REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. E004 OF 2021

REPUBLIC.....APPLICANT

VERSUS

THE LAND ADJUDICATION AND SETTLEMENT OFFICER,

TIGANIA SUB-COUNTY.....1ST RESPONDENT

THE ATTORNEY GENERAL..... 2ND RESPONDENT

JUDGMENT

1. Before this court is the motion dated **4.3.2021** seeking for orders of certiorari to quash the decision dated **11th August, 2020** by the 1st respondent and through mandamus to compel the 1st respondent to issue a consent letter to exparte applicant as per **Section 30 of the Land Adjudication Act Cap 284 Laws of Kenya**.

2. The application is supported by a statement dated **10.2.2021**, **verifying affidavit sworn on 10th February, 2021 with annextures marked GHG6.**

3. The grounds upon which the motion is made are that the decision to decline issuance of the consent was unlawful, unreasonable and unprocedurally unfair and hence amounts to breach of the exparte applicant's rights to fair administrative action, fair hearing and access to justice.

4. By written submissions dated **4th October, 2021** the exparte applicant submits there was a conservatory order issued in ***Meru ELC Petition No. 5 of 2019 Muthara Njuri Ncheke Counsel of Elders & Another –vs- Committee of Ngaremara/Gambela Adjudication Section & 2 Others (2019) eKLR*** halting the adjudication process, and this was one of the reasons given by the 1st respondent in declining to give a consent.

5. The applicants relies on the case of ***Mohammed Ali Baadi and Others –vs- The Attorney General and 11 Others (2018) eKLR*** on the proposition that exhaustion doctrine is only applicable where alternative forum is accessible, affordable, timely and effective.

6. Further the ex-parte applicant sought reliance on ***Republic –vs-Secretary of the Firearms Lincensing Board & 2 Others ex-parte Johnstone Muthama (2018) eKLR and Pastoli –vs-Kabale District Local Government Council & Others (2018) 2 EA 300*** on the proposition that where a decision is tainted with illegality, irrationality and procedural impropriety, the same cannot stand.

7. Last the exparte applicant submits failure to allow the exparte applicant opportunity to make presentation before denial of the consent was **contrary to Section (4) (3) (c) of the Fair Administrative of Actions Act**.

8. On the other hand the respondents oppose the notice of motion through grounds of opposition and submissions dated **22nd September 2021.** The respondents take the view that the motion offends **Section 30 (3) of the Land Adjudication Act,** consents only issue when the adjudication register is final as per **Section 31 (c)** thereof; Meru **ELC Petition 5 OF 2019** halted the process through a conservatory order and hence the application lacks merit; is a non-starter and an abuse of the court process.

9. In support of their position, the respondents rely on ***Republic –vs- National Employment Authority & 3 Others exparte Middle East Consultancy Services Limited (2018) eKLR*** on the proposition that mandamus is an equitable remedy only granted if it is the most efficacious remedy in the circumstances. In sum the respondents take the view the 1st respondent acted reasonably and if at all the exparte applicant was aggrieved he had another alternative as per law to appeal against the refusal to grant consent.

10. **Section 30 (3) of the Land Adjudication Act** states:

> ***"Any person who is aggrieved by the refusal of the Adjudication Officer to give consent or make a direction under Section (1) or (2) of this Section may, within twenty eight days after the refusal, appeal in writing to the Minister whose decision shall be final***."

11. It is not in dispute that the exparte applicant has appealed to the Minister concerning the refusal of a consent. What is in dispute is whether before the refusal of the consent the exparte applicant ought to have been given an opportunity to make presentation and secondly if the refusal itself was irrational, unreasonable, unprocedural and unfair.

12. Now it is not in dispute that the act, made by the 1st respondent is an administrative decision, there is a statutory administrative remedy which the exparte applicant has exercised but instead of awaiting its outcome he has resorted to judicial review proceedings for reprieve.

13. The question this court shall have to answer is whether the exparte applicant should have awaited the outcome of the available administrative remedies. Put another way, is whether availability of internal administrative mechanism is a bar to the Constitutional rights under **Article 47 of the Constitution**. Third is whether laid down procedures under **Section 30 of the Land Adjudication Act** are themselves unconstitutional and or an impediment to other available remedies laid down under **Fair Administrative Actions Act.**

14. In the case of ***Speaker of the National Assembly –vs- James Njenga Karume (1992) eKLR***, the Court of Appeal stated that:

> ***"…… where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or Act of Parliament this procedure should be strictly followed."***

In ***Mutanga Tea & Coffee Ltd. v-s- Shikara Ltd. & Another eKLR***, the Court of Appeal stated:

> ***"…. We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific Dispute Resolution Mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the high Court. The basis for that view is that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution."***

15. In my view therefore, the internal mechanism set out in the **Land Adjudication Ac**t has the Constitutional imprimatur and cannot be termed as an hindrance to the exparte applicants' rights as to fair hearing, access to justice and a fair administrative action. If anything they are more facilitative of his rights given that the process is aimed at ensuring Kenyans the applicant included have ascertainments of their land rights and interests, in an orderly and timely manner.

16. The exparte applicant has not explained why he did not await the outcome of this appeal process before the Minister. If anything, once he exercised his rights, as to the appellate process, in my considered view he ought to have awaited for the outcome of that process before rushing to court. Perhaps the prudent way, if at all he thought the Minister's outcome had been inordinately delayed, he would have enjoined him in these proceedings as a respondent. Failure to do so perhaps in an indication, that the exparte applicant is hopeful of an outcome. The outcome may, very well be favourable to him.

17. In my considered view the exparte applicant cannot have its both ways; he ought to have chosen one route and to await it outcome. It has not been submitted that he has withdrawn that appeal so as to come to this court. On the contrary he insists there has been an inaction. If there was any delay, the exparte applicant still had an option under the Fair Administrative Action Act which in itself mandates parties to exhaust internal dispute mechanisms before resorting to court. In ***Geoffrey Muthinja Kabiru & 2 Others –vs- Sameul Muuga Henry & 1756 Others (2015) eKLR*** the Court of Appeal took the view that the exhaustion doctrine is a sound one and serves the purpose of ensuring there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside court.

18. In my view the reasons given for non-issuance of a consent, among others that there are conservatory orders issued by this court cannot be termed unreasonable, illogical or unfair. The ex-parte applicant herein has not disputed there exists such orders and that there is a ripe case pending before this court of that nature. On this end alone, this court would be acting contrary to good order and against the spirit of the Constitution if it was to issue mandamus orders to compel the 1st respondent to perform a public duty, when the very same court have barred the said officer through conservatory orders.

19. In the circumstances and due to the foregoing, it is my finding that the notice of motion herein lacks merit and the same is dismissed with costs to the respondents

DATED, SIGNED AND DELIVERED via MICROSOFT TEAMS AT MERU THIS 13TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

Nkunja for exparte applicant

Kietyfor 1st & 2nd respondents

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE