



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**JUDICIAL REVIEW NO. 9 OF 2018**

**JOHN NJATI KIREMA .....1<sup>ST</sup> APPLICANT**

**ESTHER NKIROTE KIREMA ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE DEPUTY COUNTY COMMISSIONER**

**TIGANIA WEST SUB-COUNTY .....1<sup>ST</sup> RESPONDENT**

**THE LAND CONTROL BOARD TIGANIA WEST.....2<sup>ND</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR MAUA .....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**PHILIP KIREMA ..... 5<sup>TH</sup> RESPONDENT**

**TIMOTHY MURATHANI ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. By a notice of motion dated 11.7.2018 the exparte applicants hereinafter the applicants pray for an order of certiorari to remove into this court and quash the 2<sup>nd</sup> respondent's decision made on 19.6.2018 approving the sale and transfer of property known as **L.R Kianjai/Kianjai/2459** hereinafter the property and secondly an order of prohibition to issue against the respondents either jointly or severally by themselves, servants or agents from interfering with the applicants occupation, possession, use and effecting or registering any dealings over the property.

2. The application is supported by a statutory statement of facts dated 25.6.2018, an affidavit verifying facts sworn on even date attaching annexures, index map of the property marked annexure **JNK "1"**, photographs showing developments on the property marked as **JNK "2"**, **"3"** and **"4"** and copies of an application for caution and a statutory declaration marked **JNK "5"** and **"6"**.

3. Further the applicants rely on the grounds on the face of the motion and a supporting affidavit sworn on 11.7.2010 attaching a sale agreement between the 5<sup>th</sup> and 6<sup>th</sup> respondents drawn by Wamachi & Associate's Advocates.

4. The applicants aver they are children of the 5<sup>th</sup> respondent who reside and occupy the property registered in the name of their father.

5. It is averred the property is ancestral land held by the 5<sup>th</sup> respondent for his own benefit and in trust for his immediate and extended family the applicants included who have beneficial interest in it established by way of trust.

6. Further the applicants state the 1<sup>st</sup> respondent has been sub-dividing and disposing off the property without involving them and or taking into consideration their beneficial interests.

7. The applicants state they made an application dated 12.6.2018 for registration of a caution to the 3<sup>rd</sup> respondent who summarily rejected it without giving any reason and or considering its merits hence leaving them exposed to the danger of losing their beneficial rights or interests.

8. It is averred the 5<sup>th</sup> respondent made an application to the 2<sup>nd</sup> respondent for a consent to transfer a portion of the property to the 6<sup>th</sup> respondent which was approved by a decision made on 19.6.2018 to the 2<sup>nd</sup> respondent and who was slated to effect the transfer on 26.6.2018, notwithstanding the protestations by the applicants.

9. The applicants aver the decision of the 2<sup>nd</sup> respondent was made without considering their beneficial interests, and legitimate expectations both under the constitution and statutory law without being accorded an opportunity to be heard; was unfair and unreasonable and if allowed to stand will grossly cause irreparable harm and damage to them and all those siblings of the 5<sup>th</sup> respondent residing and occupying his land both young and old who are likely to be rendered homeless, destitute, indigent and vagabond.

10. Therefore the applicants pray for the decision be quashed and the respondents to be prohibited from the aforesaid conduct and action.

11. The 1<sup>st</sup> – 4<sup>th</sup> respondents oppose the motion through grounds of opposition dated 20.3.2019 on the basis:-

**a) The challenged decision of the 2<sup>nd</sup> respondent was not annexed hence there was nothing to quash.**

**b) The application is a non-starter and an abuse of the court process.**

**c) The application lacks merit.**

**d) Judicial review are discretionary and not guaranteed.**

**e) Judicial review does not deal with merits of the decision but the process.**

12. The 5<sup>th</sup> respondent opposes the motion through a replying affidavit filed on 19.3.2019 but lacks the sworn date.

13. Firstly he admits he entered into a sale agreement with the 6<sup>th</sup> respondent voluntarily and denies the subject property is ancestral in nature.

14. Secondly the 5<sup>th</sup> respondent states that even if the land was ancestral out of his entire family, it is only the applicants who have brought the case without enjoining the rest of his family.

15. Thirdly he avers it is strange the applicants can purport to stop him from disposing his property to cater for his wellbeing.

16. As regards the 6<sup>th</sup> respondent, he opposes the motion through a replying affidavit filed on 19.3.2019. He denies the land was ancestral but stated he bought the land from the 5<sup>th</sup> respondent so as to cater for his wellbeing.

17. Secondly, he denied knowledge of the applicants and states he was unaware if a court of law had declared the subject property as ancestral land and averred he was a bonafide purchaser for value commensurate to the subject land contrary to the averments he had paid too little for it and in any event he insisted it was on a willing seller willing buyer basis.

18. Following directions, parties agreed to dispose the matter through written submissions which were to be filed by 4.7.2021.

19. By written submissions dated 6.7.2021, the applicants submit they had proved on a balance of probabilities since the sale had been admitted yet it was not done with their approval or consent.

20. Secondly the applicants submit there was no dispute they are the children of the 5<sup>th</sup> respondent and aver the only bone of contention was on whether or not the said property was ancestral land thus qualifying as an intergenerational trust and urge the court to be guided by the principles laid by Supreme Court of Kenya in Isack M'Inanga Kieba –vs- Isaya Theuri M'Linturi & Another [2018] eKLR and find the applicants deserving of the orders sought since:

**a) They had proved before registration the suit land was family land.**

**b) Their grandmother was buried there.**

**c) The land had been passed through from generation to generation with the 5<sup>th</sup> respondent holding it in trust for his family members.**

**d) The applicants were part of the 5<sup>th</sup> respondent's family hence their claim was not remote or misplaced.**

**e) The 5<sup>th</sup> respondent was registered the owner since the applicants were minors.**

**f) The land falls under ancestral property.**

**g) The sale was against the rights of the applicants under Article 40 of the Constitution.**

**h) The applicants have been occupying and living on the land as per the photographic evidence produced hence the 6<sup>th</sup> respondent was aware the land was ancestral and had he done due diligence he would have established those facts.**

**i) The applicants shall suffer irreparable loss and damages if the sale proceeded for they will be rendered destitute.**

21. Thirdly, the applicants submit the 1<sup>st</sup> – 4<sup>th</sup> respondents denied them their right to **Fair Administrative Action** and Fair hearing as per **Article 47 and 50 of the Constitution** by denying them an opportunity to safeguard their rights by lodging a caution.

22. Further the applicants submit the 1<sup>st</sup> – 4<sup>th</sup> respondents should be taken to have conceded the claim by the failure to file an affidavit in opposition to the application hence the material facts are not denied.

23. Having gone through the notice of motion, the grounds of opposition, replying affidavit and submissions thereof the issue for determination are:-

**a) If the 3<sup>rd</sup> respondent's Action in failing to register the caution offends Articles 47 and 50 of the Constitution as read together with the Fair Administrative Actions Act.**

**b) If the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' action and or decision in approving the transfer of land between the 5<sup>th</sup> and 6<sup>th</sup> respondents offends Articles 47 and 50 and of the Constitution and the Fair Administrative Actions Act.**

24. The lodging of caution on any property is governed by Sections 71 – 75 of the **Land Registration Act**. It provides a person who claims the right whether contractual or otherwise or a licence to obtain an interest in any land, lease or charge, capable of creation of an instrument registrable under this Act, may lodge a caution with the registrar forbidding the registration of disposition on the land.

25. **Sub-section (4)** thereof grants the Registrar powers to reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under the **Act**. So the purpose of a caution is to forbid the registration of disposition because the cautioner is apprehensive failure to do so may prejudice his or her interests over the land.

26. On the other hand, the law on issuance of a land control board consent is provided under **Section 6 (1)** of the **Land Control Act**. It provides an application for consent in respect of a controlled transaction be made to the appropriate land control board within 6 months of the making of the agreement.

