



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 21 OF 2019**

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

**MANDAMUS, CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF**

**THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA AND**

**IN THE MATTER OF**

**SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF**

**LAND PARCEL NO. 1575- UPPER ATHIRU GAITI "A" ADJUDICATION SECTION**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**VERSUS**

**DISTRIC LAND ADJUDICATION AND SETTLEMENT**

**IGEMBE DISTRICT ..... RESPONDENT**

**M'MUKARIA M'MUCHEKE .....1<sup>ST</sup> INTERESTED PARTY**

**JACINTA KAWIRA MITHIKA ..... 2<sup>ND</sup> INTERESTED PARTY**

**ANN MUKAMI MITHIKA ..... 3<sup>RD</sup> INTERSETED PARTY**

**AND**

**EVANGELINE NKIROTE KAIBI.....EX PARTE APPLICANT**

**JUDGMENT**

1. The background to this matter is that the exparte applicant is the mother of 3<sup>rd</sup> interested party and step mother to the 2<sup>nd</sup> interested party and a daughter in law to 1<sup>st</sup> interested party. The exparte applicant was married to one Mithika who died and she is now allegedly married to his brother one Kaibi. On 20.9.2012, a decision was made before the Land adjudication officer allowing the subdivision of parcel 1575 into two whereby Jacinta retained parcel 1575 while Mukami got the resulting parcel no. 2100. The exparte applicant appealed the decision before the minister claiming that the land belonged to her husband. She lost the case through the decision made on 14.4.2016 triggering this

matter.

2. On 18.11.2019, the ex parte applicant obtained leave to bring forth the judicial Review proceedings of which the substantive motion was filed on 17/12/2019, where the ex parte applicant seeks the following orders:

a) *THAT AN ORDER OF CERTIORARI be issued, quashing the decision of the respondent to unlawfully sub divide land parcel no 1575- UPPER GAITI"A" ADJUDICATION SECTION.*

b) *THAT AN ORDER OF MANDAMUS be issued, compelling the respondent to register back land parcel no 1575- UPPER GAITI"A" ADJUDICATION SECTION in the name of Mithika M'Mukaria*

c) *THAT costs of this application and the ex-parte chamber summons for leave be borne by the respondent and the interested parties jointly and severally.*

#### Case for the ex parte applicant

3. The case of the ex parte applicant EVANGELINE NKIROTE KAIBI is anchored on the statement of facts, the affidavit verifying the facts and annexures thereof. She avers that the suit land belonged to her late husband with whom they had 3 children and that by law and practice, she ought to have been recorded as the owner of the suit land after her husband's demise. That out of spite, her father-in-law the 1<sup>st</sup> interested party is bent on frustrating her and depriving her of her matrimonial property, and thus caused the suit land to be transferred to the children namely the other interested parties, and neither her or her son benefited from the suit land yet they are dependants of the deceased.

4. That the respondent's decision dated 14<sup>th</sup> April 2016 was unfair and prejudicial to her. All through the adjudication proceedings, she was not given proper audience and consideration, whereas immaterial facts were considered. She also contends that the respondent acted in excess of jurisdiction.

5. The respondent's finding that she is married to her late husband's brother is misconceived. According to Ameru customs, her late husband's brother has the responsibility of taking care of his late brother's family but she is not married to him. She has no intention of depriving the 2<sup>nd</sup> interested party her rightful share as her step daughter but her concern is to ensure that every dependant of the late Mithika M'Mukaria is provided for.

6. In her submissions, the ex-parte applicant stated that the suit land is her matrimonial home which belonged to her deceased husband. Thus the respondent acted outside the scope of his jurisdiction by dealing with the said land when he unilaterally and in contravention to the rules of natural justice shared the land to the interested party who are daughters of the deceased to her exclusion.

7. It was submitted that the father in law of the ex parte applicant wanted her to be destitute. Further, the decision of the respondent was informed by extraneous issues which he had no jurisdiction to hear and unilaterally determine as her marital status was neither to be deliberated on nor be determined by the respondent. The decision to give the land to the children while there is a surviving spouse was ultra-vires not only because it is against Section 29 of the Succession Act but also because the respondent did not have jurisdiction to deal and/or distribute the estate of the deceased thus acting as a probate court.

8. The ex parte applicant prays that her suit be allowed. In support of her case, she proffered the case of **Municipal Council of Mombasa V Republic & Umoja Consultant Limited [2002]eKLR.**

#### Case for the 2<sup>nd</sup> interested party

9. The 2<sup>nd</sup> Interested party opposed the suit vide the replying affidavit filed in court on 20.1.2021. She stated that she is the daughter of the late Francis Mithika who died when she was I year old and Joycephine Kaiba who developed psychiatric problems thus she was brought up by her grandmother who subdivided the land into two parcels and her father's share was given to her as parcel no 1575- UPPER GAITI"A" ADJUDICATION SECTION.

10. Her uncle, one Robert Kaibi sold his portion and moved into her portion and later evicted her. Her grandmother then requested the committee to register the land in her name. The committee however decided to have the land shared between two people that is parcel 1575 for the 2<sup>nd</sup> interested party and parcel 2100 for her step sister, the 3<sup>rd</sup> interested party.

11. The 2<sup>nd</sup> interested party submitted that this court lacks jurisdiction to entertain this application for being time barred as per Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules which are couched in mandatory terms and the application herein should be dismissed for having been brought outside the statutory provisions.

12. She urges the court to dismiss the suit with costs. She relied on the cases of **Republic V Director of Land Adjudication and Settlement & others [2017]eKLR, Ak V Special District Commissioner Kisumu & Another [1989]eKLR.**

13. The 1<sup>st</sup> & 3<sup>rd</sup> interested parties as well as the respondent did not file any responses to the suit.

#### **Determination**

14. The 2<sup>nd</sup> interested party avers that the suit was time barred citing the provisions of Section .9 (3) of the Law Reform Act and Order 53

Rule 2 of the CPR which restricts the filing of a judicial review suit within 6 months from the time a decision being challenged was made. The 2<sup>nd</sup> interested party duly raised this issue in her replying affidavit but no explanation was further proffered by the exparte applicant.

15. Clearly, the present suit was brought way past the prescribed time as the decision being challenged was delivered on 14/04/2016 while the application herein was made 17/12/2019, which is almost a period of four years in between. The ex- parte applicant has not offered any explanation for the delay. Despite the fact that leave was granted to file the suit, the same is still time barred. To this end, I make reference to the case of **Rosaline Tubei & 8 others v Patrick K. Cheruiyot & 3 others [2014] eKLR** where Odunga J held that;

***“Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings.”***

Also see- **Republic v Kithele M’Munoru & 2 others [2005] eKLR**

16. The court will however proceed to consider the scenario that would have unfolded if the case was properly filed. The exparte applicant is mainly challenging the decision of the minister because the land in question apparently belonged to her husband and that the respondent had no mandate to question her marital status. She has relied on the provisions of section 29 of the law of succession Act. However, the exparte applicant is well aware about the jurisdiction of this court as set out in Article 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act. If her claim is based on the fact that she is the surviving spouse of the deceased and that the suitland forms part of the estate of her deceased husband, then she is surely in the wrong court.

17. Needless to say that both section 13 of the Land Adjudication Act and the Land Consolidation Act makes provisions for determination of claims relating to deceased persons. Thus the respondent had the mandate under the aforementioned provisions of law to determine the claim.

18. Further, it is pertinent to note the nature of the appeal which was lodged before the minister. The same is captured in the introductory heading in the minister’s appeal (annexure ENK-I) as follows;

***“Being an appeal against the decision of the lands adjudication officer then dated 20<sup>th</sup> September, 2012 allowing the subdivision of P/No. 1575 into two for Jacinta Kawiria and Ann Mukami with Jacinta retaining the number 1575 and Ann getting a new number for her parcel”.***

19. This means that prior to the decision of 20/9/2012, the 2<sup>nd</sup> interested party was the owner of the larger undivided parcel 1575 but the decision of year 2012 allowed the subdivision for her to share the land with her step sister. The appeal before the minister recognized that the exparte applicant had only appealed against the resultant share of Jacinta and not that of Ann who is her real daughter. The appeal also decreed that:

***“This appeal by Evangeline Nkirote Kaibi lacks merit and was filed in bad faith and is therefore dismissed. Land P/No. 1575 to remain registered in the name of Jacinta Kawiria Mithika and Evangeline Nkirote Kaibi to allow Jacinta Kawiria to start enjoying ownership rights of P/No. 1575 by using it. In other words, she (Evangeline) should vacate P/No. 1575 for Jacinta Kawiria”.***

20. This means that the appeal did not make any positive orders as they did not disturb the earlier decision. How then can the respondent be said to have acted in excess of jurisdiction.

21. This court cannot sit as an appeal in respect of the decision of the minister in line with the provisions of Section 29 of the Land Adjudication Act. The exparte applicant is certainly unhappy by the said decision, but it is not the place of this court to analyse the merits of the same.

22. In the final analysis, this suit lacks merits and the same is dismissed with costs to the 2<sup>nd</sup> interested party (Jacinta Kawiria).

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**