REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW NO. 6 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

THE LAND AJUDICATION & SETTLEMENT

OFFICER, KEIYO DISTRICT.....2ND RESPONDENT

THE MINISTRY OF INTERIOR & COORDINATION OF

NATIONAL GOVERNMENT.....3RD RESPONDENT

JANE CHEPKOSGEI CHEKIYENG.....1ST INTERESTED PARTY

JOHN KOSGEI TOROITICH.....2ND INTERESTED PARTY

JOSPHAT K. YATOR.....EX-PARTE APPLICANT

RULING

What is before the court is a notice of motion seeking the following orders;

a) An order of certiorari be issued to remove into the High Court and quash forthwith the proceedings and ruling delivered on 19-5-2017 in respect of parcel No. 1463 and 1179 of 20-01-2017 before the 1st, 2nd and 3rd respondent and in favour of the interested party and or against the ex parte applicant.

b) Costs of the suit.

APPLICANT'S CASE

The application is based on the grounds set out in the statutory statement and verifying affidavit sworn by *Josphat Kiserem Yator* dated 8th July 2017 and the grounds on the notice of motion.

The statement that accompanied the ex parte chamber summons stated the grounds as follows;

The Kaptum adjudication section parcel number 1463 and 1179 belonged to the ex parte applicant contrary to the respondent's decision of 19th May 2017 dismissing the applicant's appeal case no. 193 of 2017 and having the said parcels registered under the name of the 1st interested party.

The respondents and the interested parties violated the Adjudication Act and lacked jurisdiction to entertain the matter of adjudication of the

parcels of land. The interested parties do not fall within the family tree and are not entitled to inherit the said parcel of land.

The ex parte applicant was not granted an opportunity to be heard on 26th January 2015, 24th February 2015 and 20th January 2017 in respect of the adjudication objection no. 598 & 599 plot no. 1463 and 1179.

The respondents had no jurisdiction to entertain and determine the Kaptum adjudication section objection no. 598 and 599 and the appeal case no. 193/2017 over the suit parcels. The family law and ex parte applicant's community's culture touching on the parties has been violated by the adjudication objection.

The law of natural justice, on an opportunity to be heard has been violated or contravened by the respondents at the detriment of the applicant. The possession of the suit parcels has and still is with the exparte applicant.

1ST, 2ND & 3RD RESPONDENT'S CASE

They filed their submissions on 4th June 2019.

They submitted that the case does not fall within judicial review as the case is that the party that determined the case had no jurisdiction to hear the same. The applicant has failed in this regard as they did not produce the proceedings. The court cannot ascertain who held the proceedings or who the presiding officer was. It was upon the applicant to demonstrate that the presiding officer was biased and flouted the rules of natural justice. The applicant has merely averred certain breaches to invoke judicial proceedings.

The court lacks jurisdiction as what the applicant seeks to contest is facts that cannot be verified by this honourable court. *Section 29* of the *Land Adjudication Act* states that the minister shall hear all appeals but it doesn't lay down the procedure on how the appeals should be conducted.

They cited the case of ***Republic v District Commissioner (Kitui) [2008] EKLR*** where the court clearly enumerated the need to prove matters of bias by evidence. They also cited the case of ***Philes M. Muli v Minister for Lands & Settlement & 2 others [2008] EKLR.***

The applicant is more concerned with overturning the judgment rather than laying a basis with regard to the procedure used in coming to the contested decision. They have elected to use this forum as an appeal.

The issues raised in the notice of motion go to the merit of the order and not the procedure. To that extent alone the application fails as it falls outside the purview of judicial review. It is trite law that judicial review cannot be invoked to challenge the merit of the decision. It can only challenge the procedure.

The application is fatally defective as the deputy county commissioner who made the disputed ruling is not a party to the application. It is trite law that parties must be given an opportunity to be heard and the ex parte applicant has elected to lock out the most vital party in these proceedings from adducing his evidence in support of the decision.

The decision to grant judicial review is one of discretion. The court should weigh whether there is an alternative forum to address the ex parte applicant's case. The case would be best resolved in a forum that would allow conclusive determination on matters of ownership. Judicial review would leave the foregoing issues unresolved.

They cited Halsbury's laws of England on certiorari and submitted that the applicant had failed to demonstrate any form or act that would necessitate the court to invoke its discretionary powers to grant the orders sought. This stems from the fact that the applicant has merely lodged allegations in court without laying any proof before the court. They have failed to attach any evidence that the Minister's nominee was gazetted and this is a glaring admission that the applicant merely wishes to overturn the decision on flimsy allegations and be allowed to ventilate their case afresh.

The application ought to be dismissed with costs.

The interested party filed a replying affidavit on28th march 2019.

She submitted that the application was malicious. The dispute was handled by all authorities at all levels and arrived at a verdict. They acquired the parcels from her husband's father. The land was divided amongst the sons after the death of their father and they took possession of the suit lands. She took possession after her husband's death in 1997. The applicant invaded their parcels and has continuously invaded them. His claim was dismissed by the tribunal. She has sought protection from the ELC court.

The application should be dismissed with costs.

ISSUES FOR DETERMINATION

a) Whether the court has jurisdiction to hear this matter

b) Whether the applicant should be granted orders for certiorari.

WHETHER THE COURT HAS JURISDICTION TO HEAR THIS MATTER

The respondents challenged whether this application fell within the scope of judicial review.

In ***Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited [2013] eKLR*** the court held;

> **"Thus, the starting point in judicial review proceedings is that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. The purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question."**

In the case of ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001***, the Court of Appeal set out the parameters of judicial review when it held as follows:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…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."**

Section 9 of the *Fair Administrative Action* provides;

> **9. (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**
>
> **(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.**

Section 29 of the *Land Adjudication Act* provides;

> ***(1) Any person who is aggrieved by the determination of an objection under section 26 (1) & (2) of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—***
>
> ***(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and***
>
> ***(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.***
>
> ***(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar".***

The application herein is based on several grounds; one of which is that the parties that heard the dispute did not have the jurisdiction to hear the matter. The ex parte applicant also contended that he was not accorded an opportunity to be heard on 26-1-2015, 24-2-2015 and 20-1-2017. However, the applicant was the plaintiff in the appeal as per the annexed proceedings dated 20th January 2017. It is clear he participated in the proceedings and was heard in the appeal. He cannot complain that the proceedings were conducted in his absence as the appeal which he initiated was heard in his presence.

The applicant has not demonstrated how the respondents lacked the jurisdiction to entertain the matter and therefore in that regard he has failed to show that there was a flaw in the process of hearing the matter. The applicant raised issues are on the merits of the case and not the process through which the decision was arrived at.

I find that the court has no jurisdiction to entertain this matter on judicial review, as the remedies sought touch on the merits of the decision and not the process.

WHETHER THE APPLICANT SHOULD BE GRANTED ORDERS OF CERTIORARI

In ***Republic v National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited [2018] EKLR*** the court at para. 55 held;

Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either: -

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so;

or

b. a decision or action that has been taken is 'beyond the powers' (in Latin, 'ultra vires') of the person or body responsible for it.

An administrative or quasi-judicial decision can only be challenged for illegality, irrationality and procedural impropriety. An administrative decision is flawed if it is illegal. A decision is illegal if it: - (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.

The applicant has not shown that the decision on appeal was in contravention of the terms of the power which authorized the making of the decision or that it failed to implement a public duty.

The applicant did not show that the respondents were unlawfully failing to make a decision that it was under a legal duty to make. The application does not meet the threshold for the orders of judicial review and is therefore dismissed with costs to the respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of November, 2019

In the presence of:

Mr. Ngigi holding brief for Mr. Kiptarus for Exparte applicant for the Appellant

Mrs. Lung'u for the Respondent

Mrs. Nderitu holding brief for Mr. Kisei for the Interested party

Ms Abigael – Court Assistant