



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS APPLICATION NO. 46 OF 2011

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF
CERTIORARI**

IN THE MATTER OF LAND ADJUDICATION ACT 284 LAWS OF KENYA

AND

**IN THE MATTER OF THE DECISION OF LAND ADJUDICATION OFFICER, IGEMBE
SOUTH DISTRICT OBJECTION TRIBUNAL'S DECISION IN OBJECTION NO. 3819 IN
RESPECT OF L.R NO. ANTUBETWE/KIONGO ADJUDICATION SECTION NO 1450.**

AND

**IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 IN THE MATTER OF CIVIL
PROCEDURE ACT ORDERS 53 OF CIVIL PROCEDURE RULES**

BETWEEN

THE REPUBLICAPPLICANT

VERSUS

LAND ADJ. OFFICER IGEMBE DISTRICT.....RESPONDENT

AND

TABITHA MUTHENYA.....1ST INTERESTED PARTY

MAORE M'MAUTA.....2ND INTERESTED PARTY

MOROKI M'MAUTA.....3RD INTERESTED PARTY

FREDRICK MICUBU MIAKA.....4TH INTERESTED PARTY

AND

PETER MEEME M'MAUTA.....Ex-Parte APPLICANT

J U D G M E N T

1. The Notice of Motion Application in this matter is dated 7th July, 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, Igembe South made on the 19/01/2011 in objection No. 3819 respecting Antubetwe/Kiongo Adjudication Section, parcel No. 11450 and quash the same and all orders made thereon.

2. The Respondent and the Interested Parties do pay the costs of the motion.

2. The application has the following grounds:-

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

b. The Respondent denied the Ex-parte Applicant the right/ opportunity to call his witnesses and supporting documents.

c. The Respondent refused to visit the land and receive evidence on site inspite of the demand by the Ex- parte Applicant

3. On 30/06/2011, the Honourable Lady Justice M. Kasango granted the Exparte Applicant leave to institute Judicial Review proceedings seeking orders of Certiorari to quash the decision of the Land Adjudication Officer dated 19/01/2011 in respect of Land Reference No. ANTUBETWE/KIONGO ADJUDICATION SECTION 11450.

4. Leave granted on 30/06/2011 was to operate as stay of the implementation of the Respondent's decision dated 19/01/2011 pending the filing and determination of the main Motion.

5. To put matters in perspective, I deem it necessary to reproduce the affidavit verifying the statement of facts sworn by the Exparte Applicant on 23rd June, 2016, the Exparte Applicant's further affidavit verifying the statement of facts sworn by the Exparte Applicant on 25th June, 2011, and the 1st Interested Party's Replying Affidavit sworn on 30th December, 2011.

6. The affidavit verifying the statement of facts sworn on 23rd June, 2011 states as follows:-

1. THAT I am the Ex-parte Applicant herein and I am competent to swear this affidavit.

2. THAT land reference Antubetwe/Kiongo Adjudication Section No. 11450 was recorded in my name during the demarcation being a subdivision of land No. 1456.

3. That the Interested Party who is my mother, subdivided the land No. 1456 into 3 portions, and gave one portion to me, the other to Julius Karithi Kirimi and the 3rd portion to Amos Miriti Mauta.

4. That my portion was then given No. 11450.

5. THAT I live on the land, I have extensively developed the land, with a homestead on it miraa trees, avacado trees, bananas , and gravelia trees.

6. THAT before my mother transferred the land to the 3 of us, she sought the approval of the area chief, who (chief) gave his consent vide a copy of the letter annexed herein and marked PMMI.

7. That the 1st interested party subsequently wrote to the respondent instructing that the land be shared by myself , JULIUS KARITHI and AMOS MIRITI as per the copy of the letter annexed and marked PMM 11.

8. That the transaction was carried out transparently and was witnessed by independent persons

as shown by the exhibits PMM 1 & PM11.

9. **THAT during the hearing of this dispute before the Respondent, I was ready with the two documents as evidence but when I tendered them, the Respondent refused to look at them stating that he was not interested.**

10. **THAT I verily believe that the refusal to accept or look at these documents deprived the Respondent of essential evidence and this caused prejudice to me.**

11. **THAT I also asked that the respondent visit the land so that I would show him how the subdivisions were done on the ground and developments I have on the land, but he refused flatly.**

12. **THAT the conduct of the respondent was against the Rule of Natural Justice to be heard and to tender evidence through witnesses.**

13. **THAT the conduct of the respondent during the proceedings was manifestly biased against me and (sic) appeared to have decided from the onset that I had defrauded the 1st Interested Party.**

14. **THAT the respondent adopted wrong procedure and did not act in a fair manner, and his decision is grossly unreasonable.**

15. **THAT the respondent conducted the proceedings and made the decision without the aid of the committee and the decision was made single handedly.**

16. **That what I depone herein is true and within my personal knowledge except where otherwise stated.**

7. The further affidavit verifying the statement of facts sworn by the Exparte Applicant on 25th June, 2011 states as follows:

"I, PETER MEEME M' MAUTA adult male of Miriki Sub/Location, Lucuti Location, do hereby make oath and solemnly swear as follows":-

1. **THAT during adjudication process L.R NO 11450 Antubetwe/Kiongo Adjudication Section was registered/recorded in my name.**

2. **THAT my own mother, the 1st Interested Party objected to my registration during the A.R Objections.**

3. **THAT her objection was heard by the Land Adjudication & Settlement Officer, Igembe District on the 17/01/2011.**

4. **THAT on the 19/01/2011 the respondent (LAO) made his decision and ordered that the suit land be shared equally between the Interested Parties. Copy of the proceedings and decision annexed, marked PMM 111.**

5. **That 3 of the Interested Parties were not party to the proceedings before the Respondent and there is no reason why they were given my land.**

6. **THAT as a result of the respondent's decision I was rendered landless.**

7. **THAT what I depone herein is true and within my knowledge except where otherwise stated.**

8. The Replying Affidavit sworn on 30th December, 2011 by the 1st Interested Party states.

“ I TABITHA MUTHENYA of C/O P.O Box 502 Maua do hereby make oath and state as follows:-

- 1. THAT I am an adult female of sound mind and aged about 85 years.**
- 2. THAT the ex-parte applicant herein is my son.**
- 3. THAT the applicants complain (sic) emanate from equitable sharing of family land which he sought to have solely registered in his name by virtue of being an elder son.**
- 4. THAT my co-interest (sic) parties are my grand sons whose mothers begot them out of wedlock and they have grown up under my care while utilizing and living upon the parcel of land the applicant wishes to be his alone.**
- 5. THAT I and my co-interest (sic) parties have no other place of abode other than that our family land.**
- 6. THAT the applicant has ever sued me in Maua SPMCC NO. 40 of 2011 over the same land and annexed herewith and marked TM 1 is a copy of the plaint.**
- 7. That the said matter is not yet resolved at Maua Court and hearing had been halted due to the pending of this application.**
- 8. THAT parcel No. 11450 has never been owned by the applicant and has always been under my names and I only filed an objection to allow me share the land to my Dependants, the applicant included (annexed herewith is confirmation of ownership marked TM 2 and dated 16/02/2011.**
- 9. THAT the application has not demonstrated any breach of rules of natural justice nor has he demonstrated a breach of procedure.**
- 10. THAT what is deponed to herein is true to the best of my knowledge belief and information.**

9. The Exparte Applicant submits that it is only the 1st Interested Party who opposed this application through her affidavit dated 30/12/2012 . He says that by failing to answer to the serious allegations the 2nd, 3rd and 4th Interested Parties and the Respondent must be taken to have admitted the Exparte Applicant's allegations as the truth. The Exparte Applicant further says that the 1st Interested Party's affidavit does not answer the serious breach of procedure alleged by the Exparte Applicant.

10. The Exparte Applicant submits that the 1st Interested Party's affidavit relates to her perceived right over the property but does not concern itself with the manner in which the respondent conducted the apposite proceedings during the hearing. It is contended, for the Exparte Applicant, that her exhibit being Maua SPMCC NO. 40 of 2011, is of no relevance in this application as it shows that the 1st Interested Party was sued alongside others for damaging the crops of the Exparte Applicant.

11. Grounds A, B and C echo the averments contained in the statement of facts, the affidavit verifying the statement of facts sworn on 23rd June, 2011 and the Exparte Applicant's further affidavit verifying the statement of facts sworn on 25th June, 2011 (op.cit).

12. Ground (A) states that the Respondent did not have the aid and assistance of a Committee as required by the law. The applicant continues to say that the parties to the objection were not granted an opportunity to ask questions after the testimony of the opponent. It is contended for the Exparte Applicant that the non- participation by a Committee was a fundamental breach of the law and that on this issue alone, the Court should easily quash the challenged decision.

13. Regarding ground B, the Exparte Applicant submits that the record of the objection proceedings

shows that no witnesses were called. He says that he requested to be allowed to call witnesses and that this request to be allowed to call witnesses was denied. The Exparte Applicant says that one Joseph Kaberia is referred to as a witness under “additional information” and the Exparte Applicant says that it is not known or indicated whose witness this person was and how he came into the proceedings. It is submitted that refusal to allow a party to proceedings to call witnesses in support of a claim is a serious breach of procedure and that this fundamentally makes the proceedings a nullity.

14. Also regarding Ground B, it is submitted in his Verifying Affidavit and the statement of Facts, that during the hearing of the objection, the Exparte Applicant was armed with crucial documents in support of his case. The Court is referred to paragraphs 3,4 and 5 of the statement of facts and paragraphs 3,4,5,6,7,8,9 and 10 of the Verifying Affidavit. It is stated that this serious misconduct called for a response from the respondent. It is further stated that the Exparte Applicant received no response from the Respondent.

15. Concerning Ground C, it is submitted, for the Exparte Applicant, that he invited the Respondent to visit the locus in quo but the request was refused. The Exparte Applicant says that the apposite refusal was without basis and was unreasonable. He says that this visit was important in view of the allegations by the applicant that he had extensively developed the suit land.

16. For the reasons adduced in his Submissions, the Expartes Applicant urges the Court to call and quash the challenged decision and refer the matter for hearing before a different Land Adjudication Officer who should hear the matter with the assistance of a Committee as required by law.

17. The Exparte Applicant proffers the following cases in support of his assertions:

1.SAMUEL MASHIYA MUKALI VERSUS SHINYALU LDT AND SISIKO MUHATT SHIVONJE [2005] e KLR.

2. WELAMONDI VERSUS THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA, JR NO. 81 OF 2002, KLR, page 456.

3. FRANCIS LINGULI VERSUS DISTRICT LAND ADJUDICATION OFFICE, JR. 56 OF 2010 -MERU.

18. The respondent has submitted that this application lacks merit and ought to be dismissed since the proceedings relied upon by the Exparte Applicant show that a Committee was involved in the proceedings and that it asked the Exparte Applicant questions after which the respondent asked questions. The Respondent argues that the claim that there was no Committee in the proceedings is an afterthought and lacks basis. He says that this ground relied upon by the applicant fails.

19. Regarding the ground that the Exparte Applicant was denied the right and opportunity to call his witnesses and supporting documents, it is submitted that there is no evidence in the proceedings that he had any witnesses or that he requested to call any. It is further argued that if he was denied an opportunity to call witnesses or to adduce documents, then he ought to have protested and even refused to participate in the proceedings. It is submitted that the respondent could not have compelled the Exparte Applicant to call witnesses. The respondent opines that nothing turns on this issue for consideration by the Court.

20. Regarding Ground C that the Exparte Applicant's request for the suit land to be visited was denied, the respondent laconically states that it lacks merit because the Exparte Applicant has produced no evidence to show that he made such a request. It is further submitted that this assertion relates to the merits of the impugned decision and that in essence, the Exparte Applicant is contending that if whatever developments he had on the land were considered, then the respondent's decision would have tilted in his favour.

21. For the reasons he has adduced, the respondent submits that this application lacks merit. He also says

that since Judicial Review orders are discretionary and in view of his view that they are not deserven **THEN** the Exparte Applicant is not entitled to the orders sought in this application. He asserts that he properly conducted the apposite proceedings and ensured that the applicant was accorded fair treatment.

22. I have perused the pleadings proffered by Tabitha Muthenya, the 1st Interested Party.

23. I have considered the pleadings , the documents submitted in support thereof and the submissions made by the parties. I have also considered the authorities proffered by the Exparte Applicant.

24. Regarding the first ground that the respondent conducted the proceedings and made his decision without the aid of a Committee, I find that from the record of proceedings there is evidence that a Committee participated in the proceedings. After a careful examination of the Submissions proffered the Exparte Applicant, I am inclined not to be persuaded by that the respondent conducted the apposite objection without the aid of a Committee. It is not controverted that the Exparte Applicant participated in the proceedings. If there was no Committee, he should have protested and refused to further participate in the proceedings from the point when he discovered that there was no Committee.

25. Regarding the second ground that the respondent denied the Exparte Applicant the right and opportunity to call his witnesses and to adduce supporting documents, I find that no evidence to support this claim has been proffered. Once again, I opine that the Exparte Applicant should have protested and even withdrawn his participation in the proceedings.

26. Regarding the ground that the respondent refused to visit the suit land and to receive evidence on site, I do opine that there is no evidence to support this assertion. Judicial Review proceedings look at the integrity of the process , for example, was there breach of the Rules of Natural Justice, was there egregious irrationality, were the provisions of written law breached, was there bias etc. Considerations such as the extent of developments made by a litigant, for that reason only , may not sway a Court to tilt towards the concerned litigant's side should the Court find that the process in question had integrity.

27. At the beginning of the Exparte Applicant's Submissions, It is said that the 2nd, 3rd and 4th Interested parties and the respondent did not oppose this application through filing affidavits . I do not agree that failure to rebut the allegations made by an Exparte Applicant will have the effect of the Court adopting such allegations as the truth. In Judicial Review proceedings, a Court of law must examine the totality of the facts and circumstances of the case and determine if the decision making process had the required integrity. It is only then that the Court can exercise its discretionary powers to award deserved orders. This discretionary authority should not be exercised capriciously. It should be judicially exercised.

28. Regarding the authorities proffered by the Exparte Applicant, I opine that they are good authorities in their Circumstances. Each case will have its peculiarities and unique Circumstances. The Case of Welamondi Versus The Chairman, Electoral Commission was concerned with the orders of mandamus whereas in this matter, I am dealing with a prayer for an order of Certiorari . The prayer was denied. The Court also found that judicial Review orders of Certiorari, mandamus and prohibition should be sought in the name of the Republic. This is a 2002 decision. In view of the provisions of the Constitution of Kenya 2010, it is now debatable if or not such an infraction may not amount to a procedural technicality as envisaged by Article 159 thereof. In this matter, I have found that the orders sought are not deserved.

29. In the Case of Samwuel Mushiya Mukali Versus Shinyalu LDT and Sisiko Muhati Shivonje (Supra), the Court found that the apposite application had merit. In this case, I have found that the orders sought are not merited.

30. In the Case of Francis Linguli Versus District Land Adjudication Officer, Tigania and Another, the Court found that a Committee had not participated in the proceedings . In this case, I have found that a committee had participated in the proceedings.

31. In his Submissions, the Exparte Applicant concludes by urging this Court to call and quash the challenged decision and to refer the matter for hearing before a different Land Adjudication Officer to

hear it with the assistance of a Committee. It is clear that the Respondent's Jurisdiction is not challenged. From the proceedings, it is clear to me that the land that has spawned this suit is family land. The 1st Interested Party is the mother of the Exparte Applicant. The other Interested Parties are close relatives of the Exparte Applicant. In my view the Interested Parties had a right to canvas their rights through the appropriate objection.

32. In Conclusion, I find that this application lacks merit. In the circumstances, it is dismissed. The order of stay granted at the leave stage on 30th June, 2011 is vacated forthwith.

33. Costs are awarded to the 1st Interested Party and to the Respondent.

34. It is so ordered.

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

CC: Daniel /James

Kiongo for the Respondent

Muthomi h/b Murango Mwenda for the Exparte Applicant

P.M. NJOROGE

JUDGE