



REPUBLIC OF KENYA

IN THE ENRIONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW NO. E004 OF 2020

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
CERTIORARI TO QUASH THE DECISION OF THE DEPUTY COUNTY COMMISSIONER –
IGEMBE CENTRAL SUB-COUNTY DATED 15TH OCTOBER 2020 AND AN ORDER OF
MANDAMUS COMPELLING HIM TO REHEAR THE MINISTER’S APPEAL NO. 361/2015**

AND

IN THE MATTER OF LAND PARCEL NO. ATHIRU/NDOLELI/xxxx

AND

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

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORMS ACT CAP 26 LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

DEPUTY COUNTY COMMISSIONER IGEMBE SUB-COUNTY....1ST RESPONDENT

LAND ADJUDICATION & SETTLEMENT OFFICER

IGEMBE CENTRAL SUB-COUNTY.....2ND RESPONDENT

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

AND

JK.....1ST INTERESTED PARTY

PETER MURITHI MUNORU.....2ND INTERESTED PARTY

EX-PARTE BONIFACE KANGENTU KABERIA

JUDGMENT

1. The notice of motion dated **11.12.2020** seeks orders of certiorari to quash the 1st respondents’ decision delivered on **15.10.2020** and prohibition against the 2nd respondent from executing or implementing the aforesaid decision. The motion is supported by a statement of

facts and a verifying affidavit by **Boniface Kangentu Kaberia** sworn on **11.11.2020**.

2. It is the exparte applicant's case that he bought for value eight acres of Land **Parcel No. Akithi/Ndoleli/xxxx and xxxx** together with **Samuel Mathairo Muriuki** from **Mary Kananu Mutea** on **6th July 2010**, took vacant possession and started developments therein.

3. It is pleaded when title deeds were being processed in 2019 the 2nd interested party found an encumbrance registered by the 1st interested party against **Parcel No.xxxx** hence his title deed could not be issued. The 1st interested party was summoned to explain why the caution could not be removed but clearly stated she had no interest in the said land nor was she a beneficiary. Nevertheless 2nd respondent declined to issue the title deed until the pending Ministers appeals **No. 361/2015** was heard and determined.

4. It is submitted on 18th August, 2020, the 1st and 2nd interested parties appeared before the 1st respondent who proceeded with hearing the appeal in the absence of the exparte applicant and by a decision rendered on 1st October 2020 allowed the appeal and ordered the subject land be registered in the name of 1st interested party effectively disentitling the exparte applicant of his land. The exparte applicant relies on several exhibits:- marked **BKK 1 a sale agreement dated 26.8.2005, BKK "2(a) & 2(b)" transfers requisitions, BKK "3" (a) & (b) a copy of his own sale agreement BKK "4", a copy of summons during the objection proceedings, BKK "5" a decision delivered on 28.11.2013 dismissing the 1st interested party's BKK 6, a Land register letter BKK "7" being the land registrars decision as BKK "8"**.

5. The main complaint is that his exclusion from participating in the Minister's appeal amounted to being condemned unheard and in breach of the provisions of **Article 50** of the Constitution. Additionally, the exparte applicant maintains that having been fully aware that he was in exclusive possession and occupation of the subject land as an innocent purchaser for value, and a party in the objection proceedings, it was incumbent upon the 1st respondent to ensure that he was heard so that his interests in the subject land are not prejudiced, and hence ought to have been accorded fair hearing. He urges the court to overturn the said decision and order a re-hearing.

6. The respondents were duly served with notice of motion and the accompanying documents in which Mr. E.M. Kieti Senior Litigation Counsel entered appearance on behalf of the Hon. Attorney General and the Department of Justice on 25th January 2021.

7. By oral submissions made on 27.9.2021 Mr. Kieti Senior Litigation Counsel conceded to the application on reasons that the exparte applicant had demonstrated serious interest and was not given an opportunity before the 1st respondent against the rules of natural justice. Secondly, Mr. Kieti submitted the appeal was between the 1st and 2nd interested parties as per the records and that the exparte applicant was therefore not given a chance to ventilate his serious interest in the suit land. Further Mr. Kieti submitted, there was need for all parties to be given an opportunity to be heard afresh by the 1st respondent. He prayed the application be allowed with no orders as to costs.

8. On the part of the 1st and 2nd interested parties, they were served through affidavit of service filed on 23.4.2021 and 27.8.2021 respectively. The 1st interested party appeared in court on 27.8.2021 and orally submitted she was opposed to the 1st and 2nd respondents' proposal for rehearing. By leave of court she filed a replying affidavit on 4.10.2021.

9. The 1st interested party admitted JMM'E was her husband and father to her five children. She admitted her husband was the registered owner of L.R A R Adjudication Sections 5519, 4019, 6397; she claimed to have been aware of the alleged sale and transfers to the exparte applicant; added the disputed Parcel No. xxxx was where she was married and occupied the same; admitted to have lodged cautions when she heard of the purported sale; went on to state she visited the chief's office on 24.10.2005 and made an objection to the purported sale to the adjudication officer so as to stop the sale but did not attach the said letter to her affidavit; she later on went to the chief in 2007 and was given another letter to stop anyone from purchasing her husband's properties. Further she pleaded to have visited so many government offices warning anyone from purchasing her husband's properties without her consent.

10. Further the 1st interested party admitted her objection before the adjudication lands and settlement officers on 28.11.2012 was dismissed though she appealed to the Minister. The latter upheld her appeal and ordered her names be registered on the land register since her husband was likely to proceed and sell the land on account of alcoholism.

11. Regarding the exparte applicant the 1st interested party stated she had no case with him and she did not know the 2nd interested party, she insisted the land belonged to her family and that the purported sale by her husband was total lies aimed at disinheriting her and her children with a view of making them landless, homeless and destitute.

12. **Section 29 (1) of the Land Adjudication Act Cap 284** grants an aggrieved party a right to lodge an appeal over a decision of an objection within 60 days. The Minister is mandated to determine the appeal and make such orders as he thinks just and the order shall be final. The **Land Adjudication Regulations 1970 (revised in 2012)** describes the manner of disposal of the appeal including the fees payable and documents to be attached including all proceedings regarding the subject parcel of land. These Regulations to the Act requiring the manner of disposal of an appeal.

13. This means therefore the 1st respondent is deemed to have had the history of the file from inception. He must therefore have come across proceedings leading to the dismissal of the objection by the 1st interested party in which the exparte applicant was an active participant.

14. The Minister is mandated to make a decision touching on the law and rights over land whose outcome is final. This means the decision has serious implications on title holders to the land. The Minister has powers to summon all parties whose participation is necessary, relevant, crucial and mandatory so as to enable him reach a just outcome. The recorded owner of the land at the time and who appears to have been the centre of interest is JMM'E the husband to the 1st interested party and who was also the link to the 2nd interested party. The 1st interested party was making serious allegations against her husband and claiming still to be married to him yet evidence during the objection proceedings; was they were separated or divorced at the time. The 1st respondent appears to have ignored at the very least, to summon the 1st

interested party's husband to come and shed light on the matter regarding his attempts to disentitle the family of their ancestral ownership to the land.

15. Thirdly, the 1st respondent went on to make drastic orders to replace the ownership of Land Parcel No. xxxx from the recorded owner to that of the 1st interested party. This by itself was against the rules of natural justice.

16. Further the 1st respondent gave the 1st interested party an opportunity to call witnesses unlike the other parties. The Minister overstepped his mandate and failed in his statutory duties in the hearing and determination of the appeal.

17. Article 47 of the Constitution states:-

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

2) If the 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

3) Parliament shall enact legislative clause (1)

and that legislation shall -

a) provide for the review of administrative action by a court or, if appropriate, and independent and impartial tribunal; and

b) promote efficient administration.

The law envisaged by the Constitution is the **Fair Administrative Actions Act 2015. Section 4 (1)** provides ***an administrator shall give the person adversely likely to be affected by the decision he is about to make prior and adequate notice and an opportunity to be heard.***

18. Similarly an administrator under **Section 4 (4) of Fair Administrative Actions Act** shall accord the person against whom administrative action is taken an opportunity to attend the proceedings in person or in company of an expert of his choice, (b) be heard (c) cross examine persons (d) request for an adjournment to ensure fair hearing.

19. **Section 7 (1)** provides any person aggrieved by an administrative decision may apply for review of the decision in line with **Section 8** while **Section 7(2)** grants the court powers to review such a decision if the person who made the decision denied the person to whom the decision relates reasonable opportunity to state the person's case. **Under Section 11 of Fair Administrative Actions Act** the court is empowered to set aside the decision and remit the matter for reconsideration.

20. In view of the foregoing it is quite clear the prayers sought by the exparte applicant are well within the law and appropriate for denial of his constitutional right to Fair Administrative Action.

21. The 1st and 2nd respondents' counsel on record has rightfully conceded the motion. The 1st interested party is opposed to any proposal for rehearing the matter for reasons which she has not explained. Be that as it may the duty is not imposed on the 1st interested party but the 1st and 2nd respondents to ensure rules of natural justice are observed. **Section 2 of Fair Administrative of Actions Act** imposes that duty over the 1st respondent.

22. In **Kenya National Examination Council [1997] eKLR** it was held certiorari must issue where the rules of natural justice are not complied with. In this case the 1st respondent did not adhere to the principles of natural justice. The application is therefore merited and allowed. The decision made by the 1st respondent on 15.10.2020 is hereby quashed.

23. In line with **Section 11 of Fair Administrative of Actions Act** the Cabinet Secretary in charge of land is directed to gazette a different assistant County Commissioner to hear this matter by summoning the exparte applicant, JMM'E, JK and the interested party to hear and determine the appeal within 120 days from the date hereof.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10TH DAY OF NOVEMBER, 2021

In presence of:

Konyangi holding brief for Kaumbi for exparte applicant

Kieti for 1st – 3rd respondents

Court Clerk: Kananu

HON. C.K. NZILI

