



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

J.R MISC. CIVIL APP. NO 2 OF 2013

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW**

AND

**IN THE MATTER OF: MADZIMBANI/MITANGONI ADJUDICATION
SECTION IN KILIFI DISTRICT**

AND

**IN THE MATTER OF: PLOTS NO. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16,
17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32,
33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48,
49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64,
65, 66, 67, 68, 69 & 70 MADZIMBANI/MITANGONI
ADJUDICATION SECTION**

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS
OF MANDAMUS AGAINST**

**1. THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER
KILIFI DISTRICT**

2. THE COMMISSIONER OF LANDS

AND

IN THE MATTER OF: SECTION 40 OF THE CONSTITUTION OF KENYA

BETWEEN

THE REPUBLIC

AND

1. THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

KILIFI DISTRICT

2. THE COMMISSIONER OF LANDS

3. JAMES MULWA & 53 OTHERS.....RESPONDENTS

=VERSUS=

1. KILIFI MUNGA ALFRED

2. HABEL MWAMIRA NDAO & 15 OTHERS.....EX PARTE-APPLICANTS

J U D G E M E N T

Introduction

1. What is before me is the Ex-parte Applicants' Motion dated 1st March, 2013 and filed on the same day. The Ex-parte Applicants' are seeking for the following orders;-

(a) **THAT an order of mandamus do issue to compel the District Land Adjudication and Settlement Officer Kilifi District, and the Commissioner of Lands to cause their decision to demarcate and allocate the suit plots No. 1 to 69 in the names of the respondents herein thereby depriving the applicants their constitutional rights to own property and also the continued and peaceful enjoyment and possession of the suit plots and/or compel them to deliver/avail their decision for quashing.**

(b) **THAT an order of certiorari do issue to quash the said decision of the District Land Adjudication and Settlement Officer, Kilifi District and the Commissioner of Lands.**

(c) **THAT the costs be provided for.**

The Ex-parte Applicants' case:

2. The Ex-parte Applicants' case is that they are residents of Madzimboni/Mitangoni adjudication section in Kilifi County which they have fully developed. According to the seventeen Ex-parte Applicants, their parents lived on the suit property before the Respondents unlawfully invaded the land and subdivided it amongst themselves.
3. The Ex-parte Applicants have deponed that sometimes in 1966, the then African Court sitting at Kaloleni delivered a Ruling in favour of their family against outsiders who had encroached on their land.
4. It is the Ex-parte Applicants' deposition that successive Government officials also settled outsiders including the Respondents on the suit property. It has been averred by the Ex-parte Applicants that the Government also compulsorily acquired other portions of land belonging to their family without compensating them.
5. The Ex-parte Applicants have stated that in the year 2012, the Government sought to demarcate and issue titles in the area and the adjudication committee of Madzimboni/ Mitangoni

adjudication section invited people to lodge their claims which the Ex-parte Applicants did and that the 3rd to 56th Respondents are now disposing off the plots so as to defeat the Ex-partes Applicants' claim.

The Respondent's case:

6. The 38th Respondent filed a Replying Affidavit on 27th May 2013 on his behalf and on behalf of thirty other Respondents.
7. The Respondents deponed that they are residents of Madzimbani /Mitangoni village and that each one of them has their own specific plots within the area and that the Ex-parte Applicants and their parents were not originally residents of plot number 1 to 70 Madzimbani/Mitangoni Adjudication section.
8. It is in the Respondents' deposition that the Ex-parte Applicants are not blood relatives of Ali Mwadzaya, the claimant in Kaloleni case number 23 of 1966.
9. According to the Respondents, the entire parcel of land composed of 1656.46 hectares but a large portion was acquired by the Kenyan Government for the establishment of Mariakani Military Barracks and that the Ex-parte Applicants have not instituted any suit against the Government for recovery of the land or for compensation.
10. It is the Respondents' case that the Ex-parte Applicants are occupying portion of land within Madzimbani/Mitangoni adjudication section and not the suit properties; that plot numbers 1 to 70 Madzimbani/Mitangoni belong to the Respondents having been identified as the rightful owners of the said plots and that the demarcation and adjudication process was carried out in conformity with the provisions of the Land Adjudication Act cap 284.
11. The Respondents finally deponed that the Ex-parte Applicants have not shown when the decision they seek to quash was made and whether they have exhausted the avenues available to them under the Act.
12. The District Land Adjudication Settlement Officer, Kilifi, filed his Replying affidavit on 11th July, 2013 and deponed that Madzimbani/Mitangoni Adjudication Section was established on 7th June, 2012 in accordance with section 5 of the Land Adjudication Act.
13. It was the 1st Respondent's deposition that the Ex-parte Applicants made their claims and they were awarded their plots by the Demarcation Officer, that the Adjudication Committee heard all the complaints before them and that there are 54 cases pending before the Land Committee.
14. It is the deposition of the District Land Adjudication Settlement Officer that the Ex-parte Applicants lost their case at the Land Committee Tribunal and that they were advised to file their appeal with the Arbitration Board. The deponent finally stated that the filing of the current suit will delay the land adjudication process in the area
15. The parties filed their respective submissions which I have considered.

Analysis and findings

16. It is not in dispute that the suit property was declared an adjudication section on 7th June, 2012 thus bringing it under the purview of the Land Adjudication Act, Cap 284.
17. The Notice of Motion is seeking for an order of *certiorari* to quash the decision of the District Land Adjudication and Settlement Officer, Kilifi and the Commissioner of Lands. The Ex-parte Applicants are also seeking for an order of *mandamus* to compel the 1st and 2nd Respondents to avail their decisions for quashing.
18. The scope and efficacy of an order of Mandamus is well defined in **Halsbury's Laws of England, 4th 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 or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to end that justice may be done, in all cases where there is a specific legal right and no specific

legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate”, it is stated:

“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.”

19. An order of Mandamus is therefore meant to compel the performance of a public duty which is imposed on a person or body of persons by a statute and when that person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed (**See Kenya National Examinations Council Vs R; ex-parte Geoffrey Gathinji & Others – Civil Appeal No. 266 of 1996**).
20. On the other hand an order of *certiorari* is meant to quash a decision of a person or a of persons or tribunal performing a public duty which decision or act complained of is tainted with illegality, irrationality and procedural impropriety (**See An Application by Bukoba Eymkhana Club (1963) EA 478**).
21. The Commissioner of Lands, the 3rd Respondent, has no role at all in the ascertainment of rights over customary or Trust land. The Land Adjudication Act, Cap 284 has not donated to the Commissioner of Lands any functions, whether administratively or of a quasi-judicial nature. In the circumstances, the order of *mandamus* or *certiorari* cannot issue against him in respect to the suit properties as prayed by the Ex-parte Applicants.
22. The role and functions of the Land Adjudication and Settlement Officer, the 1st Respondent, in the ascertainment of rights over customary or Trust Land are provided in the Act.
23. The Land Adjudication and Settlement Officers in their respective districts work under the supervision and direction of the Director of Land Adjudication and Settlement. The Director oversees the effective implementation of the land adjudication and settlements processes.
24. The Director also signs certificates of finality upon completion of the adjudication process and forwards the adjudication register to the Chief Land Registrar for registration. Section 4 of the Land Adjudication Act, Cap 284 provides that the Land Adjudication and Settlement Officer, the 1st Respondent, is the one who appoints demarcation officers, survey officers and recording officers for demarcating, surveying and recording interests within an adjudication area.
25. The Act also mandates the 1st Respondent to appoint not less than ten persons residing within the adjudication section to be the adjudication committee which determines claims in land in accordance with African customary law. The said committee also advises the 1st Respondent.
26. If the adjudication committee is unable to reach a decision on a matter before it, section 21 of the Act mandates it to refer the matter to an arbitration board which is also established by the 2nd Respondent.
27. It is only after the disposal of all cases pending before the adjudication committee and the Arbitration Board that the land owners are invited to sign the adjudication records which records are then forwarded to the 2nd Respondent.
28. After the receipt of the adjudication register, the 1st Respondent is under an obligation to receive objections in writing from aggrieved parties. Section 12 of the Act provides that the hearing of any objection by the adjudication officer shall follow the procedure observed in the hearing of civil suits.
29. The adjudication officer, in this case the 1st Respondent, is obliged to hear any dispute in respect to the adjudication register within 60 days from the date of the publication.
30. Sections 28 of the Act provides that a person who is aggrieved by the determination of an objection by the adjudication officer may within sixty days after the date of the determination appeal to the Minister in writing.

31. The above elaborate procedure has not been complied with by the Ex-parte Applicants. Indeed, the complaints being raised by the Ex-parte Applicants have not even been decided upon the 1st Respondent.
32. It is upon the Ex-parte Applicants to have their disputes resolved by the land committee and if dissatisfied with its decision, to appeal to the arbitration board as stipulated in the Act.
33. In view of the fact that the 1st Respondent has not made a decision in respect to the claims by the Ex-parte Applicants, I find and hold that the Motion before me has no basis in law.
34. It is not for this court to substitute the bodies which have been established by law to determine disputes emanating from the demarcation, surveying and registration of interests in land. The procedure provided for in the Act in resolving the competing interests of the parties must be complied with.
35. For the reasons I have given above, I find no merit in the Ex-parte Applicants Notice of motion dated 1st March, 2013 and I dismiss it with costs to the Respondents.
35. Dated and delivered this **8th** day of **November** 2013

O. A. ANGOTE

JUDGE