



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC JUDICIAL REVIEW NO. 1 OF 2019

IN THE MATTER OF ORDER 53 RULES 3 (1) & (2) OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTIONS 8 & 9 LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR GRANT OF ORDERS OF CERTIORARI TO QUASH THE DECISION OF DEPUTY COUNTY COMMISSIONER, TIGANIA WEST SUB-COUNTY MADE ON 20.8.2018 ON BEHALF OF THE MINISTER FOR LANDS & SETTLEMENT IN APPEAL 60 OF 2008 IN RESPECT OF L.R NO. 4163 MBEU 1 ADJUDICATION SECTION AND IN THE MATTER OF APPLICATION BY

REPUBLIC.....APPLICANT

VERSUS

DEPUTY COUNTY COMMISSIONER TIGANIA

WEST SUB-COUNTY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

PAUL GITINYA MUCHAI.....INTERESTED PARTY

AND

ANDREW M'IBIRI M'MWIRABUA Alias

ANDREW MAKUMI.....EXPARTE APPLICANT

JUDGMENT

1. Mr. Andrew M'Ibiri M'Mwirabua herein the exparte applicant through a chamber summons stated on 29th January 2019 sought and obtained leave to bring judicial review proceedings against the respondent herein. Leave was granted on 29th January 2019 to act as stay with orders the substantive be filed within 21 days. The motion was subsequently filed on 12th February 2019 dated 11th February 2019. The exparte applicant seeks an order of certiorari to quash the decision of the Deputy Commissioner Tigania West Sub county on behalf of the minister for land and physical planning made on 28th August 2018 in ministers appeal no. 60 of 2008 regarding P/No. 4163 Meru adjudication section in which the applicant herein was the appellant and Paul Gitiye Muchai was the respondent.

2. The grounds in support and facts are set out in the statement of the facts dated 18th January 2019 namely:

(a) The first respondent had delegated his powers to hear the appeal to the 2nd responded. Service of summons shall be effected by the exparte applicant's advocate.

(b) The 2nd respondent who heard and determined the appeal on behalf of the 1st respondent.

3. The motion was supported by a verifying affidavit sworn on 24th January 2019 and a supplementary affidavit on 12th October 2021 respectively. The interested party opposed the motion through affidavits sworn on 23rd June 2020 and 26th October 2020 respectively. The 1st and 3rd respondents did not file any replying affidavits nor grounds of position though there was an indication on 16.10.2019 and later on 24.6.2020 that the state was not contesting the motion.
4. It appears however there was change of heart given that the 1st and 2nd respondent subsequently filed detailed written submissions setting out their grounds of opposition and case law in support.
5. Following directions, parties opted to deal with the motion by way of written submissions dated 12th October 2020, April 2021 respectively.
6. As a preliminary issue the ex parte applicant has sought the court to have the respondents submissions filed on 28th April 2021 expunged from the courts records on grounds that there was submissions prior from the bar that the state was conceding to the motion, secondly the same were filed out of time and thirdly the submissions are undated.
7. This court made an order for the respondents to regularize their position.
8. In my considered view a respondent in judicial review proceedings has every right to participate in the proceedings one way or the other before judgment is entered. This can be through grounds of opposition, a replying affidavit or by appearing at the hearing so as to address the court. The respondents opted to file written submission solely on matters of law. There was no written and or filed authority conceding the motion herein.
9. No consent to this effect was filed by the parties if at all there was any undertaking by the respondents to concede to the application. Again, the ex parte applicant has demonstrated what prejudice will suffer if the respondents are allowed to participate in these proceedings. The objection lacks merits and is hereby rejected.
10. Flowing from the respective position taken by the parties herein it appears the following facts are undisputable:
 - (a) *Prior to land adjudication process a land dispute was heard and determined by SRMCC court Tigania in case no. 295 of 1984, later on in Meru Law courts civil case no. 295 of 1985 leading to eviction orders against the ex parte applicant.*
 - (b) *There has been a long running dispute between the ex parte applicant and the interested party's relative one Bernard Muchai right from committee, arbitration and objection stages.*
 - (c) *Later on the interested party took over from Bernard Muchai and parties appeared before the 1st respondent who heard and determined the dispute who eventually rendered a decision on 20.8.2018.*
11. The ex parte applicant's case is that the minister did not take into consideration facts no. 1 -9 in the statement of facts hence was unreasonable and based his decision on irrational grounds.
12. Secondly the ex parte applicant submits the minister misapprehended the issue in question to be a boundary one as opposed to an ownership dispute.
13. Thirdly the ex parte applicant maintains as a result of the above, he was unfairly and unjustly denied ownership of what lawfully belongs to him.
14. On the other hand, the respondents and the interested party are of contrary view. It is submitted that:-
 - (i) *Judicial review orders are discretionary.*
 - (ii) *They deal with processes not the outcomes.*
15. The respondents submit they acted within the law hence there was no illegality, irrationality or procedural impropriety so as to make the court fault the process. The respondents rely on the case law of **Republic vs Public Procurement Administrative Review Board and 2 others ex parte Pelt Security Services Ltd(2018) eKLR, Republic vs Judicial Service Commission ex parte Pareno (2004) 1KLR 203 – 209, Republic vs Commissioner of Customs service ex parte Africa K – link International Ltd (2012) eKLR, Republic vs Judicial Service Commission misc app) no. 1025 of 2003, Republic vs Attorney General & 4 others ex parte Diamond Hashion Halji and Have Hashan Haji (2014) eKLR, Commission Administrative Justice vs Insurance Regulatory Authority and another (2017) eKLR, Republic Vs Non-Governmental Organization Ex parte Hilda Bonya and lastly Republic Vs National Water Conservation and Pipeline Corporation and 11 others (2015) eKLR.**
16. On the other hand the interested party takes the view that the minister took consideration of all relevant facts including previous proceedings and documentation over the issue in dispute which was a boundary dispute between the ex parte applicant parcel no. 4162 and the interested party's parcel no. 4163. Further the interested party maintains the minister acted rationally, legally, reasonably and procedurally in rendering the decision.
17. The interested party relied on the case of **Commissioner Makueni ex parte Esther Mathei Mutiso and another Gregory Wambua**

Ndiwa a decision by Mbogo J made on 11th September 2019 quoting a Court of Appeal decision in **Ransa Company Ltd vs Manca Francesco and 2 others (2015) eKLR** on the proposition that judicial review looks at the process rather than merits of the decision.

18. On his part the exparte applicant relies on **Rahab Wanjiku Njuguna vs Inspector General of Police and another (2013) eKLR** on the proposition that of the minister's decision defies logic and accepted moral standards especially on holding that the dispute was on boundary as opposed to ownership.

19. Further the exparte applicant relied on **Republic vs Alphonse Mbinda Musyoki and another exparte Party of National Unity (2018) eKLR** on the proposition that where a party acts without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand, the court can interfere.

20. The exparte applicant urges the court to find that the minister's decision is tantamount to rendering him homeless and bound to suffer damage despite his immense investment over the land since 1958, more so when the decision was not based on the subtraction of the issues raised.

Analysis and findings

21. It is now trite law that judicial review has been expanded by 2010 Constitution. Article 47 of the Constitution has elevated judicial review at into a constitutional right giving it a constitutional foundation. Consequently, administrative actions of public officers such as the 1st respondent are now subject to article 47 (1) of the constitution.

22. The article has also been buttressed by the Fair Administrative Action Act 2015. Section 4 (3) thereof provides the parameters to public officers such as the 1st respondent on the manner of hearing minister's appeals.

23. The Court of Appeal in *Law Society of Kenya vs Centre for Human Rights and Democracy and 130 others* stated thus;

“If it is proved that the tribunal person or authority has deviated from the established and set beacons or pathway or legal criteria as delineated for it or has run wild and amok out at worst has gone on a frolic of its own, become an unruly horse and engaged in caprice, malice, witch hunting and a wild goose chasing helter –skelter, it is the duty of the high court through its supervisory jurisdiction to pull the leash and firmly point the delineated legal pathway that the tribunal, person or authority is enjoined by law to tread and to follow”.

24. Contrary to the submissions by the respondents, Section 7 (2) (1) of the Fair Administrative Action Act provides proportionally as a ground for statutory judicial review. This is the view taken by Court of Appeal in **Suchan Investment Ltd Ltd vs Minister of National Heritage and culture and 3 others (2016) eKLR**. It held thus;

“The test of proportionality leads to a greater intensity of review than the traditional grounds. What this means in practice is that consideration of substantive merits of a decision; first proportionality test may require the reviewing court to assess balance which the decision makes, has struck; not merely whether it is within the range of rational or reasonable decisions, secondly the proportionality test may require attention to be directed to the relative weight accorded to the interest and consideration though the intensity of the review is guaranteed by the twin requirement in article 24 (1) (b) & (c) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society; in the sense of meeting the pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued.....

It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section II of the Act. On a case to case basis future judicial review decision shall delineate the extent of merit review under the provisions of the Fair Administrative Actions Act”.

25. This court in applying the above principles shall now look at the minister's of decision in its totality.

26. The exparte applicant faults the decision by the minister as being irrational and unreasonable. Looking at the entire proceedings there is no indication that the applicant sought for and requested to avail and was denied a chance to produce documentary evidence in terms of annexures marked DM 1” DM 2 (a) 2 (b) 2(c) and 2 (d) in the exparte applicant's supplementary affidavits sworn on 12th October 2020 so as to make allegations that the 1st respondent did not consider them in arriving at this decision.

27. There is no indication and proof by the exparte applicant that the said documents formed part of the appeal and were ignored and or overlooked by the minister during the hearing and determination of the appeal.

28. Secondly the exparte applicant seeks to impugn the decision on account of overlooking the key issue – ownership of the subject parcel as opposed to a boundary dispute. The exparte applicant's annexure marked DM (1) clearly features the issue as on boundary – a common boundary, a road.

29. The same position is confirmed by the exparte applicant at ground 2 of the statement of facts. A gain the exparte applicant submits the minister ignored developments on the suit land in terms of permanent houses. Unfortunately, there was no such assertion while arguing the appeal before the minster even after the exparte applicant was cross examined by the minister. Further the exparte applicant's own witness attested to the fact that the issue at hand was over the boundary between the two parcels of land. In his view the said the boundary was a river as opposed to a road of access while being cross examined by the interested party.

30. Further in the cross examining the interested party's witness, the ex parte applicant put up a question on whether the witness knew the boundaries of the subject parcels which was answered in the affirmative.

31. Coming to the findings, it is clear the minister dealt with issues flowing from the parties' respective pleadings, documents and prior findings by the land adjudication officers. Moreover, there was a specific finding and determination that there was rectification of the boundary which the ex parte applicant did not object to during the fixing which he has not denied before this court.

32. In the circumstances it is my considered view that the proceedings of 15th June 2017 and subsequent decision rendered on 20th August 2018 was in line with Article 47 of the Constitution as read together with Section 4 of the Fair Administrative Actions Act 2015. The same is confirmed. Subsequently the notice of motion dated 11th February 2019 is hereby dismissed.

33. Orders issued on 11th February 2019 are hereby vacated. Costs for these proceedings are awarded to the respondents and the interested party.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29TH DAY OF SEPTEMBER, 2021 IN PRESENCE OF:

C/A: Kananu

HON. C.K. NZILI

ELC JUDGE