



**Judicial Review Order of Certiorari
To Quash decision of respondents arrived at after administration of Nthenge oath.
J. R Order discretionary order.**

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
MISC APPL. NO. 18 OF 2008
IN THE MATTER OF AN APPLICATION BY PETER NCHEBERE FOR ORDERS OF
PROHIBITION & CERTIORARI
AND
IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26.
AND
IN THE MATTER OF OBJECTION NO. 107 OF 2007
OVER LAND PARCEL NOS. 3543, 1664, 1504 AND 5930 ATHINGA/ATHANJA LAND
ADJUDICATION

PETER NCHEBERE.....APPLICANT

V E R S U S

LAND ADJUDICATION OFFICER MERU NORTH DISTRICT.....1ST RESPONDENT
DERMACATION OFFICER TIGANIA NORTH DISTRICT.....2ND RESPONDENT
M'INANGA M'AKWALU.....1ST INTERESTED PARTY
KIUNGA M'AKWALU.....2ND INTERESTED PARTY
SILAS ITONGA.....3RD INTERESTED PARTY
STEPHEN MUGAMBI AMBURUNGUA.....4TH INTERESTED PARTY

RULING

The application is a notice of motion brought under LIII rule 3 of the Civil Procedure Rules. It is seeking two judicial review orders as follows:

(1)That an order of prohibition be issued to stop the respondents from proceeding with administering “Nthenge Oath” in determining the ownership of L.R. Nos. 3543, 1664, 1504, and 5930 **ATHINGA/ATHANJA ADJUDICATION/B** Section Meru North District without affording the applicant fair hearing.

2. That an order of certiorari be issued to remove to this court the decision dated 13th November 2007 in objection No.107 of 2007 of Area Adjudication Committee Tigania North District

The application is premised on the grounds on the face of the notice of motion as follows.

1. That the interested parties resorted to the use of Nthenge oath because of lack of evidence.
2. That there is no known legal way to test the veracity of on oath.
3. That the applicant and his family have since 1962 occupied and worked on the suit land to date.
4. That the interested parties have never taken possession of any of the parcels all which are 6.30 acres in area.
5. That the said “Nthenge Oath” is not allowed by law in determining the ownership of the land.
6. That the administering of the “Nthenge Oath” if allowed will amount to injustice and will not determine justly and fairly the ownership of the land in dispute.
7. That taking of a “Nthenge Oath” is unconstitutional and illegal and not provided for in settling disputes’ in Kenya.

The application is also supported by an affidavit sworn by the applicant dated 21st May 2008. The respondents in this case were the Land Adjudication Officer and Demarcation Officer Meru North District. Mr. Maroro for the respondents informed the court that the respondents were not opposing the application as they were never involved with the breach complaint of in the application. That submission is not correct as it was the Respondents who referred the matter to a committee for the purpose of having the Nthenge oath administered as per the proceedings annexed.

There are four interested parties in this application. One of them the, First Interested party M’Inanga M’Akwalu filed affidavit in reply to the application. It is dated 28th September 2009. I have considered the contents of the said reply.

The application was argued by Mr. Gituma. The learned counsel urged the court to issue the orders of prohibition and certiorari against the respondents. Counsel argued that the main complaint is that the 2nd respondent used an oath called *Nthenge* oath to resolve the dispute over the suit properties ATHINGA/ATHANJA Adjudication Section Meru North District LR.NOs. 3543, 1664, 1504 and 5930. The counsel urged that the proof that the dispute was resolved through the oath is the proceedings marked annexure DN3. Mr. Gituma argued that Nthenge oath is not a recognized mode of resolving disputes between parties under Cap 283 and 284 Laws of Kenya. Mr. Gituma submitted that since the facts were not challenged by the Interested Parties the orders sought should be granted.

The respondents were represented by Mr. Otieno. In his brief submissions counsel stated that he relied on the replying affidavit sworn by the First Interested Party in its entirety. I have considered the affidavit. In the affidavit, the 1st Interested Party does not answer the issues raised in the Statement of Facts and the verifying affidavit in support of the application for Judicial Review Orders as sought. Indeed the affidavit does not deny that the Nthenge oath was administered by the 2nd Respondent to reach its decision, the subject of the current application. In a way the affidavit is not helpful.

I have considered the application. The application was brought within time as required under S.9 of the Law Reform Act. The applicant has deponed that the 2nd Respondent applied Nthenge Oath in order to arrive at its decision now being challenged.

The applicant has annexed the proceedings of the 2nd Respondent in which the decision was reached to administer Nthenge oath. In the same proceedings a decision was reached after the oath was administered. The decision aimed at awarding the suit properties to the interested parties. It is clear

from the proceedings that the applicant protested the administration of the Nthenge oath as a means to resolve the dispute between applicant and the interested parties. The applicant declined to attend the Administration of the oath ceremony. However it is clear from the proceedings that the oath was administered and that it was on the basis of that oath that the Respondent resolved the dispute between the applicant and interested parties in the interested parties favour.

I note that the time when the application was filed in court on 15th April 2008, the Nthenge oath had not been administered. The very first prayer sought in the application was to restrain the Respondents from administering the oath because it had not been administered. The very first prayer on the application was brought within the prescribed time as provided under section 9(3) of the Law of Reform Act.

Judicial Review is concerned with the decision making process and not the outcome or merits of the process. In **COMMISSIONER OF LAND V KUNSTE HOTEL LTD [1995 -1998] 1 EAI**, it was held:

“Judicial review is concerned not with the private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected.”

The decision to grant Judicial Review Order is discretionary. The court should however exercise that discretion judicially and fairly.

The Nthenge oath administered by the 2nd Respondent in order to arrive at the decision it did is unknown in law as a tool of resolving disputes. The oath had no application recognized under our laws for purposes of resolving the dispute between the two parties. The decision making process of the respondents was therefore flawed and the decision arrived at cannot in the circumstances be allowed to stand.

Having reached the conclusion I have of the matter I will allow the application in the following terms.

- (1) An order of certiorari be and is hereby issued to remove to this court and quash, which I hereby do the decision of the Respondents dated 13th November 2007, in objection No. 107 of 2007 of Area Adjudication Committee Tigania North District.**
- (2) Each party to bear its own costs of the application**

Dated Signed and delivered at Meru this 19th day of November 2010

LESIIT, J

JUDGE

In the presence of the parties

Kirimi – Court Clerk.

Mr. Kiutha Arithi appellant

Mr. Kaberia Arimba for Respondent

LESIIT, J

JUDGE

DATE:19th November 2010

CORAM

Hon. Lady Justice J. Lesiit – Judge

C/Clerk Kirimi/Cecily

Mr. Plaintiff/Applicant

Mr. For Defendant/Respondent

ORDER

Judgment/Ruling delivered in open court.

J. LESIIT

JUDGE.