



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC JR APPLICATION NO. 4 OF 2019

IN THE MATTER OF THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY LEMARON MUNYEPERA
AND JACOB LEMARON LOGELA

AND

IN THE MATTER OF THE APPLICATION FOR LEAVE TO APPLY FOR THE ORDERS OF CERTIORARI, PROHIBITION
AND MANDAMUS

AND

IN THE MATTER OF THE LAND GROUP REPRESENTATIVES ACT CAP 287 LAWS OF KENYA

AND

IN THE MATTER OF THE DECISION OF THE REGISTRAR OF GROUPS REPRESENTATIVES AND THE CERTIFICATE
OF INCORPORATION ISSUED IN RESPECT OF ROMBO GROUP RANCH

REPUBLIC.....APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER (KAJIADO COUNTY) ...1ST RESPONDENT

THE REGISTRAR OF GROUP REPRESENTATIVES.....2ND RESPONDENT

JOHN SITELU NKIPAPAI.....3RD RESPONDENT

JOSEPH LENGAKUAI OLOMUKO.....4TH RESPONDENT

JAMES MUNDEI LENCHANGWA.....5TH RESPONDENT

EX PARTE APPLICANTS: LEMARON MUNYEPERA, JACOB LEMARON LOGELA

JUDGEMENT

Introduction

Through an application dated 29th January, 2019 the ex parte Applicants' were granted leave to commence judicial review proceedings against the Respondents. The substantive motion was filed on 14th October, 2019. Therein the ex parte Applicants sought the following orders;

1. An order of certiorari to remove to this court and quash the proceedings and election of officials of Rombo Group Ranch made on the 6th day of December, 2018 and the election results that were declared by the 1st Respondent.
2. Order of mandamus compelling the 1st and 2nd Respondent to freeze the activities of the persons elected under the said

sham elections; organize and conduct a free, fair and transparent elections for Rombo Group Ranch.

3. Any other order that the court may deem fit.

4. The cost of this application be awarded to the applicants.

The motion is premised on grounds that on 6th December, 2018, the ex parte Applicants took part in Rombo Group Ranch elections at Oiggara within Kajiado County vying for the positions of Chairman and Treasurer. It is the ex parte applicants' contention that the elections were marred with massive irregularities, intimidation, and violence. They went on to state that the open ballot system of voting was an archaic method of voting which was easily manipulated. Furthermore, it did not indicate the wishes of the people as prescribed by the Land (Group Representatives) Act Cap 287. They further contended that the number of votes cast for the candidates was 11,762 which surpassed the number of 3,382 registered voters. The elections were done devoid of a Register of Members and as such ghost voters actually took part in the said elections in breach of section 17 of the Land (Group Representative) Act Cap 287. In addition, the results were announced in a thicket, 3 kilometers from the polling station. The ex parte applicants are extremely apprehensive that the 2nd Respondent will publish the names of persons purportedly elected under the said sham elections and issue a certificate of incorporation under the Land (Group Representatives) Act, for the persons purportedly elected under the said elections.

The ex parte applicants swore a supporting affidavit on 29th January 2019. They averred that on 21st November 2018 the contestants met, agreed upon and set ground rules for the conduct of the elections scheduled on 6th December, 2018 which resolved that; voting would be by way of ballot; only community members would take part in the elections, and only persons who reach the age of majority would take part in the elections. They explained that on 6th December, 2018 Rombo Group Ranch conducted elections to elect its officials with the 1st Respondent, acting as the Returning Officer while being assisted by two counting officers. They stated that the 1st and 3rd Exparte Applicants contested for the position of Chairman and Treasurer whilst the 3rd, 4th and 5th Respondents vied for the position of Chairman, Treasurer and Secretary. Further, that before the elections all the contestants had a meeting with the Deputy County Commissioner in the presence of other members wherein security concerns were raised and it was agreed that 100 police officers would provide security and children should not vote. They explained that the elections were to be open; where the supporters for the two teams would stay on two different sides of the river. Further, after being counted supporters would cross the road to separate them from the uncounted. They deposed that on the day of elections, there were no special marking identifying those who had voted and those who were yet to vote. Further, the election officers were not enough so as to ensure children did not vote and yet some children were counted as voters. They stated that during the counting, there was a lot of commotion and movement by supporters while the security personnel were less than thirty (30) thus being overwhelmed by the massive crowd of people and at some point those who had voted crossed the road to mix with those who had not voted. They further claimed that after counting, the 1st Respondent directed his two counting officers to record the results, which he did on his notebook with the intention of announcing them. They reiterated that after recording the results, the Exparte Applicants and their supporters observed the 1st Respondent noting that their team had garnered 5813 votes against 5617 votes by the 3rd, 4th and 5th Respondents' team. Further, that a pandemonium broke out when the 3rd, 4th and 5th Respondents' team realized that they had lost the elections. They claimed the 1st Respondent was ordered into their vehicles with the aim of rigging the election results. Further, that the 1st Respondent was forced to announce the new results as follows; the Exparte Applicants' team garnered 5813 votes while the Respondents' garnered 5,881 votes.

The ex parte applicants further aver that they declined the queue voting system and did not take any part in the meetings that ratified the resolutions that there would be a queue system of voting while minors allowed to take part in the elections. Further, that their agents were not given an opportunity to counter sign and verify the results by the 1st Respondent with the said results being announced by the 1st Respondent two days later vide minutes dated 8th December, 2018 declaring the 3rd, 4th and 5th respondents as the winners by a collective win of 11,762 votes.

The 1st Respondent Josiah K. Lessan opposed the application and swore an affidavit, on behalf of the 1st and 2nd Respondents where he deposed that the officials of Rombo Group Ranch, wrote to the Registrar Land Adjudication vide letters dated 12th November, 2018 requesting for a date for the annual general meeting. Further, on 14th November 2018 he responded to the Chairman of Rombo Group Ranch inviting the group for a meeting to be held on 21st November, 2018 to discuss the modalities of conducting the requested general elections. He contended that on 26th November, 2018, he further responded to the Chairman of Rombo Group ranch inviting the group for an annual general meeting to be held on 6th December, 2018. He insisted the activities of the day were reflected in the minutes, where the members agreed as follows: queue voting method to be used; voting starts at 1 p.m.; the two contestants for the post of chairman were to nominate five (5) agents for the exercise; the counting officers were Mr. Symon Wanjau and Rose Otieno; the contestants with the highest simple majority would be declared the winner; the contesting parties agreed that all members present in the meeting will queue and be counted; the looser would concede defeat honourably, and he was to announce the results to all present. He explained that there was enough security provided by the national government while the Mlolongo method of voting was as per the agreement of all members present. Further, the contesting parties agreed that all members present to vote by Mlolongo by virtue that even if they were not in the register, and were qualified they should be included. He reiterated that the counting of votes of the present members (11,762) was done in the presence of the duly appointed agents of the contesting parties and no complaints were made. Further, the duly elected officials were declared on the spot and not in the alleged thicket. He denied the allegations of bribery and contended that the instant application is frivolous, vexatious, an abuse of the court process and should be dismissed with costs.

The 3rd Respondent opposed the application and filed a replying affidavit where he explained that on 12th November, 2018 the Ex parte Applicants' as the officials of Rombo Group Ranch wrote to the office of the Registrar of Group Ranch requesting for a date for election of the new office bearers. Further, in response to the said letter, the 1st Respondent invited all the parties to a meeting on 21st November, 2018. He contended that during the meeting they mutually agreed on the modalities of conducting the elections which they signed in the presence of the Minister in charge of lands, Kajiado County. He averred that the Ex parte Applicants were retracting the contents of the meeting. Further, before the election date, the Ex parte Applicants and the Respondents had agreed on some fundamental issues in regard to the election which included; the queue system of voting; any person present on the ground aged ten (10) years and above would vote; each candidate was entitled to five agents among others. He contended that the election results were announced on the date of the elections and not

on 8th December 2018 as alleged by the Ex parte Applicants. Further, the 1st Respondent communicated in terms of minutes, on the outcome of the elections. He reiterated that upon receipt of the minutes, the 2nd Respondent issued a certificate of incorporation in respect of Rombo Group Ranch. He reaffirmed that the orders sought by the Ex parte applicants have already been overtaken by events as they waited for a period of 53 days from the date of the election to realize that the election were a sham.

Submissions

Ex parte Applicants Submissions

They submitted that the 1st Respondent's decision of not using the Register was legally un –procedural. Further, that the 1st Respondent did not consult with the register of members on the eligible persons to vote. They claim the 1st Respondent presided over an election where the number of voters were triple the number of registered members. They further submitted that under the Land (Group Representatives) Act minors were defined as disabled and they could only vote through proxy. They relied on Section 8(1) of the Land Registration Act, and Paragraph 14(1), 5.6 and 12(j) of the Community Land Act (Regulations) 2017. They submitted that the open ballot system was inaccurate, non-verifiable, not transparent and not confidential. Further, there was no way to verify who had voted or not. It was their submission that the decision of the 1st Respondent to announce the results in a thicket in the presence of one party was un procedural and showed lack of transparency. They relied on section 86(1) (b) of the Elections Act which stipulates that elections should be publicly announced to persons present and these includes candidates, agents and observers. They reiterated that the 1st Respondent was biased by announcing the results to only one party and failed to comply with the procedure of group ranch elections. On the prayer for certiorari, it was their submission that the elections had massive irregularities devoid of the rules of natural justice. Further, that an order of mandamus should be issued compelling the 2nd Respondent to freeze the activities of the persons elected under the elections of Rombo Group ranch. They further relied on section 5 (1) (c) and section 23(5) (c) of the Land Adjudication Act,

The 3rd, 4th and 5th Respondents' Submissions

They submitted that the Ex parte Applicants participated in the elections of the group ranch as they were former officials. They contended that the Ex parte Applicants did not challenge the fact that they had they agreed with the 1st and 2nd Respondents on the mode of conducting elections. They insisted that the Ex parte Applicants were granted a fair hearing by the 1st and 2nd Respondents but they lost at the ballot. They explained that the Applicants are raising issues which are criminal in nature and such allegations cannot be proved in a judicial review application. Further, they cannot prove that the elections were marred with massive irregularities, intimidation including violence through an application for judicial review, as such allegations require the calling of evidence and cross examination of witnesses which is not possible in this forum. They insisted that the Applicants failed to report the acts of violence or intimidation to any government authorities and only averred the same in their affidavits. Further, the question of the members' register is an evidentiary issue. They reiterated that the Respondents were the custodians of the members' register and the Ex Applicants failed to tender evidence to prove that non-members participated in the elections.

Analysis and Determination

Upon perusal of the instant judicial review application dated the 14th October, 2019, including the rivalling affidavits as well as the submissions, the following are issues for determination:

- Whether the ex parte applicants are entitled to the orders sought in the instant application.
- Who shall bear the costs of the application herein?

As to whether the ex parte applicants are entitled to the orders sought in the instant application. The ex parte Applicants have sought for orders of certiorari and mandamus seeking to quash the proceedings and election of officials of Rombo Group Ranch made on the 6th day of December, 2018. Further, that the 1st and 2nd Respondents to freeze the activities of the persons elected under the said elections and for the Respondents to organize as well as conduct a free, fair and transparent elections for Rombo Group Ranch.

It is the ex parte Applicants' contention that the Rombo Group Ranch elections held on 6th December 2018 were marred with massive irregularities, intimidation and violence. They claim that they did not take part in the meeting ratifying resolutions on the system of voting; the open ballot system of voting was not credible but inaccurate, the number of votes cast were 11,762 which surpassed the number of registered voters at 3,382; elections were devoid of a Register of members, and the 1st Respondent as the Returning Officer was intimidated, threatened and possibly bribed in announcing falsified election results. The Respondents controverted the said allegations and held that the elections were conducted in a fair manner in accordance with the laid down grounds rules which had been agreed upon on 21st November, 2018 prior to the said elections to wit: have an open ballot system; queue voting method; the contestant with the highest simple majority will be declared the winner; all members present in the queues will be counted; the two contestants for Chairman would nominate five agents each for the exercise; and the loser will concede defeat honourably. They further insist there was enough security personnel at the electoral center and no violence was exhibited during the elections.

It is trite that Judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the standards of judicial review when he stated that: -

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the

second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness”...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.’

In line with these set standards, I wish to decipher whether the Respondent's actions violated the Ex parte Applicants rights to warrant the orders sought in this judicial review application. The Ex parte Applicants are seeking to challenge the decision of the 1st and 2nd Respondents on the basis that they have been subjected to unfair, unreasonable and irrational decision well calculated to bar them from exercising their constitutional including statutory right to contest free and fair elections without any apparent reason.

I note the 1st Respondent was the Returning Officer whose mandate was to oversee the elections of the group ranch. The 2nd Respondent's role is management of the group ranches and ensuring compliance with the law. I note the Ex parte Applicants who were past officials of the Rombo Group Ranch and as the candidates took part in the elections as well as annual general meeting as seen in the minutes dated the 6th December 2018.

Section 47 of the Constitution provides that: **‘(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**
- (b) promote efficient administration’.**

In the case of *Republic vs. National Employment Authority & 3 others Ex parte Middle East Consultancy Services Limited (2018) eKLR*, Justice Mativo discussed the discretionary remedy of judicial review and observed as follows, **“This application means that even if a court finds a public body has acted wrongly it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant’s own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review where the applicant has not acted in good faith, or where a remedy would impede the authority’s ability to deliver fair administration or where the judge considers that an alternative remedy could have been pursued.”**

Further, in the case of *Reid vs. Secretary of state for Scotland (1999) 2AC 512* it was held, **“Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.**

For the proceedings of the 6th December, 2018, to be quashed, it is incumbent upon the ex parte applicants to satisfy this court that the 1st Respondent’s decision was tainted with irregularity, irrationality and procedural impropriety as it was expressed in the case of *Republic vs. National employment authority & 3 others ex parte middle east consultancy services limited (2018) eKLR*, where it was held, **“An administrative or quasi-judicial decision can only be challenged for illegality, irrationality and procedural impropriety. An administrative decision is framed if it is illegal; (a) contravenes or exceeds the terms of the power which authorities the making of the decision (b) possess an objective other than that for which the power to make the decision was conferred, (c) is not authorized by any power (d) contravenes or fails to implement a public duty.”**

See the case of *Kenya National Examination Council V Republic Ex parte Gathenji Njoroge & 9 Others (1997) eKLR*.

