



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 268 of 1981

REPUBLIC.....APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER, EMBU DISTRICT.....DEFENDANT

KIRINYAGA MIHIRIGA KENDA.....EX PARTE APPLICANT

JUDGMENT

The Applicant, Kirinyaga Mihiriga Kenda, describes itself as a group of clans and persons recognised under the customary law of the Kirinyaga and other Kikuyu Districts. The Applicant filed the Notice of Motion dated 20th August 1981. Through this application, the Applicant seeks the following orders:

a) An order of certiorari to remove into the High Court of Kenya and quash the Notice of Completion of Adjudication Registers given and published by the Land Adjudication Officer, Embu District in respect of the following Adjudication sections of Mwea Location of Embu district and published respectively on:

- a. Wachoro Adjudication Scheme 2 June 1981
- b. Karaba Adjudication Scheme 2 June 1981
- c. Riakanau Adjudication Scheme 4 June 1981

b) An order of prohibition that the Land Adjudication Officer, Embu/Kirinyaga District be prohibited from proceeding under the Land Adjudication Act, Cap 284, in respect of Wachoro, Karaba and Riakanau Adjudication Sections.

The Application is supported by the Statutory Statement and the Affidavit of Perminus Mwangi Gichuki.

The grounds upon which the relief is sought include:

- a) The whole of the adjudication register is incorrect in that the adjudication process has not been carried out in accordance with the Land Adjudication Act, Cap 284;
- b) The said register or part thereof has been compiled and the adjudication process carried out by persons unauthorised to do the same;
- c) The claims of the Applicant have not been considered at any time in the preparation of this

adjudication register;

- d) The claims of the Applicant have not been investigated in the manner required by law;
- e) The provisions contained in section 7 of the Land Adjudication Act were not considered and the relevant parties failed to take into consideration the contents of this section and appoint a special arbitration board as they ought to have done;
- f) No investigation of the applicant's claims was carried out as required by the Act;
- g) No notice of the intended demarcation and the recording of claims as required by the Act was given;
- h) The adjudication of plots was commenced in or around 1978 and not or after 12th January 1980
- i) The adjudication process carried out after 12th January 1980 was not a process carried out under the Land Adjudication Act;

The Respondent filed an affidavit opposing the application on 6th November 1981. In this Affidavit, the Respondent mainly attacked the Applicants locus to bring these proceedings.

The subject of these proceedings is the adjudication proceedings in respect of Wachoro, Karaba, Riakanu and Makima sections situate in Mwea Location in Embu District of Eastern Province.

The Applicants' case is that the land in question belongs, and has always belonged, to the members of the applicant group. In 1962, the said land was constituted Trust Land under the trusteeship of the Embu County Council while the applicant retained the beneficial interest therein.

On the 12th day of January 1980, the Respondent gave notices under Section 5 of the Land Adjudication Act of the establishment of an adjudication section in respect of Wachoro, Karaba, Riakanau and Makima Sublocations. In part, the Notices required any person claiming interest to the land to present a claim within three months.

On 31st of January 1980, the Applicant presented its claims in writing to the Respondent and the recording officer. These claims were acknowledged by the Respondent on 4th March 1980. The Respondent indicated to the Applicant that the claims in those sections were being handled by the office of the Provincial Commissioner, Eastern Province, and as such, the Applicant forwarded its claims to the Provincial Commissioner.

About April 1980, the Respondent published a corrigendum in respect of the notice of 12th January 1980. The corrigendum amended paragraph 2 of the notice, which contained a description of the boundaries of the Makima adjudication section.

On 25th March 1981, the Applicant's advocate wrote to the Director of Land Adjudication inquiring on the position of the adjudication in the four sections. The Director responded on 10th April 1981, indicating that land adjudication work in the four sections was still in the early stages, but the registers would be published in due course.

On 2nd June 1981 notices of completion of adjudication registers were published with respect to the Wachoro and Karaba adjudication sections. On the 4th day of June 1981, a notice of completion of adjudication register was published in respect of Riakanau adjudication section. Before the publication of the notices, the Respondent had not communicated with the applicant in order to determine the Applicant's claim.

The Applicant filed written submission to advance its case. The Applicant submits that the adjudication

procedure was flawed because it was the Provincial Commissioner who handled the process. The Applicants submit that this was incorrect because under the Act, the office of the Provincial Commissioner is not authorised to carry out this process.

Judicial review orders are discretionary in nature. They sometimes will not be granted where there is acquiescence in an excess of jurisdiction. In *Starhomes (Midleton) v The Pension Ombudsman*[2010] No 292 JR, the Court quoted the statements of Charlton J in *J & E Davy v Financial Services Ombudsman* [2008] IEHC wherein he stated:

“...it is a principle of judicial review that where an applicant complaining of a procedure has knowingly acquiesced in the defect in respect of which a complaint is made, that the High Court may refuse relief...”

In this case, it is clear that the Applicant acquiesced to the Provincial Commissioner performing the adjudication process. If the Applicant truly believed that this was not the correct procedure in law to be followed, then it should not have agreed to present its claims to the Provincial Commissioner. The Applicant’s advocate wrote to the Director of Land Adjudication inquiring about the adjudication process. The Applicant never indicated that the wrong person was undertaking the adjudication process. The motion will therefore fail on this ground.

The Applicant has also submitted that the Act requires the appointment of a special arbitration board which was not done in this case. The appointment of special arbitration boards are dealt with under section 7 of the Land Adjudication Act which provides:

7. (1) The Provincial Commissioner of the province in which the adjudication area lies shall, upon the request of the adjudication officer, appoint a panel for the adjudication area, consisting of not less than six and not more than twenty-five persons resident within the district in which the adjudication area is situate, and the adjudication officer may from time to time appoint in writing not less than five persons from the panel to form an arbitration board for a particular question arising in an adjudication section within the adjudication area:

Provided that—

(i) no person who has sat on a committee which has given a decision upon a particular question shall sit as a member of a board to consider the same question;

(ii) where the land concerned lies on or near the boundary of a district, and the persons who claim an interest in it are resident in different districts, the Minister may, in his absolute discretion, appoint a special arbitration board consisting of eight persons.

A plain reading of this section shows that the special arbitration board would be appointed in one of two ways: where the Provincial Commissioner is requested by the adjudication officer, or where the Minister in the exercise of his discretion appoints one. In this case, there is nothing to show that the adjudication officer requested the creation of the board, or that the Minister saw it fit to exercise his discretion and create a board. The Applicant’s motion therefore fails on this ground.

The Applicant’s final submission is that the Applicant’s claim was not properly investigated or considered in the preparation of the adjudication register, and that the entire process was not done in accordance with the Land Adjudication Act. The Applicant however has not shown in what way its claim was not properly investigated by the Respondent.

The Land Adjudication Act outlines the adjudication process of adjudicated land. The Land Adjudication Officer establishes adjudication sections within the adjudication area or establishes the whole adjudication area as an adjudication section. Every person with an interest in the land makes a claim to the recording officer, pointing out the boundaries to the demarcation officer. The process of demarcation is then undertaken. A demarcation map is created. After this, an adjudication record is prepared. The

recording officer must consider all the claims made in pursuance of the notice. Where he investigates, and finds it proper, he shall prepare in duplicate, a form in respect of every parcel shown on the demarcation map.

The demarcation map and the adjudication record are collectively known as the adjudication register.

In this case, the procedure of adjudication had progressed as far as the preparation of the adjudication register.

The effect of the adjudication process results in the ascertainment of rights over land. In this case, the pleadings show that the adjudication process had gone on as is outlined in the Act. The grounds raised in the Application are unproven and unfounded, I therefore find that the Application lacks merit and it is hereby dismissed. Each party shall bear its own costs.

Dated at Nairobi this **19TH** day of **NOVEMBER** 2012

M. WARSAME
JUDGE