



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. APPLICATION NO. 26 OF 2012

M'MBIKU LAMBITU.....EX-PARTE APPLICATION

VERSUS

THE LAND ADJ. & SETTLEMENT OFFICER

IGEMBE DISTRICT.....RESPONDENT

JEREMIAH KORONYA M'MAILUTHA.....INTERESTED PARTY

M'MBIKO LAMBITU.....EX-PARTE APPLICANT

J U D G E M E N T

This Judicial Review application is dated 4th October, 2012. It states that it is predicated upon Order 53, Rule (3) of C.P.R, Sections 8 & 9 of the Law Reform Act and all enabling provisions of the law. It prays for the following orders.

1. ***THAT this Hon. Court be pleased to issue orders of CERTIORARI to call up and bring to this court for purposes of quashing the decision of the land adjudication and settlement officer Igembe District made on 21st August, 2012 in objection No. 2481/2011 involving parcel Number 1263/Ndoleli Adjudication Section as the decision herein is illegal because it was made with no basis and time barred.***
2. ***THAT an ORDER OF PROHIBITION be issued to prohibit the Land Adjudication & Settlement Officer Igembe District from implementing the decision dated 21st August, 2012 in objection No. 2481/2011 involving parcel No. 1263/Ndoleli Adjudication Section.***
3. ***That costs of this application be provided for.***

The application is grounded upon the annexed Statement of facts and verifying affidavit of the ex-parte applicant M'Mbiko Limbitu. It has, inter alia, the following grounds.

- A. **THAT the decision of the Respondent was illegally made out of time and with no legal basis.**
- B. **THAT the Respondent just created a leeway to accommodate the interested party though the interested party did not file any land committee case or Arbitration Board case as stipulated in law under Cap 283 & 284 of Laws of Kenya.**
- C. **THAT the interested party relied on a non-existence (sic) agreement to claim this land and which was not produced during the hearing.**

D. **THAT** that Respondent had no powers/jurisdiction to entertain cases based on agreement/contract.

E. **THAT** the Respondent dealt with extraneous and irrelevant matters in arriving at his decision and award and this court has granted leave to institute these proceedings.

F. **THAT** the decision and award by the Respondent at the instigation (sic) of interested party is wrong, oppressive, arbitrary, prejudicial, unjust and is unlawful for want of procedure/jurisdiction since it was based on agreement/contract.

G. **THAT** it is only fair and just therefore for this Hon. Court to intervene by way of JUDICIAL REVIEW to quash the said proceedings entirely.

The application was canvassed by way of written submissions.

EXPARTE APPLICANT'S SUBMISSIONS

The Ex- parte applicant has submitted that:

- a. He is the demarcated owner of parcel No. 1263/NDOLELI Adjudication section and that he is entitled to all rights and interests as appertain to his ownership of the suit land.
- b. The Respondent went against the laid down procedure for hearing and determining land adjudication issues and went against the arbitration procedure by entertaining a general claim after the interested party failed to complain at the Committee and arbitration stages. He argues that the claim was baseless and time barred.
- c. The Interested Party was a stranger and that he had not produced evidence of sale of land to him by the exparte applicant and that as he had no agreement his claim was a mere allegation used as a pretext to clandestinely transfer the exparte applicants' land to the Interested Party.
- d. The exparte applicant trashes the Interested Party's contention that he should have appealed to the Minister and says that the existence of an alternative remedy can not vitiate the filing of Judicial Review proceedings. He proffers the case of *Shah Deveshi & Co Ltd Versus Transport Licensing Board (1970) EA 631* as his authority for the assertion that certiorari will issue notwithstanding the existence of an alternative legal remedy.

He asks the Court to issue the Orders of Certiorari and Prohibition as prayed.

RESPONDENT'S SUBMISSIONS

The respondent submits that issues for determination in these proceedings are:

- a. *Whether the Respondent acted ultra-vires in making the decision dated 21st August, 2012.*
- b. *Whether the Respondent acted in any manner that violated the Rules Of Natural Justice.*
- c. *Whether the applicant is entitled to the Orders sought.*
- d. *Whether the applicant is entitled to costs .*

The respondent has submitted as follows:

- a. *As averred in paragraph 2 of his Replying Affidavit, the decision made on 21st August, 2012 on parcel No 1263 was pursuant to sections 25 and 26 of the Land Adjudication Act, cap 284 Laws of Kenya. He avers that Section 26 (2)(1) is relevant and quotes it as follows:-*

2(1) *“Any person named in or affected by the Adjudication Register who considers it to be incorrect or incomplete in any respect may, within 60 days of the date upon which the notice of completion of the Adjudication Register is published object, to the Adjudication Officer in writing, saying in what respect he considers the Adjudication*

Register to be incorrect or incomplete”.

- b. The Respondent asserts that there was full compliance with the law and that the law, in accordance with section 26 of the Land Adjudication Act, did not require the Intervention of the Committee. This being the case, the Respondent was clothed with jurisdiction to make the decision being impugned. It is submitted that for this reason grounds in respect of the issue of jurisdiction must fail***
- c. The Exparte application participated fully in the proceedings concerning Objection No 2481 of 011 on Plot No 1263 as evidenced by Annexure “PMM3” of the Respondent's Replying Affidavit. It is submitted that the Respondent did not act Contrary to the Rules of Nature Justice.***

The respondent says that despite conformity with Rules of Natural Justice during the proceedings which spawned the decision being challenged, the applicant has delved into issues that go to the Merits of the decision made in objection 2481/011 on plot No 1263. He laconically states that it is trite law that Judicial Review considers the decision making process and not the merits of the decision. He opines that the proper determination of such issues would be an appeal and not a Judicial Review Process.

As the Respondent was clothed with Jurisdiction and the Rules of Natural Justice had been satisfied, the respondent submits that the suit ought to be dismissed with costs to the defendant.

THE INTERESTED PARTY'S SUBMISSIONS

The Interested Party has submitted as follows:-

- a. The Exparte applicant duly executed the requisite transfer documents and gave him possession of a portion of land measuring 2 acres to be excised from Land Parcel No. 1263/Ndoleli Adjudication Section. For this reason , he says that he was not a stranger to Objection 2481/011 on plot No 1263.***
- b. The Exparte application had fully participated in the apposite proceedings, the Respondent had Jurisdiction and that Rules of Natural Justice were observed.***
- c. Regarding the allegation of fraud, he submits that the exparte applicant did not report to police.***
- d. He proffers the case of Nairobi Permanent Markets Society and others Versus Salima Enterprises & Another (1994-1981 EA 232) for his proposition that the application had not satisfied the grounds on which his title could be challenged and for the assertion that a mere omission on a document's title is not enough to impeach the title of a registered proprietor.***
- e. He proffered the case of James Waithaka Kamau & 3 others versus Stanley Njoroge, Nairobi HCCC No. 6656 of 1991 where at page 121 the learned Judge said: “the Plaintiff took possession of the land immediately on purchase in 1962 and settled thereon thereby coming under the provisions of section 3 (3) of the Law of contract Act (cap 23).” He says this holding supports the Interested Party's case in that he has been cultivating his portion of 2 acres since 1992 when he purchased it from the exparte applicant. He further submits that he was a bonafide purchaser of 2 acres from parcel No. 1263/Ndoleli Adjudication Section.***
- f. He says that he had through annexures to his Replying Affidavit demonstrated that he had documents, including transfer documents, to support his claim over the subject parcel of land.***
- g. The Interested Party says that his objection was made pursuant to Sections 25 and 26 of the Land Adjudication Act after the Adjudication register for Ndoleli Ruujine Adjudication Section was published as complete on 28/02/2011. He says he filed his objection on 28/04/2011 within the stipulated time.***
- h. He submits that the Respondent's decision in Objection No. 2481/2011 was implemented way back on 5th December, 2012 and as such an Order Of Prohibition could not issue.***

I wish to point out that many of the issues raised by the Interested Party's Submissions address the merits of the Respondent's decision which is being impugned rather than the Integrity of the decision making process which is what mainly concerns , Judicial Review.

DETERMINATION

I have perused the pleadings of the Parties, the authorities proffered and the Submissions filed by in this matter.

At the outset, I wish to point out that some of the issues addressed by the Exparte Applicant and by the Interested Party are challenging the merits of the impugned decision. Issues such as the transaction between the exparte applicant and the Interested Party coming within the purview of section 3(3) of the Law of Contract Act (Cap 23) do not address the Integrity of the process that culminated in the Respondents' decision.

Judicial Review is primarily concerned with the Integrity that led to the impugned decision including an examination as to whether the decision maker acted ultra-vires his Jurisdiction, upheld the rules of Natural Justice including the need not to be biased and the need to conduct a fair hearing. In proper Circumstances, a Court may address itself to the issues of irrationality /unreasonableness and proportionality. With regard to irrationality, a Court can among other things, depending on the peculiarity of the particular case, be guided by the wise words of Lord Diplock in Council of Civil Service Unions Versus Minister for the Civil Service [1985] AC 374, where he opined: “a decision is irrational if it is so outrageous in its deficiency of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it”. This standard is also called the Wednesbury unreasonable Principle, after the decision in Association Provincial Picture Houses Ltd Versus Wednesbury Corporation, [1948] I KB 223.

I do find that the Order of Prohibition can not issue as the implementation of the decision being challenged had been done even before this suit was filed.

A careful examination of the proceedings conducted by the Respondent before he arrived at the decision that has spawned this suit, shows that the exparte applicant actively participated in those proceedings. I do not find any evidence of bias on the part of the Respondent. I do find that Section 26 of the Land Adjudication Act clothed the Respondent with Jurisdiction to conduct the proceedings in the way he conducted them. I also find that he did not delve into irrelevant or irrational considerations. A fair hearing was accorded the Exparte applicant without discernible bias. In a sentence, there was proper obeisance to the Rules of Natural Justice.

In the Circumstances, this suit stands dismissed. As a consequence, the Orders of Certiorari and prohibition prayed for are denied.

Costs are awarded to the Respondent and the Interested Party.

It is so ordered.

Delivered in open Court at Meru this **21st day of July, 2015** in the presence of:-

Cc:Daniel /Lilian

Kimathi Kiara for Ex-Parte Applicant

State Counsel absent for Respondent

No one for the Interested Party

P. M. NJOROGE

JUDGE