



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 22 OF 2017**

**IN THE MATTER OF AN APPLICATION BY SIMON MUGAMBI NABEA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL NO. 9957 KARAMA ADJUDICATION SECTION**

**AND**

**IN THE MATTER OF OBJECTION NO.42**

**AND**

**IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC .....PLAINTIFF**

**VERSUS**

**LAND ADJUDICATION AND SETTLEMENT**

**OFFICER TIGANIA EAST.....APPLICANT**

**ALEXANDER MEME KAJOI.....INTERESTED PARTY**

**SIMON MUGAMBI NABEA.....EX-PARTE APPLICANT**

**JUDGMENT**

**Summary of Facts**

The Ex-parte applicant herein commenced these proceedings through a chamber summons application under *Order 53 Rule 1 of the Civil Procedure Rules and Section 8 & 9 of the Law Reform Act (Cap 26 Laws of Kenya)* dated 20<sup>th</sup> June 2017. He sought inter-alia, orders for leave to apply for the judicial review order of certiorari, to quash the decision of the Land Adjudication and Settlement Officer, Tigania East District, delivered on 13<sup>th</sup> April, 2017.

The Land Adjudication and Settlement Officer's decision had been delivered in response to an objection raised by the Ex parte applicant, being Objection No.42, relating to the adjudication of Land Reference No. 9957 located in the Karamana Adjudication Section of Tigania East Adjudication Area. The Ex-parte applicant's objection related to his eviction from Land Reference No. 9957 as a consequence of the Land Adjudication and Settlement Officer's decision in favour of the Interested Party.

The application dated 20<sup>th</sup> June 2017 was placed before court and the Ex Parte applicant allowed to file the substantive application. It was

also ordered that the leave granted would operate to stay the implementation of the award by the Land Adjudication and Settlement Officer, pending the filing of the substantive motion.

The Ex-Parte applicant's substantive motion was filed by way of a Notice of Motion on 6<sup>th</sup> July 2017. The matter came up for directions on 2<sup>nd</sup> September 2020 and the parties agreed to have the Notice of Motion Application canvassed by way of written submissions.

The Ex-parte Applicant filed their submissions on 15<sup>th</sup> September 2020. The Respondent and Interested Party did not file their submissions within the 21 days' timeline set by the court, and have not done so at the time the court withdrew to write this judgement.

### **Issues for Determination**

The Ex parte applicant's application raises two key issue for determination, that is:

1. *Whether the procedure used by the Land Adjudication and Settlement Officer in the hearing and determination of Objection 42, without the involvement of the Committee under Section 26 of the Land Consolidated Act (Cap 283) was flawed.*
2. *Whether the application warrants the judicial order of certiorari to quash the decision of the Land Adjudication and Settlement Officer, Tigania East District, delivered on 13<sup>th</sup> April, 2017 in Objection 42 involving Land Reference No. 9957 located in the Karamana Adjudication Section of Tigania East Adjudication Area.*

### **Submissions of counsel for the Ex-parte Applicant**

The submissions filed by counsel for the Ex-parte applicant, Messrs. Maitai Rimita & Co on 15<sup>th</sup> September 2020 challenges the decision making process followed in the hearing and determination of Objection 42. He notes that the Respondent single handedly fixed the hearing, conducted the hearing and issued his decision on 13<sup>th</sup> April 2017, dismissing the objection lodged by the Ex Parte Applicant and awarding the whole of Land Reference No. 9957 to the Interested Party. The submissions cite the case of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR* relating to the function of a court in undertaking judicial review. The submissions also reproduce *Section 26(1) of the Land Consolidation Act (Cap 283)* which require the presence of the Committee under the Act to be present during the hearing and determination of objections. The decision in the case of *Peter Kimandui Vs Land Adjudication Officer Tigania West District & 4 Others [2016] e KLR* is also cited, wherein facts similar to the ones in the present case are raised.

The prayers raised are that the decision of the Land Adjudication and Settlement Officer, Tigania East District in respect to Objection 42 be quashed and that an award of costs be given.

### **Legal Principles**

Prior to canvassing the issues raised, it is important to set out the mandate and permitted parameters of a court invited to undertake a judicial review process. In the case of *Republic Vs Attorney General & 4 others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] e KLR* the court calibrated the scope of judicial review as follows:

*“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.”*

The decision in *Municipal Council of Mombasa Vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] e KLR*, provided in the Ex Parte applicant's submissions is also instructive on the contours of a judicial review exercise. The relevant portion of the case is cited below:

*“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”*

From the foregoing, the mandate of this court is not to determine the rightful owner of Land Reference No. 9957, but to examine whether the manner in which the objection was heard and determined followed due process.

The adjudication of land in Kenya is governed by two main statutes: The *Land Adjudication Act (Cap 284)* which deals with the ascertainment and recording of rights and interests in community land, and *The Land Consolidation Act (Cap 283)* which is concerned with the governance and ascertainment of rights, and the consolidation of land in special areas.

While the parties did not provide the court with a legal notice highlighting Tigania East District as one of the special areas, the proceedings of the objection hearing No. 42, marked 'SMNC' are indicated as being conducted under the **Land Consolidation Act (Cap 283)**. In addition, the Ex Parte applicant's statement of facts and verifying affidavit refer to the **Land Consolidation Act (Cap 283)**.

There is no contention therefore that the applicable law is the **Land Consolidation Act (Cap 283)**. **Section 26 of the Land Consolidation Act (Cap 283)** provides the procedure to be followed by a person who is aggrieved by the constitution of an Adjudication register by reason of its inaccuracy, incompleteness or allocation of land. The Section is set out below:

*(1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and **the Adjudication Officer shall consider the matter with the Committee** and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.*

*(2) If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate.*

*(3) No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.*

*(4) Any compensation awarded by the Adjudication Officer under this section, together with such costs as the Court may award, shall be paid by the Minister.*

The Section provides a four-part objection process:

First, the aggrieved person is required to inform the Adjudication officer of their objection within 60 days of the Notice of Completion of Adjudication Register. Second, the Adjudication Officer is required, **together** with the Committee appointed under **Section 9 of the Act**, comprising not less than 25 persons, to consider the validity of the objection. Should the objection be invalid, the Adjudication Officer is allowed to dismiss it. If found valid, the objection is to be referred to the Committee for rectification; Third, where the Adjudication Officer forms the opinion that the rectification process by the Committee would incur unreasonable expense, delay or inconvenience, he has power to award the appropriate compensation;

Lastly, appeals against the decision of the Adjudication Officer are allowed only where the amount of compensation awarded is found to be unsatisfactory, and the appeal is to be lodged in a subordinate court held by a Resident Magistrate for revision.

### **Determination**

It is discernible from the hearing of the objection that the second requirement of the process was not complied with, that is, that the Adjudication Officer ought to have considered the objection **together** with the Committee appointed under Section 9 of the Act. The Adjudication Officer indeed erred in considering and determining the objection on his own without the presence of the Committee.

In the case of **Peter Kimandiu Vs Land Adjudication Officer Tigania West District & 4 Others [2016] e KLR** provided by the Ex parte applicant, the court noted the centrality of the Committee to the adjudication process, since under the Act, they would be the primary decision making organ.

It is thus clear that the decision making process by the Land Adjudication and Settlement Officer was flawed and contrary to the provisions of **Section 26 (1) of the Land Consolidation Act (Cap 283)** and thus amenable to the corrective powers of the court.

The Court would therefore be correct in granting the order of certiorari to quash the decision of the Land Adjudication and Settlement Officer, Tigania East District in respect to Objection 42, issued on 13<sup>th</sup> April, 2017 in relation to Land Reference No. 9957 Karamana Adjudication Section of Tigania East Adjudication Area.

Since the reviewing court is not mandated to substitute its own decision for that of the Adjudication Officer as was noted in **Suchan Investment Limited Vs Ministry of National Heritage & Culture & 3 others, (2016)**, the Court can only remit the matter to the Land Adjudication and Settlement Officer, Tigania East District for hearing and determination in accordance with the law. The costs of this application shall be borne by the respondents. It is so ordered.

**DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28<sup>TH</sup> DAY OF JULY, 2021.**

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**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Mr. Nyamokeri for the Respondent
2. Applicant/Advocate-Absent
3. Fardowsa; Court Assistant