



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JR NO. 24 OF 2017

(FORMERLY MISCELLANEOUS APPLICATION. NO. 1 OF 2012)

IN THE MATTER OF AN APPLICATION BY ROSEMARY KALIUNTU ISAIAH FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

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

AND

IN THE MATTER OF LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF THE APPEAL TO THE MINISTER LAND CASE NO. 32 OF 2011 AND IN THE MATTER OF LAND PARCELS NOS. 485 AND 1566 KIWENGO KANJOO ADJUDICATION SECTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

MINISTER/ DISTRICT COMMISSIONER

IGEMBE SOUTH DISTRICT.....RESPONDENT

JOSEPH NJORO 1ST INTERESTED PARTY

REUBEN MUTUMA MWIRABUA..... 2ND INTERESTED PARTY

THIAKUNU MWIRABUA..... 3RD INTERESTED PARTY

EX-PARTE ROSEMARY KALINTU ISAIAH

JUDGMENT

1. This JUDICIAL REVIEW Motion was filed on 13th February 2012, whereby the Applicant is seeking for judicial review orders of certiorari to issue to remove to this court and quash the proceedings, findings and decision/ruling of the respondent herein Igembe South District Commissioner D.Y. KIPKEMEI (acting for and/or on behalf of the minister) in the Appeal to the Minister Land Case No. 32 of 2011 made in respect of Land Parcels Nos. 485 and 1566 in Kiwengo Kanjoo Adjudication Section delivered and dated 10th August, 2011. Costs have also been prayed for.

2. The grounds in support of the motion are set out in the statements of facts and verifying affidavit of the ex-parte Applicant Rosemary Kalintu Isaiyah sworn on 10th January 2012. The ex-parte Applicant claims that she had land disputes with the 1st and 2nd Interested Parties in respect of land parcels Nos. 485 and 1566 Kiwengo/Kanjoo Adjudication Office vide objections Nos. 91 and 92. The objections were settled

vide decisions dated 20th August, 2009 (*see annexures “RKI 1” and “RKI 2”*) but the 3rd Interested Party was not a party in any of the said disputes. The latter purportedly appealed to the Minister against the decisions made in the said disputes. The appeal was heard and determined by the District Commissioner –Igembe South District (D.Y. KIPKEMEI) for and on behalf of the Minister (*see annexure “RKI 3”*). The Exparte-Applicant avers that the Respondent (District Commissioner) did not give her a chance to cross-examine the said witnesses which denial amounts to a direct affront to the rules of natural justices. She also claims that the District Commissioner had no jurisdiction to hear an appeal lodged by the appellant who was not a party in the proceedings.

3. The motion was opposed by the 3rd interested party vide his replying affidavit sworn on 23rd September 2013. He avers that on or about the 15th August, 1997, he entered into a sale of land agreement whereby he lawfully purchased land measuring 8.00 Acres from one Jacob Kirai Murungi at an agreed consideration of Kshs. 80,000/= . By then the land was within Atheru Ndolesi Adjudication Section in Igembe North District and the same was not adjudicated. When the external boundaries changed and Igembe South District created, the said parcel of land then fell under Kiengu/Kanjoo Adjudication Section now in Igembe South District from Atheru Ndolesi Adjudication Section within Igembe North District and the said land was re-demarcated.

4. The 3rd Interested party further states that 1st and 2nd Interested Parties were in the adjudication committee and they allocated land parcels No. 1566 and No. 485 to themselves and they then transferred the land to the ex-parte applicant to defeat his interests on the said land. Objections Nos.91 and 92 in respect of the said land parcels between the ex-parte Applicant and the 1st and 2nd Interested Parties were then filed to pre-empt the 3rd Interested Party's interest on the said land.

5. The Respondent filed grounds of opposition averring that the motion is misconceived and is mischievous.

6. The 1st and 2nd interested parties did not file any response to the motion.

Submissions.

7. The ex-parte Applicant submitted that the 3rd Interested Party came from nowhere and preferred an appeal to the minister under Section 29 of the Land Adjudication Act. It is further submitted that the dispute in the AR Objection cases was between the Exparte Applicant and the 1st and 2nd interested parties. Finally, it was submitted that there was no jurisdiction to entertain the appeal. It was averred that a person ought to appeal within 60 days of which the 3rd Interested Party failed to do so. The Ex-parte Applicant therefore claims that there was no competent appellant, appeal and that the district commissioner acted ultra vires.

8. The Respondent has submitted that under Section 29 of CAP 284 any person affected by the register may appeal and Section 26 of the same Act does not limit contestants to only those involved in objection proceedings; provided a person can demonstrate that entries in the register are prejudicial then he is given the opportunity to ventilate his grievances. The Respondent contends that there was nothing irregular in the appeal as the proper process was followed. Further, Respondent has submitted that the ex-parte Applicant did indeed participate in the proceedings for she was a witness of the then Respondents.

9. The 3rd interested party has submitted that Judicial Review orders are discretionary and given the arguments herein, he desires the court to find that the motion lacks merit and is insincere.

10. The 3rd Interested Party relied on the case of **Herold Kidem Mganga & Another vs. Constance Mwai HCCA NO. 244 of 2014**, to buttress his averment that the ex-parte Applicant has not shown any sufficient reason to warrant the orders sought.

11. For the Respondent, it has been submitted that any person affected by the register is allowed to lodge an appeal to the minister, and that section 29 of cap 284 even guides the minister to make such orders as he thinks to be **JUST**.

Determination

12. 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 that;

“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 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.”

13. Consequently, the purpose of judicial review is not to review the decision but the decision making process. This was so stipulated by the Court of Appeal in the case of **Republic Vs. Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eKLR**, where it was held that; ***“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....”***

14. The ex-parte Applicant seeks orders that the appeal to the Minister Land Case No. 32 of 2011 be quashed based on the grounds that the decision reached was against the rules of justice for there was procedural impropriety, denial of fair hearing and breach of

legitimate expectation and bias.

15. I find it necessary to reproduce the provisions of 29 of the Land Adjudication Act where it is stated as follows;

“(1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall—

(a) Alter the duplicate adjudication register to conform with the determinations; and

(b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

(4) Notwithstanding the provisions of Section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this Section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.”

16. In addition, the Land Adjudication Regulation 4 (4) provides that;

“Subject to the leave of the Minister being first obtained, the appellant or any other party to an appeal may attend before the Minister either in person or by dully authorized agent and shall be entitled to call witnesses.”

17. Against this background, I am satisfied that the District Commissioner acted within his powers which were delegated to him by the Minister and was entitled to hear parties and their witnesses as prescribed by the law.

18. For emphasize, I make reference to Section 26 and 29 of CAP 284 where the party mentioned is; ‘Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete...’ and ‘Any person who is aggrieved...’ respectively. Both provisions do not state that there are specific litigants who ought to object or appeal. The only requirement needed is that you are an affected or aggrieved person as result of the adjudication decision.

19. I have perused the proceedings and findings of the appeal before the Minister. The 3rd Interested Party was the appellant, whereas the 1st and 2nd interested parties herein were the respondents. It is interesting to note that the only witness for these two Respondents in the Appeal before the minister was the current ex-parte Applicant –Rose Mary Kalintu. She chose to be a witness for the Respondents and she gave her evidence in that capacity. She cannot now turn around to state that she was denied a fair hearing.

20. From the foregoing, I am of the view that this suit has no merits, the same is dismissed with costs to the 3rd interested party.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 3RD OCTOBER, 2018 IN THE PRESENCE OF:-

C/A: Janet/Galgalo

Miss Rimita for Exparte applicant

Kiango for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE