



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

JR CIVIL APPLICATION NO. 5 OF 2020

IN THE MATTER OF AN APPLICATION

BY CATHRINE MATETA MUSINGA FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF APPEALS TO THE MINISTER OF LANDS NUMBERS; A) 240 of 2017

CATHRINE MATETA MUSINGA VS LOISE WAIU & JOYCE MBINYA KIMUNYU

(PARCEL NO. MAKUENI/KISEKINI/2623) B) 241 OF 2017 CATHRINE MATETA MUSINGA

VS

LOISE WAIU & JOYCE MBINYA KIMUNYU (PARCEL NO. MAKUENI/KISEKINI/702)

BETWEEN

REPUBLIC.....APPLICANT

AND

THE MINISTER FOR LANDS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

CATHERINE MATETA MUSINGA.....EX-PARTE

JUDGMENT

1. By an Ex-parte Chamber Summons dated 2nd of June 2020 and filed on the same day brought under Order 53 Rule 1 of the Civil Procedure Rules & Section 8 of the Law Reform Act Cap 26 and all the enabling provisions of the law, the Applicant sought for the following orders;

b) Spent.

c) That leave be granted to the Applicant to apply for orders of Certiorari to call to this court and to quash the proceedings and decision of the 1st Respondent the minister of lands dated 7th December 2019 in minister appeal number 240 of 2017 and 241 of 2019 both between Catherine Mateta Musinga Vs Loise Waiu and Joyce Mbinya Kimuyu.

d) That the costs of this application be in the cause.

2. According to the record, the said application was heard ex-parte on the date of filing before Hon. Justice Charles Mbogo who granted the leave to apply the order of Certiorari on the 2nd of June 2020.

3. The Applicant was directed to file the substantive application within 21 days and to serve all the parties within 14 days.

4. By a Notice of Motion dated 22nd of June 2019 and filed on the 23rd of June 2019, the Applicant sought for the following orders: -

b) That an order of certiorari do issue to bring to this court this Honourable Court for purposes of being quashed the proceedings and the decision of the 1st Respondent issued on the 7th of December in Appeals number 240 of 2017 and 241 of 2017 both between Catherine Matata Musinga versus Loise waiu and Joyce Mbinya Kimuyu.

c) That the Respondents to meet the costs of the application.

5. The motion is premised on the Statutory Statement and the verifying affidavit of the Applicant. The Applicant stated that on the 17th of January 2017 the Land Adjudication Officer delivered a decision in objection cases number 391 and 392 regarding parcel number 3623 and land parcel number 702 Kisekani Adjudication Section.

6. That being aggrieved with part of the decision, she appealed against the decision to the Minister. The Applicant contends that Loise Waiu died on the 6th of July 2016. That the appeals before the Minister proceeded in the absence of Loise Waiu which was against the rules of natural justice.

7. The Applicant also faulted the Minister for referring the dispute to the succession court without taking into account that the ex-parte Applicant was by virtue of the decision of the land adjudication officer Makueni the owner of part of Makueni/Kisekani/3623 and Makueni/Kisekani/702 as they were not part of the estate of Loise.

THE RESPONDENTS RESPONSE

8. The Hon Attorney general entered appearance for the 1st and 2nd Respondents. The Respondents opposed the application vide the grounds of opposition filed on the 5th of January 2021. The grounds are: -

a) That the application herein was filed out of the time of 6 months provided for under judicial review.

b) That the application is frivolous, vexatious and abuse of the court process.

c) That the application if granted will not serve any purpose.

d) That the Applicants have not demonstrated any right capable of being violated arising from the action of the decision of the minister.

THE INTERESTED PARTY'S RESPONSE

9. The interested party opposed the application vide a replying affidavit sworn on the 27th of January 2021 and averred that the application was frivolous, vexatious and a waste of the court's time.

10. She further averred that the Ex parte Applicant filed Appeal Nos. 240 and 241 of 2017 so that she could remove the name of the deceased mother from the register and become the absolute owner of NO Makueni/Kisekani/3623.

11. The application was canvassed by way of written submissions. The Applicant's written submissions were filed on the 21st of October 2021. It was argued that the Appeals before the minister were null and *void abinitio* as they proceeded in the absence of the 1st Respondent who was deceased. The Ex parte Applicant contends that the proceedings in the appeals offended the rules of natural justice and that it mattered not whether the decision arrived by the minister was correct if the procedure was wrong.

12. The Ex parte Applicant relied on the decision in the case of **Pashito Holdings Limited & Another Vs Paul Nderitu Ndungu & 2 Others (1997) eKLR** in support of their submissions.

