



**REPUBLIC OF KENYA**

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

**ELC JUDICIAL REVIEW NO. 6 OF 2019**

**IN THE MATTER OF**

**AN APPLICATION FOR JUDICIAL REVIEW**

**PROCEEDINGS FOR AN ORDER OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF**

**THE LAND ADJUDICATION ACT (CAP. 284), LAWS OF KENYA**

**IN THE MATTER OF**

**PLOTS NUMBERS 4007, 4008, 4084, 3992, 3993, 2952 AND**

**4161 SALAWA ADJUDICATION SECTION**

**AND**

**IN THE MATTER OF**

**THE DECISION OF THE DEPUTY COUNTY COMMISSIONER BARINGO SUB COUNTY**

**BETWEEN**

**MOSES KIPRONO KAPLAWAT.....APPLICANT**

**VERSUS**

**THE DEPUTY COUNTY COMMISSIONER,**

**BARINGO CENTRAL.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY FOR**

**LANDS, SETTLEMENT AND HOUSING.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR**

**BARINGO COUNTY.....3<sup>RD</sup> RESPONDENT**

**AND**

**CHEBOIWO ROTICH.....1<sup>ST</sup> INTERESTED PARTY**

CHESIRE KIBOWEN.....2<sup>ND</sup> INTERESTED PARTY  
EUNICE KIBET CHESIRE.....3<sup>RD</sup> INTERESTED PARTY  
BENJAMIN KANGOGO KANDAGOR.....4<sup>TH</sup> INTERESTED PARTY  
JOSEPH CHEPKURGAT.....5<sup>TH</sup> INTERESTED PARTY  
DAVID CHEBORE SIMBA.....6<sup>TH</sup> INTERESTED PARTY  
JACKSON K CHIRCHIR.....7<sup>TH</sup> INTERESTED PARTY

### **JUDGMENT**

1. The Applicant was granted leave to institute judicial review proceedings through the order dated the 17<sup>th</sup> October, 2019. That order required the judicial review application to be filed within 21 days. The Applicant then filed the notice of motion dated the 4<sup>th</sup> November, 2019 on the same date which was within the time given by the court. The application is brought under **Order 53 Rule 3(1-3), 4(1-3) of the Civil Procedure Rules** and **sections 8-9 of the Law Reform Act**. The Applicant seeks for the following orders;

***“(i) THAT an order of certiorari to issue to remove to this Honourable Court the proceedings and judgment dated 26<sup>th</sup> June, 2019 of the 1<sup>st</sup> respondent the Deputy County Commissioner Baringo Central Sub County in appeal to the Minister Case No 256 of 2009 in respect of parcel numbers 4007, 4008, 4084, 3993, 2952 and 4161 Salawa Adjudication Section between MOSES KIPRONO KAPLAWAT (APPELLANT) and CHEBOIWO ROTICH, CHESIRE KIBOWEN, JAMES K. CHESIRE, BENJAMIN KANGOGO KANDAGOR, JOSEPH CHEPKURGAT, DAVID CHEBORE SIMBA and JACKSON K. CHIRCHIR for the purposes of them being quashed and remitted for hearing.***

***(ii) THAT an order of prohibition do issue prohibiting the 3<sup>rd</sup> and 4<sup>th</sup> respondents from issuing title deeds to the interested parties as owners thereof in pursuant of the judgment in the court of the Deputy County Commissioner Baringo Central Sub-County in appeal to the Minister Case No. 256 of 2019.***

