



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. JUDICIAL REVIEW NO. 19 OF 2015
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLE 40, 159 & 43

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 S. 8 & 9

AND

IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP

3 & 3 s. 11, 12, 13, 14, 15, 18, 19 AND 26

AND

IN THE MATTER OF AKAIGA LAND ADJUDICATION SECTION

AND

IN THE MATTER OF LAND PARCEL NO. 6988, 5172, 1742 AND 5578

REPUBLIC..... APPLICANT

VERSUS

THE ATTORNEY GENERAL..... 1ST RESPONDENT

THE DERMACATION AND SETTLEMENT OFFICER

AKAIGA LAND ADJUDICATION2ND RESPONDENT

THE AKAIGA LAND DISPUTES.....3RD RESPONDENT

THE LAND ADJUDICATION OFFICER AKAIGA LAND

ADJUDICATION SECTION.....4TH RESPONDENT

TARASILA NYOROKA.....1ST EX-PARTE/APPLICANT

DAVID LAIKURU MUKETHA.....2ND EX-PARTE/APPLICANT

JUDGMENT

1. The applicants Motion is supported by the averments set out in their affidavit of 2nd September, 2015 and the Motion is opposed by the interested party Michael Kalunde Muketha through his affidavit of service of 21st June 2016. The respondents did not file any response to the claim.

2. Case for the Applicants.

The case for the applicants is that Tarasila Nyoroka 1st Applicant is the owner of parcels of land No. 6988, 5578 and 5172, all at Akaiga Land Adjudication Section where as David Laikuru Muketha, 2nd Applicant owns parcels No. 1742 in the same place. The interested party is a brother of 2nd Applicant who owned parcel No. 1743 in the same section. Applicants aver that the interested party had sold his land No. 1743 at Akaiga adjudication section and he then went to Nairobi only to come back and file objection proceedings No. 494 in respect of parcel No. 6988. The decision in the matter was to the effect that Interested Party was to get;

- 5.30 acres in 6988
- 0.48 acres in 5172
- 0.04 acres in 1742
- 0.80 acres in 5578

Applicants contend that the decision is not in conformity with the rules of Natural Justice, and that the affected parcels of land belonged to applicant 's family who were not given a chance to defend their claim to the land.

In their submissions applicants state that there was no fair hearing as the owners of the land No. 6985, 5172 and 5578 were not given a chance to be heard and therefore ,1st Applicant was condemned unheard. It is also averred in the submissions that 3rd Respondent could not purport to distribute the property of a deceased when no letters of administration had been taken out.

3. Case for the interested party:

The Interested party on the other hand states that he is a biological brother of 2nd Applicant, that their father had given them land, 10 acres to interested party and 20 to 2nd Applicant and that their father had remained with 23 acres. When their father died they agreed to share their father's land as follows: 10 acres to interested party and 11.60 acres to 2nd Applicant. The interested party had then left the area to work elsewhere. When he came back, he found that the adjudication records were indicating that he was reported dead by 2nd Applicant. The 2nd Applicant had then caused the share of the interested party to be transferred to himself, some parcels of land he had sold, some he had had caused to be transferred to his wife, who is the 1st Applicant.

That was the basis upon which the interested party had filed the objection proceedings No. 494 before the District Land Adjudication Officer.

4. The Respondents case

The Attorney General filed a Notice of appointment in respect of 1st, 2nd and 4th Respondent on 16th October, 2015. On 5th November, 2015, Mr. Kiety for the said 1st, 2nd and 4th Respondents was given 30 days to file their response. This court revisited the issue and gave the Respondents more time to file response on 21st February 2017. None whatsoever has been filed. Equally no submissions have been filed. The court will therefore proceed to make a determination on the basis of the arguments advanced by the Applicants and the interested party only.

5. Analysis and findings

I have weighed all the arguments raised herein. The Applicants were aggrieved by the Land Adjudication Officer's decision of 23rd December 2014. That being the case, on what basis have the applicants sued the Demarcation and Settlement Officer? Further, who is the 3rd Respondent?, since in their documents, the applicants have identified him as AKAIGA LAND DISPUTES !. I can only say that there is no justification in bringing forth the case as against the 2nd Respondent. As for 3rd Respondent, that one is non-existent.

The bone of contention can be split into two areas. Firstly the applicants were aggrieved by the decision itself. Secondly they are also aggrieved by the decision-making process.

6. Merits of the decision:

The applicants have taken issue with the fact that in the objection No. 494, land meant for grand children of the deceased (father of 2nd Applicant and interested party) was given to the objector whereby that decision entailed the excision of some portions of land from parcel No. 6981, 5172, 1742 and 5575. This being a Judicial Review motion, it is trite law that the court would not deal with the **MERITS OF THE DECISION** but the **THE DECISION MAKING PROCESS** see **municipal council of mombasa vs. republic & umoja consultants ltd. civil appeal no. 185 of 2001** where the Court of Appeal held:-

“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 decision which would involve going into the merits of the decision itself.”

The Land Adjudication Officer derives his mandate from Section 26 (2) of the Land Adjudication Act which provides that;

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

7. The Applicants ought to have followed the legal mechanisms provided for under the act by lodging an appeal. It is therefore not for this court to analyse the decision of the Land Adjudication Officer to see if it has merits or not.

8. The decision making process:

Issues under this head are;

- i. Whether the rules of Natural Justice were flouted on the basis that the owners of parcels of land No. 6988, 5172, 1742 and 5578 (who included 1st Applicant) were not given a hearing.
- ii. Whether the Land Adjudication Officer erred in distributing land of a deceased person when there were no letters of administration of the estate.

9. Rules of National Justices:

It is averred by both applicants that 1st Applicant was not given a hearing during the objection proceedings yet she was the owner of parcels of land No. 6988, 5578 and 5172. A perusal of the

proceedings in objection No. 494, reveals that the father of 2nd Applicant and Interested party had died leaving 23 acres of land. He had earlier on given the two sons their respective shares. The deceased had apparently stated that the land was for his grand children, but when he died, the two sons agreed on how to share the 23 acres. Then 1st Interested party left the area for a long period of time. When he came back, he found that the land Register records were showing that he had died. His brother 2nd Applicant had then caused his (interested party's share) to be registered in the name of the 2nd Applicant's wife (who happens to be 1st Applicant) and other portions, he caused them to be in names of his grand children. When testifying in the aforementioned proceedings No. 494, the 2nd Applicant had stated as follows:-

“I don't have any land that belongs to him. Our father gave us both land in 1982. The portion of land that was left was neither in my account nor the objectors. When my father passed away in 1996, he was buried by his grand children not us. He said that the portion of land that was left was to be given to Kamejai and Khaembe, his grand children who were to be given that remaining land. I also gave my wife the rest for safe keeping. Instead of bringing his children, so I can give them land, he put a case against me....”

10. It is clear from this evidence that 2nd Applicant is the one who had caused the disputed parcels of land to be in his wife's name and that of his grandchildren. Strangely, nowhere does the 1st and 2nd Applicants identify themselves as husband and wife.

11. The point is, the owners of the affected pieces of land are close family members of the 2nd Applicant. The 2nd Applicant was aware that the dispute was concerning his father's land, the Land he had given to these family members. So why didn't the 2nd Applicant call these family members as his witnesses. After all he could manage to line up three witnesses namely zakayo Mutia, Bernard Ntoiti and Francis Michubu John during the objection proceedings which means he was given an opportunity to be heard..

12. The adjudication proceedings are anchored under the Land Adjudication Act (cap 284) where in the preamble it is stated that:

“An act of parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto”

Further, under Section 13 (2) of the Act

“Every person whose presence is required by the adjudication officershall attend in person or by a duly authorised agent...”

13. In the present case, the 1st Applicant happens to be the wife of the 2nd Applicant. I therefore consider that 1st applicant was duly represented by the 2nd Applicant. I conclude that the rules of natural justice were not violated.

14. Letters of Administration

Was a grant required for the Land Adjudication Officer to deliberate on the claim in respect of property of a deceased?

Again reference is made to the preamble of the Act. The purpose of the proceedings before the Land Adjudication Officer is to ascertain rights and interest in community land.

15. In *Tobias Achoda Osidi & 13 others vs.Cypriano Otieno Ogola & 6 others H.C.C.C NO.4 of 2011 (kisii)*, Judge Okongo observed that;

“A claim for an interest in land made under the Land Adjudication Act, Cap. 284, Laws of

Kenya , following the declaration of an area as an Adjudication Area or an Adjudication Section cannot be equated to a claim before this court. A claim under the Act pursuant to section 13 thereof can be made by “every person who considers that he has an interest in land within an adjudication section”. A claim under section 13 of the Act can be made by successors of a deceased person and not necessarily the deceased’s legal representatives.”

16. I therefore find that the contention by the applicants that the property of the deceased could only be distributed under a formal succession cause cannot hold.

17. In my conclusion, I find that the Judicial Review motion is unmeritorious. The same is dismissed with costs to the Respondents and the interested party.

DELIVERED, DATED AND SIGNED AT MERU THIS 30TH DAY OF MAY, 2017 IN THE PRESENCE OF:-

C:A Janet

Mutunga for Applicant

Waigwa Miss for Interested Party

Kiango for Respondent

HON. L. N MBUGUA

JUDGE