REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT ELDORET

MISC. JUDICIAL REVIEW NO. 1 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI, MANDAMUS AND PROHIBITION OVER THE DECISION OF THE MINISTER OF LAND, MARAKWET EAST SUB-COUNTY DATED 19TH NOVEMBER 2019

AND

IN THE MATTER OF ARTICLE 23(3) (F), ARTICLE 27 (3) (4) (5) AND ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MAITER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MAITER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT

BETWEEN

JOHN C. CHELANGA.....APPLICANT

AND

THE MINISTER FOR LANDS.....1ST RESPONDENT

LAND ADJUDICATION OFFICER, MARAKWET DISTRICT...2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

SAMUEL KIPCHUMBA.....4TH RESPONDENT

RULING

This ruling is in respect of an application by the applicant brought by way of a Notice of Motion dated the 17th of January 2020 seeking for the following orders:

a. An order of Judicial review for orders of certiorari to remove to this court for purposes of quashing the proceedings and respondent's Land Adjudication decision made on 19th November 2019 holding that the respondent's house be given 21 parcels of land whereas the applicant's house be given 7 parcels.

b. Costs of the application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed,

APPLICANT'S SUBMISSIONS

Counsel gave a brief background to the application and stated that the dispute is between the applicant and the 4th respondent who are grandchildren of one Kapterwa (deceased) who owned 21 parcels of land. That after his death the land was subjected to land adjudication process that awarded the parcels to the grandchildren but the applicant was not satisfied with the decision on grounds of bias alleging that the respondent was given more parcels of land.

It was counsel's submission that the applicant filed an appeal with the Minister who upheld the decision of the Land Adjudication. The applicant's contention is that land parcel Nos 1006 and 1007 that were allocated to the 4th respondent should have been allocated to him on the basis that he had been in occupation of the said parcels of land and had made significant development on the parcels including erecting his house.

Secondly, the applicant is contesting the decision of the 1st respondent to allocate 21 acres of land to the 4th respondent while his household received only 7 acres which he claims to be discriminatory. He avers that through cases Nos. 404/2017, 415/2017 and 425/2017, he raised queries with the manner in which the 28 parcels of land were shared noting that the grandchildren of the deceased daughters' side were denied equal shares with the grandchildren from the deceased sons. That this is because their grandfather had 2 wives with the applicant's grandmother having 5 daughters while the 4th respondent grandmother having a single son.

It was the applicant's case that the 28 parcels of land should have been shared proportionally depending on the number of children each household or in the alternative, the land be shared equally between the two households.

Counsel submitted that it is upon those grounds that the applicant sought for leave to file a judicial review of the orders which was granted on 28th November 2019 and urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent submitted that the application is fatally defective as it offends the provisions of Order 53(2) of the Civil Procedure Act and Section 9(2) of the Law Reform Act.

Ms Tigoi submitted that the applicant is inviting the court to delve into the merits of the decision rather than the decision-making process which is not within the purview and or remedy of judicial review. Further that the court lacks the requisite jurisdiction in this case since the facts in contest cannot be verified by this honorable court.

It was Counsel's submission that the applicant has failed to establish that he has locus standi to institute this suit and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the court has jurisdiction to hear and determine this application and whether the application falls within the ambit of Judicial Review.

On the first issue as to whether the court has jurisdiction to hear and determine this application, the court held in the *locus classicus* decision in Kenya on jurisdiction in the celebrated case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd[4] where the late Justice Nyarangi** of the Court of Appeal held as follows:-

> "I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Further in the case of **Sir Ali Salim v Shariff Mohammed Sharray 1938 KLR** the court held that :

> "If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the court in which they are rendered but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver or their part cannot make up for the lack of jurisdiction. "

Article 162 (2)b of the Constitution gives the court the mandate and Section 13 of the Environment and Land Court stipulates the jurisdiction of the court and provides as follows:

> 1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and

e) any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

a) interim or permanent preservation orders including injunctions;

b) prerogative orders;

c) award of damages;

d) compensation;

e) specific performance;

f) restitution; or

g) declaration; or

h) costs

From the foregoing constitutional and statutory provisions, it is clear that the Environment and Land Court has jurisdiction to hear and determine disputes relating to the environment, use, occupation and title to land. The court is further empowered to make any order or grant any relief as the Court deems fit and just, which may include interim and permanent preservation orders. This position was also adopted by the court in **Gerick Kenya Limited v National Environment Management Authority [2015] eKLR**

A court cannot give itself jurisdiction that it does not possess. In the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 others [2012] eKLR** where the Supreme Court expressed itself as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law …"

Similarly, in the case of **Republic vs National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others [2018] eKLR** it was held that it would be improper for the court to grant itself jurisdiction on the basis of convenience.

This court therefore has jurisdiction to hear and determine judicial review applications as stipulated under section 13 of the Environment and Land Court.

Having found that the court has jurisdiction to hear and determine judicial review applications in respect to use and occupation of land, the next issue is whether the application falls within the ambit of judicial review. To answer this question, it is important to look at the meaning and purpose of judicial review.

The purpose of judicial review was enunciated in the case of **Municipal Council of Mombasa…Vs…Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, where the Court of Appeal held that:-

"The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did

those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".

A Handbook by Michael Fordham titled Judicial ***Review Handbook, 6th edition, Hart Publishing, 2012, p. 5*** defines judicial review as the rule of law in action and a central control mechanism of public administrative law where the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. This remedy is however not limited to decisions made by public bodies only but also covers decisions made by private entities. A plain and literal reading of ***The Fair Administrative Action Act, 2015*** in particular ***Section 3(1)*** confirms that private entities have been brought into the purview of judicial review. The particular section reads:

3. Application.

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1st respondent.

This position was adopted by the court in **Associated Provincial Picture Houses, Ltd. –vs- Wednesbury Corporation [1947] 2 All E.R 680.** As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited [2013] eKLR**, while citing the **Associated Provincial Picture Houses Ltd. vs Wednesbury Corporation (supra**) namely:

"where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it."

The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision- making process as was held by Mumbi Ngugi J in the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited (supra*),***

"That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question."

The applicant's case is that he is dissatisfied with the disproportionate allocation of the suit land to the respondents. It is his opinion that the 28 parcels of land should have been shared proportionally depending on the number of children each household or in the alternative, the land be shared equally between the two households. The applicant claims bias but he does not go any further to establish whether the process was tainted with illegality, irrationality and procedural impropriety as was held in the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Ugandan High Court defined the terms tainted with illegality, irrationality and procedural impropriety as follows:

"It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

The applicant has not stated whether there was any procedural impropriety and whether there was non- observance of rules of natural justice. From the reading of the application and the replying affidavit, the applicant wants the court to act as an appeal court to reverse the findings and determine the merits of the case. That would mean that the court would act ultra vires and cause more harm than good to both the applicant and the respondents

It should be noted that the applicant avers in his supporting affidavit sworn on the 17th January 2020, that he objected to the proceedings of the 1st and 2nd respondent on grounds that he was in occupation of the land and the fact that the 1st respondent upheld the decision of the 2nd

respondent granting 21 acres of land to the 4th respondent and 7 acres to him. He averred that the decision of the 1st and 2nd respondent is discriminatory in nature and an affront to his rights under Articles 23 (3) (f), 27(3)(4)(5) and 47 of the Constitution which shows that the applicant is canvassing the merits of the case as opposed to the procedural impropriety in the decision-making process.

It was incumbent upon the applicant to demonstrate that the decision-making organ, in this case, the 1st Respondent acted ultra vires in making the impugned decision. In the case of **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR,** the court held:

> "Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

I have considered the application, the rival submissions and judicial authorities and find that this application does not fall within the ambit of judicial review and is therefore dismissed with costs.

DATED and **DELIVERED** at **ELDORET** this 2ND **DAY** OF **FEBRUARY, 2021**

M. A. ODENY

JUDGE