



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

JR NO. 90 OF 2009

REPUBLIC.....APPLICANT

VERSUS

TIGANIA EAST DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

GEORGE IRIMBA THIRUANE.....INTERESTED PARTY

ELIJAH M'MAITAI CHAURI.....EX-PARTE APPLICANT

R U L I N G

1. Pursuant to the apposite leave of court, the ex-parte applicant instituted judicial review proceedings seeking the following orders:

1. **THAT an order of certiorari do issue calling into this honourable court and quashing the proceedings, findings and decision dated 17.09.2009 made by the 1st respondent in objection No.1161 over parcel of land numbers 3097 and 2925, situate in Kiguchwa Adjudication section within Tigania East District.**
2. **THAT the respondents and the interested party be condemned, jointly and severally, to pay the ex-parte applicant costs for this application and the ex- parte chamber summons application for leave of court to institute these proceedings**

It is premised on the apposite statement of facts, a verifying affidavit sworn by the Exparte Applicant and on the following grounds:

(a) **THAT the proceedings, findings and decision of the 1st Respondent herein beleagured are ultra vires and in contravention of sections 9(I), 11 (I) and 26 (I) of the Land Consolidation Act, Cap 283, Laws of Kenya.**

(b) **THAT the 1st Respondent unreasonably denied the ex parte applicant a fair hearing converse to the cardinal tenents of natural justice and Section 77 (9) of the Constitution of Kenya.**

(c) **THAT the herein impugned proceedings were conducted, and the findings and decision made most partially and contrary to substantive justice, public policy and rule of law.**

(d) THAT the 1st Respondent usurped the statutory powers of the Land Adjudication Committee of Kiguchwa Adjudication Section.

(e) THAT the 1st Respondent conducted Objection No.1161 in blatant discrimination against ex-parte applicant, contrary to section 82(2) and (3) and Constitution of Kenya.

(f) THAT the 1st Respondent's findings and decision are unreasonable, unjustified, arbitrary, capricious, biased against, and manifestly prejudicial to the ex-parte applicant.

2. The parties, by consent, elected to have the application determined by way of written submissions.

3. The ex-parte applicant submitted as follows:

(a) The 1st Respondent failed to constitute a committee to hear the apposite objection in accordance with the applicable customary laws as required by the Land Consolidation Act.

(b) The 1st Respondent was in breach of the rules of natural justice by refusing to hear the two witnesses presented by the exparte applicant but heard the interested party's witness. The exparte applicant also claimed that the action of refusing to constitute a committee to hear the apposite objection by the 1st respondent denied him a fair hearing.

(c) The 1st Respondent had breached the legitimate expectations of the ex- parte applicant to have an impartial, fair and just hearing through the refusal to constitute a committee to hear the objection as statutorily required.

(d) The 1st respondent had considered extraneous matters in embracing the alleged sale of 10 acres to the interested party by the exparte applicant. The applicant also said that the interested party had not stated from which parcel of land between P/Nos 3097 and 2925, the 10 acres were to be excised from. It was contended that the 1st respondent had no power to enforce the alleged sale of 10 acres to the interested party by the ex-parte applicant.

(e) The exparte applicant ascribed arbitrariness and vagueness to the decision of the 1st respondent to award 10 acres to the interested party from P/NO.3907. He also stated that the 1st Respondent did not visit the subject parcels of land to ascertain, inter alia, their sizes, occupants, extent of developments, period of occupation and immediate neighbours

(f) The exparte applicant contended that as the respondents had failed to oppose the application by way of a replying affidavit or grounds of opposition, the ex- parte applicant's claim should be deemed admitted.

(g) Touching on the interested party's affidavit, the ex- parte applicant generally restates the positions he has adopted above. However, he opines that the Land Adjudication Act, Cap 284 Laws of Kenya, could not apply in the proceedings before the 1st Respondent as the nature of the objection was a CLAIM as opposed to objection to the adjudication register. He submitted that the claim should have been handled under the regime of the Land Consolidation Act, Cap 283, Laws of Kenya.

(h) The ex-parte applicant argue that since 4 affidavits supporting the interested party's case had been filed without the leave of court they should be expunged.

4. The respondents submitted as follows:

(a) That Judicial Review remedies are discretionary and constitute a special jurisdiction. The respondents also said that the ex-parte applicant did not exhaust all avenues before moving to court. It was submitted that he ought to have appealed to the Provincial Disputes Tribunal and having not followed this route, this application was not mature, was incompetent and merited

being struck out with costs.

(b) The respondents submitted that the 1st respondent acted within the provisions of the Land Adjudication Act, Cap 284, Laws of Kenya. Under Section 11(c) of Cap 284, it was submitted that the Adjudication Officer was entitled to act for any person who was absent from the proceedings to avoid injustice. It was submitted that the Adjudication Officer had absolute discretion regarding what evidence to admit.

(c) Judicial review was concerned with the process and not the merits of the case.

(e) The applicant had not shown or demonstrated how the 1st respondent acted illegally or unreasonably or that there was any procedural impropriety. For this reason, it is urged that the ex- parte applicant's application be dismissed with costs.

5. The interested party submitted as follows:

(a) The ex-parte applicant had sold a parcel of land to the interested party and this transaction had been undertaken in front of witnesses. He had, however, refused to go to the Adjudication officer for the transfer to be executed. This left the Interested Party with no choice but to file an objection. The ex- parte applicant was given an opportunity to be heard and to call witnesses. The Adjudication officer was satisfied that the ex-parte applicant had sold the land to the Interested Party and ordered that it be transferred as had been agreed. It was submitted that there was no need for a written agreement as money had changed hands in the presence of witnesses.

(b) There was a Committee in place but the Adjudication Officer did not need to have the Committee sit at that stage of objection by the Interested Party as the process was guided by Section 26 of the Land

Adjudication Act, Cap. 284, Laws of Kenya.

(c) There was no denial of fair hearing as the affidavits demonstrated that the parties had witnesses.

(d) The ex-parte applicant had not demonstrated breach of legitimate expectations, bias, unreasonableness or irrationality on the part of the 1st Respondent.

(e) The Law Reform Act and Order 53 of the Civil Procedure Rules were applicable in Judicial Review Proceedings. There was no requirement to file affidavits or grounds of opposition. An interested party can choose to file a replying affidavit or not as there was no rule binding this area.

(f) The interested party contended that the nature of a Judicial Review contest was that it was between the ex- parte applicant and the Interested Party and hence the respondent was a nominal party with no interest in the subject matter. He also argued that Judicial Review prayers were discretionary and could be refused for good reason even in the absence of the Respondent and the interested party

6. I have examined the submissions, the averments, documents and the authorities proffered by the parties. Judicial review is concerned with the process and not the merits of a case. To buttress this position, the Court of Appeal in the case of Commissioner of Lands versus Kunste Hotel, Civil Case No. 234 of 1995 stated:

“The purpose of Judicial Review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according a fair treatment, reaches on a matter authorized by law ... a conclusion which is correct.”

In other words Judicial Review Proceedings are not meant to micro-manage public bodies and officials. As long as public bodies and officials perform their functions bona fides, devoid of malice, uncapriciously and in accordance with the law, Judicial Review should not be concerned with an examination as to whether the conclusion is correct.

In judicial review proceedings the Law Reform Act and Order 53 of the Civil Procedure Rules provide a special jurisdiction. Except for Order 53 of the Civil Procedure Rules, the Civil Procedure Act and other parts of the Civil Procedure Rules do not apply. Submissions by the ex-parte applicant regarding non-compliance with the provisions of the Civil Procedure Rules, therefore, stand dismissed. I will confine myself to the process and avoid issues raised regarding merits.

I find that the objection that has spawned these proceedings was properly conducted and under the Land Adjudication Act. Under the said Act, the Adjudication Officer can disregard normal procedure rules and has discretion to determine what evidence to admit. Being Judicial Review Proceedings, this Court must address itself to the question: Did the ex-parte applicant receive fair treatment before the 1st respondent reached the decision which is challenged by these Judicial Review Proceedings?

I find that the ex- parte applicant participated in the objection proceedings which spawned this suit. He has not satisfied me that the 1st respondent had exceeded his powers, had acted illegally or unreasonably or that he had exhibited procedural impropriety. The exparte applicant had been given an opportunity to be heard.

In the circumstances, the application is dismissed with costs to the Interested Party and the Respondents.

It is so ordered

Delivered in Open Court at Meru this 20th day of September, 2013 in the presence of:

c. Mwonjaru/Daniel

Muthomi h/b Carl Peters Mbaabu for Applicant

Rimita present for Interested Party

Kieti present for respondents.

P. M. NJOROGE

JUDGE