***(iii) THAT this court be pleased to issue any other relief it may deem fit and just to grant.***

***(iv) THAT the costs of this application be provided for.”***

2. The application is based on the grounds on the statutory statement dated the 17<sup>th</sup> October, 2019 and supported by the affidavit of verification of facts sworn by **Moses Kiprono Kaplawat**, the Exparte Applicant, on the 17<sup>th</sup> October, 2019. It is the case of the Applicant that his father and himself are the beneficial owners of land parcel Nos. **4007, 4008, 4084** and **4161** and also claim portions of land in Parcels Nos. **3992, 3993** and **2952** in Salawa Adjudication section, hereinafter referred to as the suit properties. That the suit properties belonged to his grandfather, and that they have been in occupation, possession and use of the lands since 1926. That the suit properties were bequeathed to his father, Richard Chemjor. That during the land demarcation and adjudication at Salawa Adjudication Section, his father demarcated part of the land and registered it under parcel number 3999. That thereafter, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties invaded part of parcel 3999 under the pretext of purchase, inheritance and or boundary extension and registered them as parcels 3992, 3993 and 2952 respectively. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> Interested Parties also claimed portions of parcel No. 3999 and filed objections at the committee and or arbitration board, and were awarded portions of the land that were registered as parcel numbers **4007,4008, 4084** and **4161** respectively. That his father being dissatisfied with the committee and/or arbitration committee board decisions in respect of the aforesaid parcels of land, filed objections to the adjudication officer against the decisions which were dismissed. That his father then filed several appeals to the Minister which were consolidated and heard by the 1<sup>st</sup> Respondent as Appeal Case No. 256 of 2009 and dismissed. That according to the Applicant, the 1<sup>st</sup> Respondent erred by consolidating all the appeals under **Case No. 256 of 2009** and hearing them on the same day, while the appeals filed were distinct and separate in respect of each interested party. That the 1<sup>st</sup> Respondent did not determine the real issues in dispute in each of the appeals, and had denied him a fair hearing. That further, the 1<sup>st</sup> Respondent relied on extraneous evidence, the number of victories the Interested Parties had garnered at the previous stages and had ignored the Applicant’s fundamental grounds of appeal. That the 1<sup>st</sup> Respondent failed to accord him an opportunity to cross examine witnesses especially the 5<sup>th</sup> Interested Party, who was chased out for receiving a phone call. That the 1<sup>st</sup> Respondent’s decision is vitiated by an error on the face of the record, and is ultra vires as it contains an award to a deceased person.

5. The application is opposed by the 1<sup>st</sup> to 7<sup>th</sup> Interested Parties through the replying affidavit sworn by **Jackson K. Chirchir**, the 7<sup>th</sup> Interested Party, on 25<sup>th</sup> February 2020, and filed on 10<sup>th</sup> June, 2020. Their case is that the application is incompetent, an abuse of the court process and the supporting affidavit is devoid of form, making the application fatally defective and that the same should be struck out with costs. That the Salawa Adjudication Section was established on 1<sup>st</sup> February 1981, and when the register was published complete on 31<sup>st</sup> August 2014, vide **Notice No. LA/BAR/13 Vol V/R, Richard Kaplawat**, the father to the Applicant, filed several objections at the committee and/or arbitration board being case Nos **178, 107, 99, 98, 722** and **105** in respect of **Plot Nos. 3996, 3995, 2952, 4084, 4008, 3992, 4007** and **3997**, which he lost to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Interested Parties herein. That Richard Kaplawat, being aggrieved by the decision of the adjudication officer, proceeded to appeal to the Minister and the Appeal Case No. 256 of 2009 was heard by the 1<sup>st</sup> Respondent under delegated powers, vide gazette notice No. 6854 of 13<sup>th</sup> September, 2014 and dismissed. That the objection and appeal proceedings between the Applicant and/or his father and the Interested Parties, were conducted separately, where the Applicant and or his father were granted an opportunity to tackle each Interested Party one at a time. That after the Applicant finished with an Interested Party,

the next one would be called in, and that was continued until the last one was heard. That at no single time were the proceedings consolidated as insinuated by the Applicant. That the appeals were heard on the same day upon the request of the Applicant to the 1<sup>st</sup> Respondent, due to costs implications were the appeals heard on diverse dates. That the procedure of hearing the appeal was to the effect that each party participating would ask questions, call witnesses and when done would sign, which was a clear indication that the party was satisfied with the proceedings. That the 1<sup>st</sup> Respondent complied fully with the rules of natural justice and the proceedings were just, fair and in accordance with the law. That the Applicant's father was a committee member presiding over land cases and had illegally caused the Interested Parties' land to be registered as parcel No. 3999, which resulted to the many disputes between him, the Applicant and the Interested Parties. That the Interested Parties have been in possession of the suit properties from 1920 after inheriting them from their forefathers. That there is no evidence, either by way of a complaint letter, attached to the instant application hereto, addressed to the 1<sup>st</sup> respondent showing that the Applicant ever complained about the manner in which the 1<sup>st</sup> Respondent was conducting the Applicant's appeals' proceedings. That as judicial review applications are not concerned with merits of the decisions of a quasi-judicial body but the process that was followed before the decision was arrived at, the application herein should be dismissed with costs.

