



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC MISCELLANEOUS APPLICATION NO. E015 OF 2021

IN THE MATTER OF

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BY WAY OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF

THE LAND ADJUDICATION ACT CHAPTER 284, LAWS OF KENYA

AND

IN THE MATTER OF

THE LAND REGISTRATION ACT, 2021

AND

IN THE MATTER OF

FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF

THE PARCEL OF LAND KNOWN AS SIAYA/NYANGOMA/4754

REPUBLIC.....APPLICANT

VERSUS

MINISTER FOR LANDS AND SETTLEMENT.....1ST RESPONDENT

DISTRICT LAND ADJUDICATION/

SETTLEMENT OFFICER, BONDO.....2ND RESPONDENT

BONDO SUB COUNTY LAND REGISTRAR.....3RD RESPONDENT

EX-PARTE

AUSTIN OKOTH ORINDA (Suing as the Administrator of the estate of

RAPHAEL MIDHODHO).....APPLICANT

AND

WILLIAM ODONGO GUYA.....INTERESTED PARTY

JUDGEMENT

Austin Okoth Orinda hereinafter referred to as the ex parte Applicant has filed this Judicial Review application against the Minister for Lands and settlement, District Land Adjudication/Settlement Officer, Bondo and Bondo Sub-County Land Registrar seeking judicial review orders of certiorari bringing into this court for purposes of quashing the decision of the Minister of Lands and Settlement made on behalf of the latter by the Deputy County Commissioner of Bondo Sub county on 14.01.2021 and an order of prohibition do issue directed at the Bondo Sub County Land Registrar, prohibiting him from cancelling the name of the deceased from its registrar in respect to land parcel known as SIAYA/NYANGOMA/4754.

William Odongo Guya was enjoined as an Interested Party. The Judicial Review application is based on grounds that the Minister failed to appreciate the fact that the matter was first heard and decided in favour of the applicant herein by the Land Adjudication Officer 2003 and that the respondent did not raise any objection until 2021 when his right to lodge an appeal was already extinguished and/or time barred. The Minister acted in excess of his jurisdiction or without jurisdiction under Section 29 (1) of the Land Adjudication Act, Cap 224, and Laws of Kenya by accepting, hearing and determining an appeal after the statutory period of sixty days. That 1st Respondent decision to effectively cancel the title of land parcel number SIAYA/NYANGOMA/4753 which is in the name of one Raphael Midhodho was made without jurisdiction and thus ultravires. The decision of the 1st Respondent in directing that the suit and SIAYA/NYANGOMA/4753 be registered in the name of the Interested party herein was materially influenced by an error of the law. The 1st Respondent failed to take into account that the Interested Party had no locus standi to maintain those proceedings. The 1st Respondent failed to appreciate that there was no competent appeal before him for determination and his decision was thus irrational, illegal and highly prejudicial. That the minister failed to consider the long period the appellant had used the land and the development he had made on it.

In the supporting affidavit the ex parte applicant states that he is the administrator of the estate of his deceased father. That the land parcel number 4754 Bondo/Nyangoma Adjudication Section is now known as Siaya/Nyangoma/4754 and is in the name of his deceased father Raphael Midhodho completion of the adjudication process having taken place and title deeds issued. That as at 18th May, 2015, the title deed to land parcel number 4754 had not been issued as parcel within that locality were still under adjudication. That the land parcel number is registered in the name of one Odongo Guya and is currently registered as Siaya/Nyangoma/1009 upon completion of the adjudication process. That on the proceedings conducted on the 17th March 1997, the Siaya District Arbitration Board did hear his case against the Interested Party herein on a dispute touching on the land parcel number 1009 in Arbitration Cause No. 30 of 1983 wherein his Appeal was allowed and he was awarded a portion of land parcel number 1009 by being issued with a new number being parcel number 4754. That the decision of Siaya District Arbitration Board, the Interested Party herein being aggrieved by that decision proffered an objection before the Land Adjudication Officer being objection number 8 of 43 on 8/7/2003 wherein the Land Adjudication Officer vide its judgment delivered on the 14th July 2003 dismissed with objections.

That the land Adjudication Officer ordered that land parcel number 4754 was to remain in the name of his deceased father Raphael Midhodho thus dismissing objection Number 8 and Objection number 433 was equally dismissed by directing that land parcel number 1009 was to remain in the name of the Interested Party herein. That being aggrieved by this decision, as specifically with the finding made as regards to land parcel number 4754, the Interested Party herein did prefer an appeal to the Minister, being Appeal number 59 of 2010. The Minister gave his decision on the 14th January 2021 wherein he did allow the appeal and ordered that the names of the ex parte applicant's deceased father be deleted from the Lands Records and the names of the Interested Party be entered.

The Ex Parte Applicant filed her submissions on 23rd August 2021 and the following issues were raised for determination:

a) Whether the Minister acted in excess of jurisdiction or power under any written law;

The Ex parte Applicant submitted that the 1st Respondent acted ultra vires as the proceedings were irregular. That as at 2015, the suit land was still under adjudication process and the suit land was known as Land Parcel 4754 BONDO/NYANGOMA Adjudication section which was in the name of RAPHAEL MIDHODHO (deceased). The suit property was registered in the name of the deceased on 8th March 2017.

The Minister acted contrary to the provisions of the Land Adjudication Act since at the time of rendering his decision he was not vested with powers to entertain a registered land that was already adjudicated. The Ex parte Applicant relied in the case of **Nairobi Misc Appeal No.169 of 2019, Livingstone Ntutu vs the Minister of Lands**.

b) Whether a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

It was submitted that the ex parte Applicant had no locus standi to maintain the proceedings at that point and his action ought to have been supported by Grant of Letters of Administration. That the proceedings conducted by the Minister are provided for under section 29 of the Land Adjudication Act and the Minister ought to have ascertained whether parties had locus standi. The 1st Respondent failed to take into consideration the issue of locus standi as provided for in terms of section 7 (2) (b) of the Fair Administrative Act. The Ex parte Applicant relied in the case of **Kisumu ELC JR Misc. Cause No.16 Of 2018 Republic vs Minister for Lands & Another Ex Parte Joash Onyano Opiyo, Daniel Omondi Owira & Another (Interested Parties)**.

c) Whether the 1st Respondent was unfair and biased.

It was submitted that the 1st Respondent's decision was biased as the Interested Party was disorderly and disrupted the proceedings as he was

hostile and declined to answer questions and that the Minister failed to take into account that the ex parte Applicant's family were the owners of the suit property. The Ex Parte Applicant therefore submitted that the Application is merited and the same be allowed with costs. The Respondents and the Interested Party failed to file their Submissions.

I have considered the submissions on record and do find that the Minister acted in excess of Jurisdiction because at the time of making his decision the suit property was already registered in the names of Raphael Midhodho. Moreover, the Minister acted ultra vires as he has no power to direct cancellation of title and deletion of a proprietor's name from the register. Section 29 of the **Land Adjudication Act** Cap 284 Laws of Kenya provides:

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by -

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication,

and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall -

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

(4) Notwithstanding the provision of section 38 (2) of [the Interpretation and General Provision Act](#) or of any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

The Ex Parte Applicant stated in paragraph 14 of the Supporting Affidavit that the Appeal to the Minister was filed in 2010 being seven years after the decision of the Land Adjudication Officer and therefore the Minister lacked jurisdiction to entertain Appeal that had been filed out of time and this court finds the same to be contrary to the provisions of Section 29 (1) of the Land Adjudication Act. The Ex parte Applicant stated in his Affidavit that in 2017, the suit property was no longer under Adjudication as it was registered in the name of the deceased as per the search certificate annexed.

The fact that the Minister cancelled the title and yet the suit property was no longer under adjudication process was *ultra vires* as he lacked power to entertain the Appeal filed by the Interested Party. In the case of **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully exercised..... Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations.....The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

On the issue of whether the 1st Respondent was unfair and biased;

Article 47 of the Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The Ex parte Applicant submitted that the 1st Respondent was unfair in making his decision, this court finds that the Minister violated the provisions of Article 47 of the Constitution of Kenya as the Appeal was filed 7 years later which was contrary to the provision of section 29(1) of the Land Adjudication Act and therefore this amounted to abuse of his powers. This court also finds that the 1st Respondent cancelled the title yet he the Land Registrar is the one entitled to cancel titles land. The 1st Respondent also failed to consider the fact that as per the letter dated 18th May 2015 the same had confirmed that the suit property was registered in the name of the deceased and the same had no pending case neither did it have any encumbrance. I am satisfied that the Judicial Review application is well founded and I do grant the following orders:

a) That an order of certiorari is hereby issued quashing the decision of the Minister of Lands and Settlement made on behalf of the latter by the Deputy County Commissioner of Bondo Sub county on 14.01.2021.

b) That an order of prohibition is hereby issued directed at the Bondo Sub County Land Registrar, prohibiting him from cancelling the name of the deceased from its registrar in respect to land parcel known as SIAYA/NYANGOMA/4754.

c) Costs of this proceedings to the exparte applicant. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21st DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE