REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW NO. 4 OF 2018

GEOFFREY MUTHUIBA.....APPLICANT

VERSUS

DEPUTY COUNTY COMMISSIONER.....1ST RESPONDENT

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

JOSEPH MATI BAIKIOME.....INTERESTED PARTY

JUDGMENT

The Applicant commenced these Judicial Review proceedings with an Ex-parte Chamber Summons application dated 20th February 2018 under ***Order 53 Rule 1, 2 & 3 CPR*** and ***Sections 8 & 9 of the Law Reform Act*** seeking leave to apply for orders of certiorari to quash the proceedings and the decision of the Deputy County Commissioner – Igembe North sub-county in the Appeal to the Minister Land Case No. 182 of 2010 made on 7th September 2017. That application was brought under certificate of urgency. Upon being placed before the duty Judge, the application was certified urgent. The Applicant was also granted leave to file the substantive Notice of Motion within 21 days and such leave was to operate as a stay of implementation of the subject decision. On 12th March 2018, the Applicant filed the substantive motion.

APPLICANT'S CASE

According to the Applicant, the order by the Deputy County Commissioner, Igembe North sub-county in the Appeal to the Minister Land Case No. 182 of 2010 made on 7th September 2017 that ordered parcel No. 2925 to be registered in the name of the Interested party as the owner thereof is illegal, unreasonable, irrational and made in total ignorance of the law. The Applicant also contends that the decision was against the rules of Natural Justice and made without proper jurisdiction. He stated that he is the registered owner of land parcel No. NAATHU/NAATHU/2925 which he has occupied and developed for over 42 years. He inherited the same from his late father one Henry Muthangaine in the year 1975 measuring approximately 0.56 acres. He further stated that in 1984 or thereabouts, he sold the same to the Interested party at a consideration of Ksh. 3,500/=. The Interested party paid him a deposit of Ksh. 2,000/= leaving a balance of Ksh. 1,500/= which they agreed would be paid upon giving possession of the property to the Interested party the same year. The Applicant contends that the interested party failed to pay him the balance of the purchase price the same year and he proposed that he refunds him the down payment he had received in the sum of Ksh. 2,000/= but the Interested party refused. He stated that the Interested party took the dispute to the Land Committee which decided the matter without summoning him or hearing his evidence which decision he appealed to the Arbitration Board who reversed the same. The Interested party was dissatisfied with the decision and appealed to the Minister for Land which decision was again reversed by the Deputy County Commissioner. The Applicant therefore contends that the decision by the Respondent was a blatant abuse of procedural and substantive law and that the same is irrational and unreasonable in that his evidence of purchase of land was availed in the initial proceedings and no memorandum of sale was produced. The Applicant further stated that the Interested party did not proof that he fully paid the full purchase price to warrant an order of specific performance.

INTERESTED PARTY'S CASE

The Interested party filed a replying affidavit in which he stated that the Appeal to the Minister was heard procedurally and in accordance with the applicable law and rules. He stated that the Applicant was duly accorded a fair hearing and that he fully participated in the hearing of the Appeal. The Interested party further stated that his Appeal to the Minister being No. 182 of 2010 in respect of land parcel No. NAATHU/NAATHU/2925 would not have been registered in the name of the Applicant before his Appeal was heard and determined. In conclusion, the Interested party argued that the issues raised by the Applicant herein are not amenable to Judicial Review process.

RESPONDENTS CASE

The Respondents did not file any response to these Judicial Review proceedings.

ANALYSIS AND DECISION

I have carefully analyzed the pleadings, the record and the submissions and frame the following issues for determination:

(1) Whether the 1st Respondent had jurisdiction to hear and determine the said Appeal No. 182 of 2010?

(2) Whether the 1st Respondent made irrational and unreasonable, illegal, null and void decision?

(3) What relief should the Court grant?

(4) Who will pay the costs of these proceedings?

It is now settled law that jurisdiction is everything and without it, the Court cannot make one step. A decision by a Court or tribunal without requisite jurisdiction is a nullity and of no legal effect. It is therefore imperative for a Court to be satisfied that it has jurisdiction before embarking to determine any dispute referred by parties.

Section 29 (1) of the Land Adjudication Act *provides as follows:*

> ***29 (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 the appeal; and***
> >
> > ***(b) Sending a copy of the appeal to the Director of Land Adjudication and the <u>Minister shall</u> determine the appeal and make such order thereon as he thinks just and the order shall be final"***
>
> (***4) Notwithstanding the provisions of Section 38 (2) of the Interpretation and General provisions Act or any other written law, the Minister may delegate, by notice in the Gazette, his powers to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination order and acts of any such public officer shall be deemed for all purpose to be that of the Minister".***

Traditionally, Judicial Review is not concerned about the merits of the decisions taken but rather, the process. The remedy of Judicial Review is to ensure fair treatment by the bodies mandated to make decisions. However, the enactment of the ***Fair Administrative Actions Act*** has changed the outlook and matrix of Judicial Review. ***Section 7 (2) (1) the Fair Administrative Actions Act*** provides thus:

> "***A Court or tribunal under sub-section (1) may review an administrative action or decision, if the administrative action or decision is not proportionate to the interests or rights affected".***

The Court of Appeal in the case of ***Suchan Investment Limited Vs Ministry of National Heritage & Culture & 3 others (2016) K.L.R*** discussed grounds of unreasonableness and proportionality as giving rise to Judicial Review on merits of a decision as follows:

> ***"An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while Judicial Review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, Judicial Review is not concerned with the merits of the case. However, Section 7 (2) (1) of the Fair Administrative Action Act provides proportionality as a ground for statutory Judicial Review. Proportionality was first adopted in England as an independent ground of Judicial Review in Republic Vs Home Secretary; Ex-parte Daly (2001) 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the Court to evaluate the merits of the decision; first, proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decision; Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view consideration of proportionality is an indication of the shift towards merit consideration in statutory Judicial Review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of Judicial Review to include aspects of merit review of administrative actions. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (i) identifies abuse of discretion as a ground for review while Section 7 (2) (K) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable.***
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> ***Section 7 (2) (K) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd Vs Wednesbury Corp. (1948) 1 K.B 223 on reasonableness as a ground for Judicial Review. Section 7 (2) (i) (ii) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the***

administrative action was authorized by the empowering provisions or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing Court has no mandate to substitute its own decision for that of the administrator.

The Court can only remit the matter to the administrator and/or make orders stipulated in Section 11 of the Act. On a case to case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Actions Act".

I agree with the decision of the Superior Court which is binding on me. The Applicant in these Judicial Review proceedings has challenged the decision by the Minister. Applying the principles set out in the above case, I now delve into the issues set out for determination as follows:

Whether the 1st Respondent was seized with jurisdiction to hear and determine the impugned Appeal No. 182 of 2010?

As I indicated in my analysis hereinabove that the impugned decision was an Appeal to the Minister under ***Section 29 of the Land Adjudication Act***, the law authorized the Minister to either exercise that authority personally or delegate by notice in the Gazette to any public officer and the acts of any such public officer shall be deemed to be that of the Minister. The impugned decision was delivered by the Deputy County Commissioner one MALACK M. NAMAL who was authorized by the Minister. The Applicant did not raise any objection as to his presiding over the said Appeal. The Applicant has merely stated on the grounds apparent in his Notice of Motion dated 8th March 2018. He did not elaborate in his statement or verifying affidavit. On that ground, I find that the Minister was properly sized with the requisite jurisdiction to hear and determine the impugned Appeal.

Whether the 1st Respondent made irrational, unreasonable, illegal, null and void decision?

It is important to note that these Judicial Review proceedings seeks to challenge the appeal by the Minister under ***Section 26 of the Land Adjudication Act Cap. 284 Laws of Kenya.*** It was the Applicant who had lodged the appeal to the Minister against the decision of the Arbitration Board in A/R Appeal No. 103/1987 who awarded him land parcel No. 2925 Naathu Adjudication Section. The Interested party was dissatisfied with the decision and lodged Appeal to the Minister under ***Section 29 of the Act.*** The Applicant from the proceedings of the Appeal and the impugned decision participated fully in the said appeal as well as in cross-examination. The suit land was therefore subject to the adjudication process which included the determination of the appeal to the Minister. As such, the suit land could not have been registered in favour of any of the parties until the whole process including the Appeals were concluded.

Section 29 (3) states as follows:

"When the appeals have been determined, the director of Land Adjudication shall:

(a) Alter the duplicate adjudication register to conform with the determination; 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".

The Applicant has attached a copy of certificate of official search to the verifying affidavit dated 20/12/2017. The said certificate of official search indicates that he was issued with a title in respect of the suit property on 28/11/2014. That certificate of official search in my view is a mistake. The Applicant has not explained under which law he was issued with a title when the suit land was still under adjudication process. I will not comment on the same further but for the purposes of this Judicial Review, I find the 1st Respondent acted reasonable fairly and within the law in determining the impugned appeal. The Applicant submitted himself before the 1st Respondent and participated fully in the appeal process. He cannot now cry font when the decision is not in his favour.

The Applicant merely stated that the impugned decision by the 1st Respondent is illegal, unreasonable, irrational and made in total ignorance of the law. He went further and gave a long history of how he acquired the suit land and sold to the interested party and how the Interested party failed to pay him the balance. It is important to note that this Court is not an appellate Court but a supervisory Court which is mandated by law to review the decision of the administrative body. It was upon the parties to present all their facts and evidence before the administrative body who is to consider and render itself. It is not for this Court to hear evidence afresh, but as a reviewing Court, my role is to re-evaluate the proceedings and the impugned decision whether irrelevant consideration was taken into consideration or whether relevant consideration was not taken into consideration. I am also required to determine whether the decision was rational and/or reasonable and whether the administrative body had jurisdiction or not. Upon evaluating the evidence and the impugned decision, I find and hold that the Applicant was treated fairly and was given opportunity to prosecute his appeal, cross-examine witnesses and call witnesses. I also find that the 1st Respondent was seized with the requisite jurisdiction. The Applicant has not shown that the impugned decision was unlawful or in any way violates his rights.

In the result, these Judicial Review proceedings lack merit and the same is hereby dismissed with costs to the Respondent.

DATED and SIGNED in open Court at Kerugoya this 7th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 10th day of February, 2020.

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L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: