



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC JUDICIAL REVIEW NO. 13 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY COUNTY COMMISSIONER

MAKUENI SUB-COUNTY.....1ST RESPONDENT

THE LAND REGISTRAR MAKUENI COUNTY.....2ND RESPONDENT

THE COUNTY SURVEYOR

MAKUENI COUNTY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

DORCUS KALONDU MASA KU (*Sued as the legal*

representative of the Estate of

***Masaku Kitemwa Kitika Deceased*).....1ST INTERESTED PARTY**

KASUNGUNI DAM PROJECT.....2ND INTERESTED PARTY

AND

DAVID MUINDI NGWAVA.....EX-PARTE APPLICANT

JUDGMENT

1. Before this Court for determination is the Notice of Motion dated 11th December, 2019 and filed on 19th December, 2019. It is brought under Section 9 of the Law Reform Act and Order 53 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law.

2. The ex-parte Applicant seeks judicial review orders as follows:

i) ***THAT*** an order of certiorari do issue to remove into this Honourable Court for purposes of quashing the ruling of the 1st Respondent delivered on the 23/10/2019.

ii) ***THAT*** an order of prohibition do issue directed to the 2nd and 3rd Respondents restraining them from subdividing plot number 739 and transferring a portion of the same to the Administration compound and issuing them with a title deed in line with the ruling delivered on the 23/10/2019.

iii) ***THAT*** costs of this application be paid by the Respondents.

3. The application is based on the affidavit of David Muindi Ngwava, the Ex-parte Applicant sworn on the same date. It is deposed therein

that the ex-parte Applicant is the grandson of Kitemwa Kitika. That his late grandfather was married to four wives and his grandmother was named Kavuli Kitemwa. That after the demise of his grandfather, the parcel of land he left behind was divided to his four wives by his eldest son Matheka Kitemwa. That his grandmother got Plot No. 739 Kasunguni Adjudication Section but she never took possession immediately as at the time she had relocated to Iveti Hills, Machakos with her family. However, the other three wives of his grandfather took possession of their respective plots immediately. That before his grandmother's death, in the year 1980 she declared that her Plot No. 739 be given to her son Paul Ngwava Kitema (the Applicant's father) who at the time had already passed away. That he was shown Plot No. 739 by his uncle and thereafter he left for Bungoma where he was working leaving the land under the care of his uncle, Kyule Kitemwa.

4. He further deposed that following a land adjudication exercise conducted in 1986, the four divisions of land were given their respective plot numbers and registered in the names of his grandfather's wives apart from Plot No. 739 which was registered in the name of his uncle Matheka Kitemwa. From this point (paragraph 13 of the supporting affidavit), the deponent avers albeit in vague terms that the name of Matheka Kitemwa was fraudulently deleted from the land register. That in an attempt to rectify the problem, he went to the survey offices where he was advised to pay Kshs. 600/= to facilitate a change of names. That while preparing to pay the said amount, he learnt that the office of the Chief had already started being built on Plot No. 739. He further learnt that a portion of Plot No. 739 was donated for the construction of a dam without his consent. Aggrieved by those actions, he filed an Objection No. 53 at Kasunguni Adjudication Section which was heard and a ruling delivered on 30th October, 2012. He was dissatisfied with the decision of the Land Adjudication Officer and filed an appeal to the Minister being Appeal No. 50 of 2013. That his Appeal No. 50 of 2013 was never considered, that the proceedings were conducted by a person who was not authorized to conduct the hearing and that the Chief was allowed to sit through the proceedings as the secretary despite being an interested party in the dispute. That the chief was also allocated land despite not having asked for it. Therefore, he is dissatisfied with the ruling delivered on 23rd October, 2019 dismissing his appeal and ordering that Plot Nos. 739 and 2714 (a subdivision of Plot No. 739) remain as it were and the administration compound be issued with its own parcel number and subsequently be registered.

5. Opposing the application is the 1st to 4th Respondents' Grounds of Opposition dated 30th November, 2020. It is stated therein *inter alia* that the ex-parte Applicant has no *locus standi* to institute judicial review proceedings against the Respondents for lack of the requisite authority to file any suit on behalf of the estate of the deceased. That the ex-parte Applicant does not disclose in his pleadings which deceased person caused the alleged fraudulent deletion of the name of Matheka Kitemwa from Plot No. 739 and whose name was inserted as the new owner. That paragraphs 12 and 13 do not disclose the deceased person's name thus making the pleadings vague. That the ex-parte Applicant neither raised an objection to the Chief being allowed to sit through the Minister's Appeal nor to the authority of the person conducting the appeal making his claims at this stage an afterthought. That no evidence has been presented by the ex-parte Applicant for the illegality he has alleged. Lastly, that the application is incurably defective, incompetent and an abuse of the court process and thus liable to be dismissed with costs.

6. Pursuant to the directions of this court issued on 1st December, 2020, only the ex-parte Applicant had filed written submissions at the time of writing this Judgment. I have perused the submissions dated 1st February, 2021. The ex-parte Applicant enumerated various provisions of the law which underpin his application. He reiterated that he was neither heard nor considered in the Minister's Appeal No. 50 of 2013. He submits that the 1st Respondent illegally and unprocedurally allowed the area Chief who was an interested party in the appeal to sit through the proceedings as the secretary. That he has been pursuing the suit land on behalf of the estate of Kitemwa Kitika since the year 1996 and for that reason, he has *locus standi*. That the ownership of the suit land is not in dispute but the process leading to the outcome of the Appeal was flawed and thus subject to these judicial review proceedings. He relies on the decision of the Court of Appeal in **Municipal Council of Mombasa -Vs- Republic & Umoja Construction Ltd Civil Appeal No. 185 of 2001** which was cited in **Republic -Vs- Secretary of the Firearms Licensing Board & 2 others Ex-parte Senator Johnson Muthama [2018] eKLR**.

7. I have perused the respective pleadings. In my assessment, there appears to be one salient issue for determination: -

- Whether the ex-parte Applicant has locus standi to institute these judicial review proceedings under the Civil Procedure Act?

8. To begin with, it is not in dispute that the preceding proceedings giving rise to this judicial review case were governed within the ambit of the Land Adjudication Act Cap 284 Laws of Kenya. That the subject land was an adjudication zone with the formal exercise having been conducted in 1986. Section 29(1) of the said Act provides 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.

9. I have quoted the above Section of the law mainly because I am interested in the language of the lawmaker. The opening to Subsection 1 makes it clear that whoever feels dissatisfied with the outcome of an objection to the Land Adjudication Officer may appeal to the Minister within 60 days of the decision. The outcome of the appeal to the Minister informed the filing of these proceedings.

10. The proceedings hereof are brought under Order 53 Rule 1 of the Civil Procedure Rules 2010. Under the Civil Procedure Act, no right of action over an interest in land may accrue to a person who has no direct interest in that land. A right of action over land may arise out of a contract, registration as proprietor, a registered power of attorney giving a person the right to sue on behalf of the registered proprietor, through receivership, through statutory power of sale or by dint of legal representation on behalf of the estate of a deceased person i.e. administratorship of the estate of the deceased. From my perusal of the pleadings, the ex-parte Applicant is suing for his interest on behalf of the estate of his deceased father or by extension for the interest of his grandmother as the true owner of Plot No. 739 Kasunguni Adjudication Section.

11. The question that immediately springs to my mind is whether the ex-parte Applicant is the duly appointed administrator of the estate of his late father or the estate of his late grandmother. The answer is a resounding no, as there is no such evidence from the pleadings. I have borrowed the sentiments of the Court of Appeal from their finding in **Euton Njuki Makungo -Vs- Republic & 2 others [2014] eKLR** which I wholly subscribe to. It was aptly stated therein as follows:

“No person can deal with the land of another unless that person is the duly authorized representative of the registered proprietor. The appellant admits that he does not have a power of attorney from the registered proprietor and neither was he a duly appointed legal representative. The appellant’s argument is that under the Land Adjudication Act, any person can represent another without a power of attorney and the appellant all along represented Mwaniki Mwigie. It is our considered view that proceedings under the Civil Procedure Act and rules are distinct from proceedings under the Land Adjudication Act.. We find that the appellant not being a duly authorized representative of the registered proprietor had no locus standi to initiate judicial review proceedings in relation to the suit property. On this issue, we concur with the findings and conclusions arrived at by the learned Judge.”

12. I am therefore unconvinced with the ex-parte Applicant’s submission that since he has all along represented the Estate of his grandfather, he has automatic *locus standi* to file the judicial review proceedings herein. The Land Adjudication Act and the Civil Procedure Act provide separate procedural regimes for the conduct and disposal of disputes. I am also unconvinced by the ex-parte Applicant’s extravagant invocation of provisions of the Constitution and the Fair Administrative Action Act that he merits admission to these proceedings without conforming to the requirements of the Civil Procedure Act.

13. It is, therefore, a futile exercise to enter into a consideration of the merits of substantive Notice of Motion dated 11th December, 2019 on the procedural impropriety culminating in the delivery of the decision of the 1st Respondent since the ex-parte Applicant lacks *locus standi* to present the suit herein. The upshot of this matter is that I uphold the Respondents’ Grounds of opposition dated 30th November, 2020 on the aspect of *locus standi* to file this suit in the ex-parte Applicant’s own name. I accordingly order that the Notice of Motion dated 11th December, 2019 be struck out with costs to the Respondents.

Signed, dated and delivered at Makueni via email this 11th day of May, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi