



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

JUDICIAL REVIEW NO. 1 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL ON BEHALF OF THE DISTRICT COMMISSIONER

BARINGO DISTRICT AND THE BARINGO DISTRICT LAND

ADJUDICATION COURT.....1ST RESPONDENT

JOSEPH K. KIMGOCHOCH.....2ND RESPONDENT

(EX-PARTE APPLICANT SOKOME KIPKEBUT)

JUDGMENT

1. Upon an appeal from the Land Adjudication Tribunal, the District Commissioner for Baringo Central District gave judgment for the appellant as follows:

“From the foregoing, I have established that the appellant’s evidence adduced before me and his witnesses outweighs that of the respondents’ representatives and his witnesses as well.

Basing on the above findings, I therefore dismiss the allegations lodged by the respondent’s representative and his witnesses and award the whole of parcel number 3162 to be registered in the names of Joseph Kimngochoch the appellant in this case as the rightful owner of this land”.

Appeal to minister case No. 130 of 1996 Kapchomuswo “A” Adjudication section, parcel No. 3162, hearing on 3/3/2010.”

2. By Judicial Review proceedings launched on 14/6/2010, the applicant challenged the judgment of the District Commissioner on the grounds, primarily, the jurisdiction of the District Commissioner to deal with the Land, of which he had become the registered proprietor under the Registered Land Act Cap 300 on 15/11/2001. In his Verifying Affidavit, the applicant detailed the history of dispute from 1994 when, after alleged discovery of encroachment by the 2nd Respondent, the applicant had lodged a case at the Land Adjudication Tribunal which had decreed him the bona fide owner of the parcel of land provoking the appeal to the minister which was determined in favor of the 2nd respondent herein in the judgment set out above, the subject of these judicial proceedings. It was contended that the District Commissioner did not have jurisdiction under either the Land Adjudication Act or the Registered Land Act to deal with registered Land. An order of Certiorari was, therefore, sought to quash the judgment.

3. The court (Mwilu, J. as she then was) ordered that the leave granted to file Judicial Review proceedings do operate as a stay of the enforcement of the decision of the District Commissioner, Baringo in Appeal to the Minister No. 130 of 1996, by order of court dated 15/6/2010.

4. The 2nd respondent filed a Replying Affidavit sworn on 17/11/10 setting out the defence, principally, that the suit land was part of the parcel of land Baringo/Kapchomuswo “A”/595 to which he was registered proprietor following demarcation and Land Adjudication in 1965; that he had been on the suit Land since 1948 after inheriting it from his late father; and that the applicants had not raised any objection at the time of demarcation and adjudication of the land.

5. The 2nd respondent claimed that the Ex-parte applicant had “fraudulently hired off a portion of my Land and registered it as Baringo/Kapchomuswo “A”/3162 [which] was still registered under parcel No. Baringo/Kapchomuswo/595 and it is a mystery how it was exercised from the said parcel which the original title deed being recalled by the Land register”. It was therefore contended that the “excision

of the parcel number Baringo/Kapchomuswo “A”/3162 and subsequent registration in the name of the applicant is tainted with fraud and the 1st respondent had jurisdiction as a representative of the minister to hear and adjudicate on matters arising out of the land Adjudication tribunal, and the Ex-parte applicant had obtained title to the suit Land pursuant to a ruling of the Land Adjudication Tribunal for which the respondent had appealed.

6. The applicant was, on an application dated 11/12/2013, upon her death substituted by her personal representative her son Philimon Chepyegon Menego, by order of the court dated 18/12/2013.

7. The Ex-parte applicant and the interested party (previously described as the 2nd Respondent) filed written submissions respectively dated 14/11/2013 and 19/3/18. The file was on establishment of the court at Kabarnet, transferred to Kabarnet from Eldoret on 28/10/15 and then retained when the court did not commence its sittings at Kabarnet, only to be transferred on 31/1/2017 when this court was inaugurated.

Issue for determination

8. The issue for determination before the court is whether the District Commissioner had jurisdiction to deal with the suit Land under the land Adjudication Act after its registration under the Registered Land Act, Cap. 300 and, consequently, whether the order of Certiorari shall be granted to quash the judgment on appeal made on 3/3/2010.

