



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**LAND AND ENVIRONMENT COURT**

**JR. MISC. 97 OF 2008**

REPUBLIC.....EXPARTE APPLICANT

**VERSUS**

THE DISTRICT LAND ADJ. & SETTLEMENT

OFFICER, TIGANIA & IGEMBE .....RESPONDENT

M'MBAU THAMBAU.....INTERESTED PARTY

EX-PARTE.....MUSA NGAITII

**J U D G M E N T / R U L I N G**

This application is dated 29th December, 2008 and seeks orders:

- 1. That an order of certiorari be issued to quash the unilateral, arbitrary and unwritten decision of the Respondent to sub-divide and allot 0.30 acre of the ex-parte's land parcel No. 5690 Athanja/Athinga Land Adjudication Section to the Interested party.**
- 2. That an order of mandamus be issued to cancel the sub-division registered for Interested Party as Parcel No. 2639 Athanja/Athinga Land Adjudication Section and demarcate and register the Ex-parte's 0.50 acre as one parcel where situate.**
- 3. That costs of this application be provided for.**

It has the following grounds:

- i. That the Respondent without notice to the Ex-parte (sic) unilaterally, arbitrary (sic) sub-divided Ex-Parte's land parcel No. 5690 measuring 0.50 acres into portions of 0.20 and 0.30 acre and showed the former to Ex-parte but not the latter.**
- ii. That on 26.06.2008 the Respondent still without notice to the Ex- Parte allotted the 0.30 acre to the Interested Party as plot No. 2639.**
- iii. That despite demand the Respondent failed to show or explain to the Ex- Parte why his 0.50 acre had to be sub-divided and where the 0.30 acre was demarcated.**

The application is supported by the statement of facts and the verifying affidavit of Musa Ngaitii, the

Exparte applicant.

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

1. **The applicant says that he was the owner of land parcel No. 5690 Athanja/Athinga Land Adjudication Section measuring 0.5 acres. He says that he had bought this piece of land in 1997 from one Stephen M'Erongi and occupied it after that purchase.**
2. **The applicant says that this parcel of land was in the year 2000 demarcated and registered as belonging to him.**
3. **The applicant has told the Court that without notice to him, the respondent sub-divided Parcel No. 5690 into two portions of 0.20 acres and 0.30 acres, although the parcel measuring 0.20 acres retained No. 5690 whereas the parcel measuring 0.30 acres was given No. 6243. In 2007 Parcel No. 6243 was allotted to one Francis Kirichiu.**
4. **The applicant filed an objection to challenge the giving of part of this land to the said Francis Kirichiu. He tells the Court that his objection was allowed and the disputed 0.30 acres of land was restored to his original parcel of land. He has annexed evidence seeking to assert his claim that the 0.30 acres had been restored to his original parcel of land No. 5690.**
5. **The Exparte Applicant submits that on or about 26.6.2008, the respondent without notice to him, allotted to the interested party, one M'Mbau Thambau the portion he had unsuccessfully allotted to Francis Kirichiu and now gave it No. 2639.**
6. **The Exparte Applicant tells the Court that all the alleged uncalled for activities of the Respondent of sub-dividing and giving portions of his land to other persons were illegal and against the rules of natural justice in that the Exparte Applicant was condemned unheard.**
7. **The applicant submits that the actions of sub-dividing his small portion by the respondent was against the letter and spirit of land consolidation whose aim was to consolidate parcels into one unit which would facilitate proper economic use by owners of consolidated land.**
8. **The applicant argues that this application is unopposed as since this application was filed in 2008, neither the Respondent nor the Interested Party had filed any replying affidavits in opposition to the application.**
9. **The applicant denies the claim by the Interested Party that his application was time barred and refers to his statement of fact which says that the Interested Party was allotted parcel No. 2639 on or about 26.6.2008 and laconically states that by the time this application was filed on 9.12. 2008, 6 months had not elapsed.**
10. **The applicant states that there is no dispute that the Respondent did not keep records regarding how he allocated his land to the Interested Party, and states that that is why he wants the unwritten decision of the Respondent quashed.**
11. **The applicant submits that where a public officer or a public institution has acted in contravention of the law or rules of natural justice, the aggrieved party, in this case himself, has a right to seek redress by way of judicial review.**

### **RESPONDENT'S SUBMISSIONS**

12. **The counsel representing the Respondent does not oppose the application. He is, therefore, not supporting the respondent's activities which spawned this suit.**

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

13. The Interested Party has argued that by dint of Order 53 Rule 2 of the Civil Procedure Rules, this application was time barred as it was brought outside the 6 months stipulated for filing an application seeking an order of certiorari.
14. The Interested Party argues that since this application seeks to quash an unwritten decision, it is unfounded, misconceived and trivial. He rhetorically asks how this court can determine that the decision is accurate and correct in all details when the challenged decision is unwritten. He argues that since Judicial review is sui generis and amounts to special proceedings conferred by the Law Reform Act, this application does not bring out any cause of action as it is addressing itself to the merits of a decision by a tribunal. The Interested Party argues that the Applicant's remedy lies in appeal. He says that Judicial review jurisdiction does not sit on an appeal. The Interested party proffers the case of Republic versus Chief Justice of Kenya and others Ex parte Lady Justice Naliaka Nambuye, Misc. CC No. 764 of 2004 as his authority in support of his postulation.
15. The Interested Party argues that the second order sought by the applicant, the order of Mandamus, can not be granted since it is meant to compel action on the part of an authority which has omitted to act or to discharge its lawful duty. He submits that an order of mandamus can not be issued to a sub-division registering Parcel No. 2639 Athinja/Athinga Land Adjudication in favour of the Interested Party.

#### **DETERMINATION**

16. The Primary issue for determination is whether the process of sub-dividing the applicant's original land parcel no. 5690 and allocation 0.30 acres of it to the Interested Party and giving it parcel No. 2639 was done with procedural integrity, in accordance with the law and in obedience to the rules of natural justice.
17. I do not agree that the filing of this application was time barred. In his Statement of Facts the Applicant has stated that the challenged decision was made by the Respondent on or about 26.6.2008. This claim is not challenged by the Interested Party or by the Respondent.
18. I find that the respondent abused his office and acted ultra vires the law that creates his office in that he acted unilaterally and failed to keep a record of proceedings buttressing his various decisions. The Interested Party does not at all controvert the claim by the applicant that the Respondent's decisions were unwritten. By making unwritten decisions, the respondent abused his office. I think that this is the reason why the Attorney General's representative, his counsel, has disowned him.
19. I find that this court would encourage dangerous tendencies by District Lands and Settlement Officers, if by abusing their offices and disobeying the law through making unwritten decisions, they would avoid capture by the process of Judicial Review. I opine that any decision made against the law and against the rules of natural justice is a good candidate for subjection to the rigours of judicial review which is meant to redress abuse of office by public officers and public institutions.
20. The Land Adjudication Act (Cap. 284, Laws of Kenya and the Land Consolidation Act (Cap. 283) pellucidly and very carefully circumscribe the procedures that eventually lead to registration of persons as owners of land. Those procedures presume or require written records. In the present case, the Respondent was the custodian of these records.
21. A writ for certiorari orders a lower body to deliver its record in a case so that the higher Court can review it. The Respondent, as the custodian of the records culminating in his decision to register Parcel No. 2639 Athanja/Athinga Land Adjudication Section in the Interested Party's names, has not availed the apposite records for review by this Court. But there is no dispute that he had made a decision. This Court, since the Respondent has not

**proffered any documents in support of his decision, presumes that the Respondent's decision was unwritten. The Exparte applicant can not be expected to avail documents or records which he is not custodian of**

**22.I do find that the prayer for an order of mandamus as sought is crafted in a nebulous manner. It will not issue.**

**23.Having considered all the material aspects in this matter, I find that an order of certiorari against the respondent is deserved. I, therefore, bring the unwritten decision of the Respondent to this court and I do quash it. I note that the respondent has not opposed the application. Indeed his counsel has supported the application. In a rather circuitous manner, through his counsel, the Respondent is loudly shouting that he was wrong and had abused his office.**

**24.In the circumstances, an Order of Certiorari is issued to quash the unilateral, arbitrary and unwritten decision of the Respondent to sub-divide and allot 0.30 acres of the Ex- Parte Applicant's Parcel Land No. 5690 Athanja/Athinga Land Adjudication Section to the Interested Party. Having quashed that decision, the exparte Applicant's land parcel No. 5690 Athinja/Athinga Land Adjudication Section should remain 0.50 acres in area and the Respondent should amend his records forthwith.**

**25.Costs are awarded to the Exparte Applicant.**

It is so ordered

**Delivered in Open Court at Meru this 22nd day of September, 2015 in the presence of:**

Cc. Daniel/Lilian

Muthamia h/b Kimathi Kiara for the Interested Party

Mutunga h/b Mburugu for the Exparte Applicant

Kieti present for Respondent

**P. M. NJOROGE**

**JUDGE**