



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT HOMA BAY

ELC JR CASE NO. 1 OF 2021

(Formerly Migori ELC JR Case No. 7 of 2017)

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF LAND ADJUDICATION &

SETTLEMENT.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION &

SETTLEMENT OFFICER FOR SUBA

DISTRICT.....2ND RESPONDENT

AND

DEBORAH OGENDI.....1ST INTERESTED PARTY

CLEMENT AKONDO MARGOT.....2ND INTERESTED PARTY

ELLY KIDA ASAO.....3RD INTERESTED PARTY

DOMNIC ODOYO ODUMBA.....4TH INTERESTED PARTY

AND

JOSEPH GOROBA OLUM.....EX- PARTE APPLICANT

JUDGMENT

1. On 15th March 2010, the ex-parte applicant namely **JOSEPH GORUBA OLUM** through the firm of G.S. Okoth and Company Advocates mounted a Notice of motion of even date under some provisions of the law, inter alia, sections 8 and 9 of the law Reform Act Chapter 26 Laws of Kenya (The JR application herein). This followed leave of the court (Makhandia J, now JA) duly granted pursuant to chamber summons dated 4th March 2010.
2. The respondents are not represented herein.
3. The original 2nd and 3rd interested parties namely **CLEMENT AKONDO MARGOT and ELLY KIDA ASAO (Both deceased)** were substituted with the current 2nd and 3rd interested parties on 27th July 2020 further to a Notice of motion of even date which was granted accordingly. The 1st, 2nd, 3rd, and 4th interested parties are represented by M/s Omonde Kisera and Company Advocates.
4. Originally, the JR application was lodged at Kisii Environment and Land Court. It was transferred to Migori Environment and Land Court on 17th May 2017. It was further transferred to Homa-Bay Environment and Land Court by the orders of the court given on 28th July 2021. It must be noted that the JR application was heard exparte and Judgment was rendered on 27th February 2020 and decree issued accordingly. However, further to an application dated 27th July 2020 by the interested parties and upon hearing it, this court delivered a

ruling on 17th November 2020 that the ex parte Judgment be set aside and the JR application be heard and determined on merit or inter partes in the best ends of justice.

5. By the JR application, the ex-parte applicant has sought four (4) orders;

i. That the created parcel No. West Kobia/5082 from P/No. West Kobia 2385 be cancelled immediately as provided by section 11 (b) of the Land Adjudication Act and the court order on Civil Case No. 61 of 1990 be upheld as per section 30 subsection (4) and (5) of the Act. Whoever is aggrieved may seek redress in a court of law.

ii. That parcel No. West Kobia/3070, 3071 and 3073 be cancelled immediately and their respective lands be enjoined to P/No. 3072 in the names of George Olum Obade as provided by section 11 (b) of the Act. Whoever is aggrieved may lodge an A/R objection when the adjudication register is published complete and 60 days objection period given.

iii. The honourable court be pleased to issue an order of Mandamus directed at the District Land adjudication and settlement officer for Suba District compelling him to implement the abovementioned directives given by the director of land adjudication and settlement as above set out.

iv. The Honourable court be pleased to issue an order for costs to be awarded to each of the applicants.

6. The JR application is based on four (4) grounds namely;-

a) The District Land Adjudication Officer for Suba District has refused and or neglected to perform duties and responsibilities placed upon him by law in the manner prescribed by law.

b) The District Land Adjudication Officer for Suba District contrary to the rules of administration and the chain of command refused to enforce a lawful order issue by his Senior Officer, the Director of land adjudication and settlement.

c) The property rights of the applicant and members of the family of George Olum Obade, deceased, have been adversely affected by the said disobedience of lawful order.

d) The actions done by the District land adjudication and settlement officer in subdividing the land awarded to George Olum Obade by a court of law and creating four new titles and refusing to cancel them is illegal and ultra vires.

7. The JR application is also anchored on the ex-parte applicant's statement, affidavit verifying statement and copies of documents annexed thereto and marked as "JO-1" to "JO-12" inter alia;

a) A limited grant of letter of administration ad litem issued on 19th February 2009 in Homa-Bay SRM's Court Succession Cause No. 172 of 2009 to the ex-parte applicant as an administrator of the estate of his father, George Olum Obade (Deceased-1) (JO-1)

b) A decree in Homa-Bay SRM's Court Civil suit No. 61 of 1990 against Nyangweso Sibuur (Deceased -2) who was related to the interested parties herein for the subdivision and registration of the suit parcel of land (JO-2) and

c) A letter reference DS/1/47/45/15 dated 14th June 2007 by the Director of land Adjudication and settlement (JO-7)

8. The ex-parte applicant complains that he is the administrator of the estate of deceased -1 further to the grant (JO-1). That deceased -1 had obtained the decree (JO-2). That the directives of the Director, land adjudication and settlement issued to the District Land Adjudication and settlement officer, Mbita and copied to the Suba District Commissioner as shown in the letter marked as "JO-7", have not been implemented to the letter or at all. So, it precipitated the JR application.

9. Notably, there was no response to the JR application by the respondents herein.

10. By a twenty-four (24) paragraphed replying affidavit sworn on 27th July 2021 by the 1st interested party for and on behalf of the interested parties and herself duly filed in court on 28th July 2021, the interested parties opposed the JR application. The 1st interested party deposed in part that the 3rd interested party was brutally attacked and fatally wounded concerning the suit parcels of land on 30th April, 2013 while the 2nd interested party died in the year 2020 which information was not brought to the attention of this court. That the interested parties were neither parties to the suit which generated the decree marked as "JO-2" nor were they were related to deceased-2 hence the decree cannot be enforced against them. That the said decree did not disclose any title or land reference and since each decree cannot be executed on its own, the decree cannot be used to effect the interested parties' interest or right on the suit parcels of land. That the interested parties obtained registration to the suit parcels of land through processes entailed in the Land Adjudication Act and the Land Registration Act, 2016 (2012) and the decree is statute barred by dint of section 4 (4) of the Limitation of Actions Act Chapter 22 Laws of Kenya.

11. After hearing respective learned counsel for ex-parte and interested parties, the JR was heard pursuant to Order 51 Rule 16 of the Civil Procedure Rules 2010 and the orders and directions of this court made on 27th May 2021 that;-

" The notice of motion dated 15th March 2020 be argued by written submission..."

12. Accordingly, learned counsel for the ex-parte applicant filed a five (5) paged submissions dated 26th May 2021 reproducing earlier submissions filed on 6th March 2012 to the effect that the JR application has attained the legal requirements for the grant of prerogative orders of mandamus and prohibition as well as costs sought in therein and interest or costs at the rate of 12% from the date of filing suit until payment in full. Counsel made reference to the facts of the case and the law available namely sections 2, 25 and 30- (4) of the Land Adjudication Act Chapter 284 laws of Kenya alongside **Articles 73 and 75 (2) of the Constitution of Kenya, 2010**. To buttress the submissions, counsel further relied upon **Commissioner of Lands =vs= Kunste Hotel Ltd (1997) eKLR, Chief Constable of the North Wales Police =vs= Evans (1982) 1 WLR 1155, The District Commissioner, Kiambu =vs= Rex and others, ex- parte Ethan Njau (1960) EA 109 and Masaka Growers Union =vs= Mumpiwakoma Growers society (1968) EA 258**.

13. The respondents did not file submissions in this JR application.

14. On the part of the interested parties, their counsel filed a three (3) paged submissions dated 27th July 2021 on 28th July 2021. Three (3) issues for determination are framed in the submissions, inter alia, whether this Honourable Court is seized of jurisdiction, whether the letter dated 14th June 2007 is valid and tainted with procedural impropriety. In the analysis of the issues against the grant of orders sought in the JR application, counsel submitted that the letter (JO-7) was invalidated by the meeting held on 24th October 2007 convened by the Director, Land Adjudication and Settlement, the District Land Adjudication officer and the ex-parte applicant as discerned in letters dated 31st October 2007 and 14th November 2007. To fortify the submissions, counsel relied on sections 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya, sections 4 (b) 7, 17 and 37 of the Limitation of Actions Act Chapter 22 Laws of Kenya and the case of **Owners of Motor Vessel Lilian "S" =vs= Caltex Oil (K) Ltd (1989) KLR 1 and Migori ELC case No. 64 of 2017 Gichambati Mwita Mairo =vs= Sarara Matongo (2019) eKLR**.

15. I have anxiously studied the entire JR application, the interested parties' replying affidavit and submissions of their respective counsel herein. Being guided by the Court of Appeal decision in the case of **Galaxy Paints Company Ltd =vs= Falcon Grounds Ltd (2000) 2 EA 385** concerning issues for determination in a suit generally and the obtaining scenario, is the JR application tenable?

16. It is noteworthy that under Article 23 (3) (f) of the Constitution of Kenya, 2010 a court may grant an order of Judicial Review as an appropriate relief in any proceedings brought under Article 22 of the same Constitution for enforcement of the Bill of Rights. Furthermore, this court has the mandate to grant prerogative orders as provided for in **section 13 (7) (b) of the Environment and Land Court Act, 2015 (2011)**.

17. In the case of **Republic =vs= Kenya Revenue Authority ex parte Yaya Tours Ltd (2008) KLR** hereby approved, it was noted that the remedy of Judicial Review is concerned with the decision making process and not with the merits of the decision. That the remedy in discretionary in nature and may not be availed in cases where there are other efficacious remedies.

18. Indeed, mandamus relief is a prerogative order compelling performance of public legal duties. The same is not for enforcement of private rights as held in **Commissioner of Lands case (supra)**.

19. As regards prohibition, it is a prerogative remedy that forbids the continuance of a wrong or threatened injury; see **Masaka Growers Union case (supra)**, among other authorities.

20. Since the respondents are public officers, the values and principles of public service as stipulated in section 18 (e) of the Environment and Land Court Act, 2015 (2011) guide this court. They include; accountability for administrative acts as anchored in Article 232 of the Constitution. This court is not unaware of the right to fair administrative action, the responsibilities of leadership and conduct of state officers under Articles 47, 73 and 75 of the Constitution respectively.

21. The ex parte applicant contended that the respondents are bound to honour decisions of the court including the decree (JO-2b) and the court to grant orders 1 and 2 sought in the JR application. Clearly, he is vouching for the realization of his vested right to the fruits of the decree as held in **Shahmad =vs= shamji and Brothers (1957) EA 438**.

22. The assertion of the ex parte applicant is that the 2nd respondent has continued the wrong of disobedience of a lawful directive of 1st respondent (JO-7) concerning the decree. However, the interested parties contend that the JR application is an attempt to achieve execution of decree and orders is governed by **Order 22 rules 1 to 86 of the Civil Procedure Rules, 2010**

23. Section 34 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya reads;-

"...All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

24. It is abundantly clear that the decree was issued 5th November 1995 after it was given on 23rd October the same year in Homa-Bay Senior Resident Magistrate's court Civil Case No. 61 of the 1990 in favour of the deceased as disclosed in paragraph 7 (a) hereinabove. By the letter (JO-7), the 1st respondent directed the 2nd respondent to comply with the decree (JO-2B) hence the Orders sought in the JR application.

25. On their part, the interested parties' reaction is that the decree is barred by statute and cannot be executed in the terms sought in the JR application. That the decree is now 28 years old. Their counsel cited **Gidambati Mwita Mairo case (supra)** where this court emphatically concluded that :-

“Article 10 (2) (b) of the Constitution, 2010 binds this court and the principles of equity include that delay defeats equity and equity aids the vigilant and not the indolent. Quite plainly, the instant application suffers from inordinate delay and its filing was unnecessary. It should have been made in Kisii High Court Civil Case No. 10 of 1990 where judgment and decree were rendered and issued respectively”

26. The interested parties also complained that the letter (JO-7) was invalidated by the meeting of 24th October 2017. Plainly, the letters dated 31st October 2017 and 14th November 2017 marked as “JO-2” and “JO-9A” respectively speak to that position. In that regard, I affirm the position as the matter was resolved and the decree (JO-2B) is statute barred in the circumstances.

27. The cardinal principle is that litigation has to come to an end; see **Halsbury’s Laws of England 4th Edition Volume 22 at page 273**.

28. So, is the JR application tenable? The answer is not in the affirmative being guided by **Order 53(2), Section 34 (1) of the Civil Procedure Act, Gidambati Mwita Mairo case** and the **Halsbury’s Laws of England** (supra) on the requisite timelines. I find that the JR application lacks merit.

29. A fortiori, the JR application dated 15th March 2010 and filed herein on even date, be and is hereby disallowed.

30. This court is not unconscious of the proviso to **Section 27(1) of the Civil Procedure Act Chapter 21 Laws of Kenya** and **Section 13 (7)(i) of the Environment and Land Court Act, 2015 (2011)** on costs of a suit. **Section 27(2) of the Civil Procedure Act** governs interest on costs. Given the outcome of this matter, the foregoing provisions and the circumstances of the JR application, the parties shall bear their own costs in this matter.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT HOMA BAY THIS 28TH DAY OF SEPTEMBER 2021.

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. G. S. Okoth, Learned Counsel for ex-parte applicant.

Ms. Amondi holding brief for Mr. Omonde Kisera, Learned Counsel for the interested parties.