



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION NO.190 OF 2011

REPUBLIC.....

APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER – KIBWEZI
 DISTRICT....1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL..... 2ND

RESPONDENT

AND

JULIUS MULI KIMEU 1ST

INTERESTED PARTY

JOSPHAT KITHOME KIMEU..... 2ND

INTERESTED PARTY

PHILIP NZIOKA MUNYAMBU..... 3RD

INTERESTED PARTY

EX-PARTE:JUSTUS

MUTHUSI MULI

RULING

Julius Muthusi Muli, hereinafter “**the applicant**” lodged an objection with the District Land Adjudication and Settlement Officer, Kibwezi District hereinafter “**the 1st respondent**” on the basis that his father and uncle who are the 1st and 2nd interested parties herein had transferred plot number 335, “**the suit premises**” situate at Kiteng’ei. A settlement scheme in to their names and subsequently sold and transferred the same to the 3rd interested party. To him, the suit premises belonged to his grandfather, **Kimeu Masaa** – deceased. The purported sale and transfer aforesaid was therefore illegal, since the other children of the deceased were neither consulted nor were they involved in the transaction. He therefore prayed that the 1st respondent be ordered to revert the suit premises to the names of his deceased grandfather. For clarity, the exparte applicant is the son of the 1st interested party and a nephew to the 2nd interested party. The interested parties are brothers and sons of **Kimeu Masaa**, deceased. The ex-parte

applicant is therefore a grandson to the deceased.

For the 1st and 2nd interested parties, they contended that there was a dispute over the ownership of the suit premises between their deceased father and one, **Pius Nzuki**. The dispute was arbitrated upon by the divisional Land Adjudication and Settlement Officer who returned the verdict that the suit premises belonged to the deceased. Despite the award, **Pius Nzuki** refused to vacate the suit premises. To evict him, the 1st and 2nd interested parties approached the 3rd interested party and sold him the suit premises. In the process the 1st interested party destroyed the house of **Pius Nzuki**. He was subsequently arrested by the police but was bailed out by the 3rd, interested party at a cost of KShs.3000/-. By that time, the 1st and 2nd respondents had caused the suit premises to be registered in their names.

The case for the 3rd interested party is that in 1997 he was approached by the 1st and 2nd interested parties so that they could sell him the suit premises. He was reluctant at first but later agreed to the transaction. He paid a consideration for the same in the sum of KShs.160,000/- by installments and in kind. He would occasionally buy them food instead of cash. After deducting what he had paid as aforesaid, there was a balance of KShs.125,430/- which he paid to the 1st and 2nd interested parties at ago whereupon he commenced cultivation of the suit premises. Around 2009 when replotting within **Kitengei A settlement** scheme was going on, the exparte applicant found out from the records that the suit premises were initially in the names of the deceased which was later cancelled and replaced by the names of the 1st and 2nd interested parties. It was then that he started claiming the suit premises, hence the objection.

The 1st respondent having evaluated the objection albeit carefully came to the conclusion thus on 21st April, 2011,

“.....plot 335 to be transferred to the name of Philip Nzioki Munyambu at Kiteng’ei settlement scheme and the name of Julius Kimeu and Josphat Kimeu be cancelled. The caution placed by the plaintiff on plot 338 recorded in the name of Josphat Kimeu is hereby lifted since plot 338 is for Josphat Kimeu and Justus has no reason whatsoever to caution it. In fact Josphat has already sold plot 338 to the son of Philip Nzioki and migrated to Taveta and has applied for the transfer to this office”.

This verdict did not go down well with the ex-parte applicant. Accordingly, on 28th July, 2011, he mounted this judicial review proceeding in the nature of certiorari and prohibition. Certiorari was directed at the findings by the 1st respondents dated 21st April, 2011 aforesaid. He sought to have the same quashed on the grounds that the same was without any reasonable basis, *ultra vires* and oppressive to him and to the rest of the family of the deceased. On the other hand, the order of prohibition was to prohibit the respondents and interested parties from enforcing the 1st respondent’s award aforesaid.

On 28th July, 2011, the exparte application for leave came before **Kihara Kariuk J.** (as he then was) for hearing. He granted leave but declined to order that the leave so granted do operate as a stay. He directed that the application be served and be heard inter partes on the aspect of leave operating as stay. The record is however silent as to whether that order was subsequently complied with by the parties.

The substantive Notice of motion was thereafter filed and served on the respondents and all interested parties if the affidavit of service on record by one, **Arthur Kimamo** is anything to go by. However, it appears only the 2nd and 3rd interested parties responded to the application.

Where pertinent, the 2nd interested party deponed that the deceased prior to his death had subdivided his parcel of land into four plots identified as 469, 335, 338 and 339 respectively. Plot 338 was given to him by the deceased before his death and had it registered in his name. Plot 469 was subdivided amongst the grand children of the deceased, the exparte applicant, included but he caused the said plot to be registered in his name solely. Plot 335 was sold to the 3rd interested party and the exparte applicant was a witness to the transaction and all members of the family of the deceased were aware. He

therefore sought for the dismissal of the application.

As for the 3rd interested party, he took the view that the application was without merit and orders sought untenable. He had purchased the suit premises from the 1st and 2nd interested parties who were the registered owners thereof at a consideration of KShs.160,000/- vide a sale agreement dated 18th July, 1999. The ex-parte applicant was a witness to the sale agreement. In the entire application nothing has been pleaded to either show that the 1st respondent did not have authority or never accorded the ex-parte applicant an opportunity to be heard. Again if the ex-parte applicant felt aggrieved by the decision of the 1st respondent he ought to have appealed rather than file judicial review proceedings. Before he purchased the suit premises, he conducted a search with the 1st respondent and established that the suit premises were jointly owned by the 1st and 2nd interested parties. Otherwise the 1st respondent had jurisdiction to make the findings that the ex-parte applicant now wants quashed. He had been in occupation of the suit premises for a period in excess of 14 years and had even constructed permanent structures thereon. He therefore prayed for the dismissal of the application.

When the application came up for interpartes hearing before me on 21st November, 2011 parties agreed to canvass the same by way of written submissions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

My take on the application is this. Generally, where a matter involves public law as distinct from private law, judicial review will be available to the aggrieved party. Judicial Review, however, is not concerned with the merits of decisions of statutory bodies or tribunals but rather with public rights and decision making process. Where the decision is wrong, the manner of challenging it is through an appeal. This court does not in judicial review exercise or usurp the function or power of an appellate court in that regard. Rather it exercises its original supervisory jurisdiction conferred on it by section 8 of the Law Reform Act. The rationale behind this principle is that the High Court is entrusted by law with the task of ensuring that an individual does receive fair treatment and that the authority concerned acts within the law. This court will not be concerned whether the authority involved made a good decision or not providing that the decision was authorized by law and the individual was given fair treatment and the rules of fair play and natural were adhered to. In determining whether or not the decision making process was conducted in accordance with the law, the court will inter alia, ascertain if there was principles relating to bias, bad faith, irrational decision which may amount to unreasonable decision, or whether the concerned authority took irrelevant consideration into account or failed to take into account relevant considerations thus making the decision making process wanting and therefore amenable to judicial review. See **Colletta Osyambu Khaemba vs. Kakamega H.C. Misc. Civil Application No.21 of 2005 (UR)**. This then is the essence of judicial review.

What in particular is an order of certiorari in aid of? Such an order will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with, or there is an error apparent on the face of the record or for such like reason. I may also add that judicial review is a public law remedy and cannot issue against an individual in his private capacity.

How about prohibition? It is an order from this court directed to an inferior tribunal forbidding such tribunal from continuing with proceedings in excess of its jurisdiction or in contravention of the law. It lies not only for excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice and procedure of the inferior tribunal or a wrong decision on the merits. See **Kenya National Examination Council Vs. Republic Ex-parte Geoffrey Gathenji Njoroge & others (1997) eKLR**. I may also add that prohibition looks to the future as opposed to the past. As stated in the **case of Stanley Munga Githunguri Vs. Republic Criminal Application Number 271 of 1985 (UR)** so that if the tribunal were to announce in advance that it would not consider itself bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of Natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has been made; it can only prevent the making of a contemplated decision.

I have spent a bit of time on the purport of judicial review and in particular orders of certiorari and prohibition because these are the orders that the ex-parte applicant has sought in the application. However, in the circumstances of this case, are those orders available to him? I do not think so.

With regard to certiorari, all that the ex-parte applicant has alleged is that the decision is erroneous, without any reasonable basis and oppressive to him and other members of the family. As already stated such an order can only issue where a tribunal has acted in excess of jurisdiction, there has been breach of rules of natural justice, apparent error on the face of the record, bad faith, abuse of process and or unreasonableness, or procedural impropriety. It is concerned more with decision making process as opposed to the merits of the decision. If the decision is wrong on the merits, that is not the province of judicial review in the nature of certiorari. It is not meant to correct a wrong decision on merit. That is the province of the appellate court. In the premises, if the ex-parte applicant felt aggrieved by the award of the 1st respondent, he ought to have filed an appeal against the decision of the 1st respondent in terms of section 10(1) of the Land Adjudication Act. The ex parte applicant is not claiming that in making the award, the 1st respondent, acted in excess or want of jurisdiction. Nor is he claiming that he was denied a hearing before a decision was arrived at. Nor is he claiming that there is an error apparent on the face of the record. From the record, the 1st respondent conducted the proceedings in accordance with the provisions of the Land Adjudication Act. Both parties were present, testified and called witnesses. If the subsequent award did not meet expectations of the ex-parte applicant and according to him was wrong as it failed to determine the real issues in controversy and or was contrary to the evidence tendered, then an appeal would have been an appropriate remedy. The ex-parte applicant, in my view has adopted wrong approach and remedy, in that rather than appeal the decision of the 1st respondent in accordance with the Land Adjudication Act, he opted to institute judicial review proceedings. In the premises certiorari is not available to him.

Of course, I am aware that the existence of a right of appeal cannot bar a litigant from mounting judicial review proceedings. However, in the circumstances of this case, the complaints of the ex-parte applicant are well beyond the scope of judicial review. Those complaints could only be vindicated by an appellate process.

With regard to prohibition, it is trite law again and which I wish to reiterate that, judicial review orders cannot be directed at individuals in their private capacities. In this case the ex-parte applicant wants the interested parties to be barred or prohibited from dealing with the suit premises. This is not tenable. Further, and as already stated, prohibition looks to the future as opposed to the past. In this case what the ex-parte applicant is seeking to prohibit is that which has already been done. For instance, he wants the respondent and interested parties prohibited from enforcing the award. However, the award has already been enforced. It is common ground that the 3rd interested party is the registered owner of the suit premises. That can only be the reason why the ex-parte applicant wants the suit premises to revert to the original registered owner, the deceased. Indeed the 3rd interested party has annexed a certificate from a demolition officer which indicates that he is the owner of the suit premises. The matter is now beyond the 1st respondent and interested parties. Orders of prohibition cannot issue after the fact and which in any event will be in vain.

The ex-parte applicant also raised the issue that the suit premises belonged to the deceased and could only be dealt with in accordance with the Law of Succession Act. I do not think that, that is a correct position. As at the time the 3rd interested party bought the suit premises, they were registered in the names of the 1st and 2nd interested parties. It matters not how that registration was acquired. It may have been fraudulent, but that was not the matter for determination by the 1st respondent. As parting shot, since the ex-parte applicant appears to be litigating on behalf of the estate of the deceased, does he himself have a grant of letters of administration intestate for the estate of the deceased?

The application lacks merit. It is accordingly dismissed with costs to the 2nd and 3rd interested parties.

Ruling dated, signed and delivered at Machakos, this 31st day of January, 2012.

**ASIKE-MAKHANDIA
JUDGE**