



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

JUDICIAL REVIEW APPLICATION NO.E002 OF 2021

IN THE MATTER FOR JUDICIAL REVIEW ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: ARTICLES 40 AND 43 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ORDER 53 RULES 1,2,3 AND 4 OF THE CIVIL PROCEDURE RULES,2010

AND

IN THE MATTER OF : SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN TH MATTER OF: SECTION 7,10,11 OF THE FAIR ADMINISTRATIVEACTIN ACT NO. ,4 of 2015

AND

IN THE MATTER OF SECTION 29 OF THE LAND ADJUDICATION ACT CAP, 284

LAND ADJUDICATION RULES 1970 AND KAMARANDI B ADJUDICATION

SECTION0 PARCEL NO.73

IN THE MATTER OF: APPEAL TO THE CABINET SECRETARY IN

CHARGE OF LANDS AND PHYSICAL PLANNING NO.103 OF 2018

AND

IN THE MATTER: ISSUANCE OF TITLE IN RESPECT OF KAMARANDI B

ADJUDICATION SECTION= PARCEL NO.73

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY,

MINISTRY OF LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

THE HON.ATTORNEY GENERAL.....3RD RESPONDENT

GEREVASIO MUGAO NYAGA.....INTERESTED PARTY

AND

EXPARTE.....JOSEPH MUTEMI NKUNO

EXPARTE.....MOSES NKUNO MAKEMBO

JUDGEMENT

1. This matter is brought pursuant to a notice of motion application dated 27th April, 2021 seeking orders that:

- a) An order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the decision and award of the 1st Respondent dated 18.11.2020 made and delivered on his/her behalf by the Deputy County Commissioner, Tharaka South Sub-county on the 08.02.2021 relating to Kamarandi 'B' Adjudication section – Parcel No.73:
- b) An order of prohibition do issue to prohibit the 1st Respondent by themselves, agents or whoever from issuing a title in favour the interested party in respect of Kamarandi 'B' Adjudication section – parcel no.73 which includes the portion belonging to the 1st Applicant;
- c) An order of Mandamus do issue to direct the 1st Respondent to re- demarcate Kamarandi "B" Adjudication section – parcel no.73, issue a fresh number for the portion belonging to the 1st applicant, and issue the 1st Applicant with a title for the same:
- d) Cost of and incidental to this suit be provided for.

2. The motion is supported by the facts and Grounds restated therein and contained in the Statutory statement dated 9th April 2021, the annexed supporting affidavits of Moses Nkuno Makembo, Joseph Mutemi Nkuno, Gerevasio Kinyua Mitambo and Japhet Nthiga Nkamba.

FACTS OF THE MATTER

3. The Applicants being dissatisfied with the decision of the Land Adjudication officer, filed an appeal to the Cabinet Secretary in charge of Land and Physical Planning under the provisions of section 29 of the Land Adjudication Act Cap284 Laws of Kenya, claiming a portion that was wrongfully included in Kamarandi 'B' Adjudication Section – parcel no.73:
4. That the Cabinet secretary delegated the hearing and determination of the appeal to the Deputy county Commissioner, Tharaka South Sub-county (hereinafter referred to as the DCC under section 29(4) of Cap 284;
5. The applicants aver that the DCC acted unreasonably, hurriedly, unfairly and arrived at a hurried decision, completely disregarded the testimony of the 1st Applicant's three witnesses, and reached a decision without even visiting the locus in quo to be able to appreciate the full facts and did not consider all the facts placed before him by the witnesses in totality:
6. The applicants allege that DCC acted unreasonably by giving undue regard and undeserved weight to the testimony of the interested party who did not even call a single witness in support of his case, yet it was a matter touching on land ownership.
7. The applicants allege that the DCC was overly induced and influenced by the area lands committee which was improperly constituted, conspicuously and apparently biased in its decision.
8. That the Committee constituted of members who were largely cronies, of the same family or related by blood or marriage and who favoured their relatives in their decisions. In particular, the applicants allege that the father to the interested party was a member of the Committee and was out rightly biased and influenced the allocation to his son in total unfairness, injustice and prejudice to the interests of the 1st and 2nd applicants.
9. The applicants aver that the grounds upon which the relief are sought are that, the 1st Respondent's decision of dismissing the 1st applicant's Appeal and effectively awarding Kamarandi "B" Adjudication section- parcel no.73 which includes the portion belonging to the 1st Applicant, to the Interested party, without following the due process and without due consideration of the evidence tabled before him, was illegal, ultra vires, unreasonable, in bad faith, constitutes an abuse of power and discretion and in excess of jurisdiction and in breach of the legitimate expectation that the 1st Respondent would adhere to the laid down requirements of the law.
10. That the decision of the 1st Respondent was unprocedural hence ultra vires, an error of law on the face of the record hence illegal, prejudicial to the rights of the Applicants, made in bad faith, violates the legitimate expectation of the Applicants, unfair and constitutes an abuse of power by the 1st respondent.
11. On the 15th of June 2021, the 1st and 2nd respondents filed grounds of opposition in opposition to the notice of motion application dated

27th April 2021.

12. In the grounds of opposition, the 1st & 2nd respondents claim that the application does not demonstrate with sufficient clarity the nature of misconduct in the actions of the Respondents in the exercise of their statutory duties.

13. The respondents allege that judicial review deals with procedure and not results.

14. They further state that the orders sought are discretionary and can be denied even when warranted. They further reiterate that the application is misconceived and a non-starter. It is the respondent contention that the application is vexatious, frivolous, scandalous and abuse of court process.

15. The interested party, though served, did not file any response to the application.

ISSUES FOR DETERMINATION

- i. Whether the Respondents exercised their statutory duties as envisaged in the law?
- ii. Whether the Respondents acted Irrationally or in bad faith?
- iii. Whether the orders of Judicial Review are available?

ANALYSIS & DETERMINATION

16. In terms of the provision of order 21, Rule 4 of the Civil Procedure Rules, the claim by the applicants is that the decision of the Deputy County Commissioner in this case was made through a process that was procedurally unfair, was irrational and was made in ignorance of relevant considerations.

17. The respondents have counter-argued that the Deputy County Commissioner's decision was procedurally fair, was rational and did not evince any evidence of his ignorance of the Law. For their diametrically incongruent assertions, the parties asked the court to be persuaded by their arguments. All the assertions they have proffered are reasonable assertions in their facts and circumstances. Courts of Law in civil matters reach their decision on a balance of probabilities.

Whether the Respondents exercised their statutory duties as envisaged in the law

18. Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya provide inter alia that;

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
- b) Sending a copy of the appeal to the Director of the 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.

19. The exparte applicants appealed to the 1st Respondent and in accordance to section 29 of the Land Adjudication Act, the 1st Respondent through the Deputy County Commissioner conducted appeal proceedings and came to a decision while following due process.

20. Section 108 of the Evidence Act provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

21. In the case of M'Bita Ntiro v Mbae Mwirichia & another (2018) eKLR, it was held:

“The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”

Whether the respondent acted irrationally or in bad faith?

22. Judicial review only concern itself with the merits of the decision. It is focused on the process through which decisions were made.

23. The applicants aver that the DCC acted unreasonably, hurriedly, unfairly and arrived at a hurried decision, completely disregarded the testimony of the 1st Applicant's three witnesses, and reached a decision without even visiting the locus in quo to be able to appreciate the full facts and did not consider all the facts placed before him by the witnesses in totality.

24. The applicants explain that the failure to visit the locus in quo was negligent on the part of the DCC. That the failure led to the applicants losing their parcel of land that they had lived on their entire lives.

25. The applicants further contend in their submission that the DCC decision to award the suit land to the interested party without taking into consideration the fact that the applicants have been on that land for many years since it is ancestral land was unreasonable and irrational.

26. In **Zachariah Wagunza & Another v Office of the Registrar, Academic Kenyatta University & 2 others (2013) eKLR** the court reiterated the broad grounds on which the court exercises its judicial review jurisdiction as was stated in the **Uganda case of Pastoli vs Kabale District Local Government council and Other (2008) 2 EA 300**, and observed among other things that:

“In order to succeed in an application for Judicial review, the applicant 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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of law or its principles 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 is usually in defiance of logic and acceptable moral standards.

Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice act or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

27. The applicants have alleged that the committee demarcated the suit land unilaterally and was influenced by one Geoffrey Nyaga, who is the father of the Interested party and a member of the committee as well, in total exclusion of the ex parte applicants who are the rightful owners and occupiers of the portion in dispute.

28. The Ex- parte Applicants have not provided any evidence in support of their allegations neither have they pleaded how the 1st respondent action were against rules of Natural Justice. All that the applicants have done is to make general allegations which have not been substantiated.

29. Natural justice was outlined in the Halsbury Laws of England volume 1 (1) page 218, as follows: -

“Natural justice comprises two basic rules: first that no man is to be a judge in his own case (nemo iudex in causasua) and second that no man is to be condemned unheard (audialterampartem).

The rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct.”

30. The Ex parte Applicants have pleaded that the 1st Respondent's decision was unprocedural hence ultra vires and that there was an error of law on the face of the record hence illegal and prejudicial to the rights of the applicants, made in bad faith, violated the legitimate expectation of the applicants, unfair and constitutes an abuse of power by the 1st respondent.

31. In the case of Republic v Director of Immigration Services & 2 others Ex parte **Olamilekan Gbenga Fasuyi & 2 others (2018) e KLR** it was held that:

“...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere.”

32. The ex parte applicant's further alleged that they were not given a fair treatment by the committee undertaking adjudication, that the procedure followed was faulty and decision making was biased and that the DCC did not make the situation any better when he had the

opportunity to remedy the situation.

33. In the case of Republic v Kenya Revenue Authority Ex parte; Cosmos Limited (2016) (eKLR, the court whilst granting the order quoted Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1KB 223 a case which explains the concept of unreasonableness and bad faith in the said case as follows:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word unreasonable in a rather comprehensive sense. It has frequently been used as general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in Law. He must call his own attention to the matters which he is bound to consider must exclude from his what he has to consider. If he does not obey those Rules, he may truly be said, and often is said to be acting unreasonably, similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs Poole Corporation (1926) Ch.66,90,91 gave the example of the red-haired teacher, dismissed because she had red hair. That is so unreasonable that it might almost be described as being done in bad faith and in fact all these things run into each other.”

34. From the material on record, it is evident that all parties, including the ex parte applicants were afforded an opportunity by the Respondents to present their respective cases. In my considered view, the process followed by the 1st respondent throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. There was no evidence of bad faith disclosed as submitted by the applicants. As already stated, judicial review remedy is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision-making process itself. The role of the court in judicial review is supervisory, not an appeal.

Whether the orders of Judicial Review are available?

35. On the issue of Whether the Ex parte Applicants herein are entitled to the orders of certiorari and mandamus, it should be noted that judicial review orders are discretionary.

36. According to Halsbury Law of England 4th EDN.Vol. 1 (1) para 12 page 270:

The remedies of quashing orders (formerly known as orders of Certiorari) prohibiting orders formerly known as orders of prohibition (mandatory orders formerly known as orders of mandamus) ...are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.

37. The objective of Judicial review was observed in Chief Constable of the North Wales Police VS Evans (1982)1 WLR 1155 where Lord Brightman noted:

Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.

38. In the instant case the applicants have levelled various allegations that go to the root of the case. This clearly spells out that the issue is the decision and not the process.

39. **The court in Commissioner of Lands vs Kunste Hotel Limited (1997)eKLR** with authority reiterated Lord Bright man’s view and observed:

“...it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision- making process. Its purpose is to ensure that the individuals is given fair treatment by the authority to which he has been subjected.”

40. It is my finding that the process followed by the 1st Respondent throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. The Exparte Applicants Notice of Motion lacks merit. The same is full of mere innuendoes and baseless claims by the applicants.

41. The notice of motion Application dated 27th April, 2021 is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF NOVEMBER,2021 IN THE PRESENCE OF:

C.A. NDEGWA

Kimakia for Ex-parte Applicants

N/A for Kiongo for Respondents

N/A for Interested Party

C. K. YANO,

JUDGE.