



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. 21 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

TIGANIA EAST DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

JOSEPH MATHITA IKIRIMA.....INTERESTED PARTY

EX-PARTE APPLICANT.....SOLOMON MWORIA SAMUEL

JUDGMENT

BACKGROUND

The Ex-parte Applicant commenced these Judicial Review proceedings vide a Chamber Summons under **Order 53 Rule 1 (2), 2 and 4 CPR** as read with **Section 8 and 9 of the Law Reform Act Cap. 26 Laws of Kenya**. The said Ex-parte application was filed under certificate of urgency in which the Ex-parte Applicant sought leave of this Honourable Court to apply for an order of certiorari to remove to this Court for purposes of quashing the decision of the 1st Respondent made on 19th April 2017 in Objection No. 1966 involving land parcel No. 1591 KARAMA ADJUDICATION SECTION on grounds that it was made without jurisdiction. The Ex-parte Applicant also sought an order that the leave so granted do operate as stay of implementation of the decision/order made by the Land Adjudication and Settlement officer. When the application was placed before the duty Court, leave was granted to the Ex-parte Applicant to file a substantive motion for orders of certiorari within 21 days from the date thereof. The Court also ordered the leave so granted do operate as a stay against the impugned decision.

In compliance with the Court order, the Ex-parte Applicant filed this substantive motion dated 5th June 2017 together with a verifying affidavit and annexures thereto. On 21st November 2018, the 1st Respondent filed a replying affidavit and on 29th October 2018, the Interested party also filed his replying affidavit opposing these proceedings.

EX-PARTE APPLICANT'S CASE

According to the Ex-parte Applicant, the suit land parcel No. 1591 KARAMA ADJUDICATION SECTION was recorded in the name of his late father SAMUEL LICHORO. He stated that on 2nd March 1971, there was a Land Case No. 649/70 between his late father and the Interested party's father one JOSEPH MUTHINJA and that the subject land herein was awarded to his father. The Ex-parte Applicant stated that the Interested party lodged an Objection No. 1966 about 46 years later which the 1st Respondent heard on 19th April 2017 and delivered his verdict the same day. He contends that his evidence was not considered at all. The Ex-parte Applicant also stated that the Adjudication officer was bound to hear and determine the matter with the aid of the committee under **Section 26 Cap. 283** but refused to involve the committee and arrived at an illegal decision.

RESPONDENTS CASE

The Respondent through its Sub-county Land Adjudication and Settlement officer one Benjo K.D. stated that when a section is finalized, it is

published and landowners are invited to peruse Adjudication Records (AR) and raise any objections regarding its completeness, correctness or otherwise. He stated that an objection was filed through Objection No. 1966 by the Interested party where the Land Adjudication officer (DLASO) heard, determined and implemented his decision on 19th April 2017 in accordance with **Section 26 of the Land Consolidation Act Cap. 283 Laws of Kenya**. He stated that the law provides ways to determine the land rights and avenues to redress parties who feel they are aggrieved by such decisions and any decision by previous tribunals. He stated that in making the decisions, the District Land Adjudication and Settlement officer (DLASO) is not bound by previous decisions made by independent bodies and tribunals based on evidence adduced before him. The Respondent also stated that Karama Adjudication Section where the suit land is situated is governed by the Land Consolidation Act Cap. 283 Laws of Kenya and that the Land Adjudication and Settlement officer was guided by **Section 26 of the Land Consolidation Act**. The Respondent further stated that whereas the committee is central to the determination and implementation of all objections brought before the District Land Adjudication and Settlement officer, the point of departure is that the decision itself is solely made by the DLASO as is evident by **Section 26 (1) (3) of the Land Consolidation Act Cap. 283 Laws of Kenya**.

INTERESTED PARTY'S CASE

The Interested party opposed the application stating that land parcel No. 1591 KARAMA ADJUDICATION SECTION does not exist at the moment the same having been sub-divided into four pieces namely 14748, 14749, 14750 and 14751. He stated that the Ex-parte Applicant's father SAMUEL LICHORO wanted to claim the suit land from his father and filed a Land Case No. 649/70 with the Council of elders, Njuri Ncheke wherein an oath (Nthenge Oath) was to be taken in order to determine ownership but the committee stopped him from taking the oath as required under the Meru Customary Law and awarded the land to the Ex-parte Applicant's deceased father. He stated that the Applicant's deceased father was one of the Committee members who adjudicated upon the proceedings in Land Case No. 679/70 hence he ought to have disclosed the conflict of interest. He stated that the decision of the Committee to award the land to the Applicant's deceased father was biased.

The Interested party further stated that the Land Case No. 649/70 was filed when he was a young school going student hence could not participate in the proceedings. Upon announcement of completion of adjudication register, he filed an Objection No. 1966 which was completely heard by the 1st Respondent and rendered himself based on the evidence presented before him. The Interested party also stated that, contrary to his allegations, the Ex-parte Applicant participated fully in the objection hearing where both parties gave evidence and were allowed to cross-examine each other. He also stated that the 1st Respondent adjudicated upon the matter with the aid of committee chaired by David Thirianja. The Interested party further contends that the due process was followed and if the Ex-parte Applicant was aggrieved by the determination of the Objection, he was supposed to appeal to the Minister as provided under **Section 29 of Cap. 284 Laws of Kenya**.

ISSUES FOR DETERMINATION

The following are issues for determination in this dispute:

- (1) *Whether the impugned decision was heard without the aid of a committee?*
- (2) *Whether the Ex-parte Applicant was not accorded a fair hearing?*
- (3) *What appropriate orders to issue?*
- (4) *Who shall bear the costs of these proceedings?*

ANALYSIS AND DETERMINATION

The principles for Judicial Review was set out by the Superior Court in a land mark of cases. In the case of **REPUBLIC VS KENYA NATIONAL EXAMINATION COUNCIL EX-PARTE GATHENJI AND OTHERS CIVIL APPEAL No. 266 of 1996**, 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 un-procedurally, that his decision was un-reasonable and that the impugned decision was illegal.

Regarding the first issue, both the **Land Consolidation Act** and the **Land Adjudication Act Chapter 283 and 284 Law of Kenya** provide for ascertainment of rights and interest in land held under African Customary Law. The only point of departure is the manner of ascertaining those rights and interests as well as the geographical application of the two statutes. **Land Adjudication Act** applies to trust land which are ancestral lands and are held in trust for the others. Both statutes point out the procedure to be followed by parties in having their claims recorded wherever an adjudication is declared and further sets out the procedure to be followed by any party aggrieved by the adjudication process. This procedure was succinctly set out in the case of **Martha Kigeu Vs Johana Tibino (2014) e K.L.R** where the Court held as follows:

“Under Section 13, every person who considers himself to have an interest in land within the adjudication section makes his claim to the recording officer and points out his boundaries to the demarcating officer. If there are two or more conflicting claims to an interest in land, and the recording officer is unable to resolve the conflict, the dispute is submitted to an Adjudication Committee as noted in Section 19. The Adjudication Committee is meant to listen to the conflict and issue a decision. If the Committee is unable to reach a decision on a matter before it, it shall refer the matter to an Arbitration Board. A person affected by a decision of the Committee may also make a complaint to the Executive officer of the Committee and the Executive officer is mandated to refer the complaint to the Arbitration Board. The Arbitration Board hears and determine the matters referred to it by the Committee. The Adjudication officer prepares what is termed as an Adjudication register. This comprises the demarcation map and the Adjudication record. Under Section 24, when the Adjudication register is completed,

the Adjudication officer is inter alia supposed to give a 60 days' notice for the inspection of the Adjudication register. Any person who is of the view that the Adjudication register is incorrect, may make an objection to the Adjudication officer in writing within 60 days of the publication of the notice for inspection. The Adjudication officer is empowered to determine the objection. He is also empowered to alter the adjudication register from time to time so as to conform to any objections. Any person aggrieved by the determination of an objection, may within 60 days of the determination, appeal to the Minister. After determination of all objections, the Adjudication register is inter alia forwarded to the Chief Land Registrar alongside any list of appeals. The Land Registrar then causes the registration of the parcels of land. Where there is an appeal, a restriction is to be made and registered on the subject land and is to endure until the determination of the appeal. Appeals are determined by the Minister and his decision is final. On such determination, the register may be altered in accordance with the determination. When all appeals have been determined, the Director of Land Adjudication certifies that the Adjudication register has become final".

It is imperative to note that the above procedure is similar to both Acts except that under the **Land Consolidation Act Cap 283**, an appeal does not lie to the Minister. The decision of the Adjudication officer is final save that the Adjudication officer is mandated to hear the objections with the aid of a committee. The Ex-parte Applicant is challenging the impugned decision by the Adjudication officer on grounds that he made the decision alone. My cursory look at the minutes of the Objection proceedings held on 19th April 2017 which gave rise to the impugned decision shows that the Adjudication officer sat alone in determining the objection raised. The names of the Committee members are not shown on the face of the proceedings. In the case of **REPUBLIC VS LAND ADJUDICATION OFFICER IGEMBE/TIGANIA DISTRICT (2009) e K.L.R, Justice L.N. Mbugua** faced with a similar issue posed a relevant question as follows:

"27. The Interested party has stated that "it is not provided in any law that a member or members of a Committee should sign or record their names in objection proceedings". That is indeed true. But again, how else does the respondent comply with the law if such compliance is not discernable from the proceedings. If indeed there was a committee, who were these members, how many were they, what was so difficult in availing information regarding the composition of the committee if indeed there was a committee. These are the questions I have previously posed in J.R 36/12 Ex-parte Applicant Henry Mwika M'Aramba Vs DLSO Igembe and Koome Geoffrey and the Case J.R 24 OF 2015 Ex-parte Applicant Jacob Mururu Thiribi Vs LAO Akaiga Adjudication Section, Attorney General and Peter Kiremba M'rukwaru.

28. the case of Peter Kimandiu and Land Adjudication officer Tigania West District Vs Zaverio Mithika & 3 Others, Nyeri Civil Appeal, cited by the Ex-parte Applicant aptly captures the importance of complying with Section 26 of Cap 283. The onus of demonstrating that there was compliance with the law fell upon the Respondent and not the Ex-parte Applicant. Sadly the respondent continues to display a lackluster attitude on these matters of compliance with the law resulting in untold misery to the parties and waste of precious judicial time and resources".

I entirely agree with the observation and holding in the said decision which I apply to the instant case mutatis mutandis. In the upshot, the Notice of Motion succeeds on grounds of lack of a committee. I therefore make the following orders:

(1) An order of certiorari be and is hereby issued to remove to this Honourable Court for the purposes of being quashed the order/decision made by the Land Adjudication and Settlement Officer, Tigania East on 19th April 2017 in Objection No. 1966 involving land parcel No. 1591 KARAMA ADJUDICATION SECTION.

(2) The matter is remitted back to the 1st Respondent for the objection proceedings to be conducted in accordance with the law.

(3) Since neither the Ex-parte Applicant nor the Interested parties were to blame for the error, I order each party to bear his/her own costs of this suit.

DATED and SIGNED at Kerugoya this 5th 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: