



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 51 OF 2018

(FORMERLY MISC CIVIL 34 OF 2018)

IN THE MATTER OF NOTICE OF AUTHORITY TO THE CHIEF KIRIMA LOCATION AND THE NYANDARUA NORTH DISTRICT SUB COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER DATED THE 8<sup>TH</sup> DAY OF MAY, 2018 AND THE 7<sup>TH</sup> DAY OF JUNE 2018 RESPECTIVELY TO PREPARE MUTATION FORMS FOR SURVEYING AND SUB DIVIDING PLOTS NO. 564 KIRIMA SETTLEMENT SCHEME IN NYANDARUA COUNTY BETWEEN LUCY MUTHONI MBOGO AND PAUL MWICIGI MBUGUA ON THE ONE PART AND NDUATI NJOROGE ON THE OTHER PART BY THE MINISTRY OF LANDS AND PHYSICAL PLANNING.

BETWEEN

PAUL MWICIGI MBUGUA.....1<sup>st</sup> PLAINTIFF/APPLICANT

LUCY MUTHONI MBOGO.....2<sup>nd</sup> PLAINTIFF/APPLICANT

VERSUS

THE HON ATTORNEY GENERAL.....1<sup>st</sup> RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING.....2<sup>nd</sup> RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA.....3<sup>rd</sup> RESPONDENT

NYANDARUA NORTH SUB COUNTY DISTRICT LAND

ADJUDICATION AND SETTLEMENT OFFICER.....4<sup>th</sup> RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND

SETTLEMENT OFFICER.....5<sup>th</sup> RESPONDENT

THE CHIEF KIRIMA LOCATION.....6<sup>th</sup> RESPONDENT

NDUATI NJOROGE.....7<sup>th</sup> RESPONDENT

RULING

1. Vide a substantive motion dated the 12<sup>th</sup> October 2018, the Applicants herein have sought for orders in the nature of Certiorari and Prohibition with regard to two notices issued by the Ministry of Lands and Physical Planning dated the 8<sup>th</sup> May 2018 and the 7<sup>th</sup> June 2018 respectively addressed to the Nyandarua North District Sub County Land Adjudication and Settlement officer and the Chief Kirima location respectively, which notices authorized them to prepare mutation forms for purposes of surveying and sub dividing plots No. 564 Kirima Settlement Scheme between the Applicants as the administrators of the estate of Peter Mbugua Mwicigi and Nduati Njoroge the 7<sup>th</sup> Respondent.

2. The Application was supported by grounds on the face of it as well as the statutory statement of Paul Mwicigi Mbugua the 1<sup>st</sup> Applicant herein.

