



**REPUBLIC OF KENYA**

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

**ELC J.R. 19 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT**

**IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 296) LAWS OF KENYA**

**IN THE MATTER OF RUIRI/RWARERA/ADJUDICATION SECTION**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DEPUTY COUNTY COMMISSIONER**

**BUURI EAST, MERU COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LANDS AND**

**PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**EX-PARTE**

**SHAM SATISH KUNDALAH WASON**

**AND**

**ISAAC NGEERA.....1<sup>ST</sup> INTERESTED PARTY**

**ELIZABETH GATITU.....2<sup>ND</sup> INTERESTED PARTY**

**MARY NTHINGA ITHUTA.....3<sup>RD</sup> INTERESTED PARTY**

**STANLEY KARUTIM'MBIRITHI.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1. The exparte applicant filed an exparte application dated 25.11.2019 in which he was ordered to serve for interpartes hearing. It was eventually heard on 29.1.2020.

2. By a ruling delivered on 30.4.2020 leave was granted. Leave did not act stay as for reason that the exparte applicant had failed to adhere to the court orders made on 28.11.2019 and more particularly in light of the Court of Appeal **No. 129 of 2005, Petition No. 35 of 2016**, Meru

**ELC case between Johnson Mbaabu & Another-vs- Mathiu Nabea & 9 Others.**

3. The ex parte applicant did not file the substantive notice of motion on time. He came back to court for an extension of time vide notice of motion dated 9.7.2020. The court allowed the same on 24.5.2021 and the notice of motion dated 18.5.2020 was deemed as duly filed on time and served.

4. Prior to 24.5.2021 the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and interested parties had filed their responses on 8.9.2020 respectively.

5. For avoidance of doubt, the court in allowing the notice of motion dated 18.5.2020 and filed on 15.6.2020 to be deemed as duly filed on time, it also granted leave to all the parties to make any responses, further affidavits, file and serve relevant replies with regard to the substantive motion by 24.6.2021 and 24.7.2021 respectively.

6. The ex parte applicant prays for:

**a) An order of certiorari to remove into this court and quash the decision and award made by the 1<sup>st</sup> respondent on 24.9.2019 in appeal to Cabinet Secretary A/C No. 165 of 2018 over Parcel No. 3624 Ruiri/Rwarera Adjudication Section.**

**b) Stay of the award thereof.**

7. The motion is made under the grounds and matters set forth in the statutory statement and a verifying affidavit of Sham Satish Kundalal Wason.

8. In the statement dated 25.10.2019, the ex parte applicant states he purchased 9.6 acres from Paul Kibaya Araiigwa for Kshs. 150,000/= after which his interests were noted in the adjudication register as Plot No. 3524. He states he fenced the property and leased it to Intex Company.

9. Further the applicant pleads that in 2018, the interested parties filed objections No's 2224, 2206, 2219 and 3869 at the Sub-County Land Adjudication & Settlement office Imenti which were heard and determined by a judgment delivered on 16.5.2018 in his favour.

10. After the dismissal, the interested parties appealed to the Minister whereof the 1<sup>st</sup> respondent heard and determined the matter and allowed the appeal.

11. The ex parte applicant takes the view the Minister acted arbitrarily, unreasonably and unfairly in allowing the appeal in that there was no independent professional advice of a surveyor to ascertain acreages; relied on a Court of Appeal case No. 129 of 2005 which was hearsay evidence, breached the rules of natural justice as the ex parte applicant was not a party to the Court of Appeal matter, condemned the ex parte applicant before hearing him, acted ultra vires without jurisdiction and illegally as he was not gazetted to act in line with the law.

12. Further the ex parte applicant relies on a verifying affidavit sworn on 25.10.2019 and with leave of court a supplementary affidavit sworn on 2.10.2020. In the verifying affidavit, the ex parte applicant relies on the **annextures marked as SS1 & SS2**, the supporting documents **SS3 & SS5** the objection proceedings and judgment; copies of the appeal and judgment by the 1<sup>st</sup> respondent marked as **annextures SS6 & SS7**.

13. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents grounds are:

**a) That the nature of misconduct in the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the exercise of their statutory duties has not been demonstrated with sufficient clarity.**

**b) The suit offends Order 53 rules 1, 2 and 3 of Civil Procedure Rules.**

**c) Statutory threshold to warrant grant of the orders has not been satisfied hence the application is an abuse of the court process.**

**d) The application is a non-starter, ungrounded in law and out to circumvent good judicial order.**

**e) The interested parties rely on a replying affidavit sworn on 28.8.2020 by Isaac Ngeera Ndoweri the 1<sup>st</sup> interested party with authority dated 28.8.2020 to swear on behalf of the other interested parties.**

14. They claim to be the rightful owners and occupants of Plot No. 3624 measuring approximately 18.6 acres which was initially owned by one Ithuta Ngaruthi (deceased) and left for him to hold in trust for his other family members among them the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties. They insist that they have occupied the land since 1976 with extensive developments thereon as noted by the 1<sup>st</sup> respondent in his proceedings.

15. The 1<sup>st</sup> interested party denies knowing the ex parte applicant as well as his alleged occupation of the land. He claims there are no documents tendered before this court on his ownership, as SS1 lacks vital details as to the location, stamp, or seal from the land register verifying them. Further he states the alleged seller Paul Kibaya Araiigwa is unknown to him and in any event no minutes have been attached to support the allegations as well as a signed sale agreement. Further it is submitted that Under **Section 15 of Cap 284** boundaries had to be ascertained by the demarcation officers. Further they state the fencing off the land was done without using a demarcation map and or

survey's assistance.

16. The interested parties aver the Minister exercised his powers properly and but the ex parte applicant wants to unjustly enrich himself.

17. By further grounds of opposition dated 8.9.2020 the interested parties aver that;

**a) Ruiru/Rwarera is a closed adjudication section with one registration number 3624 to which the ex parte applicant is claiming 9.6 acres out of 18.16 acres hence unjustly attempting to hive off 9.6 acres from aforesaid number which legally belongs to the family of the interested parties.**

**b) The ex parte applicant mis-apprehends Section 29 (4) of Cap 284 since it allows the Minister to delegate his powers hence acted lawfully, legally and within the law.**

**c) He did not raise any objection to gazettment of the 1<sup>st</sup> respondent on time or at all during the hearing.**

**d) The 1<sup>st</sup> respondent visited the locus in quo, made observations before making and delivering the judgment.**

**e) Court of Appeal decision was relevant to the proceedings.**

18. In response to the grounds of opposition by both the respondent and the interested parties, the ex parte applicant in a supplementary affidavit sworn on 2.10.2020 states in his verifying affidavit hereof has specified the 1<sup>st</sup> and 2<sup>nd</sup> respondents particulars of misconduct while hearing the appeal; states no evidence has been brought before court in support of the assertion the register is closed and is in favour of the interested parties; Minister's decision is appealable to court and not to the director of land adjudication; no gazettment has been displayed to prove indeed there was compliance with the law; the court is entitled to look at the decision making process and not the merits; the findings of the 1<sup>st</sup> respondent were not supported by any professional advice of experts and in any event was contrary to the ex parte applicant's interests duly noted in the adjudication register; the observation confirmed existence of a construction site and quarry yet the decision went against him; the Court of Appeal decision was not shared with the ex parte applicant for his input hence he was condemned unheard and against the rules of natural justice; the 1<sup>st</sup> respondent was not gazetted at all to hear the matter.

19. The ex parte applicant filed a list of authorities dated 11.8.2020. He relies on *Republic –vs- Land Adjudication Officer Ankamia Adjudication Section & 2 Others Ex parte Solomon Mathu Nabea [2018] eKLR, Republic –vs- Cabinet Secretary Ministry of Lands and Settlement & 2 Others Ex parte Gerald Mbuuri Kabugu [2018] eKLR, Republic –vs- procurement Administrative Review Board & 2 Others Ex parte Pelt Security Services Ltd. [2018] eKLR & Johnson Mbaabu Mburugu & Another –s- Mathiu Nabea & 9 Others [2020] eKLR.*

20. As a point of clarification, on 12.10.2021 Mr. Kieti litigation counsel appeared for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents . He also held brief for Mr. Mwesigwa advocate for the interested parties while Mr. Ali advocate was for the ex parte applicant. He addressed the court on the basis that there were two pending applications which they were not opposed to, dated 25.10.2019, a notice of motion dated 18.5.2020 and 9.7.2020 respectively.

21. Given the foregoing record it is obvious that parties ought to have been aware of the previous orders and directions thereof.

22. While aware of the above directions and orders on 21.10.2021 the interested parties wrote a letter purportedly seeking for some orders and or directions. Similarly and even before there were any directions, the interested parties purported to file a replying affidavit sworn on 19.10.2021 by one Mary Nthiga Ithura.

23. As indicated above the court had given clear timelines on when to file responses and further affidavits. The deadline was 24.6.2021 and 24.7.2021 respectively for the parties and a hearing date given for 12.10.2021 for the substantive motion. So the documents purportedly filed on 21.10.2021 were filed without leave and outside the timelines and hence prejudice the other parties in this matter.

The same are hereby rejected and expunged from the court's records for being filed out of time and without leave of court.

Coming to the merits of the motion herein the issues for determination are what the guidelines the minister ought to have adhered to and if the same were followed in arriving at the decision complained about.

24. **Article 47** of the **Constitution** grants every person a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

25. The **Fair Administrative Actions Act** 2015at **Section 4(1)** provides the 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.

26. Under **Section 4 (4)** of **Fair Administrative Actions Act**, the administrator is required to accord every party to be affected by the outcome an opportunity to attend the proceedings in person or in company of an expert of his choice, to be heard, cross examine persons and also request for an adjournment to ensure fair hearing.

27. **Section 7 (1)** provides for an opportunity to apply for review while **Section 7 (2)** grants the court powers to review such decisions in line with **Section 8** thereof.

28. Under **Section 11** thereof the court may set aside the decision and remit the matter for reconsideration.

29. In *Suchan Investments Ltd –vs- Minister of National Heritage & Culture & 3 Others [2016] eKLR* the court held the court has to consider the substantive merits of a decision, through the proportionality test but has no mandate to substitute its own decision with that of the administrator.

30. The exparte applicant faults the Minister for acting arbitrary, unreasonably and unfairly in allowing the appeal without calling for an independent professional expertise in form of a surveyor to ascertain the acreage, relying on the Court of Appeal decision and failing to accord him an opportunity to be heard while he was making the observations and later on relying on those observations to making the decision .

31. The respondents response to the above was that the exparte applicant had not made any specific details on how the Minister failed in his statutory duties.

32. In my considered view the exparte applicant is under no obligation to give more than what the law expects of the Minister in line with **Article 47** and the **Fair Administrative Actions Act 2015** which are the baseline and the bare minimum.

33. The conduct and the decision of the 1<sup>st</sup> respondent has to be looked at through the constitutional spectrum. The 1<sup>st</sup> respondent had an obligation to observe the rules of natural justice over and **Article 47** of the Constitution.

34. It was its constitutional and statutory duty to ensure whatever action and activity it undertook in hearing the appeal was in accordance with the constitutional and statutory edicts above mentioned.

35. The 1<sup>st</sup> respondent has not stated that he had professional experts to guide him on the boundaries existing over the subject parcels of land between the parties . There is no evidence the 1<sup>st</sup> respondent accorded all the parties an opportunity to be present while visiting the scene and each of them given the opportunity to pinpoint their boundaries and or areas of dispute .

36. The 1<sup>st</sup> respondent did not state he had any expertise with him who showed him the exparte applicant’s parcel of land as opposed to that of the interested parties and vice versa.

37. In absence of any evidence to the contrary my finding is that the actions and decision of the Minister diverted from the established and set beacons as held in *Law Society of Kenya –vs- Centre for Human Rights and Democracy & 12 Others (2014) eKLR*.

38. In the premises the motion herein succeeds with costs to the exparte applicant.

The matter is remitted to the Minister for reconsideration.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

Nelima holding brief for Ali for Exparte applicant

Mwesigwa with Mutunga for Kieti for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**