



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW APPLICATION NO. 11 OF 2018

IN THE MATTER OF AN APPLICATION BY JOSEPH KUBAI TARICHIA

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FINDINGS, PROCEEDINGS AND RULING/JUDGEMENT

DELIVERED ON 5TH JUNE 2018 IN OBJECTION NO. 414 & 417 OVER

LAND PARCEL NO. 1681 AND 750 RESPECTIVELY SITUATE

IN KARAMA ADJUDICATION SECTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

TIGANIA EAST DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

PETER MUKONDO.....INTERESTED PARTY

EX PARTE APPLICANT

JOSEPH KUBAI TARICHIA

RULING

The Ex-parte applicant herein commenced these proceedings through ex-parte 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 24th July 2018. In his application, he sought three reliefs being: a prayer for leave to apply for the judicial review writ of certiorari to quash proceedings, findings and the judgement of the 1st Respondent made on 5th June 2018 in Objection Nos. 414 and 417 over Land Parcel Nos. 1681 and 750 situated in the Karama Adjudication Section; An order of certiorari to quash proceedings, findings and the judgement of the 1st Respondent made on 5th June 2018 in Objection Nos. 414 and 417 over Land Parcel Nos. 1681 and 750 situated in the Karama Adjudication Section; and lastly, that the leave so granted operate as a stay of implementation of the judgement/ruling made on the said 5th June 2018. The Ex-parte chamber summons were supported by the Ex-parte Applicant's verifying affidavit. In it, he grounds the reliefs sought on the basis that he is the owner of the disputed parcels of land and that the 1st Respondent's ruling was biased and *ultra vires* by not involving the committee mandated under *Section 26 of the Land Consolidation Act (Cap 283)*. He also pointed out that the proceedings were conducted contrary to the principles of natural justice in that he was not allowed to call any witnesses and that the proceedings were tainted with impartiality in allowing an interpreter who was a committee member and a friend of the interested party to undertake interpretation. In support of his application, the Ex- parte Applicant also filed the proceedings and judgement relating to Objection Nos. 411, 412, 413, 414, 416, 417 & 1385 relating to Parcel Nos. 7259, 5939,5115,1618,5940, 750 & 2526 all held by the Ex-Parte Applicant, in which a judgement was issued on 5th June 2018.

The Objection proceedings were instituted by the Interested Party herein against the Ex-Parte Applicant on 31st August 2016. The gist of the dispute was that the Interested Party, being a younger brother of the Ex-Parte Applicant, had been disinherited of his portion of family land by his brother. The Interested Party therefore raised Objection Nos. 411, 412, 413, 414, 416, 417 & 1385 relating to Parcel Nos. 7259, 5939,5115,1618,5940, 750 & 2526. After hearing the parties and their witnesses, the Land Adjudication and Settlement Officer handed down his decision on 5th June 2018, dismissing all but two Objections, to wit Objection No. 414 and 417 relating to Land Parcel Nos.1681 and 750 respectively.

Dissatisfied by the decision making procedure followed, the Ex Parte Applicant then filed the present application.

On 07th August 2018, vide a Notice of Motion, the Ex Parte Applicant prayed that the matter be certified as urgent and that he be granted leave to apply for Judicial Review proceedings to quash the Land Adjudication and Settlement Officer's judgement of 5th June 2018.

On 04th September 2018, the prayers sought by the Ex Parte Applicant were granted by court, to wit, that the matter was certified as urgent and leave granted for the application of Judicial Review proceedings to quash the Land Adjudication and Settlement Officer's judgement of 5th June 2018.

On 13th November 2018, the Interested Party herein unfortunately passed away. His sons, Stephen Muriira& Edwin Murithi applied for and were granted Limited Grant of Letters of Administration Ad Litem on 18th November 2019 in MiscSucc. Cause No. 60 of 2019 at the Tigania Principal Magistrate Court.

On 14th December 2018, the Ex Parte Applicant filed their written submissions on the substantive application. The Submissions largely reiterate the issues raised in the Chamber Summons and supporting affidavit of the Ex Parte Applicant. The submissions cited a number of cases including *Republic Vs M'nchebere M'ithae & Another Meru HC Misc No. 101 of 2008; Republic Vs Gervasio Mugambi Thitura & 2 Others Meru HC Misc. JR No. 58 of 2009 and Peter Kimandui vs Land Adjudication Officer, Tigania West District, Zaverio Mithika & 3 Others Nyeri Civil Appeal No.28 of 2015* to buttress the point that the proceedings were procedural in not adhering to *Sections 9 and 26 of the Land Consolidation Act (Cap 283)* and offensive to the dictates of natural justice.

On 21st January 2020, the sons of the deceased Interested Party filed a Notice of Motion Application praying to be allowed to substitute their father in the proceedings.

On 26th August 2020, the 1st Respondent filed its replying affidavit. The affidavit was sworn by the Sub-County Land Adjudication and Settlement Officer Tigania East. He admits that one of the committee members was in fact an interpreter in the proceedings but the Ex Parte Applicant did not express any dissatisfaction with him at the time of the proceedings. He denies breach of any section of the Land Consolidation Act (Cap 283) and states that the law and process was duly followed.

On 28th August 2020, the substituted Interested Party filed their Replying Affidavit. They admitted that the Ex-Parte Applicant was an elder brother of their deceased father, consequently, their uncle. They averred that the Ex Parte Applicant refused to give any portion of their family land to their deceased father, prompting his Objection to the Land Adjudication process. They aver that both parties to the Objection proceedings were allowed to call one witness each, as is apparent from the front page of the Objection proceedings. They further expressed their astonishment at the Ex Parte's discontent with the manner in which two of the seven Objections were conducted and note that he has not contested the remaining five Objections in which he was allowed to retain the contended parcels of land and the Objections dismissed. They therefore conclude that the Ex Parte Applicant is essentially unhappy with the outcome of the two Objections and not the entire manner in which the proceedings were conducted. In relations to the alleged bias of the interpreter, they aver that the Ex Parte Applicant did not raise the issue at the time of the proceedings.

On 31st August 2020, the parties to the case agreed to have the original motion canvassed by way of written submissions. The Court ordered the Respondents and Interested parties to file their submissions by 14th September 2020 and for the Ex Parte Applicant to file their supplementary submissions 14 days thereafter. Parties were directed that failure to stick to the agreed timeline would result in the submissions not being considered in the judgement.

Apart from the submissions filed by the Ex Parte Applicant on 14th December 2018, no other submissions were filed in the matter by the lapse of the agreed timeline.

Issues for Determination

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

1. Whether the procedure used by the Land Adjudication and Settlement Officer in the hearing and determination of Objection Nos. 414 and 417 over Land Parcel Nos. 1681 and 750 situated in the Karama Adjudication Section, without the involvement of the Committee under Section 26 of the Land Consolidation 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 5th June 2018 in Objection Nos. 414 and 417 over Land Parcel Nos. 1681 and 750 situated in the Karama 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 14th December 2018 challenge the decision making process followed in the hearing and determination of Objection 42. The Submissions largely reiterate the issues raised in the Chamber Summons and supporting affidavit of the Ex Parte Applicant. The submissions cited a number of cases including *Republic Vs M'nchebere M'ithae & Another Meru HC Misc. No. 101 of 2008*; *Republic Vs Gervasio Mugambi Thitura & 2 Others Meru HC Misc. JR No. 58 of 2009* and *Peter Kimandui Vs Land Adjudication Officer, Tigania West District, Zaveri Mithika & 3 Others Nyeri Civil Appeal No.28 of 2015* to buttress the point that the proceedings were un-procedural in not adhering to Sections 9 and 26 of the Land Consolidation Act (Cap 283) and offensive to the dictates of natural justice.

The prayers raised are that the decision of the Land Adjudication and Settlement Officer, Tigania East District in respect to Objections 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 Parcel Nos. 1681 and 750 situated in the Karama Adjudication Section, 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, 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 Act 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.

Analysis & Opinion

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.

On the issue on whether the Objection was contrary to the rules of natural justice on account of the Ex Parte Applicant not being allowed to call any witnesses, I note the following:

The definition of the contours of constituents of natural justice was set out in *Egal Mohamed Osman Vs Inspector General of Police & 3 Others [2015] e KLR* referring to *The Management of Committee of Makondo Primary School and Another Vs Uganda National Examination Board, HC Civil Misc. Application No.18 of 2010*, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase ‘audia lteram partem’ literally translates into ‘hear the parties in turn’, and has been appropriately paraphrased as ‘do not condemn anyone unheard’. This means a person against whom there is a complaint must be given a just and fair hearing.”

The case of **Msagha Vs Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule, J.J on 3/11/06) (HCK) [2006] 2 KLR 553** is also instructive:

“The Court observes firstly that the rules of natural justice “audia lteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in

respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision....It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.”

From the proceedings, it is clear that both the Ex Parte Applicant and the deceased Interested Party were given an opportunity to be heard, to bring one witness each (Peter M’muturi M’imanja for the deceased Interested Party and M’machoki M’ndurumo for the Ex Parte Applicant) and to cross examine the opposing party’s testimony. On the premises, the Ex Parte Applicant’s allegation that he was prevented from calling any witnesses cannot stand. On the further issue of whether the interpreter was biased by reason of his alleged friendship with the deceased Interested Party, the Ex Parte Applicant has not tendered any evidence to demonstrate a flaw in the interpretation done and as the 1st Respondent and Interested Parties have pointed out, it is curious why this was not a concern at the time of the Objection proceedings.

Having found that the Objection proceedings went contrary to the dictates of Section 9 and 26 of the Land Consolidation Act (Cap 283), 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 the **entire judgement** issued on 5th June 2018 relating to Objections Nos. 411, 412, 413, 414, 416, 417 & 1385 in reference to Parcel Nos. 7259, 5939,5115,1618,5940, 750 & 2526 and **not as selectively prayed by the Ex Parte Applicant in relation only** to Objection Nos. 414 and 417 over Land Parcel Nos. 1681 and 750. This is because, the judgement for all the Objections was given consequent to joint proceedings determining all the Objections, which process has now been found to be marred with illegality in so far as **Sections Section 9 and 26 of the Land Consolidation Act (Cap 283)** are concerned.

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.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Applicant/Advocate- Absent
2. Respondent/Advocate- Absent
3. Fardowsa ; Court Assistant- Present