



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Director Land Adjudication & 4 others; Munoru (Exparte Applicant);
Kang'Entu & 4 others (Interested Parties) (Judicial Review Application
12 of 2018) [2022] KEELC 15361 (KLR) (14 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW APPLICATION 12 OF 2018
CK NZILI, J
DECEMBER 14, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR LAND ADJUDICATION 1ST RESPONDENT

**THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER IGEMBE
NORTH DISTRICT 2ND RESPONDENT**

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE DISTRICT LAND REGISTRAR IGEMBE 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

AND

PETER MUNORU EXPARTE APPLICANT

AND

HENRY KANG'ENTU INTERESTED PARTY

MARY MUKWANJIRA INTERESTED PARTY

LAZARUS MUTUMA MUKIRI INTERESTED PARTY

SIMON MUKARIA KITHURE INTERESTED PARTY

GERALD KAIBUNGA ITIRITHIA INTERESTED PARTY



JUDGMENT

1. By a notice of motion dated August 14, 2018, the court was asked to prohibit the 3rd & 4th respondents from affecting the registration of Parcels No Athiru Ruujine/1704, 4397, 9806,10115, 10116, 7399, 9320, 8537 and 9714. Secondly *ex parte* applicant prays for an order of mandamus compelling the respondents to amend or otherwise re-adjust the adjudication records, including the registers and maps; and to incorporate or show and revert Parcels No's Athiru/Ruujine/9806, 10115, 10116, 9810, 7399, 9320, 8537 and 9714 together with any subsequent subdivisions to the originally gathered and recorded Parcels No's Athiru/Ruujine/1704 and 1704 forming part of the estate of Phyllis Wairimu Munoru (deceased).
2. The application was supported by a statutory statement of facts dated July 20, 2018, an affidavit verifying facts sworn by Peter Munoru on July 30, 2018.
3. The facts were that; Parcels No's Atheru/Ruujine/1704 & 4397 at the initial stages of the demarcation and adjudication, recorded in the names of Phyllis Wairimu Munoru (deceased) and measuring a total of 11.47 acres herein after the subject land.
4. It was averred that during the adjudication process, no objection proceedings were raised against the ascertained interests of the deceased by the interested parties or any other person(s) and that the final official adjudication record of the 2nd respondent showed the undisputed ownership by the deceased, of the land.
5. The applicant averred that any alteration or changes to the proprietorship under the adjudication process could only have been pursuant to objections properly and officially lodged, heard and determined under the *Land Adjudication Act*.
6. The *ex parte* applicant averred that in total collusion, the 1st, 2nd and 3rd respondents altered the two subject land parcels, created 10 new parcels of land, listed and alienated the same to the interested parties with no official claims or objection having been lodged, heard and determined against the proprietorship of the deceased.
7. It was averred that the said changes were illegal, unlawful unprocedural, arbitrary and ultra vires the duties and powers bestowed upon the 1st, 2nd & 3rd respondents.
8. As a consequence, the *ex parte* applicant averred that the estate of the deceased has been deprived of its legal interest to the subject property and hence prayed for orders of prohibition against the respondents from affecting the registration of the said parcels under the *Land Registration Act* and for the writ of mandamus compelling the respondents to amend their adjudication records including maps and the register, the deletion of said parcel numbers and for the reinstatement of two parcels to their original acreage totaling to 11.4 acres.
9. The facts were verified by the supporting affidavit of Peter Munoru reiterating the contents of the statutory statement of facts and attaching a copy of grant of letters of administration as annexure marked PM "1". He deposed that he had lived on the suitland for 53 years during the adjudication process leading to the completion and the submission of the adjudication records to the 1st & 4th respondents as being final in all aspects with no objections by any parties.



10. The applicant deposed that he discovered the collusion and the creation of the new parcel numbers when the interested parties entered into the land, following which he obtained the official map attached as annexures PM “2” (a) (b) (c) and (d) respectively.
11. The notice of motion was served upon the respondents and the interested parties as evidenced by affidavits of service sworn by Robert Nyagah on August 20, 2018, David Mwenda Kanyamu on September 5, 2018, Baylon Mutahi on August 6, 2018 and Nahashon Karuti on September 5, 2018 respectively.
12. The application was opposed by the respondents through grounds opposition dated September 9, 2019, on the basis that the applicant failed to invoke Section 26 of the Land Adjudication Act; the prayers sought were not the most efficacious in the circumstances since the decision creating the new parcel numbers has not been quashed; an order of prohibition was untenable for it would operate in perpetuity given that no quashing orders have been sought; the orders sought were discretionary and should be disallowed otherwise they would occasion administrative chaos.
13. The 1st, 2nd & 3rd interested parties opposed the notice of motion through relying affidavits sworn on October 22, 2018 and October 3, 2018 respectively.
14. In his response, the 1st interested party averred that Parcel No Athiru/Ruujine/7399 was sold to him by the 2nd interested party in 2013 who had been in occupation for long and had developed the land. That he subsequently subdivided it into Parcel No’s 9804 & 7399 measuring 0.84 acres, the whole of parcel numbers 9320, 8537, 10116 and 9806 formed part of the land that he rightfully bought during the adjudication from the 4th interested party in 2012 and subdivided into plots as per annexed confirmation letter and a sale agreement marked as HK 1 (a) and (b) respectively but retained the original Parcel No8537.
15. The 2nd interested party averred that the deceased Phyllis Wairimu unlawfully acquired her land Parcel No 1868 owned by late husband Johanne M’Nchebere in 1974 measuring 2.15 acres.
16. The 2nd interested party averred that in 2005, she filed Objection No 1131 as per receipt No 694616 against the deceased then represented by the *ex parte* applicant while she represented her husband, which was determined on April 28, 2005 in her favour and was ordered to be given a balance of 0.16 acres and a further 0.84 acres to be excised from Parcel No 1704 totaling 1 acre. She attached a copy of proceedings and decision as annexure marked MMN -1.
17. The 2nd interested party averred that 0.84 acres was allocated as Parcel No 7399 which she sold to the 1st interested party in 2013.
18. She averred that the *ex parte* applicant never appealed against the said decision and the land was lawfully acquired under the relevant laws.
19. The 4th interested party averred that he bought Parcel No Athiru/Ruujine/8537 from one M’Ibutu M’Mwine in 2003 which was eventually demarcated and recorded under his name, took vacant possession, planted various trees and erecting a fence. He maintained that *ex parte* applicant never filed any objection against his parcel number and since title deeds were out, the claim if any could not be determined by way of judicial review since the applicant failed to invoke Sections 17 and 18 of the Land Consolidation Act (Cap 283).
20. In a supplementary affidavit sworn on October 22, 2018, the 4th interested party attached a copy of the sale agreement as annexure SMK “1” and averred that he had also sold the said parcel of land to the 1st interested party in 2012 as per annexure marked SMK “2”.



21. With leave of court parties filed written submissions dated November 8, 2022 respectively. The *exparte* applicant submitted that no objections were filed and determined during the adjudication process and therefore any creation of and the recording of new parcel numbers under the interested parties' names was unprocedural, arbitrary, illegal and ultra vires.
22. As concerns Parcel No's 1868 and the hiving off of 0.16 acre and 0.84 acre respectively, the *exparte* applicant submitted the 2nd respondent's decision to award the suit parcel numbers to the 2nd interested party without any objection being filed and determined was ultra vires and illegal.
23. Regarding the 3rd & the 5th interested parties, the *exparte* applicant submitted that the acquisition of their parcel number was irregular since the 1st interested party had irregularly acquired Parcel No 7399 from his Parcel No 1704 instead of Parcel No 1868, thus he had no title to pass. It was lastly submitted that the interested parties were not in occupation of the said parcels of land.
24. The respondents submitted that the *exparte* applicant had failed to invoke Section 26 (1) of the [Land Adjudication Act](#) (Cap 284) within 60 days from the decisions whose implication was that under Sections 27 thereof, the adjudication register became final in all aspects. Further, it was submitted that had the *exparte* applicant been vigilant, he would have noticed the subdivisions during the publication of the adjudication register.
25. Additionally, the respondents submitted that the two prayers sought by the applicant were not the most efficacious since the decision leading to the creation of the parcel numbers has not been quashed and as per annexure PM "2", the said decisions had already been implemented on the ground.
26. The respondents relied on *Republic Vs Town Clerk Kisumu Municipality ex parte East African Engineering Consultants* (2007) 2 EA 441 on the proposition that for mandamus to issue, a specific demand for the performance of the public duty must have been made and refused which was not the case in these proceedings.
27. Further, the respondents submitted that the orders sought were meant to amend or otherwise readjust the official land records with regard to the suit parcels which ideally required a merit determination of the case through oral evidence in an ordinary civil claim.
28. The interested parties submitted that no proof has been tendered that the objection proceedings were under Cap 284 and no copy of the demarcation booklet ascertaining the applicant's allegations as per A/R objection decisions was produced. Further, it was submitted that the *exparte* applicant failed to produce any A/R records for the parcel numbers claimed for the court to ascertain the allegations that upon the completion of the adjudication process some irregular alterations were made.
29. The 2nd interested party submitted that the proceedings attached to her affidavit indicated that the *exparte* applicant participated in the objection proceedings, became contented with the committee's decision and was only coming to court 13 years down the line without having exhausted the internal mechanisms set out under Sections 26 (1) and (2) of Cap 283 and Sections 29 of [Cap 284](#) which decision was final. Reliance was placed on Meru Petition No 21 of 2012 [Stephen Michuki Kiunga vs Nkuni M'Turuchiu and 2 others](#).
30. Lastly, the 2nd interested party submitted that the *exparte* applicant had failed to substantiate his allegations on the acreage being irregularly reduced, and on the claim based on collusion/ultravires through tangible evidence.



31. The issues for courts determination are; (a) whether the *exparte* applicant has made out a case for the grant of the prayers sought and (b) if he had exhausted the statutory provisions on dsiputes arising during adjudication process prior to coming to court.
32. Mativo J in *Republic vs PS ministry of internal security and another exparte Schon Noorani & another* (2018) eKLR cited with approval *Apotex Inc vs Canada (Attorney General)* 1993 Can L113004 (FCA) where it was held that for a writ of mandamus to issue, there must be a public legal duty to act owed to the applicant, it must be a clear right to the performance of that duty, there must be a prior demand to act met with an outright refusal to act; that no other adequate remedy was available for the applicant; the order sought must be of some practical value or effect; there was no equitable bar to the relief sought and lastly on a balance of convenience mandamus should lie.
33. The court of appeal in *KNEC vs Republic Exparte Geoffrey Gathenji Njoroge and others* (1997) eKLR, cited with approval *Halsbury's Laws of England* 3rd Edition where it was stated that mandamus was a command directed at a person requiring him to do so particular thing therein specified appertaining to his office in the nature of a public duty so as to remedy any defects of justice and is issued so that the ends of justice can be met.
34. In *Shah vs AG* (1970) E.A 543 the court held that an order for mandamus does not lie to a public office as a matter of course and was only applicable where some specific act or thing which the law requires to be done has been omitted.
35. On an order of prohibition, the court in *KNEC vs Republic (supra)* held that the writ issues to stop a body from continuing with proceedings in excess of its jurisdiction or in contravention of the laws of the land. The court stated that such an order lies not only for excess of jurisdiction or the absence of it but also where there was a departure from the rules of natural justice. The court similarly held that it did not lie to correct the course, practice or procedure of the inferior tribunal or a wrong decision on the merits of the proceedings.
36. The *exparte* applicant has faulted the respondents for illegally and or unprocedurally creating new numbers out of his two parcels of land in favour of the interested parties outside any known claims or objections during the adjudication process.
37. On the other hand, the respondents averred and have submitted that the applicant failed to appeal to the decision(s) if at all he was aggrieved in line with Sections 26 (1) and 29 of [cap 283](#) and [284](#) thereof, respectively. The 2nd interested party on her part has averred and submitted that there was an objection proceeding where the applicant participated but failed to appeal if at all he was aggrieved by the decision.
38. The 1st, 3rd and 4th interested parties have averred that they legally and or lawfully became recorded owner(s) of their parcels of land before the adjudication process was completed and therefore the allegations by the applicant were spurious, an afterthought, overtaken by events and or an unsubstantiated through tangible and cogent evidence, more so since he never objected to their parcel numbers at the adjudication process.
39. In *Republic vs Joe Mucheru Cabinet Secretary Ministry of Information Communication and Technology and 2 others* (JR E1138 of 2020 (2021) KEHC 122 (KLB) JR 14th October (2021) (Judgment), the court held that where there was an alternative remedy statutorily prescribed through a particular form of procedure for resolution of a complaint that procedure ought to be followed. See also Section 9 (2) of the [Fair Administrative Actions Act](#).



40. Angote J, in *Mohamed Ahmed Khalid (chairman) & 10 others vs Director of Land Adjudication & 2 others* (2013) eKLR held that, the Land Adjudication Act has an elaborate procedure on how complaints arising from the planning, demarcation and the surveying of trust land are supposed to be dealt with. Therefore the court in his view should not be a substitute to the established bodies which are supposed to deal with such complaints. The court found the petition premature.
41. In *Justus Mugaa M'Impwi vs DLASO Tigania West & East District & another* (2018) eKLR, the court held that the most obvious and available remedy to the petitioner after the objection was allowed by the adjudication officer was to lodge an appeal to the Minister pursuant to Section 29 of the *Land Adjudication Act* and that the failure to exercise that right of appeal within the stipulated period meant that the petitioner had avoided the judicial review process to escape the limitation period imposed by statute and was looking for an escape route.
42. Similarly, in *Reuben Mwangela M'itelekwa vs Paul Kigea Nabea & 2 others* (2019) eKLR, the court upheld a preliminary objection and struck out a petition for non-exhaustion of the available remedies under the *Land Adjudication Act*. The court held that the disputes concerned the ascertainment of rights and interests in land which dispute had been decided through objection proceedings as anchored under the statute.
43. In *Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry and 15756 others* (2015) eKLR, the court held that the exhaustion doctrine was a sound one which served to ensure that there was a postponement of judicial consideration of matters so that a party is first of all diligent in the protection of his interests within the mechanisms in place for resolution of disputes outside the courts. This principle was also echoed in *Mutanga Tea and Coffee Co Ltd vs Shikara Ltd & another* (2015) eKLR where the court held that a party must resort first to the alternative dispute mechanism before involving the court's jurisdiction which concept has been recognized under Article 159(2)(c) of the *Constitution*.
44. Applying the foregoing caselaw, the 2nd interested party has attached objection proceedings and a decision made by the 2nd respondent in Objection No1131 over Parcel No 1869. The 2nd interested party has averred that the applicant was party to the objection and a decision was made on April 28, 2005. Similarly, the 1st, 3rd and 4th interested parties have also attached confirmation letters and sale agreements indicating that they acquired their parcels of land in a lawful manner, during the adjudication process.
45. Despite being aware of the said replying affidavits and the annexures, the *ex parte* applicant did not seek leave of court to file any supplementary affidavit(s) and counter such evidence. Instead, the *ex parte* applicant has used his written submissions to try to poke holes on the documents presented and to give an explanation to the contrary. It is trite law that affidavits amount to evidence on oath and that written submissions however powerful or forceful cannot amount to evidence. See *Mwangi Stephen Muriithi V Daniel T Arap Moi & Another* [2017] eKLR.
46. The *ex parte* applicant's evidence attached to the affidavit verifying the facts, while looked at against his main pleading the statement of facts has no factual basis. Annexures marked PM 2 (a) (b) (c) and (d) to the verifying affidavits were not authenticated, verified and or indicated on who their makers were. The statement of facts did not state particulars of any decision or specific duties which each of and respondents had failed to exercise and or adhere to under the land adjudication and registration statutes.
47. The *ex parte* applicant failed to attach to his affidavit the were no adjudication records, notices of publication upon completion of the adjudication register and or transmission thereto to the 1st and 3rd respondents by the 2nd respondent regarding the creation, recording and cancellation of new parcel



- numbers. The dates of the alleged cancellation, creation and subdivision(s) of the two parcels in favour of the interested parties and the exact registration records were not been supplied to the court.
48. Similarly, the *exparte* applicant failed to produce any evidence to show that his late mother was at any given time a recorded owner of Parcel Nos Athiru/Ruujiine/1704 and 4397 measuring 11.47 acres. At the very least the *exparte* applicant ought to have shared with the court any letters of complaints which he wrote to the respondents prior to moving to court on July 30, 2018. Additionally, the inordinate delay with effect from 2005 to 2018 when the notice of motion was filed has not been explained at all.
 49. In *M'Arachi vs Land Adjudication officer Meru central Ruiru/Rwareva Adjudication Sections Arachi (Interested Party)* JR (2020 KEELC 1311 (KLR) October 5, 2022) Judgment, the court cited with approval *Republic Vs Director of Immigration Services and 2 others exparte Gbenga Fasuyi & 2 others* (2018) eKLR, where the court took the view that judicial review looks into the decision making process as well if the decision or action was an unauthorized or invalid. Similarly, the court cited with approval *Nicholas Njeru vs AG & 8 others* (2013) eKLR on the supervisory powers of the court to check the excesses of jurisdiction and non-compliance with the rule of law by inferior tribunals, public bodies and or persons discharging public duties.
 50. Looking at the prayers sought in the notice of motion it is quite clear that the *exparte* applicant did not pray to quash the decision(s) creating the ten parcels of land in favour of the interested parties. The manner in which each of the subject parcels of land were created was distinct, peculiar and was done at different times and dates going by the replying affidavits.
 51. If then the *exparte* applicant has not sought to quash the decisions creating the parcel numbers, can the prayers of mandamus and prohibition serve any useful purpose if the court was to grant them? The answer can only be no due to the following reasons. One, the 1st and 2nd respondents were statutorily mandated to hear and determine any objections or complaints during the adjudication process absence of which the arbitration process proceeded to the next stage by involving the 3rd respondent.
 52. Secondly, an aggrieved party on the decision(s) by the 1st & 2nd respondents has all the right to minister, appeal under the laid down mechanisms.
 53. Thirdly, not every infraction under the adjudication process must attract a court redress unless the available internal mechanism is incapable or the reliefs sought are outside its mandate.
 54. Fourthly, the applicant has failed to demonstrate that there is any unlawfulness, unreasonableness, impropriety or inexpedience on part of the respondents for this court to find that the two reliefs sought are the most efficacious under the circumstances.
 55. The applicant has demonstrated no exceptional circumstances why the court should nevertheless exempt him from resorting to the Land Adjudication Act for redress as per Section 9 of the *Fair Administrative Action Act*.
 56. The upshot is, I find the notice of motion lacking merits. The same is dismissed with costs to the respondents and the 2nd, 3rd and 4th interested parties.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

No appearance



HON. C.K. NZILI

ELC JUDGE

