REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC JUDICIAL REVIEW NO. 12 OF 2019

REPUBLIC.....APPLICANT

VERSUS

MINISTER APPEAL TRIBUNAL –

(DISTRICT COUNTY COMMISSIONER) –

KILUNGU SUB-COUNTY.....1ST RESPONDENT

THE DIRECTOR OF LANDS &

SETTLEMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL .....3RD RESPONDENT

AND

GABRIEL MUSIU MAINGI.....1ST INTERESTED PARTY

JOSEPH K. MAINGI.....2ND INTERESTED PARTY

AND

PAUL KINYAMBU MAUNDU..... EX-PARTE APPLICANT

JUDGMENT

1. Before this court for determination is the Ex parte Applicant's Notice of Motion application dated 30th November, 2019 and filed in court on 2nd December, 2019. It is brought under Order 53 Rules 3 and 4 of the Civil Procedure Rules, Sections 8 and 9 of the Law Reform Act, Sections 7 and 9 of the Fair Administrative Action Act, Articles 40, 46 and 50 of the Constitution of Kenya and pursuant to the court's leave dated 27th November, 2019.

2. The Ex parte Applicant is seeking judicial review orders as follows;

a) That a judicial review order of Certiorari be granted to the Ex parte Applicant to bring into the Environment and Land Court and quash the decision of the Minister qua Deputy County Commissioner Kilungu Sub-County – Makueni County dated the 4th September, 2019 and certified on the 30th September, 2019 by the Director of Land Adjudication Nairobi, allowing the interested parties Appeal Case No. 46 of 2013 and ordering that the Objection case No. 290 of 2012 be set aside and that parcel number 4085 Wautu Land Adjudication Section, belonging to the Exparte Applicant be deleted from the Adjudication records and that land parcel no. 2881 Wautu Land Adjudication Section does remain as originally demarcated.

b) That a judicial review order of prohibition be granted to the Ex parte Applicant to prohibit the implementation of the decision of the Minister qua Deputy County Commissioner Kilungu Sub County in Minister's Appeal Case 46 of 2013 dated the 4th September, 2019 and certified on the 30th September, 2019 by the Director of Land Adjudication, Nairobi.

c) That the costs of this application be borne by the Respondents and the Interest parties.

3. The application is supported by the statement dated 26th November, 2019 and a verifying affidavit sworn on the 26th November, 2019 by Paul K. Maundu, the Ex parte Applicant herein. Both the statement and the verifying affidavit were filed in court on 29th November, 2019.

4. The Ex parte Applicant has deposed in the verifying affidavit inter alia that he lodged objection case number Wautu/Obj/290 in which the Adjudication Officer ordered that parcel number 2881 Wautu Land Adjudication Section remain in the name of the interested parties, but that a portion which was given number 4085 be extracted for the family of the Ex parte Applicant, that the interested parties appealed through Minister's Appeal No. 46 of 2013 and the same was heard though illegally and the decision was that parcel number 4085 Wautu be deleted from 2881 Wautu Land Adjudication Section was made, that the Minister never really considered the matter fairly, because she failed to visit the land and take the evidence of the Ex parte Applicant on the boundary between the disputants, that during the hearing, the Minister adjourned the proceedings to prepare to visit the land as is indicated in page 7 of the proceedings, that the Ex parte Applicant waited for the Minister to visit the land but he was surprised to be notified that a ruling was to be delivered on 4th September, 2019 wherein he was deprived of his land, that upon reading the ruling the Ex parte Applicant was surprised that the Minister had relied on the decisions of earlier court cases, yet none had been produced before her to confirm the true position of the matter and that the Minister was unduly influenced by decisions, which she herself never read to correctly get the true position of the matter.

