



Masumbuo (Suing in her capacity as administrator of the Estate of Daniel Masumbuo Kafwihi (deceased)) v Land Registrar Kilifi & 2 others; Kithi & 7 others (Interested Parties) (Miscellaneous Cause E1 of 2022) [2023] KEELC 15704 (KLR) (20 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15704 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

MISCELLANEOUS CAUSE E1 OF 2022

MAO ODENY, J

FEBRUARY 20, 2023

IN THE MATTER OF: AN APPLICATION BY REBECCA MVERA FOR

JUDICIAL REVIEW

AND

IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 OF THE

LAWS OF KENYA

AND

IN THE MATTER OF: PLOT NUMBERS 1384, 1380, 1385, 1382, 1381, 1379, 1383

AND 1386

BETWEEN

REBECCA MVERA MASUMBUO APPLICANT

SUING IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF

DANIEL MASUMBUO KAFWIHI (DECEASED)

AND

THE LAND REGISTRAR KILIFI 1ST RESPONDENT

DISTRICT LAND ADJUDICATION AND SETTLEMENT, KILIFI 2ND

RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

WANGA KITASI KITHI INTERESTED PARTY



KAHUNDA BIRYA MASHA	INTERESTED PARTY
KATHAA CHAI MANGI	INTERESTED PARTY
HALUWA KHAMISI	INTERESTED PARTY
CHENGO KAHINDI JEFWA	INTERESTED PARTY
ALBERT STEVE KATANA	INTERESTED PARTY
ZUBEDA JUMAA TUNU	INTERESTED PARTY
VINCENT RAMADHAN CHAI	INTERESTED PARTY

RULING

1. This ruling is in respect of a chamber summons dated January 17, 2022 by the applicant seeking the following orders; -
 - a. The applicant, Rebecca Mvera be granted leave to apply for an order of *mandamus* directed to the respondents to compel them to rectify their records and adjudication register relating to plot numbers 1384, 1380,1385, 1382, 1381,1379,1383 and 1386 by removing the names of the interested parties therefrom as the interested parties
 - b. That costs of the application be in the cause.
2. The application is premised on the supporting affidavit of Rebecca Mvera Masumbuo, the applicant who states that together with her siblings Emily Fikirini and Onesmus Daniel Masumbuo are the administrators of the estate of her late father, Daniel Masumbuo Kafwihi (deceased) of plot numbers 1384, 1380,1385, 1382, 1381,1379,1383 and 1386 situate at Kaloleni having inherited the same from their father who died on October 10, 1993.
3. The applicant stated that her late father was the owner of all that piece of land at Vishakani measuring approximately 58 acres and further deponed that on or about March 1, 1975 a land dispute arose between their late father and one Tende Masha and their late father was declared the rightful owner of all those parcels of land through a court order/ decree in Kilifi Magistrate’s Court case No 5 of 1974 which Tende Masha attempted to appeal against in Mombasa Resident Magistrate’s Court civil appeal No 10 of 1975 which appeal was unsuccessful.
4. The applicant further stated that their family has lived peacefully and uninterrupted on the said property until the demise of their father on October 10, 1993 when the interested parties wrongfully entered and took possession of the suit property and have thereafter wrongfully remained in possession thereof.
5. The applicant also stated that the defendant Tende Masha’s land was sold in order to recover costs that were ordered by the court. That the said land was later invaded by one Kashuru Magelu who was charged in criminal case No 536 of 2013 and was convicted for the offence of trespass to land and despite that, he has again encroached and begun subdividing the property.
6. The 1st interested party filed a replying affidavit dated March 7, 2022 opposing the entire application and stated that there is no nexus between the suit parcels of land and the land referred to under Kilifi District Magistrates Court case No 5 of 1974. He also stated that the suit parcels of and were part of



the estate of the late Kalama Nzaro Mgeli who upon his demise was inherited by his son Karisa Mgeli who sold part of it to him in 1992. Further, that during the adjudication process, the applicant raised an objection but the parcels of land were awarded to the interested parties.

7. The respondents filed grounds of opposition dated March 22, 2022 opposing the application on grounds that judicial review is not the proper forum for contested matters of ownership of land between the applicant and the interested parties.
8. The 2nd – 7th interested parties entered appearance on March 22, 2022 but did not file their response.

Submissions

9. Counsel for the applicant submitted that the applicant has no other option or legal redress to enforce her late father's decree other than an order for *mandamus* and the court has the jurisdiction to entertain the application.
10. Counsel relied on the cases of *Republic v Kenya vision 2030 Delivery Board and another Ex parte Eng Judah Abekah* [2015] eKLR, *Republic v Town Clerk Webuye County Council and another* HCC No 448 of 2006 and *Vuyile Jackson Gcaba v Minister for Safety and Security First & Others* CCT 64/08 [2009] ZACC and further submitted that the applicant has provided evidence of ownership of the suit properties and revocation by the 2nd respondent is *ultra vires*.
11. The respondents submitted that from the application one can form a conclusion that the dispute is about ownership of the land between the interested parties and the applicant and that dispute can only be determined when all parties have been heard, therefore judicial review is not the proper forum.
12. Counsel relied on the case of *Republic v District Lands Registrar, Nakuru Ex parte Lawi Kigen Kiplagat; lee Maiyani Kinyajui (interested party)* [2021] eKLR.
13. Counsel for the 1st interested party submitted that the application should not be granted as time has lapsed and that the issues raised date back to 1975, further that the facts presented do not disclose any cause of action. Counsel cited the case of *DT Dobie & Co (K) Ltd v Muchina* [1982] KLR.

Analysis And Determination

14. From the pleadings, submissions and authorities relied upon by the parties, the issue that arise for determination is whether the application for leave to apply for an order of *mandamus* is merited. The instant application is brought under order 53 rule 1 (2) of the *Civil Procedure Rules*.
15. Order 53 rule (1) and (2) of the *Civil Procedure Rules* require the application for leave to be made *ex parte* to a judge in chambers and in essence the applicant was under no obligation to serve but upon service by the applicant, the respondents and interested parties filed grounds of opposition to leave being granted to the applicant. This is the ruling that the court is dealing with and not the substantive application for judicial review.
16. In a three judge bench case of *Matiba v Attorney General* Nairobi HC Misc application No 790 of 1993 the court explained the requirement of leave to institute judicial review proceedings and held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the court or those applications which are statute barred.



17. In the case of *Republic v County Council of Kwale & another Ex Parte Kondo & 57 others* Mombasa HCMCA No 384 of 1996 the court held that:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

18. Similarly, in *Republic v Land Disputes Tribunal Court Central Division and another Ex Parte Nzioka* [2006] 1 EA 321, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious
19. From the elaborate averments by the applicant, it is evident that the issues raised would not be suitable to be addressed by judicial review proceedings. It would be a waste of judicial time and resources for the respondents to be dragged to court on issues that the court will not adjudicate upon.
20. In the case of *Commissioner of Land v Kunste Hotel Ltd* [1995-1998] 1EA 1 (CAK) the Court of Appeal laid down the principle on judicial review as follows-

“Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected’,” as was held in *Republic v Secretary of State for Education and Science ex-parte Avon County Council* [1991] 1 ALL ER 282.”

21. The applicant herein seeks leave to apply for an order of *mandamus* direct to the respondents to compel them to rectify their records in respect of the suit properties. In seeking redress through judicial review, it is the duty of the applicant to demonstrate that either there was unfair administrative action or there is a valid order declaring ownership of the suit properties which the court can compel enforcement.
22. There is contention on ownership of the suit property as elaborated by the applicant and the interested parties. It should also be noted that the issues raised cannot be suitably adjudicated *vide* judicial review proceedings which are limited to the process and in the current case for an order of *mandamus* to issue, there must be a valid determination of ownership for the court to compel the rectification of the register as the applicant prays for.



23. In the case of *Re: Kenya National Federation of Co-Operatives Ltd & others* [2004] 2 EA 128 based on *Judicial Review Handbook* (3 Ed) By Michael Fordham:

“ A claimant for permission is under an important duty to make frank disclosure to the court of all material facts and matters and it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a “confess and avoid”). The duty of “full and frank” disclosure harks back to the time when permission for judicial review was *ex parte*.”

24. It follows that grant of leave to commence judicial review proceeding is not a mere formality and therefore not automatic. An applicant must show that he/she has a *prima facie* arguable case to enable the court exercise its discretion in his/her favour.

25. I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the application lacks merit and is dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

