REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JUDICIAL REVIEW NO. 70 OF 2010

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF LAND ADJUDICATION &

SETTLEMENT OFFICER.....1st RESPONDENT

THE DISTRICT LAND ADJUDICIATON AND SETTLEMENT

OFFICER-TIGANIA DISTRICT.....2ND RESPONDENT

STEPHEN MUKANGU.....1ST INTERESTED PARTY

JOSEPH THARIMBU.....2ND INTERESTED PARTY

JAMES GITUMA.....3RD INTERESTED PARTY

SAMSON MUTIGA .....4TH INTERESTED PARTY

CHARLES MWORIA .....5TH INTERESTED PARTY

MUTIGA MUKETHA.....6TH INTERESTED PARTY

TIMOTHY MWINGIRWA .....7TH INTERESTED PARTY

ZAKAYO MARIMBA .....8TH INTERESTED PARTY

ABURUKI MUKETHA .....9TH INTERESTED PARTY

JOSEPH DAVID MWILARIA.....10TH INTERESTED PARTY

MISHECK B.NDUBAI .....EX PARTE APPLICANT

ISAIAH M'ITUBIRI.....EXPARTE APPLICANT

LAWRENCE TEREBA.....EXPARTE APPLICANT

M'IBUKU M'LIMBERIA .....EXPARTE APPLICANT

M'MUTIGA M'RIIBI.....EXPARTE APPLICANT

CHARLES M'NTHAKA.....EXPARTE APPLICANT

JUDGMENT

1. By a notice of motion dated 22/10/2010 the Ex parte applicants herein sought the following orders**:-**

> **(1) That an order of certiorari be issued to the Ex-parte Applicants (sic) to call for and quash the proceedings and the award of the 2nd respondent dated 13/5/2010 in The Land Adjudication and Settlement Officer Tigania District Objection No. 1591, 1592, 1013, 351, 906, 1548, 663, 916, 352, 889, 67, 1231 and 1587.**
>
> **(2) That an order of mandamus be issued to the Ex-parte Applicants ordering and compelling the Land Adjudication and Settlement Officer Tigania District to hear Objection No. 1591, 1592, 1013, 351, 906 1548, 663, 916, 352, 889, 67, 1231 and 1587 afresh and/or de-novo.**
>
> **(3) This Honourable Court be pleased to direct and order that costs for and incidental to this application be borne by the respondents and the interested parties.**

2. The application is based on the following grounds set out in the statement of facts dated 28/9/2010 and the verifying affidavit of the Ex-parte applicant of the same date:-

> **(1) The 2nd respondent acted unfairly and contrary to the natural justice by consolidating the aforesaid objection and not hearing all the objectors who are applicants herein.**
>
> **(2) The 2nd respondent failed to determine the objectors (sic) on their merits and relied on "Zenge Oath" of 1959 by third parties to determine the aforesaid objections.**
>
> **(3) The 2nd respondent failed to have regard to the fact that the objectors have been in occupation of the material parcels of land which they had inherited from their fathers who had in turn inherited them from the applicant's forefathers since the year 1956.**
>
> **(4) The 2nd respondent erred in finding that the applicants land is across river Kathanga while in actual fact that land is already demarcated to other people.**
>
> **(5) The 2nd respondent failed to act judiciously in the discharge of his duties by failing to deal with all the objections filed before him.**
>
> **(6) The 2nd respondent's decision and findings are unfair, unreasonable and based on irrelevant and immaterial facts.**

The Applicants' Case

3. In the verifying affidavit of the 1st Ex-parte applicant **Misheck B. Ndubai** sworn on the 28/9/2010 he avers that he swears the affidavit on his own behalf and on behalf of the other co-applicants and with their authority to do so. He states that the applicants filed an objection against the interested parties claiming the lands which the applicants were occupying. It is his evidence that the 2nd respondent who is the District Land Adjudication Officer Tigania District consolidated all the objections filed by the applicants and several other people and only heard a few objectors and a few defendants and at the same time heavily relied on what the applicants referred to "1959 Zenge Oath" to determine all the objections. It is the evidence of the applicants none of them partook of the said oath and that the District Land Adjudication Officer's finding that that oath was binding on all the applicants is against the law and principles of Natural Justice. In addition the deponent states that the finding that the applicants' lands are across river Kathanga while the same are already demarcated to other people is recipe of chaos and confusion; they blame the 2nd respondent for not specifying the numbers of those lands across river Kathanga which he alleged to belong to the applicants. It is the applicants' case that the 2nd respondent's findings if allowed to stand would render all the applicants landless and destitute since they have no other land. Lastly the applicants claimed that the 2nd respondent relied on extraneous facts to determine the objections and never considered the evidence of the few plaintiffs who testified.

The Respondents' Defence

4. The 1st and 2nd respondents' responded to the notice to motion vide the sworn affidavit of Amos Muli Musyoka, the Land Adjudication Officer dated 13/12/2012. The gist of the 1st and 2nd respondents' defence is that the 2nd respondent acted within the law in consolidating the objections since they were all interrelated and they referred to one particular parcel of land that was subject to Ameru Customary "Nthenge Oath" in 1959; that the 2nd respondent determined the objections on their merit and the weight of the evidence available and was guided by the provisions of ***Section 26 (1) of the Law Consolidation Act Cap 283*** of the Laws of Kenya. The 2nd respondent averred that regardless of the situation on the ground, he was duty bound to determine who the rightful owner of the land was and that he was correct in finding that the applicants' land is situated across river Kathanga where it was originally gathered although the same had been demarcated earlier. The 2nd respondent maintains he considered all the objections in their spirit and that his decision was fair reasonable justified and relied on relevant and material facts presented to him.

The Interested Parties' Case

5. The interested parties authorized the 2nd interested party **Joseph Tharimbu** to swear the replying affidavit dated 11/2/2012 on their behalf. He also swore a supplementary affidavit dated 11/6/2013 on his own behalf and on behalf of the other interested parties. The sum total of the interested parties' defence as contained in those affidavits is as follows: that when the impugned decision was made, ***Cap. 284*** had been applied to the **Uringu II Adjudication Section**; that the parties in the proceedings before the Land Adjudication Officer were

accorded a fair hearing when the Meru Customary laws on land acquisition and ownership were applied; that the suit lands are their ancestral or clan land comprising of one block; that the lands belong to *Bothanja* clan to which they all belong; that the ex-*parte* applicants were claiming the suit land as ancestral land and did not have individual claims on the same; that during the objection some of the applicants elected to be represented by other persons; that all the applicants claims over the suit land were common and that is why they was treated so during the hearing; that the applicants never pursued independent claims for separate consideration; that the applicants' common claim was that they were dissatisfied with the Arbitration Board decisions in case **No. 5/80** and **37/80/81**; that the applicants objections were dismissed after it was found that they were similar as they hinged on dissatisfaction with the said two Arbitration Board cases; that the suit land was visited before judgment and confirmed to be one block belonging to *Bwothanja* (which I believe to be a variant of "*Bothanja*") clans; that the 2nd respondent relied on a report Reference Number **LA7/3/VOL.XV/55** and the proceedings in the aforesaid two Arbitration Board cases plus ***CMCC No. 400 of 1994*** which had been decided in the interested parties' favour; that the objections were *res judicata* the two Arbitration Board decisions and the Civil Case decision. The interested parties find fault in the fact that the land parcel numbers of the interested parties are not named in the filed documents of the applicants. They aver that there is nothing to be heard afresh as the applicants have made their bids to deprive the interested parties of their clan land on three other occasions.

The Ex-parte Applicants' Submissions

6. These judicial review proceedings were disposed of by way of written submissions. The Ex-parte applicants filed their written submissions on 22/1/2016; the interested parties filed theirs on 7/3/2016 and the respondents on 22/9/2016.

7. The ex-parte applicants submitted that they are the owners of the land in question; that they found that their parcels land had been registered in the interested parties' names, hence the objections to claim back their land. They fault the 2nd respondent for consolidating all the objections without their consent which they argue led to failure to accord them audience. They aver that the 2nd respondent made a sole decision without granting them a chance to be heard separately as required by law. Further they also faulted the respondent for entertaining the issue of the ***"Nthenge"*** Oath of ***1959*** to make his decision yet they were not party to that oath. They also argue that according to the ***Section 26 (1)*** of the said Act when dealing with an objection to the Adjudication Register the Adjudication Officer shall consider the matter together with the Committee yet in the present instance the 2nd respondent never involved the Committee in the proceedings and thus they are a nullity. They thus aver that they were condemned unheard by the consolidation of their objections into one **Objection No. 663,** that the 2nd respondent acted *ultra vires* and that *certiorari* should issue.

8. In the respect of order of *mandamus* the applicants avers that the 2nd respondent failed to perform a legal obligation as per the **Land Consolidation Act** which the applicants expected to perform. They aver that consolidation of the objections into **Objection No. 663** amounts to a failure to discharge a duty bestowed on him by the statute as he never accorded and their witnesses a chance to be heard. Therefore the order of mandamus should issue to compel the 2nd respondent to do what he ought to have done when the proceedings were before him.

9. The Ex-parte applicants rely on the decision in ***Judicial Review No. 90 of 2011 Joshua Muruyu M' Ikiara –vs- the Land Adjudication Officer Igembe North and South District & Another,*** for the proposition that the respondent contravened statutory provisions for failing to involve the Committee in determining he dispute. However a look at the grounds in statement of facts dated 28/9/2010 shows that this was not one of the grounds the applicants originally relied on to bring these proceedings. It is now trite law on the grounds relied on at the leave stage may be argued at the hearing of the substantive notice of motion. **Order 53 rule 4(1)** of the **Civil Procedure Rules** provides as follows:

> ***"Copies of the statement accompanying the application for leave shall be served with the notion of motion and copies of affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statements".***

By virtue of **Order 53 Rule 4(1)** replicated above, this court is inclined to preliminarily disregard that ground as it amounts to an ambush of the other parties in this case.

10. The Ex-parte applicants also relied on the cases of ***Meru Judicial Review No. 61 of 2010 R –vs- Tigania East and West District Land Adjudication Officer & Another*** and ***Nairobi JR No. 223 of 2014 Republic –vs- Kenya Vision 2030 Delivery Board and Another*** to support their claim for orders of judicial review and certiorari.

The Respondents' Submissions

11. The respondents' submissions closely follow what is contained in their replying affidavit, to wit, that all the consolidated objections were interrelated and they referred to one particular parcel of land that was subject to their Meru Customary Oath. The also aver that the objections were heard on their own merits and determined on the weight of the evidence available. They submit that they complied with the **Section 26 (1) Cap 283.** They submit that the issues raised by the applicants relate to the merits of the decision of the 2nd respondent as opposed to the decision making process and hence fall outside the province of the judicial review proceedings as judicial review does not concern itself on the merits of a decision but with the decision making process. They submit for those reasons *certiorari* cannot issue. They also submit that an order of *mandamus* cannot issue because the ex-parte applicants has failed to demonstrate that a request for the performance of a duty was made and the same was refused.

12. Secondly they submit that the 2nd respondent acts together with an Adjudication Committee in hearing objections proceedings and hence cannot be compelled to hear objections alone as that would amount to amendment of law.

Submissions of Interested Parties

13. The interested parties submit that the parties were fairly heard and accorded time to cross examine the witnesses before the decision was made. They submit that ***Section 31(1) of the Land Consolidation Act Cap. 283*** permits every individual person claiming any right or interest in any land within an adjudication section to attend in person or by representative according to African customary law. They cite ***Meru High Court Misc. 22 of 2010 Republic –vs- Land Adjudication Officer Tigania West District and 3 others*** and the case of ***Stanley Thianie Mbui & Another –vs- Land adjudication Officer Tigania west District & Another [2014] eKLR for*** the proposition that in a judicial review the court is concerned with the process rather than the merits of a decision.

14. The interested parties also rely on the case of ***Wilberforce Odhiambo Mwoga and 13 others –vs- Minister for Provincial administration [2013] eKLR*** for the same proposition.

15. On the suitability of *mandamus*, the interested parties submit that an order of *mandamus* can only be granted to compel the performance of a public duty which is imposed on a person or a body of persons by statute where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. They submitted that the body mandated to hear the objection did so in accordance with the law and arrived at the correct decision and orders of *mandamus* are not deserved. They point out that the 2nd respondent sworn affidavit sworn on **11/2/2012** has not been challenged by way of any supplementary or further affidavit as required by law.

16. The interested parties also raised other reasons why these proceedings should be dismissed. They aver that the suit against the 3rd, 4th and 8th interested parties is null as those parties died long ago yet the proceedings against them were filed after they died. They also alleged that there was non-payment sufficient court filing fees as the receipt on the record is for **Kshs.6150/=** and aver another fees of **Kshs.6000/=** for the second prayer in the application has never been paid. They submit that the court should not consider that prayer or determine it and rely on the case of ***Meru HCJR No. 49 of 2009 Republic –vs- Land Adjudication Committee Giithu & Others***. Lastly they submit that the subject matter of the objections was *res judicata*. They submit that the contents of the replying affidavit sworn by Joseph Tharimbu on 11/2/2012 confirms that the objections were *res judicata* Arbitration Board Case ***No. 5/80 and 37/80/81*** *and* ***Meru CMCC 400 of 1994*** and submit that this court should not entertain this judicial review application.

DETERMINATION

17. I have examined the grounds in the statement of facts dated **28th September 2010** and I find that **grounds 3** and **4** do not form a good basis for seeking judicial review orders. I had earlier in this judgment stated that the issue of whether or not the Adjudication Officer sat with the Committee in the determination of the subject objections and should not be entertained for the reason that it never formed one of the grounds in the said statement of facts. Grounds 3 and 4 therefore now join that category but for the reason that they address substance of the impugned decision as if in an appeal rather than the process. The issues for determination in this matter are therefore as follows:

> ***a. Whether consolidation of the objections and their determination as one objection and the reliance on the "Nthenge" Oath of 1959 offended natural justice.***
>
> ***b. Whether the decision and findings of the 2nd respondent is unreasonable and based on irrelevant and immaterial facts.***
>
> ***c. What orders should issue.***

18. These issues are dealt with as hereunder.

> ***a. Whether consolidation of the objections and their determination as one objection and the reliance on the "Nthenge" Oath of 1959 offended natural justice.***

19. I will first deal with the issue of consolidation.

20. It is not denied that the objections filed by the applicants and those of other parties not before court now were consolidated. In that purported act of consolidation lies the origin of the applicants' claim that the rules of natural justice were violated.

21. First, it is alleged that the consolidation was done without seeking their consent. Secondly, it is averred that by virtue of that unauthorized consolidation, the 2nd respondent made a sole decision and failed to grant them a chance to be heard separately as required by law and they were thus denied audience.

22. In **Paragraph 4** of the applicant's verifying affidavit dated **28th September 2010** the deponent states that the 2nd respondent, after the consolidation went ahead to hear only a few objectors.

23. It is an observation of this court that consolidation *per se* can not and does not in the present case lead to breach of the rules of natural justice. It is common in the justice system, to have matters that are similar in nature consolidated for the purpose of arriving at a single determination that addresses all of them.

24. First to be dealt with in this judgment is the issue of whether the consolidation was done with the consent of the applicants. A look at the proceedings shows that the applicant was listed as the 22nd objector in a list of about 35 objectors.

25. In a matter of this nature where serious allegations are being raised against them, it is the task of the respondents to provide evidence to disprove the applicants' allegations. The replying affidavit of the respondents is a short two page affair of about 8 paragraphs and it is important to examine whether the same does anything to satisfy this court's inquiry as to whether consent for consolidation was sought from

the applicants.

26. That affidavit leaves a lot to be desired.

27. It would have been necessary, for example, to avail a clear typed record of the proceedings or other evidence that showed that an enquiry was made of the applicants for their opinion and that the opinion was considered before their cases were lumped together with other objections for the purpose of a common determination.

28. It would also have been also necessary to show that the applicants consciously waived their right to have their objections heard separately, for only each party knows what ammunition they wish to unleash in any particular case and in what manner. **Article 50** of the Constitution of Kenya provides as follows:

> ***"50. Fair hearing***
>
> ***(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

29. I do not find any evidence presented by the respondents to the effect that the applicants were asked for their consent for the consolidation of the various dispute lodged before the second respondent.

30. However, perchance there was that consent, I would also suppose that if any of the applicants were afforded an adequate opportunity to ventilate their grievances in person or through their representatives in the consolidated case, it was the duty of the respondents to demonstrate as much.

31. It appears that the 2nd respondent's assumption that the objections were all similar led to the consolidation. However, in my view, even in the scenario of consolidated objections, the 2nd respondent ought to have demonstrated to this court by affidavit evidence with annextures that he had taken and considered each case on its own merits for the purpose of doing justice and ensuring that justice was seen to have been done. The point here is that consolidation does not absolve the 2nd respondent from considering each claim on its merits.

32. Without the kind of evidence this court has referred to hereinabove and in view of the concession that the objections were lumped together, this court can only conclude that the consolidation was done without the consent of the applicants and that in the circumstances that prevailed at the time of the hearing of the case they were not afforded and adequate opportunity of presenting their cases appropriately hence these proceedings. The consequent finding is that the applicants' rights with regard to natural justice have therefore been violated.

33. The second issue is the "Nthenge" Oath. The applicants aver that the oath was partaken by third parties and that it never bound them.

34. This issue partially goes into the process of the decision making and partially into the substance of the decision of the respondent. First, the reliance on the oath speaks to the process of the respondent's decision making. It is the manner in which it speaks to the process that this court is interested in, for as I have already stated before, Judicial review is concerned about the process of decision making rather than the merits of the decision itself.

35. There is not much information given about this oath, and the only observation that the court makes is that the respondents concede to having relied on that oath in determining the applicants' objections. There is no indication from the respondents in their affidavit to show that an inquiry was made by the respondent to determine if that oath applied to the individual applicants in this case. This court would have expected the respondents to avail all details concerning this oath and the participants and how it affected the applicants' claim in detail. There is more detail in the applicant's supporting affidavit and the interested parties' replies that in the respondent's affidavit.

36. In assuming that the objectors partook of and were bound by the oath that speaks to the merits of his decision. However, the question that arises is in what circumstances were the applicants held to be affected by an oath that they aver they never partook of?

37. This court may not be able to state whether the respondent's reliance on the oath was or was not wrong as that is an issue of merit. In my view it all depended on the circumstances of the case before the 2nd respondent. There is no answer to this question from the respondents. Even so, this court hesitates to conclude that reliance on that oath was contrary to the principles of natural justice. Instead, it finds that there is need for the 2nd respondent to demonstrate in his decision how he came to the conclusion that it bound the applicants

38. From the above it can clearly seen that the question of whether the respondent failed to hear the objections that were filed before him and so failed to act judicially has already been answered in the positive;

b. Whether the decision and findings of the 2nd respondent are unreasonable and based on irrelevant and immaterial facts.

39. An examination of the decision of the 2nd respondent to establish whether it is irrational or unreasonable has to be conducted in the light of the "*Wednesbury unreasonableness*" test. The merits of the decision therefore come into question for this purpose. For this ground to succeed the decision has to be tainted with an excessive degree of unreasonableness defined in the renowned case of ***ASSOCIATED PROVINCIAL PICTURE HOUSES LTD v WEDNERSBURY CORPORATION [1948] 1 KB 223***.

40. While analyzing the issue of irrationality of a decision in the case of **Republic v Kenya Power & Lighting Company Ltd & another [2013] eKLR Nairobi JR Case No. 88 OF 2013** the court observed as follows:

"From the foregoing, it is clear that a judicial review court does not consider the merits of the decision of a tribunal or public body. Any person dissatisfied with the merits of the decision of a tribunal or public body ought to file an appeal where an appeal is provided for. I, however, hold the view that a declaration that the decision of a tribunal or public body is unreasonable in the Wednesbury sense (ASSOCIATED PROVINCIAL PICTURE HOUSES LTD v WEDNESBURY CORPORATION [1948] 1 KB 223) is an attack on the merits of the decision. In the words of Lord Diplock at paragraph 110 in THE COUNCIL OF CIVIL SERVICE UNIONS case (supra) an unreasonable administrative decision is:-

"So outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

41. Is that the case regarding the decision of the respondent herein? The basis of the claim of irrationality lies in the fact that the 2nd respondent found that the applicants lands are to quote the applicants' verifying affidavit, *"across river kathanga when the same are demarcated to other people and without specifying their numbers"* which finding the applicants termed as *"misplaced and a recipe for chaos."* In addition the applicants aver that the 2nd respondent's findings *"if allowed to stand and remain will render all the applicants landless and destitute"* since they have no other land.

42. In adjudication proceedings there is nothing strange about a decision that finds that one is not entitled to land where he thought that he had a valid claim, or a decision that will leave one landless, as long as the proper process of adjudication has been followed. I it can be presumed that between the objectors and the defendants there had to be a party to the dispute who was entitled to the land in question and one who was not. There is also probability that in certain cases persons in lengthy occupation of land may be dispossessed of such land at the end of the process.

43. In this particular case, is there anything that makes the act of pointing out land across the river Kathanga, which had been adjudicated, unreasonable to the extent that it can be considered to be within the "*Wednesbury unreasonableness*"? It may well be that that land that the 2nd defendant was pointing out had been adjudicated to other people, but bearing in mind his official position and experience and knowledge of the local geography, there is probability of truth in his statements. It cannot be considered a decision so "*outrageous, in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*."

44. I am not saying that the Land adjudication officer was right in making the decision that he made. All that is being done here is to subject his decision to the "*Wednesbury unreasonableness*" test. The conclusion that this court comes to is that no such category of unreasonableness has been demonstrated by the ex-parte applicants in these proceedings.

c. <u>What orders should issue?</u>

45. It has been found that the consolidation of the objections and their being heard as one without the consent of the applicants was contrary to the rules of natural justice. I therefore find that an order of certiorari may issue. As regards mandamus, I find that it is the duty of the 2nd respondent to hear objections and that such duty is conferred upon him by the law. In my view an order of mandamus may issue in the circumstances of this case to compel him to carry out his duty.

46. I therefore find that the notice of motion dated 22/10/2010 has merit. I therefore grant the same in terms of prayers Nos (1), (2) and (3) thereof.

Dated and signed at Kitale this 15th day of June 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 28th day of June, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

In the presence of:

C/A Janet/Galgalo

Mr. Kithinji for exparte applicant

N/A for interested parties

N/A for the respondents