



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAROK**

**ELC JUDICIAL REVIEW CASE NO. 1 OF 2020**

**REPUBLIC.....APPLICANT**

**–VERSUS–**

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**THE LAND ADJUDICATION & SETTLEMENT OFFICER NAROK NORTH/EAST**

**SUB-COUNTIES.....2<sup>ND</sup> RESPONDENT**

**THE MINISTRY OF LANDS & HOUSING.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**EX – PARTE PARASAPIYIO SORONKA & 6 OTHERS.....APPLICANTS**

**AND**

**OLE NKOMEI ADJUDICATION SECTION & 8 OTHERS.....INTERESTED PARTIES**

**JUDGMENT**

1. Pursuant to leave granted by this court on 11<sup>th</sup> March, 2020, the Applicants commenced this judicial review proceedings vide a Notice of Motion dated 29<sup>th</sup> May, 2020 wherein they sought the following orders:

***a) That an order of mandamus to compel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to complete the adjudication processes for Nkoirienito, Iloiborlukuny, Oltepesi, Oloika (Shilarie) and Olosho Lole Punyua Adjudication Sections and issue Certificates of Title Deeds; and***

***b) That the costs of this Application be borne by the Respondents.***

2. The grounds in support of the Applicants’ case were set out on the face of the Notice of Motion as well as in the supporting affidavit of the 1<sup>st</sup> Applicant, Parasapiyio Ole Sironka, sworn on 29<sup>th</sup> May 2020. The Applicants’ case is that they are the absolute and duly registered land owners and representatives of members of Nkoirienito, iloiborlukuny, Oltepesi, Oloika (Shilarie), Ildamat, Olosh Lole Punyua, Olenkomei Adjudication Sections. According to the Applicants, their stated areas were declared adjudication sections in the 1990s by the then Minister for Lands.

3. The aforesaid sections were said to have resulted from further sub-division of the larger Ntulele Adjudication Section earlier declared an Adjudication Section on 1<sup>st</sup> September, 1970 vide Notice LA/9/4/34. The sub-division is said to have been informed by the fact that the government saw that it was impossible to proceed with the adjudication process of the larger Ntulele Adjudication Section since there was ferocious division between the Purko, Keekonyokie and the Ildamat being the clans that occupied the land.

4. According to the Applicants, there exists registers of all the members of the aforesaid Land Adjudication Sections, where each member is said to have been apportioned their share of the land after the setting aside of public utilities. Notices of completion of the Adjudication Registers for Shilarie, Olosho Lole Punyua, Oltepesi and Nkoirienito Adjudication Sections are said to have been issued in the year 2019.

5. After the closure of the adjudication registers of some of the adjudication sections by the 2<sup>nd</sup> Respondent, the Applicants deposed that the registered members with complaints followed the avenues provided for in the Land Adjudication Act and lodged objections before the 2<sup>nd</sup> Respondent. Interestingly, the Applicants averred that the adjudication process could not proceed since there is a matter filed in the year 2005 being Miscellaneous Civil Application No. 871 of 2005 which has interim orders issued since the year 2009.

6. It was contended by the Applicants that the unreasonable and unwarranted delay of the adjudication by the 2<sup>nd</sup> Respondent has caused them robust economic loss and has also violated their right to own property. Further, the Applicants also argued that the actions of omission and commission by the 2<sup>nd</sup> Respondent are intended to threaten, violate and infringe on the fundamental rights of the Applicants.

7. The Applicants further argued that they are apprehensive as they are doubtful and suspicious of the activities of the Respondents, hence, they sought consent under section 30(1) of the Land Adjudication Act in order to seek protection from this court. Should the orders sought in the application not be granted, the Applicants asserted that their rights to own and continue enjoying the rights, interests and title over their private property, to natural justice, to equality and to equal protection before the law would be curtailed for no good reason. The court was therefore urged to allow the application.

8. The Respondents opposed the application vide a replying affidavit sworn on 2<sup>nd</sup> October, 2020 by Amos M. Musyoka who described himself as a sub-county Land Adjudication & Settlement Officer in Narok/East wherein he briefly explained the purpose and the procedure of land adjudication under the Land Adjudication Act. According to the Respondents, Ntulele was a proposed group ranch which was subdivided into the following seven (7) adjudication sections:

*a) Nkorienito;*

*b) Oloibor-lukuny;*

*c) Oltepesi;*

*d) Shilarie;*

*e) Ildamat;*

*f) Olenkomei; and*

*g) Olosho lole Punyua.*

9. The Respondents contended that demarcation was done and completed in the adjudication sections as at 1993, and that clan clashes informed the decision of demarcating the ranch into seven (7) sections held by the Ildamat, Purko and Keekonyokie clans. It was further contended that when five people claim an interest in one parcel of land, they are advised to apply for incorporation as a group ranch. Accordingly, it was stated that Ntulele Group ranch was never incorporated, hence, it does not exist and that the seven (7) adjudication sections have been kept in abeyance pending a court order dated 10<sup>th</sup> February, 2009.

10. By the time the aforesaid court order was issued on 10<sup>th</sup> February, 2009, it was deposed that the demarcation exercise and register had been completed pending publication, and that no further survey or demarcation has been done since the court order was issued.

11. The Respondents maintained that demarcation was done and completed in the seven (7) adjudication sections before the order dated 10<sup>th</sup> February, 2009 was issued. According to the Respondents, all land in the "Ntulele Adjudication Section" (now divided into seven (7) sections) is private land held individually by the land owners therein awaiting issuance of title deeds.

12. In the greater Ntulele area, it was deposed that everyone has his land demarcated, numbered and acreage computed and boundaries marked. As far as the Respondents are concerned, the completion of the exercise was halted by the court order of 10<sup>th</sup> February, 2009 and only the court can make orders directing otherwise.

13. The Interested Parties supported the application. Their case was made through the replying affidavit of the 5<sup>th</sup> Respondent, Ntario Ole Ketao Shonko, who deposed that he is the chairman of Oltepesi Adjudication Section and that the adjudication process started in the 1990s for Nkorienito, Oloiborlukuny, Ildamat, Oloika (Shilarie), Olosho lole Punyua and Ole Nkomei adjudication sections.

14. It was their case that they undertook their mandate of being chairman and committee members of their respective adjudication sections to conclusion. They averred that their position is that since the registers for some of the adjudication sections had been closed and notices of completion issued in the year 2019, those sections ought to have been issued with titles except for the pending appeals to the minister.

15. The Interested Parties therefore asserted that their position is that since the adjudication process was complete, title deeds should be issued to the members of the respective adjudication sections as per their respective registers.

16. The *Ex-Parte* Applicants filed their written submissions on 3<sup>rd</sup> September, 2021, while the Interested Parties filed theirs on 13<sup>th</sup> January, 2022. As at the time writing this judgment, the Respondents had not filed their written submissions in spite being granted time to do so.

17. In their submissions, the Applicants contended that since the year 1975 when the adjudication process commenced that ought to lead to

effective registration of the Applicants' land ownership, the same has been delayed by the 2<sup>nd</sup> Respondent's inaction of failure to forward the adjudication register to the 1<sup>st</sup> Respondent despite the exercise being complete.

18. It was the Applicants' submission that the inordinate delay in discharging the public duty under consideration without any lawful justification has violated the Applicants' constitutional proprietary rights to own private property, and the right to fair administration of justice, hence, it was their contention that grant of an order of mandamus is warranted to avert an apparent injustice. The inaction by the Respondents to complete the adjudication process also said to be against the principle of legitimate expectation, and that the same amounts to abuse of power.

19. The Applicants further submitted that they had sufficiently demonstrated that the failure by the 2<sup>nd</sup> Respondent acting under the supervision of the 1<sup>st</sup> Respondent's action and/or inaction to discharge his duty to forward all the respective adjudication registers to the 1<sup>st</sup> Respondent for effective registration is manifestly unreasonable, irrational and illegal despite issuing a notice of completion of adjudication register on 11<sup>th</sup> June, 2019. The Applicants therefore urged that their Notice of Motion dated 29<sup>th</sup> May, 2020 ought to be allowed as prayed.

20. Reliance was placed on the case of *Kenya National Examination Council vs Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997]eKLR*, *Republic vs the Commission of Lands & Another ex-parte Kithinji Mungu Miagere* and the case of *ELC Judicial Review No 9 of 2015 at Nakuru, Republic vs Director of Surveys & 5 Others ex-parte Ndeffo Company Limited*.

21. The submissions by the Interested Parties largely agreed with the submissions filed by the Applicants. In a nutshell, they submitted that the actions by the 2<sup>nd</sup> Respondent in failing to forward the adjudication register to the 1<sup>st</sup> Respondent despite the exercise being complete offends public policy, social justice, truthfulness, openness, and social values and constitutional principles of governance.

22. It was their submission that the Respondents have the capacity and means to issue the necessary approvals under review. Ultimately, the Interested Parties urged the court to make a finding in their favour. To buttress their submissions, the Interested Parties relied on the case of *Apotex Inc. vs Canada (Attorney General), Republic vs National Employment Authority & 3 Others ex-parte Middle East Consultancy Services Limited [2018]eKLR*, and the case of *Council of Civil Service Union vs Minister of Civil Service [1984] 3 All ER 935*.

23. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in *Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89* thus:

*"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual." ...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."*

24. Upon consideration of the material presented in respect of the case herein, the court is of the opinion that the following are the issues for determination:

- i) Whether the *ex-parte* Applicants have established any grounds for this court to grant the order of Mandamus prayed; and
- ii) Whether the application is merited under the circumstances.

25. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*, and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. The eight factors that must be present for the writ to issue are:

**(I) There must be a public legal duty to act;**

**(II) The duty must be owed to the Applicants;**

**(III) There must be a clear right to the performance of that duty, meaning that:**

**a) The Applicants have satisfied all conditions precedent; and**

**b) There must have been:**

**1) A prior demand for performance;**

**2) A reasonable time to comply with the demand, unless there was outright refusal; and**

**3) An express refusal, or an implied refusal through unreasonable delay;**

***(IV) No other adequate remedy is available to the Applicants;***

***(V) The Order sought must be of some practical value or effect;***

***(VI) There is no equitable bar to the relief sought;***

***(VII) On a balance of convenience, mandamus should lie.***

26. It is imperative that the above tests must be satisfied before an order of *mandamus* can issue. In this case, it is common ground that the Respondents owed the *ex-parte* Applicants a public duty to undertake the adjudication process to its logical conclusion. The adjudication process has, admittedly, not been carried out to its logical conclusion hence the present application seeking to compel the Respondents to perform the remaining part of its public duty owed to the *ex-parte* Applicants.

27. The main issue that this court has had to grapple with in this case is whether the failure by the Respondents to perform their public duty was deliberate. For an order in the nature of *mandamus* to issue, one of the factors that an Applicant must satisfy is to demonstrate that there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay by the Respondent[s] to perform its public duty.

28. In this case, all parties are in agreement that the delay in concluding the adjudication process was occasioned by an interim order issued by a court on 10<sup>th</sup> February, 2009 in *Miscellaneous Civil Application No 871 of 2005*. The Respondents were categorical in their response that completion of the adjudication process was halted by the court, and that only the court can make orders directing otherwise. Given the foregoing, it is evident that it cannot be contended that there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay by the Respondents to complete the adjudication sections.

29. Having said the foregoing, I must then proceed to consider the propriety of the orders sought given the circumstances of the case. I have considered the full effect of granting the order of *mandamus* being sought by the *ex-parte* Applicants. It is instructive to note that the stated court order issued on 10<sup>th</sup> February, 2009 halting the completion of the adjudication process is apparently still in force. The nature, extent and the full particulars of the said orders were never disclosed to this court.

30. I have cautioned myself on the dangers of issuing orders which would have the effect of countermanding orders of another court. It is also imperative to note at this juncture that it is trite law that a court cannot purport to determine the lawfulness of a decision of another court of concurrent jurisdiction. On this, the Court of Appeal decision in *Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018]eKLR* is of particular relevance where it held in part that:

***“...it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals. Pronouncements by judges of the High Court on this point are germane and demonstrative of this understanding. In KOMBO vs. ATTORNEY GENERAL [1995-98] 1EA 168, cited by Ole Keiwua, J (as he then was) properly rejected and repulsed an invitation to scrutinize and interrogate the conduct and decision of a judge of concurrent jurisdiction mounted by way of an application for enforcement of fundamental rights under section 84 of the retired Constitution.***

31. I agree with the above reasoning by the Court of Appeal. Even if the said order was from a subordinate court or tribunal, this court would still be cautious to intervene noting that the present case is not an appeal, and granting the orders sought would have the effect of usurping the jurisdiction of the court concerned. It is not clear why parties in this case have not explored the avenue of appeal or setting aside the order issued on 10<sup>th</sup> February, 2009 which I am of the view would have been the most viable option in the circumstances of the case.

32. Given the foregoing factors, it is my finding that the *ex-parte* Applicants have not established any grounds for this court to grant the order of *mandamus* prayed for.

33. The upshot of the foregoing is that I find no merit in the *ex-parte* Applicants' case. Accordingly, I dismiss the same with costs to the Respondents.

**SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 10<sup>TH</sup> DAY OF MARCH, 2022.**

**MBOGO C.G,**

**JUDGE**

**10/3/2022**

**IN THE PRESENCE OF:**

**T.Chuma CA**