IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 3 OF 2017

BETWEEN

EMMANUEL KAINGU KARISA.....1ST APPELLANT

SWALEH BWANA OBO.....2ND APPELLANT

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE LAND & ADJUDICATION DEPARTMENT.....2ND RESPONDENT

AND

THE COUNTY GOVERNMENT OF LAMU.....1ST INTERESTED PARTY

MANDA SURVEYING PROJECT COMMITTEE....2ND INTERESTED PARTY

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Malindi (Angote, J.) dated 1st December, 2016

in

(Judicial Review Appl. No. 4 of 2016)

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JUDGMENT OF THE COURT

Pursuant to leave granted by the Environment and Land Court (ELC) at Malindi on14th July, 2016, the appellants instituted judicial review proceedings through a notice of motion application dated 2nd August, 2016, challenging the demarcation process within the Manda Island Settlement Scheme (Settlement Scheme) in Lamu County. The Settlement Scheme comprised an unallocated government land earmarked for settlement of resident beneficiaries who were to be identified in accordance with the law.

According to the appellants, they were inhabitants and beneficiaries of the Settlement Scheme; that earlier on, the respondents had attempted to illegally demarcate the unregistered land leading to one Mohamed Avuke Haroon instituting judicial review proceedings in **E.L.C Misc. Applic. No. 13 of 2013**, at Malindi; that though that application was dismissed by Angote, J. in a judgment dated 24th April, 2015, the learned Judge set out the procedure to be followed in the demarcation of the land in question; that despite those guidelines, when the Settlement Scheme was relaunched on 8th April, 2016, the respondents failed to adhere to the guidelines and procedure stipulated under **Section 134** of the **Land Act**; that, the Sub-county Selection Committee that was anticipated to identify the beneficiaries was not set up, while the respondents not only usurped the mandate of the 1st interested party but also kept the would-be beneficiaries totally in the dark with regard to the demarcation exercise; and that as a result, the entire exercise was illegal and detrimental to the legitimate beneficiaries.

It is on those grounds that the appellant sought the following orders:

"1. An order of prohibition be issued against the 1st and 2nd respondents, the National Land Commission and the Land &

Adjudication Department, to prohibit both parties from carrying out or proceeding with the exercise of demarcation of all that unregistered land within Manda Island of Lamu County until all legal measures are put in place including but not limited to the appointment of the Sub- County Selection Committee.

2. An order of Certiorari be issued against both defendants for the removal to the High Court of any records of any demarcation exercise that may have been conducted so far in disregard of the existing law".

In response, the 1st respondent maintained that it was its function to implement and manage the Settlement Schemes on behalf of both the National and County Governments under **Articles 62 & 67** of the **Constitution** as read with **Section 134** of the **Land Act**; that the Settlement Scheme was initiated in the year 2011 through the proposal and recommendation of the District Development Committee; that the perimeter survey of separating the allocated land from the unallocated land within Manda Island was carried out by the District Land Surveyor in June, 2011; that following the land use planning of the unallocated land by the Ministry of Lands in the year 2012, the 2nd respondent commenced the settlement exercise; and that there was however an attempt to stop the exercise by the institution of **Malindi E.L.C Misc. Appl. No. 13 of 2013** which was ultimately dismissed.

According to the 1st respondent, the appellants were no more than strangers squatting on other peoples' land in the Settlement Scheme and were determined to continue ?misusing the court process to illegally acquire land in the Scheme; that there had been extensive consultations between the relevant stakeholders including the 1st interested party with respect to the exercise; that by the time the appellants lodged the application, the Sub- County Selection Committee was operational and was in fact set to commence its work once the survey of the unallocated land was completed; that, the survey was a precursor and a condition precedent to identification of beneficiaries and allocation of land; that the 1st respondent had complied with the provisions of **Section 134** of the **Land Act** as well as the directions of the ELC to the letter; and that it had not made any decision(s) capable of being challenged by a judicial review order.

Through its grounds of opposition, the 2nd respondent contended that the appellants' application was aimed at delaying the settlement process; and that the appellants had failed to demonstrate that the respondents had acted in excess of their lawful authority.

The 1st interested party did not participate in the proceedings at the ELC.

The 2nd interested party, who identified itself as a representative of the resident beneficiaries of the Settlement Scheme, was likewise adamant that the appellants were neither residents nor beneficiaries of the Settlement Scheme; and that the 1st respondent followed the due process in the settlement exercise; that the 1st interested party was clearly not aggrieved by the settlement exercise, a fact evident from its lack of interest in the proceedings at the ELC.

Angote, J., not convinced that the appellants had made out a case to warrant the granting of the orders sought, proceeded to dismiss the application by a judgment dated 1st December, 2016. It is this decision that has provoked this appeal.

Despite service of the hearing notice of the appeal as well as directions in accordance with the Covid-19 Practice Note, only Dr. Khaminwa, SC for the 2nd interested party, was in attendance. He relied on their written submissions which he highlighted. The appellants written submissions too were on record and as we are bound to consider them, we shall make reference to them too in the decision we shall ultimately reach in this judgment.

In those submissions the appellants argued that the **4th Schedule** to the **Constitution** vests the responsibility of mapping, surveying and planning in settlement schemes in the County Government, the 1st interested party; that in contrast, the respondents engaged in the above activities without the commission of the 1st interested party; that due to this usurpation of function there was a disagreement between the 1st respondent and 1st interested party concerning the development plan of the Settlement Scheme; and that the 1st respondent ignored the 1st interested party and bulldozed its way. On the basis of the foregoing, the appellants urged us to find fault in the learned Judge's failure to, one- issue orders of prohibition to stop the respondents from continuing with the exercise, which in their view was illegal, and two- to quash, by an order of *certiorari* any records or decisions arising the 1st respondent's activities.

The 2nd interested party, as we have noted earlier in this judgment took the position that the learned Judge understood the issues in dispute and correctly determined them by finding that the respondents did not act in excess of their jurisdiction to warrant judicial review orders sought by the appellants. Drawing our attention to the prevailing status of the Settlement Scheme, Dr Khaminwa pointed out that as it stood at the time of the hearing the entire settlement exercise was complete; beneficiaries having been identified and the title deeds issued to them, rendering this appeal otiose.

By nature, judicial review orders are discretionary hence whenever this Court is called upon to interfere with the exercise of judicial discretion, like in this case, we are bound by the principles enunciated in **Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others** [2014] eKLR, that we can only interfere with that exercise of discretionary power where we are satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of his discretion and as a result the decision occasioned injustice.

We equally remind ourselves that the jurisdiction of a court sitting in judicial review proceedings is circumscribed; that only to a limited extent can it consider the merits of the decision by a public body, but it can generally undertake a consideration of the procedure adopted to arrive at the decision in issue so as to rule out allegations of procedural malpractices, lack of fair hearing, unreasonableness or other illegalities. See the Supreme Court's decision in **Communication Commission of Kenya vs. Royal Media Services & 5 Others** [2014] eKLR and also the judgment of this Court in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others** [2016] KLR.

Turning to the reliefs sought but declined, it is now firmly established that the essence of the two orders of *certiorari* and prohibition, prayed for by the appellants will be issued in specific circumstances, well-articulated in the *locus classicus*, **Kenya National Examination Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others** [1997] eKLR as follows:-

> **"Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."** *[Emphasis added]*

Granted, the appellants were clearly disappointed by the demarcation exercise. But to succeed in their application, they were required to identify and specify the decision or decisions they wished to be quashed. This, the appellants did not do, with the result that the burden of proof was not discharged. It is not the function of the court to speculate or fill gaps in the cases brought by parties as this Court directed in **Republic vs. Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)** [2013] eKLR, where it said;

> **"Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed."**

As noted above, again it must be borne in mind that an order of *certiorari* will issue where the decision challenged was made without or in excess of jurisdiction, or where the rules of natural justice were not complied with. We have explained that there was evidence before the learned Judge that under the **Fourth Schedule, Part 2(8)** of the Constitution, the 1st interested party is the authority charged with the County planning and development, which includes land survey and mapping, a function that the County Governments took over from the National Government with effect from March 2013. However, it is too on record that the survey and mapping of Manda Island was done before the County Governments were established, hence the 1st interested party was not in existence at the time that happened. However, the learned Judge in the aforesaid judgment of 24th April 2015 in **Misc Application No. 13 of 2013**, appreciating its role, directed the 1st interested party to **"put in place a sub-County Selection Committee to complete the identification of beneficiaries of land on the Island with a view of completing the process that seems to have been commenced by the 2nd Respondent under the old legal regime."**

In the circumstances, the stage of survey and mapping having been exhausted, it was inaccurate for the appellants to suggest that the 1st respondent had usurped the powers of the 1st interested party, who had not complained. The learned Judge properly and in accordance with the law determined that issue.

No doubt the land in question is public land, which by the provisions **Articles 62 (2)** and **67** of the Constitution as read with Section 134 of the Land Act is vested in and held by a county government in trust for the people resident in the county. But such land is to be administered on behalf of the national and county governments by the 1st respondent. In addition, and on behalf of the national and county governments, the 1st respondent is the body charged with the implementation of settlement programmes to provide access to land for shelter and livelihood. What emerges from this analysis is that the allegations of excess of jurisdiction by are the respondent are incorrect.

Turning to prohibition, the appellants applied that the respondents be prohibited from continuing with the demarcation process. Again, we are guided by **Kenya National Examination Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge** (supra) for the scope of prohibition. It will be issued by the High Court to forbid a tribunal or a body from continuing with proceedings which are in excess of its jurisdiction or in contravention of the laws of the land or where there is a departure from the rules of natural justice.

With respect, we agree with the learned Judge, and in consonance with what we have said above, it was within the purview of the respondents to undertake the exercise. But more fundamentally, the Sub-county Selection Committee under **Section 134(4)** of the Land Act was set up with the full participation of the 1st interested party. The process was also participatory with stakeholder engagements about the exercise. This exercise is now complete. Beneficiaries have been identified and title documents issued as we have already noted earlier. An order of prohibition at this stage will be in vain.

> **"An order of prohibition is futuristic; it is pre-emptive and not retroactive. For an order of prohibition to issue the decision complained of must not be completed, it is a contemplated decision".**
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> See **Timothy Kagondu Muriuki & 4 others vs. Republic & 3 others** [2013] eKLR:-

For all the reasons above, we find no merit in this appeal. It is accordingly dismissed with costs to the 1st respondent and the 2nd interested party.

Dated and delivered at Nairobi this 19th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR