



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 35 of 2004

IN THE MATTER FOR AN APPLICATION FOR AN ORDER OF JUDICIAL REVIEW
PROHIBITION CERTIORARI MANDAMUS AND BY ROBERT KIMUTAI KOSGEI & 82
OTHERS

AND

IN THE MATTER OF THE LAW REFORM ACT CAP. 26 LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND IN THE MATTER OF LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND IN THE MATTER OF ALLOCATION OF KIPKABUS SETTLEMENT SCHEME/848

BETWEEN

REPUBLIC.....APPLICANT

AND

COUNTY COUNCIL OF KEIYO.....1ST RESPONDENT

PROVINCIAL LAND ADJUDICATION AND SETTLEMENT OFFICER...2ND RESPONDENT

COMMISSIONER OF LANDS.....3RD RESPONDENT

EX-PARTE

ROBERT KIMUTAI KOSGEIEX-PARTE APPLICANT

JUDGEMENT

This is an application by way of Notice of Motion for Judicial review Orders brought under the

provisions of Order LIII Rules 1 and 2 of the Civil Procedure Rules Sections 3 and 3 A of the Civil Procedure Act cap. 21 Laws of Kenya Section 11 of the Registered Land Act Cap. 300, section 25 and 27 of the Land Adjudication Act. The orders sought by the applicant on his behalf and on behalf of 82 others are that:

- 1. An Order of prohibition restraining the 1st and 2nd Respondents from evicting the applicants rightfully allocated land parcel known as No. U/KIPKABUS SETTLEMENT SCHEME/848 and re-allocating the said land to third parties.**
- 2. An Order of Certiorari to remove into this Court for Purposes of quashing the 1st Respondent's Decision to evict the applicants from the applicant's parcel of land known as U/KIPKABUS SETTLEMENT SCHEME/848 and further unlawfully re-allocating the same to third parties.**
- 3. An Order of Mandamus to compel the third Respondent to register the said parcel of land U/KIPKABUS SETTLEMENT SCHEME/848 in the names of the Applicants and issue title deeds for the said land in the names of the applicants respectively.**

Leave was granted to the applicants to file the Judicial Review application on the 19.2.2004.

The application is supported by the grounds in the application and the supporting affidavit of Robert Kimutai Kosgei dated 8th March 2004.

The Grounds for the application are that the applicants are lawful allottees of all that parcel of land known as U/KIPKABUS SETTLEMENT SCHEME/848 and have paid necessary allocation and surveying fees for the land. That the 1st and 2nd Respondents have failed refused and or neglected to complete the process of registration of the land in favour of the applicants. That the 1st respondent has threatened and attempted to evict the applicants and intend to re-allocate the land to third parties. That it is imperative that an order of certiorari do issue quashing the 1st Respondent's unminuted decision to evict the applicants from the said land.

The Ex-parte applicant in his supporting affidavit depones that: the applicants in 1997 made an application to the Provincial commissioner Rift Valley as squatters to be given land designated at KIPKABUS SETTLEMENT SCHEME/848. That the Provincial Commissioner accepted their application and ordered the Provincial Land Adjudication officer to subdivide the land in equal portions to the applicants. That the County Council and the District Commissioner of Keiyo were empowered to oversee the allocation. That the County Council Keiyo requested the applicants to include 35 other persons of its choice who contributed to the 1st respondent's public utilities lands. That the applicants were issued with letters of allotment and were told to pay survey fees and fees for title processing. That in the Year 2000, 82 original allottees subdivided the land equally among themselves. That in 2001 the 1st Respondent unlawfully expanded the list to 117 people and resurvey was done which allocation turned out to be irregular and biased. He avers that the applicants have been waiting for issuance of title deeds in vain only to be told by the District Commissioner at a Baraza on the 5.2.2004 to wait for eviction since the land has been allocated afresh to other people.

The 1st Respondent through its Town Clerk Joseph K. Mutai has filed a replying affidavit. He avers that the application is defective, unmeritorious and an abuse of the Court process. That the applicant has no proper authority to bring the suit on behalf of the others. That the land in question was allocated by the Government to 104 squatters which was previously owned by EATEC. That the 1st Respondent in conjunction with Provincial Administration was mandated to oversee equitable distribution of the said land. That the District Commissioner Requested for a list of genuine squatters and 82 names were forwarded. That it transpired that this list was fictitious. That the council thereafter suspended further cultivation of the land in question; the council with the assistance of the Provincial Administration sought to identify genuine squatters and held several meetings on the ground. That this lead to cancellation of previous allotments and 77 needy squatters were settled while 16 people who have been left out were

resettled on another parcel of land. That the remaining 26 were requested to wait until another land is available and are not part of the complainants herein.

The 1st Respondent states that the complainants are either sons of genuine squatters who were legally and reasonably disentitled or are not genuine squatters.

Counsels for the parties presented their oral arguments before the court.

Mrs. Wambua counsel for the ex-parte applicant conceded that title was already issued to third parties who are not parties to this suit. He only argued prayer No. 3 of the application

He submitted that the court do grant an order of certiorari to quash the decision of the 1st respondent to evict the applicants from the suit land U/KIPKABUS SETTLEMENT SCHEME/848. The decision to evict is contained in ground (f) of the application- it is an unminuted decision. He argued that the applicants are in possession, that the land does not belong to the County Council and there is no basis to evict them and the decision should be quashed.

Counsel for the Respondent submitted that he relies on affidavits of Joseph K. Mutai dated 18.12.2004 and 8.5.2006. He contended that the applicant has forgone prayers 1 and 3 of the application. He urged that the grounds be dismissed with costs.

Counsel argued that the decision complained of has not been evidenced and there is no prove that such decision was made. He submitted that from paragraph 11 of the statement and paragraph 13 of the Supporting affidavit the decision complained of was made by the District commissioner. That pursuant to subdivision of the land U/KIPKABUS SETTLEMENT SCHEME/848 titles have been issued and exhibited and the said land no longer exists. That the County Council of Keiyo has no longer interest in the said land as the same vests in the successful allottees. That judicial review is not appropriate in the circumstances.

Counsel further submitted that the application is defective in that cited provisions of the Civil Procedure Rules whereas the court is exercising special jurisdiction under Order 53.

Counsel for the ex-parte applicant in brief reply stated that the 1st respondent will not suffer any prejudiced by the wrong citation of law and the defect is in the form and should not be a basis to dismiss the suit.

Counsel for the 1st Respondent also attacked the application on the basis that it cited the provisions of Sections 3 and 3A of the Civil Procedure Act, Cap. 21 Laws of Kenya. In his view, the Civil procedure Act save for Order 53 does not apply to judicial review applications. He further submitted that the substantive law for Judicial Review is the Law Reform Act (Cap 26) Laws of Kenya. The procedural law is Order 53 of the Civil Procedure Rules. In a litany of cases the courts have held that the application of the Civil Procedure Act and Rules there-under do not apply to Judicial Review Applications save for Order 53. The Court in Judicial Review application is exercising a special jurisdiction though of civil nature.

I have considered the application and the submissions by counsels in the matter. I have also considered the affidavits and annexures thereto.

The suit herein is brought before the Court in form of judicial review application.

There are three substantive prayers as set out above. Prayers 1 and 3 have been abandoned.

Prayer 2 is for an Order of Certiorari to remove into this Court for Purposes of quashing the 1st Respondents Decision to evict the applicants from the applicants' parcel of land known as U/KIPKABUS SETTLEMENT SCHEME/848 and further unlawfully re-allocating the same to third parties.

The decision of the 1st Respondent to evict the Applicants was never exhibited to the court. It was only stated that in ground F of the grounds in support of the application that **an order of certiorari of issue to quash the un-minuted decision to evict the applicants from the applicants said parcel of land.**

I am not persuaded that there is any decision for the court to quash. It is upon the ex-parte applicant to put before this court an extract of the decision complained of for the court to exercise its judicial discretion and issued the orders requested. There is no evidence that the decision to evict the applicants was made by the 1st Respondent and such decision was not exhibited to the court.

The ex-parte applicant in his supporting affidavit to the application at paragraph 11 states that “the applicants have been waiting for the issuance of the title deeds in vain only to be told at a District Commissioner’s baraza convened at the settlement scheme land on the 5.2.2004 to wait for an eviction since the same had been allocated a fresh to other people.” He does not state who made the statement whether the DC or someone from the 1st Respondent.

I am not satisfied that the ex-parte applicant has proved his application and specifically prayer 2 of the application which is the only prayer for determination by this court.

I therefore dismiss the entire application with costs to the 1st Respondent.

Dated AND SIGNED at Nairobi ON this 24th day of August 2012.

M.K. Ibrahim
Judge

DATED AND Delivered At Eldoret on This 31st Day Of October 2012.

F. AZANGALALA

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JUDGE

In the presence of: Mr. Kiplimo h/b for Chebii for Applicant

Mr. Barasa h/b for Ms Kipseii for the 1st Respondent

Mr. Ngumbi for 2nd and 3rd Respondent