



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**MISC. APPLICAITON NO. 59 OF 2010**

IN THE MATTER OF APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI

**AND**

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

**AND**

ORDERS 53 OF THE CIVIL PROCEDURE RULES

**AND**

IN THE MATTER OF LAND PARCEL NO'S 2368, 2367, 1059, 323, 2377 & 2360

ADJUDICATION SECTION WITHIN TIGANIA WEST DISTRICT

**BETWEEN**

**REPUBLIC.....APPLICANT**

**TIGANIA WEST LAND ADJUD. & SETTLEMENT OFFICER.....1ST  
RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**AND**

**EBUTHANIA RETERE & 5 OTHERS.....INTERESTED  
PARTIES**

**Ex-Parte**

LYDIA MUNYATTA M'ARUYARU

(the administratrix of the estate of

the late M'aruyaru M'M'ayuki)

## JUDGMENT/RULING

These Judicial Review Proceedings were commenced by way of a Notice of Motion dated 6th September, 2010. Leave to commence the proceedings was granted on 19th August, 2010.

On 29.4.2013, it was confirmed to the court that the Exparte Applicant and the Interested Parties had filed and exchanged their written submissions. Mr. Kieti, for the Attorney general for the respondents, told the court that the respondents had not put in a response and the apposite submissions due to lack of proper instructions. He requested the court to give the respondents 30 days, as a last opportunity, to file and exchange all the necessary documents. Specifically he told the court that if the respondents should be found not to have filed their submissions within the 30 days period as prayed, the court could go ahead and fix a date for delivery of the apposite judgment.

The court directed as follows:

**(1) “With the concurrence of Mr. Kieti for the AG – for both respondents, respondents allowed 30 days to put in their documents and submissions failing which a date for judgment will be fixed.**

**(2) Mention on 17.7.2013.”**

On 17th July, 2013, when the suit was to be mentioned to confirm if the Respondents had put in their documents and submissions, the representative for the Attorney General, for the Respondents, did not turn up. A date for delivery of judgment was fixed. The Judgment could not be delivered on the date fixed for that purpose as the Judge hearing this matter was given his annual leave. The file was returned to the Registry for the parties to seek apposite directions in future.

The exparte applicant seeks the following orders:

***1. That an order of certiorari do issue, causing into this honourable Court and quashing the proceedings, judgement or order of the 1st respondent dated 1.4.2010 in objection Nos. 4, 5, 6, 7, 8, 9, 72 and 73 over land parcels Nos. 2363, 2367, 2500, 1059, 323, 2377, 1300 and 2360 situate within Uringu 11 Adjudication Section within Tigania West District.***

***2. That costs of this application and the ex-parte Chamber Summons for leave be borne by the respondents and interested parties jointly and severally.***

The exparte applicant based his application on the statutory statement of facts and the verifying affidavit of **LYDIA MUNYATTA M'ARUYARU** and the following grounds:

**a) The 1st Respondent unreasonably denied the Exparte Applicant a fair hearing by denying her a chance to call her witnesses.**

**b) The 1st Respondent usurped the powers of the land adjudication Committee of Uringu 11 Adjudication Section.**

**c) The 1st respondent acted *ultra vires*.**

**d) The 1st respondent lacked jurisdiction to hear and determine the said objection alone.**

The Exparte Applicant has given a short background of this matter. She says that she is seeking Judicial Review orders of certiorari removing into this court and quashing the proceedings, judgment or order of the Tigania West District land Adjudication and Settlement Officer, the 1st Respondent in this suit, in Objection Nos, 4, 5, 6, 7, 8, 9, 72 and 73 over L. R. No's 2268, 2367, 2500 1059, 323, 2377, 1300 and 2360 all of them situated within Uringu II Adjudication Section within Tigania West District.

She has explained that leave to file these proceedings was granted on 19th August, 2010 and the

application was filed on 8th September, 2010 even though it is dated 6th September, 2010.

It is explained that the Exparte Applicant is the administratrix of the estate of late M'Aruyaru M' Ayuki, her late husband. It is averred that the late M' Ayuki was the owner of the parcels in dispute, that is parcels Nos. 2368, 2367, 2500, 1059,323, 2377, 1300 and 2360 Uringu 11 Adjudication Section which were curved out of a common parcel of land measuring approximately 15.10 acres. It is claimed that the land was awarded to the deceased by the erstwhile Mathene District Magistrate's Court in Land Case No. 8 of 1961. Upon the demise of the late M'Aruyaru M' Ayuki, he was survived by his daughter, the exparte applicant, two sons and their families who are in occupation of the land parcels, which they have developed extensively. It is stated that long after the deceased's demise, the Interested Parties started to claim that they owned the suit lands after having purchased them from the deceased original owner. The Interested Parties went ahead and filed objection Nos' 4, 5, 6, 7, 8, 9, 72 and 73, claiming the parcels in dispute. The Exparte applicant says that the Interested Parties have never utilized any of the disputed suit lands, though they threatened to forcibly take possession thereof.

The Exparte Applicant submits that the ruling/order/judgment of the 1st respondent was unlawful, biased and against the rules of natural justice.

The Exparte Applicant claims that the 1st Respondent heard the objection alone contrary to Section 11 of the Land Consolidation Act, Cap 283 which mandates a Committee appointed for an adjudication section to adjudicate and determine in accordance with African Customary law the claim of any individual person to any right or interest in any land within the adjudication section. It is submitted that the 1st respondent usurped the power of the Land Adjudication Committee and his decision, for that reason, was *ultra vires*. The Exparte Applicant has proffered the case of the Republic Versus Tigania East District Land Adjudication Officer and Another **AND** Gervasio Mugambi Thurairaja (IP) and Florence Nikio Philip (exparte Applicant), Meru, which granted orders of certiorari on the basis of violation of this law.

It is also submitted that the Exparte Applicant was denied a chance to call her witnesses and she says that this was against the rules of natural justice regarding fair hearing. The Exparte Applicant submits that the right to fair hearing is a fundamental right entrenched in the Constitution by virtue of Article 50 thereof.

The Exparte Applicant has submitted that the decision of the 1st Respondent was against the rule of law in that it purported to take away land that had been awarded to the Applicant's father by a Court of law in Mathene District Magistrate's Court Land Case No. 8 of 1961 whose proceedings and judgment have been annexed to the affidavit of the Exparte Applicant. She has also said that the Interested parties have not exhibited anything to show that they had bought the land from the deceased father of the Exparte Applicant and if so, when. It is opined, for the Exparte Applicant, that nothing would have been easier for the Interested parties than to avail a sale agreement between the Interested parties and the Exparte Applicant's deceased father. It is submitted that the contention that the Interested Parties bought portions of land from the Exparte Applicant's father is unfounded.

The Exparte Applicant concludes by saying that the 1st Respondents award to the Interested Parties of the disputed parcels of land is at best a back door attempt to defeat the Judgment of the Court of Law.

The Exparte Applicant urges this Court to find that the objection and proceedings before the 1st Respondent together with his award were null and void *ab initio*, and were a violation of the rule of law and the rules of natural justice. She urges the court to quash the same and that a declaration be made that the Exparte Applicant is the rightful owner of the suit land as against the illegal claims of the Interested Parties.

The Interested Parties have opposed this application.

It is submitted that the Exparte Applicant had not been denied the right or a chance to call her witnesses. It is proffered that at page 233 of the proceedings, the applicant completed her evidence and stated: "**That is all**", and signed. It is opined that there is nowhere in the proceedings where she prayed for a chance to call her witnesses and she was denied that chance. It is further argued that there is nowhere in

the proceedings where the Exparte Applicant had indicated that she had witnesses.

Regarding the 2nd complaint that the 1st Respondent usurped the powers of the Land Adjudication Committee and conducted the proceedings without their presence, the Interested parties state that it is clear from the record that the land Committee fully participated in the proceedings and even asked questions to the Exparte Applicant and witnesses. This court is urged to look at pages 154, 160, 182 and 196 of the proceedings where the Land Committee members were asking questions. It is, therefore, submitted that the 1st Respondent acted within his powers as conferred by the Land Consolidation Act and particularly Sections 9(1) and 11 (1) of Cap. 283.

The Interested Parties submit that the 1st Respondent did not take away land that had been adjudicated upon by a court of law. They say that the proceedings and judgment of the District Magistrate's Case No. 8 of 1961 do not mention any land number which was being adjudicated upon. They say that the parties herein are not the parties in Miathene DMCCC No. 8/1968. They submit that they have indicated in their replying affidavit that the deceased father of the Exparte Applicant after winning DMCC No. 8 of 1961 sold land to other people namely **JASON MUGAMBI, M'IKIBA M'KIRICHU** and **IKIYU IKABU**. They, therefore, say that the 1st Respondent had not taken away any land adjudicated upon by the District Magistrate.

The Interested Parties claim that they are purchasers who have extensively developed their parcels of land and that the Exparte Applicant has no ascertainable right over the suit parcels of land. They submit that the objections were conducted in a lawful manner and urge this Court to dismiss this application with costs.

I have examined and considered the averments of the parties, their submissions and all materials proffered in this suit. I find it necessary to first consider the complaint that the 1st Respondent usurped the powers of the Land Adjudication Committee of Uringu II Adjudication Section. Section II(1) of the Land Consolidation Act states as follows:

**“II (1) The Committee appointed for an adjudication section shall adjudicate upon and determine in accordance with African Customary Law the claim of any individual person to any right or interest in any land within the adjudication section.”**

**“11 (2) If a Committee is unable to reach a decision in accordance with African Customary law it shall refer the matter to the Arbitration Board which shall decide the matter and shall inform the Committee of its decision.”**

A perusal of the proceedings conducted by the 1st Respondent evinces little or no evidence that a Committee took part in the impugned proceedings. The Committee members present are not recorded. The hand written proceedings are presumably written by the Land Adjudication Officer whose signature is appended at the the end.

I do take particular interest in 2 portions of the proceedings headed as (1) Findings and (2) Judgment/Order. In both of them there is no suggestion that the apposite Committee is making the findings and the judgment/order. It is clear that the 1st Respondent is alone in charge of the proceedings at this stage. I find that in doing so, he is acting beyond the jurisdiction conferred by law. Regarding jurisdiction, I wish to quote the Supreme Court of Kenya in the case of **Samuel Kamau Macharia and Another Versus Kenya Commercial Bank and 2 others (Petition No. 2 of 2011)** as having opined as follows:

**“A Court's jurisdiction follows from either the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law**

*Mutatis Mutandis*, the 1st respondent should not have arrogated to himself jurisdiction which had not been conferred by law.

The 1st respondent can not be allowed, by a mere sleight of his hand, to contrive jurisdiction for himself. On the ground that he lacked authority to act as he did, this application will be found to have merit.

Although I find that the 1st Respondent acted solely in hearing the subject objections, I need to point out that the did not have any business in adjudicating and determining the apposite objections even together with the relevant Committee. Section 11 (1) of the Land Consolidation Act decrees that the Committee appointed for an adjudication section shall adjudicate upon and determine in accordance with African Customary law the claim of any individual person to any right or interest in any land within the adjudication Section. The language of this Section is couched in veritably pellucid mandatory terms. The adjudication and the determination is by the Committee. Not by any other person or body!

The non-adjudication and non-determination by the Adjudication Officer is buttressed by the mandatory requirement by Section 9 (2) of the Land Consolidation Act for the Adjudication Officer to appoint an executive officer for each Committee. The Executive Officer is mandatorily required to attend meetings of the Committee. He is allowed to speak but is not allowed to vote. This allows the Committee to be fully in charge of determinations.

In the circumstances, I find that the proceedings before the 1st Respondent and the decision made by the 1st Respondent are null and void *ab initio*.

Judicial Review proceedings are meant to look at the propriety and integrity of the decision making process. Considerations which are taken into account are issues such as illegality including lack of jurisdiction, irrationality including unreasonableness, partiality and caprice and procedural impropriety, intentioned or otherwise. As I have found that the 1st Respondent acted without authority, I do not find it necessary to consider the other issues raised by the parties.

I grant the following orders:

**1. An order of certiorari is issued calling to this court and quashing the proceedings, judgment or order of the 1st Respondent dated 1.4.2010 in objection Nos. 4, 5, 6, 7, 8, 9, 72 and 73 over land parcels Nos. 2363, 2367, 2500, 1059, 323, 2377, 1300 and 2360 situate within Uringu Adjudication Section within Tigania West District.**

**2. Costs of this application and the Ex-parte Chamber Summons for leave are awarded to the Ex-Parte Applicant against the respondents and the Interested Parties jointly and severally.**

It is so ordered.

**Delivered in Open Court at Meru this 14th day of January 2015 in the presence of:**

Cc. Daniel/Lilian

Muthomi h/b Ayub Anampiu for Interested Parties

Miss Makori for Attorney General

Firm of Mithega Kariuki – Absent for Exparte Applicant

**P. M. NJOROGE**

**JUDGE**