



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**MISC. APPLICATION NO. 1 OF 2019 (J.R)**

**IN THE MATTER OF AN APPLICATION BY ELIUD NYAGA MBOGO AND  
JOEL MWANGI KINYUA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF MINUTES NO. L/H/UD/42/2018 OF  
KIRINYAGA COUNTY GOVERNMENT DISPUTE RESOLUTION  
COMMITTEE MEETING HELD ON 6/9/2018 AND IN THE MATTER  
OF PLOT NO. 29 NYAGITHUCI ALSO KNOWN AS PLOT NO. 64 NYAGITHUCI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT**

**FREDRICK MURIUKI MWAI.....2ND RESPONDENT**

**KARIMI NJUE.....3RD RESPONDENT/INTERESTED PARTY**

**AND**

**EX-PARTE APPLICANTS.....ELIUD NYAGA MBOGO**

**AND JOEL MWANGI KINYUA**

**RULING**

**Background**

Pursuant to leave granted to the Applicant to apply for an order of certiorari to remove to this Honourable Court for purposes of quashing the decision by the Respondent held on 6th September 2018, the applicant in compliance with the order filed the substantive motion dated 21st February 2019 on 9th October the same year in which he sought the following orders:-

- (1) That prerogative orders of certiorari do issue quashing MINUTES NO. L/H/UD/42/2018 of the Kirinyaga County Government Disputes Resolution Committee awarding Plot No. 29 NYAGITHUCI Also KNOWN AS PLOT NO. 64 NYAGITHUCI to Fredrick Muriuki Mwai the 2nd Respondent.
- (2) That costs of this application be provided for.

**Grounds upon which the Application is grounded**

- (a) That the Ex-parte Applicants are the owners of PLOT NO. 29 NYAGITHUCI ALSO KNOWN AS PLOT NO. 64 NYAGITHUCI.
- (b) The Dispute Resolution Committee of the County Government of Kirinyaga met on 6/9/2018 and heard the dispute over ownership of the plot without involving the Ex-parte Applicants who are the actual owners of the plot in dispute.
- (c) The Dispute Resolution Committee of the County Government of Kirinyaga did not give the applicants a hearing and they were condemned unheard yet they are the owners of the plot.
- (d) The Dispute Resolution Committee of the County Government of Kirinyaga heard a dispute over the applicants' plot between parties who are not owners of the plot in question and awarded the plot to the 1st interested party.
- (e) The respondent breached laws of Natural justice and failed to follow laid down procedures.
- (f) The minutes have no legal basis and ought to be quashed.

### **Applicants Statements of Facts**

The applicant filed an affidavit in support of the motion and deponed as follows:-

- (1) That he was the owner of Plot No. 29 Also known as Plot No. 64 Nyagithuci until 13/11/2018 when he signed a transfer in favour of the 2nd applicant at the offices of the County Government of Kirinyaga and paid for the same (Annexed and marked ENM 1 is a copy of transfer form and ENM2 is a copy of receipt for payment of transfer fees).
- (2) That he acquired the plot from his father one Joseph Mbogo Kathiga who transferred the plot to him vide Minute No. WTPM & H. 114/10 (Annexed and marked ENM 3 is a copy of the minutes).
- (3) That Joseph Mbogo Gathiga had acquired the plot from one Johnson Karimi Njue vide Minute No. WTPM & H.170/96 (Annexed and marked ENM 4 is a copy of the Minutes).
- (4) That Johnson Karimi had acquired the plot from his father Kirai Ngingi vide Minute No. WTPM H 34/91. (Annexed and marked ENM 5 is a copy of the Minutes).
- (5) That he had exclusive possession of the plot and had built several houses,
- (6) That on 18/6/2013, he sold the plot to one Joel Mwangi Kinyua (Annexed and marked ENM 6 is a copy of the sale agreement).
- (7) That he took possession of the plot and has had uninterrupted occupation.
- (8) That he was surprised when he heard that the 1st interested party had asked him to vacate the plot and threatened to evict him.
- (9) That he learnt that on 6/9/2018, he County Government of Kirinyaga through its dispute resolution Committee meeting at the County Headquarters board room heard a dispute over plot No. 29 also known as 64 Nyagithuci.
- (10) That he and his co-applicant were not notified of the dispute yet the plot is in his name and he signed a transfer in favour of the 2nd applicant at the same offices of County Government of Kirinyaga.
- (11) That the County Government of Kirinyaga through its dispute resolution Committee heard a dispute involving them and in their absence.
- (12) That the County Government of Kirinyaga dispute Resolution Committee did not give him and his co-applicant who are the owners of the plot a hearing and made a ruling having condemned them unheard.
- (13) The County Government of Kirinyaga Dispute Resolution Committee heard a dispute between parties who are not owners of the plot in question and awarded the plot to the 1st interested party.
- (14) The 2nd applicant has been threatened by eviction by the 1st interested party.
- (15) That the respondent is not following laid down laws and procedures and has breached the rules of Natural justice.
- (16) That it is in the interest of justice that the Minutes that awarded the applicant's plot to a third party without their participation be quashed as it has no legal basis.

### **2<sup>nd</sup> Respondent's Statements of Facts**

The 2nd respondent Fredrick Muriuki Mwai filed a replying affidavit in opposition to the motion and deponed as follows:-

- (1) That vide a valid sale agreement dated 16/7/1992, he bought plot No. 29 Nyagithuci village of the defunct Kirinyaga County Council from K.F.P Church of Post Office Box 5 Kerugoya and the same was lawfully transferred to him vide Minutes No. 44/94 of the County Council of Kirinyaga Special Works, Town Planning, Markets and Housing Committee meeting held on 18/5/1994 (Annexed is a copy of minutes marked "F.M.M 1").
- (2) That since then he has diligently been paying all the rates due and owing to the allocating authority. (Annexed are copies of payment receipts marked "F.M.M 2").
- (3) That Plot No. 29 Nyagithuci village was owned by K.F.P Church prior to their sale agreement of 16/7/1992 as per Minutes No. TPM & H 60/83 and hence their sale transaction was legally binding (Annexed is a copy of Minutes No. 60/83 marked "F.M.M 3").
- (4) That later, the 3rd respondent/interested party laid claim over his plot No. 29 Nyagithuci Village and the dispute was heard by the 1st respondent on 6/9/2018 and it was resolved that plot No. 29 belongs to him (Annexed is a copy of Minutes extract marked "F.M.M 4").
- (5) That his plot has always been Plot No. 29 Nyagithuci Village and not Plot No. 64 Nyagithuci and he is not aware of how Plot No. 64 Nyagithuci Village could be juxtaposed in my Plot No. 29 and vice versa.
- (6) That the proceedings of 6/9/2018 between him and Karimi Njue were properly constituted and the Ex-parte applicant has no locus to participate in these as their claim lays in Plot No. 64 which plot is distinct from his own Plot No. 29 which plot he holds valid documents.
- (7) That the judicial proceedings filed herein are misconceived, frivolous and are an abuse of Court process.
- (8) That the application lacks merits and does not meet the granting of the orders of certiorari sought herein.
- (9) That he is further advised by his Advocate on record which advice he verily belief to be true that the Notice of Motion dated 21/2/2019 is fatally defective in law and substance as the same is based on supporting affidavit filed without leave of the Court and ought to be struck out.

#### **1st Respondent's Statements of Facts**

The 1st Respondent through its Director – In-charge Survey & G.I.S one Mwai Ngunyi filed a replying affidavit and stated as follows:-

- (1) That he is aware the Ex-parte Applicants have gone to Court seeking to quash the decision of the Dispute Resolution Committee held on 6th September 2018 at the County headquarters wherein the 2nd respondent and the 3rd respondent had filed a dispute, and which was resolved in favour of the 2nd through the Resolution Referenced as MIN/L/H/UD/42/2018. (Annexed herein and marked "MN – 2" is a certified copy of the Resolution made on 6th September 2018 Referenced as MIN/L/H/UD/42/2018).
- (2) That the findings on which basis the members constituting the Dispute Resolution Committee decided in favour of the 2nd respondent were as follows:-
  - (a) That the claim was in respect of Village Plot No. 29 Nyagithuci, which the 2nd respondent claimed he bought from K.F.P Church, and the transfer was approved and effected through a sitting of the County Council of Kirinyaga Special Works Town Planning Markets & Housing Committee held on 18th May 1994. (Annexed herein and marked "M.N 2" is a certified copy of an extract of the Minutes of the Works Town Planning Markets & Housing Committee held on 18th May 1994 which approved the above transfer referenced as WTPM & H 44/94).
  - (b) That the 2nd respondent further informed the Dispute Resolution Committee that the K.F.P Church had bought the plot from the 3rd defendant's brother, a fact which can only be verified if the Church is called upon to explain when and how it acquired ownership of Village Plot 29 Nyagithuci.
  - (c) That on the other hand, in the Dispute Resolution Committee, the 3rd respondent stated that the disputed plot, which according to him is also known as Plot No. 64 Nyagithuci, belonged to his father, Mwai Kirai Ndingi who was allocated the plot by the County Council of Kirinyaga. The 3rd respondent's father, Mwai Kirai Ndingi subsequently transferred the plot to him vide Minute WTPM & H 34/91. The records indicate that this minute refers to the disputed plot as Village Plot 29 Nyagithuci and not Village Plot 64 Nyagithuci. (Annexed herein and marked "MN – 3" is a certified copy of an extract of the Minutes Referenced as WTPM & H 34/91).
  - (d) That further, their records indicate that the 3rd respondent jointly with one Jane Kariko Karimi, later transferred Plot 29 Nyagithuci to one Joseph Mbogo Gathoga vide Minute WTPM & H 4 170/96. (Annexed herein and marked "MN – 4" is a certified copy of an extract of the minutes referenced as WTPM & H 170/96).
  - (e) That in his application dated 21st February 2019, the 1st Ex-parte applicant claims that the aforementioned Joseph Mbogo Gathoga, who is his father, subsequently transferred the disputed plot to him, which the 1st Ex-parte applicant terms as "Plot 29 also known as Plot 64 Nyagithuci" vide Minute WTPM & H 114/10, a copy of which is annexed to his application. (Annexed herein and marked "MN – 5" is a certified copy of an extract of the minutes referred as WTPM & H 114/10).

(f) That the above said annexure, to wit, WTPM & H 114/10, indicates clearly that the plot transferred to the 1st applicant is not Village Plot 29 Nyagithuci as was allegedly owned by his father one Joseph Mbogo Gathogo, but is Village Plot 64 Nyagithuci.

(g) That to buttress the rationale behind the 1st respondent's decision made through its Dispute Resolution Committee in its Department of Land, Housing & Urban Planning, there exists a list of village plots in Nyagithuci Village as at 1983, Confirmed through Minutes prepared by its predecessor, the defunct County Council of Kirinyaga, vide a copy of Minutes extract 60/83 on page 19 of the certified copy of the extract and is titled "*CONFIRMATION OF VILLAGE PLOTS*" in six villages namely Thaita, Karaine, Nyagithuci, Gathambi, Thumaita and Rwambiti, and the list of Confirmation commences with Nyagithuci Village under Schedule (a), as indicated in the second page of the certified copy of the extract. (Annexed herein and marked "MN – 6" is a certified copy of an extract of Minute 60/83 of confirmation of plots in Nyagithuci Village as at 1983 and a list of the confirmed plots in the said village as stated in the said certified copy of Minute extract 60/83).

(h) That the above list indicates that as at 1983, Village Plot 29 Nyagithuci was registered in the name of "K.F.P Church" as the allottee, while Village Plot 64 was registered in the name of "Pentecostal Church" as the allottee.

(i) That further to paragraph (h) above, the KFP Church later transferred to Fredrick Muriuki Mwai, the 2nd respondent herein through Minute extract WTPM & H 44/94 which is herein annexed and labelled as Exhibit "MN – 2".

(j) That he is advised by his counsel whose advice he verily believe to be sound that in the absence of evidence of re-planning of Nyagithuci Village, the 1st Ex-parte applicant cannot claim Village Plot 29 Nyagithuci as was recognized in Minute WTPM & H 170/96 when Joseph Mbogo Gathogo was the registered allottee changed names to be Village Plot 64 Nyagithuci upon its transfer to him by his father, one Joseph Mbogo Gathogo, who was the previous owner, vide Minute WTPM & H 114/10.

(k) That it is on the basis of the foregoing clear circumstances that the dispute was rationally ruled in favour of the 2nd respondent, a finding which the 1st respondent, prays be upheld by this Honourable Court.

#### **Submissions by the Ex-parte Applicant**

The Ex-parte Applicant through the firm of Ann Thungu & Co. Advocates submitted that it was the 1st respondent which approved the transfer of the suit plot from JOSEPH MBOGO GATHOGO to ELIUD MBOGO and also from ELIUD MBOGO to JOEL MWANGI KINYUA. The learned counsel submitted that bearing in mind that the County Government of Kirinyaga is the custodian of all the records of the plots, Dispute Committee decided to hear the dispute between the 2nd and 3d respondents. She is surprised why the Dispute Resolution Committee decided to choose the name of the 3rd respondent KARIMI NJUE who was not the owner of Plot No. 29 Nyagithuci or Plot No. 64 Nyagithuci in their records and he ceased being the owner in 1996. She also expressed conservation why the Committee chose to litigate the dispute with him even though he was not the original owner or current owner. She is also surprised how he was awarded the plot despite the fact that he was not in occupation of the plot and had never occupied the plot in question. The learned counsel also submitted that the Ex-parte Applicant learnt of the decision when the 2nd respondent tried to evict them and filed these proceedings to challenge the impugned decision.

The Ex-parte applicants' counsel also submitted that they were entitled to have been summoned and heard by the Dispute Resolution Committee of the County Government of Kirinyaga when it was hearing a dispute concerning and/or affecting their rights. She cited the case of *Commissioner of Lands Vs Kunste Hotel Ltd (1997) e K.L.R.* The Ex-parte applicant also submitted that they have been greatly affected by the decision of the Dispute Resolution Committee issued on 6/9/2018 as their plot was awarded to the 2nd respondent yet as persons likely to be affected by the decision, they were not heard. She submitted that the decision of the 1st respondent's Dispute Resolution Committee was tainted with irrationality and procedural impropriety. She cited the case of *Republic Vs Kerugoya County Council & Patrick Njue Ngari Ex-parte Applicant J.R No. 4/2015 (Kerugoya) (U.R).* The Ex-parte applicant also submitted that illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to provisions of law or its principles are instances of illegality.

On the issue of irrationality, the learned counsel submitted that the same can be demonstrated when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the fact and the law before it would have made such a decision. She stated that procedural impropriety is when there is failure to act fairly on the part of the decision making authority. She cited Article 47(1) of the Constitution of Kenya 2010 as the applicable law. The Ex-parte applicant argued that it was irrational and grossly unreasonable to make a decision concerning over land without affording him a hearing and going ahead to pick a name from old records as the owner of the property without any basis. She submitted that the rational thing to do was to check their records and confirm the transfers that had taken place and call the concerned parties the current owners and the persons in occupation as persons of interest likely to be affected by the dispute hearing on the 6/9/2018.

In conclusion, the learned counsel submitted that there was procedural impropriety on the part of the 1st respondent in that they breached rules of Natural justice and also their rights under *Article 47 (1) of the Constitution of Kenya, 2010.* Finally, the Ex-parte applicants submitted that the decision by the 1st respondent dated 6/9/2018 was irrational and illogical which demonstrated malafides and is therefore a nullity.

#### **1<sup>st</sup> Respondent's Submissions**

The 1st Respondent through the firm of Amollo & Kibanya Advocates submitted that the Ex-parte applicant has not produced any material evidence to confirm that there was re-planning of plots within Nyagithuci Village leading to Plot No. 29 and 64 referring to one and the same plot. She submitted that the only logical conclusion to be drawn from the evidence is that the 1st applicant is the allottee of Plot No. 64

Nyagithuci having had the same, transferred to him by his father Joseph Mbogo Gathogo vide Minute No. WTPM & H 114/10 and not Plot No. 29 Nyagithuci since it has already been clearly demonstrated that the two plots are distinct from each other.

On these grounds, the 1st respondent prays that the Dispute Resolution Committee's decision made on 6th September 2018 made vide Minute No. L/H/UD/42/18 be upheld as the same was procedurally done and that the application dated 12th February 2019 be forthwith dismissed with costs.

## **2<sup>nd</sup> Respondent's Submissions**

The 2nd respondent through the firm of Kiguru Kahigah & Co. Advocates on their part and in further opposition to these proceedings submitted that no evidence of a census by the allocating authority has been produced by the applicant to support their claim that Plot No. 29 Nyagithuci was renamed later as Plot No. 64 Nyagithuci in their favour and the alleged Minute No. WTPM & H 71/02 that allegedly affected changes from Plot No. 29 to No. 64 has not been produced as an annexure either in the applicant's affidavit of verifying facts dated 12/2/2019 or even the affidavit in support of the Notice of Motion dated 21/2/2019 and that there is no admissible evidence to controvert the allegation by the 2nd respondent that Plot No. 29 Nyagithuci is distinct from Plot No. 64 Nyagithuci. The respondent further submitted that the 2nd respondent has demonstrated that Plot No. 29 Nyagithuci still legally exists on the ground and also on the records of the Kirinyaga County Government contrary to the allegations by the applicants and the 3rd respondent to the effect that Plot No. 29 ceased to legally exist on or about year 2002 upon conversion to Plot No. 64 Nyagithuci.

The 2nd respondent also submitted that since Ex-parte applicants claim relates to Plot No. 64 Nyagithuci which is distinct from Plot No. 29 owned by the 2nd respondent herein, it was therefore unnecessary to summon the applicants for issues of a dispute over Plot No. 29 Nyagithuci which dispute only involved the 2nd and 3rd respondents and not the applicants and hence no breach of rules of Natural justice was occasioned to the applicants herein since they are not affected parties and the legal Authorities relied upon by the applicants in their written submissions are distinguishable as they relate to parties who were adversely affected by decisions which they sought to be quashed unlike in the instant case. The respondent also argued that Order 53 Rule 4 of the Civil Procedure Rules is couched in mandatory terms in that upon granting leave to file a substantive motion for prerogative orders, no other documents/affidavits shall be filed other than affidavit verifying facts filed during the leave stage and no other new grounds shall be relied upon by the applicants other than the grounds on the statements of facts without first seeking leave of the Honourable Court. He submitted that the applicants filed the application dated 12/2/2019 together with a statement of facts and affidavit of verifying facts under Order 53 Rule 3 CPR. However, upon being granted leave, the applicants filed the Notice of Motion dated 21/2/2019 which contains other grounds and a supporting affidavit sworn by Elius Nyaga Mbogo and another supporting affidavit sworn by the 2nd applicant Joel Mwangi Kinyua dated 21/2/2019 containing several annexures which is contrary to *Order 53 Rule 4*. He submitted that those additional affidavits and documents makes this application dated 21/2/2019 fatally defective in law and should be dismissed with costs.

In conclusion, the 2nd respondent submitted that the application dated 21/2/2019 fails to meet the legal threshold for granting of the prerogative orders of certiorari and that the orders prayed for are not available to the Ex-parte applicant herein and the application should be dismissed with costs.

## **Legal Analysis and Decision**

I have considered the application dated 12th February 2019 seeking leave to commence these Judicial Review proceedings and the substantive motion dated 21/2/2019. I have also considered the affidavit evidence and the submissions both in support and in opposition thereto. The applicant in the substantive motion is seeking to quash the decision of the County Government of Kirinyaga Dispute Resolution Committee meeting held on 6/9/2018 vide Minute No. L/H/UD/42/2018 awarding the 1st interested party Plot No. 29 also known as 64 Nyagithuci. Judicial Review proceedings as contemplated under **Order 53 of the Civil Procedure Rules** traditionally is a common law remedy. It is trite law that Judicial Review is now entrenched in the Constitution which gives the Courts Constitutional supervision of public authorities such as the respondent in matters involving a challenge to the legal validity of their decisions. **Article 47 of the Constitution** provides for the right to a fair Administrative Action. To give effect to this Article, Parliament enacted the **Fair Administrative Actions Act No. 4 of 2015**. **Section 2 of the Act** defines an "**administrative action**" to include – the powers, functions and duties exercised by authorities or quasi – judicial tribunals; or any act, omission or decision of any person, body or authority that affect the legal rights or interests of any person to whom such action relates. It can therefore be said that Judicial Review is no longer a common law prerogative but is now a Constitutional imperative that seeks to safeguard the Constitutional principles, values and purposes. The role of the Court exercising Judicial Review jurisdiction is supervisory. It is not sitting on appeal and should not therefore attempt to adopt the "**forbidden appellate approach**". Judicial Review is the Review by a Judge of the High Court or Courts of equal status of a decision; proposed decision or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory – reflecting the role of the Court to supervise the exercise of power by those who hold it to ensure that it has been exercised in accordance with the law. It is concerned more with the manner in which a decision is made rather than the merits or otherwise of the ultimate decision itself.

In the case of **Republic Vs Attorney General & 4 Others Ex-parte Diamond Hashim Lalji And Ahmed Hasham Lalji (2014) e K.L.R**, the Court held:-

*“Judicial Review applications do not deal with the merits of the case but only with the process. In other words, Judicial Review only determine whether the decision makers had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings Judicial Review proceedings with a view to determining contested matters of fact and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a Judicial Review proceedings to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore Judicial Review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute Judicial Review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in Judicial Review proceedings is mainly concerned with the question of fairness to the applicant .....”*

The applicant in this Judicial Review proceedings is challenging the respondent's decision to award his plot parcel No. 29 which according to him is also known as Plot No. 64 Nyagithuci to the 1st interested party Fredrick Muriuki Mwai without giving him a hearing vide its Minutes No. L/H/UD/42/2018 held on 6/9/2018. By design or deliberate mistake, the applicants did not annex a copy of the 1st respondent's meeting held on the said 6/9/2018. However, the 1st respondent/interested party annexed those minutes in her replying affidavit sworn by one Mwai Ngunyi, Director In-Charge Survey & G.I.S on 23/1/2020 annexed the said minutes. From a cursory look at those minutes, the dispute was Plot No. 29 Nyagithuci between the 2nd and 3rd respondents/interested parties which was resolved in favour of the 2nd respondent/interested party. There is no evidence from the material placed showing that Plot No. 29 Nyagithuci is also known as Plot No. 64 as alleged by the applicant. There is no evidence of re-planning of Nyagithuci Village which changed the naming of Plot No. 29 Nyagithuci to Plot No. 64.

I therefore find that there is no basis for the argument by the applicant that he was not given a hearing when the respondent through its Dispute Resolution Committee met on 6/9/2018. In the upshot, I find the Notice of Motion dated 21st February 2019 lacks merit and the same is hereby dismissed with costs to the respondents.

***READ, DELIVERED physically and SIGNED at Kerugoya this 5<sup>th</sup> day of February, 2021.***

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**E.C. CHERONO**

**ELC JUDGE**

***In the presence of:***

- 1. Ms Makazi holding brief for Ann Thungu for Applicant*
- 2. Respondent/Advocate – absent*
- 3. Kabuta – Court clerk.*