



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC APPL NO. 29 OF 2010

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF LAND PARCEL NO ANTUAMBURI ADJUDICATION SECTION NO'S
9656, 957, 9658 AND 9659 FORMERLY NO 936**

BETWEEN

FABIAN KANYITHIA.....APPLICANT

-VS-

DISTRICT LAND ADJUDICATION OFFICER TIGANIA

WEST/EAST DISTRICT.....RESPONDENT

MWITARI LIMBITU

MUGAMBI NDIMBO MWITARI

AMOS MUTHAURA BAITHUMBI

NGIRI M' MWITARI

MURIIRA NGOLUA BAITHUMBI.....INTRESTED PARTIES

JUDGMENT

1. By a Notice of Motion Application dated 28th May 2010 and brought pursuant to provisions of Order 53 Rule 3 (1) of the Civil Procedure Rules, CAP 21 of the Laws of Kenya and Section 8 and 9 of the Law Reform Act CAP 26 of the Laws of Kenya and all other enabling provisions of the Law, the Applicant has sought the following orders:

i. An order of Certiorari to remove into the High Court for purposes of being quashed

**the decision award dated 29th October 2009, in Objection No.3161
ANTUAMBURI/ADJUDICATION SECTION.**

ii. An order of Mandamus to compel the Respondent to cancel the names of Mugambi Ndimbo, Amos Muthaura, Ngiri M' Mwitari and Muriira Ngolua from the register of land parcels No.9656,9657,9658 and 9659 formerly 936 Antuamaburi Adjudication Section and enter the names Fabian Kanyithi as the owner of the same.

iii. That costs be provided for.

2. The application is premised upon grounds and matters set out in the Statutory Statement and Verifying Affidavits of the Applicant as filed in court.
3. The Applicant's case is that he was at all material time during Land Adjudication at Antuamburi Land Adjudication Section, the owner of land parcel number 936 Antuamburi Adjudication Section, having bought the same from one Marimba Limbitu (now deceased). The Applicant avers further that the seller's brother (the 1st interested party) herein, filed an Objection over the same parcel of land and he was eventually awarded the land without compensation to the Applicant.
4. The Applicant contends that the interested party colluded with the then Adjudication Officer and purported to hear an Objection No. 3261 without challenging the award which transferred the subject matter to him and awarded the same to the 1st interested party. It is the Applicant's further contention that the land was subsequently registered in the name of the 1st interested party who subdivided and transferred to the Interested Parties numbers 2, 3, 4 and 5. The Applicant contends that the award is not only unconstitutional but also illegal as at no time did the land belong to the 1st Interested Party and neither had he authority to claim for and on behalf of his brother. The Applicant contends that the 1st Interested Party did not enjoin his deceased brother in the matter yet he was alive then since he died in December 2009.
5. The application is opposed both by the Interested Parties and the Respondent. It has been contended for the Interested Parties that the application lacks merit premised on the fact that it is the Interested Parties who are currently in occupation of the suit land and that the Applicant failed to follow the procedure provided for in the Land Consolidation Act and the Land Adjudication Act. It has further been submitted for the Interested Parties that the decision in the Objection over parcel of land Antuamburi Adjudication Section No.936 was heard and decided on 30th April 2009 and not 29th October 2009 as stated by the Applicant, and since the Applicant did not seek any leave of the honourable court to file the instant application within six months statutory limitation, then the application should be struck out with costs.
6. On the other hand it has been contended for the Respondent that the Applicant has not complied with Order 53 of the Civil Procedure Rules in that the order of certiorari sought was filed outside the six months period since the order sought to be quashed was made and yet no leave was ever sought to bring the application out of time. It has further been submitted that the Respondent acted within the law in that the suit property was initially registered in the name of the ex-parte Applicant who had bought the same from Marimba Limbitu and when the Adjudication Section was published a brother to the seller one Mwitari Limbitu filed an objection against the Applicant and won the case whereupon the land was subdivided and new numbers issued.
7. The Respondent has further submitted that judicial review is concerned with the process rather than merits of the decision. The Respondents urged further that judicial review is a discretionary remedy and can be declined even where deserved. Consequently the Respondent urges the court to disallow the orders being sought.
8. I have carefully considered the pleadings, application, submissions by counsels in the case and cases cited. I will begin by considering whether the application was brought within the 6 months statutory

period. It has been contended for the Applicant that the objection over the suit property was heard and decided on 29th October 2009. The Respondents on the other hand contend that the same was heard and determined on 30th April 2009.

9. I have carefully examined the hand written proceedings filed by the ex-parte Applicant. These proceedings reveal that the Objection was heard and determined on 29th October 2009. The application for leave to institute judicial review proceedings was filed in court on 29th April 2010 within the period of six months from the date that the decision being sought to be quashed was made. Consequently I do find and hold that these proceedings were filed within time and therefore are properly before court.

10. I now turn to the merits or otherwise of the instant application. Judicial Review is a special jurisdiction of the Court. It does not concern itself with the merits of the case but with the process of decision making. In **COMMISSIONER OF LAND VERSUS KUSTE HOTEL NAKURU CA NO. 234 OF 1995** the Court of Appeal cited with approval an English case, **Chief Constable of the North Wales Police Vs Evans [1982] 1WLR 1155** where the court stated thus:

“The purpose of Judicial Review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according a fair treatment, reaches on a matter which is authorized by law to decide for itself a conclusion which is correct.”

11. In order to have an order in Judicial review, an Applicant must satisfy the court that either the Tribunal or decision making body exceeded its powers, or the Applicant was not given an opportunity to be heard, or they acted illegally or unreasonable or that there was procedural impropriety. See **COUNCIL OF CIVIL SERVICE UNIONS VS MINISTER FOR THE CIVIL SERVICE (1985)AC 374.**

12. It is not in dispute that the Applicant was the owner of the suit property having bought the same from one Marimba Limbitu. Subsequently thereafter, the seller’s brother one Mwitari Limbitu, the 1st interested party, successfully filed an Objection over the same parcel of land and the same was eventually registered in his name and that of the other Interested parties to this suit. .

11. It is trite law in an action for Judicial Review to be sustained, an Applicant must demonstrate that the decision complained of and the conduct of the proceedings was irregular. The proceedings in question were heard in the presence of both the Applicant and the Objector. The Applicant even had the opportunity of cross examining the witnesses. The Applicant was not condemned unheard and the decision by the Respondent doesn’t contravene the principles of natural justice.

12. The Applicant’s assertion is that the Interested Party colluded with the then Adjudication Officer to have the land transferred to him. The Applicant is complaining of fraud. That cannot be the basis of judicial review. The Applicant ought to have appealed against the decision of the Objection before the Adjudication Officer rather than come for Judicial Review. In the case of **REPUBLIC – VS- CHAIRMAN TRIBUNAL KIRINYAGA DISTRICT AND ANOTHER EX-PARTE PETER MARU(2005) eklr** Khamoni, J. stated that Judicial Review is not an appeal from a decision but a review of the manner in which the decision was made. Similarly in the case of **Republic V Judicial Service Commission of Kenya Exparte Pareno(2004) 1KLR 203** Hon. Nyamu, J, as he then was, held that the remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made but the decision-making process itself. I agree with both learned judges.

13. The orders being sought challenges the merits of the decision made as opposed to the process through which the decision was reached. The ex-parte Applicant has clearly demonstrated that he was dissatisfied with the decision of the Respondent. The ex-parte Applicant ought to have filed an appeal as provided for under Section 29 of the Land Adjudication Act CAP 284 of the Laws of Kenya. The same provides as follows:

“any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the minister

(a)...

(b)..."

14. For the above reasons I find that the application challenged the merits of the Objection decision and not the process of the decision made. Consequently, the Applicant has failed to bring the application within the ambit of Judicial Review and is therefore without merit. In the result:

a).The application is hereby dismissed.

b).The ex-parte Applicant will meet the costs of the case.

READ, SIGNED AND DATED THIS 20TH MARCH, 2014

LESIT, J.

JUDGE