



REPUBLIC OF KENYA

High Court at Embu

Miscellaneous Application 47 of 2011

MISC. APP. NO.47 OF 2011 (JR)

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF LAND ADJUDICATION ACT CAP 284

AND

**IN THE MATTER OF LAND APPEAL CASE NO.260 OF 2003 TO THE MINISTER FOR
LANDS**

**IN THE MATTER OF LAND PARCELS NUMBERS MBEERE/KIAMBERE/2925, 2926, 2927,
2929, 2931, 2933, 2934, 2936, 2937, 2939, 140, 03040 AND 3352**

REPUBLIC OF KENYAAPPLICANT

VERSUS

THE MINISTER OF LANDS1ST RESPONDENT

NGOCI MBITI Representing

NGARI MURATHO (DECEASED).....2ND RESPONDENT

KIRINYAGA DISTRICT LAND REGISTRAR.....3RD RESPONDENT

IRERI NGIRI & 10 OTHERSEXPARTE

R U L I N G

This is the Notice of Motion dated 12th September 2011 filed by the Exparte Applicants. Its brought under Order 53 rule 3 & 4 Civil Procedure Rules and section 9 Law Reform Act and section 29 of the Land Adjudication Act. The Applicants are seeking the following orders;

a) Certiorari against the Respondents to remove to the High Court and to quash the Judgment/Award/Findings dated 10th March 2011 of the Minister for Lands in Land Appeal case No.260/03 in respect of land parcels number MBEERE/KIAMBERE/2925, 2926, 2927, 2929, 2931, 2933, 2934, 2936, 2937, 2939, 140, 03040 and 3352 in Kiambere Adjudication section.

b) Prohibition be issued against the Respondent to prohibit the Minister for Lands and specifically the Director of land Adjudication and settlement, the Chief Land Registrar and the District Land Registrar, Mbeere District, from implementing the Judgment/Award/Findings of the Minister for Lands dated 10th March 2011, in Minister's Land Appeal case No.260 of 2003 in respect of Land parcels Nos MBEERE/KIAMBERE/2925, 2926, 2927, 2929, 2931, 2933, 2934, 2936, 2937, 2939, 140, 03040 and 3352 in Kiambere Adjudication section.

The statement of facts shows that the Exparte Applicants were some of the Respondents while the Interested Party was the Appellant in Land Appeal case No.260 of 2003 before the Minister for Land. There had been previous cases prior to this appeal. The lands in issue have been registered in the names of the Exparte Applicants who say they did not participate in the Appeal before the Minister. And that Ngoci Mbiti the Appellant was not a party to the appeal yet he represented the deceased Appellant.

That the District Commissioner acted *ultra vires* in dealing in a deceased person's estate. The supporting affidavit was filed by the 1st Exparte Applicant who produced the record of various proceedings (IR 2-6).

The Respondents filed grounds of opposition but the Interested Parties did not file any replying affidavits. Counsels however agreed to file written submissions in disposing of the application.

Mr. Okwaro for the Exparte Applicants submitted that during the hearing of the appeal No.260/03 the District Commissioner acted unprocedurally and irrationally as he did not observe the Rules of Natural Justice. This is because the Exparte Applicants lands were affected but they were not parties in the appeal.

Secondly Ngoci Mbiti purported to represent the original Appellant **NGARI MURATHO** yet he was not a legal representative. Thirdly the District Commissioner acted ultra vires in making a decision over a deceased's estate when he had no powers to do so.

M/s Chimau for the Attorney General for the 1st and 3rd Respondents reiterated her grounds of opposition saying the application lacked merit. She submitted that the Land Adjudication Board acted within their jurisdiction Ref: **REPUBLIC -VS- PERMANENT SECRETARY TO THE CABINET** citing **NAIROBI HIGH COURT MISC. APPLICATION NO.99/06 SHANGHANI INVESTMENT LTD -VS- THE OFFICER INCHARGE NAIROBI REMAND AND ALLOCATION PRISON**. She submitted that the matter before Court involved ownership of land and rights to occupation. And to her this was not a matter which could be disposed by way of Judicial Review.

Further she submitted that Prohibition could not issue as the decision made had already been implemented.

Mr. Mungai for the Interested Party submitted that the law on Adjudication provides that the decision of the District Commissioner appointed by the Minister for Lands in adjudication process is final. He therefore submitted that Judicial Review could not apply. The Exparte Applicants did not raise the issue of representation before the District Commissioner and so could not raise it in the Judicial Review.

It has been stated over again and again through Court decisions that Judicial Review deals with the process of decision making by a *quasi-judicial* body. Judicial Review does not deal with the merits or otherwise of the decision.

The Exparte Applicants allude to the fact that rules of natural justice were violated in the process of hearing of the appeal No.260/03 because of the following;

a)The Exparte Applicants were not parties in the Appeal No.260/03 though their lands were affected.

b)Ngoci Mbiti the Interested Party was not the legal representative of the Appellant yet he was allowed to conduct the appeal.

A perusal of the annexures herein shows that the parcel of land that was being claimed by **NGARI MURATHO** and **KANGECHU MUTHAGUA** (both deceased) was BLOCK NO.140 and not the

parcels shown in the Notice of Motion filed herein. The annexures I have referred to are IR2-5. The members Mbeere/Kiambere/2926, 2927, 2929, 2931, 2933, 2934, 2936, 2937 and 2939 were resultant subdivisions from Block 140 following the decisions over the arbitration of various cases between Ngari Muratho and Kangechu Muthagua. One can't claim to be a registered owner when there is a pending appeal to the Minister. The appeal to the Minister herein is the final Order in the process of adjudication. One can only comfortably claim ownership after the whole process is through with no appeal to the Minister. But as long as there is a pending appeal the matter is not through. Section 28 of the Land Adjudication Act provides;

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registration to be effected in accordance with the adjudication register.

Provided that where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal and on such determination the register shall if necessary be altered in accordance with the determination”.

The Appeal No.260/03 was filed under section 29 of the Land Adjudication Act and the Chief Land Registrar acted in accordance with section 28 of the Land Adjudication Act. This is confirmed from all the certificates of official search annexed herein. There is a stay of registration noted on all the parcels shown in the certificates of search. What therefore happens when an Appeal is filed under section 29 of the Land Adjudication Act? Section 29(1) (b) provides;

“and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final”.

Copies of this final order shall be sent to the Director of Land Adjudication and the Chief Land Registrar for necessary action. The above steps were adhered to i.e. Appeal was filed, it was heard and a determination was made on 10/3/2011. It is this determination that the Exparte Applicants are challenging.

I will first deal with the issue of representation. The Exparte Applicants submit that the Interested Party herein could not represent Ngari Muratho because he is not his legal representative. A look at the cases involving this land reveal the following;

1. IR5 decided on 8/5/974. Both Kangechu Muthagua and Ngari Muratho appeared in person.

2. IR4 decided on 9/10/1984. Ngari Muratho appeared in person while Kangechu Muthagua deceased was represented by Elizapan Ileri of his clan. This was an appeal by Ngari Muratho.

3. IR3 determined on 19/2/1992. Ngari Muratho appeared in person while Ireri Ngiri appeared as an authorized agent. The land is still the same. The proceedings show he was representing Kangechu Muthagua. And he was the only Defendant. He called two witnesses who are not among the Exparte Applicants.

4. IR 2 which is the appeal No.260/03 had – Ngari Muratho represented by Ngoci Mbiti as Ngari had died. Ireri Ngiri the agent of Kangechu Muthagua was present representing the Respondents.

I have gone to some great length of highlighting these cases and the representation to show that Kangechu Muthagua died after the decision of 1974. All along he has been represented in all the proceedings. On the other hand Ngari Muratho appeared in almost all the proceedings except the appeal No.260/03 where he was represented by Ngoci Mbiti. No issue was raised about this representation. And no such issue would have in any event been raised as Kangechu had died and had all along been represented.

And this was allowed based on the land existing. Under section 13(5) of the Land Adjudication Act its provided that;

“Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors unless the adjudication officer otherwise directs”.

Therefore just as Kangechu was represented, the late Ngari Muratho had to be represented. This is so only under the Land Adjudication Act but not the Civil Procedure Act or Law of Succession Act. Equally the District Commissioner acting on behalf of the Minister for Lands cannot be faulted for dealing with a deceased's estate by virtue of section 13(5) of the Act. The process of adjudication gives them that special power to have representatives and not necessarily legal representatives.

The Exparte Applicants also submitted that the appeal was heard without them yet their lands was affected. The appeal complained of originated from the objection No.126. The parties in this objection were Ngari Muratho and Ireri Ngiri an agent for Kagenchu. The Exparte Applicants were not party to those proceedings because the contest devolved around Plot/Block No.140 and not the parcels carved out of it. And thats why the decision then was that the LAND was to remain with IRERI NGIRI. Even the decision in Appeal No.260/03 clearly states that the land is awarded to Ngari Muratho who should subdivide it to clan members. In other words the decision which led to the subdivision creating the numerous parcels mentioned in the Notice Motion was overturned by Appeal No.260/03. The Land Adjudication Act vide section 29 makes the finding of the Minister to be final in that process.

Would it then be the subject of Judicial Review? It can only be if the process was faulty because Judicial Review is concerned with the process only. The issues raised about the process applied have been found by this Court not to be sustainable. The other issue that the Exparte Applicants are raising is the

correctness of the decision. Mr. Okwaro in his submission states;

“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate Order in Judicial Review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached such decision”.

He is referring to Judicial Review but what the Exparte Applicants are questioning is the propriety of the decision to award the land to Ngari Muratho. Judicial Review cannot deal with such a dispute as it would require more than the process of reaching the determination. I have had the opportunity of reading the case of ***SANGHANI INVESTMENT LTD -V- THE OFFICER INCHARGE NAIROBI REMAND ALLOCATION PRISON (Supra)*** and ***REPUBLIC -VS- EXPARTE KAURIA MISC. APPLICATION NO.534/03*** through which I am ably guided. I do find that the dispute between the parties herein is beyond the reviewing of the decision making process which is clearly set out in the affidavits. The District Commissioner did what the law allowed him to do. I therefore find that the Orders of Certiorari and Prohibition cannot issue. Certiorari can't issue because there was no breach of the rules of natural justice.

Prohibition cannot issue because the said Order is lawful and has been implemented.

The Exparte Applicants should be challenging the ownership which can't be done through Judicial Review.

I therefore find that the application lacks merit and is dismissed with costs.

DATED AND DELIVERED AND SIGNED AT EMBU THIS 17TH DAY OF APRIL 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Chimau for 1st and 3rd Respondent

Mr. Okwaro for Exparte Applicant

Mr. Mungai for Interested Parties