



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. APPLICATION NO. 22 OF 2010

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW ORDER OF CETIORARI

AND

IN THE MATTER OF LAND ADJUDICATION ACT CAP 284 AND LAND CONSOLIDATION ACT CAP 283

AND

IN THE MATTER OF AWARD OF OBJECTION BOARD ANTUAMBURI

ADJUDICATION SECTION PARCEL NO.1196, 1249 AND 2286 DATED 22.1.2010

AND

IN THE MATTER OF LAW REFORM CT CAP 26 LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

LAND ADJUDICATION OFFICER TIGANIA

WEST DISTRICT.....RESPONDENT

ZABERIO MUTHIKA.....1ST INTERESTED PARTY

JAMES MWINILIA.....2ND INTERESTED PARTY

CHARLES KINGEERE.....3RD INTERESTED PARTY

J U D G E M E N T

By a Notice of Motion dated 8th July, 2010, the Exparte Applicant seeks orders that:-

- 1. The honourable court be pleased to remove to this Court for quashing through an order of Certiorari the decision/award of the Land Adjudication Officer, Tigania District dated 22/1/2010 in respect of L. R. No.1196, 1249, 2286/Antuamburi Adjudication Section.*

2. *The Interested Party and the Respondent be ordered to pay the costs of this motion.*

The motion is supported by the statement of Facts, the Verifying Affidavit of the applicant that accompanied the Application for leave and the following grounds;

- (a) *That the board chaired by the Respondent was not properly constituted.***
- (b) *The dispute had already been determined by a competent tribunal and the Respondent lacked jurisdiction.***
- (c) *The decision was outrightly biased against the Ex- Parte applicant and was made in consideration of matters that were not placed before the board.***
- (d) *The decision was unreasonable and untenable in law.***

THE EXPARTE APPLICANT'S SUBMISSIONS

The applicant submits that the decision of the Respondent made on 22.1.2010 should be quashed for the following reasons:-

1. The panel that heard the dispute was not properly constituted as Section 26 (1) of the Land Consolidation Act requires the Adjudication officer to consider objections with the assistance of a Committee. He argues that the proceedings do not contain names of members of a Committee and there is no evidence of participation of any Committee members. He opines that for this reason alone the Respondents award is rendered illegal and should be quashed.
2. The applicant submits that the dispute had been heard and determined by a panel of equal jurisdiction in another objection, No.268. He says that the award in this objection awarded the whole land in dispute to the applicant. He argues that the respondent did not have jurisdiction to re- hear the dispute and that it was wrong for him to sit on appeal in a decision made by another adjudication officer. He proffers that under Section 26 (3) of the Land Consolidation Act, no appeal is allowed once a decision is made.

The applicant says that the 1st Interested Party is the son of Joseph Thaimuta who was litigating with the applicant in the previous Objection. He further says that the respondent did not, therefore, have the powers to re-open the dispute and by so doing grossly erred. He opines that if Land Adjudication Officers are allowed to re-open disputes already settled by their predecessors, litigation would never come to an end. He feels that the Respondent grossly abused his office by allowing parties to re-litigate over a matter which had been closed years back.

The applicant argues that provisions relating to the hearing of objections under both Cap 283 and 284 require the Adjudication Officer to sit with the aid of a committee.

3. The applicant submits that the decision of the respondent was against the weight of evidence to the extent that it was unreasonable and untenable in law.

The Applicant urges this Court to quash the award and award costs to the applicant. In support of his submissions the applicant proffers the following cases.

- (a) *HC Judicial Review No. 101 of 2008 (Meru) Republic Vs Land Adjudication Officer and Josphat M'Nchebere.***
- (b) *HC Judicial Review No. 58 of 2009 (Meru) – Republic Vs Tigania East District Adjudication and Settlement Officer and Another***

RESPONDENT'S SUBMISSIONS

The Respondent has submitted that Antuamburi Adjudication Section was placed under Cap. 283 and not Cap 284 as alleged by the Applicant. He further submits that the objection in issue was heard by the Land adjudication Officer and not by an Arbitration Board as alleged by the Applicant. He says that the period to bring up issues handled by the Arbitration Board had long expired as the Antuamburi Adjudication Section had been published and this gave the Land Adjudication Officer legal power to hear an A/R Objection concerning the Section as mandated by the law.

The Respondent has also stated that this is a family dispute which began way back in the year 1968 and what the Land Adjudication Officer did was only to allow family members to share out ancestral land as had been decided by Committee members vide Case No.60/1968. They proffered that the records available at the Adjudication Office show that the ex-parte applicant and the Interested Parties have been in occupation of their respective portions since 1968.

The Respondent has concluded his submissions by saying that this application is incompetent and an abuse of the Court process and has urged this Court to dismiss it with costs to the Respondent.

1ST AND 3RD INTERESTED PARTIES' SUBMISSIONS

The two Interested Parties gave a brief history of this matter as follows:- There was land case No. 60/68 which concerned the original parcel of land which belonged to the 1st Interested Party's Rujuu Clan. In that objection there was a Committee and the case determined that the said land be shared equally between Joseph Thaimuta (1st Interested party's father) and Thiringi Kithara (Ex-parte Applicant's father) who belonged to the same clan.

The parties reiterated that it was undisputed that they have lived and utilized the subject land all their lives. They proffer that later on after Case No. 60/68 was decided by the Committee, the Arbitration Board for the area heard the case and delivered its decision in 1985 to the effect that land Case No. 60/68 be set aside and the whole land be awarded to Thiringi Kithaka (Ex- Parte Applicant's father). Thereafter as envisaged under Section 17 of the Land Consolidation Act, Cap 283, Laws of Kenya, the Interested Parties lodged an objection.

In their view the parties felt that the issues for determination in this matter are:

1. ***Whether this was an Arbitration Board case or an objection under Section 17 of Cap 283.***
2. ***Whether or not there was need for a Committee during the hearing and determination of this case.***
3. ***Whether or not the Respondent had requisite jurisdiction.***
4. ***Whether or not the decision was fair, unbiased and tenable in law.***

They submit that Parcel No. 2286 was not part of the impugned respondent's decision of 22.1.2010. They proffer that the only parcels subject to that decision were 1196 and 1249. They, therefore, argue that any parts of these proceedings touching on Parcel No. 2286 are misplaced and can not bring in parcels of land not the subject of the impugned decision.

They submit that the decision being impugned was not made by an Arbitration Board or by a Committee as it was the decision of the Land Adjudication Officer following proceedings instituted after the publication of the record for Antuamburi Adjudication Section as mandated by the law. They referred the Court to Section 17 of the Land Consolidation Act, Cap 283, Laws of Kenya. They Opined that this case was not a Committee Case or an Arbitration Board Case was uncontroverted and, therefore, the proceedings and decision being challenged did not fall under Sections 9, 11 and 26 of the Land Consolidation Act.

Regarding whether or not there was need for a Committee during the proceedings being challenged, they submit that there was no need for a Committee because under Sections 17 and 18 (1) (b) of the Land Consolidation Act, no Committee was required as the land Adjudication Officer was clothed with requisite authority while sitting in his individual capacity and to make the required decision. They

submit that the situations in the authorities proffered by the applicant in support of his case were distinguishable and different from the present circumstances as in this case there was no need for a Committee whereas in those cases a Committee was required. The cases provided by the Applicant are H. C. Judicial Review No. 101 of 2008, Meru (Op. Cit) and H. C. Judicial review No. 58 of 2009, Meru, (op cit).

Concerning Jurisdiction, the parties have submitted that the Respondent was clothed with sufficient jurisdiction to issue the decision of 22.1.2010. As they had said earlier, they reiterated that the provisions of Section 17 and 18 (1) (b) of the land Consolidation Act give the Land Adjudication officer authority to act as he did.

On allegations of unfairness, bias and non-tenability in law, they submit that no evidence against the Land Adjudication's decision has been presented. They assert the maxim: ***“He who alleges must prove”***. They assert that the impugned decision met all the requirements of the law, was sound and urge the Court to maintain it. They also ask the Court to be persuaded by the fact that the parties herein have been in user and possession of their respective parcels and claim that the applicants' prayers are only intended to destabilize the situation on the ground.

The parties conclude that this suit is without merit and should be dismissed with costs.

2ND AND 4TH INTERESTED PARTIES' SUBMISSIONS

The parties have submitted that the decision being challenged was not made in an arbitration case. They also say that the decision was not made in a Committee Case. They say that the arbitration case was heard in objection No.268 and not in the case being challenged.

They submit that the Respondent's decision of 22.1.2010 relates to an objection after the publication of the record of Antuamburi Adjudication Section. They say that such objections are envisaged by Section 17 of the Land Consolidation Act, Cap 283, Laws of Kenya and say that these objections are commonly referred to as A. R. Cases. This being the case, they argue that the decision of 22.1.2010 being an A. R. case can not amount to an arbitration board's decision and can also not amount to an appeal in objection 268.

The parties submit that after the publication of the apposite register, the respondents had separate objection numbers and for that reason, the applicant ought to have filed separate applications for Judicial Review and later seek to consolidate them.

The parties urge the Court to find that the objection in issue was made after publication of the record and brought within 60 days as required by law. They argue that it did not fall under Sections (9) and 26 (1) of the Land Consolidation Act and as such the submissions that there were no Committee members or their names recorded in the proceedings were misplaced.

They conclude that the application is not merited as it distorts the facts and should be dismissed with costs to the respondents.

There is another set of written submissions filed by the firm of Maitai Rimita & Co. Advocates for the 4th Interested Party alone.

The 4th Interested Party submits that his replying affidavit explains how the matter ended up with the Land Adjudication Officer under section 26 of the Land Adjudication Act, Cap. 284, Laws of Kenya. He submits that the adjudication process was followed to the letter and each of the institutions created by Cap. 284 did their work. There were objections before the Committee. Then followed proceedings before the Arbitration Board. After that the parties had a chance to object as allowed by Section 26 of the Land Adjudication Act which granted the Respondent jurisdiction to determine objections in what is commonly called A/R objections. Anyone dissatisfied could appeal, under Section 29 of the Land Adjudication Act, to the Minister.

The 4th Interested Party opines that this is not a case of the Adjudication Officer setting aside what had been done by another process but the employment of procedures set out in the Adjudication process to allow Justice to be done before land is finally registered and Title Deeds issued.

The 4th Interested Party prays that this application be dismissed. The 4th Interested Party has proffered the following authorities in Support of this submissions:

1. ***Pages 95 to 97, PETER KALUMA – JUDICIAL REVIEW, 2nd edition.***
2. ***Section 26, Land Adjudication Act, Cap. 284.***

The 4th respondent has also submitted that the application was filed more than 21 days after leave was obtained in breach of the terms of order 53 r 3 of the Civil Procedure Rules and on this ground alone, the application should be dismissed.

DETERMINATION

In my view, the issues for determination are:

1. ***Was there a board chaired by the respondent and if one existed, was it properly constituted.***
2. ***Did the respondent re-open a dispute already determined by a competent tribunal, and if he did so did he possess jurisdiction to do so?***
3. ***Was the Challenged decision biased against the applicant and did he consider extraneous matters?***
4. ***Was the respondent's decision unreasonable and untenable in law?***
5. ***Was the application filed in breach of the requirements of Order 53 r. 3 of the Civil Procedure Rules?***

I find my answers to questions Nos 1, 2, 3, 4 and 5 to be “No”.

I will first of all deal with the determination of whether the application was filed in breach of Order 53 rule 3 of the Civil Procedure Rules. Order 53 rule 3 (1) says:

“When leave has been granted to apply for an order of Mandamus, Prohibition or Certiorari, the application shall be made within twenty-one days by notice of motion not the High Court, and there shall unless the judge granting leave has otherwise directed be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”

Leave was granted by the Hon. Lady Justice M. Kasango, J, on 21.6.2010. The application is dated 8th July, 2010 and was filed on 10th July, 2010. This is clearly within the 21 days allowed by the law. This submission by the 4th Interested Party is dismissed outrightly.

On whether or not the respondent chaired a board and if one existed, was it properly constituted? I have carefully examined the averments and submissions of the parties. The respondent and the Interested Parties have denied that a board existed. They have submitted that the Respondent acted individually as mandated by the apposite law.

Section 26 of the Land Adjudication Act says:

“26(1) any person named in or affected by the Adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or

incomplete.

(2) the adjudication officer shall consider any objection made to him under sub-section (1) of this section, and after such further consultation and inquiries as he thinks fit shall determine the objection.”

It is clear that any proceedings under Section 26 of the Land Adjudication Act do not require the Land Adjudication Officer to sit with a Committee. But the question is: did the Land Adjudication Officer, when he made the impugned decision hear the objection under the provisions of Section 26 of the Land Adjudication Act? The decision being challenged by the applicant is in the following form:

“JUDGMENT/ORDER

- ***Parcel No. 1196 and 1249 sub-divided.***
- ***On Parcel No. 1196 two acres awarded to Kimayo family and recorded to James Mwingilia and Chalres Kingeere M'Lingulu and issued a new parcel No.***
- ***From P/No.1196 again two acres awarded to Daniel M'Lithara and issued a new Parcel No.***
- ***Parcel No. 1249 sub-divided***
- ***Kimayo family awarded three acres and same recorded to James Mwingilia and Charles Kingeere M'Lingulu.***

LAO

22.1.2010

It is clear that the Land Adjudication Officer does not purport to be hearing the objection with a Committee or a board. It is indicated that the applicant took part in the proceedings. It is clear that the Land Adjudication officer was proceeding under the auspices of Section 26 of the Land Adjudication Act. He, therefore, did not need the assistance of board members.

Regarding the question whether the respondent opened a dispute already determined by a competent Tribunal, it is clear that the Adjudication Officer was acting under the provisions of Section 26 of the Land Adjudication Act. The applicant has failed to provide evidence to convince this Court that the Land Adjudication Officer acted otherwise. I find that he had apposite jurisdiction conferred by Section 26 of the Land Adjudication Act.

Regarding bias and consideration of extraneous matters, I agree that the applicant has not tendered tangible evidence. Although this is not crucial to the determination of this application, the applicant has not controverted the assertion by the Respondent and the Interested parties that all parties in this suit, including the applicant, who are members of the same clan have been in occupation of their respective portions since 1968.

Regarding the claim by the applicant that the respondent's decision was unreasonable and untenable in law, I find that no sufficient evidence was tendered by the applicant to persuade this Court to accept this claim.

I note that although the applicant's Notice of Motion dated 8th July, 2010 wants this court to remove to itself and quash through an order of certiorari the decision/award of the Land Adjudication Officer, Tigania District dated 22.1.2010 in respect of L.R. No.1196, 1249 and 2286 Antuamburi Adjudication Section, it is veritably pellucid that Parcel No. 2286 was not one of the parcels of Land included in the decision which the applicant is challenging. I opine that even if the court was inclined to issue an order of Certiorari, which it is not, it would find it difficult to do so as the decision the applicant wants quashed is not the decision made by the District Land Adjudication Officer on 22.1.2010.

I find that the authorities proffered by the applicant are distinguishable as the circumstance of this case are different from the circumstances obtaining in the cases offered by the applicant.

Having carefully considered the averments of the parties, the authorities proffered by the parties and their submissions, and taking into account my observations herein, I find that this application lacks merit. In the circumstances, it is hereby dismissed. I award costs to the Respondent and to the 4 Interested Parties.

It is so ordered.

Delivered in Open Court at Meru this 21st day of November, 2014 in the presence of:

Cc. Daniel

Mokua h/b Murango Mwenda for Exparte Applicant

Mokua h/b Mwanzia for 1st & 3rd Interested Parties.

Rimita for 4th Interested Party

Kiongo for Respondents

P. M. NJOROGE

JUDGE