



Republic v Land Disputes Tribunal Magarini (Defunct) & another; Ngonyo & 5 others (Exparte Applicants); Kalama & another (Applicant) (Judicial Review Miscellaneous Application 19 of 2019) [2024] KEELC 5235 (KLR) (26 June 2024) (Ruling)

Neutral citation: [2024] KEELC 5235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 19 OF 2019
FM NJOROGE, J
JUNE 26, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE LAND DISPUTES TRIBUNAL MAGARINI (DEFUNCT) 1ST RESPONDENT

PRINCIPAL MAGISTRATE’S COURT AT MALINDI 2ND RESPONDENT

AND

JEREMIAH KAZUNGU NGONYO EXPARTE APPLICANT

FREDRICK NGUMA EXPARTE APPLICANT

CHRISPUS CHARO CHEU ALIAS CHRISPIN CHARO CHEU EXPARTE APPLICANT

MORRIS KAKA KITSAO ALIAS KAKA KITSAO NGONA EXPARTE APPLICANT

SAMSON RAHISI KASHURU EXPARTE APPLICANT

ANTONY SHUKU KAINGU EXPARTE APPLICANT

AND

KATANA GONA KALAMA APPLICANT

HARRISON KAZUNGU KATANA APPLICANT



RULING

1 The notice of motion application dated 13/2/2024 has been filed by the interested parties who seek orders that the court be pleased to issue an order of execution/eviction against the Respondents (who were the *ex parte* applicants in the judicial review notice of motion) either by themselves, their agents, servants and/or any person acting on their instructions and/or in any way, from the property title number Malindi/Pumwani Phase 1/426, Malindi/Pumwani Phase 1/427 and Malindi/Pumwani Phase 1/429 (all referred to as the suit property herein) and the OCS Gongoni Police Station to assist in executing the order. The Applicants also sought costs of the application. It is supported by the affidavit sworn by Harrison Kazungu Katana of even date. The application was filed pursuant to Article 159 of *the Constitution* of Kenya, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 rule 7 (2) and rule 29 (1), and Order 40 rule 7 of the *Civil Procedure Rules* and it is premised on the following grounds: -

1. That on or about 13/2/2023, the court pronounced itself and dismissed the ex-parte applicants' (respondents) application herein;
2. That the respondents have now refused/ignored to give vacant possession of the suit land and are now creating nuisance and threatening the applicants/beneficial owners of all that suit property with dire consequences should they continue claiming ownership or any interest on the said suit property;
3. That the respondents have further threatened to sell the said suit property to other 3rd parties with an aim of dispossessing the applicants their rightful property;
4. That it is only through this application and the orders sought if granted to the applicants they can be able to enjoy quiet possession of their land without any interference from the respondents who are acting with a lot of impunity in total disregard of the law;
5. That unless this application is heard expeditiously, the respondents their servants, agents and nominees may transfer, dispose, lease and/or deal with the suit property in a manner that infringes with the powers of this court;
6. That it is in the interest of justice that this matter be heard expeditiously and without delay and the orders sought granted.

2 The application was first fixed for inter partes hearing on 5/3/2024 and orders issued to the effect that the respondents are personally served with the same. On the said hearing date, the respondents were absent and the court observed that there was no proof of personal service upon the respondents. The hearing was adjourned to 25/4/2024 and later to 3/6/2024. Notably, latter this date was taken at the registry. The proceedings reveal that on 3/6/2024, there was no appearance for both parties herein and the application was given a ruling date. I must therefore determine the same herein.

3 The context in which this application is founded is that on 29/11/2019, the Respondents sought leave to seek judicial review reliefs against the applicants herein and the defunct Land Disputes Tribunal, Magarini and the Principal Magistrate's Court, Malindi. The gist of that application was that the Magarini Land Dispute Tribunal acted in excess of its jurisdiction in entertaining a claim filed by the Applicants herein alleging that the Respondents were wrongly allocated the suit property. The said Tribunal ruled in favour of the Applicants herein and its decision subsequently adopted by the Malindi Principal Magistrates Court on 23/11/2006.



4 The respondents then filed an appeal to the Provincial Land Disputes Committee which was later transferred to this Court after the repeal of the Land Dispute Tribunals Act. The Court ultimately dismissed the appeal for want of prosecution on 9/10/2019. It is that dismissal that prompted the filing of this suit and the substantive motion dated 16/12/2019 seeking the afore stated judicial review reliefs, to wit, an order of *certiorari* quashing the judgment and decree by the Malindi Principal Magistrate's Court adopting the decision of the Tribunal; and an order of prohibition directed at the Principal Magistrate's Court prohibiting the execution of the said judgment and decree.

5 In response, the 2nd Applicant, who was the interested party in the main suit, filed a Preliminary Objection dated 30/1/2020 on grounds that the substantive Judicial Review Notice of Motion dated 16/12/2019 was *res judicata* and an abuse of the court process. The objection was ultimately upheld by the court on 25/1/2022. Consequently, the Respondents filed another application dated 14/2/2022 seeking to review the ruling upholding the Preliminary Objection. That application was dismissed on 13/2/2023.

6 The Applicants have now moved this court to grant eviction orders against the Respondents. As already established, the application is unopposed. In the Supreme Court of Kenya case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, the court had this to say in relation to an unopposed application;

" Be that as it may, as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted."

7 It is abundantly clear from the decree of the Principal Magistrates' Court at Malindi given on 23/11/2006, which I have had occasion to peruse, that the Applicants were declared owners of the suit property herein. The application by the Applicants is for enforcement of the orders of the Court afore stated. The Respondents have all along been aware of the said orders. The provisions of Order 22 Rule 29 of the Civil Procedure Rules provide for execution of a decree of immovable property and delivery of possession as follows: -

" Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

8 In the given circumstances and having in mind that the Respondents were adequately served with the present application and hearing notice thereof, I see no reason to deny the orders sought by the Applicants. The upshot is that the application dated 13/2/2024 is hereby allowed as prayed in Prayer No 2 thereof. The respondents who were the *ex parte* applicants in the substantive judicial review application shall bear its own costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF JUNE 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