13. The Respondents filed their written submission on the 30th September 2021. The Respondents argued that the application offended the provisions of order 53 of the civil Procedure Rules as read with Section 9(3) of the Law Reform Act as it was filed outside the six months' statutory period. They further submitted that the ex parte Applicant had not sought leave to file the application herein out of time.

14. The Respondents relied on the following decisions in support of their submissions:

1) Musa Tapem (Suing as the Administrator of the Estate of the late Danger Tabim) Vs Director of land adjudication and Settlement & Another (2202) Eklr;

2) Gilbert Hezekiah Miya Vs Advocates Disciplinary Committee (2015) eKLR.

3) Rosaline Tubei & 8 Others Vs Patrick K Cheruiyot & 3 Others (2014) eKLR;

4) Republic Vs The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006;

5) Africa Oil Turkana Limited & 2 Others Vs Edward Kings Onyancha Maina & 2 others (2016) eKLR;

6) Republic Vs Mwangi Nguyai & 3 Others.

15. Through their submissions filed on the 27th of April 2021, interested party argued that when the Minister referred the matter to the succession court, he took into account all the relevant matters and that he was aware that Loise Waiu was deceased. She further submitted that the interests of that parties was not affected and thus the argument that Loise Waiu was condemned unheard was unfounded.

16. From the onset, it is important to set out the purpose of Judicial Review.

17. In the case of **Pastoli Vs Kabale District And Others (2008) 2 E.A. 300** the court set out the duty of a court in Judicial Review applications as follows: -

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or the 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 or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions 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 would have made such a decision is usually in defiance of logic and acceptable moral standards.....Procedural impropriety is when there is a 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 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.”

18. In the case of **Municipal Council of Mombasa Vs Republic Umoja Consultants Ltd Civil Appeal No. 185 of 2007 (2002) eKLR** the court of appeal set out the parameters in applications for JR and held that: -

“The court would only be concerned with the process leading to the making of the decision. how was the decision arrived at. Did those who made the decision have power i.e. jurisdiction to make it. Were the provisions affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did the take into account irrelevant matters. These are the kind of questions a court hearing a matte by way of Judicial review is concerned with and such court is not entitled to act as a court of appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”

19. The court has considered the Applicant’s notice of motion, the Statutory Statement, the Verifying Affidavit, the Respondents response, the interested party’s replying affidavit as well as the written submissions on record The court has also considered the exhibits annexed to the various affidavits on record and is of the opinion that the following issues arise for determination;

a) Whether the claim by the ex-parte Applicant is incompetent for being time barred.

b) Whether the decision by the minister offends the principles of natural justice.

Whether the claim by the Ex parte Applicant is incompetent for being filed out of time.

20. Order 53 Rule 2 of the Civil Procedure Rules as read with Section 9 (3) of the Law Reform Act provides for the time limits within which an application can be filed.

21. Order 53 Rule 2 of the Civil Procedure Rules provides that: -

“Leave shall be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceedings or such shorter period as may be described by any act; and where the proceeding is subject to appeal and a time is limited by the law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time.”

22. Section 9(3) of the Law Reform Act provides that: -

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings, for purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such period as may be prescribed under any written law.....”

23. The Respondents through their written submissions submitted that the Ex parte Applicant filed the application after the lapse of the statutory six months’ period provided in Order 53 of the Civil Procedure Rules as read with Section (9) of the Law Reform Act.

24. Counsel further submitted that no leave was sought to file the judicial review application. Counsel urged the court to dismiss the application and relied on the following authorities where similar applications were dismissed for being filed out of time.

25. The Ex parte Applicant submitted that the application for leave was filed within six months from the date of the impugned decision by the Minister.

26. I have carefully perused the court record and I find that the chamber summons application that sought for leave to file the application herein for an order for Certiorari against the two decisions by the Minister was filed on the 2nd of June 2020. The decisions complained of were delivered on the 7th of December 2019. The application was filed within the statutory time limits.

27. Having found that the application was filed five days before the expiry of the statutory period, I find that the application was filed within the stipulated time.

Whether the proceedings and determination by the Minister offend the rules of natural justice.

28. In **Halbury Law of England 5th Edition 2021 Vol 61 at para 639**, it states: -

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alterman partem rule) is a fundamental rule of justice.”

29. The Ex parte Applicant filed objection to the Land Adjudication officer in case number 391 and 392 against Loise Waiu and Joyce Mbinya regarding land parcels 3623 and 702 Kisekani Adjudication Section. Being aggrieved with the decision of the Land Adjudication Officer, she filed Appeals number 240 of 2017 and 241 of 2017 before the Minister. It is not in dispute that the minister was by virtue of the provisions of Section 29 of the Land Adjudication Act empowered to hear appeals.

30. The Applicant herein contends that the Appeals were null and void since at the time they were lodged, one of the defendants namely Loise Waiu was deceased. A copy of the death certificate indicates that she passed away on the 6th of July 2016. She avers that at the time of hearing of the Appeals, the Estate of Loise Waiu was not represented in the proceedings. She submits that the said proceedings and determination must be quashed whether the decision reached was correct as the procedure offends the rules of natural justice.

31. She further contends that the referral of the dispute to the succession court was wrong as the ex parte Applicant was already the part owner of Makueni/Kisekini/3623 and 702 therefore those parts could not be subjected to succession.

32. The Interested Party submitted that the Ex parte Applicant had not demonstrated any grounds to warrant a judicial review and that the application was unmerited and an abuse of the court process. He further submitted the Minister decision took into account the fact that Loise Waiu was deceased and referred the parties to the succession court.

33. He further submitted that the Minister having not determined the interests of the parties in the Appeal, it could not be said that the deceased was condemned unheard. That furthermore, the decision did not affect the right of the estate of the deceased.

34. I have carefully scrutinized the proceedings and the decision by the minister and I find that the appeals were lodged by the Ex parte Applicant against Loise Mutevu and Joice Mbinya Kimuyu. The Respondents are mother and sister in law to the ex parte Applicant respectively. By the time she filed the Appeal one of the parties namely Loise mutevu was deceased.

35. I have looked at the Appeals proceedings before the Minister and I note that the Ex parte Applicant and the 2nd Respondent actively participated in the proceedings therein. The Minister rendered his decision in appeals number 240 and 241 of 2017 on the 7th of December 2019.

36. The Ex parte Applicant submitted that the hearing and determination in appeal number 240 and 241 of 2017 before the Minister offends the rules of natural justice as the estate of Loise Waiu was not represented.

37. The court takes the view that in order to undertake legal proceedings in a court of law on behalf of a deceased person, there must be a personal representative in respect to the estate of the deceased. From the proceedings and determination before the Minister, the Estate of Loise Waiu was not represented as required.

38. I am in agreement with Counsel for the ex parte Applicant that the deceased was not represented in the proceedings before the Minister. In **Msaga Vs Chief Justice & 7 others NBI HCMA No. 1062**, the court held that: -

“The court observes firstly that the rules of natural justice “audi alterem partem” hear the other party, that no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey days of the British Empire. An Essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers deprive himself of the views of the person who will be affected by the decision. It is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principle of justice. The decision must be declared to be no decision.”

39. In the case of **Onyango Oloo Vs Attorney General (1989) EA** the court of appeal held that: -

“The principle of natural justice applies where ordinary people would reasonably expect those making the decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard.....There is a presumption in the interpretation of statutes that the rules of natural justice will apply and therefor the authority is required to apply the principles of natural justice. A decision in breach of natural justice is not cred by holding that the decision would otherwise have been right since the principle of natural justice is violated, it matters not the same decision would have been arrived at.....”

40. In the instant case, the Respondent was obliged not to proceed with the hearing and determination of the Appeals until the estate of Loise Waiu was represented. The court equally notes that even at the time when the decision with respect to the objection was made, Loise was deceased. The decision ought not to have been made until such a time proper legal representation had been made and presented to the adjudication officer. The adjudication officer ought not to have delivered his decision in the objection filed by the appellant herein on the grounds that one of the Respondent namely Loise Waiu was deceased.

41. It is the finding of this court that where a party has not been heard, a decision made is in breach of the rules of natural justice is null and void *abinitio*. It is my view that the rules of natural justice were flouted. The proceedings and the decision made by the 1st Respondent were null and void.

42. The upshot of the foregoing is that the court finds merit in the application for judicial review. Accordingly, the Notice of Motion dated 22nd of June 2020 is hereby allowed in the following terms: -

In the end, I find that the notice of motion dated has merit and allow it as follows;

a) That an order of certiorari be and is hereby issued to remove into this court and quash the decision of the 1st Respondent dated 7th December 2019 in appeals numbers 240 and 241 od 2017 relating to land parcels number 3623 and 702 between Catherine Mateta Masinga (Appellant) and Loise Waiu and Joyce Mbunya (Respondents).

b) Each party to bear its own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF DECEMBER, 2021.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Mathuva present for the ex parte applicant

Kamanda present for the interested party