27. The purpose of the **Act** is to protect registered owners from improvident use of their rights. See **Professor Okoth Ogendo Tenants of the Crown Acts, Press [1991] Pg 74.**

28. On whether to grant or refuse consent, the board is obligated under the Act to consider inter alia economic development of the land, fairness or otherwise of the consideration, and the productivity of the land See **Wamukota –vs- Donati [1987] KLR 280.**

29. The **Act** establishes a Statutory Board, the Land Control Board whose primary mandate is to determine questions affecting the rights of subjects regarding controlled transaction in the disposal of agricultural land, situate in a controlled area as per **Section 9** thereof.

30. In discharging its mandate the Land Control Board must act judicially and within its jurisdiction and which is subject to the controlling jurisdiction of the ELC court. See **Republic –vs- Chairman Manyatta Divisional Land Control Board [1999] eKLR.**

31. The ex parte applicants' major complaints are that the 3<sup>rd</sup> respondent failed to give them a fair hearing and acted illegally in summarily dismissing the intended caution.

32. Secondly, the applicants fault the Land Control Board composed of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents for failing to give them a fair hearing.

33. The 1<sup>st</sup> to 4<sup>th</sup> respondents have not filed any replying affidavit to counter the factual issues. However, they state the alleged decision and proceedings, have not been attached hence rendering the application dead on arrival.

34. **Order 53 Rule 7** provides an applicant shall not question the validity of an inquisition or record unless before the hearing he has lodged a copy thereof verified by an affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the court.

35. In **Samson Kirere M'Ruchiu –vs- Minister for Land & Settlement C.A 21 of 1999** cited with approval in **Musa Kingori Gaita –vs- Kenya Wildlife Service [2006] eKLR** the Court of Appeal held compliance with **Order 53 rule 7** is a precondition to seeking an order of certiorari whose failure renders the motion a nullity and or incompetent ab initio. See also **Republic –vs- Ruiru District Land Disputes Tribunal & Another Ex parte Lucia Waithira Muiruri & Another [2014] eKLR.**

36. Whereas the applicants were granted leave to put or file judicial review proceedings it was their responsibility before the hearing to furnish the court with the decision or proceedings to be quashed. They have not done so and the court is therefore not in a position to determine whether there in fact, existed any proceedings, order or decision capable of being quashed.

37. Similarly the applicants have not attached a copy of the proceedings by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents approving the consent to transfer. The applicants have not tendered any material to demonstrate if they ever sought for and were denied access to the decision and

proceedings. In any event under **Section 6 of the Fair Administrative Action Act** as read together with the right to access to information held by the state, grants the applicants those rights as a matter of right. I see no valid reason (s) why the applicants did not furnish the court with these mandatory but vital documents to their case as provided by order 53.

38. That notwithstanding, the applicants have in the statement of facts, verifying affidavit and the motion tried to explain the nature and contents of the decisions and proceedings, some of which have been admitted by the 5<sup>th</sup> and 6<sup>th</sup> respondents in their replying affidavits.

39. Whereas that may be true, the decisions were made by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents even though the three have not filed any replying affidavits to the material facts. That notwithstanding that the applicants have urged the court to find the facts as admitted.

40. My understanding of the law is that the burden of proof lies with the exparte applicants to prove the notice of motion on a balance of probabilities in line with section 107 and 109 of the Evidence Act.

41. The 1<sup>st</sup> – 4<sup>th</sup> respondents were undertaking both constitutional and statutory duties. Any person questioning the constitutionality of the acts of 1<sup>st</sup> to 4<sup>th</sup> respondents has the obligation to bring his or her claim within the four corners of the law as to both the procedure and the substance.

42. In *Republic –vs- Mwangi S. Kaimenyi Exparte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR*, the Court of Appeal held a court cannot act in vain against a non-existent decision and if there was no decision to be called and removed into the court, to proceed to quash would be descending into the realm of speculation.

43. In this the court is unable to ascertain or determine the appropriateness, legality and constitutionality of the decision and or the proceedings complained about. Moreover no explanation has been made as to the non-inclusion in the application for leave and or later on with the notice of motion. While discussing the law on **Order 53 Rule 7 (1)**. In *IEBC -vs- NASA Kenya & 6 Others [2017] eKLR* the Court of Appeal held there are exception to the general rule and especially where the contents of the decision is not in contention.

44. In this case however, whereas the parties have not contested, there was denial to register a caution and that a consent to transfer land was issued, the court finds itself unable to take judicial notice of the decisions and or proceedings in absence of a consent by the parties on the nature of that decision or proceedings.

45. This court would be trending on speculations in waiving the law on inclusion of the decisions and or proceedings to be quashed even if it were to be guided by **Article 159 (2)** of the **Constitution** for two reasons.

46. First the decisions and or proceedings as alluded above are governed by two different pieces of legislation with different parameters and considerations.

47. Secondly, the applicants' submissions have raised other issues bordering on overriding interests, customary trust and beneficial interests over the subject land and which rights they submit they were denied opportunities to ventilate both before the Land Registrar and the Land Control Board under the **Land control Act**.

48. In the two instances, the court under the **Fair Administrative Action Act** is mandated to look at both the procedure and substance of the decisions and or proceedings for judicial review post 2010 Constitution w has an expanded mandate. See *IEBC –vs- NASA Kenya (Supra) – vs- Lempaa Suyianka & 5 Others –vs- Nelson Andayi Havi & 14 Others, Caucus of LSK Branch Chairpersons (Interested Party) [2021] eKLR*.

49. The second issue raised by the applicants is that the 1<sup>st</sup> to 4<sup>th</sup> respondents failed to take into consideration their beneficial interests to the land by virtue of occupation on account of being children of the 5<sup>th</sup> respondent and lastly the court to find the land was ancestral in nature hence they were unjustly denied registration of a caution and eventually the consent to transfer was allowed without considering those beneficial interests.

50. On the other hand the 5<sup>th</sup> – 6<sup>th</sup> respondents plead no court of law has declared the subject land to be ancestral in nature.

51. There is no doubt the underlying dispute in this proceedings is the beneficial interests of the applicants as children of the 5<sup>th</sup> respondent and who continue to occupy the subject property.

52. The question to determine is whether judicial review proceedings would be the appropriate forum to consider and determine the aforesaid aspects alongside the twin issues alluded above on the failure to register a caution and or stop the issuance of a land control board consent by the 1<sup>st</sup> – 4<sup>th</sup> respondents.

53. In my considered view the three issues are intertwined and related in nature. Similarly the issue on customary trusts as submitted by the applicants in line with the *Kiebia* decision may not be determined through affidavit evidence alone without calling for viva voce evidence.

54. Faced with similar scenario, Cheron J, in *Republic –vs- County Government of Tana River & 2 Others [2018] eKLR* quoting *Saghani Investments Ltd –vs- Officer in Charge of Nairobi Remand Prison [2009] eKLR*, *Ahumed Siad Mohammed –vs- Municipal Council of Garissa & Another [2014] eKLR*, *Republic –vs- Exparte Karin Misc. Application No. 534/03*, the court held in instances where the subject matter or question to be determined involves ownership of land and rights to occupy land, there would be need for viva voce evidence and cross examination of witnesses, which is not available in judicial review proceedings.

55. In my view an order for certiorari and mandamus would not be the most appropriate in the circumstances obtaining in this matter given that the beneficial rights of the applicants have to be ascertained. Even if the alleged decisions were to be brought and which the court has made a finding above are not before the court were to be quashed, the issue of the beneficial interests if any of the applicants vis a vis the 5<sup>th</sup> and 6<sup>th</sup> respondents shall still require determination in an ordinary suit.

56. The upshot is the notice of motion herein is hereby struck out with no order as to costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

**KIETI FOR 1ST, 2ND, 3RD AND 4TH RESPONDENTS**

**WAMACHE FOR 5TH AND 6TH RESPONDENTS**

**MACHERU HOLDING BRIEF FOR KABATHI FOR EXPARTE APPLICANTS**

**HON. C.K. NZILI**

**ELC JUDGE**