



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC JUDICIAL REVIEW NO. 03 OF 2019

EDWARD NZIOKA KIMASIA.....1ST APPLICANT

JOSHUA MASENGE.....2ND APPLICANT

JOHN KIMOLO MUSYOKI.....3RD APPLICANT

SYOKAA MATUVA.....4TH APPLICANT

-VERSUS-

THE COUNTY DIRECTOR OF LAND ADJUDICATION

& SETTLEMENT (MAKUENI COUNTY).....1ST RESPONDENT

THE MINISTER HOUSING & LANDS

THROUGH THE DEPUTY COUNTY COMMISSIONER

KILUNGU SUB-COUNTY.....2ND RESPONDENT

-AND-

JOSEPHAT MWANIA KISUNA.....INTERESTED PARTY

JUDGEMENT

1. Before this Court for determination is the Notice of Motion dated 15th July, 2019 and filed on even date. It is brought under Order 53 Rule 3(1) of the Civil Procedure Rules and all other enabling provisions of the Law.

2. The Applicants are seeking judicial review orders as follows: -

i) **THAT** an order of *certiorari* do issue directed against the 1st and 2nd Respondents to bring forth before this Honourable Court for purposes of being quashed their judgment in their Land Appeal No. 52 of 2013 in respect of Land Parcel No. Wautu Adjudication Section 3758 and which judgment is dated and/or delivered on the 29th day of April 2019.

ii) **THAT** costs of this application be provided for.

3. The application is based on the statement dated 15th July, 2019 and the affidavit of Edward Nzioka Kimasia, sworn on the same date on behalf of the four Applicants. It is deposed therein that the Applicants were invited by the Deputy County Commissioner vide latter dated 23rd April, 2019 for the delivery of a judgment in respect of Appeal Case No. 52 of 2013. That Plot No. 3758 Wautu Adjudication Section was the subject of the said judgment. That following the delivery of the said judgment, the Applicants were dissatisfied with the outcome since the subject land was not awarded to them. That the Deputy County Commissioner gave consideration to extraneous matters which was not within his powers and hence, they have invited this Court to issue judicial review reliefs in the nature of *certiorari*.

4. Opposing the application is the Interested Party through the Replying affidavit sworn by Josephat Mwanja Kisuna on 7th November, 2019. He deposed therein that the substantive dispute over Plot No. 3758 began in 1976 when there was a wrongful encroachment of the boundary line separating Applicants' and the Interested Party's sections of the subject land. That between 1976 and 2013, there have been relentless

proceedings going on back and forth which recently culminated in the judgment of Appeal Case No. 52 of 2013 delivered on 30th April, 2019. That the 2nd Respondent herein did not fail to analyze the evidence presented before him and neither did he consider extraneous matters while dismissing the appeal before him. That the Applicants have not specifically pointed out the extraneous matters that were considered by the 2nd Respondent. Lastly, that the Applicants have not annexed the impugned judgment in respect of which they are now seeking judicial review orders as required by law.

5. The 2nd Respondent has also opposed the application vide the Replying affidavit sworn on its behalf and that of the 1st Respondent by Rebecca W. Ndirangu on 11th December, 2019. It is deposed therein that the Applicants filed an Appeal Case No. 52 of 2013 which was duly heard and determined by the Deputy County Commissioner exercising delegated jurisdiction from the Cabinet Secretary, Lands. That the Applicants participated throughout the proceedings without raising any procedural concerns and the judgment was delivered on 29th April, 2019. That the Applicants have not cited any procedural irregularities on the part of the Deputy County Commissioner to justify the judicial review proceedings herein. That the Applicants are raising serious issues of fact by way of judicial review which goes against the parameters set by the Court of Appeal in the case of **Municipal Council of Mombasa -Vs- Republic & Umoja Construction Ltd Civil Appeal No. 185 of 2001.**

6. Pursuant to the directions issued by Court on 11th August, 2020, only the Interested party filed submissions dated 25th November, 2020. He submitted therein that the application herein goes beyond the purview set for judicial review which is in contravention of the position of law taken in two cases which have been relied on namely: -

1) Dume Deri Mumbo & 19 others (suing on their behalf and on behalf of Wandarari Clan) -Vs- Cabinet Secretary of Lands, Housing & Urban Development & 6 others [2016] eKLR; and

2) Municipal Council of Mombasa -Vs- Republic & Umoja Construction Ltd Civil Appeal No. 185 of 2001

7. I have perused the parties' respective pleadings. In my assessment, one issue arises for determination: -

- ***Whether the Applicants have demonstrated with precision any irrelevant or extraneous considerations to vitiate the judgment of the Deputy County Commissioner?***

8. To begin with, I must point out that the Applicants did not annex a copy of the judgment they now wish to challenge. Undoubtedly, that impairs the effectiveness of the Applicants' case because that decision and the circumstances with which it was made, is the primary document from which they base their arguments.

9. To compound this omission further, the provisions of Order 53 Rule 7(1) of the Civil Procedure Rules, 2010 states as follows: -

(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

10. The above provision has a mandatory implication that the party who desires that any proceedings and subsequent decision be quashed vide an order of *certiorari* must before hearing of their application produce a copy thereof in the supporting affidavit to the application. In the substantive application herein, the Applicants have annexed as Exhibit "ENK1", the Deputy County Commissioner's letter dated 23rd April, 2019 inviting them for the delivery of the judgment which they are challenging now and Exhibit "ENK2" is a copy of the proceedings and decision of the Land Adjudication Committee in Case No. WTU/COM/162/2001 dated 2nd September, 2002. No reason has been provided by the Applicants as to why the proceedings and decision in Appeal Case No. 52 of 2013 was not annexed to the pleadings.

11. Failure to produce such proceedings renders a continuation of these proceedings a nullity by reason of the said defect. I ought to immediately strike out the instant application. The Court of Appeal in **Samson Kirerea M'Ruchu -Vs- Minister for Land & Settlement CA 21 of 1999** held as follows: -

"Compliance with the above provision is a precondition to seeking an order or certiorari. An applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of his Motion under Order Rule 3 of the Civil Procedure Rules. It would appear to us that the failure to comply with Rule 7 (1) above, does not render the application incompetent ab initio but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the Motion for an order of certiorari."

12. Nonetheless, the Respondents and the Interested Party have provided saving grace to the Applicants by annexing a copy of the impugned decision of the Deputy County Commissioner. The Court of Appeal in **Republic -Vs- Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR** held as follows on the need for a court to ascertain itself of the existence of an impugned decision before granting an order of *certiorari*: -

"The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August, 2005 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August, 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December, 2004 when the court had not determined that the decision made on 3rd December, 2004 was in existence. A court of law should not descend into the realm of

speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned Judge erred and it was not appropriate to issue the judicial review orders in this matter.”

13. That being said, I shall proceed to examine the application on merit as to whether an arguable case is borne out on whether extraneous considerations were taken by the Deputy County Commissioner while making his decision. As correctly pointed out by the Applicants, the taking into consideration of irrelevant grounds when making an administrative decision is sufficient ground for the issuance of an order for judicial review. The learned Judges Nyamu and Ibrahim JJ aptly held the above view in the case of **Republic and others -Vs- Attorney General and another [2006] 2 EA 265 (HCK)** as follows: -

“We again hold that the taking into account an irrelevant consideration invites this Court’s intervention in Judicial Review.”

14. Learned Counsel for the Respondents and the Interested Party in defending the impugned decision of the Deputy County Commissioner have relied on the Court of Appeal decision in **Municipal Council of Mombasa -Vs- Republic & another [2002] eKLR**, wherein it was held as follows: -

“Judicial review is concerned with the decision-making process, not with merits of the decision itself... 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 made 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 he 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 there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

15. The Court of Appeal further held as follows in the case of **Kenya Revenue Authority & 2 others -Vs- Darasa Investments Limited [2018] eKLR**: -

“The need to take into account relevant considerations and ignore irrelevant facts in the decision making has close nexus with the need to act reasonably. This much was appreciated by Lord Greene MR in Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223 thus, "For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.”

16. I have scrutinized the decision of the Deputy County Commissioner and these are my views. I have noted that due process was accorded to the parties in the hearing of the appeal. The Applicants herein who were the Appellants then were allowed to call witnesses and both sides were thoroughly cross-examined. I do not hold the view held by the Applicants that the Deputy County Commissioner’s consideration of erstwhile cases either through the land adjudication dispute resolution hierarchy or through the court legal system was irrelevant consideration of matters. In fact, she even went the extra mile to visit the subject land. In any event, that was the only way she could learn the heritage of the subject land.

17. In sharp contrast, the Applicants herein have not provided any detailed grievance on which aspects of the proceedings or the decision the Deputy County Commissioner gave extraneous consideration to. I find the entire application to be without much substance as to invite this Court to issue the order of *certiorari* sought.

18. I, therefore, find that the Applicants have failed to demonstrate an arguable case to warrant a grant of the order of *certiorari* sought in the substantive Notice of Motion to remove into this court for purposes of being quashed the decision of the Deputy County Commissioner delivered on 30th April, 2019. Based on the foregoing the application dated 15th July, 2019 is hereby dismissed. Each party shall bear its own costs.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 28TH DAY OF APRIL, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. G. Kwemboi.