



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISCELLANEOUS APPLICATION NO. 73 OF 2011
IN THE MATTER OF APPLICATION BY ISAIAH KABERIA M'MUNGANIA FOR ORDERS
OF CERTIORARI
AND
IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26
AND
IN THE MATTER OF LAND ADJUDICATION ACT CAP 284 OF THE LAWS OF KENYA
AND
IN THE MATTER OF KIENGU/KANJOO ADJUDICATION SECTION NO.3644 OBJECTION
NO. 103/2011

ISAIAH KABERIA M'MUNGANIA.....APPLICANT

VERSUS

MINISTRY OF LANDS & SETTLEMENT.....1ST RESPONDENT

DISTRICT COMMISSIONER IGEMBE SOUTH DISTRICT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JACOB KAIBUNGA KIUNGA.....INTERESTED PARTY

JUDGMENT/RULING

This application is dated 19th October, 2011 and seeks orders:

1. That an order of **CERTIORARI** do issue to bring into the High Court for purposes of being quashed the proceedings and the award of the 1st and the 2nd Respondent dated 30.8.2011 in appeal No.103 of 2011 in relation to parcel No. **KIENGU/KANJOO/3644**.
2. **That** an order of prohibition be issued to the Exparte Applicant against the 1st and 2nd Respondents and the interested party to prohibit them from any further dealings with the Exparte Applicants interest in land parcel No. **KIENGU/KANJOO/3644**.
3. **That** the Honourable court be pleased to direct that the costs for and incidental to this application

be borne by the interested party.

It is premised upon the following grounds;

1. **THAT** the proceedings in appeal **No.103/2011** were null and void ab initio since they were centered on facts not before the Minister and/or the District Commissioner.
2. **THAT** the Appeals Committee never considered fully the evidence of the Exparte Applicant
3. **THAT** the Exparte Applicant will suffer irreparable damages if the illegal award by the Minister in appeal **No.103/2011** is allowed to stand.

On 19.6.2013, Mr. Ondieki, the advocate for the applicants prayed that the application be allowed because despite the fact that all parties, including the Interested Party, had been properly served, the Interested Party was not in Court. He opined that the Interested Party was not interested in defending the application.

I declined to allow the application for the following reasons.

1. When the oral application that the application should be allowed was made, it was during a mention and not a hearing session.
2. Mr. Kieti for the Respondent had indicated that there was an attempt in the offing to have the matter settled out of Court.

The application came up for hearing on 27.3.2014. I am satisfied that all concerned parties had been properly served. The Respondents were represented by Mr. Kieti, a State Counsel. The interested party, despite proof of service was not in court.

Mr. Ondieki, for the ex-parte applicant, urged the court to allow the application as it was unopposed. Mr. Kieti for the Attorney General, for the Respondents, supported the Ex-Parte Applicant save that no costs should be awarded against the Respondents. The Ex- Parte Applicant conceded this prayer and urged the court to award the Ex-parte Applicant costs against the Interested Party only.

At this point, after considering the very persuasive case postulated by the Applicant's advocate, I am inclined to allow the application. I have, however, been confronted by a veritable conundrum. It has long been established as contained in the case of *Farmers Bus Company & Others Versus Transport Licensing Appeal Tribunal* [1959] EA 779 and *Mohamed Ahmed Versus R* [1957] E.A.523 that in Judicial Review Applications the Republic should be the applicant rather than the person aggrieved by the decision sought to be impugned. The Court in *Mohamed Ahmed Versus R* (OP. Cit), said:

This recital reveals a series of muddles and errors which is not unique in Uganda and in some registries of the high Court. The appellant's advocate appears to have failed entirely to realize that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be instituted and served accordingly. The Crown cannot be both Applicant and Respondent in the same matter.

In **Commissioner of Lands Versus Kunste Hotel Ltd (2006) KLR 249**, the Court of Appeal held that judicial review is a jurisdiction that is *sui generis* (neither Criminal nor Civil). In the case of **Republic versus Public Procurement Administrative Review Board & 2 Others Exparte Selex Sistemi Integriti, [2008] eKLR**, the Court opined:

“It has been held severally by the Kenya Courts that Judicial Review proceedings are neither Civil nor Criminal proceedings. Judicial Review Proceedings are some sort of special proceedings conferred by the Law Reform Act (Cap 26) Section 8 and 9. Under Section 8 of

the Law Reform Act the jurisdiction to grant orders of mandamus, prohibition and certiorari is conferred upon the High Court.”

From the foregoing, it is pellucidly established that Judicial Review is a special jurisdiction. It requires that an application be brought to court in the name of the Republic. In this suit the citation was as follows:

ISAIAH KABERIA M'MUNGANIAAPPLICANT

VERSUS

MINISTRY OF LANDS & SETTLEMENT.....1ST RESPONDENTS

DISTRICT COMMISIONER IGEMBE SOUTH DISTRICT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JACOB KAIBUNGA KIUNGA.....INTERESTED PARTY.

There is no doubt that the application was not filed in the name of the Republic. For this reason, I decline to issue the Orders of Certiorari and Prohibition as prayed by the applicant.

Then what? I definitely deplore the fact that the parties did not alert the court during the 3 years that the application was in court that it had fundamental procedural deficiencies.

During the hearing of the application on 27.3.2013 the parties recorded a consent in the following terms:

1. In terms of the Attorney General's letter dated 10.6.2013 addressed to J. Ondieki & Co, Advocates and copied to the Deputy Registrar, Meru High Court, the 1st, 2nd and 3rd Respondents are not opposed to the application herein on condition that no costs will be granted against the 1st, 2nd and 3rd Respondents.

2. The applicant has conceded that the 1st, 2nd and 3rd Respondents will not be condemned to pay costs.”

This court adopted the consent terms as its orders without having been alerted of fundamental flaws in the application. I am of the opinion that court orders should not be granted in vain. Consent orders should bind the concerned parties unless there are vitiating circumstances which are strictly circumscribed. This position is pellucidly elaborated in the English Case of **PURCELL Vs F. C. TRIGELL LTD** (trading as **SOUTHERN WINDOW AND GENERAL CLEANING CO. AND ANOTHER, [1970] 3 all er.671** where **WINN L J**, opined:

“ It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

This opinion was re-stated in **Kenya Commercial Bank Ltd Versus Specialized Engineering Co, Ltd [1982] KLR 485** where Justice Harris at Page 493 said:

“The marking by a Court of a Consent Order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made such an order is not likely to be set aside or varied save by consent of one or other of the recognized grounds.”

The letter quoted in the consent whose terms this court adopted as its orders reads as follows:

“J. Ondiek & Co

Advocates

P. O. Box 1132-60200

MERU

**RE: MERU HC MISC APPLICATION NO. 73 OF 2001 – ISIAIAH KABERI
M'MUNGANIA**

VERSUS

THE HON ATTORNEY GENERAL & 4 OTHERS

The above subject refers.

We have instructions that there was an objection to the adjudication register case AR/26 between your client Isaiah Kaberia M'Mungania as the objector and Jacob Kaibanga as the Respondent which was ruled in favour of the objector who is your client.

The matter which was also a subject to Appeal to the Minister was heard and determined (attached find a copy of the letter) which is self- explanatory for your perusal.

This is to inform you that on our part we shall not be opposing the application on condition that each party do incur their costs. The matter now remains between your client and the interested party.”

Be advised Accordingly.”

The letter was copied to the Deputy Registrar Meru High Court. The Interested Party despite proper service did not participate in these proceedings at this stage. To me, this letter amounts to an admission by the 1st, 2nd and 3rd Respondents that they had accepted the complaint by the applicant that he had not been allowed to call his witnesses and to table his document in the proceedings before the 1st and 2nd Respondents. The consent terms which this court adopted as this order merely buttressed its position.

The immutability of the hallowed position of a consent order or a consent judgment is demonstrated by the opinion of Lindley L. J. in *Huddersfield Banking Co. Ltd Versus Henry Lister & Son. Ltd* (1895) 2 Ch. D 273 at page 280 where he said:

“A consent order, I agree, is an order and as long as it stands it must be treated as such, and so long as it stands it is good an estoppel as any other order.”

The orders that the applicant sought in this application were directed against the 1st and 2nd Respondents. They were not directed against the interested party. The consent order adopted by this court has the effect of estopping the 1st and 2nd Respondents from claiming otherwise even if other properly filed proceedings are initiated. The Constitution of Kenya, inter alia, decrees that Justice shall not be delayed. The Environment and Land Court Act at Section 3 (1) states that its overriding objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes. It also requires the parties and their duly authorized representatives, as the case may be, to assist the court to further this overriding objective. By their consent, the parties have done what was exactly intended by the establishment of this court.

With the consent willingly entered into by the Exparte Applicant and the Respondents against whom orders were sought, it is unlikely that they will have any recourse to appeal proceedings. I hold that the consent between the parties establishes equitable jurisdiction upon which this court may move to

actualize the unequivocal intention of the parties. I deem that this is the minimum that can be done to achieve justice and fairness and at the same time minimizing the detriment that may be spawned should the situation be handled otherwise.

I will uphold the letter and spirit of law that established this court and give effect to the consent entered into by the Exparte Applicant and the Respondents. In view of the wrong citations, already explained, I will not award any costs against the interested party.

In the circumstances, I uphold the consent order binding the applicant and the Respondents and give the following orders:

1. The 1st and 2nd Respondents are restrained from any further dealings with the interest of **ISAIAH KABERIA M'MUNGANIA** in Land Parcel No. **KIENGU/KANJOO/3644**.

2. A declaration is issued that Land Parcel No. **KIENGU/KANJOO/3644** belongs to **ISAIAH KABERIA M'MUNGANIA** to the exclusion of any other person and if any part of the land had been given to any other person, the process of doing so should forthwith be reversed so that the Land belongs solely to **ISAIAH KABERIA M'MUNGANIA**.

3. No costs are awarded.

It is so ordered.

Delivered in Open Court at Meru this 3rd day of April, 2014 in the presence of:

Cc. Daniel/Christine

Nyamu Nyaga h/b Ondieki for Applicants

Isaiah Kaberia M'Mungania

P. M. NJOROGE

JUDGE