



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. E002 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND ADJUDICATION & SETTLEMENT OFFICER**

**MERU CENTRAL.....1<sup>ST</sup> RESPONDENT**

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

**CELINA NKIROTE MOSES.....INTERESTED PARTY**

**EXPARTE APPLICANT**

**MICHAEL MWIRIGI MAITIMA (As the legal representative of the estate of M'Maitima M'Muthamia (deceased))**

**RULING**

1. The exparte applicant filed a chamber summons application on 21.1.2021 seeking leave to apply for judicial review orders of certiorari to quash the 1<sup>st</sup> respondent's decision of 22.7.2020 in objection case no. 438 Ruiru Rwarera Adjudication section. The applicant desires that the case be re-heard. In the meantime the applicant sought an order of stay of the implementation of the aforementioned decision.
2. On 21.1.2021, the court allowed the exparte applicant to file the Judicial Review suit but directed that the issue of stay be heard inter-partes.
3. Thereafter, the interested party filed a preliminary objection on 22.2.2021 arguing that the court lacks the jurisdiction to entertain the suit and that the entire suit is an abuse of the court's process.
4. The court gave directions that both the issue of stay and the preliminary objection be canvassed by way of written submissions. The exparte applicant has submitted that the objection proceedings in case no. 438 were conducted when the allocated owner of the land M'Maitima M'Muthamia had long passed on. He is therefore challenging the decision of the 1<sup>st</sup> respondent as the proceedings before the adjudicating body were heard in absence of the estate of deceased.
5. For the interested party he submitted on the application dated 1.2.2021, which happens to be the substantive motion. He contends that the applicant has not appealed against the decision of the 1<sup>st</sup> respondent, thus the applicant has not exhausted the dispute resolution mechanisms available under Cap 284 of laws of Kenya. It is also averred that the applicant has not obtained the relevant consent to institute those proceedings.
6. The respondent has submitted that; to grant or not to grant a stay is a matter of judicial discretion as set out under order 53 rule (4) of the civil procedure rules. Thus an order of stay is not automatic.
7. It is contended by the respondent that the interested party has been in occupation of the suit land for a period of over 40 years hence the implementation of the decision is a mere formality. To this end, the respondent has made reference to **Swift Energy Distributors Gas Limited vs Energy and Petroleum Regulatory Authority & another; Abdi Ali Mohamed (interested party) (2020) eKLR** where guidance was sought in the case of R (H) vs Ashworth Special Hospital authority (2003) I WKL 127 where Dyson L. J held as follows:

**(a) "An order of stay can be granted where the decision has not been implemented or where the same is a continuing process.**

**(b) If the implementation is complete then a discretion to order stay should be exercised sparingly and being guided by the**

**need to dispose off the matter within a limited time frame”.**

8. Further, the respondent avers that public interest is an overriding factor when determining whether or not to grant an order of stay. To this end the respondent relied on the case of **R. vs Capital Markets Authority Exparte Joseph Mumo Kivai & another (2012) eKLR** where Majanja J stated that Judicial Review proceedings are public law proceedings for vindication of private rights hence public interest is a relevant consideration in the granting of stay orders.

9. The respondent further submitted that in so far as this matter is concerned, public interest relates to the completion of the adjudication process and inter-generation equity where land is managed well for the benefit of future generations. That ownership needs to be affirmed for a person who has been in occupation for close to 40 years.

10. The respondent further submits that the exparte applicant doesn't have a strong case. That the respondent had on many occasions tried to reach out to the applicant in vain and that under Section 13 of the Land Adjudication Act, the respondent has the mandate to cater for the interests of absent parties. Thus no right is violated by absence of a party. The respondent also submit that this court lacks jurisdiction to hear this suit on account of the fact that the exparte applicant has not exhausted the dispute resolution mechanisms available under the Land Adjudication Act, particularly section 29 and 30 thereof. To this end, the respondent has relied on the case of **Isaiah Mbaabu & 2 others vs the land adjudication & settlement officer Igembe South District & 4 others (2020) eKLR**.

11. I have considered all the arguments raised herein. For reasons I have not fathomed, the interested party has submitted on the main substantive motion dated 1.2.2021, yet on 23.2.2021, the court reminded the parties herein that the issues at hand only relates to the issue of stay of implementation of the 1<sup>st</sup> respondents decision sought in the application dated 19.1.2021 as well as the preliminary objection dated 22.2.2021. To this end the court cannot consider the merits of the substantive application at this stage.

12. On the issue of stay, I find that on 21.1.2021 when the court granted leave for the applicant to file the substantive motion, the court took cognizance of the fact the dispute emanates from Ruiriri Rwarera where the disputes therein have turned out to be extremely convoluted. The only reason as to why the court did not grant a stay was to avoid a situation where conflicting orders may find a footing in this court.

13. None of the parties herein mentioned other disputes that could be related to the current one emanating from Ruiriri Rwarera adjudication area. As such, the issue as to whether the 1<sup>st</sup> respondent's decision should be quashed is a matter that should await the hearing of the case.

**14. For now I do grant the order of stay of execution of the 1<sup>st</sup> respondent's decision as set out in prayer 3 in the application dated 19.1.2021.**

15. On the preliminary objection the applicant contends that this court lacks jurisdiction as the applicant has not exhausted the mechanism set out in the adjudication statutes. However, this is a Judicial Review suit of which the concern of the court is not the merits of the decision but the decision making process.

16. The scope and purpose of judicial review was explained by the Court of Appeal in the case of **Municipal Council Of Mombasa V Republic And Another 2002 eKLR** as follows;

*“Judicial review is concerned with the decision -making process, not with the merits of the decision itself. .... 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.”*

17. Thus in so far as this suit is concerned, the court will not be dealing with the merits of 1<sup>st</sup> respondent's decision, but the manner in which the said decision was arrived at. In the circumstances, the issue of exhaustion of remedies doesn't arise. Thus the preliminary objection is unwarranted in this case.

18. The interested party has raised the issue of consent in his submissions. However, that issue is not anchored on pleadings or in the preliminary objection and the court will not belabor on the same.

**19. All in all, I find that the preliminary objection is unmerited. The same is dismissed with costs to the exparte applicant.**

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

C/A: Kananu

Kiety for 1<sup>st</sup> & 2<sup>nd</sup> respondents

**HON. LUCY. N. MBUGUA**

