



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC MISCELLANEOUS APP. NO. E014 OF 2020**

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

**AND**

**IN THE MATTER OF KENZE ADJUDICATION SECTION APPEAL NO. 2 OF 2020 & PLOT NO. 585**

**AND**

**IN THE MATTER OF LAND ADJUDICATION ACT, CAP 284, LAWS OF KENYA**

**BETWEEN**

REPUBLIC .....APPLICANT

**VERSUS**

THE CABINET SECRETARY MINISTRY OF

LAND AND PHYSICAL PLANNING .....1<sup>ST</sup> RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....2<sup>ND</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

NZELI MUSYIMI .....EX-PARTE APPLICANT

**AND**

STANLEY TIO KILONZI .....INTERESTED PARTY

**RULING**

1. The Exparte Applicant in this matter filed a chamber summons application dated 11<sup>th</sup> December 2020 seeking the following orders;

(1) That the Honourable Court be pleased to grant leave to the Ex-parte Applicant to file an application for Judicial Review seeking an order of CERTIORARI to bring to this Honourable Court and quash the decision of the Cabinet Secretary, 1<sup>st</sup> Respondent, dated 26<sup>th</sup> June 2020, relating to Land Parcel No. 585 Kenze Adjudication Section in Appeal Case No. 2/2020, the previous decisions of the committee dated 12<sup>th</sup> October 2011, decision of the Adjudication Board 9<sup>th</sup> November 2012 and decision of the Land Adjudication Officer dated 11<sup>th</sup> February 2019.

(2) That the cost of this application to be borne by the Respondents.

2. The application is supported by a statutory statement dated 11<sup>th</sup> December 2020 as well as the verifying affidavit dated the same date and sworn by the exparte applicant. The exparte applicant states that she has lived on Land Parcel Number 585 Kenze Adjudication Section in Kitui County, since she got married to the late Musyimi Masila in 1960; that there had never been a dispute between the late Musyimi Masila and one Stanley Tito Kilonzi the Interested Party herein or his family; that by a decision in case No. 58 of 2011, the Adjudication Committee made a finding in a dispute between Stanley Tito Kilonzi and Nzeli Musyimi, that the suit land belonged to Nguni and not to either of the

parties, but the committee awarded the parcel to the Interested Party; that the Ex-parte Applicant dissatisfied with the decision appealed to the Adjudication Board in A/B Case No. 06 of 2011; that the Board entertained a new claim from the Interested Party and dismissed the appeal; that the appellant filed an objection Cause No. 40 of 2017 which was dismissed which prompted an appeal to the Minister which was also dismissed. The Exparte Applicant's complaint is that the entire adjudication process and proceedings in respect thereto were marred with legal and procedural improprieties, breach of natural justice principles, favouritism and corruption. She also complained that the impugned decisions were contrary to the decision in Kitui Criminal Case No. 74 of 1990.

3. The application is opposed. The Attorney General filed grounds of opposition dated 2<sup>nd</sup> March 2021 where it was argued that the application is an abuse of court process, frivolous and a waste of judicial time; that the material before court does not demonstrate that the Exparte Applicant has a prima facie arguable case and that the dispute has been ongoing since 1960 and judicial review will not avail remedies sought by the applicant.

4. In addition, Stanley Tito Kilonzi, the Interested Party filed a replying affidavit sworn on 12<sup>th</sup> April 2021 and stated that the omnibus prayers in the chamber summons for decisions made on 11<sup>th</sup> February 2019, 8<sup>th</sup> November 2012 and 12<sup>th</sup> October 2011 are stature barred for having been filed outside the six months period provided for application for Judicial Review orders; that no prayer for extension of time and this court has no jurisdiction to extend time; that the applicant has not demonstrated a prima facie case; that the exparte applicant ought to have filed an affidavit verifying the facts not a verifying affidavit under Order 3 Rule 2 of the Civil Procedure Rules; that the Affidavit verifying the facts should refer to proceedings that led to the decision of 26<sup>th</sup> June 2020, but it does not; that the verifying affidavit is uncommissioned, and unmarked; that the decision of 26<sup>th</sup> June 2020 ought to have been attached to the verifying affidavit and the same ought not to be thrown at the court; that the applicant's approach is dilatory as he has included untranslated proceedings in Kamba language; that no consent was obtained from the Adjudication Officer before this suit was filed and that this court cannot entertain a claim for ownership of land.

5. The chamber summons was canvassed by way of written submissions whereof the Exparte Applicant filed his submissions on 24<sup>th</sup> May 2021 while the Interested Party filed his submissions on 19<sup>th</sup> October 2021.

#### **EXPARTE APPLICANT'S SUBMISSIONS**

6. The Exparte Applicant submitted that the chamber summons dated 11<sup>th</sup> December 2020 were filed in court on 14<sup>th</sup> December 2020, and the minister's decision was supplied to the Exparte Applicant's Advocate in November 2020 vide a letter dated 29<sup>th</sup> October 2020, hence the application was brought within five months of the said decision. Counsel argued that the exparte applicant's case was because there was breach of procedure, consideration of irrelevant materials, failure to consider relevant materials and undue influence. Counsel argued that the culmination of the decision of 26<sup>th</sup> June 2020 is as a result of procedural improprieties in the adjudication process.

7. Counsel argued that this court has jurisdiction to determine this matter. Counsel relied on the decision of **Republic vs Kenya Revenue Authority Ex-parte Stanley Mombo Arruti [2018] eKLR**. Counsel contended that the application complied with Order 53 Rule 1 of the Civil Procedure Rules and argued that the verifying affidavit complied with the Rules. Counsel pointed out that the verifying affidavit is well commissioned and duly signed while the annexures accompanying the statement of facts are well marked, commissioned and duly executed.

8. It was also contended that this suit does not concern an interest in land and therefore no consent from the adjudicating officer was necessary. Counsel emphasized that the Exparte Applicant had demonstrated a prima facie case by providing all facts and evidence including decisions of the committee, the Board, the Adjudication Officer and the Minister. Counsel pointed out that at this stage the Respondent ought not challenge the merits for judicial review orders since the matter ought to be restricted only to whether the Exparte Applicant has an arguable case. Counsel relied on the cases of **Mirugi Kariuki vs Attorney General [1992] eKLR**, **Republic vs Nairobi City Council & Another [2014] eKLR** and **Felix Kiprono Matagei vs The Hon. Attorney General, Nairobi High Court Petition No. 337 of 2018**.

#### **INTERESTED PARTY'S SUBMISSIONS**

9. The Interested Party submitted that the verifying affidavit of the Exparte Applicant is in compliance with Order 4 Rule (1) (2) and not Order 53 Rule (1) (2) of the Civil Procedure Rules. Counsel contended that the verifying affidavit should verify the facts relied upon, and cited the case of **Commissioner General, Kenya Revenue Authority (through the Republic) vs Silvano Onema Owaki t/a Marenga Filling Station, Kisumu Civil Appeal No. 45 of 2000**, where the court held that it is the verifying affidavit that is of evidential value in an application for judicial review. Counsel contended further that the verifying affidavit was incurably defective by relying on the cases of **Republic vs Busia Chief Magistrate Exparte Therese Hudson & Others, Busia High Court Judicial Review No. 9 of 2015**, **Cowest Trading GMBH vs Specialized Lighting Systems Ltd Nairobi Milimani High Court Civil Case No. 1251 of 2002** and **Republic vs The County Assembly of Nakuru & Others Nakuru HC JR No. 19 of 2016**.

10. Counsel argued that under Section 30(1) of the Land Adjudication Act, no person should institute a suit concerning an interest in land without consent in writing of the Adjudication Officer. Reliance was placed on the cases of **Kiroket Ole Punyua vs Umash Ole Mwanik & Others Narok High Court Constitutional Petition No. 24 of 2017** and **William Mutuura Kairiba vs Samuel Nkari & Others Chuka High Court ELC Case No. 8 of 2018**.

#### **ANALYSIS AND DETERMINATION**

11. I have considered the application, the Replying Affidavit and the submissions of parties. The issue that arise for determination is whether the Exparte Applicant has demonstrated that he has a prima facie case to warrant filing judicial review application.

12. The law in respect to grant of leave to commence judicial review proceeding is provided for in Order 53 Rule 1 (1) of the Civil Procedure Rules which provides that no application for judicial review orders shall be made unless leave was sought and granted by the court. The

purpose for grant of leave was stated in the case of *Republic vs County Council of Kwale & Another Exparte 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. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceeding for judicial review or it were actually pending even though misconceived ..... Leave may only be granted therefore if on the material available the court is of the view without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigations at a full interpartes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially.”**

13. Therefore at the stage of determining an application for leave like in this matter, the court need not consider in great detail the parties arguments, but a glance at the applicant’s case ought to be sufficient for the court to decide if the Applicant’s plea deserves an order for leave, and the matter calls for further investigation.

14. In the instant application, the applicant has stated that decisions made in the adjudication process by the committee, the Adjudication Board, the Adjudication Officer and the Minister were tainted with legal and procedural improprieties, breaches of principles of natural justice, favouritism and corruption. The Interested Party has argued that the verifying affidavit has no annexure of the evidence of the impugned decisions, but that the decisions were attached to the statement contrary to the provisions of Order 53.

15. I note that it is not in dispute that the impugned decisions were made in the terms stated by the Exparte Applicant, and the same are on record, though annexed to the statement. In my view, failure to annex the impugned decisions does not render the application incurably incompetent. See the Court of Appeal decision in the case of *Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR*.

16. Having considered the evidence on record, I am satisfied that the exparte applicant has met the threshold for grant of leave. I therefore make the following orders;

- (a) That the Exparte Applicant’s chamber summons application dated 11<sup>th</sup> December 2020 is allowed in terms of prayer 1.**
- (b) The Applicant shall file and serve the substantive Notice of Motion together with a copy of this ruling and submissions within 14 days of today.**
- (c) Upon service, the Respondents and Interested Party shall file and serve their responses to the substantive Notice of Motion together with submissions within 14 days of service. The Exparte Applicant shall be at liberty to file and serve supplementary submissions if need be in 7 days of service.**
- (d) This matter shall be mentioned on 24<sup>th</sup> March for further directions.**

17. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. MUNYOKI FOR THE EXPARTE APPLICANT**

**MR. KARANJA FOR INTERESTED PARTY**

**NO APPEARANCE FOR THE RESPONDENTS**

**MS JOSEPHINE MISIGO – COURT ASSISTANT**