



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. 3 OF 2019

IN THE MATTER OF AN APPLICATION BY SILAS KAIYONGI MUGAMBI FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NOS. 6999 KARAMA ADJUDICATION SECTION

AND

IN THE MATTER OF OBJECTION NO. 5953

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE LAND ADJUDICATION AND SETTLEMENT

OFFICER TIGANIA EAST..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

AND

DAVID THIRINJA..... INTERESTED PARTY

EXPARTE

(SILAS KAIYONGI MUGAMBI)

JUDGMENT

1. This matter relates to the Notice of Motion dated 28/03/2019 brought pursuant to **Order 53 rule 3 of the Civil Procedure Rules 2010 and Section 8 and 9 of the Law Reform Act** and all other enabling provisions of the Law. The Exparte- applicant seeks the following orders:

a) **AN ORDER OF CERTIORARI** to remove into this court for the purposes of being quashed the 1st respondent’s decision made on 28/02/2019 in objection 5953 involving land parcel No. 6999 KARAMA ADJUDICATION SECTION.

b) **AN ORDER OF PROHIBITION**, prohibiting the 1st Respondent and the Interested Party from effecting or implementing the decision made on 28/02/2019 in objection 5953 involving land parcel No. 6999 KARAMA ADJUDICATION SECTION.

2. The grounds in support of the motion are set out in the statement of facts, the verifying affidavit and the further supporting affidavit of the

ex-parte Applicant SILAS KAINYONGI MUGAMBI. It is his case that he is the registered owner of land parcel No. 6999 Karama Adjudication Section measuring 3.20 acres. He contends that the interested party is his neighbor and the chairman of Karama Land Adjudication Section Committee, who filed objection 5953 against the ex-parte applicant claiming that a portion of land parcel No. 6999 belonged to him and the said committee proceeded to award the interested party a portion of 0.13 acres out of the ex-part applicant's land.

3. The ex-parte Applicant contends that the decision of the Land Adjudication and Settlement Officer was ultra vires, unfair, unreasonable, biased, illegal and against the rules of natural justice for the reason that he was never served with any summons to attend the objection hearing and was rather ambushed by the said hearing, that the interested party chaired the committee, thus the 1st respondents independence and impartiality was compromised, that his protest on the composition of the said committee was procedurally overruled, that he was never accorded time to sufficiently prepare for the hearing and he was not accorded an opportunity to call witnesses.

4. In his further supporting affidavit, the ex-parte applicant stated that he did indeed purchase a parcel of land from the interested party's father estimated to measure approximately one acre. However, at the time of purchase, the land was not duly surveyed to determine the exact measurements but the parties went round the parcel and the interested party's father pointed out the boundaries which boundaries have been maintained to date. It was accepted by all parties that the actual measurement of the land might be either slightly over or less than 1 acre.

5. The suit was opposed by the Interested party vide the replying affidavit dated 2/5/19. He argued that he is the registered owner of all that land that was gathered and comprised in FNO 1199 measuring approximately 2.83 Acres. That in 1980, his father and himself decided to sell to the ex-parte applicant one acre of land so as to facilitate his education. Later, he noticed that the demarcation officer had erroneously cancelled the whole of his gathering comprised in FNO. 1199 and transferred it to the ex-parte applicants land comprised in FNO.1549.

6. That the Interested Party's gathered Parcel measured 1.13 Acres and having transferred the whole of his gathering, it meant that he had transferred to the ex-parte applicant 1.13 Acres instead of the agreed 1 Acre. That being aggrieved by the foregoing action, he filed objection no. 5953 claiming 0.13 acres.

7. The interested party avers that though he is the chairman of Karama Land Adjudication section committee he complied with Section 14 of the Land Consolidation Act by openly declaring that he was at the hearing as an aggrieved party and not the chair, that at no time did he chair the hearing nor sit down to consider the objection or participate in voting on the question for determination.

8. He also stated that the ex-parte applicant was served with summons by the area chief and on the 1st hearing date of 7/2/19, the exparte applicant sent an emissary one Solomon Mukaria before the committee to seek an adjournment as he was in hospital in Nairobi. On the next hearing 14/2/19, both himself and the ex-parte applicant were present but due to many matters on that day, their case was adjourned to the following day of 15/2/19 when the matter proceeded. The interested party avers that the applicant never objected to the manner in which the proceedings were conducted and that he even appeared with a witness.

9. The interested party views the application to be lacking in merits and prays for its dismissal.

Submissions

10. In his submissions, the ex-parte applicant reiterated the averments made in his grounds in support of his main motion and the statement of facts. He laid great emphasize on the averment that he was not accorded a fair hearing as per the rules of natural justice, as he was not given prior notice of the hearing nor was he accorded a fair opportunity to be heard. The ex-parte applicant further submitted that the interested party sat as a committee member in the objection proceedings, hence he was a judge in his own case. Thus the likelihood of bias was real and that the said committee members were likely to act in a manner to impress their own chairman.

11. In support of his own application, the x-parte applicant relied on the provisions Section 12 of the Land Consolidation Act, cap 283 Laws of Kenya, and Article 50 (2)(c) of the Constitution of Kenya 2010. He also cited the case of **Republic v Kenya National Highways Authority Ex Parte John Mwaniki Kiarie [2016] eKLR** where the court upheld the principle that **"a man cannot be a prosecutor and a judge at the same time as it would be arbitrary and unjust"**.

12. The interested party submitted that the ex-parte applicant was accorded a fair hearing devoid of any bias and that the interested party complied with Section 14 of the Land Consolidation Act by openly declaring that he was appearing before the committee as an aggrieved land owner within the adjudication section. That the ex-parte applicant has not made his case and the same should be dismissed with cost.

Determination

13. The principles of Judicial Review were laid down by Lord Diplock in the case of **Civil Servants Union Vs. The Minister For Civil Service [1985] AC** where the Judge said;

"Judicial review has, I think developed to a stage today when one can conveniently classify into 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 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 as "procedural impropriety", rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision."

14. Consequently, the purpose of Judicial Review is not to review the decision but the decision making process. In the case of

Republic Vs. Judicial Service Commission, Ex Parte Pareno [2004] eKLR, the court stated as follows:

“What then is the scope of judicial reviewThe Supreme Court Practice 1997 Vol 53/1-14/6 states:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”

15. The person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. See Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya(Suing through its Chairman Robert Njoka Ex Parte Applicant [2019] eKLR. Judicial review is therefore concerned with the process leading to the said decision and not the merits of it.

16. The ex-parte Applicant seeks the decision of the Land Adjudication and Settlement Officer to be quashed based on the grounds that the decision reached was against the rules of natural justice for there was procedural impropriety, denial of fair hearing and bias. The exparte applicant contends that the interested party is the chair of the Karama Adjudication section and he sat as such in the committee and that he was not accorded sufficient time to prepare for the trial.

17. It is not disputed that the interested party is the chairman of Karama adjudication section committee. Was he therefore justified in participating in the objection proceedings? A look at the aforementioned proceedings reveal that the process was conducted under the **Land Consolidation Act Cap 283 laws of Kenya. Section 14** thereof stipulates as follows;

“If a member of a Committee or of an Arbitration Board has any interest, direct or indirect, in the determination by the Committee or the Arbitration Board (as the case may be) of any claim to any right or interest in any land, and is present at a meeting of the Committee or the Arbitration Board at which the determination of that claim is under consideration, he shall, at the meeting, soon as practicable after the commencement thereof, disclose the fact and shall not take part in the consideration or discussion of, or vote on any question with respect to, the determination of that claim”.

18. Thus the statute recognizes that a member of a committee may have an interest, direct or indirect in a matter before them and gives guidance on how such a member is to conduct himself. In the case at hand, **I have gone through the objection proceedings which reflect that the interested party categorically stated in his opening statement that he was there, not as a chairman of the land committee but as a land owner within the adjudication section.** A closer perusal of the proceedings conducted by the 1st Respondent shows that the interested party took no part in the proceedings, deliberation or decision/judgment. Further, the Committee members present are recorded on the first page of the proceedings and the name of the interested party is not among them. I therefore find no basis of illegality, bias or lack of a fair hearing on the basis that the interested party is the chair of the Karama adjudication section.

19. On the question as to whether the exparte applicant was given sufficient time to prepare for the trial, I find that the records are self-explanatory, the reason being that he had a witness as reflected in the proceedings. Further, the interested party has given minute details of how parties were informed about the hearing, starting with the date of 7.2.2019 when the exparte applicant sought for an adjournment through an emissary, how the matter was re- scheduled to 14.2.2019 and both parties were present in court but matter was adjourned to the following day due to workload.

20. The exparte applicant did file a further supporting affidavit in response to the averments raised by the interested party. The contents of the said affidavit containing 18 paragraphs are devoted to his claim over the suit property. It is only in paragraph 13 that the exparte applicant gives a general response as follows;

“I maintain that I only heard of the said hearing through a third party who knew me and the allegation that I was served through a chief is a creation of the interested party...”.

21. To this end, I find that the 1st respondent had jurisdiction to handle the objection, and did not fail to give an opportunity to the ex-parte applicant to be heard, nor did it exhibit substantive and procedural unfairness. See Republic v District Land Adjudication and Settlement Officer, Igembe District Ex-Parte M'Aciita M'Mingaine & another [2016] eKLR.

22. It is apparent that the process leading to the decision of the 1st respondent dated 15/02/2019 was not evidenced to be illegal or unlawful as stated by the ex-parte applicant. What it shows is the dissatisfaction of the applicant in the decision that was made. That being so, **I conclude that the suit has no merits, the same is hereby dismissed with costs to the interested party.**

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 20.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE