



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC JUDICIAL REVIEW CASE NO. 10 OF 2017

FORMERLY MERU ELC JUDICIAL REVIEW CASE NO. 22 OF 2013

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....1ST RESPONDENT

LAND REGISTRAR CHUKA LAND REGISTRY.....2ND RESPONDENT

MUNENE GAICHU KIREGU.....INTERESTED PARTY

DR. STEPHEN KANYARU M'IMPWIEX-PARTE APPLICANT

JUDGMENT

1. This Judicial Review application is dated **28th August, 2013** and seeks orders:

1. That this honourable court be pleased to grant an order of Mandamus to compel the Director of Land Adjudication and Settlement and the Land Registrar Chuka Lands Registry to follow decisions of the committee, Land Arbitration Board, the Adjudication Officer resting with the decision of the Minister and act in terms of the provisions of section 142 and 143 of the Registered Land Act (repealed) and Section 79 and 80 of Land Registration Act 2012 and rectify the register of Land Reference No. THARAKA/NKONDI "A"/1855 and enter the name of the Applicant DR. STEPHEN KANYARU M'IMPWI as the proprietor of the same.

2. That costs of this application and the chamber summons herein previously filed be provided for.

2. The statement of facts which spawned this application is dated **5th August, 2013** and is reproduced in full herebelow:

STATEMENT OF FACTS

1. The applicant is **DR. STEPHEN KANYARU M'IMPWI** of P. O. Box 368 MERU.

2. The 1st respondent is the director of Land Adjudication and Settlement and his address for service is Nairobi.

3. The 2nd respondent is the Land Registrar Chuka and his address for service is Chuka Town.

4. The respondents have neglected to rectify the register of L.R. No. THARAKA/NKONDI "A"/1855 and implement the Minister's decision.

RELIEF SOUGHT

5. An order of mandamus to compel the 1st respondent to follow the decisions of the committee, arbitration board, the adjudication Officer and finally the minister and rectify the register of land reference No. THARAKA /NKONDI "A"/1855 and enter the name of the applicant Dr. STEPHEN KANYARU M'IMPWI as the proprietor of the same.

6. GROUND ON WHICH THE APPLICATION IS BASED

- a) That by the time the final order was given by the minister L.R. No. 1477 had been sub-divided into 1477 and 1855 as ordered by the arbitration board.
- b) That the letter written by the director of Land Adjudication and Settlement Officer did take care of the sub division.
- c) That to implement the minister's decision the rectification of the register of land reference No. THARAKA/NKONDI "A"/1855 is necessary.
- d) That the respondents have neglected or refused to act in accordance with the law.
- e) That the registration of land reference No. THARAKA/NKONDI "A"/1855 is now in error, unlawful and wrongful.
- f) The basis of the application is to prevent an illegality being perpetrated.

DATED AT MERU THIS 05TH DAY OF AUGUST, 2013

MAITAI RIMITA & CO.

ADVOCATES FOR THE APPLICANT

3. This application was canvassed by way of written submissions.
4. The ex-parte applicant's written submissions are reproduced herebelow.

EX-PARTE APPLICANT'S SUBMISSIONS

My Lord this matter had been filed in Meru Court but was transferred to this court.

After leave to file the application was granted the ex-parte applicant made the substantive application and made the following prayer:

1. That this honourable court be pleased to grant an order of Mandamus to compel the Director of Land Adjudication and Settlement and the Land Registrar Chuka Lands Registry to follow decisions of the committee, Land Arbitration Board, the Adjudication Officer resting with the decision of the Minister and act in terms of the provisions of section 142 and 143 of the Registered Land Act (repealed) and section 79 and 80 of Land Registration Act 2012 and rectify the register of Land Reference No. THARAKA/NKONDI "A"/1855 and enter the name of the applicant DR STEPHEN KANYARU M'IMPWI as the proprietor of the same.

2. That costs of this application and the chamber summons herein previously filed be provided for.

The application your Lordship was supported by grounds on the statement of facts and the verifying affidavit used at the leave stage as the procedure requires.

We fully rely on the said statement of facts, the verifying affidavit and the exhibits.

My lord this is a simple matter which has been compounded and made difficult by land officers after they made an error and technical mistake.

A. HISTORY OF THE MATTER

My lord it is necessary to state briefly what the supporting material show so that the ex-parte applicant's case can be understood.

The ex-parte applicant owned land at THARAKA/NKONDI "A" which measured 20 acres.

Upon adjudication this land was marked as land reference No. 1477.

The Interested party filed an objection before the adjudication committee claiming part of the land.

The committee dismissed the Interested party's objection. He appealed to the arbitration board who awarded 10 acre of the land to the Interested party and the 10 acres were sub-divided from the main land and given No. THARAKA/NKONDI "A"/1855.

The ex-parte applicant filed an objection in what was known as A/R but lost to the Interested party.

The ex-parte applicant appealed to the minister for lands who awarded the whole land to the ex-parte applicant.

After the decision by the minister the parties had no further dispute and the ex-parte applicant developed the land fully. To this day parties

have no dispute on the ground as they accepted the minister's decision.

However, when the title deeds of the area were ready the ex-parte applicant discovered that the minister's decision had not been implemented. The relevant offices were contacted but they all advised the ex-parte applicant to move to court. This is why this case is before your lordship.

B. THE PRAYER

The prayer your lordship is clear. It is a prayer for an order of mandamus to compel the respondents to rectify the register to give effect to the minister's decision.

The respondents had powers under sections 79 of Land Registration Act to do the said rectification.

However, the court can order such rectification and the respondents could proceed under section 80 of the said Land Registration Act.

My lord as was said by your brother Justice Onyancha in Republic versus minister for local government & another ex-parte Mhahima.

“13. The order of mandamus is supposed to compel the performance of a public duty which is by law imposed on a person or body of persons and lies if the person fails to perform the duty to the detriment of a party who has a legal right to expect such a duty to be performed. The order of mandamus therefore lay against the town clerk to compel him to perform his lawful duties.”

Our submission is that the ex-parte applicant herein has a legal right and expects the respondents to perform their duty and put things right. They have failed to perform that duty to the detriment of the ex-parte applicant. This court should intervene as prayed.

C. FAILURE BY THE RESPONDENTS TO OPPOSE THE APPLICATION

It is worth-noting that the respondents have not opposed the instant application either by way of a replying affidavit or grounds of opposition. We may say that the ex-parte applicant's grievance against the respondents remain uncontroverted and unchallenged.

D. FAILURE BY INTERESTED PARTY TO OPPOSE THE APPLICATION

The Interested party has been served from the word go and severally due to the strictness of this court. He appears to have known the truth and accepted it. I think he is now considering us a big brother to his peace. But as it is now he has not opposed the application.

E. CONCLUSION

We humbly pray that the ex-parte applicant be given his prayer.

We so pray on behalf of the ex-parte applicant

We have attached the following for court's perusal and consideration.

(a) REPUBLIC V/S MINISTER FOR LOCAL GOVERNMENT & ANOTHER (2002) 2KLR 557.

DATED AT MERU THIS 11TH DAY OF OCTOBER, 2017

MAITAI RIMITA & CO.

ADVOCATES FOR THE EX-PARTE APPLICANT

5. The Respondent's written submissions are reproduced herebelow.

Respondent's submissions

May it please your Lordship.

We submit on behalf of the respondent as follows:-

The ex-parte applicant filed the Notice of Motion dated 28th August, 2013 seeking for an order of Mandamus to compel the respondents (sic) rectify the register of parcel of Land No. THARAKA/NKONDI A/1855 and enter the name of the ex-parte applicant.

Your lordship, we submit that Judicial Review (sic) are discretionary. They can be denied. Your Ladyship (sic) for the Court to exercise its discretion the ex-parte applicant ought to place before the court sufficient evidence to show that Rules of Natural Justice were not adhered to and it is our submission that having been granted an opportunity by the Respondent to call witnesses and even have a scene visit by the Respondent on the disputed land before the decision was made is an indication that he was given a fair hearing abiding to the rules of Natural

Justice. Your Ladyship, we submit that the ex-parte applicant has failed to show this court why it should exercise its discretion and it's our submission that the Notice of Motion dated 28th August, 2013 lacks merit and is an abuse of the court process and the same should be dismissed with costs to the respondent.

Your Lordship to support our case we rely on the case of **Republic –vs- NAIROBI CITY COUNTY & HANNAH WAITHIRA GATUNDU EX-PARTE BONIFACE WACHIRA GICHIMU [2016] eKLR** (copy annexed).

Your Lordship, we further submit that Judicial Review is concern (sic)with the decision making process and not with the merits of the decision itself. This was held by Justice G. V Odunga in the case **EX-PARTE BONIFACE WACHIRA GICHIMU (supra)**. The ex-parte applicant herein is challenging the merits/results of the decision and not the decision making process.

Your Lordship, in conclusion therefore we submit that the ex-parte applicant did not file any appeal neither was there any dispute over parcel No. 1855 as against the ex-parte applicant and any other party, in the arbitration case No. 8/93 on parcel No. 1477 created a new parcel 1855. Parcel No. 1477 remained in the names of the ex-parte applicant while the new parcel 1855 was registered in the name of the interested party herein. The ex-parte applicant lodged an appeal against his own parcel that is 1477 instead of an appeal on the new parcel 1855 which emanated from parcel No. 1477. The ex-parte applicant has filed to implore to this court that the orders sought are merited and that this honourable court do find that the application for Judicial Review dated 24th April, 2016, 28th August, 2013 is unmerited, and abuse of the court process and dismiss it with costs to the respondents. The ex-parte applicant is on a forum fishing expedition he ought to have appealed against 1855 and not his own 1477.

Your Lordship, we shall also rely on the case of **REPUBLIC –VS- CITY COUNCIL OF NAIROBI EX-PARTE RAJIN VELJI SHAH [2014] eKLR** (copy attached) in support of our submissions.

Your Lordship this is our humble submission and prayer.

We so pray

DATED AT MERU THIS 11TH DAY OF APRIL, 2018

J. M. KIONGO

SENIOR LITIGATINO COUNSEL,

FOR: HON. ATTORNEY GENERAL & DEPARTMENT OF JUSTICE.

6. The ex-parte applicant proffered a response to the respondent's submissions which takes the following form.

EX-PARTE APPLICANT'S RESPONSE TO THE RESPONDENT'S SUBMISSIONS

My Lord we wish to respond to the Respondents' submissions because the same are a complete misdirection and if followed will do injustice.

A. WHAT LAND WAS IN DISPUTE BEFORE THE ARBITRATION BOARD

Your Lordship, the proceedings are clear. What was in dispute was Land Parcel No. THARAKA/NKONDI "A"/1477as a whole.

The arbitration board made a decision and took away part of it and of cause later gave it a new number which is land reference No. THARAKA/NKONDI "A"/1855.

The ex-parte applicant challenged this decision before the minister and the minister decided that the whole of land reference No. THARAKA/NKONDI "A"/1477 which was the subject of the decision of arbitration board was the property of the ex-parte applicant.

The respondent cannot at this stage rely on technicalities of the reference numbers as land reference No. THARAKA/NKONDI "A"/1855 was not in existent (sic) and not subject to the dispute as it did not exist.

After the decision the parties respected the same and occupied their lands as decided.

It is only in the books were (sic) the error remains because of poor understanding by the respondent.

B. THE APPLICATION

The ex-parte applicant's application seeks the orders of this honourable court to put things right.

Since the respondent had rushed to create new numbers we are saying that instead of having them compelled to return it to the old number it can be transferred to the ex-parte applicant. On the ground the two parcels of land are adjacent and are occupied by the ex-parte applicant. The dispute was finalized and parties should be allowed to leave (sic) in peace instead of creating a new dispute which is now being brought

up through a technicality.

We pray that the application be allowed.

DATED AT MERU THIS 7TH DAY OF MAY, 2018

MAITIA RIMITA & CO.

ADVOCATES FOR THE EX-PARTE APPLICANT.

7. The Interested party did not oppose this application.

8. The issue for determination, in my view, is only one. It is if or if not the ex-parte applicant is entitled to an order of Mandamus to compel the Director of Land Adjudication and Settlement and the Land Registrar, Chuka Land Registry to implement the decision of the Minister, rectify the register of land Reference No. THARAKA/NKONDI "A"/1855 and enter the name of the applicant DR. STEPHEN KANYARU M'IMPWI as the proprietor of the suit land.

9. The Interested party did not oppose this application.

10. The ex-parte applicant has proffered the Case of Republic Versus Minister for Local Government and Another (2002) 2KLR 557 to buttress his assertions.

11. The Respondent has proffered the case of **Republic AND Nairobi City Council & Another Ex-parte Boniface Wachira Gichimu** in support of his submissions.

12. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. The case of Republic Versus Minister of Local Government & Another (op.cit) proffered by the ex-parte applicant is a good exposition of the principle that an order of mandamus is tenable to compel a public officer to undertake legally mandated duties which he has failed to perform. It is veritably relevant to this application. The case of Republic AND Nairobi City Council and Another Ex-parte Boniface Wachira Gichimu (op.cit) is a good exposition of the principle that for a person seeking an order of mandamus to succeed, that person must satisfy the court that the action he seeks to compel the respondent to perform is a duty which the respondent is under a duty whether at common law or by statute to perform.

13. The respondent has submitted that the issuance of Judicial Review Orders is a discretionary function of this court. However, a court of law must not exercise its discretion capriciously or will-nilly. For example, there must be a compelling reason to deny an applicant a judicial review order when it is deserved. I opine that the submissions filed by the Respondent are by and large irrelevant to this matter. At least, the first part of the submissions seems to have been plagiarized from submissions concerning another suit.

14. This is a straight forward matter. The parties went through the whole gamut of the statutory mandate of ascertaining ownership of land rights. The process ended with the decision of the minister which found in the ex-parte applicants favour. Substantial justice as decreed by Article 159 (d) of the Constitution of Kenya requires that technicalities do not come in the way of according Kenya Citizens and other deserving residents justice that is unnecessarily delayed. As the minister determined that the whole of the land comprised in Land Reference No. THARAKA/NKONDI "A"/1855 belongs to the ex-parte applicant, I find that there is merit in the land being registered in the name of the ex-parte applicant. This will implement the decision of the minister which the respondents have a legal duty to perform.

15. In the circumstances,

(a) this court grants an order of Mandamus compelling the DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT and THE LAND REGISTRAR CHUKA LANDS REGISTRY to follow decisions of the Committee, Land Adjudication Board, the Adjudication Officer resting with the decision of the Minister and act in terms of the provisions of Sections 142 and 143 of the defunct Registered Land Act and Sections 79 and 80 of the Land Registration Act 2012 and rectify the register of Land Reference No. THARAKA/NKONDI "A"/1855 and enter the name of the applicant DR STEPHEN KANYARU M'IMPWI as the proprietor of the same.

(b) As the Interested Party did not oppose this application, no costs are awarded against him.

(c) As regards the Respondents, I exercise my discretion and also award no costs against them.

16. It is so ordered.

Delivered in open court at Chuka this **3rd of July, 2018** in the presence of:

CA: Ndegwa

Muchiri for Ex-parte Applicant

Kiongo absent for the Respondents

P.M. NJORGE

JUDGE