5. Opposing the application are the Respondents' grounds of opposition dated 7th January, 2020 and filed in court on 16th January, 2020 where they contend that: -

> **1) The Minister in hearing the impugned appeal complied with the provisions of Section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya. The said law does not mandate him to conduct a site visit as alleged by the Applicant.**
>
> **2) This honourable court's jurisdiction is to determine the legality of the decision making process by the Minister and not whether the decision itself was right or wrong.**
>
> **3) The Applicant was duly heard as evidenced by the proceedings attached to the application herein hence can't claim that rules of natural justice were not observed.**
>
> **4) The application as drawn and taken out is bad in law, incompetent, and otherwise an abuse of the process of this Honourable Court.**

6. The Interested Parties have also opposed the application through the replying affidavit sworn at Machakos on 24th February, 2020 by Gabriel Musiu Maingi, the 1st Interested Party, with the authority of the 2nd Interested Party. The 1st Interested Party has deposed *inter alia* that he has been informed by his Advocate which information he verily believes to be true that the application has no merits, that the Ex parte Applicant adduced evidence and produced the judgements in Kilungu 67 of 1978 and 233 of 1975, that the Minister heard the appeal lodged by the Interested Partes and made a decision to award to them the land in question, that the judgement by the Minister was just and did not commit error on the face of the record and nor was she influenced by the earlier court cases, that he is informed by his Advocate which information he verily believes to be true that the minister did not violate rules of national justice by failing to appear at the site to hear the evidence of the Ex parte Applicant as there was enough evidence on record to support her decision, that both parties were granted the chance to present their evidence and produce documents in support of their claim and that the decision of the Minister is not *ultra vires*, irrational and nor did she apply the principle of *res judicata.*

7. The application was canvassed by way of written submissions and by the time of writing this judgement, it is only the Ex-parte Applicants and the Interested Parties who had filed theirs.

8. The counsel for the Ex parte Applicant began by submitting on the jurisdiction of the court to hear and determine such an application as is discussed in the case of **Pastoli -Vs- Kabale District Local Government Council & Others [2008] 2EA 300** as follows: -

> ***"In order to succeed in an application for judicial review, the application has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety….illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principle are instances of illegality…….irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards……Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness maybe in non-observance of the rules of natural justice or to act with un procedural fairness toward one to be affected by the decision."***

9. The counsel correctly submitted that the essence of judicial review is to address the decision making process as opposed to the merits of the decision arrived at. The counsel pointed out that a decision arrived at in flagrant disregard of the law the laid down procedure or improper assumption of jurisdiction or in breach of the rules of natural justice is amenable to be quashed by a writ of *certiorari.* In support of his submissions, the counsel relied the case of **Municipal Council of Mombasa -Vs- Republic & Umoja Consultants Ltd CA, Civil Appeal No. 185 of 2011** where the Court of Appeal addressed the issue as follows;

> ***"Judicial review is concerned with the decision making process, not with the merits of the decision itself, the court would concern itself with such issues as to whether the decision maker 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. The court should not act as a Court of Appeal over the decider which would involve going into the merit of the decision itself."***

10. The counsel for the Ex parte Applicant urged the court to allow the application on the grounds: -

i) Error of fact on the face of record.

ii) Illegality.

iii) Procedural impropriety.

iv) Abuse discretion.

v) Abuse/failure and/to exercise discretion.

vi) Abuse of rules of natural justice.

11. With regard to error of fact on the face of the record, the counsel submitted that from the findings of the Minister at pages 7 to 9, it is clear that the Minister relied on the court cases earlier on decided to overturn the objection. The counsel went on to submit that the Minister had a duty to follow the laid down procedure set out in the Land Adjudication Act. The counsel added that under Section 29 of the Land Adjudication Act, the Minister was under a statutory duty to determine and make such order as she thought just. That by failing to visit the site, she failed to make a determination based on evidence given that is what was to be procured during the site visit. That by relying on earlier decided cases, the Minister allowed herself to be influenced by the principle of *res judicata* which clogged her mind so as not to be able to perform her statutory duty under the Act.

12. It was further submitted that the boundary was to be shown to the Minister on her visit and that her reliance on the court decisions could not help her to make a decision. The counsel pointed out that the issue of the boundary remains unresolved to date and that the Minister failed to appreciate that under Section 18 of the Act, existing boundaries can be altered or adjusted.

13. It was also submitted that the principles of res judicata have no bearing in disputes under the Land Adjudication Act and that court decisions are only relevant as facts to be taken into account. In support of his submissions, the counsel relied the case of **Timotheo Makenge -Vs- Manunga Ngochi (1979) eKLR** pages 8 to 10 where Law J, held that the principles of *res judicata* do not apply in land adjudication process and that the Minister must determine rights and interests of the parties without being clogged by court decisions.

