> Respondent dated 23<sup>rd</sup> August 2012 reads as follows:-

### **"RE: MVUNDENI COMMUNITY LAND**

***Further to my letter Ref NO. ND16/16 Vol III/110 dated 22<sup>nd</sup> August 2012 and after careful consideration I offer the following directives;***

***That the said community land be subdivided among the local residents and thereafter any investor to come in and negotiate with the real land owners. This gives the residents chance to reap maximum benefits of their land. Any other option of giving out land is open to abuse."***

32. The letter by the County Commissioner, in my view was well intentioned. The County Commissioner was calling upon the District Land Adjudication and Settlement Officer, the 2<sup>nd</sup> Respondent to subdivide "community" land and allocate it to the local residents.
33. However, according to the Ex-parte Applicant the County Commissioner does not have the legal mandate to give such direction and the letter was a calculated move to give land to undeserving people. The settlement of the squatters, or the members of the community, it was argued, had to await the establishment of the National Land Commission.
34. All the parties are agreeable that the Mvundeni land is unalienated Government land.
35. Article 62 (1) (a) of the Constitution states that unalienated government land, as defined by an Act of Parliament, is public land.
36. Pursuant to the provisions of Article 62(2) of the Constitution, public land, as defined under Article 62 (1) (a) shall vest in and be held by the county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission. This function is repeated under section 5(1) (a) of the National Land Commission Act, No. 5 of 2012.
37. According to the provisions of Section 134 of the Land Act, No. 6 of 2012, the National Land Commission is mandated, on behalf of the National and County Government, to implement settlement programmes so as to provide access to land for shelter and livelihood to individuals.
38. The identification of the beneficiaries of the settlement programmes is supposed to be carried out by a sub-county selection committee which comprises the sub-county administrator, or a representative of the county government, a representative of the Commission, a national government representative, a representative of persons with special needs, a women's representative and a representative of the youth.
39. The law has further provided for the establishment of the land settlement fund which is supposed to be administered by the National Land Commission. From this fund, the commission may purchase private land for settlement programmes.
40. Upon the promulgation of the Constitution in August 2010, the Provisions of Article 62(1) (a) of the Constitution vested all unalienated government land in the county governments for the benefit of the residents of the county.
41. The Mvundeni land falls in this category and the same could not be administered by the Ministry of Lands after August, 2010. It does not matter that as at August 2010, when the Constitution was promulgated, the National Land Commission Act 2012 had not been legislated or that the Commissioners had not been appointed.
42. The 2<sup>nd</sup> Respondent has annexed on his Replying Affidavit a letter dated 23<sup>rd</sup> April 2012 addressed to the District Commissioner, Lamu East, which reads as follows:-

***"Our office has accepted residents request for settlement formalization of Mkokoni area.***

***Refer to DS15A/Vol. 1 X138 dated 22/3/12 and our discussion on 29/4/12. The programme is to be guided under Lamu East CDF. Pursuant to this a public sensitization/stakeholders meeting should be held. Kindly schedule the meeting for Thursday 26/4/12 at Mkokoni at 9.00 am and mobilise the residents.”***

43. The 2<sup>nd</sup> Respondent has also annexed the minutes of a “Baraza for sensitization and planning of survey of Mkokoni, Ashuwuli and Mvundeni Villages held on 26<sup>th</sup> April, 2012 at Mkokoni Primary School.”
44. It would appear, from the 2<sup>nd</sup> Respondent's Replying Affidavit and the annexures, that the Department of Lands Adjudication and Settlement, in the Ministry of Lands continued to deal with unalienated Government land in Lamu despite the provisions of Article 62(1) and (2) of the Constitution which vested such land in the counties.
45. This position is confirmed by the letter of the Lamu West District Commissioner dated 23<sup>rd</sup> February 2012 addressed to the Director, Land Adjudication and Settlement. The letter reads as follows:-

***“RE: FORMALIZATION AND REGULARIZATION PROGRAMME FOR MKOKONI***

***....The District Land Management Committee has advanced the programme and only awaits the findings. The purpose of this letter is to request you to hasten the process and confirm that the local constituency development fund committee has agreed to put funds for that purpose.”***

46. The Director of Land Adjudication and Settlement responded to the letter by way of his letter dated 22<sup>nd</sup> March 2012 as follows:

***“...The request has been accepted. You may therefore proceed to prepare a budget and liaise with the Constituencies Development Fund Manager, Lamu East for funding. Please ensure that all settlement procedures are followed and keep the office updated.”***

47. It is not clear to me why the Provincial Administration, together with the officials at the Ministry of Lands, were all of a sudden, from their own letters, in hurry to deal with unalienated government in Lamu when such land was vested in the county governments.
48. In my view, any dealing in unalienated government land as defined by the Constitution could only be dealt with as provided for in the Constitution and the subsequent legislation. The Ministry of Lands had no Constitutional mandate to deal with unalienated government land within Mvundeni after August 2010.
49. It was upon the central government to move with speed with the appointment of the National Land Commission to manage such land as per the law. Indeed, now that the National Land Commission is in place, it should move with speed and put in place the sub-county selection committee as stipulated in the Land Act, 2012 with a view of identifying people who are supposed to be settled in Mvundeni area.
50. It is now settled that a court can only issue the orders of certiorari and prohibition where a claimant has proved that the impugned decision had been made either in excess or without jurisdiction, irrationally or unreasonably or in breach of the rules of natural justice
51. In the circumstances, and for the reasons I have given above, I find and hold that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted in excess of their jurisdiction by purporting to proceed with the settlement of individuals on unalienated government land within Mvundeni area in Lamu County in view of the provisions of Article 62 (1) and (2) of the Constitution. That function was and is the preserve of the National Land Commission as from August, 2010.
52. The upshot of this Judgment is that the Ex parte's Application dated 6<sup>th</sup> November, 2012 is

allowed in its entirety.

Dated and Delivered in Malindi this **12<sup>th</sup>** day of **July**, 2013

**O. A. Angote**

**Judge**