



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW APPLICATION NO. 8 OF 2019

REPUBLIC.....APPLICANT

VERSUS

LAND ADJUDICATION OFFICER,

AMWATHI MUTIU AMINA ADJUDICATION SECTION.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

AND

MESHACK M' MBUKIWA.....INTERESTED PARTY

JOHANAH MUTURI MBIKO-EX PARTE APPLICANT

JUDGMENT

1. **Johanah Muturi Mbiko** (*The ex-parte applicant herein*) seeks an **Order of Certiorari** to issue calling and bringing into this court and quashing the proceedings, findings and decision of the 1st Respondent dated 14/2/2019, in **objection No. 1798 over land parcel No. 2794 situated in Amwathi Mutuati 1A Adjudication Section.**

2. He averred that he is the owner of the suit land since 1995 to date. That the 1st respondent contravened the provisions of Cap 283 and 284 by hearing and determining the objection without seeking to hear the evidence of both parties. That the 1st respondent misled the applicant that the matter was for hearing on 21/2/2019 whereas he knew he would hear and determine the same on 14/2/2019. That on 14/2/2019, the 1st respondent erroneously awarded the ex-parte applicants land to his step brother, the interested party herein, on the wrong basis that the applicant's land is their fathers and liable to be shared to the two houses. (*He attached a copy of the summons marked as JMM 1.*)

3. **Meshack M'Mbukiwa** (the interested party) opposed the motion vide the replying affidavit filed in court on 3.9.2019. He avers that a glimpse of the annexure JMM1 reveals that the applicant has indeed changed the dates from 14/2/2019 to read 18/2/2019 in order to dupe the court into granting the orders sought.

4. That the applicant had ignored summons issued by the 1st respondent as is evident from the face of the objection proceedings where the 1st respondent succinctly indicated that the applicant had been summoned four (4) times but declined to attend the hearings hence the decision to proceed with the objection. That the applicant got his chance to be heard but waived the same. Through a further affidavit dated 3rd July 2020, he averred that the applicant had proceeded to file an appeal to the minister on 5/3/2019 against the impugned decision in appeal No. 295 of 2019 hence the applicant cannot pursue two parallel courses. (*He attached a letter from the land adjudication officer dated 16/5/2019 and the appeal marked as MM1.*)

5. The respondent opposed the suit vide the grounds of opposition dated 19.2.2020 where it is averred that the decision of the Land Adjudication officer was appealed against and the matter is hence pending before the minister.

6. On 23/1/2020, this court directed the parties to canvass the suit through written submissions. All parties have duly filed their respective submissions. The applicant averred that the 1st respondent's decision was arrived at un-procedurally illegally as it went against the tenets of natural justice and in particular Articles 25, 47 and 50 of the Constitution. That by denying the ex-parte applicant a chance to be heard, the 1st respondent was biased.

7. Further, the 1st respondent did not have powers to hear and determine the matter alone in view of the provisions of Section 9 as read with Section 11 of the Land Consolidation Act which requires the committee to comprise 25 members. He cited the cases of **Muthoni Kiriungi & Another v Chairman, Land Adjudication & Settlement Officer, Tigania East Central Division & 3 Others [2017] eKLR** and **Peter Kimandiu vs. Land Adjudication Officer Tigania East District and 4 Others Nyeri Court of Appeal No. 28 of 2015**.

8. The Interested Party submitted that the applicants never sought a consent to institute these proceedings. He also ought to have exhausted the mechanisms provided under Section 29 of the Land Adjudication Act. In this regard he cited the cases of **Meru ELC Petition 21 of 2012 Stephen Michuki Kiunga vs Nkuni M' Ruchiu & 2 Others** which held that one cannot file a constitutional petition when an appeal under the Land Adjudication Act has not been heard and determined. He also relied on the cases of; **William Mutuura Kairibia vs. Samuel Nkari & 2 Others Chuka elc no. 8 of 2018**, **Abdallah Mangi Mohammed VS Lazarus & 5 others 2012 eKLR**, **Meru Hcc No. 6 of 2019 Kanampiu M' Rimberia vs Julius Kathane & 3 others**, **Rueben Mwongela M'Itelekwa & 2 others vs Paul Kigea [2019] eKLR** and **Samuel Busiega vs Jane Jemaiyo Ng'arng'ar [2019] eKLR** the courts held that one must show that he has exhausted all the available remedies.

9. The respondents have submitted that Judicial Review orders are discretionary and can be denied even when warranted .In this case, the appeal is still pending before the minister hence the matter is not ripe to be subjected to another dispute resolution mechanism.

Analysis and Determination

10. I have keenly looked at the record and the submissions of all the parties. I have equally considered the principles for Judicial Review. In the case of; **Municipal council of Mombasa vs Republic & Umoja Consultants LTD Civil Appeal No. 185 of 2001**, it was held as follows:

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself.....

The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision”.

11. In this case the court will determine the issue of consent, whether the case was heard without a committee and whether the ex-parte applicant was denied a chance to be heard.

12. The interested party is the one who contends that the suit is wanting for lack of a consent as stipulated under section 30 of the Land Adjudication Act. However, the exparte applicant has availed the requisite consent as annexure “JMM6” in his verifying affidavit. I must however add that the consent is only required when a claimant is seeking for ascertainment of an interests and rights in land, See- **Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others [2015] eKLR**, **Johnson Mbaabu Mburugu & another v Mathiu Nabea & 9 others [2020] eKLR**.

13. On the claim by the exparte applicant that the 1st respondent heard the case without the aid of a committee, I find that the ex-parte applicant appears to mix the law as applied in the adjudication statutes. The proceedings availed by the ex-parte applicant bears the heading “Cap 284”. It follows that the law applicable was the Land Adjudication Act where under section 26 of the said Act, there was no requirement for the 1st respondent to conduct the case with a committee. It follows that the cited case of **Peter Kimandiu v Land adjudication officer Tigania West District & 4 others [2016] eKLR** is distinguishable from the present case since in the Peter Kimandiu case, the law applicable was the Land Consolidation Act.

14. On the issue that the exparte applicant was not given a chance to be heard, I find that the document relied on by the exparte applicant is the annexure “JMM1”. The date indicated therein for hearing of the case appears to be 18/2/2019. However, the exparte applicant avers that he had been given the date of 21.2.2019 instead of 14.2.2019. The question is, where is the document bearing the date of 21.2.2019 if indeed this is the date that the applicant was given? What is captured in the objection proceedings is that the exparte applicant had shunned the proceedings, not once or twice but 4 times.

15. This is a case whereby the exparte applicant has already lodged an appeal to the minister. The said appeal is yet to be heard. The issues he is raising can also be adequately dealt with by the Minister in the appeal. The issue of having parallel proceedings does not augur well for the efficient administration of justice.

16. In the final analysis, I find that the suit lacks merits. The same is therefore dismissed with costs to the respondent and interested party.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 6.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137,

this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE