REPUBLIC OF KENYA

IN THE ENVRONMENT & LAND COURT

AT KITUI

MISC CIVIL APPLICATION NO.26 OF 2021

(FORMERLY MACHAKOS MISC APPLICATION NO. 12 OF 2020)

IN THE MATTER OF AN APPLICATION BY JOSEPH MULWA NDENA FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284

IN THE MATTER OF PLOT NO.1192 MWAMBIU ADJUDICATION SECTION

IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES AND

ALL OTHER ANABLING PROVISIONS AND PROCEDURES OF LAW

BETWEEN

JOSEPH MULWA NDENA.....APPLICANT

-VERSUS-

THE MINISTER OF LANDS (through the District Commissioner Mwingi East sub-county

Kitui County Appeal No.549 of 2019).....1ST RESPONDENT

DIRECTOR OF LANDS ADJUDICATION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MWENDWA ISIKA..... INTERESTED PARTY

JUDGEMENT

1. The application before the Court is a Judicial Review Application dated 22nd May 2020 brought under Order 53 Rule 3 (1) of the Civil Procedure Rules and Sections 8, & 9 of the Law Reform Act CAP 26 Laws of Kenya and the same seeks the following orders of:

1. **Certiorari directed to the 1st Respondent to bring to the High Court to be quashed the 1st Respondent's decision(through Deputy County Commissioner Mwingi East Sub-County, Kitui County) by the delegated powers dated 20th November 2019 dismissing the Applicant's Appeal No.549 of 2015 and upholding the decision of the Land Adjudication Officer and Arbitration Board awarding Plot No.1255 to Mwendwa Isika as owner which formal notice of finalization of Minister's decision was communicated to the Applicant on 20th November 2019.**

2. **Prohibition directed to the 1st Respondent, the Director of Lands Adjudication and Chief Lands Registrar Nairobi, their servants and/or agents or others whomsoever from in any way dealing with Plot No.1192 Mwambiu Adjudication Section**

and/or from implementing the award of the Minister aforesaid.

3. **That the costs of this Application be provided for.**

The Applicant's Case and Submissions

2. The Ex parte Applicant's verifying affidavit and the Statement set forth the grounds in support of the application and he states that the Interested Party filed a dispute with the Adjudication Committee over **Plot. No.1192 Mwambiu Adjudication Section** and that the Interested Party was awarded the plot.The Applicant then instituted objections before the Land Adjudication Board who upheld the decision of the Adjudication Committee.

3. The Applicant filed an appeal to the Minister Appeal No.549 of 2015 which was heard and determined by the Deputy County Commissioner Mwingi East Sub County, Kitui County and the same was dismissed.The Applicant states that the finding and the ruling by the Minister failed to consider material particulars pertaining to the history of the suit land.

4. In his written submissions, the Applicant stated that his Appeal to the Minister was dismissed on the grounds that he did not bring any letter/document to establish his claim of ownership over the land in question. He submitted that neither did the Interested Party bring any proof of ownership, therefore the decision was not balanced and had no merit.

5. The Applicant submitted that the Deputy County Commissioner failed to consider his evidence that his kinsmen/family had buried a total of six(6) people on the disputed land. He also failed to consider the fact that the Interested Party and/or predecessors had been temporarily given the land by one Ndena Nzii(Deceased) the Applicant's father in 1961 who left the land in 1966 and never laid claim to it until Isika Mwendwa(The Interested Party's father) passed away.In addition, the Applicant submitted that Plot No.1192 Mwambiu Adjudication Section was originally a part of Plot No.763 owned by the Applicant's father.

6. In light of the above, the Applicant submitted that the rules of natural justice demand that an arbiter consider all the evidence laid before him and the Minister failed to do so and thereby acted in excess of his powers and contrary to the rules of Natural Justice in reaching his decision.

7. Finally, the Applicant concluded that the right to property is safeguarded under Article 40 of the Constitution and the Minister failed to uphold the right. The Applicant relied on the decision in **ELC Judicial Review No.6 of 2019 Republic vs National Land Commission & Another Ex Parte Farmers Choice Limited (2010)eKLR.**

The Respondents' Case and submissions

8. The Respondents filed Grounds of Opposition dated 4th February 2021 opposing the Judicial Review Application and stated that the 1st Respondent had the requisite jurisdiction to hear and determine the matter at hand by virtue of delegated powers granted to him by the Minister. The Respondent further stated that the application offends the mandatory provisions of Order 53(7) which provides that for an order of certiorari to issue a copy of the decision has to be lodged with the Registrar and verified by an Affidavit.

9. That the Applicant being aggrieved with the decision made in Appeal No.549 of 2015 by the Minister through the Deputy County Commissioner ought to have gone for an Appeal but not to come under Judicial Review.That the current application is an appeal disguised as a Judicial Review application and the grounds upon which this application is premised are grounds of appeal and not judicial review. It is claimed that the application is frivolous, vexatious and an abuse of the court process and devoid of any merit and the orders sought should not be granted.

10. In their submissions, the Respondents have set out and submitted on the following issues for determination:

1) Whether the Applicant is entitled to file an Appeal instead of Judicial Review Orders.

2) Whether the matter is *res judicata*

3) Whether the instant application is frivolous, vexatious and an abuse of court process.

4) Whether an order of certiorari should be issued against the 1st Respondent's decision.

11. Regarding whether the Applicant is entitled to file an appeal instead of Judicial Review Orders, the Respondent submitted that the application herein is wrongly instituted and should have been filed as an appeal instead. They cited the case of **National Bank of Kenya Limited vs. Ndungu Njau (1997)eKLR** where the court held that a review is only granted when the court considers it necessary to correct an apparent error or omission.

12. The Respondents submitted that the suit does not satisfy the test for judicial review orders to issue and relied on the decision in **Republic v Attorney General & 4 others Ex parte Diamond Hashim Lalji and Ahmed Hasham, and Municipal Council of Mombasa vs Republic;Umoja Consultants** where the court found that the Applicant has not demonstrated that the decision is tainted with illegality, irrationality and procedural impropriety. Courts can only interfere where there is non-compliance of the law.

13. The Respondents also relied on the decision in **Speaker of National Assembly vs Karume** where the court held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be

strictly followed. The Respondents therefore state that the right Appeal mechanism was followed under Section 29 of the Land Adjudication Act and hence no orders should issue.

14. The Respondents submitted that the matter is *res judicata and* that it is trite in law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which in its nature is final and conclusive, the judgment or ruling is *res judicata.* The judgment can be pleaded by way of estoppel in the subsequent case. They submitted that this matter is clearly *res judicata* and has been determined to finality and should not be entertained by this Court.

15. The Respondents further submitted that the framing of this application as a judicial review is wrong and does not change its colour as the same seeks orders of appeal and relied on Hon. Mativo J's ruling in **Republic v Commissioner of Domestic Taxes; Panafina Airflo Limited (Ex Parte) (2019) eKLR** where the Honorable Judge stated that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused.

16. Finally, on whether an order of certiorari should be issued against the 1st Respondent's decision, the Respondents answered in the negative and cited the case of **George Muriithi Ndirangu v Chairman Business Premises Rent Tribunal & another [2016] eKLR** where the court found that the scanty material deposed to in the Verifying Affidavit cannot be the basis of grant of orders in the nature of judicial review and also **East African Community vs Railways African Union(Kenya) and others(No.2)Civil Appeal No.41 of 1974(1974)EA 425** where the Court held that for a prerogative order to be granted, the person seeking it must show that it is essential as they cited the decision in **Republic v Kenya Power & Lighting Company Ltd & another [2013] eKLR** to the effect that the actual sins of a tribunal must be exhibited for judicial review remedies to be granted.

17. The Respondents further relied on the decision in **Republic vs Public Procurement Administrative Review Board & 2 others Ex parte Rongo University (2018) Eklr** where the court held that the grant of the orders of certiorari, mandamus and prohibition is discretionary. In addition, the decision in **Martin Nyaga Wambora v Speaker of the Senate(2014)eKLR** where the court found that the common law principles of no man shall be a judge in his own cause(*nemo judex in causa sua*) and no man shall be condemned unheard *(audi alteram partem)* are now cardinal constitution principles and not merely common law derivatives.

The Interested Party's Case and submissions

18. The Court directed that this matter proceeds by way of written submissions on 9th February 2021. When the suit came up for mention to confirm filing of submissions on 7th February 2022, the court noted that though the Interested Party claimed to have filed a replying affidavit opposing the Judicial Review Application no copy of the affidavit was in the court file. The Interested Party was directed to provide the court with a copy of the filed replying affidavit and a receipt for the same and to also file written submissions within fourteen days from the said date. From the court record a replying affidavit was forwarded to court filed on 22nd September 2021 in Machakos Misc Civil Application No 13 of 2020 between **Joseph Mulwa Ndena (Applicant)** and **the Minister of Lands (Through the District Commissioner Mwingi East Sub-County Kitui County Appeal No. 554 Of 2019), Director of Lands Adjudication, The Honorable Attorney General (Respondents) and Musembi Mbai (Interested Party).** The said suit when transferred to Kitui ELC Court was allocated number Misc Civil Application No. 25 of 2021. The filed documents therefore did not relate to this suit which was formerly Machakos Misc Application No. 12 Of 2020 and was upon transfer to Kitui ELC court allocated number 26 of 2021. In the circumstances herein,the documents will be disregarded. No written submissions were filed.

Analysis and Determination

19. Having considered the Notice of Motion herein, the verifying affidavit, the statement and all documents filed in reply to the same, all the documents and submissions on record, I opine that the issue for determination is whether the Applicant's application met the threshold for grant of judicial review orders.

20. The first issue that is noted is that the Applicant has failed to produce a copy of the decision that is the subject of the proceedings hereinand he has further not or accounted for his failure to do so to the satisfaction of the Court.The first order sought is for ***"****Certiorari directed to the 1st Respondent to bring to the High Court to be quashed the 1st Respondent's decision (through Deputy County Commissioner Mwingi East Sub-County, Kitui County) by the delegated powers dated 20th November 2019 dismissing the Applicant's Appeal No. 549 of 2015 and upholding the decision of the Land Adjudication Officer and Arbitration Board awarding Plot No.1255 to Mwendwa Isika as owner which formal notice of finalization of Minister's decision was communicated to the Applicant on 20th November 2019."* The second order sought is for Prohibition which order is dependent on the first order having been granted.The said orders sought relate to appeal number 549 of 2015.

21. The Applicant swears in his verifying affidavit sworn on 14th April 2020 at paragraph 5 and 6 states;

> *"THAT I appealed to the Minister in Appeal No. 549 of 2015 and the appeal was heard and determined by the Deputy County Commissioner Mwingi East Sub County, Kitui County. THAT on 20th November 2019 or thereabouts the Minister communicated to me the finalization of the Ministers decision dismissing my appeal and I sought for the proceedings findings and verdict of the Minister in appeal No 549 of 2015"*

22. The Court is of the view that the Applicant was notified of the challenge to his application on the ground of failure to file in court the impugned decision through the grounds of objection filed on behalf of the Respondents where the Respondent stated that the application offends the mandatory provisions of Order 53(7) which provides that for an order of certiorari to issue a copy of the decision has to be lodged with the Registrar and verified by an Affidavit. Such failure to file the decision subject matter of the application for judicial review renders the application incompetent following the provisions of Order 53(7) of the Civil Procedure Rules which provide that:

> *"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. (2) Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court."*.

30. It has been severallyheld that this provision is mandatory and failure to comply with Order 53 Rule 7(1)renders the proceedings incompetent. In the case of **Republic Vs Ruiru District Land Disputes Tribunal & Another ExParte Lucia Waithira Muiruri & amp; Another [2014] eKLR** the court observed that:

> *"I am of the view that where the ex parte applicant for any reason is unable to exhibit thedecision sought to be quashed, he ought to satisfy the Court on his failure to exhibit thedecision which decision is required to be verified by affidavit with the registrar. Failureto comply with this mandatory provision similarly rendered the application incompetentsince the Court cannot be in a position to find whether there is in fact an order capable of being quashed and if it exists whether the application was made within the stipulatedtime."*

23. The rationale behind Order 53 Rule 7 is to enable the court satisfy itself of the existence, nature and contents of the order and avoid acting in vain or giving an order that may end up being contradictory and an embarrassment to the court. This was ably captured by Wendoh, J in **Waweru Vs District Veterinary Office, Maragua & Another [2006] 1 KLR (E & L)**.

24. Further, 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 for itself of the existence of orders before granting an order of certiorari-

> *"The learned judge in his judgment was correct in stating that the court cannot act in vainagainst a non-existent decision. There was no decision or letter dated 24th August, 2005 thatcould be called and removed into the High Court to be quashed. This being so, the learned judgeerred 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 inexistence. A court of law should not descend into the realm of speculation. The decision to bequashed must first be ascertained and determined to be in existence. This is the rationale forcalling 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".*

Based on the foregoing reasons I find that the Notice of Motion dated 22nd May 2020 is incompetent and the same is hereby dismissed with Costs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 8TH DAY OF MARCH, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and online in the presence of-

C. Nzioka.....Court Assistant

No attendance.....for the Ex Parte Applicant

Chimau State Counsel.....for the Respondent

Mbaluka.....for the Interested Party