



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA MISCELLANEOUS JUDICIAL REVIEW CASE NO. 10 OF 2017**

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF APPEAL TO THE MINISTER APPEAL NO. 141 OF 2017 IN RESPECT TO L.R. NO. 2340 GATUNGA  
ADJUDICATION SECTION**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE MINISTER, MINISTRY OF LANDS,**

**THROUGH THE SUB-COUNTY ADMINISTRATOR GATUNGA**

**ADJUDICATION SECTION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**SOPHIA GATIRIA KIMENCU.....INTERESTED PARTY**

**EX-PARTE APPLICANT**

**STEPHEN MWATHI RUGERA**

**JUDGMENT**

1. This Judicial Review Application is dated 5<sup>th</sup> day of September, 2017 and seeks orders that;

1. The Honourable Court be pleased to issue an order of certiorari to call up and quash the ruling of the 1<sup>st</sup> Respondent dated 18.7.2017 in Appeal No. 141/2017 in respect to **L.R. NO. 2340 GATUNGA ADJUDICATION SECTION**.

2. Costs be provided for.

2. The application has the following grounds:

A. The 1<sup>st</sup> Respondent delegated the hearing of the appeal to a person not qualified to hear the same.

B. The 1<sup>st</sup> Respondent showed open biasness (sic) against the applicant.

C. The 1<sup>st</sup> Respondent abused the due process by introducing evidence which had not been given by the parties in his judgment.

3. The application is supported by the affidavit of the ex-parte applicant sworn on 5<sup>th</sup> September, 2017 which states:

I, **STEPHEN MWATHI RUGERA of P. O. BOX GATUNGA** do make oath and states as follows:-

1. That I am the ex-parte applicant herein and thus competent to swear this affidavit.
  2. That I am the proprietor of L.R. No. 2340 Gatunga Adjudication Section having gotten it through adjudication process.
  3. That the Interested party herein objected to my getting the land during arbitration proceedings but I was nevertheless awarded it (annexed decision marked S. M. "1").
  4. That she was dissatisfied with that decision and she filed an appeal to the minister vide Appeal No. 141/2017 in which on 18.7.2017 was heard and on the same date the sub-county officer pronounced judgment orally that the Interested Party had won the case (annexed are the proceedings marked S.M. "2")
  5. That during the hearing the respondent showed open biasness toward the Interested Party and he completely refused to hear me and my witness and threatening to lock me in if I ask certain question (sic).
  6. That the Appeal proceedings do not indicate all that evidence I gave.
  7. That in his judgment the 1<sup>st</sup> respondent added evidence which was not tendered before, thus arriving at the wrong finding.
  8. That the 1<sup>st</sup> respondent did not follow the sue (sic) process while analyzing the evidence before coming to the wrong conclusion.
  9. That the 1<sup>st</sup> respondent delegated the hearing of the appeal to an unqualified person who is the area D.O instead of the D.C.
  10. That since I had won in the A.R Proceedings the 1<sup>st</sup> respondent ought to have considered the A.R proceedings but he never did so.
  11. That I pray the judgment be quashed for being unjust and for denying me my land.
  12. That all what is deponed herein is true to the best of my knowledge, belief and understanding.
4. The apposite Statement of Facts reads as follows:

#### **STATUTORY STATEMENT OF FACTS**

##### **(UNDER 0.53 R 1 (2) C.P.R)**

#### **1. NAME AND DESCRIPTION OF PARTIES**

- A) The applicant is an adult male of sound mind and his address of service shall be C/O L. KIMATHI KIARA & CO. ADVOCATES.
- B) The 1<sup>st</sup> respondent is the Minister of lands, sued through the sub-county administrator Gatunga Adjudication Section and his address of Service is P. O. Box 38 Marimanti.
- C) The 2<sup>nd</sup> respondent is the Attorney General of the Republic of Kenya and he is sued in a representative capacity and his address is P. O. Box Chuka.

#### **2. GROUNDS UPON WHICH RELIEF IS SOUGHT**

- A) The respondent acted in a bias (sic) manner in determining the appeal in favour of the Interested Party.
- B) The respondent did not follow the due process of the law in determining the appeal before him.
- C) The respondent denied the applicant the right to a fair hearing when he refused to hear him and his witnesses.

#### **3. RELIEF SOUGHT**

- A) An order of Certiorari to remove into this court and quash the decision of the Minister in Appeal no. 141/2017 dated 24.7.2017.
- B) An order of prohibition to prohibit the registration of the Interested Party as owner of L.R. No. 2340 Gatunga Adjudication Section.
- C) Costs of the application.

**DATED AT MERU THIS 29<sup>TH</sup> DAY OF AUGUST, 2017**

**FOR: L. KIMATHI KIARA & CO. ADVOCATES**

**FOR THE APPLICANTS**

5. The response to the application is through a replying affidavit sworn by the Interested Party on **16<sup>th</sup> November, 2017** which states:

I, **SOPHIA GATIRIA KIMENCU** do swear this affidavit and state as follows:

1. That I am the Interested party herein hence capable of swearing this affidavit.
2. That I am owner of the subject land herein.
3. That this land matter had preliminary proceedings which culminated in the tribunal hearing before the minister as enunciated by my counterpart herein.
4. That the hearing before the minister was held as an appeal by the applicant herein but he lost.
5. That the main contention by the applicant herein is that since the appeal was not heard by the minister personally then the sitting was not legal.
6. That I say the above argument has no basis since it is a judicial notice that there is no time the minister in person has sat in any tribunal but he delegates his duty to the D.O.s as was done in this case.
7. That still the applicant herein did not complain/oppose the constitution of the appeal tribunal when the case came for hearing thus cannot be heard to complain now since the issue of the panel was overtaken by events.
8. That still I have been advised by my advocate that article 159(2) (d) of the constitution is against the application herein.
9. That I have been advised by my learned advocate that it is tenate (sic) of law that litigation must come to an end.
10. That still this land belongs to me and the applicant has never occupied the same thus the tenate (sic) of occupation tilts to my favour.
11. That it is a judicial notice that the minister cannot sit in all appeals in the whole country that is why there is automatic delegation of the appeal tribunal to the district officer (D.O).
12. That what is deponed herein is true to the best of my knowledge, information and belief.

6. The application was canvassed by way of written submissions.

7. The ex-parte applicant's written submissions are reproduced herebelow:

**EX-PARTE APPLICANT'S WRITTEN SUBMISSIONS**

Your Lordship it is our humble submissions that the ex-parte applicant has demonstrated that he has a prima facie which is meritorious and should be allowed.

Your lordship the ex-parte applicant sought the intervention of the honourable court because he felt that the due process was not followed during the hearing of his appeal to the minister. He felt that the arbiter was biased and he was hell bent to assist the Interested Party get his land. Your honour he has sworn an affidavit decrying the arbiters refusal of him to adduce evidence by calling his witnesses. The arbiter himself was the area D.O who had been delegated the power to hear the case by the minister. It is the ex-parte applicant's view that a delegated power/duty cannot be re-delegated to a third person. That is abuse of the delegated powers.

In this case the D.C delegated his powers delegated to him by the minister to the D.O. This explains the fiasco during the hearing as the D.O failed to analyse the evidence, or interrogate the proceedings in the committee in order for him to make a reasoned judgment on appeal level. It is our submissions that the ex-parte applicant having won all the cases at the committee level there is no way he should have lost at appeal.

Your honour a judicial review application is an application to challenge the process rather than the merit. I wish to submit that this appeal ought to be heard by a qualified person who is independent and who is conversant with analysis of evidence.

All the parties to the dispute must be given opportunity to call all the evidence in their possession before they are condemned or otherwise. These are our humble submissions.

**DATED AT MERU THIS 22<sup>ND</sup> DAY OF MAY 2018**

**FOR: L.KIMATHI KIARA & CO. ADV**

**FOR THE EX-PARTE APPLICANT**

8. The Respondents' written submissions are reproduced herebelow:

**RESPONDENTS' SUBMISSIONS**

May it please your Lordship.

We submit on behalf of the Respondents as herein below.

The ex-parte applicant filed the notice of motion, dated 29<sup>th</sup> August, 2017 seeking for order of certiorari to quash the ruling of the 1<sup>st</sup> respondent made on 27.7.2017 in appeal No. 141/2017 in respect to LR. NO. 2340 Gatunga Adjudication Section.

Your Lordship, this matter was directed to be heard by oral evidence (sic) the ex-parte applicant and the interested party tendered their evidence in court. It is our submission that from the evidence of the interested party during the hearing the decision made on 27.7.2017 (sic) was just, fair and was done in accordance with the law.

Your Lordship, we pray that you do dismiss the notice of motion dated 29<sup>th</sup> August, 2017 with costs to the respondent. In the alternative we pray that the matter be submitted back for hearing by the minister on the appeal.

This is our humble submissions and prayer. We so pray.

Much obliged.

**DATED AT MERU THIS 2<sup>ND</sup> DAY OF JULY, 2018**

**J. M. KIONGO**

**SENIOR LITIGATION COUNSEL**

**FOR:HON. ATTORNEY GENERAL &**

**DEPARTMENT OF JUSTICE**

9. I have considered the pleadings, the evidence and the submissions proffered by the parties in support of their veritably and diametrically incongruent assertions.

10. I find that the respondent's oral evidence that she had occupied the suit land since 1973 and that her children were born and brought up on the suit land was not in any meaningful way controverted by the ex-parte applicant. It is also congruent with the findings made by the presiding officer who made the minister's decision.

11. Inter alia, the findings contained in the minister's decision were:

- a) The respondent had lived on the suit land before the ex-parte applicant came to claim her land in the year 2005.
- b) The plaintiff was registered as owner of the suit land before the ex-parte applicant came to lay his claim upon it and had a registration booklet which proved her registration whereas the ex-parte applicant had no such booklet.
- c) The minister found that the ex-parte applicant's claim that the respondent was registered as owner of the land because the respondent's brother Njeru M'Takaichu was chairman of the land committee fallacious. He found that the respondent was born in Kireria in Nkondi, far from the apposite adjudication section. He further found that the respondent's brothers were Nyaga, Karugi and Kithaka. He also found that the Land Committee chairman was born in Kagochwani and was in no way related to the plaintiff.
- d) He found that even though the ex-parte applicant had claimed that he had a home on parcel 2340, on cross-examination, he recanted that claim.

12. During cross-examination by the Interested Party, the ex-parte applicant had agreed that parcel No. 2340 belonged to the Interested Party and that it had been allocated to her by the land committee.

13. It should be noted that it is the ex-parte applicant's advocate who moved the court to hear the application orally because he felt that the Interested Party was a lay and uneducated person.

**14.** The court notes that before the appeal was heard by the minister, the parties had indicated by way of signing through their thumb prints that they had no objection to the hearing of the case by the officer who heard it. By doing so, they accepted the jurisdiction of that officer. In the area of jurisdiction, I need not reinvent the wheel. Justice Nyarangi, JA, as he then was, in the case of Owners of Motor Vessel 'Lilian' S Versus Caltex Oil Kenya Ltd [1989] KLR 10pined as follows: ***"Jurisdiction is everything. Where a court had no jurisdiction, there would***

***be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds it has no jurisdiction.***

15. I decline to reopen the issue of jurisdiction at this late stage.

16. Principally, Judicial Review is concerned with the integrity of the process that leads to a decision. It is not meant to attack the merits of the decision. At the appellate level, the minister had the duty to establish all relevant facts so that he could reach a just decision. He could not have acted in a vacuum. From the totality of the material provided to court, I do not find any evidence that the minister was biased, acted against the rules of natural justice or committed infractions against the germane statutory law.

17. Regarding who hear appeals upon delegation by the minister, section 29(4) of the Land Adjudication Act is apposite. It states:

***“Section 29(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.”***

18. The ex-parte applicant proffered not even one iota of evidence to prove that the officer who heard the impugned appeal on behalf of the Minister had no jurisdiction. Section 107 of the Evidence Act proffers erudite guidance. It says

***“Section 107 – Burden of proof***

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

In short, except for the mere allegation that the officer who heard the appeal at the ministerial level had no jurisdiction, the ex-parte applicant has not proved his claim.

19. The court notes that the ex-parte applicant in his submissions at paragraph 2 states as follows: ***“The arbiter himself was the area D.O who had been delegated the power to hear the case by the minister.”*** By so stating, he has admitted the jurisdiction of the officer who heard the appeal.

20. In the circumstances, this Judicial Review application is dismissed.

21. Costs will follow the event and are awarded to the Interested Party only.

22. It is so ordered.

**Delivered in open court at Chuka this 1<sup>st</sup> day of October, 2018** in the presence of:

CA: Ndegwa

Stephen Mwathi Rugera – Ex-parte Applicant

Sophia Gatiria Kimencu – Interested Party

**P.M. NJORGE**

**JUDGE**