REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

J.R MISC. CIVIL APPLICATION NO. 5 OF 2014

(FORMERLY KERUGOYA J.R MISC CIVIL APPLICATION NO. 15 OF 2014)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF AN APPEAL TO THE MINISTER LAND APPEAL CASE NO. 149 OF 1996 MUNYI MBITI

AGAINST 16 CLANS

AND

IN THE MATTER OF MBEERE/KIRIMA LAND ADJUDICATION SECTION

AND

IN THE MATTER OF LAND PARCELS/TITLES NUMBER MBEERE/KIRIMA/2244/2968 AND 2244/4090

GODFREY MUNENE REPRESENTING MUNYI MBITI (DECEASED)

AND OTHERS………....…………..…………….…....……….APPLICANT

(AND ON BEHALF OF 59 OTHERS AS LISTED)

VERSUS

THE HON. ATTORNEY GENERAL ………......……….…..1ST RESPONDENT

MINISTER FOR LANDS…………......……….………..…..2ND RESPONDENT

THE COMMISSIONER OF LANDS…………..……….....3RD RESPONDENT

THE MBEERE DISTRICT ADJUDICATION OFFICER.....4TH RESPONDENT

THE LAND REGISTRAR MBEERE DISTRICT….......…..5TH RESPONDENT

AND

NELSON RUNJI NJIRA………………..…………...….INTERESTED PARTY

JUDGMENT

On 24th September 2012 the Applicant herein **GODFREY MUNENE** representing **MUNYI MBITI** (deceased) and on behalf of 59 others as listed, filed a Chamber Summons in EMBU HIGH COURT MISCELLANEOUS APPLICATION NO. 25 OF 2012 seeking the following orders:-

1. ***Spent***
2. ***Blank***
3. ***That leave be granted to the Applicants to apply for order of prohibition to issue bringing into this Court and prohibition (sic) the 2nd, 3rd, 4th and 5th Respondents from implementing the decision of the 2nd Respondent in Appeal No. 146 of 1996 on 24th May 2007 for allocating land to the Interested party when he was not even a party to the appeal.***
4. ***That leave be granted to the Applicants to apply for an order of certiorari to be issued bringing into this Court and quashing the decision of the 2nd Respondent dated 27th October 2011 in Appeal No. 258 of 2003 depriving the Applicants their property without a reasonable cause and for being reasonable (sic), irregular and against the rules of natural justice.***
5. ***That leave be granted to the Applicants to apply for an order of prohibition be issued bringing into this Court and prohibiting the 3rd, 4th and 5th Respondents from issuing a title in the names of the Interested party and in form of the Green Card issued on 18th May 2012 granting the said Interested party 54.410 Ha which is not a reflection of the 2nd Respondent's decision delivered on 24th May 2007 in Appeal Case No. 146 of 1996 pending the hearing of this application.***
6. ***That leave be granted to the Applicants to apply for an order is (sic) issued against the 3rd, 4th and 5th Respondents revoking and/or quashing their unfounded decision to issue Green Card No. MBEERE/KIRIMA/2968 in the name of the Interested party and against the 2nd Respondent's finding in Appeal Case No. 146 of 1996.***
7. ***That leave be granted to the Applicants to apply for an order of prohibition be issued bringing into this Court and barring the Interested party herein and the Land Registrar Mbeere District from commencing the process of land alienation, demarcation, transfer and registration in the suit titles number MBEERE/KIRIMA/2968 as a sub-division from MBEERE/KIRIMA/2244 in pursuance of the decision made on 27th May 2007 in Appeal No. 149 of 1996.***
8. ***Blank.***
9. ***That grant of leave does operate as a stay of processing of land titles in parcel being titles number MBEERE/KIRIMA/2968 and 4096 as a sub-division from MBEERE/KIRIMA/2244 in pursuance of the decision made on 24th May 2007 in Appeal Number 149 of 1996 to the Interested party pending the hearing of this application.***
10. ***That the costs of this application be provided for.***

That application for leave, accompanied with the relevant statement of facts and affidavit verifying the same, was placed before **Ong'udi J.** the same day and the Judge promptly made the following orders:-

> ***"Before me is the application (Chamber Summons) dated 24.9.12 for leave to file Judicial Review for orders of prohibition and certiorari against the Respondents. The decision complained of was made on 24.5.07. Under Order 53 Rule 2 Civil Procedure Rules, leave to file Judicial Review for an order of certiorari should be made not later than 6 months after the making of the decision being complained of. Because of the order of prohibition sought, I shall grant the leave sought. The Substantive Motion to be filed and served within 21 days. The stay sought is not granted"***

That order by **Ong'udi J**. clearly meant that the applicant was only granted leave to institute Judicial Review proceedings for prohibition and no more. Indeed the order extracted and signed by the Deputy Registrar on 24th September 2012 reads as follows:-

ORDER

> ***"This matter coming up for directions under certificate of urgency before H.I. Ongu'di Judge this 24th September 2012***

IT IS HEREBY ORDERED:-

1. ***That leave be and is hereby granted to the Applicant to apply for order of prohibition be issued bringing into this Court and prohibition (sic) the 2nd, 3rd 4th and 5th Respondents from implementing the decision of the 2nd Respondent in Appeal No. 146 of 1996 on 24th May 2007 for allocating land to the Interested party when he was not even party to the appeal.***
2. ***That the substantive motion to be filed and served within 21 days"***

Notwithstanding those clear orders, when the applicants filed the Substantive Notice of Motion on 15th October 2012 it still contained prayers for certiorari in the following paragraphs:-

2: That an order of certiorari be issued bringing into this Court and quashing the decision of the 2nd Respondent dated 27th October 2011 in appeal No. 258 of 2003.

3: That an order be issued against the 3rd, 4th and 5th Respondents revoking and/or quashing their unfounded decision to issue Green Card number MBEERE/KIRIMA/2968 in the name of the Interested party and against the 2nd Respondent's finding in appeal case number 146 of 1996.

This Court obviously cannot now interrogate the prayer for certiorari as leave was not granted and to do so would have been in violation of the law. From the statement of facts and affidavit verifying the same, the applicant **GODFREY MUNENE** brings this application on behalf of the 59 applicants as their chairman and previously, the applicants and himself were represented by **MUNYI MBITI** (now deceased) being their chairman in the Minister's Appeal Case Number 146 of 1996. It is his case that the Minister's Appeal in Case Number 146 of 1996 was done without due regard to proceedings and the interested party was awarded land yet he was not even a party to those proceedings. That those proceedings do not even indicate the number of acreage that each party was awarded and as such, the award by the 3rd and 4th respondents was biased and without basis. The award was therefore a breach of the principle of due process and the rules of natural justice and therefore the 3rd, 4th and 5th respondents acted ultra vires in awarding the interested party 54.410 Ha. That the 3rd, 4th and 5th respondents did not give the applicants a hearing before implementing the decision of the Minister in Appeal Case No. 146 of 1996 and if that decision is implemented and title to MBEERE/KIRIMA/2968 and 4090 is processed as reflected in the Green Card, it will defeat the rules of natural justice and cause great injustice to the applicants. Annexed to the said affidavit are the proceedings and findings in the Minister's Appeal Case No. 149 of 1996, the list showing the members of the Ngithi Clan represented by **MUNYI MBITI**, the death certificate of **MUNYI MBITI** and the Green Card with respect to parcels No. MBEERE/KIRIMA/2968 and 4090.

The interested party **NELSON RUNJI NJIRA** filed a replying affidavit in response to the application in which he deponed, inter alia, that the leave granted was in respect to the Minister's Appeal Case Number 149 of 1996 yet the matters herein were the subject of Judicial Review Application Number 17 of 2007 which was dismissed with costs on 19th July 2010 under a ruling a copy of which is annexed (NRN 1). A notice of appeal was filed but no appeal was prosecuted and therefore this application is res-judicata and an abuse of the process of the Court. That the parcel of land designed as MBEERE/KIRIMA/2244 belonged to the seventeen (17) clans of the Mbeere Clan which was being held in trust by the County

Council of Embu but later reverted to the clans and it was agreed that each clan make a claim for their respective portions of land. That both he and the applicant belong to the Ngithi Clan which was represented by **MUNYI MBITI** in the Minister's Land Appeal Case Number 149 of 1996 and both he and **MUNYI MBITI** were awarded land. As a result land parcel number MBEERE/KIRIMA/2244 which measured about seven thousand (7000) acres has since been sub-divided into numerous parcels and he was awarded parcel number MBEERE/KIRIMA/2968 while **MUNYI MBITI** was awarded parcel number MBEERE/KIRIMA/4090. That the award by the Minister in appeal case number 149 of 1996 was made in compliance with the law and the laid down procedures under the Land adjudication Act and the Applicant has not demonstrated how the rules of evidence and/or procedure were breached nor was there a violation of the rules of natural justice and the applicant is only seeking to appeal the Minister's decision through these proceedings. Also, annexed to the replying affidavit is the notice of appeal with respect to the decision of **Wanjiru Karanja J.** (as she then was) in Judicial Review Application Number 12 of 2007 and a copy of the register in respect of parcel number MBEERE/KIRIMA/2244 – see annextures **NRN 2** and **NRN 3** respectively.

On 15th October 2014 **Bwonwonga J**. allowed all the parties to file further affidavits. However, no affidavits were filed by the 1st to 5th respondents but the applicant filed a further replying affidavit in which he clarified that the Minister's Land Appeal Case No. 149 of 1996 was the subject of an appeal that emanated from the ruling in objection number 172/83, 572/83 and 1130/83 which were annexed.

I have considered the application, the rival affidavits and statement as well as the submissions by counsel for the applicant, the respondent and the interested party.

The interested party has deponed in paragraph eleven (11) of his replying affidavit that the matters raised in this Judicial Review application were directly and substantially in issue in Judicial Review Application No. 12 of 2012 which was dismissed with costs on 19th July 2010. In his submissions, the interested party's counsel Mr. Muyodi has stated that the applicant herein has filed this application as the representative of the deceased **MUNYI MBITI** who was the applicant in Judicial Review Application No. 12 of 2012 and the matters in question are substantially the same and arise from the Minister's Land Appeal Case No. 149 of 1996. Further, this application is confusing and mis-leading in that in some sections, it indicates that the impugned decision is the Minister's Appeal Case No. 149 of 1996 while in other portions, it makes reference to the Minister's Appeal Case No. 149 of 1996 and 258 of 2003. However, counsel for the Applicant Mr. Kamunda has submitted that the applicant in this application has filed it in his capacity as the chairman and representative of the applicants while **MUNYI MBITI** filed Judicial Review Application No. 12 of 2007 on his own behalf and not on behalf of the Ngithi Clan. Further, that the grounds relied upon in Judicial Review Application are different from those relied upon in this application.

Res-judicata is provided for in ***Section 7 of the Civil Procedure Act*** in the following terms:-

> ***"No Court shall try a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"***

Section 7 of the Civil Procedure Act then goes on to give six (6) explanations as to how those provisions should be construed. In Explanation 6, it is provided as follows:-

> ***"Where persons litigate bona file in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating"***

It is common ground that the interested party herein was also a party in Judicial Review Application No. 12 of 2007 which was dismissed with costs on 19th July 2010 by **Wanjiru Karanja J**. (as she then was). It is also clear from that ruling that the orders being sought were to quash the decision in the Minister's

Appeal Case No. 149 of 1996. I agree with Mr. Muyodi advocate for the interested party that in the application subject of this judgment, the applicant's reference to both the Minister's Appeal Cases No. 149 of 1996 and 146 of 1996 is only meant to confuse the Court and the matters in this Judicial Review Application and Judicial Review Application No. 12 of 2007 are substantially the same and that is the Minister's Appeal Case No. 149 of 1996. Mr. Kamunda advocate for the applicant has submitted that the matters directly and substantially in issue in Judicial Review Application No. 12 of 2007 are fundamentally different from those sought by the applicant in this Application. However, under ***Explanation 4 of Section 7 of the Civil Procedure Act,*** it is provided as follows:-

> "***Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit"***

Even from a casual glance of Judicial Review Application No. 12 of 2007, it is clear that the matter directly and substantially in issue was the Minister's Appeal Case No. 149 of 1996 in so far as it related to the land parcel No. 2244. That is the same land parcel the subject of this Application. Counsel for the applicant has submitted, without illustrating, that the grounds relied upon in Judicial Review Application No. 12 of 2007 are fundamentally different from those raised in this Application. As I have indicated above, the matters directly and substantially in issue in this Application were the same matters directly and substantially in issue in Judicial Review Application No. 12 of 2007. If there were some matters which should have been raised but were not raised in Judicial Review Application No. 12 of 2007, then ***Explanation 4 of Section 7 of the Civil Procedure Rules*** would bar the raising of those issues in this Application. In ***POP-IN (KENYA) LTD & 3 OTHERS VS HABIB BANK A G ZURICH CIVIL APPEAL NO. 80 OF 1988,*** the Court of Appeal cited ***WIGRAM VC in HENDERSON VS HENDERSON (1843) HARE 100 where*** the Judge said:-

> "***Where a given matter become the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, in-advertence or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time"***

It is of course correct that in Judicial Review Application No. 12 of 2007, the applicant was **MUNYI MBITI** while in this Application the applicant is **GEORGE MUNENE** representing **MUNYI MBITI** (deceased) and fifty nine (59) others. Counsel for the applicant has therefore submitted that this Application is not res-judicata because the parties are not the same. The answer to that submission is found in ***Explanation No. 6 of Section 7 of the Civil Procedure Act***. While **MUNYI MBITI** (deceased) may have filed Judicial Review Application No. 12 of 2007 on his own behalf, it is clear from the citation of this Application that it is brought by the applicant as representing **MUNYI MBITI** (deceased) and also on behalf of fifty nine (59) others. In paragraph two (2) of the applicant's verifying affidavit, he has deponed as follows:-

> ***2: "That in the proceedings in the Minister's Appeal Case Number 146 of 1996 the applicants and I were represented by MUNYI MBITI as their chairman, now deceased and I was subsequently elevated the chairman and the subsequent representative in these proceedings"***

It is obvious, therefore, that not only was the applicant herein aware about Judicial Review Application No. 12 of 2007 in which he was represented by **MUNYI MBITI** (deceased) but further he (Applicant) has now taken over the matter from **MUNYI MBITI** in filing this Application on behalf of fifty nine (59)

others which relates to the same matters that were in issue in the previous Application. The applicant herein is not only litigating under **MUNYI MBITI** (deceased) over the same subject matter but was also represented by the said **MUNYI MBITI** (deceased) in Judicial Review Application No. 12 of 2007 in which the subject matter directly and substantially in issue is also the subject matter directly and substantially in issue in this Application. It is clear to me that this application is res-judicata.

I have given the plea of res-judicata ample consideration in this Application because it is a matter affecting the Court's jurisdiction and I therefore found it prudent to determine it in limine before getting into the merits of the Application itself. And having done so, I am satisfied from the material before me that this Application is indeed res-judicata as the matters directly and substantially in issue in this Application were directly and substantially determined in Judicial Review Application No. 12 of 2007 involving the same parties or those claiming under them. In the circumstances, this Application being res-judicata, it must be struck out with costs.

Notwithstanding my findings above, I have considered the merits of this Application which, as I have already held above, can only be confined to the remedy of prohibition. The orders sought by the applicant herein with regard to prohibition are:-

1. ***That an order of prohibition be issued bringing into this Court and prohibiting the 3rd, 4th and 5th respondents from issuing a title in the name of the interested party and a form of the Green Card issued on 18th May 2012 granting the said interested party 54.410 Ha which is not a reflection of the 2nd respondent's decision delivered on 24th May 2007 in Appeal Case No. 146 of 1996 pending the hearing of this application.***
2. ***That an order of prohibition be issued bringing into this Court and barring the interested party herein and the Land Registrar Mbeere District from commencing the process of land alienation, demarcation, transfer and registration in the suit titles number MBEERE/KIRIMA/2968 as a sub-division from MBEERE/KIRIMA/2244 in pursuance of the decision made on 24th May 2007 in Appeal number 149 of 1996.***

3. ***That an order of prohibition be issued bringing into this Court and prohibiting the 2nd, 3rd, 4th and 5th respondents from implementing the decision of the 2nd respondent in Appeal number 146 of 1996 on 24th May 2007 for allocating land to the interested party when he was not even a party to the appeal.***

The interested party's response to the above claims is found in paragraphs 29 and 30 of his replying affidavit in which he has deponed as follows:-

> ***29**: "That land parcel number MBEERE/KIRIMA/2244 which originally measured about 7000 acres has since been sub-divided into numerous parcels and the register to the said land was closed on 7th April 2008. Annexed is a copy of register for MBEERE/KIRIMA/2244 marked NRN 3"*
>
> ***30: "That as per the Minister's Appeal number 149 of 1996, I was awarded land parcel number MBEERE/KIRIMA/2968 while the deceased Munyi Mbiti was awarded land parcel number MBEERE/KIRIMA/4090"***

Judicial Review is concerned, not with the merits or otherwise of the decision arrived at, but rather, with the process by which the decision maker arrived at the said decision. It is also settled that the Judicial Review remedy of prohibition will not issue where the decision complained of has already been made. In ***REPUBLIC VS KENYA NATIONAL EXAMINATION COUNCIL EX-PARTE GATHENJI & OTHERS C.A CIVIL APPEAL NO. 260 OF 1996***, the Court of Appeal said as follows with regard to the remedy of prohibition:-

> ***"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be***

obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision"

Only an order of certiorari can quash a decision already made but as I have already stated above, no leave was granted to move this Court to seek a remedy of certiorari because the application was filed after the six (6) months period provided for under the law. The land parcel number MBEERE/KIRIMA/2244 which was the subject of the Minister's Appeal Case No. 149 of 1996 no longer exists as it has since been sub-divided into numerous parcels as is clear from the copy of register annexed to the interested party's replying affidavit – see annexture **NRN 3.** That title was closed on 7th April 2008 and the interested party was awarded the parcel number MBEERE/KIRIMA/2968 and **MUNYI MBITI** (deceased) was awarded land parcel number MBEERE/KIRIMA/4090. This Court would therefore be acting in vain if it issued the prohibitory orders being sought herein. Courts, as it has been stated before, do not and should not act or be seen to be acting in vain. Therefore even if this application was to be considered on its merits, it would fail because the remedy sought is not available to the applicant since the decision sought to be prohibited has already been made.

Ultimately however, having found that this Application is res-judicata, the Notice of Motion dated 5th October 2012 and filed herein on 25th October 2012 is struck out with costs to the interested party.

B.N. OLAO

JUDGE

11TH MARCH, 2016

Judgment delivered this 11th day of March 2016 in open Court

Ms Muthoni for Ms Thungu for the Applicant present

Ms Muthike for Mr. Okwaro for the Interested party present

Mr. Nyaga Court clerk present

Right of appeal explained.

B.N. OLAO

JUDGE

11TH MARCH, 2016