



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT SIA YA

ELC JUDICIAL REVIEW CASE NO. E3 OF 2021

IN THE MATTER OF: LAND ADJUDICATION ACT CAP 284 OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION OF THE DECISION OF THE DISTRICT COMMISSIONER BONDO ACTING AS A DELEGATE OF THE MINISTER PURSUANT TO SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284 OF THE LAWS OF KENYA IN APPEAL CASE NO.237 OF 2007 ON PARCEL NO.2407 AND 2712 NYANGOMA/UYAWI ADJUDICATION SECTION

AND

IN THE MATTER OF AN APPLICATION BY

REPUBLIC.....APPLICANT

VERSUS

DISTRICT COMMISSIONER ACTING AS A DELEGATE

OF THE MINISTER UNDER SECTION 29 OF THE LAND

ADJUDICATION ACT CAP 284.....RESPONDENT

AND

MARTIN OLOO OBONYO.....INTERESTED PARTY

EX PARTE APPLICANT.....WALTER OMBENG OKELLO

RULING

Ex parte applicant's case

1. Pursuant to the provisions of **Order 53 Rule 1(2)** of the **Civil Procedure Rules** and **Section 29** of the **Land Adjudication Act**, the *ex parte* applicant filed a chamber summons dated 11/05/2021 against the respondent seeking the following main verbatim reliefs:

a) Spent

b) That the court be pleased to grant leave to the applicant to apply for judicial review orders of certiorari, mandamus and prohibition in respect of the appeal decision of the minister that was issued in appeal decision of the minister that was no.237 of 2007 in regards to land parcel nyangoma/uyawi/2407 and 2712 on 12/11/2020.

c) That the grant of leave do operate as a stay of further proceedings in respect of the appeal decision that was issued in appeal no.237 of 2007 in regards to land parcels to land parcel nyangoma/uyawi/2407 and 2712.

2. The summons is supported by a statement of facts and an affidavit verifying the facts both dated 11/05/2021 and annexures thereto. The summons is grounded on the following main ground; in his ruling dated 12/11/2020, the deputy commissioner acting as a minister under powers conferred to him by **Section 29** of the **Land Adjudication Act**, failed to appreciate the laid down procedure in law and overlooked the grounds of appeal raised by the *ex parte* applicant and proceeded to pronounce himself on non-existent proceedings and relied on

extraneous evidence. This decision is the subject of this ruling.

3. In his rebuttal to the interested party's submissions, the *ex parte* applicant filed a further affidavit dated 22/10/2021. In it, the *ex parte* Applicant reiterated the averments made in his verifying Affidavit and averred that in dismissing the appeal, the district commissioner acting on behalf of the minister did not consider the underlying issues.

The respondents' case

4. The Attorney General neither entered appearance, filed a response nor filed written submissions.

The interested party's case

5. The interested party filed a replying affidavit dated 11/08/2021. Similarly, the interested party gave a history of the appellate mechanisms that have been undertaken by the parties in the land adjudication process for land parcels number **NYANGOMA/UYAWI/2407** and **NYANGOMA/UYAWI 2712 [the suit property]**. The procedures are outlined as follows; During land demarcation exercise in the region in 1987, the larger portion of the suit property prior to the current subdivision was allocated to the *ex parte* applicant. Dissatisfied by this decision, the interested party in 1987 appealed to the land committee and he was successful. Aggrieved by the decision, the *ex parte* applicant appealed to the arbitration board in 1988; the appeal was disallowed. Dissatisfied, the *ex parte* applicant appealed to the minister; the appeal was dismissed.

The ex parte applicant's submissions

6. On 27/10/2021, the court directed the summons to be heard by way of written submissions. The *ex parte* applicant was to file his submissions within 14 days from 27/10/2021 and he was at liberty to file supplementary submissions. When this matter came up for mention on 29/11/2021, the *ex parte* applicant informed the court that he had filed his submissions dated 13/09/2021. Noting the absence of these submissions from the court file, the court directed the *ex parte* applicant to avail his submissions by close of business on 29/11/2021. These submissions have not been availed as directed by the court. The long and short of it is that the *ex parte* applicant's submissions are not in the court record.

Interested party's submissions

7. The interested party filed his written submissions dated 11/11/2021 and he contended that *ex parte* applicant had not met the criteria for the grant of leave to file a judicial review motion and consequently, the prayer for stay pending the hearing and determination of the judicial review application had collapsed. He prayed for the summons to be struck out with costs. He placed reliance on several authorities including; **Republic v Kenyatta university ex parte Ochieng Orwa Dominic & 7 others [2018] e KLR**, **Municipal Council of Mombasa v Republic Umoja Consultants Limited Nairobi Civil Appeal Number 185 of 2007 [2002] e KLR** and **Republic v Kenya Revenue Authority, Commissioner ex parte Keycorp Real Advisory Limited [2019] e KLR**. He identified one issue for determination; whether the *ex parte* applicant should be granted the orders sought.

Analysis and determination

8. Having considered the summons, statement of facts, affidavit verifying the facts, annexures, replying affidavit, further affidavit and written submissions, these are the issues for determination; (i) whether the *ex parte* applicant has established grounds for the court to grant the leave sought, and, (ii) if the answer to issue (i) is in the affirmative, whether the leave should operate as a stay of the implementation of the decision of the respondent and status quo to be maintained.

I will proceed to analyze the legal and jurisprudential framework on the issues in a sequential manner.

9. **Article 47** of the **Constitution** and **Section 13 (7)** of the **Environment and Land Court Act** clothes this court with jurisdiction to preside over judicial review cases. The procedure for moving the court in an application for judicial review is governed by **Order 53** of the **Civil Procedure Rules**.

10. The intent of leave before filing a substantive notice of motion is to ensure frivolous and vexatious applications that are an abuse of the court are weeded out by the courts. This position was upheld in the case of **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows;

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration... It is an exercise of the court's discretion but as always it has to be exercised judicially.”

11. Has the *ex parte* applicant established grounds for the court to grant leave sought? The answer lies in establishing whether the *ex parte* applicant has established a prima facie case. This was settled by the Court of Appeal in the case of **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** where the court held:

“If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave”

12. Within the provisions of **Section 26 and 29** of the **Land Adjudication Act**, the appellate process and determination by the Minister is well elaborated. An aggrieved party is required to appeal to the minister within 60 days of the decision of an adjudication officer on an objection. The said procedure was succinctly set out in the case of **Martha Kigeu Vs Johana Tibino (2014) e K.L.R** which was quoted with approval in the case of **Republic v Tigania East District Land Adjudication and Settlement Officer & another; Joseph Mathita Ikirima Ex parte Solomon Mworua Samuel [2020] eKLR** as follows;

“Any person who is of the view that the Adjudication register is incorrect, may make an objection to the Adjudication officer in writing within 60 days of the publication of the notice for inspection. The Adjudication officer is empowered to determine the objection. He is also empowered to alter the adjudication register from time to time so as to conform to any objections. Any person aggrieved by the determination of an objection may within 60 days of the determination, appeal to the Minister”. [Emphasis added].

13. This court has evaluated the pleadings filed by the parties. The *ex parte* applicant’s objection numbers 62, 63 and 64 were heard by nyamonyo adjudication section on 21/8/2003 and it rendered its decision on 21/11/2003. The decision gave the *ex parte* applicant 60 days right of appeal. The *ex parte* applicant’s appeal to the minister is undated and unsigned however, from the *ex parte* applicant’s pleadings, it can be discerned it was filed in the year 2007 which was 4 years beyond the requisite timelines. This court considers this period to be outside the statutory timelines.

14. The *ex parte* applicant has contended that there were gross errors of procedural errors in the manner the minister conducted himself in the proceedings, however, he has not specified the errors. Further, he averred that the minister considered extraneous and irrelevant evidence from witnesses but he has not stated which witnesses gave irrelevant evidence. He also contended that the minister failed to consider the evidence on record wholly and impartially to the detriment of the *ex parte* applicant but equally too he has not stated in specific terms what the minister erred in. From the documents in the court record, the notice indicating the date of the appeal’s hearing was duly issued to the parties and the *ex parte* applicant was duly notified to avail documents that he deemed relevant to his case. This court has had a chance to look at the minister’s proceedings and it is evident the parties were accorded a fair hearing.

15. In light of the foregoing it is the net finding of this court that the *ex parte* applicant has not established a *prima facie* case and consequently, his summons is not merited.

16. Costs follow the event and I award costs to the interested party. Because the respondent did not file a response to the summons, this court shall not award costs to it.

a) The *ex parte* applicant’s chamber summons dated 11/05/2021 is hereby dismissed.

b) Costs to the interested party.

17. It is so ordered.

Ruling delivered virtually.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JANUARY 2022

IN THE PRESENCE OF:

MR. NYANGA FOR EXPARTE APPLICANT

MR. OBIMBO FOR 1ST RESPONDENT

COURT ASSISTANT: SARAH OORO

HON. A. Y. KOROSS

JUDGE

20/1/2022