



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**JUDICIAL REVIEW NO. 18 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS OUT OF TIME**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR A JUDICIAL REVIEW WRIT OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 95 OF THE CIVIL PROCEDURE ACT AND ORDER 50 RULE 5 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 51 RULE 1(1), (2) & (4), RULE 2 & 3 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE FINDINGS OF, PROCEEDINGS AND ORDER MADE ON 1<sup>ST</sup> DECEMBER 2016 IN OBJECTION NO. 1967 OVER LAND PARCEL NUMBER 391 SITUATED IN KARAMA ADJUDICATION SECTION**

***BETWEEN***

**JOSEPH MATHITA IKIRIMA.....EX PARTE APPLICANT**

***VERSUS***

**TIGANIA EAST DISTRICT LAND ADJUDICATION**

**AND SETTLEMENT OFFICER.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**NKUNJA EDWARD MWENDA.....INTERESTED PARTY**

**JUDGMENT**

1. On 30.10.2019, leave was granted to the exparte applicant to file Judicial Review suit of which the substantive motion was filed on 20.11.2019 seeking the following orders;

(1) That this Honorable Court do grant the ex parte applicant an order of Judicial Review in the nature of MANDAMUS to compel the 1<sup>st</sup> respondent to alter the adjudication records to conform with the findings of objection no. 1967 and record Land Parcel No. 391 Karama Adjudication Section measuring approximately 3.40 acres in the name of the ex-parte applicant.

(2) That this Honorable Court be pleased to issue an eviction order against the interested party being that he is trespassing on the ex-parte applicant's parcel of land No. 391 Karama Adjudication Section.

(3) That this Honorable Court be pleased to issue a permanent injunctive order restraining the interested party, his servants, employees, agents or any other person acting under instructions or his interest from interfering with the ex-parte applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land No. 391 Karama Adjudication Section measuring approximately 3.40 acres.

(4) That the costs of the application be in the cause.

2. The application is premised on grounds set out in the statement of facts, the verifying affidavit and the supporting affidavit of the ex-parte Applicant JOSEPH MATHITA IKIRIMA. He contends that the suit land has roots in ancestry, and he inherited the same from his father in the 1960's, who in turn had inherited it from his father, the initial gatherer. That his deceased father and the interested party's deceased father were great friends who trusted each other and out of that trust his father gave the interested party's deceased father a booklet containing the parcel number with the request to have it registered in the applicant's name, but instead, the interested party's deceased father registered the land in his name and subsequently died before correcting the same.

3. The exparte applicant therefore filed an objection in case no. 1967 for parcel 391 which was heard and determined on 22<sup>nd</sup> November 2016 in his favor with the order given that the suit land be restored in his name. One year down the line, he has not been issued with a certificate of ownership, the decision in the objection case was not implemented and that the interested party is still occupying the suit land.

4. He further contends that the interested party had listed the suit land as part of his father's estate and to this end, the 1<sup>st</sup> respondent caused the suit land to be subdivided and distributed among the interested party's siblings.

5. Further out of the 3.4 acres only a portion of 1.35 acres was recorded in his name contrary to the findings of the adjudication officer in objection 1967. That the failure of the 1<sup>st</sup> respondent to record his name as per the objection findings has enabled the interested party to continue occupying the suit land despite ownership being determined in his favor. Despite numerous visits to the 1<sup>st</sup> respondent's office and oral pleas, the latter has refused to correct the register.

6. The suit is opposed by the Interested party vide the replying affidavit dated 20/01/2020 who argues that the suit is incompetent and an abuse of the court process as the decision in objection proceedings was implemented and the suit land is registered in the name of the exparte applicant. He also states that the suit land is not listed as part of his father's estate. That during the objection proceedings, it was noted that the suit land measured averagely 3. Acres but no one had taken actual measurements and it was purely an estimate and the said measurements of the suit land remain the same as they were during the objection proceedings and no one has interfered with them.

7. No pleadings were filed by the respondents.

#### **Submissions**

8. The Applicant filed his Submissions dated 24<sup>th</sup> November 2020, those of the interested party were filed on 20<sup>th</sup> January 2021, while the Respondents filed theirs dated 9<sup>th</sup> February, 2021. However the respondents did not file replying affidavits opposing the application. **In Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR**, the Supreme Court held that;

***“A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect.***

***..... Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature”.***

9. I do wholly echo the above sentiments and find that the filed submissions by the respondents are of no effect.

10. The ex-parte applicant submitted that an order of Mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. The exparte applicant is seeking this order to compel the 1<sup>st</sup> respondent to implement the decision of the objection proceedings. That the court as per section 13(7) of the Environment and Land Court Act has powers to issue injunctions as well as prerogative orders where justice demands. That the interested party is still in occupation of the suit land and the applicant has been unable to take up possession of his land thus he is also a necessary party in these proceedings.

11. He is seeking to compel the 1<sup>st</sup> respondent to alter the records of the adjudication register to conform with the findings of objection no. 1967 which is a responsibility placed on the 1<sup>st</sup> respondent under the law. It was further submitted that the adjudication officer before rendering his decision had already visited the suit land and established that it was surrounded by other parcels of land owned by other family members of the applicant and he also determined that the suit land is approximately 3.0 acres. That the adjudication officer is a competent

officer who cannot make such a huge error from 3 acres to 1 acre and the assertion that the adjudication officer's findings were based on estimation as to amount to that huge difference is misplaced and it also beats logic why the interested party would be occupying any land near or adjacent to the suit land. He submitted that he is entitled to the orders sought and prays that his application be allowed.

12. In support of his case, the exparte applicant relied on the cases of; Moses Wachira V Niels Bruel & 2 others [2015]eKLR, Global Exhibitions Incorporated Limited V County Government of Vihiga [2017]eKLR, Republic V Attorney General Ex Parte Italbuild Imports Limited [2017]eKLR.

13. The interested party submitted that the injunctive orders sought by the ex-parte applicant are outside the scope of Judicial review jurisdiction, he denies being in occupation of the suit land hence injunctive orders cannot issue and prays that the suit be dismissed.

14. The interested party has relied on the cases of; Republic V District Land Registrar Nandi & another, ex parte Kiprono Tegerei & another [2005]eKLR, HCC Nairobi JR 32 OF 2011 Republic V Registrar of Titles, ELC Garissa JR No. 25 of 2017 Republic V County Government of Tana River & 2 others, Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another [2014] eKLR, Waig Limited v Francis Kariuki & 2 others[2020] eKLR.

### Analysis & Determination

15. I have considered the pleadings of the exparte applicant and the interested party as well as their respective submissions. The issues for determination are whether the orders of mandamus, injunction and eviction sought by the exparte applicants are merited.

16. The scope of the judicial review remedy of Mandamus was the subject of the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR in which the court held inter alia as follows:

*“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.....*

*Like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can 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 complied with or for such like reasons.”*

17. The cases cited by the exparte applicant in Global Exhibitions Incorporated Limited V County Government of Vihiga [2017]eKLR, and Republic V Attorney General Ex Parte Italbuild Imports Limited [2017]eKLR (supra) resonate well with the above mentioned case. Simply put, the order of mandamus is a command whose purpose is to remedy the defects of justice.

18. There is no controversy that the dispute relating to the suit land was subjected to proceedings commonly referred to as A/R Objection proceedings which are primarily undertaken under the adjudication statutes. What I discern from the aforementioned objection proceedings case no 1967 for parcel 391 is that Cap 283 (the Land Consolidation Act) was the applicable law.

19. In paragraph 8 of his supporting affidavit, the exparte Applicant claims that the 1<sup>st</sup> respondent did not implement the findings in objection no. 1967. However, the interested party has availed annexure “NM-1” which is a confirmation of ownership of the suit land no.391 indicating that this land is registered in the name of the exparte applicant as at 17.1.2017. The exparte applicant did not seek leave to file any further affidavit to challenge the said document. This far it is clear that the decision of the 1<sup>st</sup> respondent was implemented albeit not in accordance with what the exparte applicant considers to be the correct position.

20. Going by the contents in paragraph 10 of the exparte applicant's supporting affidavit, it is quite apparent that he was aggrieved by the acreage listed in parcel 391 and not the fact that there was no implementation of the 1<sup>st</sup> respondent's decision. Indeed the document confirming ownership of the suit land availed by the interested party indicates that the suit land consist of 1.35 acres. The applicant contends that the suit land consisted of approximately 3.4 acres.

21. In order for this court to determine whether the 1<sup>st</sup> Respondent's actions were wrongful in giving the exparte applicant 1.35 acres instead of 3 or 3.4 acres, and in order to establish whether the interested party's actions amount to interference with the applicant's use and occupation of the suit premises, this Court would have to make a determination with respect to the actual acreage claimed by the exparte applicant before and after the objection proceedings. This in my view is purely a question of evidence and facts which cannot be ascertained in the Judicial Review proceedings.

22. What the court is able to discern from the said proceedings is that the exparte applicant was declared the owner of land parcel No.391 Karama Adjudication Section. The appellant appears to base his claim on the statement made in the “findings” in the objection case whereby the 1<sup>st</sup> respondent states that **“the parcel is average 3.0 acres as it appears on the ground”**. In lay man's language, appearance on the ground connotes a look with the naked eye, which cannot form a basis of the true acreage of the suit land.

23. As stated earlier, the applicable law was the Land Consolidation Act. Section 15 of the aforementioned Act provides for the “**Record of Existing Rights**” as follows;

***“(1) There shall be prepared in respect of each adjudication section and in accordance with the findings of the Committee or Arbitration Board, as the case may be, a Record of Existing Rights which shall be in three parts. (2) The executive officer of the Committee shall enter or cause to be entered in Part I of the Record of Existing Rights— (a) the name and description of every person (hereafter in this Part referred to as a land owner) whose right, in the opinion of the Committee or Arbitration Board, should be recognized as ownership, together with a description or other sufficient identification and the approximate area of every parcel of land to which he is entitled (emhasize added)”.***

24. In paragraph 3 of his supporting affidavit, the exparte applicant contends that the father of the interested party recorded the suit land in his name instead of exparte applicant’s name. This means that the parcel in question had certainly undergone the processes indicated under section 15 of the aforementioned statute. It follows that the exparte applicant ought to have availed tangible evidence of the acreage of the suit land as reflected in the records of existing rights commonly referred to as **R.E.R** at the time of filing the objection case. To this end, I find no basis to determine that the true acreage of the suit land was 3 plus acres and not what was implemented as 1.35 acres. In the circumstances, this court cannot make a finding that the interested party is occupying the land of the exparte applicant.

25. As regards the chief’s letter, the same does not state that the suit land is to be distributed, all it does is to list the beneficiaries of the interested party’s deceased father’s estate.

26. In the final analysis, I find no material upon which I can make a determination that the interested party is interfering with the exparte applicant’s occupation of the suit land or that the 1<sup>st</sup> respondent did not perform his statutory duties. Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute, the Court does not have jurisdiction in a judicial review proceeding to determine such a dispute and leaves the parties to ventilate the merits of the dispute in the ordinary civil suits.

Ultimately, I find that this suit is not merited, the same is hereby dismissed with costs to the interested party.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2021 IN PRESENCE OF:**

C/A: Kananu

Ms. Ngeso for Exparte applicant

Ms. Karimi for interested party

Kiety for respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**