



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 142 OF 2011

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

TAITA, VOI AND MWATATE DISTRICTS

THE COMMISSIONER OF LANDS

JOHN BOSCO MWASI.....RESPONDENTS

EX PARTE APPLICANTS

DAVID WACHENJE

WANJALA HARON SIO

HUMPHREY TALARI SIO

JUDGMENT

THE APPLICATION

1. By Notice of Motion dated 2nd December 2011, the *ex parte* applicants seek judicial review orders as follows:

“a) That an order of mandamus do issue to compel the District Land adjudication and Settlement Officer, The Commissioner of Lands and John Bosco Mwasi to cause **their decision to demarcate and record parcel no. 525 in the names of John Bosco Mwasi (a descendant of Peter Mwambule) the respondent herein thereby depriving the applicants their constitutional rights to own property and also their continued and peaceful enjoyment and possession of this land for over a period of 16 years and or compel them to deliver/avail their decision for quashing.**

b) that an order of certiorari do issue to quash the said decision of the District Land Adjudication and Settlement Officer Taita, Voi and Mwatate districts and the Commissioner of Lands.”

2. Although expressed as seeking two prerogative orders of mandamus and certiorari, the application

clearly only seeks an order of Certiorari to quash the decision of the District Land Adjudication and Settlement Officer under reference.

3. The grounds of the application are set out in the Notice of Motion as follows:

- i. That the applicants are residing on the suit property with their families.*
- ii. That the applicants have lived and are living on this plot for more than 16 years without any disturbance.*
- iii. That the applicants have no other plot to move to.*
- iv. That the 3rd respondent has been allotted some other land in the adjudication section.*
- v. That the government had sought to subdivide and issue title deeds to the people on the ground including the applicants.*
- vi. That the demarcation officer and the surveyors have demarcated the suit property as per the acreage occupied by the applicants.*
- vii. That the 3rd respondent has never bothered to execute the award since 1993 when it was entered as court judgment and it cannot be executed now.*
- viii. That the applicants have fully developed the suit property.*

4. The Motion was supported by the Verifying Affidavit of the 1st applicant sworn on 30th November 2011 on behalf of himself and the other applicants in which the facts upon which their case is founded are set out in paragraphs 3 -11 thereof as follows:

“Affidavit of David Wachenje dated 3rd November 2011

- 3. that I am a resident of Sangeni Mwararu Adjudication Section and I and the 2nd and the 3rd applicant have been residing on the suit property for more than 16 years and we have fully developed the plot.*
- 4. That my parents had lived on this plot before I and the 2nd and 3rd defendants inherited it.*
- 5. That in 1993, the late Peter Mwambule laid on this plot and filed a claim before the panel for elders who without cogent reasons made z ruling in his favour.*
- 6. That I and the 2nd and the 3rd applicants had already built our houses on the suit property and we were in complete and exclusive possession.*
- 7. That although the late Peter Mwabule had obtained a finding in his favour, he did not demand for possession and even after his death none of his beneficiaries has ever claimed this plot and it is now over 16 years.*
- 8. That the government has now placed the whole area under adjudication process and the officers from the Adjudication office have already demarcated the plot as per the law.*
- 9. That the demarcation officers and other committees have indeed found us in possession and they have found that we have fully developed our plot. Annexed marked DW a-d are photos of our houses.*
- 10. That I was surprised when I was invited by the officers of the 1st respondent and told that the*

3rd respondent was claiming that the plot where we are residing is the property of their father.

11. That I tried to explain to the officers of the 1st respondent but to my surprise they overruled me and told me point blank that I the 2nd and 3rd applicants cannot be allotted the plot.”

SUBMISSIONS

5. The applicants filed submission dated 1st November 2013 and the 1st and 2nd, and the 3rd respondents, respectively, filed submissions dated 10th February 2014 and 20th February 2014.

6. For the ex parte applicant, it was submitted that the 1993 judgment of the Court awarding the land to Peter Mwambule under whom the 3rd respondent claims had not been executed for 17 years at the time of the submissions and therefore “the 3rd respondent’s claim based on a judgment delivered in 1993 is expressly barred by the provisions of Limitations Act” under section 4 (4) thereof. It was further contended that the 3rd Respondent was not a legal administrator to the Estate of the Peter Mwambule, Deceased, and could not therefore competently raise the ownership claim and “the 1st respondent’s decision to entertain his claim is illegal and cannot be sustained”. It was further contended that on the respective merits of the parties’ cases that the ex parte applicant had been in total and exclusive possession of the suit property on which he lived and had developed, while the 3rd respondent had never lived on the suit property and had some other plots that he had been allotted by the 1st respondent including the one on which he resided with his family. The court was urged that the “the purpose of placing an area under Adjudication is to give land to those who are on the ground and have no other plots.” In addition, it was contended that the 3rd respondent had never filed any cause against the applicants to seek possession of the suit property, and section 10 (2) (3) and (4) of the Limitation of Actions Act was cited as barring such action.

7. The 1st and 2nd respondent contended that the matter was really an ownership dispute between the *ex parte* applicant and the 3rd Respondent, and that all the 1st and 2nd respondents sought to do was to establish in accordance with the Land Adjudication Act who was the owner of the suit property. It was contended that the 1st respondent had stayed the adjudication process pursuant to section 30 of the Act pending confirmation of the position of the court’s decision as to the issue of ownership, and that, therefore, the ex parte applicant could not satisfy the requirements for the grant of prerogative orders as set out in the *Council of Workers Union v. Minister for Civil Service* (1985) AC 374 in relation to the rules of Natural Justice, ultra vires and procedural impropriety. Citing, *R. v. The Kenya National Examination Council ex parte Geoffrey Githinji and 9 Others*, Court of Appeal Civil Appeal 266 of 1996, it was contended that the Court could not in judicial review application for certiorari determine the merits of the decision which was made within jurisdiction, but only the decision making process. The respondents objected that the issue of long uninterrupted stay on the suit property alleged by the ex parte applicant could only be raised in a proper suit by way of Originating Summons for adverse possession.

8. In brief submission dated 20th February 2014, the 3rd Respondent accused the ex parte applicant of inordinate delay in challenging the decision of the Tribunal and that the ex parte applicant could have appealed to the High Court from the decision of the Appeals tribunal. The respondent urged that the ex parte applicant had disobeyed the order of the subordinate court by staying on the suit property and he could not legitimize the disobedience by the order sought herein. In addition, the respondent objected that the land in question was not government land that could be allocated to landless persons and urged the court to dismiss the attempt by the ex parte applicant to dispossess him of his lawful inheritance from his late father. The Submissions attached a copy a ruling of the Panel of Elders in a Claim by Peter Mwambule versus David Mwachenje where the Panel ruled that “the disputed land belongs to Petr Lagho Mwambule” and a copy of certified order of Resident Magistrate’s Court at Voi, Hon. Nduku Njuki, RM, made on 3rd June 1993 adopting the finding of the Panel of Elders in Land Case No. 9 of 1993.

Issue for determination

9. The question for determination is whether an order of Certiorari will issue to quash the decision of the 1st Respondent herein.

DETERMINATION

10. Section 4 (4) of the Limitation of Actions Act provides for limitation as to action based on a judgment as follows:

“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

11. Land Tribunals Act, No. 18 of 1990 which is the applicable law for the panel of elders proceedings in 1993, did not give the Panel jurisdiction to hear disputes as to the ownership of parcel of land. The elders could have competently found as they purported to do that the land herein belonged to Peter Lagho Mwambule, alleged 3rd respondent’s father. The panel’s decision on ownership of the suit property was therefore null and void. For the same reason, the ex parte applicant’s appeal to the Provincial Appeals Committee under the Act was also incompetent, as was the purported ‘ratification’ by the Resident Magistrate’s Court by Order of 3rd June 1993.

12. There being no valid judgment, the provisions of the Limitations Act as regards execution of the judgment do not apply. The 3rd respondent cannot thereby be barred from seeking to recover the suit property.

13. Land Adjudication is not about settlement of landless persons but rather the ascertainment and record of ownership rights in land. The process of adjudication is for the determination of bona fide owners of parcels of land to facilitate registration in their individual names. The object of the Land Adjudication Act cap 284 laws of Kenya is disclosed by the long title preamble is -

*“An Act of Parliament to provide for the **ascertainment and recording of rights and interests in community land**, and for purposes connected therewith and purposes incidental thereto”*

14. The ex parte applicant cannot therefore oppose the determination of the 3rd respondent as the owner of the suit property by inheritance from his late father by reason only of occupation for the period of 17 years after the decision of the panel of elders. The ex parte applicant may however object to the adjudication process by showing that he is owner of the parcel of land. That is the process set out in the Land Adjudication Act. The reliance on long occupation on the suit property cannot avail the ex parte applicant in judicial review proceedings which only deal with the decision making process rather than the respective merits of the parties. Moreover, there is special procedure by Originating Summons under Order 37 of the Civil Procedure Rules, 2010 for litigation of adverse possession claims.

15. In addition, the adverse possession principle to registered land applies to un-adjudicated and unregistered land but that is a matter for the suitable trial court on the merits. Section 38 (1) of the Limitation of Actions Act provides-

“38. Registration of title to land or easement acquired under Act

*(1) Where a person claims to have become entitled by **adverse possession to land registered under any of the Acts cited in section 37 of this Act**, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”*

Conclusion

16. The *ex parte* applicant has not shown that the Respondents acted without jurisdiction or that the decision making process was vitiated by want of reasonableness or procedural impropriety and therefore the judicial review order of Certiorari is unavailable to him. **See *ex parte Geoffrey Gathinji Njoroge*, supra.**

17. The 1st and 2nd Respondents have only acted within and pursuant to their powers in the determination of adjudication process under the Land Adjudication Act.

18. If the *ex parte* applicant is minded to pursue an interest in the suit property, the Environment and Land Court established under Article 162 (2) of the Constitution is the appropriate forum for the determination of a dispute as to ownership where, as here, oral evidence may be necessary to prove occupation, and the judicial review proceedings, which are conducted on the basis of affidavit evidence generally on the process of decision making rather than the merit of the decision, are wholly unsuited.

ORDERS

19. Accordingly, for the reasons set out above, the *ex parte* applicant’s Notice of Motion dated 2nd December 2011 for judicial review orders is dismissed with costs to the respondents.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 21st DAY OF NOVEMBER 2016.

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JUDGE

Appearances -

M/S Hezron Gekonde & Co. Advocates for the Ex Parte Applicants

Ms. Ruth Lutta, Counsel for the 1st and 2nd Respondents

The 3rd Respondent appeared in Person.