The ex parte applicants seek an order of certiorari to remove to this court and quash the proceedings and elections of officials of Rombo group ranch conducted on 6th December, 2018 and the election results that were declared by the 1st Respondent. From their averments above, I opine that the irregularities alleged by the ex parte applicants requires interrogation of the facts, calling in evidence, examining the merits of the case so as to determine whether the elections were irregular or unlawful. Further, from the averments of the respective parties herein including the annexures presented, it is quite evident that the ex parte applicants sought for the 1st Respondent to oversee the elections of the Rombo Group Ranch which he did. I further note the 1st Respondent adhered to their invitation vide the letter dated the 12th November, 2018; convened a meeting on 21st November, 2018 where parties agreed on the Grounds Rules for the Elections; Conducted the Elections and Announced Results. It is only after the elections and 53 days later when they sought to quash the said election results.

Based on the evidence presented by the respective parties while associating myself with the decisions cited above and applying the standards set in Article 47 of the Constitution, I find that the ex parte applicants’ case has not met the threshold set for granting orders of certiorari as they have failed to demonstrate if the Respondents acted illegally, irrationally and if there were procedural impropriety when the elections were conducted. I note they seek for the restoration of status quo ante, which means they are restored as officials of the group ranch, since they were the previous ones before the impugned elections.

On the issue of the order of mandamus sought, I wish to make reference to the definition of the same as contained in the Halsbury Laws of England (4 ed) vol.1 page 111, where it states as follows: **“The order of mandamus is most extensive remedial nature and is in the form of command issuing from the high court of justice directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or her office and is of the nature of public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done, on all cases where there is a specific legal right, and it may issue in cases where although there is an alternative remedy yet that mode of redress is not convenient, beneficial and effectual.”**

In the case of *Republic vs. National employment authority & 3 others exparte middle east consultancy services limited (2018) eKLR*, **“Mandamus will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. Mandamus is a judicial command requiring the performance of a specified duty which has not been performed. Mandamus is employed to compel the performance when refused of a ministerial duty, this being its chief use. It is also employed to compel action, when refused in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, not to direct the retraction or reversal of action already taken in the exercise of either. Mandamus is a discretionary remedy which a court may refuse to grant even when the requisite grounds for it to exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.”**

From the above explanation, it is clear an order of mandamus should issue when the public officers have refused whether expressly or impliedly or unreasonably delayed in performing their duties. It is worth noting that prior to the elections, the said Applicants wrote a letter to the 1st Respondent, which he adhered to by convening a meeting to set the grounds rules for the elections, which rules parties consented to. Further, the Respondents proceeded to oversee the elections based on the grounds rules set and announced the same. All these are pointers that the Respondents performed their public duty fairly. I note the Ex parte Applicants’ main complaint was that the elections were marred with massive irregularities which facts are yet to be proved. However, based on the facts before me while associating myself with the decisions cited above, I find that the Respondents performed their duties reasonably and in accordance with the Fair Administrative Action Act. Further, no sufficient evidence has been tendered by the Ex parte Applicants to demonstrate that the Respondents failed, refused or neglected to perform their duties or unreasonably delayed in doing the same. There was no demonstration that the Respondents acted in excess of their jurisdiction or in breach of the rules of natural justice contrary to the law. To my mind it seems the Ex parte Applicants seek to interfere with the discretion of the Respondents as they wanted the elections to be conducted in a specific manner. It is trite that the repealed Land Group/Representatives Act as well as the Community Land Act imposed a duty on the Respondents to conduct elections but left a discretion to them based on the respective Group Ranch constitutions. It is my considered view that the allegations made by the Ex parte Applicants require an in depth analysis of evidence and the merits of the case which cannot be handled in this forum. In the circumstances, I find that the Ex parte Applicants have failed to meet the threshold set for the grant of orders of mandamus.

It is against the foregoing that I find the Application dated the 14th October, 2019 unmerited and will proceed to dismiss it with costs to the Respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF FEBRUARY, 2021

CHRISTINE OCHIENG

JUDGE