



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

JUDICIAL REVIEW NO 51 OF 2011

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND ADJ & SETTLEMENT OFFICER,

IMENTI SOUTH DISTRICT.....RESPONDENT

PATRICK RIUNGU.....1ST INTERESTED PARTY

JAPHET MWENDA.....2ND INTERESTED PARTY

JUSTUS MURIUKI MUTHURI.....3RD INTERESTED PARTY

ARON GITONGA.....4TH INTERESTED PARTY

JACKSON KIRAGU.....5TH INTERESTED PARTY

DANSON NKONGE.....6TH INTERESTED PARTY

SIMON NKONGE.....7TH INTERESTED PARTY

M'ITONGA M'RACI.....8TH INTERESTED PARTY

IKIARA BURURIA.....9TH INTERESTED PARTY

MURIANKI NCURAI.....EX-PARTE APPLICANT

J U D G M E N T

1. The Notice of Motion apposite to this suit is dated 2nd August, 2011 it seeks orders:-

1. That an order of certiorari do issue to remove to this High Court the decision of the land Adjudication officer, Imenti South district made on 15/04/2011 in Objection Nos. 765, 766, 767, 768, 769 770, 771 773, 774 and 776 representing L.R. NO. MWERU 111 Adjudication Section Nos. 547, 548, 549, 554, 560, 554, 560, 561, 563 and 853 and to quash the same and all orders made thereon.

2. The Respondent and the interested parties do pay the costs of the motion.

2. It states that it relies on the statement of facts, the Verifying Affidavit and the following grounds:-

a. The Respondent visited the parcels in dispute in the absence of the Ex-parte applicant and without notification or summoning the Ex-parte applicant.

b. The Respondent denied the Ex-parte applicant the opportunity to challenge the evidence he collected when he visited the parcels, thereby breached a basic principle of Natural Justice.

c. The Respondent's decision was unreasonable and unfair as he did not put into consideration the evidence in support of the Ex-parte applicant from persons with knowledge of the land.

d. The Respondent conducted the proceedings and made the decision without the aid of a committee.

3. The Applicant was granted leave by the Hon. Justice Lesiit on 12/07/2011 and the said leave was to operate as stay.

4. The Application was canvassed by way of Written Submission.

5. The Applicant has submitted that:-

a. The Objections were heard by the Land Adjudication Officer without the participation of a Committee as required by Section 26 of the Land Adjudication Act.

b. The Respondent visited the subject land in his absence and hence denied him an opportunity to cross-examine the witnesses and to challenge any evidence collected during the visit. He says that the claim by the Interested Party that the hearing was conducted on 4/4/2011 and on the same day the parties were given 06/04/2011 as the date of the visit is not supported by any record. He says that this is contrary to Section 12 of the Land Adjudication Act which requires the Land Adjudication Officer when hearing objections to, as far as practicable, follow the procedure which is observed in the hearing of Civil suits. He opines that the donation under Section 12 of the Act to call evidence that may not be admissible in a Court of law does not extend to excluding any party to the proceedings.

c. The exparte applicant Submits that the opportunity to appeal to the Minister in the event of being dissatisfied with the decision of the Land Adjudication Officer does not deprive the applicant of the right to move the Court by way of Judicial Review, where it is clear that the process was irregular and unfair. He opines that the process of Judicial Review exists in order to enable the High Court to exercise its supervisory authority over Subordinate Courts and all other bodies or persons exercising quasi Judicial functions.

6. The exparte applicant opposes the grounds filed by the respondent and urges the Court not to consider them at all. He submits that in Judicial Review, there is no provision for filing of grounds of opposition and that they are only filable under Order 51 of the Civil Procedure Rules which do not apply to Judicial Review Proceedings Under Order 53 of the Civil Procedure Rules. In support of this assertion, the exparte applicant has proffered the cases of SAMUEL MASHIYA MUKALI (APPLICANT) VERSUS SHINYALU LDT AND SISIKO MUHATI SHIVONYE (Interested Party) eKLR and WELAMONDI VERSUS THE CHAIRMAN ELECTORAL COMMISSION OF KENYA, JR. NO. 81 OF 2002, KLR page 456.

7. The exparte applicant proffered the case of FRANCIS LINGULI and DISTRICT LAND ADJUDICATION OFFICER, JR NO. 56 OF 2010, (MERU) where the Court quashed the decision of the Land Adjudication Officer when he had acted autonomously without the input of a Committee.

8. The Interested Party opines that the circumstances and facts in JR NO. 56 OF 2010 (Meru (op.cit) are similar to those ones of this case. The exparte applicant urges the Court to quash the decision herein and direct that the objections be heard before another officer with the aid of a Committee.

9. The raised grounds of objection dated 29th July, 2013 state as follows: -

a. That the Respondent acted within the required legal parameters in dealing with the relevant claims.

b. Judicial Review remedies are discretionary and the Court should decline to grant them depending on the circumstances of each case and considering the effect of granting the orders.

The ex parte -applicant had urged the Court to disregard these objections on the ground that it is only Order 53 that applies to Judicial Review Proceedings and that grounds of opposition fall under Order 51 of the Civil Procedure Rules. I opine that the apposite grounds of opposition are nebulous and too general for the Court to consider. I will not take them into consideration. In any case their general tenor is embraced by the Respondent's Submissions.

10. The Respondent submits that the respondent acted within the law when dealing with the Objection proceedings. He says that Section 12(1) gives him absolute discretion to admit evidence which would not be admissible in a Court of law and also allows him to use evidence adduced in another claim or contained in any record. Section 12 (1) also says that he may call evidence of his own accord.

11. The Respondent argues that grounds relied upon by the ex parte applicant are challenging his decision on merits rather than addressing the decision making process. He proffers the Court of Appeal case of Commissioner of Lands Versus Kunste Hotel -Nakuru Civil Appeal No. 234 of 1995 where the Court opined as follows:-

“The purpose of Judicial Review is to ensure that the individual receives fair treatment reaches and not to ensure that the authority after according a fair treatment reaches on a matter which is authorised by law to decide for itself a conclusion which is correct”.

12. The Respondent in his Submissions includes two lengthy paragraphs which say in the statement of facts the ex parte applicant seeks an order of mandamus. I outrightly declare that this Court will not consider these Submissions because the Notice of Motion that spawns the parties' Submissions only seeks an order of certiorari.

13. The Respondent submits that the only remedy available to the applicant is to lodge an appeal to the Minister. He argues that Judicial Review remedies are sought only in exceptional circumstances in which category this application does not fall.

14. The Respondent urges the Court to dismiss the application with costs.

15. The Interested Parties submit that this application is fatally defective as it shows that Murianki Ncurai is the applicant. They argue that this Court should not proceed to make judgment or a ruling on a defective application. They submit that this is not a mere technicality and say that this infraction concerns the substance of the application. In support of this assertion, they proffer the authority of *FARMERS BUS SERVICE AND OTHERS VERSUS THE TRANSPORT APPEAL TRIBUNAL-COURT OF APPEAL CIVIL APPEAL NO. 63 OF 1959*.

16. The Interested Parties submit that the proceedings before the Land Adjudication Officer show that the parties to the dispute gave evidence which was recorded and parties were allowed to ask questions whose answers were recorded. They say that the Plaintiff's 3 witnesses gave evidence and were cross-examined by all objectors.

17. The Interested Parties say that the only ground the ex parte applicant can rely upon is that the apposite hearings were heard by the Land Adjudication Officer without the assistance of a Committee. They submit that the non-Constitution of a Committee by the Land Adjudication Officer is a fault that can not be meted against innocent Interested Parties.

18. They submit that much as the Court may quash the proceedings herein on the ground that the Land Adjudication Officer handled the proceedings without a Committee, they pray that the Interested Parties be not condemned to pay costs since it is not their fault that a Committee was not constituted by the Land Adjudication Officer as the law requires.

19. On the Submission that the Interested Parties should not be condemned to pay costs because it was not their fault that the Land Adjudication Officer had failed to Constitute a Committee, the Interested Parties have proffered the following cases:-

i. FRANCIS LINGULI VERSUS THE DISTRICT LAND ADJUDICATION OFFICER, TIGANIA DISTRICT & JULIUS MARETE-JR NO. 56 OF 2010 (MERU).

ii. REPUBLIC VERSUS TIGANIA EAST DISTRICT ADJUDICATION & SETTLEMENT OFFICER & ANOTHER VERSUS GERVASIO MUGAMBI THITURA EXPARTE FLORENCE NKIO PHILIP-HC MISC APPL. NO. 58 OF 2009.

iii. REPUBLIC VERSUS LAND ADJUDICATION OFFICER IGEMBE/TIGANA DISTRICT & JOSPHAT M'NCHEBERE M'THAE -HC MISC.APPL. NO 101/2008.

20. The respondent responded to the Submission made by the Respondent and the Interested Parties. He says that the Kenya Constitution 2010 ushered in a new dispensation and that Article 159 (2) (d) decreed that justice shall be delivered without undue regard to procedural technicalities. He says that the titling of his motion was a procedural technicality and that the authority of Farmers Bus Services & Others Versus The Transporting Licensing Appeal Tribunal can not now continue to be good law in view of the provisions of the present Constitution.

21. The exparte applicant has submitted that the subject matter being land, the jurisdiction of the Court to deal with the matter is derived from both the Constitution and the Environment and Land Court Act. He points out that Section 18 (c) enjoins the Court to be guided by the principles of judicial authority circumscribed by Article 159 of the Constitution. He submits that the matters raised by the Respondent as to the format of the application are matters of technicalities and do not assist the Court in addressing the real issues in dispute.

22. The exparte applicant submits that the Interested Parties have conceded that no Committee was constituted by the Land Adjudication Officer and opines that this fact alone is sufficient to move the Court to grant the reliefs sought.

23. The exparte applicant takes issue with the contention that he should have appealed to the Provincial Disputes Tribunal. He Terms this proposition as lacking merit. He says that the Court's power to exercise supervision over the proceedings conducted by the Land Adjudication and Settlement Officer can not be questioned. He stresses that he is properly before this Court.

24. I have carefully considered the pleadings, the Submissions and the authorities proffered by the parties in support of their respective submissions.

25. I will start with the heading/titling of the Notice of Motion dated 2nd August,2011. It correctly calls Murianki Ncurai the Exparte Applicant. There is no doubt that he is the exparte applicant. He does not call himself"Applicant", the title which is reserved for the Republic. I find that this could have been a typographical error that placed the exparte applicant at the wrong place and also left out the "Republic". I note that the interested parties, in their Submissions have given the correct citation. The exparte applicants have also correctly cited the parties. I find that the parties have constructively resolved this issue. I find that the application is properly before this Court. I will not add any other word in as far as this issue is concerned.

26. Regarding the Submission by the Respondent that he had unfettered discretion to decided on how to take evidence, I opine that in whichever way he had to take evidence, he had a duty to operate within the

law. Judicial Review mainly looks at the process. This includes an examination as to whether the rules of Natural Justice have been observed, and whether statutory provisions of the law have been observed meaning that the challenged decision should not have been ultravires and beyond the jurisdiction of the decision maker.

27. The authority of Commissioner of Lands Versus Kuuste Hotel (op.cit) offered by the Respondent, apparently in support of his assertion that Judicial Review is concerned with the process and not the merits of a case is good law. However, this case supports the exparte applicant's case. The Quotation proffered by the respondent is veritably stating that such a decision must be authorized by law.

28. Section 26 of the Land Adjudication Act requires the Adjudication Officer to hear Objections with the aid of a Committee. There is no shortcut to this requirement. Any proceedings conducted without a Committee are not only done without jurisdiction but they are also illegal ab initio.

29. The authorities proffered by the Interested Parties in support of their assertion that parties should not be condemned to pay costs when it is not their fault that an Adjudication Officer has abdicated his statutory duty to appoint a committee are relevant and good law.

30. I find that the Adjudication Officer had gone against the rules of Natural Justice by conducting proceedings in the absence of the exparte applicant. In any case the powers he had arrogated to himself to conduct the proceedings autonomously without the participation of a Committee were veritably pyrrhic. Statutorily he had no such powers.

31. In the circumstances, I find that the prayer for an order of certiorari is merited.

I issue the following orders:-

1. An order of certiorari is hereby issued calling to this Court for the purposes of being quashed, the proceedings and decision of the Land Adjudication Officer, Imenti South District made on 15/04/2011 in Objections 765, 766, 767, 768, 769, 770, 771, 773, 774 and 776 respecting L.R. NO. MWERU 111 Adjudication Section Nos. 547, 548, 549, 554, 560, 563 and 853 AND that decisions and all orders made therein are forthwith quashed.

2. As the Adjudication Officer's failure should not be blamed on the applicant or the Interested Parties, each party to bear own costs in respect of this action.

3. An order is hereby issued for the Adjudication Officer Imenti South District to hear the apposite objections afresh.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 17TH DAY OF MAY, 2016 IN THE PRESENCE OF:-

CC: Lilian/Daniel

Mutunga h/b E.G. Mwangi for the Interested Party

Nyauchi h/b Murango Mwenda for the Exparte Applicant

State for Respondent-Absent.

P . M. NJOROGE

JUDGE