



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JR MISC 44 OF 2012

**IN THE MATTER OF APPLICATION BY NDENGEI NGULI FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI**

AND

**IN THE MATTER OF THE DECISION BY THE RESIDENT MAGISTRATE AT SENIOR
RESIDENT MAGISTRATE COURT AT WANG'URU IN MISCELLANEOUS APPLICATION
NO. 3 OF 2012**

AND

IN THE MATTER OF THE TRUST LANDS ACT CHAPTER 288 LAWS OF KENYA

AND

IN THE MATTER OF THE IRRIGATION ACT CHAPTER 347 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

THE HON. THE ATTORNEY GENERAL

RESIDENT MAGISTRATE AT THE SENIOR

MAGISTRATE COURT AT WANGURUDEFENDANTS

AND

NDENGEI NGULI.....EX-PARTE APPLICANT

AND

PETRONILA WARUI NJERU..... 1ST INTERESTED PARTY

ESTHER KABUKU..... 2ND INTERESTED PARTY

RULING

1. Ndengei Nguli, the *ex-parte* applicant is seeking an order of certiorari to quash the order of the magistrate's court in this judicial review application, which was brought by way of notice of motion. According to her, the learned Resident Magistrate acted *ultra vires* his powers in making the order complained of in the court of the Senior Resident Magistrate at Wanguru in Misc App No. 3/12.
2. According to her notice of motion, the learned magistrate acted in contravention of the statutory provision of the Irrigation Act (Cap 347) Laws of Kenya. She has further stated that the learned magistrate overreached his mandate by making the order which in her view can only be made by the High Court. She also submits that the learned magistrate usurped the administrative functions of the National Irrigation Board in making the order and as a result the applicant lost her beneficial interest in land reference No. Rice Holding No. 2649.
3. In her verifying affidavit she has stated that the matter arose from Misc Succ No. 19/10 in which the *ex-parte* applicant was the objector. The outcome of those objection proceedings was that she lost the suit because the court found that she was not entitled as a beneficiary in the suit land. She never challenged the judgement of the succession court. That succession court ordered Kabuku Ikui the wife of Ikui Kabibia Mukiti to be registered as successor of land reference Rice Holding 2649. That judgement was delivered on 2nd August 2011.
4. As a result Kabuku Ikui was registered as the owner of the said suit land and was recognized as such by the National Irrigation Board. Subsequently, Petronila Warui Njeru, first Interested Party advanced a loan to Esther Kabuku, the 2nd Interested Party, who failed to repay the loan. As a result, the first Interested Party filed a recovery suit in Wanguru Senior Resident Magistrate's Court Misc App No. 3/12. During the pendency of the recovery suit, the parties entered and recorded a consent order which was adopted as an order of the court. The effect of that consent order was that the 1st Interested Party became the registered owner of part of the suit land which was owned by Kabuku Ikui. It should be noted that the *ex-parte* applicant was not a party to those recovery proceedings.
5. She now submits that the order following the adoption of the consent order by the court was tainted with fraud and should be set aside. According to her, the conduct of the parties therein was to transfer part of the suit land to the 1st Interested Party through the back door, which did not have the approval of the National Irrigation Board. It is for this reason that she now applies to have the order of the magisterial court to be set aside.
6. The 1st respondent (Hon. A.G) has opposed the *ex-parte* applicant's application. According to him, judicial review is concerned with the process of reaching a decision. It does not concern itself with the merits or the demerits of the decision itself. He further submitted that a consent judgement such as the instant one, that is now the subject of the judicial review, can only be set aside on the same grounds that will justify the setting aside of a contract on grounds of fraud, mistake or misrepresentation. A consent judgement of cannot be a subject of judicial review. In that regard, he cited ***Flora Wasike v. Destino Wamboko (1982 – 88) 1 KAR 625*** and ***Brook Bond Lieberg (T) Ltd v. Mallya (1975) EA 266*** and ***Kafuma v. Kimbowa Builders and Contractors (1974) EA***. In other words, a consent judgement can only be challenged by way of filing a plaint and the production of oral (viva voice) evidence.
7. I have considered the affidavit evidence of the parties, their rival submissions and the authorities cited. I find that the judgement or order complained of was adopted as an order of the court following the application of the interested parties to the magisterial court. From that consent judgement, a decree was extracted, signed and sealed. In the circumstances, I accept the principles pronounced in the above cases that the only way to challenge a consent judgement is to proceed by way of a plaint and of tendering oral evidence. To challenge such a judgement by way of judicial review will not be effective. The reason being that in order to establish fraud, oral evidence has to be produced. And the production of oral evidence cannot be done through the judicial review process.
8. Furthermore, the magisterial court whose order is complained of, was vested with jurisdiction to hear and determine the matter. In doing so, I find that the magistrate's court did not exceed its jurisdiction.

The *ex-parte* applicant was not a party to the judgement that gave rise to the instant judicial review proceedings. I therefore find that the *ex-parte* applicant is a busy body, who should not be allowed to engage in litigation such as the instant one.

9.The upshot of the above is that the application for the orders sought is hereby dismissed with costs to the interested parties and the 1st respondent.

RULING DELIVERED, DATED and SIGNED at EMBU this 26th day of April 2016.

In the presence of the ex parte Applicant and in the absence of both the 1st Respondent and the interested parties

Court clerk Njue

J.M. BWONWONGA

JUDGE

26.04.16