6. The 1<sup>st</sup> to 4<sup>th</sup> Respondents have also opposed the application vide the replying affidavit sworn by **John Ongalo Laku**, the Baringo County Principal Land Adjudication & Settlement officer, on the 16<sup>th</sup> October, 2021. It is their case that Salawa Adjudication Section was established on 1<sup>st</sup> February, 1981 vide Notice of Establishment of Adjudication Section Ref. LA/SECT/82/8. That on 31<sup>st</sup> August 2004, and pursuant to **Section 25(C) of the Land Adjudication Act**, the adjudication register for Salawa Adjudication Section was declared complete, and all the interested parties were called to inspect it. That from the register **Plot Nos. 3996, 3995, 2952, 4084, 4008, 3992, 4007 and 3997** were recorded with the Interested Parties herein, prompting the Applicant to file complaints with the Land Adjudication officer in case Nos. **178, 106, 104, 107, 99, 98, 722 and 105** against the Interested Parties. That those cases were heard and determined in favour of the Interested Parties on the 28<sup>th</sup> September, 2006. That the Applicant then lodged an appeal to the Minister in **Case No. 256 of 2009**, which was heard by Deputy County Commissioner- Baringo Central, and a decision made on 27<sup>th</sup> June, 2019 in favour of the Interested Parties. That from the proceedings and decision of the Minister, there is nothing to suggest that the 1<sup>st</sup> Respondent conducted the appeal proceedings in a haphazard manner or with a preconceived determination as alleged, or that the Applicant was not afforded ample opportunity to ventilate his case. That on the contrary, the record shows that the Applicant and his witnesses gave elaborate account of their case and were cross examined, and his allegations of breach of **Article 47 of the Constitution**, and the provisions of the **Fair Administration Act** cannot arise in the circumstances. That the notice of motion dated 4<sup>th</sup> November 2019, offends the provisions of **Section 29 of the Land Adjudication Act** as it seeks to appeal or challenge the merit of the decision of the Minister. That the application does not meet the threshold for granting prerogative writs of certiorari and prohibition as no grounds of judicial review have been set out. That the notice of motion revolves outside the purview of judicial review as the Applicant's contention is over ownership of the parcels in dispute and not the process of decision making.

7. Pursuant to the directions issued by Court on 24<sup>th</sup> March, 2021, the learned counsel for the Interested Parties filed their submission dated the 7<sup>th</sup> June, 2021 on the 9<sup>th</sup> June, 2021 while that for the Applicant filed theirs dated the 14<sup>th</sup> October, 2021 on the 15<sup>th</sup> October, 2021. The counsel for the Respondents filed their submissions dated the 16<sup>th</sup> July, 2021 on the 18<sup>th</sup> October, 2021.

8. The following are the issues for the court's determinations;

- (a) *Whether the application is defective due to the form of the supporting affidavit.*
- (b) *Whether the Applicant has demonstrated that the 1<sup>st</sup> Respondent failed to accord him a fair hearing.*
- (c) *Whether the application is challenging the merit of the 1<sup>st</sup> Respondent's decision or the process thereof.*
- (d) *Whether the Applicant has presented before the court reasonable basis for quashing the 1<sup>st</sup> Respondent's decision.*
- (e) *Who pays the costs?*

9. I have carefully considered the grounds on the statutory statement and affidavit in verification of facts filed with the Exparte chamber summons dated the 17<sup>th</sup> October 2019, the replying affidavits by the Respondents and Interested Parties, the written submissions, superior courts decisions cited thereon and come to the following determinations;

(a) That **Order 53 Rule 3 of the Civil Procedure Rules** does not require the substantive application for prerogative orders to be supported by an affidavit. That Rule 4 of the said Order goes on to provide that;

***"Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."***

That one of the Interested Parties' complaints in respect of the application that it was defective and incompetent as the supporting affidavit is devoid of form has not been established as no supporting affidavit was filed with the notice of motion on the 4<sup>th</sup> November, 2019. That any affidavit filed in support of an application for judicial review is unnecessary in view of the provisions of the law set out above.

(b) That in the case of **Republic v National Employment Authority & 3 Others, Ex-Parte Middle East Consultancy Services Limited [2018] eKLR**, Mativo J, at paragraph 53 expressed himself on judicial review as;

*".....the review by a judge of the High Court of a decision; proposed 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."*

This honourable judge at paragraph 55 held that

*"... Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:*

*(a) the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*

*(b) a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it."*

That from the Applicant's pleadings and submissions, his main complaints in respect of the 1<sup>st</sup> Respondent's decision are the consolidations of the appeals, hearing of the appeals on a single day and inclusion of a deceased party (**3<sup>rd</sup> Interested Party**). I have scrutinized the copy of the proceedings of the said appeal that was availed by the Applicant, marked "**MKK2**" and annexed to the instant application, and it is clear from the said record that **James K. Chesire**, the 3<sup>rd</sup> Interested Party, was indicated as deceased. That while the proceeding does not appear to have captured when the said deceased passed on, the court has taken note that the Applicant had included him among the Interested Parties in both the leave application and Notice of Motion without a personal representative or indicating that he had already died. That the 1<sup>st</sup> Respondent's decision simply put, dismissed the Applicant's appeals, and cannot be taken to have amounted to an award to a deceased party. That in any case, the court takes it that the distribution of the benefits, if any, accruing to the beneficiaries of the estate of the deceased party will be guided by the Succession Court in accordance with the **Law of Succession Act Chapter 160 of Laws of Kenya**. That further, the copy of the proceeding shows that the Applicant, 1<sup>st</sup>, 2<sup>nd</sup> 4<sup>th</sup> to 7<sup>th</sup> Interested Parties were all heard and cross examined by among others the opposing side. The availed witnesses including **Barnaba Chepkaitany** and **Richard Kaplowat Chemjor**, who were the Applicant's witnesses, were also heard and cross examined. That the record also shows that the 1<sup>st</sup> Respondent was in all instances the first to cross examine each of the parties and the witnesses. That though ideally the 1<sup>st</sup> Respondent should have allowed the opposing parties to do cross examination first before seeking for clarifications as necessary, I do not find evidence of any prejudice on the Applicant as all the parties were subjected to the same order of cross examination, and therefore the due process was accorded to the parties in the hearing of the appeal by the 1<sup>st</sup> Respondent.

(c) That though the copy of the proceedings confirms the Applicant's contention that the seven appeals were consolidated and heard at the same place on a single day, it is apparent from the recorded testimonies that the Applicant, the Interested Parties and the witnesses testified one at a time. That further the parties were accorded the opportunity to cross examine the opposing side as appropriate. That there is therefore no evidence to suggest that the proceedings were conducted in a chaotic or confusing way with the Interested Parties forming a tag team against the Applicant as he appeared to claim. I therefore find that the Applicant was accorded a reasonable opportunity to ventilate his appeals adequately, notwithstanding that the appeals were consolidated and heard at the same place, and on the same day. That in any case, consolidation of two or more cases touching on the same subject matter, and or between the same parties, is a common phenomenal even before this court and helps in expeditious, timely, efficient and affordable disposal of disputes as dictated by **sections 1A and 1B of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

(d) That Applicant appear to have been dissatisfied with the decision of the 1<sup>st</sup> Respondent for other reasons, and not because of the process employed by the 1<sup>st</sup> Respondent in the hearing of the appeals. That in judicial review applications, this court's jurisdiction is limited to questions of the process, as opposed to the merits of the decision. I therefore find the Applicant has failed to present reasonable basis or grounds upon which the court could fault the process followed in arriving at the disputed decision. That his application is without merit and therefore fails. That in accordance with **section 27 of the Civil Procedure Act**, the Interested Parties are awarded costs of the judicial review proceeding.

10. That flowing from the foregoing, the Applicant's notice of motion dated 4<sup>th</sup> November, 2019 is without merits and is hereby dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 7<sup>th</sup> Interested Parties.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021.**

**S. M. KIBUNJA**

**ENVIRONMENT AND LAND COURT JUDGE**

**IN THE PRESENCE OF;**

APPLICANT: ABSENT

RESPONDENTS: ABSENT

INTERESTED PARTIES: ABSENT

COUNSEL: MR. KIBII FOR THE EXPARTE APPLICANT

M/S RUTO FOR 1<sup>ST</sup> TO 4<sup>TH</sup> RESPONDENTS

MR. KAGUNZA FOR INTERESTED PARTIES

ONIALA: COURT ASSISTANT