



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

JUDICIAL REVIEW DIVISION NO. E001 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 KAMWIMBI 1048,1417 &1419

AND

IN THE MATTER OF LR PARCELS MERU SOUTH.KAMWIMBI A'/1498 &

MERU SOUTH/KAMWIMBI A'/1498 & MERU SOUTH/KAMWIMBI' A'/1499

IN THE MATTER OF THE APPEAL TO THE MINISTER NO.95/2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

MAARA SUB- COUNTY.....1ST RESPONDENT

COUNTY COMMISSIONER MERU SOUTH SUB-COUNTY....2ND RESPONDENT

THE LANDS REGISTRAR.....3RD RESPONDENT

AND

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

AND

NJERU KIRIRIKA.....INTERESTED PARTY

M'NYIRI RAGWA.....EX- PARTE APPLICANT

JUDGEMENT

1. Pursuant to leave granted by court on 20.4.2021, the ex parte applicant filed the notice of motion application dated 20th April 2021 brought under Article 23 (3) (f) and 47 of the constitution of Kenya, Section 8 and 9 of the Law Reform Act and Order 53 Rule 1 (1), (2) & (3) of the Civil Procedure Rules 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. 95 of 2015 via a Ruling delivered on the 3rd September, 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.95/2015 made on the 3rd September, 2020 in relation to Parcel Nos.1048,1417 and 1419.

2. The motion is supported by the facts and grounds contained in the Statutory statement and the verifying affidavit of M'NYIRI RAGWA dated 15th March 2021.

3. The 1st, 2nd, 3rd and 4th respondents filed grounds of opposition dated 3rd May 2021. They stated that the application does not demonstrate with sufficient clarity the nature of misconduct in the actions of the 1st, 2nd and 3rd Respondents in the exercise of their statutory duties, that judicial review deals with procedure and not the results, that the orders sought are discretionary and can be denied even when warranted, that the application is misconceived and a nonstarter and lastly that the application is vexatious, frivolous, scandalous and an abuse of the court process.

4. The interested party filed a Replying Affidavit sworn on 3rd May 2021 and filed on 6th May 2021.

APPLICANT'S CASE

5. The applicant contends that the interested party is well known to him and was appointed by the clan members during demarcation to act for, to hold in trust for and defend the clan interests, concerning parcel KAMWIMBI No.534 measuring approximately 1200 acres and thereafter subdivide the land parcel amongst applicant and other rightful owners.

6. The applicant avers that the Land parcel KAMWIMBI 534 was allocated to the interested party to hold in trust for him and other aggrieved persons belonging to Igakuya clan.

7. The applicant further states that due to the actions of the interested party, the applicant and other aggrieved persons filed Adjudication Objections against the Interested party for his failure to distribute and award the portions of land emanating from parcel No.534 amongst the clan members and the applicant as mutually agreed by the Igakuya clan.

8. The applicant avers that upon the completion of the Adjudication Objection proceedings, he was awarded his portions Nos. KAMWIMBI ADJ SECTION 1048,1417 & 1419. A copy of the objection proceedings dated 9th October, 2013 has been exhibited.

9. The applicant contends that it is when the Interested party lodged a Judicial review application at Meru via No. JR 35 of 2013 which was then transferred to Chuka via No.11 of 2017 despite the right of Appeal to the Minister being granted to him to be filed within the stipulated 60 days. The applicant avers that the court ordered that the appeal to the minister be heard first before the bringing up of an application for Judicial Review.

10. The applicant avers that the grounds of appeal to the minister by the interested party were based on misleading information by the fact he alleged Parcel No. KAMWIMBI/534 to be his ancestral parcel of land, a claim that he disapproved in the previous proceedings.

11. The applicant avers that the findings by Deputy County Commissioner (DCC) which formed the basis of the Ruling dated the 3rd September, 2020 is based on falsehoods rendering the same unjust to him and other aggrieved parties.

12. The applicant avers that he has been on the parcel of land Nos. KAMWIMBI ADJ SECTION 1417,1419 &1048 for over 80 years and that he has called the same home together with his children.

13. The applicant avers that Land Parcel No. KAMWIMBI A' ADJ SECTION 1048, was awarded to him way back in the year 2003 and the adjudication process completed. That with all the rights and authority, he then sub-divided the same, into land parcels MERU SOUTH/KAMWIMBI 'A'/1498 & 1499 and allocated the same to his sons. The applicant has annexed copies of the title deeds.

14. The applicant contends that if the decision made by the Minister is implemented, he shall stand to suffer irreparable harm by being rendered landless and destitute.

15. The applicant avers that unless the Honourable court intervenes and upholds the Law and the Constitution, injustice shall be occasioned to him.

16. The applicant avers that it is in the interest of justice that the orders sought herein should be granted.

Interested party's Case

17. In his response to the application, the interested party contends that the said decision was made by the Minister and not by any of the Respondents herein and therefore the motion dated 15/3/2021 is grossly incompetent as it is directed against the wrong persons.

18. The interested party avers that judicial review proceedings are concerned with decision making process and not the merits of the decision made.

19. The Interested party states that nothing has been pointed out by the Ex parte applicant to prove or demonstrate that the decision-making process was flawed to warrant issuance of judicial review orders by this court.

20. The interested party contends that none of the known grounds for judicial review proceedings has been cited by the Ex -parte Applicant and therefore the motion dated 15/3/2021 is hollow and stands on quick sand.

21. The interested party avers that what comes out clearly from the ex parte Applicant's case especially at paragraph 9 of his affidavit is that the applicant is challenging the merits of the decision by the Minister which is beyond the scope and purview of judicial review proceedings. He states that the ex-parte applicant's claim that the interested party holds the suit land in trust for him also falls outside the scope and purview of judicial review proceedings. He further states that even if the court was to step outside the purview of Judicial review proceedings and consider the merits of the 1st Respondent's decision the court would still come to the conclusion that the orders sought are not merited.

22. The interested party states that he is the owner of land parcel number 534 Kamwimbi 'A' Adjudication Section which parcel was originally occupied by his grandfather one KITHANYA long before the declaration of Kamwimbi 'A' Adjudication section.

23. The interested party avers that when the adjudication process began in Kamwimbi 'A' Adjudication section he gathered the said parcel of land on his own behalf and on behalf of the descendants of KITHANYA family lineage. He states that the Ex parte Applicant does not belong to their family or even the clan and therefore his claim that the interested party holds the suit land in trust for the applicant is farfetched.

24. The interested party avers that the applicant is his neighbor and has his separate and distinct parcel of land being parcel number 518 Kamwimbi 'A' Adjudication section. He further avers that the ex parte applicant has always harbored the intentions of annexing part of his land to his and colluded with an adjudication officer by the name Sarah Gachine to hive off his land. That when he discovered the scheme that was being hatched by the Ex parte Applicant and the said Adjudication officer he complained to the Director of Land Adjudication and settlement.

25. He states that the director acted on his complaint and vide a letter dated 30/4/2012, he directed that the objections filed by the Ex -parte Applicant and others against him be heard by a different adjudication officer. That despite the letter dated 3/4/2012 by the Director Land Adjudication and settlement M/S Sarah Gachine proceeded to hear the exparte applicant's claim and awarded him portions of the interested party's land which were recorded in the Ex parte Applicant's name as parcels numbers 1048,1417 and 1419. He has annexed a letter dated 10/10/2013 confirming that the said officer had proceeded to hear the objections despite the direction that she should not do so.

26. The interested party alleges that the minister clearly found that the said Adjudication officer Ms Sarah Gachine had proceeded to hear the objection despite the direction to step aside which is a clear pointer of collusion between the Ex- parte applicant and the said officer. He further states that after the Ex parte applicant was awarded portions of the suit land, the very officer proceeded to sub divide the land in the register but not on the ground and further assisted the Ex parte Applicant to obtain titles to the portions while the appeal to the minister was pending.

27. He contends that the ex parte applicant and the said officer also disregarded a court order issued in Meru High court Judicial Review Case No.35 of 2013 which stayed the implementation of the decision awarding the Ex- parte Applicant portions of the interested party's land and he annexed a copy of the court order dated 14.11.2013.

28. The interested party state that the case no.35 of 2013 was eventually withdrawn from court to enable the hearing of the appeal to the minister and upon withdrawal the court re-issued the order staying the implementation of the decision awarding the ex parte applicant portions of the interested party's land. He has also annexed a copy of the court order dated 15/3/2017.

29. He alleges despite the court orders staying the implementation of the decision awarding the ex parte applicant land, the applicant even went ahead to sub-divide parcel number 1048 and transferred portions thereof to his children. He alleges the Ex parte Applicant's claim is founded on fraud and he has all along acted fraudulently and in complete disregard of court orders. He reiterates that the claim before court is a perpetuation of fraud that the applicant has committed all along and urged the court to reject the same.

30. The application was canvassed by way of written submissions. The applicant filed his submissions on 28.5.2021 while the 1st -4th Respondents filed theirs on 11.5.2021 and the interested party filed his on 18.5.2021.

ANALYSIS & DETERMINATION

31. The court has carefully considered the evidence on record and the submissions made.

The issues that call for determination are:

- i. Whether the Respondents exercised their statutory duties as envisaged in the law?
- ii. Whether the orders of Judicial Review are available?

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

32. In this case, the applicant avers that the grounds of appeal to the minister by the interested party were based on misleading information by the fact that he alleged Parcel No. KAMWIMBI/534 was his ancestral parcel of land, a claim that he disapproved in the previous proceedings. That this is an issue that ought to have been addressed at the proceedings and not judicial review.

33. Judicial review does not concern itself with the merits of the decision. It is focused on the process through which decisions were made.

34. The principles for Judicial Review were set out in a land mark case of ; **Republic Vs Kenya National Examination Council Ex parte Gathenji** and others Civil Appeal No.266 of 1996, where 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 that the impugned decision was illegal.**”

35. In the case of **Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR**, the Court of Appeal held that: -

Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

36. 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.

37. In this case, the interested party 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 in my view following due process.

38. The applicant’s submissions addresses the merits of the decision rendered by the minister which clearly demonstrate that the applicant has an issue with the merits and not the procedure.

39. 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.

40. 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.

41. 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?

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

43. 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.”

44. Similarly, 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.”

45. 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.

46. 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.

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

48. **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.’’

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

50. 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.

51. Consequently, the notice of motion Application dated **20th April 2021** is dismissed with costs to the respondents and the Interested Party.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF DECEMBER,2021 IN THE PRESENCE OF:

C/A. Ndegwa

M/s. Kijaru for Ex-parte Applicant

Ms. Nyaga h/b for Gachuki for Interested Party

N/A for AG for Respondents

C. K. YANO,

JUDGE