Determination

9. It is trite law that the Land Disputes Tribunal established under the Land Disputes Tribunal Act of 1990 had no jurisdiction to determine a question relating to the ownership of Land. See decisions cited by the ex-parte applicant, *Asman Maloba Wepukhulu & Anor v. Francis Wakwabubi Bikati* Court of Appeal Civil Appeal No. 157 of 2001; *Kipkering Arap Muzee v. Kitur Arap Muzee & Anor* Eldoret HCCC No. 1 of 2003; *R v. The Chairman Nandi Hills Division Land Disputes Tribunal & Anor*. Eldoret HC Misc. App. No. 195 of 2005; and *R v. Kosirai Land Disputes Tribunal & 2 Ors*. Eldoret H.C Misc. App. no. 69 of 2003.

10. There was evidence that the applicant and the 2nd respondent (interested party) were registered proprietors of the two parcels of Land registered under the Registered Land Act as parcels Baringo/ Kapchomuswo “A”/3162 and 595, respectively, both registered on 15/11/2001. In accordance with section 159 of the Registered Land Act, it is the High Court that would determine the question of ownership of registered Land to determine the validity of the title or the possession of the Land or any interest in the Land. The Land Dispute Tribunal under the Land Dispute Tribunal Act had no jurisdiction on the matter.

11. However, this matter was never before the **Land Dispute Tribunal** established under the **Land Dispute Act of 1990**. It was before the Land Adjudication Tribunal established under the Land Adjudication Act, Cap. 284. Upon an objection by the Ex-parte Applicant under section 26 of the latter Act and thereafter on appeal to the Minister under section 29 thereof was lodged by the 2nd Respondent/Interested party.

12. Sections 26 and 29 of the Land Adjudication Act Cap 284 are in the following terms:

“26. Objection to adjudication register

(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after further consultation and inquires as he thinks fit he shall determine the objection.

...

...

29. Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 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.

(3) When the appeals have been determined, the Director of Land Adjudication shall –

(a) **Alter the duplicate adjudication register to conform with the determination; and**

(b) Certify on duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication registrar accordingly.

(4) Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap 2) or any other written law, the Minister may delegate, by notice in Gazette, his powers to hear appeal and his duties and functions under this section to any public officer by name, or the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

13. At the outset, by virtue of subsection 4 of section 29 of the Act, the objection by the Ex-parte Applicant as to the jurisdiction of the District Commissioner Baringo to hear and determine the appeal for the decision of the Land Adjudication Tribunal is without merit. The Ex-parte Applicant has also very improperly sneaked in evidential statements by way of submission statement by Counsel rather than by Verifying Affidavit of the statement upon which the Judicial Review application is founded. See Court of Appeal decision in **Douglas Odhiambo Apel & Anor. v. Telkom (K) Ltd [2014] eKLR** that evidence cannot be supplied by the pleadings or the submissions.

14. It is clear from the finding of the District Commissioner on Appeal No. 130 of 1996 that he was aware that the Lands subject of the Appeal had been registered. The full text of the District Commissioner's finding is set out below:

"FINDINGS

The respondent in this case Sokome Kipkebut is a female adult but aged. However it is alleged by her grandchildren that she is senile.

In the circumstances therefore she was represented by Geoffrey Kemboi having been given leave to do so after swearing an affidavit before the Commissioner of Oaths.

*The appellant in his statement confirmed that the Land Adjudication team arrived in the area in the year 1975. Thereafter a notice was given to all land owners to prepare their boundaries for demarcation. It was during this time that the appellant registered this land in his name without any complaint from the respondent. **Having visited the disputed land, I established that the appellants' land was registered as parcel number 595 of which the disputed area i.e parcel number 3162 was inclusive during the land demarcation exercise.***

However, upon cross examination of both disputing parties on the ground, I realized that the appellant in this case, Joseph Kimngochoch fenced the disputed piece of land earlier in the year 1965 a fact which was evident from the old indigenous trees which he had used to securely fence the area before the respondent arrived in the area. I've also established that the respondent has her own land registered in her full names as parcel Number 613 and that the said land borders with the appellant's land.

Nevertheless, I also established from neighbours some who are as old as 80 years and they confirmed to me that the disputed land belonged to the appellant ever since they came to the area.

The respondent's representative's argument that the land belonged to Sokome Kipkebut could not hold any water since he only relied on a story he alleged to have been told and that he had very little knowledge about the history of the disputed land, since he was not born by the time the appellant acquired possession of the land from his parents.

The respondent's representative was challenged by the appellant as to why he could not allow Sokome Kipkebut the main respondent in this case to give evidence since she knew the whole truth, but surprisingly he brought an interesting twist to this case by alleging that Sokome Kipkebut was senile although I realized that she could recall some issues during the hearing of this case. According to the evidence that I gathered from both parties, their witnesses and neighbours that I interrogated on the ground, I established this the decision reached by the Land Adjudication Officer to excise part of the appellant's land and award to the respondent was not genuine since he did not gather enough evidence."

15. Further, the Green Card register on the suit parcel of land **Baringo/Kapchomuswo "A"** 3162 shows the Ex-parte Applicant registered as proprietor but subject to a restriction as Entry No 2 dated 15/11/2004 that **"Except by the Orders of the Chief, Land Registrar no dealing should be registered against the title until the appeal is to the Minister is finalized."**

16. There is, in my view, no inconsistencies in a Minister or his delegate, District Commissioner, proceeding to hear and determine a pending appeal which is the subject of a restriction noted on the register, even after the registration of a parcel of land under the Registered Land Act. Such process is stipulated under section 28 of the Land Adjudication Act as follows:

"28. Action by Chief Land Registrar

Upon receiving the adjudication register under [section 27](#) of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register:

Provided that, where the land is affected by an appeal under [section 29](#) of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination."

17. Indeed, section 136 of the Registered Land Act (now Repealed) anticipates the registration of the restrictions on the register and under subsection (3) thereof as follows:

“The Registrar shall make a restriction in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.”

18. Upon determination of the Appeal to the Minister under section 29(1) of the Land Adjudication Act, which decision is final, the matter of adjudication is finalized in terms of section 29(3) of the Act as follows:

“3. When the appeals have been determined, the Director of Land Adjudication shall-

a. Alter the dispute adjudication register to conform with the determinations; and

b. Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication, register accordingly.”

19. Although the registration of a parcel of land in accordance with the Adjudication Register, is authorized, even where there is an appeal under section 29 of the Land Adjudication Act, it made clearly subject to the determination of the appeal by the Minister. It would be absurd, if as suggested by the Ex-parte Applicant, a Minister or District Commissioner who was seized of an appeal from an adjudication lodged by a party aggrieved by the said adjudication in favor of another would, upon registration of a parcel of land in the name of the latter, cease to have jurisdiction over the appeal when such registration is by the statute responsible for the adjudication of claims of land expressly made subject of the determination of such an appeal. I would agree that the registration of the parcel of land and the rights thereby accruing only crystalize upon the final determination of the appeal(s) which the registration of the parcel of land is expressly made subject by the Statute.

20. I would, therefore, respectfully, agree with the dictum of Ongudi, J. in ***R. v. Minister of Lands and 2 Ors, Ileri Ngiri and 10 Ors. Ex-p*** [2013] eKLR that:

“One cannot claim to be a registered owner when there is pending appeal to the Minister. The appeal to the Minister herein is the final Order in the process of adjudication. One can only comfortably claim ownership after the .whole process is through with no appeal to the minister. But as long as there is a pending appeal in the matter the matter is not through.”

21. Judicial Review is not concerned with the merits of the decision. See ***The Commissioner of Lands v. Kunste Hotel Ltd.*** C.A No. 234 of 1995. I respectfully adopt the application of the principle of process review rather than merits in ***Musyoka Kavingo v. The Minister for Lands and Settlement and Housing and another*** [2007] eKLR where Visram, J. (as he then was) observed:

“In Judicial Review application the court is not so much concerned with the merits of the decision, as it is with the process by which the decision was made. As long as the correct process in law was followed, the court cannot, and will not, interfere with decision itself. Here, I find that the Minister’s decision was made in accordance with the law, it is final and there is nothing to quash.”

22. The Ex-parte application may, of course, if so advised by his Legal Advisors, file an Article 40 constitutional application for protection of any property rights in the suit parcel of land before a competent court.

Orders

23. For the reasons set out above, the Ex-parte Applicant’s Judicial Review Application herein for an Order of Certiorari is declined with costs to the 2nd Respondent / Interested Party.

DATED AND DELIVERED ON THIS 24TH DAY OF JULY, 2018

EDWARD MURIITHI

JUDGE

Appearances:

M/s Gicheru & Co Advocates for the Ex-parte applicant

The Attorney General for the 1st Respondent

M/s M.K Chebii & Co Advocates for 2nd Respondent/ interested party