



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. APPL. NO. 73 OF 2009

IN THE MATTER OF AN APPLICATION BY ALEXANDER MEEME KAJOI

TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP. 26 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. 3278 AMWATHI/MAUA ADJUDICATION SECTION

AND

IN THE MATTER OF THE ADJUDICATION ACT CAP. 284

AND

IN THE MATTER OF THE CONSOLIDATION ACT CAP. 283 LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND ADJ. AND SETTLEMENT OFFICER

IGEMBE DISTRICT.....RESPONDENT

SAMUEL MBATARU.....INTERESTED PARTY

ALEXANDER MEEME KAJOI.....EX-PARTE

J U D G M E N T

1. By an application dated 2nd November, 2009 the Ex-parte applicant prays for the following:-

a. THAT this Honourable Court do issue an Order of Certiorari to remove to this Court the

decision of the District Land Adjudication and Settlement Officer Igembe District vide a letter dated 29th April, 2009 pertaining to land parcel No. 3278 Amwathi Adjudication Section and other orders therein made without Jurisdiction and against the law of the land and quash the same.

b. THAT this Honourable Court do issue an Order of Mandamus to the District Land Adjudication and Settlement Officer compelling him to restore the Register of Land Parcel NO. 3278 Amwathi Maua Adjudication Section to its original state prior to the decision of the District Land Adjudication and Settlement Officer dated 29th April, 2009.

c. Costs of this Application be provided for.

EXPARTE APPLICANT'S SUBMISSIONS

2. The Court has been told that the application was filed by the original applicant who passed on and was replaced by the present applicant after he had obtained a Limited Grant and applied to be substituted in place of the deceased. As a result, the Notice of Motion was amended so that the present applicant Alexander Meeme Kajoi replaced the deceased applicant, Geoffrey Kajoi Akwalu. The amended Notice of Motion is dated 23rd May, 2011 and repeats the prayers of the original motion.

3. It is submitted that at all material times the applicant was the owner of land parcel No. 3278, Amwathi, Maua Adjudication Section. The applicant says that the parties went through the adjudication process and the disputed land was found by the Committee and the Adjudication Officers to belong to the Ex-Parte Applicant. He says that the Interested Party, having failed through the adjudication process sought consent of the adjudication officer and filed MERU CMCC NO 21 OF 2001. It is proffered that the case was partly heard but its file disappeared.

4. The Ex-Parte Applicant was surprised to see the Interested Party trying to re-demarcate his land. Complaints were raised by the Ex-Parte Applicant's children who live on the land, and that notwithstanding, the Demarcation Officer went ahead with re-demarcation. Upon checking with the Lands Officer, the Exparte Applicant was surprised when he was shown a letter from the Land Adjudication and Settlement Officer, Igembe District ordering the Demarcation Officer to take away 4.50 acres from the Exparte Applicant's land and to leave him with a small portion. This letter was supposed to have been copied to the Exparte Applicant but was not. The letter was only given to him when he visited the Lands Office.

5. This letter was a response to the Interested Party's Advocate's and contained a decision to take away the ex-parte applicant's land without giving him an opportunity to be heard. The applicant submits that this was against the rules of Natural Justice, and therefore, the decision contained in the letter should be quashed. The applicant prays for an Order of Mandamus to restore the original position.

6. The applicant submits that the Adjudication and Settlement Officer had no jurisdiction to make the decision he made. It is submitted that both the Land Adjudication Act and the Consolidated Act are clear on the procedure to be followed. As the parties had gone through the stage of settlement of land disputes, any aggrieved party should have appealed to the Minister. It is claimed that when the Interested Party found that he would lose the case, he withdrew, and had the case file in the CMCC Court lost or destroyed. The applicant through exhibit GKA 1 (PLAINT) submits that it was clear that the Interested Party's objection had been dismissed. He therefore wonders what the Adjudication Officer was considering and under what law.

7. The applicant in support of his assertions proffers the following authorities:-

1. The Land Adjudication Act (Cap. 284) and the Land Consolidated Act (Cap. 283).

2. Republic and others Versus Attorney General and Another (2006) E.A 265.

3. *Mutiso Versus Mutiso (1984) KLR 536.*

4. *Aloo Versus Kenya Posts and Telecommunications Corporation (1985) KLR 829.*

RESPONDENT'S SUBMISSIONS

8. The Respondent opposes the Motion and filed a Replying Affidavit dated 13th September, 2012 deponed by George Owuor.

9. The Respondent says that in his ground number 1, the applicant says that Geoffrey Kajoi (deceased) was on several occasions before his death given an opportunity to be heard. He says that the said Geoffrey Kajoi (deceased) never explained to the Land Adjudication Office his claim against the disputed parcel of land. He submits that since this fact has not been controverted, this adequately answers the issue, and , it therefore stands to be concluded that the ground cannot be relied upon, and therefore, fails.

10. The Respondent submits that the second ground relied upon by the applicant is deficient in particulars and evidence/proof for the Court to be able to exercise its discretion in granting the orders sought. He takes issue with there not being specification regarding the particular provision of the law which was violated . He says that the applicant is merely relying on a sweeping and broad ground. The Respondent says that despite deficiency in the ground, he had carried out his mandate based on adequate investigation as regards ownership of the property. He says that, for the reasons he has given , the second ground relied upon by the applicant is hollow and cannot aid the applicant.

11. The Respondent submits that the third ground has no prayer amenable to being granted and should be ignored as it merely states the object of the application.

12. The Respondent submits that the Order of Certiorari is not grantable as all the grounds relied upon by the applicant lack basis and the same had been adequately responded to. He urges the Court not to grant the order.

13. Regarding the order of Mandamus, the Respondent submits that for it to be tenable, the applicant must demonstrate the following:-

a. That there exists a public duty which is imposed on a person or a body of persons by a statute.

b. The person or body of persons has failed in that duty to the detriment of a party who has a legal right to expect the duty to be performed.

c. That there was demand made to compel performance of the duty and that there has been non-Compliance. For this proposition the respondent refers the Court to Misc. Application No. 224 of 2004, Wamwere Versus Attorney General (2004) eKLR.

14. The Respondent says that a perusal of the Notice of Motion, Statement of Facts or the Verifying Affidavit shows that the applicant has not demonstrated which duty, under statute, the respondent owes him and the resultant non-performance thereof. He also says that prior to these proceedings, there has not been shown any demand or evidence compelling performance of any duty and a refusal. He urges the Court not to grant the Order of Mandamus.

15. In further support of his assertion that the Order of Mandamus should not be granted, the Respondent submits that granting the order would not be in the interest of Justice, as it would have the effect of shutting out the Interested Party from pursuing his claim He also contends that it would be against the spirit of the Land Adjudication process which is not a summary manner of determining issues.

16. The respondent submits that it is trite law that an Order of Mandamus assumes a decision has not been made and as such the Order cannot be granted in the alternative with an Order of Certiorari as sought by the Applicant.

17. The Respondent has submitted that it is trite law that Judicial Review is discretionary and orders sought may be denied even if deserved. He has referred the Court to Nairobi Misc. Civil Application No. 368 of 2010, Republic Versus Minister of Agriculture and 2 Others (20B) e KLR where the Court *inter alia* held that the Court can withhold the gravity of a Judicial Review Order where among other reasons “.....*public body has done all it can be expected to do to fulfill its duty*”. The Respondent has proffered the case of *Wamwere Versus the Attorney General* [2004] IKLR 166 in support of his assertions regarding the granting of the order of Mandamus.

18. The Respondent submits that as was evident from the Replying Affidavit, he had done all that was expected so as to fulfill his duty. He also submits that the letter relied upon by the applicant shows that extensive investigations were done by him with a view of putting the case to rest.

DETERMINATION

19. I have carefully considered the pleadings in this matter. I have also considered the Submissions and the authorities proffered by the parties.

20. The Case of *Republic and others Versus Attorney General and Another* proffered by the applicant upheld the need for rules of Natural Justice to be taken into account when decisions are being taken into account. It expressly stated that taking into account irrelevant considerations invited a Court's intervention. The case relied upon in the cases of *Associated Provincial Houses Limited Versus Wednesbury*, *COP Civil Appeal 1948* and *Padfield Versus Minister of Agriculture and Fishers* [HL 1968] and said that unlawful behaviour might be constituted by:-

- a. An outright refusal to consider the relevant matter;***
- b. A misdirection on a point of law;***
- c. Taking into account some wholly irrelevant or extraneous consideration;***
- d. Wholly omitting to take into account a relevant consideration.***

21. This case also delved into the issue of unreasonableness and held that failure to give reasons for what is patently lack of evenhandedness on the part of the decision maker constituted procedural impropriety. It further held that a duty to give reasons was implied in the following situations:-

- a. Where the decision involved an interest which was highly regarded in law;***
- b. Where the nature of the process required reasons to be given;***
- c. From the Circumstances of the individual case.***

22. The case of *Mutiso Versus Mutiso* [1984] KLR 536, also proffered by the Exparte Applicant, stressed that it is a fundamental principle of justice that before an order or decision is made, the parties and particularly the party against whom the decision is to be made should be heard. *The case of Aloo Versus Kenya Posts and Telecommunications Corporation* (1985) KLR 829, also proffered by the Exparte Applicant amplified on the need of the Rules of Natural Justice to be always upheld during decision making.

23. I do find that the case of *Wamwere Versus Attorney General*, Supra, is relevant. I find that the Exparte Applicant has not demonstrated that a public duty existed for the Respondent to take action in favour of the Exparte Applicant. I also find that there was no failure arising from such duty that amounted to the Exparte Applicant being affected detrimentally. Finally, there is no indication anywhere in the pleadings that the Exparte Applicant had demanded of the Respondent that a decision had to be made.

24. The orders sought by the Exparte Applicant are Spawned by a letter dated 29th April, 2009 addressed

to the Demarcation Officer, AMWATHI/MAUA ADJUDICATION SECTION by the District Land Adjudication & Settlement Officer, (DLASO) Igembe District. The said letter gives a chronology of events germane to a complaint in respect of P/NO. 3278, Amwathi/Maua Adjudication Section. The letter is detailed and attaches the following documents:-

1. Records of Existing Rights (R.E.R)

2. Njuri Ncheke proceedings

3. LCC No. 229/68 and 11/77

4. Directors letter LA. 5/1/17 Vol. XXXIV/124 of 1st July, 1992.

5. A/R objection proceedings 46/97 and 908/97.

6. Copy of the letter addressed to the Minister of Lands dated 13th February, 2009 by Samuel Mbataru, the Interested Party.

7. Copy of the letter withdrawing the case from Court.

25. From the detailed explanations contained in the letter, the DLASO states: “ **From the aforementioned facts and findings it is seen clearly that Geoffrey Kajoi fraudulently acquired the land in dispute as shown by the cancellations of the record by quoting non-existent cases and letters**”. The DLASO then goes ahead to order the Demarcation Officer to re-demarcate P/No. 3278 measuring four decimal five zero (4.50) to Samuel Mbataru.

26. In his letter the DLASO also states: "Therefore owing to the above facts, it can be seen that there was a deliberate attempt to tamper with the record of existing rights in relation to S/NO. 849, S/NO. 1220, S/NO 1137 and S/NO. 2691 to give the disputed portion of land at Iriene to Geoffrey Kajoi. This is supported by the fact that after gathering of S/No. 849 in the name of Geoffrey Kajoi there was an attempt to transfer the 6.20 acres at Iriene to S/NO. 1137 of Gerrard Bariu and also cancellation of the same 6.20 acres from S/No. 1137. There was also no genuine reason as to why S/NO. 849 had to be cancelled and issued with a new number S/NO. 2961 unless this was being done to hide something”.

27. I find that the DLASO in writing this letter to the Demarcation Officer was exercising his duties, in accordance with the law, to see to that what had been properly done through the established legal process was upheld. From the pleadings filed by the Exparte Applicant, I find that he has not impeached the detailed reasons given by the DLASO for making his decision which is being challenged in these proceedings.

28. Allegations and Counter-allegations and assertions made by the Exparte Applicant and the Interested Party amount to cross-accusations. I do not find them central to the determination of this suit. The important thing is that I do not find that in arriving at his decision, the DLASO had gone against any statutory provisions, was biased, was unreasonable, had not acted in a proportionate manner, breached any rules of Natural Justice or had failed to proffer valid reasons before arriving at the challenged decisions.

29. I do find that the respondent did not make a decision without jurisdiction and against the provisions of the Land Adjudication Act and the Land Consolidated Act. I find that the letter containing the decision the Exparte Applicant is challenging had the effect and intention of upholding the provisions of the applicable law and the processes established by the said law. I opine that the Respondent did not act illegally.

30. In the circumstances, **I find that the order of Certiorari prayed for by the Exparte Applicant is not merited. I decline to grant it.**

31. As I have already decided that an order of mandamus is not merited , **I dismiss the suit.**

32. **Costs are awarded to the Respondent and the Interested Party.**

33. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 30th DAY OF NOVEMBER, 2016 IN THE PRESENCE:-

CC: Daniel/James

Kiongo for Respondent

Manasses Kariuki h/b Rimita for Exparte Applicant

P.M. NJOROGE

JUDGE