14. On the issue of illegality, the counsel submitted that the Minister's reliance on the doctrine of *res judicata* made her fail to observe the provisions set out in Sections 12, 18 and 29 of the Land Adjudication Act and thus she committed an error of law and made an illegal decision.

15. The counsel went on to submit that the Minister decision to ignore the provisions of Sections 4 and 7 of the Fair Administrative Action Act she not only failed to be fair but also committed acts of illegality and acted *ultra vires*. In support of his submissions, the counsel relied on the case of **Pastoli -Vs- Kabale District Local Government Council & Others [2008] 2EA 300** at pages 303 to 304 where it was held;

> ***"Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint; Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principle are instances of illegality."***

16. On procedural impropriety, the counsel submitted that while hearing the appeal, the Minister saw it proper to visit the site and obtain further evidence but later decided not go. The counsel pointed out the Minister having set down the procedure to follow, she was under a duty to do so and that her failure was procedural impropriety. The counsel added that the Minister thus failed to act fairly in the process of her decision making.

17. The Ex parte Applicant further contends that the Minister abused her unfettered discretion under Section 29 of the Act when she failed to visit the land to gather evidence on the boundary and determine the exact size of each party's land.

18. It was also submitted that the Minister abused rules of natural justice by condemning the Ex parte Applicant unheard when she failed to visit the site. The counsel added that this caused her not to take into account and consider all the relevant factors and circumstances surrounding the case.

19. On the other hand, the counsel for the interested parties submitted that the Minister did not rely on the decisions of the court and nor was she influenced by them. The counsel pointed out that the court decisions complained were never produced even though the parties gave evidence on their contents.

20. Regarding the principle of *res judicata*, the counsel agreed with the counsel for the Ex parte Applicant that the same does not apply in Land Adjudication process and that all what the Minister did was to acknowledge the court decisions even though she did not rely on them.

21. It was the counsel's submissions that the Minister had sufficient facts and evidence to arrive at her decision thus there was no violation of the law.

22. Regarding procedural impropriety, the counsel submitted the evidence and proceedings before the committee and the Board were placed before the Minister and therefore she did not require evidence other than that was in the adjudication register. The counsel was of the view that visiting the site was neither procedural nor statutory requirement.

23. It was also submitted that the Minister gave reasons on why she declared parcel number 1848 as the property of the Respondent and that all the grounds raised on the instant application have no merit and hence the same should be dismissed with costs.

24. Having looked at the application, the replying affidavit and rival submissions by the counsel on record for the Ex parte Applicant and the Interested Parties, I am of the view that the only issue for determination is whether the substantive motion has merits.

25. As was correctly submitted by the parties, a court exercising judicial review jurisdiction should only concern itself with the decision among process and not the merits of the decision.

26. I have scrutinized all the documents exhibited by the parties and indeed, the history of the dispute is as captured by both the Ex parte Applicant and the Interested parties. It is clear that the Ex parte Applicant or his representatives participated throughout the adjudication process and were afforded the opportunity to present their case. He however says that the Minister relied on earlier decided court cases and allowed herself to be influenced by the principle of *res judicata*. That in so doing the Minister failed to appreciate that under Section 18 of the Land Adjudication Act, Chapter 284 of the Laws of Kenya, boundaries could be altered and adjusted. The Ex parte Applicant further contends that even though the Minister had advised the parties that she would visit the land, she failed to do so and did not give the Ex parte Applicant the chance to be heard on why it was important for the Minister to visit the site.

27. Even though the Ex parte Assistant contends that the Minister breached the rule of natural justice by condemning him unheard and that she failed to give reasons on why she decided not to visit the site, as earlier on observed in my judgement, the proceedings herein show that the parties and their witnesses before the Minister were given the chance to be heard before the case was adjourned. In the proceedings of 24th May, 2018, the Minister stated thus;

> ***"case is adjourned to await site viewing and judgement."***

28. The Minister appears to have decided to visit the site on her own motion as there is nothing in the said proceedings that shows she was prompted by any of the parties. I also note that the date of the site visit is not stated and nor is there is indication that the Minister was to receive further evidence from the parties. Despite being inconvenienced by the Minister's failure to visit the site, the Ex parte Applicant cannot be heard to say that the Minister breached rules of natural justice. I would agree with the counsel for the Interested Parties that the site visit was neither procedural nor statutory requirement.

29. Given those circumstances, the Minister was not bound to give reasons as provided under Section 4 and 7 of the Fair Administrative Act.

30. Section 18 of the Land Adjudication Act provides as follows;

> **18 particular powers of a demarcation officer.**
>
> **1) In the performance of his duties, the demarcation officer may;**
>
> > **a) When the boundary between parcels of land is curved or irregular, or in his opinion is inconvenient or uneconomic for the use of land, layout a fresh boundary in its place and adjust the interests of the owners of the land adjourning the boundary either by exchange of land or such other means as the parties may agree.**
> >
> > **b) Demarcate any right of way which is necessary for providing a parcel completely surrounded by other parcels with access to a public road or to water.**
> >
> > **c) Make such alignment of parcels adjoining a public road as may be required in the public interest.**
> >
> > **d) With the agreement of the owner or owner's group together in one or more parcels, by way of exchange or otherwise separate areas of land owned by such owner or owners.**
>
> **2) Where a piece of land has not been demarcated in the manner and before the date fixed by the demarcation officer under Section 5(2) (d) of this Act, the demarcation officer may demarcate or cause to be demarcated the land and may clear or cause to be cleared any boundary or other line which may be necessary to clear for the purpose of such demarcation.**

31. In the case of **Timotheo Makenge -Vs- Manunga Ngochi [1979] eKLR** referred to me by the counsel for the Ex parte Applicant, Law JA had this to say regarding Section 18 of the Land Adjudication Act and the principle of *res judicata*.

> ***"Section 18 of the Act makes it clear that existing boundaries can be altered and adjusted. This would not be possible if the rules of res judicata were strictly applied."***

32. I have looked at the judgement by the Minister. In the second last paragraph of page 9 it stated thus,

> ***"Based on these facts, thus court does not concur with the objection court's decision to ignore the previous court's decisions and the sketch map thereof (sic)."***

33. It seems to me that the Minister's judgement faulted the objection proceedings number 290 of 2012 filed by the Ex parte Applicant herein on the grounds that the Objection Court ignored previous court's decisions. In so doing, the Minister failed to make a determination as is

provided under Section 29 of the Act. As observed in Timotheo's case (Supra), the Minister's obligation was,

> ***"his duty by Section 29 of the Act, is to, determine the appeal and make such order thereon as he thinks just."***

The Minister therefore cannot be said to have determined the appeal and made an order thereon as she thought fit.

34. Notwithstanding the fact that parties were heard by the Minister, I would agree with the counsel for the Ex parte Applicant that the Minister allowed the principle of *res judicata* to clog her mind and thus she failed to appreciate that under Section 18 of the Act, boundaries can be altered and adjusted. In my view the Minister's judgement is tainted with an error of law in that she acted contrary to the provisions of Sections 18 and 29 of the Act. Her actions further amounted to procedural impropriety for her failure to act fairly in the process of making her decision.

35. From the foregoing, my finding is that the application partially succeeds and I proceed to allow it as hereunder;

a) That a judicial review order of Certiorari be granted to the Ex parte Applicant to bring into the Environment and Land Court and quash the decision of the Minister qua Deputy County Commissioner Kilungu Sub-County – Makueni County dated the 4th September, 2019 and certified on the 30th September, 2019 by the Director of Land Adjudication Nairobi, allowing the interested parties Appeal Case No. 46 of 2013 and ordering that the Objection case No. 290 of 2012 be set aside and that parcel number 4085 Wautu Land Adjudication Section, belonging to the Exparte Applicant be deleted from the Adjudication records and that land parcel no. 2881 Wautu Land Adjudication Section does remain as originally demarcated.

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c) That the costs of this application be borne by the Respondents and the Interest parties.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 9TH DAY OF SEPTEMBER, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi