



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**JUDICIAL REVIEW APPL. NO. 61 of 2010**

**REPUBLIC.....APPLICANT**

**VERSUS**

**TIGANIA EAST & WEST DISTRICT LAND ADJUDICATION**

**AND SETTLEMENT OFFICER.....1ST RESPONDENT**

**ATTORNEY GENERAL .....2ND RESPONDENT**

**AND**

**GERVASE MWITI ANJELO.....INTERESTED PARTY**

**EX-PARTE-JOSPHAT MUCHUI**

**J U D G M E N T**

1. Through a Notice of Motion dated 7th September, 2010, the Exparte Applicant sought the following orders:

1. ***THAT an order of certiorari do issue, calling into this Honourable Court and quashing the proceedings, findings and decision made by the 1st Respondent on 11.06.2010 in objection No. 121 over land parcel No. 108 situate in Antuamburi Adjudication Section, within Tigania East District.***

2. ***THAT an order of prohibition do issue, prohibiting implementation of the decision made by the 1st Respondent on 11.06.2010 in objection No.121 over land parcel No.108 situate in Antuamburi Adjudication Section, within Tigania East District.***

3. ***THAT an order of mandamus do issue, compelling the 1st respondent to appoint a committee under section 9 of Land Consolidation Act, Cap.283, to hear and determine objection No. 121 over land parcel no.108, situate in Antuamburi Adjudication Section within Tigania East District.***

4. ***THAT costs of this application and the ex-parte Chamber summons for leave be borne by the Respondents and interested party jointly and severally.***

2. He predicated his application on the Statutory Statement of facts, verifying Affidavit and also on the following other grounds:

(a) ***The 1st Respondent lacked jurisdiction to hear and determine the said objection alone.***

**(b) The said objection was not heard and determined according to the applicable customary law.**

**(c) The 1st Respondent usurped the statutory powers of Antuamburi Adjudication section's committee.**

**(d) The 1st Respondent contravened the ex-parte Applicant's legitimate expectations to have the said objection heard and determined as by law ordained.**

3. On 8th October, 2012, the Exparte Applicant through his advocates, the firm of Calpeters Mbaabu & Co gave notice that he would not be pursuing prayers 2 and 3 in the Notice of Motion. He would, therefore, be pursuing henceforth only prayer 1 for certiorari.

The suit was heard by way of written submissions.

#### **SUBMISSIONS ON BEHALF OF THE EXPARTE APPLICANT**

4. The Exparte Applicant submitted that there was procedural impropriety, unreasonableness, illegality and usurpation of non-existent powers on the part of the 1st respondent when he made his decision in the proceedings spawning this suit. He says that the 1st respondent did not observe the requirements of section 9 (1) of the Land Consolidation Act, Cap 23 to ascertain customary rights and interests in land. He states that the 1st Respondent did not appoint a committee of 25 members, which was mandated to determine objections and to apply customary law as per section 11 (1) of Cap 283. The exparte applicant challenged the veracity of the impugned proceedings saying that they did not bear the names of any committee members.

5. The exparte applicant submitted that there was breach of natural justice, bias and denial of fair hearing when the decision being impugned was made. He stated that Articles 25 (c) and 50 (1) of the Constitution had been contravened and as such his unlimited right to a fair trial had been trampled upon. He said that the 1st Defendant did not understand customary laws applicable to the Tigania adjudication area and had also failed to take into consideration the exparte applicant's testimony that P/No 108 was ancestral/family land which himself, his family and his brothers and their families had cultivated since 1979. He also argued that the 1st Respondent failed to find that case No. 187 of 1968 related to P/No. 1130 and 1194 and not to P/No.108 which is the suit land.

6. I find that his submission No.3 can be subsumed by submissions Nos 1 and 2. Submission No.4 raises the issue of unreasonableness and consideration of extraneous matters. I opine that the issue of unreasonableness has been handled under submission No.1. The Exparte applicant is not quite clear on the extraneous matters he complains were considered.

7. Under submission 5, the exparte applicant says that the decision being impugned was capricious, arbitrary and nebulous in that it does not proffer reasons why he awarded P/No 108 to the Interested party when he had not even visited the subject parcel of land.

8. In submission No. 6, the Exparte Applicant reasserted the position that P/No 1130 and 1194 were different from P/No 108. He submitted that in an affidavit sworn on 16.11.2010 by one Samson Asande, the 1st respondent had not denied that a committee had not been constituted when the challenged decision was made. He re-stated that the 1st respondent, the adjudication Officer, did not understand Meru Customary Laws in land acquisition and ownership.

9. Submissions 7, 8 and 9 can be considered together. Submission 7 is a comment on the Affidavit sworn by the Interested Party. I have taken it into account. Submission 8 asserts that the exparte applicant's further affidavit sworn by him on 2.4.2013 had not been controverted. Submission 9 (a) is a reply to the Interested Party's submissions. I have taken it into account. Submission 9 (b) contains the Exparte Applicant's Analysis of this suit and submission 9 (c) explains that the Exparte Applicant was only seeking the order of certiorari as he had by a letter dated 8.10.2012 withdrawn a part of his claim and

by so doing was not pursuing the orders of Mandamus and Prohibition.

#### **SUBMISSIONS ON BEHALF OF THE 1ST AND 2ND RESPONDENTS**

10. The Respondents have submitted that the 1st Respondent's affidavit contains the gist of the respondents' response to the effect that the Lands Adjudication Officer who heard the objection proceedings had the requisite jurisdiction, the persons involved therein acted reasonably and that the decision emanating therein had already been implemented prior to the issuance of the stay orders.

11. The Respondents explained that the genesis of this suit relates to the discovery by the interested Party of an anomaly that showed that parcel No. 108 Antuambari Section was recorded in the name of the late Nkiriti Likiugu, who had lost to the late Interested Party's father in 1968 in Land Case No. 187 of 1968. The Interested Party lodged objection proceedings dated 22nd July, 1997 and a decision was made on the 11th June, 2010, whereupon the suit reverted to the Interested Party's late father. Hence the need to regularize the records arose from the irregular proceedings carried out by the *exparte* applicant seeking to change and/or purportedly challenge the 1968 decision 28 years later notwithstanding that no appeal had been preferred by the *ex-parte* applicant on behalf of his father's estate.

12. The Respondents submitted that the *exparte* applicant had participated in the proceedings and should, therefore, not be heard saying that the 1st Respondent had no jurisdiction, as there was a Committee which Cross-examined him. It was argued that it was not mandatory for the names of Committee members to be included in the proceedings as section 14 (4) of the Lands Consolidation Act only required the decision of the Committee to be in writing and it be signed by the chairman or the executive officer.

13. Regarding breach of the rules of natural Justice, this is denied by the respondents who assert that there was a Committee and that the *exparte* party participated in the proceedings which had emanated from the proceedings of Land Case No. 187 of 1968.

The aim was to correct the decision made in irregular proceedings at the behest of the *exparte* applicant 28 years later, purporting to alter the status quo.

14. The respondents felt that they had demonstrated that the decision of the lands officer together with the Committee was fair, reasonable, *intravires* and resulted in a satisfactory and sufficient finding in view of the issues considered in the proceedings and the participation of the *exparte* applicant.

15. The respondents conclude their submissions by saying that it is trite and well settled law that judicial review proceedings relate to the process of decision making and not the decision itself. The respondents argue that since the main thrust of the application is what ought to be considered and what ought not to be considered and the giving of reasons in the decision, this in essence amounts to attacking the decision of the lands officer and his committee and not the process. The respondents also said that the 1st Respondent had shown that the decision had already been implemented and for that reason there was nothing to be prohibited.

#### **SUBMISIONS ON BEHALF OF THE INTERESTED PARTY**

16. The first part of the Interested Party's submissions constitute his perception of the history of the suit from the moment the father of the Interested Party took the traditional Meru "Nthenge Oath" in Land Case No. 187 of 1968 until the decision made by the Adjudication Officer on 11.6.2010 which decision spawned this suit.

17. The Interested Party alluded to the affidavit of the 1st Respondent sworn by Samson Asande, the Divisional Land Adjudication officer on 16.11.2010 and which contended that the Land Adjudication officer had jurisdiction to hear the objection as the matter had already passed the committee stage with the result that issues touching on customary law were not applicable. He also, in his affidavit, opined that the decision of the Land Adjudication Officer had been implemented by the time the Honourable Court's

order was issued. The 1st Respondent also pointed out that the decision of the Land Adjudication Officer had made reference to Land committee Case No. 187 of 1968, which he claimed had been decided in favour of the objector (the Interested Party).

18. The Interested Party complains that the Exparte Applicant had not been diligent enough in prosecuting his case and argued that his conduct negated the overriding objectives of the Civil Procedure Act as set out in Sections 1A and 1B to the detriment of the Interested Party. He then narrated the Exparte Applicant's explanation that he had not been indolent. I do not find it necessary to put this down, as in the final analysis the parties by consent agreed to have the suit heard on its merits by way of written submissions.

19. The Interested party then alluded to the Exparte Applicant's affidavit dated 2.4.2013 which deponed that the suit land was not gathered by the father of the Interested Party but was originally acquired by the Exparte Applicant's father **N'KIRITI LIKUNGU** in the 1950's. He also alluded to the assertion in the affidavit that the "Nthenge Oath" taken by the fathers of the disputant's had adversely affected the Interested Party's father by causing death to his family members and thereafter his father pleaded for mercy and the family was cured from the oath traditionally.

20. The Interested Party also made references to the contention by the exparte Applicant that the 1968/69 and 1997 cases do not relate to the suit land, parcel No. 108 and that they related to parcel No Numbers 1130 and 1194 which are not in dispute in this suit. He also referred to the claim by the Exparte Applicant that the interested Party had refused to testify in the 1997 case and the claim that the Interested party had no capacity to file the impugned objection No. 121 over the suit land on behalf of his long deceased father **ANGELO MWITHUMBU** as he had not obtained limited letters of administration of the estate of his deceased father. The Interested Party also referred to the Exparte Applicant's claim in this application that parcel No. 108 has always been his father's family/ancestral land wherein he, his family and brothers and their respective families have cultivated from 1979 to date. Reference was made to the contention by the Exparte Applicant that the 1st Respondent had, during the objection proceedings, disregarded the Exparte Applicant's testimony and that he did not understand the applicable customary laws pertaining to the resolution of disputes over land in Tigania and was, therefore, condemned without being given a fair hearing.

21. The Interested Party set down the procedure for conducting proceedings as follows:

### **The Land Consolidation Act**

Section 11 (1): ***"The Committee appointed for an Adjudication section shall adjudicate upon and determine in accordance with African Customary law the claim of any individual person to any right or interest within the adjudication section."***

(2) ***If a committee is unable to reach a decision in accordance with African Customary law it shall refer the matter to the Arbitration Board which shall decide the matter and shall inform the committee of its decision."***

Section 12: ***"Every Committee or Arbitration Board shall give seven clear days warning of its intention to carry out an adjudication or arbitration, specifying the parcels of land upon which it proposes to adjudicate or arbitrate and stating the time and place at which it intends to adjudicate or arbitrate."***

Section 13:

(1) ***Every individual person claiming any right or interest in any land within an adjudication section and any person whose presence is required by a Committee or Arbitration Board shall attend in person, or by representative according to African Customary Law, as required by the committee or Arbitration Board at the time and place specified in the warning referred to in section 12 of this Act."***

22. It was submitted that the Interested Party discovered an anomaly that Parcel No. 108 Antuamburi Adjudication Section was recorded in the name of the late Nkiriti Likiungu and lodged an objection and a decision was made on 11.6.2010 whereupon the suit land reverted to the initial and rightful owner, the Interested Party's late father. The Interested Party submitted that the section which deals with procedure regarding Objection is Section 18 of the Land Consolidation Act which states:

18(1): *“the executive officer with whom an objection is lodged in accordance with the provisions of section 17 of this Act shall either:-*

*(a) Refer the objection to the Committee if it appears to him that the inaccuracy or incompleteness alleged is a consequence of any decision of the committee, or*

*(b) Submit the objection to the Adjudication officer, if it appears to the executive officer that the inaccuracy or incompleteness alleged is a consequence of any decision of the Arbitration Board.”*

18(2): *“Any objection referred to a Committee under sub-section (1) of this section shall be considered by the Committee and the Committee shall make a finding thereon; every such finding shall be submitted to the Adjudication Officer.”*

18 (3) *“The Adjudication officer to whom an objection or the finding of a Committee shall make a finding thereon every such finding of a Committee is submitted under sub-section (1) or sub-section (2) (as the case may be) shall in the case of an objection so submitted to him consider the matter with the Arbitration Board and after making such further inquiries as he may think fit determine the matter; and shall, in the case of a finding so submitted to him either:-*

*(a) Confirm the finding of the committee, or*

*(b) Consider the matter with the Arbitration Board and after making further inquiries as he may think fit, determine the matter”.*

23. It was the submission for the Interested Party that Procedurally, the 1st respondent had followed the apposite provisions of the law, had corrected an anomaly and had reverted ownership of parcel No. 108 properly to the Interested Party. The Interested Party was emphatic in asserting that Section 18 of the Land Consolidation Act empowers the Adjudication Officer to exercise discretion, in consultation with the Arbitration Board, where there is inaccuracy or incompleteness of any decision of the Committee.

24. I do not wish to consider the submissions of the Interested Party regarding orders of prohibition and mandamus. I do not find the submissions of any relevance or use in this suit as the Exparte Applicant is only seeking the order of Certiorari. This observation applies to the submissions by the Respondents in this respect. I do note that the Interested Party generally denies all the assertions postulated by the Exparte Applicant.

## **DETERMINATION**

25. The Exparte Applicant and the Interested Party in their submissions have adopted diametrically opposed positions.

26 According to the exparte applicant, the 1st Respondent had failed to constitute a Committee to hear the objection in accordance with the applicable Customary Laws. The 1st respondent is required by section 9 (1) of the Land Consolidation Act to constitute a Committee of at least 25 members who are required to hear objections. Section 11 (1) of the said Act mandates the Committee to hear objections and in accordance with section 26(1) of the Act, the 1st respondent can only hear objections with the aid of the committee. The Exparte applicant submits that the 1st Respondent heard the objection alone, contrary to the provisions of the law. He submits that the impugned proceedings do not bear names of any committee members and, according to the Exparte Applicant, this is proof that the 1st Respondent had

acted alone and, therefore, *ultra vires his powers*. The Exparte Applicant contends that Parcel No. 108 was ancestral land which he, his family, brothers and sisters had occupied since 1979. He also argues that had the 1st respondent taken into consideration his testimony, he would have discovered that land Committee Case No. 187 of 1997 refers to Land Parcel Nos. 1130 and 1194 and not to the suit land which is P/No. 108.

27. The Exparte applicant submitted that had the 1st respondent perused the proceedings of the 1997 case, he would have discovered that the Interested Party and his relatives refused to testify and that the “Nthenge Oath” administered had adversely affected the family of the Interested Party's father by causing death to his family members. As a consequence, the Interested Party's family withdrew their claim, pleading for mercy and the “Nthenge oath” was cured traditionally.

28. The Exparte Applicant sought to debunk the veracity of the Affidavit sworn by one Samson Asande on 16.11.2010 by saying that if at all the Land Adjudication Officer, as he avers, had made reference to the 1968 and 1997 cases, then why did he not take into account that the 2 cases related to P/Nos 1130 and 1194 and Not P/No. 108, the suit land. He also wonders why he did not discover that the Interested Party and his relatives had refused to testify and withdrew their claim of the suit land. He also wonders why, if the objection had gone beyond the Committee stage, what the Land Adjudication Officer was hearing.

29. He strongly submits that the 1st respondent's Affidavit does not deny that a Committee had not been constituted to hear the objection as required by Section 9 (1) of the Land Consolidation Act and that the Land Adjudication Officer was not conversant with Meru Customary Laws germane to land acquisition and ownership.

30. The Interested Party's position is that sometimes in 1997, following the death of his father, he and his two brothers wanted to have the land subdivided among themselves. Upon inquiry at the Lands Offices for Antuamburi Adjudication section, they discovered that Parcel No. 108 was registered in the name of, **N'KIRITI LIKIUNGU**, the deceased father of the Exparte Applicant whom their father had defeated in the 1968 land case. The Interested Party lodged a complaint with the District Land Adjudication Officer. He lodged an objection which was heard, and according to him, a meritorious decision was made on 11.6.2010 upon which Parcel No. 108 reverted to the Interested Party. The Interested Party states that in the 1968 land case, his late father took the dreaded “Nthenge Oath” and land parcel No. 108 was confirmed to belong to the Interested Party's late father and was recorded in his name.

31. The Interested Party submits that the decision making process was procedurally proper. He states that the documents which the Exparte Applicant relies upon go back to the Land Adjudication Committee, matters which the Committee had heard and determined way back in 1969. As such, the Interested Party submits that the 1st respondent had not breached the Rules of natural justice which, as he puts it, “basically entitles a person to know the case against him and to have the opportunity to put his case properly.” This he asserts was done way back in 1969.

32. I note that the submissions made by Mr. E. Kieti, State Counsel, on behalf of the 1st and 2nd respondents assert the position that the 1st Respondent had jurisdiction when he reached the impugned decision and also that no rules of natural justice had been breached. He states that after the Interested Party discovered that land Parcel No. 108 Antuamburi section, was recorded in the name of N'Kiriti Likiungu, whom the Interested Party's father had defeated in Land Case No. 187 of 1968, he lodged objection proceedings dated 22 May, 1997 and a decision was made on 11th June, 2010 where upon the suit land was reverted to the initial owner, the Interested Party's father. He submitted that the only purpose of the objection proceedings was to regularize the records which arose from irregular proceedings carried out by the exparte applicant to change and/or purportedly challenge the 1968 decision, 28 years later. He also submitted that section 14 (4) of the Lands Consolidation did not require the tabulation of members of a committee and that what was required was the signing of the decision of a Committee by the Chairman or Executive Officer. He also submitted that it was not necessary for the reasons why a decision was made to be given as in Judicial Review Proceedings what was important was the integrity of the decision making process and not the decision itself.

33. 1968 is a long time ago. 1997 is also a long time ago. The parties as I have already said, have taken diametrically opposed views. The situation is not helped by the fact that copies of the proceedings which have been availed are barely legible. I am unable to establish their authenticity and hence credibility and integrity.

34. It has to be explained, as submitted by the 1st and 2nd respondents in their submissions, why in the objection lodged on 22nd July, 1997, a decision was only made on 11th June, 2010, about 13 years later.

35. I opine that whereas Judicial Review is largely concerned with the decision making process, part of the process requires that reasons for decisions be given. Here we would not be looking at the reasonableness of the decision or propriety but as to whether the process had been followed through. I also opine that tabulating the names of Committee members, though not specifically prescribed by section 14 (4) of the Land Consolidation Act is good practice that will show that Committee members indeed participated in the proceedings and that the threshold for the necessary quorum had been achieved.

36. I do not agree with the Ex parte Applicant's position that in Land Adjudication matters a party can not file objection proceedings regarding a suit that belonged to a deceased person without at least having obtained limited letters of administration of the estate of the deceased person. Sections 26 of the Land Adjudication Act and the Land Consolidation Act allow any aggrieved person to raise apposite objections. The Consolidation Act allows, inter alia, for ascertainment of rights, interests and devolutions thereof in special areas. The Land Adjudication Act allows for ascertainment and recording of all rights and interests in Trust Land.

37. There is no dispute that the Interested Party lodged Objection no. 121 in respect of land parcel No. 108, Antuamburi Adjudication Section. There is no dispute that the 1st Respondent made a decision on 11.6.2010.

38. The Affidavit of Samson Asande, the Divisional Land Adjudication Officer, sworn on 16th November, 2010 confirms that Objection No. 121 over parcel No. 108 was heard by one Solomon Ayuko who had since been transferred to Migori.

Under paragraph 5 of the Affidavit he depones:

***“(a) that the land Adjudication Officer had jurisdiction to hear the objection as it had passed the Committee Stage when the issues touching on customary law are applicable.***

***(b) that the Land Adjudication Officer also made reference to land committee Case No. 187, which had also decided in favour of the objector, one GERVASE MWITI ANJELO .***

***(c) that the decision of the Land Adjudication Officer had already been implemented when this Honourable Court issued an order.***

39. It is clear that sub-paragraph 5(c) is superfluous as the Ex parte Applicant was not seeking orders of mandamus and prohibition, as he had withdrawn the prayers apposite to those orders.

40. It is not clear to me how a fresh objection can pass the Committee stage. From this affidavit, it is pellucid that the 1st Respondent admits that he considered the application alone. If he was assisted by a Committee, the proceedings he has availed to Court do not reflect the participation of the concerned committee members. In any case, he has admitted that he did not include committee members in the proceedings. In the circumstances, I find that the prayer of certiorari sought by the Ex parte Applicant is veritably merited.

41. I grant the following orders:

**1. An order of certiorari is hereby issued calling into this Court and quashing the**

***proceedings, findings and the decision made by the 1st Respondent on 11.6.2010 in Objection No. 121 over Land Parcel No. 108 situate in Antuamburi Adjudication section, within Tigania East District.***

**2. *I award costs to the Exparte Applicant.***

***Delivered in Open Court at Meru this 24th day of October, 2014 in the presence of:***

Cc. Daniel

Parties not in court

**P. M. NJOROGE**

**JUDGE**