



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
CHUKA JUDICIAL REVIEW DIVISION NO. E003 OF 2021
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ARTICLES 23 (3) (f),40,48,50 THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT,CAP 284 LAWS OF KENYA

AND

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

AND

IN THE MATTER OF LAND PARCELS KAMARANDI B PARCEL 719 &720

AND

IN THE MATTER OF APPEAL TO THE MINISTER NO.309/2020 & 310/2020

BETWEEN

NAFTALY NTHEDU RUBANE.....APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

THARAKA SOUTH SUBCOUNTY.....1ST RESPONDENT

THE LANDS REGISTRAR.....2ND RESPONDENT

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

AND

DAVID MURIUNGI KIANIA.....1ST INTERESTED PARTY

PETER MURITHI MUCEE.....2ND INTERESTED PARTY

JUDGEMENT

1. The matter is brought pursuant to a notice of motion application dated 10th May 2021 seeking orders that:

a) An order of Certiorari directed to the 1st & 2nd Respondent quashing the decisions of the Proceedings to the Minister Case No. 309 & 320 of 2020 via a Ruling delivered on the 24th November ,2020.

b) An order of prohibition prohibiting the Respondents from implementing or enforcing the offensive recommendations and Ruling contained in the proceedings of Appeal to the Minister Case No.309 & 320 of 2020 made on the 24th November,2020 in relating to KAMARANDI B ADJ SECTION 719 &720.

2. The motion is supported by the facts and grounds contained in the Statutory statement dated 10th May 2021 and the annexed verifying affidavit of Naftally Nthendu Rubane sworn on 10th May, 2021.

BACKGROUND OF THE MATTER

3. The ex parte applicant states that he was the first gatherer of land parcels Kamarandi Adj Section B,719 & 720 in 1984 during demarcation. The applicant avers that he knows the Interested Parties by virtue of them being from the same clan. That the Applicant avers that he occupied, established his beacons and has extensively developed the adjacent parcels by planting indigenous trees since 1984 when he was a young boy and the same has been clearly stated in all the adjudication proceedings.

4. Additionally, the applicant stated that he has made a living by selling timber from the parcels and at that time no one lodged a claim or was interested with the parcels. That it was in 2010 when the adjudication process kicked off in Kamarandi that the Interested Parties started planting euphorbia shrubs to mark the boundaries with the intention of having the parcels being registered in their names.

5. On the 21st June 2021 the respondents filed grounds of opposition dated 18th June,2021 wherein they contend 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.

6. The respondents aver that judicial review deals with procedure and not results. They further allege the orders sought are discretionary and can be denied even when warranted.

7. Lastly the respondents allege that the application is misconceived and a non-starter, vexatious, frivolous, scandalous and an abuse of court process.

The applicant's case

8. The applicant contends that he knows the interested parties by virtue that they belong to the same clan: Kanjiru clan.

9. He avers that he gathered land parcels KAMARANDI ADJ SECTION "B" 719 & 720 in 1984 during demarcation after the passing on of his parents. He further states that he began clearing the bushes, prepared the land ready for planting and eventually settled in 1987.

10. That he began grazing and even planting palm and other permanent trees on the said land parcels. That he has he lived on land parcel 719, cultivated, fenced and made several developments on Land parcels 720 since 1984 and it is the place, he has called home with his children.

11. He alleges that at the time he was clearing the bushes, the bordering land parcels had been abandoned and there were no people who resided or carried out subsistence farming.

12. He contends that during gathering and demarcation, he was informed that the interested parties visited his land parcels with the intention of grabbing them from him.

13. The applicant avers that in 2011, when the land adjudication officers came to check the boundaries, he realized that the interested parties were being allotted his parcels of land 719 &720.

14. He explains that he lodged a claim at the committee to hear and resolve the dispute over land parcels KAMARANDI ADJ SECTION "B" 719 & 720. Unfortunately, he lost to the interested parties based on the fact that one of the committee members, that is the chief Munga'tia Kaunga, was a relative to the interested parties and therefore the decision was biased.

15. The applicant avers that having been dissatisfied with the decision of the committee, he appealed against the Interested parties at the Adjudication Board.

16. He avers that the board members acknowledged that he was the first gatherer and that he had been utilizing the said parcels 719 &720 and that several developments that factored in, had been made by him and they awarded him both of the land parcels.

17. He contends that the interested parties being dissatisfied again with the ruling, appealed by lodging an objection which the applicant partially won. It was ordered that the KAMARANDI ADJ SECTION B,720 be registered in the name of the 1st interested party.

18. The applicant explains that having not agreed with the said decision as the same was arrived at by relying on the basis of erroneous and misleading information brought by the interested parties, the applicant lodged an appeal to the Minister vide Case 310 of 2020 whereby he lost while the 1st interested party being dissatisfied with the ruling at the objection stage, also lodged an appeal to the Minister.

19. The applicant avers that at the Minister stage the County Commissioner ruled that his land parcels 719& 720 be shared equally amongst the respective appellants relying on wrong facts of the kind of relationship they had with the interested party.

20. The applicant explains that if the decision made by the Minister is implemented in relation to KAMARANDI ADJ SECTION "B" 719 he stands to suffer irreparable harm.

1ST -3RD RESPONDENTS CASE

21. The 1st to 3rd respondents submitted that the ex-parte Applicant has merely cited issues of non-observance of the Rules of natural justice and unfair administration action by the respondents herein without demonstrating the exact manner in which the alleged misconduct was carried out.

22. They allege that the Ex parte applicant has pleaded that the 1st Respondent's decision was tainted with illegality and irrationality and submits that judicial review does not concern itself with the merits of the decision. They contend that judicial review is focused on the process through which the decisions were made and actions taken.

23. The Respondents cited the provisions of Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya and submitted that following the appeal by the ex parte applicant herein to the 1st Respondent and in line with the said section 29, the 1st Respondent through the Deputy County Commissioner conducted appeal proceedings and came to a decision while following proper procedure in line with the law, and therefore there was no irrationality in the 1st Respondent's decision as pleaded by the ex parte applicant. They further submitted 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.

1st Interested Party's Case

24. The 1st interested party opposes the application through the replying affidavit sworn by DAVID MURIUNGI KIANIA who is the 1st interested party on 13.07. 2021.

25. He avers that the statutory statement of facts and the affidavit verifying the facts relied on are not correct at all.

26. He argues that the 2nd respondent adhered to the Law in hearing & dismissing the said appeal to the Minister i.e. Case No.309 of 2020 &310 of 2020.

27. He states that the exparte applicant is his first-class cousin since their fathers are blood brothers and states that they share the same grandfather and ancestral land (Mburago) and the land was meant for all of them.

28. He alleges that the suit land in question was gathered by their grandfather and given to his children. He further alleges that each were awarded land, a road and a seasonal river separating them with his cousin's land, one NAFTALLY NTHENDU RUBANE. He avers that he owns land parcel No.720 KAMARANDI 'B'.

29. He alleges that the allegation that the ex parte applicant buried his wife at parcel No.720 is a lie. He explains that the applicant's 1st wife was buried at his uncle's piece of land, one Dominic Machege and his second wife was buried at her parents home in Kitui because they had separated.

30. He further states that the exparte applicant's father who was a police officer was buried at CIAKARIGA, THARAKA South District, which is approximately 20 Kms from the suit land.

31. The 1st interested party states that the exparte applicants' claim that he planted on the aforesaid parcels of land, is not true because what is there are trees which grow naturally on uncultivated land. He alleges that there are no developments on land parcel No.720 adding that it's only a make shift structure made of polythene papers and palm tree branches which the applicant made while the matter was still before the Adjudication process so as to steal a march on the interested parties and also help him to put the alleged claim on the land.

32. He alleges that at no time did he mark any boundaries on his parcel of land, since when he was allotted the said parcel from his grandfather, he had been in occupation until the applicant lodged a claim over it at the Land Committee under the KAMARANDI ADJUDICATION SECTION "B" 719 &720, a matter the ex-parte applicant lost. He contends that the claim that one of the committee members was his relative is unfounded, since the exparte applicant is his first blood cousin which makes the alleged relative his kin too.

33. He avers that the parties in the subject Appeal to the Minister No.309 of 2020 &310 of 2020 were accorded a fair hearing in that each of them was given an opportunity to testify, call witnesses who testified and were cross -examined by the other side.

34. Lastly, he contends that the matter is malicious, vexatious and an epitome of abuse of the due process of this court and submits that litigation must come to an end and prays the matter be dismissed with costs to him.

2ND INTERESTED PARTY CASE

35. In the 2nd interested replying affidavit sworn on 13th July, 2021, he has averred that the application together with the statutory statement

of facts and the affidavit verifying the facts relied on are not correct.

36. He avers that the 2nd respondent adhered to the law in hearing and dismissing the said appeal to the Minister i.e. Case No.309 of 2020 &310 of 2020.

37. He alleges that the suit land in question was gathered by his grandfather who gave it to his children as ancestral land as it was allocated to each member of the Kanjiru clan in an effort to make every member of the clan own land and earn a livelihood from it.

38. He alleges that the allegations that the ex parte applicant has buried his wife at parcel No.719 is a lie. He further avers that the applicant's first wife was buried at his uncle's piece of land, one Dominic Machege, while his second wife was buried at her parents' home in Kitui County, and his father was buried in Ciakariga, about 20km from the suit land.

39. He further alleges that the trees the exparte applicant claims he planted on the aforesaid parcels of land are trees which grow naturally on uncultivated land. He further reiterates that there are no developments on his land parcels No.719 since he lives at his grandmother's place as he awaits completion of the case.

40. The 2nd Interested Party contends that when the land was given by the committee, he proceeded to mark the boundaries with beacons, where he has used stones to mark them, and had been in occupation since until the applicant lodged claim at the land committee under the KAMARANDI ADJUDICATION SECTION "B" 719 & 720, a matter which the Exparte Applicant lost.

41. He avers that since the land committee affirmed the decision of the KANJIRU Clan and awarded him the parcels of land parcel No.719 Kamarandi B, he has not been able to live in the said parcel because he has been awaiting the conclusion of this matter.

42. He reiterates that the parties in the subject appeal to the minister No.309 of 2020 &310 of 2020 were accorded a fair hearing in that each of them was given an opportunity to testify, call witnesses who testified and were cross examined by the other side.

43. He alleges that the respondents went ahead and visited the suit land in the presence and participation of the afore said land committee members and the parties sometime in 2016.

44. Accordingly, to the 2nd interested party, the application herein is malicious, vexatious and an epitome of abuse of the due process of court.

ISSUES FOR DETERMINATION

- i. Whether this suit meets the purview of Judicial review proceedings.
- ii. Whether the Respondents' decision was made ultra vires or made contrary to rules of natural justice.
- iii. Whether the applicant ought to be granted the prayers sought.

Whether this suit meets the purview of Judicial review proceedings.

45. The applicant explains that he had not agreed with the said decision as the same was arrived at by relying on the basis of erroneous and misleading information brought by the interested parties, and the applicant lodged an appeal to the Minister vide Case 310 of 2020 whereby he lost while the 1st interested party being dissatisfied with the ruling at the objection stage, also lodged an appeal to the Minister

46. Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya provides 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."

47. In this case, the ex parte applicant appealed to the 1st Respondent and in accordance to section 29 of the Land Adjudication Act, the 1st Respondent through the minister conducted appeal proceedings and came to a decision while following due process.

48. 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.

49. In the case of *M'Bitu 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.”

50. The Respondents decision having been made pursuant to provisions of the Law, the matter clearly cannot fall within the purview of judicial review.

Whether the Respondents’ decision was made ultra vires or made contrary to rules of natural justice.

51. It is trite law that Judicial Review does not concern itself with the merits of the decision. It is focused on the process through which decisions were made.

52. The applicant alleges that at the Minister stage, the County Commissioner ruled that his land parcels 719& 720 be shared equally amongst the respective appellants relying on wrong facts of the kind of relationship they had with the interested party.

53. The 2nd interested party alleges that the respondent went ahead and visited the suit land in the presence and participation of the afore said land committee members and the parties sometime in 2016.

54. 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 Others** (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.”

55. In this case, the applicant explains that he lodged a claim at the committee to hear and resolve the dispute over land parcels KAMARANDI ADJ SECTION B719 & 720. Unfortunately, he lost to the Interested Parties based on the fact that one of the committee members that is the chief Munga'tia Kaunga was a relative to the interested parties and therefore the decision was biased.

56. In the board committee, the parties were asked if they had any issue to raise in regard to the committee members and none was raised at the time. This clearly demonstrates that this argument is an afterthought on the part of the applicant.

57. The principles for Judicial Review was set out by the Superior Court in a land mark case of ; **Republic Vs Kenya National Examination Council Ex parte Gathenji** and others Civil Appeal No.266 of 1996, the Court of Appeal stated ***inter alia that an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and the impugned decision was illegal.***

58. The Ex- parte Applicant has not provided any evidence in support of his allegations neither has he shown how the 1st respondent actions were against rules of Natural Justice. All that the applicant has done is to make general allegations.

59. The applicant has stated that he believes that if the court does not intervene and uphold the law and the Constitution, injustice shall be occasioned to him.

60. 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 (*audi alteram partem*).

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

61. The Ex parte Applicant has pleaded that he was advised by his advocate on record which advise he believed to be true that the grounds for appeal to the minister by the interested parties were based on erroneous and misleading records following the respective proceedings.

62. The applicant further stated that the Deputy County Commissioner (DCC) formed the basis of the Ruling dated the 5th March 2021 based on falsehoods rendering the same unjust to him.

63. 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.’’

64. The applicant has alleged the decision made by the Minister if implemented in relation to KAMARANDI ADJ SECTION B,719 he stands to suffer irreparable harm. Based on the above averment it is clear that the applicant is attacking the merits of the decision.

65. From the material on record, it is evident that all parties, including the ex parte applicant were afforded an opportunity by the Minister to present their respective cases. In my considered view, the process followed by the respondents throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. There was no evidence of falsehoods disclosed as submitted by the applicant. 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. It has not been shown that the impugned decision herein was made contrary to the law or that the rules of Natural justice were violated.

Whether the orders of Judicial Review are available?

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

67. 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.

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

69. In the instant case the applicant has levelled various allegations that go to the root of the case. This clearly spells out the issue is the decision and not the process.

70. **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.’’

71. In the instant case the applicant has not demonstrated with sufficient clarity the nature of the erroneous information that the Minister relied on.

72. In the applicant's submission he stated that it is quite unreasonable how the Minister reached the decision of awarding the applicant's parcel of Land based on lies and pity without putting into consideration that the same would cause irreparable harm by rendering the applicant landless. The applicant has however not demonstrated the lies and pity he has alleged. Therefore, the suit is frivolous and an abuse of court process.

73. The 2nd interested party reiterates that the parties in the subject appeal to the minister No.309 of 2020 &310 of 2020 were accorded a fair hearing in that each of them was given an opportunity to testify, call witnesses who testified and to cross examine the other side. If that was the case, then how did the Minister make a decision based on erroneous information The applicant was given an opportunity to state his case and to call witnesses. The Minister gave out a finding based on the information it was given to deliberate on.

74. 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 Applicant Notice of Motion lacks merit. The same is full of mere innuendos and baseless claims by the applicant.

75. Consequently, the notice of motion Application dated 10th May 2021 is dismissed with costs to the respondents and the interested parties.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF NOVEMBER,2021 IN THE PRESENCE OF:

C.A. Ndegwa

Ms. Kijaru for Ex-parte Applicants

Mutuma Githinji for Interested Party

N/A for AG for Respondents

C. K. YANO,

JUDGE.