



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. 29 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 40, 43 AND 159

AND

IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 SECTION 7(2), 15, 18, 19 AND 26

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 SECTION 9, 10 & 11

AND

IN THE MATTER OF URINGU 11 ADJUDICATION SECTION

AND

IN THE MATTER OF LAND PARCEL NUMBER 819 URINGU 11 ADJUDICATION SECTION

BETWEEN

REPUBLICAPPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

ADJUDICATION OFFICER URINGU 11

ADJUDICATION TIGANIA2ND RESPONDENT

DEMARCATION OFFICER TIGANIA3RD RESPONDENT

LISTON MUTUMA KIUNGAEX-PARTE APPLICANT

AND

JOSPHAT DAVID MWILARIA.....INTERSTED PARTY

JUDGMENT

1. These judicial Review proceedings were instituted vide the substantive notice of motion dated **2nd September 2014** and **filed on 7.10.2014** by the exparte applicant one LISTON MUTUMA KIUNGA who sought the following orders:-

(1) That the Court be pleased to grant the applicant an order of MANDAMUS to remove into the honorable court to compel the 2nd respondent, agents or servants to register the applicant as the owner of land parcel No. 819 URINGU 11 ADJUDICATION SECTION (Tigania) in their register book.

(2) That the costs of the application be provided for.

2. The suit was filed as against the respondents only. Thereafter, a consent was filed in court on 6.11.2014 between the exparte applicant and the respondent in which the latter agreed to register the suit land in the name of the exparte applicant, culminating in the consent judgment delivered in court on the same date.

3. Thereafter, the interested party, JOSPHAT DAVID MWILARIA filed an application on 16. 2 .2016 seeking orders to be enjoined in these proceedings, to have the consent judgment stayed and set aside and to be allowed to participate in the hearing of the suit. The application underwent a chequered history where at some point it was dismissed, then reinstated and was eventually allowed on 22.5.2019. Thereafter, the interested party filed his replying affidavit on 11.7.2019 in opposition to the substantive notice of motion.

4. I have not seen any pleadings of the respondents despite the numerous opportunities this party was given to file their responses (see proceedings of 27.11.2019, 6.8.2020).

The case for the Exparte Applicant

5. The case of the exparte applicant is premised on grounds set out on the face of the substantive motion, the supporting affidavit of Moses Thurania Akwalo containing two annexures as well as the applicant's statement of facts and verifying affidavit containing 5 annexures.

6. The exparte applicant avers that he filed an objection case in the year 2009 over the suit land parcel no. 819 URINGU 11 Adjudication against Zakayo M. Marimba deceased who was represented by his son Moses Thurania Akwalo which objection was dismissed. The applicant then took the matter to Kieiga Njuri Ncheke council of elders and when Moses Thurania Akwalo was called to take the oath on ownership, he declined stating that the land did not belong to him.

7. That Moses Thurania then wrote a letter to the District Land Adjudication & Settlement Officer Tigania, seeking to withdraw his statement/evidence in the objection case. That the exparte applicant personally went to the said offices with a view of having the land registered in his name and he was summoned to appear for the objection hearing on 29/08/2012 and again on 5/09/2012, but the officers were not interested in facilitating the transfer. He then went to the Attorney General who in turn wrote to the District Land Adjudication officer Tigania advising him to reopen the case and hear it afresh which advice was ignored. That it was only after his advocate wrote two letters indicating his intention to sue was he summoned to go with the respondent in the objection case.

8. That they appeared before the Adjudication officer on 15/8/2012 when Moses Thurania stated that he had no objection against the exparte applicant being registered as the owner of the suit land. To that effect, the exparte applicant was issued with a booklet indicating that he is the owner of the suit land. Further, he was asked to pay Kshs. 5,000 for transport of the officer to Nairobi so as to change names in the records, and Kshs. 20,000 as transfer fees which he paid. That despite all this, the respondents have refused to change the records and are now even chasing him away from their offices whenever he tries to follow up on the same. He prays that the court do find that the 2nd respondent acted ultra vires and do order that the suit land be transferred into his name.

9. The averments set out in the supporting affidavit of Moses Thurania Akwalu are that indeed there existed an objection case no.599 filed by the exparte applicant. However, later, the said Moses investigated the ownership of the suit land and discovered that it belonged to the applicant and that is why he wrote to the District Adjudication Officer authorizing them to deem his statements made in the objection case as null and void and to allow the applicant herein to own the suit land. The document termed as Moses Thurania's withdrawal of his statement has been availed as "MTAI".

10. He has further deponed that they were summoned by the respondent vide a letter dated 10/06/2014, ("MTA2") but upon arrival, the officer refused to effect transfer in the record book despite giving the applicant a letter confirming that the suit land shall be transferred to him. He avers that he has no claim over the suit land and he prays that it be transferred to the applicant.

11. In his submissions, the ex-parte applicant more or less reproduced the contents captured in his verifying affidavit and those in the supporting affidavit of Moses Thurania which evidence has already been summarized herein. The exparte applicant added that in accordance with the provisions set out under the Land Adjudication Act Cap 284, particularly section 13 thereof, Moses Thurania Akwalu was able to represent the family of the deceased who include the interested party in objection No. 599.

Case for the Interested Party

12. The interested party has opposed the suit vide his replying affidavit filed on 11.7.2019. He avers that he is the legal representative of the estate of Zakayo M'Marimba Iyaya alias Zakayo M'Marimba as he is the biological son of the deceased. He contends that the exparte applicant and the respondents fraudulently colluded to alienate the suit land from his father who died on 25/01/2003. That Moses Thurania Akwalu who is his cousin conducted the said objection proceedings because the interested party was away for work at Botswana, while his father was deceased.

13. He further submitted that his cousin, Moses Thurania has no claim over the land nor does he have any authority to deal with the land. That the Njuri Ncheke have no jurisdiction to hear any land dispute as such disputes are heard by the committees, arbitration boards and adjudication officers and any party dissatisfied with their decision should appeal to the minister. That the court should not grant the orders sought as the heirs of his late father's estate shall lose their birth right unjustly and the same should be dismissed with costs to him.

14. The interested party submitted that all along the suit land was recorded in his father's name who died on 25.1.2003. That although the applicant filed an objection, the same was heard and determined in his father's favor as it was dismissed and the the applicant never challenged the said decision. It was further submitted that the exparte applicant is obligated to exhaust the remedies set out in the Land Adjudication Act. Further, the respondent in the objection proceedings cannot purport to recant his evidence and he has no right or power to request the lands office to record the suit land in the name of the applicant.

15. In support of his case, the interested party has relied on the following cases; **Nicholas Mugambi & another (suing as the legal representatives of the Estate of Peter Etharia M'Kailibi) & 4 others v Zachary Baariu & 6 others [2018] eKLR, Municipal Council of Mombasa V Republic & Another (2002)KLR, Stanley Thiane Mbui & Another V the Land Adjudication Officer Tigania West & Another [2014]eKLR.**

Analysis & Determination

16. I have considered all the arguments raised herein including the submissions filed by the parties. The issue to determine is whether the order for mandamus to compel the Land Adjudication officer to register the suit land in the name of the exparte applicant is warranted. There is no controversy that the exparte applicant is the one who lodged the objection case no. 599 against one Zakayo M'Marimba (deceased) who was represented by Moses Thurairira Akwalo. It is also not in dispute that the objection case was dismissed.

17. What the exparte applicant avers is that the representative of Zakayo M'Marimba was to later recant his statement, claiming that the exparte applicant should be registered as the owner of the suit land.

18. In **Municipal Council of Mombasa vs Republic & Another [2002] KLR** , the Court of Appeal stated as follows in regard to the scope of Judicial Review:

“The court would only be concerned with the process leading to the making of the decision”.

19. In **Republic v Tanathi Water services board and 2 others exparte senator Johnstone Muthama (2014) eKLR**, the court stated that:

“Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case (emphasize added). It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed”.

20. A perusal of the objection proceedings availed by both the warring parties indicate that the proceedings were conducted under Cap 283 laws of Kenya (The Land Consolidation Act). Thus both the exparte applicant and the interested party have erred in citing the Land Adjudication Act as the law applicable. I must however point out that the two adjudication statutes are almost similar particularly in the manner the disputes are conducted. However, under the Land Consolidation Act, there is no provision for appeal to the minister after the objection cases are conducted under section 26 of the Act.

21. **Section 13 of the Land Consolidation Act** provides that:

“Every individual person claiming any right or interest in any land within an adjudication section, and any person whose presence is required by a Committee or Arbitration Board, shall attend in person, or by representative according to African customary law, as required by the Committee or Arbitration Board, at the time and place specified in the warning referred to in section 12 of this Act.

(2) If any such person fails to attend in person or by representative as provided by subsection (1) of this section, the adjudication or arbitration may proceed in his absence. (3) If the Committee or Arbitration Board is satisfied that any individual person who has not made a claim has a claim to any right or interest in any land within the adjudication section the Committee may, but shall not be bound to, proceed as if he had made a claim. (4) Where one or more of several heirs of a deceased person, or one or more out of a group of heirs, claiming a separate interest from another group or groups, appears, his or their appearance shall be deemed to be the appearance of all such heirs or all such groups, as the case may be, unless the Committee otherwise directs”.

22. What can be discerned from the above provisions of law is that a person whose presence is necessary in the aforementioned proceedings could be represented in accordance with the customary laws. Thus the presence of Moses Thurairira who represented Zakayo M'Marimba in the objection case was in accordance with the law. Indeed, no one seems to have an issue with that representation. The bone of contention lies with the post objection proceedings where the said Moses Thurairira apparently purported to recant his evidence.

23. I note that the decision in the objection case was delivered on 3.7.2010. In the findings thereof, it is indicated that;

“According to the records (R.E.R) P/NO. 819 is recorded under the name of ZAKAYO MARIMBA IBAYA...”

24. The objection case was dismissed. The findings of this court are that the proceedings in which Moses Thurairira participated on behalf of Zakayo M'Marimba in objection case no 599 were anchored under the statutes. The case was finalized in 2010. The said Moses was purporting to recant his evidence two years later vide his letter dated 15.8.2012. However, by then, there existed no objection case, the same having been finalized. There is no evidence to show that the case was re-heard afresh.

25. I find that the alleged post objection proceedings including the investigations by Moses Thurania, his resolve to recant his evidence through a letter dated 15.8.2012 as well as the proceedings before the Njuri Ncheke elders are of no consequence as they were not conducted within the confines of the statutory legal frame work set out in the adjudication statutes. To this end, the interested party has clearly pointed out the correct legal position in paragraph 6 of his replying affidavit where he states that disputes arising in the adjudication processes are heard by committees, arbitration board and adjudication officers. Njuri Ncheke is not one of the bodies mentioned in the adjudication statutes.

26. This being a Judicial Review suit, the court has no mandate to review and overturn the decision made by a statutory body on the basis of proceedings which are not supported by the law. The orders sought to have the ex parte applicant registered as the owner of the suit land are hence unmerited. This suit is hereby dismissed with costs to the interested party.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14TH DAY OF JULY, 2021 IN PRESENCE OF:

C/A: Kananu

Mutisya holding brief for C.P Mbaabu for interested party

Kiety for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE