REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO P., GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 124 OF 2018

BETWEEN

ATHMAN MBOSIO MWAKULU.....1ST APPELLANT

KIMANZI ELIJAH MWAKULU.....2ND APPELLANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

DIRECTOR OF LAND

ADJUDICATION & SETTLEMENT.....2ND RESPONDENT

ANTHONY MUDACHI.....3RD RESPONDENT

RICHARD KALUNDI MUDACHI.....4TH RESPONDENT

ABSAL & SONS ENTERPRISES LTD.....5TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Mombasa (Emukule, J.) dated 4th March 2016

in

JR Misc App. No. 118 of 2010

consolidated with

JR Misc App. No. 65 of 2011)

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JUDGMENT OF THE COURT

This appeal arises from the ruling of the ***High Court of Kenya*** at ***Mombasa (Emukule, J.)*** in a judicial review application for an order of *certiorari* to quash the decision of the ***Commissioner of Lands*** dated 23rd April 2010. By that decision the Commissioner issued ***Grant No. CR. 47848*** to ***Anthony Mudachi (3rd respondent)***, ***Richard Kalundi Mudachi (4th respondent)*** and ***Amos Kilonzo Katetei (deceased)***, as joint tenants in common in equal shares in ***LR No. 28164 in Kilifi, (the suit property)***. The suit property measures approximately 4.686 Ha in area.

In the trial court the appellants, ***Athman Mbosio Mwakulu*** and ***Kimanzi Elijah Mwakulu,*** contended that the said grant was issued unlawfully because the area where the suit property is situate had already been declared an adjudication section and all dealings with the land in the Section suspended. On their part, the

3rd and 4th respondents contended that the suit

property was private property, having been set apart under the ***Trust Land Act*** by the ***Town Council of Mariakani*** before the declaration of the Adjudication Section, and was therefore not available for adjudication.

The learned judge agreed with the respondents and by the ruling dated 4th March 2016 which is impugned in this appeal, held that the suit property was wrongly included in the Adjudication Section and that the Commissioner of Lands did not err by subsequently excluding it from the Adjudication Section and issuing the Grant to the 3rd and 4th respondents.

It is common ground that the Government declared the **Kawala B Adjudication Section** under ***section 5*** of the ***Land Adjudication Act, Cap 284***, Laws of Kenya, on 9th April 2010. By a letter dated 4th February 2010 the ***Director of Land Adjudication and Settlement*** confirmed that only ***LR. Nos. 23914, 2623, 27243*** and **7242** were exempt from the Adjudication Section, because they had been set apart. As is patently clear, that confirmation excluded the suit property.

After the adjudication process ***Plot No. 10*** in the Kawala B Adjudication Section was registered in the name of the appellants and three others on 19th April 2010. It is the appellants' contention that the suit property, granted to the 3rd and 4th respondents, is part of the said Plot No. 10.

The evidence adduced by the 3rd and 4th respondents indicates that they applied to the town council of Mariakani to set apart the suit property under the Trust Land Act. The application was made on behalf of their ***Mwakulu family*** which claimed ownership and occupation of the land. The council approved the application on 7th June 2002. Subsequently on 14th November 2007 the council advised the Commissioner of Lands that it had approved the application to set apart the suit property and requested that a letter of allotment and title deed be issued to the 3rd and 4th respondents. By ***Gazette Notice No. 2458*** dated 27th February 2008, the Commissioner of Lands notified the public that the suit property had *"been duly set apart in accordance with the provisions of Part IV of the Trust*

Land Act." By a letter of Allotment dated 5th June 2008, the Commissioner of Lands allotted the suit property to the 3rd respondent, the 4th respondents, and the deceased and ultimately issued them with Grant No.47848 on 23rd April 2010. As is evidently clear, save for the issuance of the grant, all the other steps were taken before the declaration of the Kawala B Adjudication Section on 9th April 2010.

The other relevant evidence on record is that on 21st April 2011, after the declaration of the Adjudication Section, the Commissioner of Lands wrote to the Director of Land Adjudication and Settlement and advised that the setting apart of the suit property was gazetted on 27th February 2008 and the grant prepared and registered in favour of the 3rd and 4th respondents and the deceased. He accordingly informed the Director that it was advisable to exempt the suit property from the adjudication process. On 17th May 2011 the Director of Land Adjudication and Settlement communicated to the District Land Adjudication and Settlement Officer the information from the

Commissioner of Lands that the suit property had already been set apart, and advised the officer to exempt the suit property from the Adjudication Section.

On 27th July 2010 the appellants filed Mombasa ***High Court Civil Suit No. 254 of 2010*** against the respondents, contending the grant to the suit property was issued fraudulently. They prayed for among others, the cancelation or revocation of the grant. On 28th July 2010 they obtained an *ex parte* order of injunction prohibiting the respondents from selling or alienating the suit property. The fate of this suit is not readily apparent from the record.

Subsequently, on 21st October 2010, the appellants commenced judicial review proceedings for an order of *certiorari* to quash the decision of the Commissioner of Lands to issue the grant to the 3rd and 4 respondents. On the same day, the court granted them leave and directed that the leave operate as a stay of further dealings with the suit property. Yet again, on 20th May 2011, the appellants filed ***Judicial Review Application***

No. 65 of 2011 in the High Court of Kenya at Mombasa, this time seeking an order of *certiorari* to quash the decision of the Director of Land Adjudication and Settlement dated 17th May 2011 advising the District Land Adjudication and Settlement Officer to exempt the suit property from the Kawala B Adjudication Section. The two Judicial Review applications, ***No. 118 of 2010*** and ***No. 65 of 2011*** were consolidated, heard and determined by ***Emukule J***. in the ruling the subject of this appeal.

In this appeal, the appellants, represented by ***Mr. Buti*** and ***Mr. Omwenga***, learned counsel, who submitted in turns, contended that the learned judge erred by holding that the suit property was set apart without appreciating that once the Adjudication Section was declared, no dealings with the land in the Adjudication Section was allowed by ***section 5 (2) (b)*** of the Land Adjudication Act and that any rights and interests over such land could only be determined as provided by ***section 13*** of the Act. Counsel contended that the Adjudication Act does not provide for opting out, or exemption of any person from its provisions.

Counsel further faulted the learned judge for relying on provisions of the former Constitution on setting apart of Trust Land, so as to defeat the clear provisions of the Land Adjudication Act. They submitted that the letter of allotment issued to the 3rd and 4th respondents for the suit property did not confer any rights known in law and could not defeat the rights of the appellants in the suit property, which was in an Adjudication Section. They added that as of the date the Adjudication Section was declared, the suit property was not registered in the names of the 3rd and 4th respondents and was therefore available for adjudication.

Counsel further submitted that the learned judge misapprehended the power of a county council under ***section 117*** of the former Constitution to make grants in land that had been set apart. They contended that the power to make grants was made by ***section 117(3)*** *"subject to any law"* and that the

law that was contemplated by the sub-section was the Land Adjudication Act. They added that by dint of ***section 15(a) (iii)*** of the Land Adjudication Act, the demarcation officer was empowered to demarcate the boundaries of land that had been set apart under the Constitution. In their view, it was incumbent upon the 3rd and 4th respondents to present their claims to the suit property to the adjudication and demarcation officers for setting out of the boundaries.

Next counsel submitted that the Land Adjudication Act, being a later statute overrides the Trust Land Act in the event of any inconsistency. They cited ***Wood & Another v. Riley [1867] L.R. 26*** in support of the proposition and added that the suit property could not be validly excluded from the Adjudication Section without first following the adjudication process, which had already commenced. The appellants relied on ***Benjamin Okwaro v. Christopher Ouko [2013] eKLR,*** and ***Julius Kilisu*** & ***Others v. Oloiren Adjudication Section [2016] eKLR*** and submitted the 3rd and 4th respondents were obliged under the

Land Adjudication Act to follow the procedures set out in that Act for determination of their claims and that the Commissioner of Lands had no power to exempt the suit property or to issue a grant to the suit property, which was already in an Adjudication Section. We were urged to find that the Commissioner's actions were *ultra vires* and that contrary to the conclusion by the learned judge, no provision in the law allowed the Commissioner to correct any mistakes, real or perceived.

The appellants therefore urged us to find that all the actions taken towards the issuance of the grant to the suit property to the 3rd and 4th respondents after the declaration of the Adjudication Section were procedurally improper, without jurisdiction, unreasonable and null and void, and should have been quashed by an order of *certiorari*.

Mr. Wameyo, learned counsel, for the 3rd and 4th respondents opposed the appeal. He contended that the grant to his clients was made following a legitimate statutory process under the Land Trust Act which was followed to the letter and the legality of which was neither questioned nor challenged, even after the public, including the appellants, were made aware through a Gazette notice that the suit property had been set apart. He added that even the ***National Land Commission***, at the prompting of the appellants and after due investigation, concluded on 30th November 2014 that the grant to the suit property was regular and valid. In counsel's view, the adjudication procedure under the Land Adjudication Act and that for setting apart land under the Land Trust Act were separate and distinct and that there was no basis for subjecting or subordinating the setting apart process to that of land adjudication.

It was counsel's further submission that the conduct of the appellants was deplorable and their *bona fides* suspect because upon confirmation that the suit property was private land, they quickly purported to subdivide ***Plot No 10*** into two plots ***(No. 1355*** and ***No. 1357)*** which they immediately purported to sell to third parties but the Demarcation Officer subsequently disowned the purported subdivisions.

The 3rd and 4th respondents further contended that by dint of ***section 58*** of the Land Trust Act, any parcel of land that is set apart in accordance with the Act is not subject to adjudication because the Land Adjudication Act applies only to un-adjudicated land. They added that even before the Kawala B Adjudication section was declared, the suit property had been set apart and allotted to the 3rd and 4th respondents and their family and was therefore not available for adjudication.

Regarding exemption of the suit premises from the Adjudication Section which the appellants claimed the law did not provide for, counsel submitted that the so called exemption was nothing more than confirmation by the Commissioner of Lands that the suit property had already been set apart and should not have been included in the Adjudication Section. He added that the process of setting apart land under the Trust Act was insulated by ***section 117*** of the former Constitution. The

3rd and 4th respondents therefore urged us to find that the appellants had not presented any valid ground to justify an order of *certiorari* to quash the grant to the suit property.

The other parties to the appeal, who were duly served with hearing notices, neither filed their submissions nor made oral submissions at the hearing.

We have carefully considered this appeal. The real question is whether the appellants presented any evidence of wrongdoing by the respondents on the basis of which the court could have issued an order of *certiorari*. There is no doubt in our minds that this dispute was occasioned solely by the unjustified application, to the suit property, of two different and distinct processes for converting communal tenure in Trust Land into individual title.

Section 115 of the former Constitution vested all Trust Land in the county council within whose jurisdiction the land was situated. By dint of ***section 115(2)*** the council held the trust land for the benefit of the persons ordinarily resident on the land, with an obligation to give effect to such rights, interests, and benefits under African customary law that were vested in them as tribe, group, family, or individual.

The appellant's case is based on the Land Adjudication Act, which they contend was the only Act applicable to the suit property once the Kawala B Adjudication Section was declared. That Act was enacted in 1968 to provide for the ***ascertainment and recording of rights and interests in Trust Land***. ***Section 3*** thereof empowers the Minister, subject to satisfaction of the conditions set out therein, to apply the Act to any area of Trust land. The purpose of declaring an area an adjudication section is to make it possible to ascertain and record individual interest in Trust land. The Act requires any person who has an interest in land in an adjudication section to lodge his claim to the recording officer.

Once the interest is ascertained and confirmed after determination of any objections, it is entered into the adjudication register, which when completed is open to the public for inspection. Throughout the entire adjudication process, the Act provides elaborate dispute resolution mechanisms, including appeals, if there are any competing claims. Once all the objections have been settled, the adjudication register is finalised and the Chief Land Registrar registers the land in favour of the claimant in accordance with the adjudication register. What is absolutely not in doubt is that the Land Adjudication Act is intended to apply to Trust land where the rights and interests of individuals ***exist*** but have not yet been ascertained and recorded.

The 3rd and 4th respondent's case is based on the argument that as of the date the Kawala B Adjudication section was declared on 9th April 2010, their rights and interests over the suit property which previously was Trust land, had already been recognised through the setting apart process provided under the former Constitution and the Trust Land Act. They further contend that in those circumstances, the Land Adjudication Act was not applicable to the suit property.

Section 116 of the former Constitution provided for conversion and registration of Trust land into individual title. The effect of such conversion was that the land henceforth ceased to be Trust land. By dint of ***section 116(2)***, the laws under which the conversion could take place were the Land Consolidation Act, the Land Adjudication Act and any other law permitting such conversion.

Section 117 of the former Constitution read with ***section 13*** of the Trust Land Act provided for setting apart of Trust land vested in a county council for use and occupation by among others, any person or persons, for a purpose which in the Council's opinion was likely to benefit persons ordinarily resident in the area. ***Section 13*** of the Trust Land Act sets out an elaborate procedure to be followed in setting apart Trust land. The effect of setting apart Trust land was given in ***section 117***

(2) of the repealed Constitution as follows:

> *"Where a county council has set apart any area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in any tribe, group, family or individual under African customary law shall be extinguished."* (Emphasis added)

After setting apart the land, the county council was allowed, subject to any law, to make grants or dispositions of any estate, interest or right in or over the land set apart to any person or authority for whose use the land was set apart.

The evidence on record shows that about eight years before the declaration of Kawala B Adjudication Section, the family of the 3rd and 4th respondents initiated with the county council of Mariakani the process of setting apart the suit property. All the steps prescribed by the Trust Land Act were undertaken, culminating with the publication of Gazette Notice No. 2458 of 27th February 2008, which provided *inter alia:*

"NOTICE is given that the land described in the Schedule hereto (the suit property) has been duly set apart in accordance with the provisions of Part IV of the Trust Land Act for the purposes specified in the said schedule."(Emphasis added)

The 3rd and 4th respondents point out that there was no challenge by the appellants or any other person to the process of setting apart the suit property, even after the publication of the Gazette Notice. Be that as it may, as of 27th February 2008, more than two years before the declaration of the Kawala B Adjudication Section, the process of setting apart the suit property was complete and the public notified accordingly. By dint of ***section 117(2)*** of the former Constitution, the effect of setting apart the suit property, even before issuance of the allotment letter or the grant to the 3rd and 4th respondents, was to extinguish all customary law rights, interest or benefits over the suit property.

This then raises the fundamental question which the appellants must, and in our view have spectacularly failed to answer: how could rights and interest which had been extinguished by operation of the law by dint of ***section 117(2)*** of the former Constitution still be ascertained and recorded subsequently under the Land Adjudication Act? The appellant's argument does not, in our view, make any legal sense. Once land has been set apart, it cannot subsequently be the subject to a process of adjudication because there are no longer any rights and benefits to ascertain and record over that same land.

This conclusion puts to rest the appellants' arguments on the application of the Land Adjudication Act to the suit property which had already been set apart before the declaration of the Adjudication section. It also settles the argument that the Land Adjudication Act, being a later statute, takes priority over the Trust Land Act. A proper reading of the legal regimes under the two statutes, as applicable in this case, does not disclose any inconsistency that would require giving preference to the later statute. On the contrary, the two statutes shows that once the process of setting apart land under the Trust Act is completed as it was in this case, the Land Adjudication Act has no application simply because by the operation of the law, there are no longer any rights over that land to ascertain and record.

As to whether the letter of allotment did confer on the 3rd and 4th respondents a valid title to the suit property or whether the grant issued after the declaration of the Adjudication Section was valid, these are, with respect, red herrings. The critical date for the purpose of this appeal is not the date on which the suit property was allotted or the grant issued to the 3rd and 4th respondents: it is the date on which the suit property was set apart, which was more than two years before the declaration of the Adjudication Section.

On the contention that the Commissioner of Lands had no power to exempt the suit property from the Land Adjudication Act, the appellants are not entirely consistent. In one breath they argue that the suit property was not among those notified by the Commissioner as excluded from the Adjudication Section, thereby implicitly accepting that the Commissioner could exclude property from the Adjudication Section. In another breath, they argue that the Land Adjudication Act does not confer any power on the Commissioner to exempt land from an Adjudication section. In our view, the Commissioner cannot be faulted on the facts of this appeal, because he was only communicating a factual situation which had arisen by the operation of the law, namely that there were no longer any rights to adjudicate over the suit property, those rights having been extinguished after the setting apart of the suit property. There was therefore no illegality committed by the Commissioner that could properly attract the remedy of an order of *certiorari*.

Like the trial judge, we are satisfied that the appellants have been desperately trying to capitalise on a glaring mistake that was committed by declaring an Adjudication Section and failing to indicate that the suit property, which was within the Adjudication Section, had already been set apart and was therefore not available for adjudication. Stating the correct factual and legal position subsequently does not constitute a reviewable error or an impropriety amenable to an order of *certiorari*, particularly when the appellants cannot point out any violation of the law in the process of setting apart the suit property.

Ultimately, we have come to the conclusion that this appeal has absolutely no merit and is dismissed in its entirety, with costs to the 3rd and 4th respondents. It is so ordered.

Dated and delivered at Nairobi this 29th day of January, 2021

W. OUKO, P.

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR