



Republic v Principal Secretary, Ministry of Lands and Physical Planning & another; Wang'ang'a Gichuru (Interested Party); Gichuru (Exparte) (through Stephen Wang'ang'a Gichuru) (Judicial Review E002 of 2021) [2022] KEELC 2601 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2601 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

JUDICIAL REVIEW E002 OF 2021

YM ANGIMA, J

JULY 14, 2022

**IN THE MATTER OF THE LAND ACT 2012, ORDER 53 OF THE CIVIL
PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS AND
PROCEDURES OF LAW**

AND

**IN THE MATTER OF THE DECISION OF THE MINISTRY OF LANDS AND
PHYSICAL PLANNING IN A LETTER DATED 12/08/2021 AND IN THE DECISION
OF THE DISTRICT SURVEYOR IN A LETTER DATED 30/09/2019**

BETWEEN

REPUBLIC APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 1ST RESPONDENT**

DISTRICT SURVEYOR (NYANDARUA NORTH) 2ND RESPONDENT

AND

ROBERT WANG'ANG'A GICHURU INTERESTED PARTY

AND

**WANJIKU GICHURU EXPARTE
THROUGH STEPHEN WANG'ANG'A GICHURU**



JUDGMENT

A. INTRODUCTION

1. By a chamber summons dated October 13, 2021 the Ex parte Applicant (the Applicant) sought leave to apply for judicial review orders against the Respondents with respect to the intended sub-division of Title No. Nyandarua/Lesirko/336 (the suit property) which was registered in her name as proprietor. By an order dated October 13, 2021 the Applicant was granted leave to apply for orders of certiorari and prohibition only and directed to file and serve the substantive application for judicial review within 21 days from the date of the order.

B. APPLICATION FOR JUDICIAL REVIEW

2. The record shows that *vide* a chamber summon dated November 17, 2021 and filed on or about November 18, 2021 under the provisions of Order 53 rule 1(2) of the [Civil Procedure Rule](#), 2010 and all other enabling provisions of the law, the Applicant sought the following orders:
 - (a) That the Honorable Court be pleased and do hereby grant the judicial review order of certiorari to remove and quash the decision of the 1st Respondent in a letter dated 12th August, 2021, and a letter dated 30th September, 2019 by the District Surveyor purporting to carry out mutational survey on the property of the Ex-parte Applicant.
 - (b) That the Honorable Court be pleased and do hereby grant the judicial review order of prohibition to prohibit the 1st and 2nd Respondents from the intended sub-division of the land reference No. Nyandarua/Lesirko/336 which land is the property of the Ex-parte application as the legal owner.
 - (c) That this Honorable Court be pleased to grant a permanent injunction restraining the Respondents whether by themselves, their agents, officers of whomsoever from interfering with the Ex-parte Applicant's property described as Nyandarua/Lesirko/336 situated in Nyandarua County.
 - (d) That this Honorable Court be pleased to declare that the Ex-parte Applicant is the sole registered owner of the property described as Nyandaura/Lesirko/336 situated in Nyandarua county.
 - (e) That this Honorable Court do issue any such other and further relief as it may deem just and fair in the circumstances of this case.
 - (f) Costs of this application.
3. The said application was based upon the grounds set out on the face of the summons and the contents of the supporting affidavit sworn by Stephen Wanganga Githiru on November 17, 2021 and the exhibits thereto. The Applicant contended that she was the absolute owner of the suit property and that the Respondents intended to unlawfully sub-divide the same on the basis of a court order dated 19.09.1993 made in Nyahuru RMCC. No.77 of 1982, *Robert Gichuru -vs- Wanjiku Gichuru* of which she was not aware. She contended that she was never served with any pleadings in the said suit hence she did not participate in the proceedings.



C. THE RESPONDENTS' RESPONSE

4. The Attorney General filed a replying affidavit sworn on April 20, 2022 by Anthony Mureithi the District Land Adjudication and Settlement Officer Nyandarua North Sub-County in opposition to the application for judicial review. It was stated that the suit property was initially allocated to the late Gichuru who died in 1969. It was further stated that upon his demise the Applicant and one Esther Wambui were appointed his legal representatives with respect to the suit property. It was contended that vide a court order made in Nyahururu RMCC No.77 of 1982, it was directed that the suit property be sub-divided into 2 equal shares to be shared between the Applicant and Robert Wanganga (the Interested Party). It was, therefore, contended that Respondents' intended actions were merely intended to give effect to a court order in the said case. The court was consequently urged to dismiss the application with costs.

D. THE INTERESTED PARTY'S RESPONSE

5. The Interested Party filed a replying affidavit sworn on 29.11.2021 in opposition to the application. The Interested Party contended that he was the son of the late Gichuru Wang'ang'a (the deceased) who was the original allottee of the suit property. It was contended that the deceased was allocated the suit property by the Settlement Fund Trustees in 1965 and that upon his demise in 1969 the suit property was transferred to the Applicant *vide* Nyahururu Succession Cause No.21 of 1969 as the Interested Party was still a minor at the time.
6. It was the Interested Party's case that when he sought to obtain his share of the suit property as per the wishes of the deceased, the Applicant refused to oblige in consequence whereof he filed Nyahururu RMCC No. 77 of 1982. The Interested Party contended that the said case was heard by a panel of elders chaired by the District Officer who decided that the suit property be shared equally between him and the Applicant. It was further contended that when the Applicant failed to appeal the award the trial court adopted the same as a judgment vide an order dated 19.09.1983. It was the Interested Party's contention that the actions of the Respondents were lawful since they were merely implementing a court decision.
7. The Interested Party further contended that the instant proceedings were filed out of time since the Applicant was granted a period of 21 days with effect from 13.10.2021 to file and serve the application for judicial review but she filed the instant application about 37 days later. The court was consequently urged to strike out the application for having been filed out of time.

E. DIRECTIONS ON SUBMISSIONS

8. When the application judicial review was fixed for hearing it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record, however, shows that none of the parties had filed submissions by the time of preparation of the judgment.

F. THE ISSUES FOR DETERMINATION

9. The court has considered the application for judicial review and the replying affidavits in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - (a) Whether the Applicant's application for judicial review was filed out of time.
 - (b) Whether the Applicant has made out a case for the grant of the orders sought.



- (c) Who shall bear costs of the action.

G. ANALYSIS AND DETERMINATION

(a) Whether the Applicant's application for judicial review was filed out of time

10. The court has considered the material on record on this issue. The record shows that when the Applicant was granted leave on October 13, 2021 she was granted 21 days within which to file and serve her application for judicial review. The record further shows that the Applicant did not file her application for judicial review until November 18, 2021 which was about 16 days after the deadline. The Applicant did not tender any explanation for the delay and neither did she seek an extension of time within which to file and serve the application. Accordingly, the court finds and holds that the instant application was filed out of time. The same is accordingly incompetent and liable to be struck out. It is also strange that the Applicant chose to institute the application through a chamber summons instead of a notice of motion.

(b) Whether the Applicant has made out a case for the grant of the orders sought

11. The court has considered the material on record on this issue. It is evident that apart from the two orders of judicial review for which leave was granted, the Applicant also sneaked in two additional prayers for which leave was not granted. The first was a permanent injunction to restrain the Respondents from interfering with the suit property. The second was a declaration to the effect that the Applicant was the sole proprietor of the suit property. The court is not inclined to consider or grant those orders for at least two reasons: First, leave was not granted for the Applicant to apply such orders in ELC Misc. No. E009 of 2021. Second, and most crucially, those orders are normally available to a successful litigant in civil cases upon a full adjudication of competing rights over the property in dispute. There is no suit before this court for adjudication of property rights over the suit property. Accordingly, the court cannot declare the Applicant the sole and absolute proprietor of the suit property or grant a permanent injunction in his favor without a hearing on the merits.
12. The court has considered the material on record on the prayers of certiorari and prohibition. The material on record shows that the Applicant was very economical with the truth when she filed the application for judicial review. She did not make a full and faithful disclosure of all material facts relevant to the case. For instance, she did not disclose that the suit property was initially allocated to the deceased by the Settlement Fund Trustees and that she obtained registration thereof through succession proceedings. She did not disclose her relationship to the Interested Party and the basis of his claim to a portion of the suit property.
13. The material on record further reveals that the Applicant fully aware of the proceedings in Nyahururu RMCC No.77 of 1982. She indicated in her application that she was never served with any court proceedings and that she did not participate in the proceedings. However, the Interested Party has exhibited copies of the elders' award which indicated that the Applicant actually testified before the elders and opposed the Interested Party's claim for a portion of the suit property. The Applicant did not file a further or supplementary affidavit to dispute the authenticity of the proceedings before the elders. It would thus appear that the Applicant was out to employ all available means, including misleading the court, in order to prevent the Interested Party from getting his rightful share of the suit property which was initially allocated to his late father. In the premises the court finds no merit in the application for judicial review orders of certiorari and prohibition hence the court is not inclined the same.



(c.) Who shall bear costs of the action

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the action. Accordingly, the Respondents and the Interested Party shall be awarded costs of the proceedings.

H. CONCLUSION AND DISPOSAL

15. The upshot of the foregoing is that the court finds and holds that the instant application is incompetent for having been filed out of time. The court further finds and holds that, in any event, there is no merit in the application for reasons given in the judgment. Accordingly, the Applicant’s chamber summons dated 17.11.2021 is hereby struck out with costs to the Respondents and the Interested Party.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 14TH DAY OF JULY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

No appearance of the Applicant

Ms. Wanjeri for the Respondent

Ms. Wanjiru Muriithi for Interested Party

CA- Carol

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Y. M. ANGIMA

JUDGE

