



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC MISC APPLICATION NO. 22 OF 2008

IN THE MATTER OF AN APPLICATION BY JESSEE MUNGANIA ITHARIA FOR LEAVE TO APPLY FOR ORDERS OF CETIORARI AND PROHIBITION AND IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP. 26 LAWS OF KENYA

AND

IN THE MATTER OF IRINGU “1” ADJUDICATION SECTION AND IN THE MATTER OF OBJECTION NO. 1234 PARCEL NO. 665

AND

IN THE MATTER OF THE ADJUDICATION ACT, CAP.284 LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

LAND ADJUDICATION OFFICER IGEMBE/TIGANIA DISTRICTS.....RESPONDENT

MARIMBA.....JULIUS M'NDEWA INTERESTED PARTY

ITHARIA.....JESEE MUNGANIA EXPARTE APPLICANT

R U L I N G

1. The application herein is dated 7th day of May, 2008 and is premised upon Order LIII r.3 of the Old Civil Procedure Rules. It seeks orders:

1. **THAT and order of certiorari be issued to remove to this Court the decision of the Land Adjudication Officer IGEMBER/TIGANIA made on 29th February, 2008 in objection No.1234 Uringu “i” Adjudication Section and quash the same and all other orders MADE therein without jurisdiction and against the Law of the Land.**
2. **THAT an order of prohibition be issued to prohibit the Land Adjudication Officer IGEMBE/TIGANIA from implementing his said decision dated 29th February, 2008.**

3. THAT the costs of this application be provided for.

2. Although this application was filed in 2008, I took it over on 31.1.2013 when it was mentioned in my Court. The parties informed the Court that the suit was being disposed of by way of written submissions and that they had all filed and exchanged their submissions. They informed me that the matter had been in court since 2008 and had been handled by three other judges prior to the placing of the matter before me. So it fell upon me to write this ruling.

3(a) The Ex-Parte Applicant has submitted that his application is supported by a statement of facts and a verifying affidavit in terms of old Order 53 r4 of the Civil Procedure Rules. According to him, he and his cousin Marimba now deceased and the father of the Interested Party agreed to gather family land and they did so with each one of them getting equal shares. At that time none of them raised any objection as they had shared the land equitably. However, when Mr. Marimba died, leaving several sons, the Interested Party filed an objection against the Adjudication Register notwithstanding that the time allocated for objection had expired.

3(b) Despite the expiry of the time limit, the Adjudication officer summoned the applicant for hearing of the case. The Adjudication Officer failed to follow the provisions of Section 26 of the Land Adjudication Act and confused himself (sic) with the provisions of the Land Consolidation Act. He allowed unauthorized persons to hear the objection by inviting the committee to hear the objection even though this was not provided for.

3(c) According to the submissions, the Adjudication Officer should not have allowed the Interested Party to file the objection without letters of administration from the Court. The applicant continued to say that the Interested Party had no capacity to bring the objection.

3(d) The applicant was praying that his application be allowed and was relying on the following authorities.

(i) Section 26 of the Land Adjudication Act, Cap 284, Laws of Kenya.

(ii) Willie V Muchuki & 2 others, Civil Suit No.163 of 2004 (OS) High Court, Nakuru

4(a) The Interested Party has submitted that both he and the Ex-Parte Applicant were parties to the proceedings before the respondent and that there was no indication that the Ex-Parte applicant was compelled to testify by force. According to the Interested Party, his appearance and testimony before the respondent were voluntary. In view of the fact that the land was under adjudication when he lodged the objection the Interested Party had no alternative avenue but to object to the respondent who possessed the legal mandate.

4(b) The Interested Party submitted that the Ex-Parte Applicant had the onus to indicate how the respondent had acted beyond his mandate but he had failed to do so. He continued to say that the Ex-Parte applicant had not tendered any documentary proof to show that the adjudication register had been closed at the time the objection was heard.

4(c) The Interested Party averred that the respondent never broke any law and reiterated that he acted within his mandate as provided by the law. He contended that the only recourse the Ex-Parte applicant would have had if he was dissatisfied with the finding of the respondent was to appeal to the Minister within 60 days of the decision by the respondent in which case such an appeal would be final. In the circumstances, the Interested Party submitted that the applicant's case was wrongly in Court and ought to be dismissed with costs.

4(d) Finally, the Interested Party submitted that he was relying on the following authorities:-

i. Section 26 and 29 of the Land Adjudication Act (Cap.284, Laws of Kenya).

ii. Machakos High Court Misc Application No. 126 of 2004 (Republic Vs C. C. Kitui and

others)

(iii) Meru High Court Misc. Application No. 134 of 2004 (Republic Vs Gerald Muthee & Others

5(a) The submissions by the respondent are in many respects similar to those ones of the Interested Party. He referred to the fact that the applicant attended the objection proceedings where he was given a chance, testified and even called one witness who gave evidence in his favour. He further averred that according to the Land Adjudication Act, the respondent has authority to hear any objection including the one raised in this suit. In any case, he argued, it should be noted that the Ex-Parte Applicant willingly and voluntarily participated in the objection proceedings and was never forced to participate. To him, the respondent acted within the law and it has not been demonstrated by the Ex-Parte Applicant how he acted outside what he is required to do within the realm of law. He opined that equity follows the law.

5(b) Regarding the register, the respondent submitted that the submission that the register had been closed at the time the objection was heard is untenable as the Ex-Parte Applicant does not provide any proof or evidence to confirm that the register was indeed closed. He submits that in accordance with the maxim that *“He who seeks equity must do equity”*, the Ex-Parte Applicant must be ready and willing to assist the Court in arriving at a fair determination by putting all the facts and documentary proof forward to enable the Court to do so.

5(c) Finally, the respondent submitted that this application contravenes Sections 26 and 29 of the Land Adjudication Act which require that if the applicant was not satisfied with the decision of the respondent his recourse would have been to appeal to the Minister within 60 days of the respondent's decision and which appeal would be final. As the same was not done, the respondent submits that the Ex-Parte Applicant is using a back door method to get the orders he does not deserve in contravention of the maxims; *“He who seeks equity must do equity and delay defeats equity”*.

In the circumstances, the respondent submits that the Ex-Parte Applicant has not come to Court with clean hands and his application should be dismissed with costs. The respondent relies on the following authorities:-

(i) Sections 26 and 29 of the Land Adjudication Act, Cap 284, Laws of Kenya,

(ii) Republic Vs Minister for Lands and Settlement (ex-Parte Nararikaik & Another) – Nakuru HC Misc Civil Case No.30 of 1986.

6(a) The authorities relied upon by the Ex-Parte Applicant are Section 26 of the Land Adjudication Act and the case of **Willie V. Muchuki & 20 others (Civil Suit 163 of 2004 (O/S) – High Court at Nakuru.**

I reproduce herebelow Section 26 of the Land Adjudication Act:

“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.

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

The wording of the section expands the range of persons who can object. Any person who is affected by the adjudication register and considers it to be incorrect or incomplete in any respect may lodge an objection. I note that the incorrectness or incompleteness may be in any respect. Was the Interested Party rightly heard by the respondent? In my view he was an affected party as he considered himself entitled to demand that the land he was objecting in respect of be declared his. Indeed I find that the Ex-Parte Applicant did not impeach, at all, the Locus Standi of the Interested Party in the objection

proceedings.

6(b) The other issue I would like to address is whether the adjudication register had been closed, at the time the Interested Party lodged his objection. I do note as a fact that the Ex-Parte Applicant did not adduce any evidence to prove his claim that the Adjudication register had been closed at the time of the objection proceedings.

6(c) Regarding the claim that the respondent confused the provisions of the Land Adjudication Act with those of the Land Consolidation Act and allowed unauthorized persons to hear the objection, this ground of opposition to the objection proceedings is answered by the wording of Section 26 (2) of the land Adjudication Act which requires the Adjudication Officer to consider any objection made to him under section 26(1), and after such further consultation and inquiries as he thinks fit, to determine the objection. It is my considered view that the involvement of the alleged Committee or outsiders is comfortably embraced by the respondents statutorily empowered authority to make further consultations and inquiries.

6(d) I now turn to the submission that the adjudication officer should not have allowed the Interested Party to file the objection in dispute without letters of administration from the court. It is my considered view that the Ex-Parte Applicant did not produce any evidence at all regarding why the Interested Party required to have letters of administration before filing his objection. In any case, I have found that under section 26 (1) of the Land Adjudication Act, he was an affected party who had the capacity and locus standi to lodge his objection before the respondent.

6(e) I do note that the Ex-Parte Applicant has not claimed at all that he was coerced to take part in the objection proceedings.

I need to mention, at the risk of repetition, ground 12 (c) in the Ex-Parte Applicant's statement of fact that the respondent had no jurisdiction to hear an objection filed out of time. This claim is also mentioned in the submissions filed by the Ex-parte Applicant but without elaboration whatsoever. I find that the Ex-Parte applicant did not produce any evidence at all to substantiate his claim that the objection proceedings took place outside the legally allowed time limit.

6(g) I find that the case of Willie V Muchuki and 2 others (Civil Suit No.163 of 2004 (OS) is not very relevant to the circumstances and issues arising in this application. By and large the case deals with issues apposite to Preliminary objections and Res Judicata.

7 (a) I am in agreement that the Ex-Parte applicant indeed appeared and testified before the respondent and even called one witness who testified in his favour. I am also in agreement that the Ex-Parte Applicant had the onus to prove that the respondent acted beyond his legal mandate and this he has not done. It is also found that the Ex-Parte Applicant has not proved that the respondent broke any law in hearing the Interested Party's objection. He, indeed, did not prove any procedural deficiencies.

7(b) Regarding the submission by the Interested Party that the Ex-Parte Applicant, after the objection proceedings, had only the recourse, if dissatisfied by the finding of the respondent, to appeal to the Minister within 60 days of the decision by the respondent, I am inclined to agree with what the Interested Party has submitted.

7(c) In view of what I have already said above, I find it a superfluous exercise to analyse the authorities submitted and relied upon by the Interested Party.

8(a) I now come to the Respondent's submissions. In general terms they are similar to those of the Interested Party. Analyzing them would amount to generally repeating what I have said regarding the Interested party's submissions. I am in general agreement with the submissions in far as they relate to this application.

8(b) In view of what I have already said, I do not find any need to analyze the authorities submitted and relied upon by the Respondent.

Having considered all issues germane to this application, I find:

(i) THAT the respondent's decision in the objection proceedings in dispute had requisite jurisdiction under the law.

ii. THAT the Interested Party had locus standi to lodge and participate in the objection proceedings which are the subject of the dispute in this application

iii. THAT the respondent did not hear an objection out of time.

iv. THAT orders of Certiorari and Prohibition are not deserved.

In the circumstances, the application herein is dismissed with costs to the Respondent and the Ex-Parte Applicant.

It is so ordered.

Dated and delivered at Meru this 23rd May day of 2013.

In the presence of:

Cc. Daniel/Mwonjaru

Igweta for Exparte Applicant

Gichunge for Interested Party

State for Respondent - Absent

P. M. NJOROGE

JUDGE