3. The same was disposed of by way of written submissions to which the Applicant submitted in his written submission dated the 10<sup>th</sup> May 2019, that the Court had unfettered jurisdiction under Article 157(1) and (7) of the Constitution to determine the legality or otherwise of any issue brought before it by any person(s) or institution(s), and thereafter issue any orders or declaration to prevent miscarriage of justice.
4. That for relief of prerogative orders of certiorari and prohibition, evidence is given by filing affidavits rather than orally. That the 1<sup>st</sup>-6<sup>th</sup> Respondent did not oppose the Application because they had not filed any affidavits contrary to the substance, content and exhibits by the Applicants. The Applicants relied on the decided case of **Commissioner General of Kenya Revenue Authority vs Silvano Okema Owaki T/A Marenga Filling Station (Civil Appeal No. 45 of 2000)** to submit that since the Respondents had not filed any replying Affidavit to their Application, it meant that they had admitted the accusations leveled against them by the Applicants.
5. The Applicant's submission to the 7<sup>th</sup> Respondent's response was that the same lacked merit, was farfetched, substantially speculative with argumentative information which was aimed to vex the Applicant. That the same was based on false hoods stated by a lay person who was trying to argue on points of law but did not disclose the source of the legal advice he was relying on. That the 7<sup>th</sup> Respondent ought to confine himself to matters of fact.
6. That although at paragraph 15 of his Replying Affidavit, the 7<sup>th</sup> Respondent had pleaded illiteracy and alcoholism yet ignorance of the law was not a defense. That it could not have taken 31 years for the 7<sup>th</sup> Respondent to recover his normalcy or discover his rights. That although the 7<sup>th</sup> Respondent blamed his woes on his co-Respondents yet the said Co- Respondents had not opposed the Applicant's Application.
7. That the 7<sup>th</sup> Respondent was guilty of latches (sic) and was legally estopped from trying to reclaim what he formally and truly sold. That his actions were intended to work injustice to the Applicants by reversing a sale of land that was exclusively sold and he had received the total consideration for the same.
8. That the 7<sup>th</sup> Respondent should not be allowed to benefit on an illegal decision and action of the 1<sup>st</sup>-6<sup>th</sup> Respondents.
9. The Applicant's further submission was that the grounds of opposition filed by the Honorable Attorney General were neither here nor there, the same were incompetent as there were no affidavits in response, which affidavits ought to have been filed and served.
10. That the Respondents' actions and decisions should be revoked, reversed and annulled as the same were a product of wrongs, illegalities, fraud, forgery abuse of official duties, arbitrariness and unfairness as well as discriminatory against the interests of the Applicants. That the Respondents should jointly and severally be condemned to pay costs incidental to the Application.
11. The Honorable Attorney General vide his written submissions dated 9<sup>th</sup> December 2019 based their submissions on two points of determination to wit;
  - i. Whether prayer No. (b) of the Application could be issued.
  - ii. Whether the Application raised any issue triable issues within the purview of Judicial Review.
12. On the first issue for determination it was the 1<sup>st</sup>-6<sup>th</sup> Respondents' submission and while relying on the provisions of Section 11(1) of the Fair Administrative Action Act that the law was clear on what action the Court could take where an Application for review was brought before it. That Judicial Review proceedings were special in nature wherein a Court exercised special jurisdiction. That the Applicant had sought for the Court to issue orders that would prevent them from being disinherited. This order according to them was not the preserve of a Judicial Review Court for reasons that by so seeking, the Applicant invited the Court to look into the issue as to whether they were rightful heirs to the property or not.
13. That it is the cardinal rule that parties are bound by their pleadings. That the order sought by the Applicant was not clear and as such the Applicant could not put parties to do guess work and expect the Court to find a way of figuring out what order they were seeking. It was thus the Respondents' submission that prayers must be specifically pleaded to enable all parties respond accordingly.
14. On the second issue for determination, the State Counsel submitted that the main reason why the Applicants were seeking for the orders of Certiorari and prohibition was because of their interest in the suit land having purchased the same. They alleged that the Respondents were in collusion with the 7<sup>th</sup> Respondent to disinherit them and all the other beneficiaries. They relied on the decided case of **Republic vs Migori County Government & Another ex-parte Nyangi John Juma [2018] eKLR** to submit that since the issues raised were issues of merit, the Court was required to call for viva voice evidence to determine the same and also to establish whether there was a valid agreement and who the owner of the suit land was. That Judicial Review proceedings did not deal with matters of merit but matters concerned with decision making process as provided for under Section 7(2) the Fair Administrative Actions Act.
15. That the Applicant did not raise any issue to challenge the administrative action as contemplated by the Act and therefore the grounds upon which the Application was grounded were not triable under the purview of Judicial Review. The Hon. attorney General thus relied on the decided case of **Kenya National Examinations Council vs Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** to buttress their submissions.
16. Their further submission was that the Applicant had not enunciated any reason as is required by the Act to convince the Court to issue the orders of Prohibition and Certiorari, what they had just stated was that they wanted the letters quashed and a prohibition issued. That indeed the said Application was dead on arrival and no life could be breathed into it. That the Applicants' remedy lay elsewhere and not in a Judicial Review. They sought that the Application be dismissed with costs to the Respondents.

17. The 7<sup>th</sup> Respondent's submission filed on the 13<sup>th</sup> December 2019 was to the effect he had not been served with the correct Application despite orders of the Court for service. The 7<sup>th</sup> Respondent sought the Applicants Application be dismissed for the following reasons.

i. That there was want of service.

ii. That the prayers or reliefs sought in the Applicants' statement seeking leave were different from the ones in the substantive motion.

iii. That the substantive motion was brought in the name of the Applicants individually yet it was trite law that Judicial Review Applications were normally brought in the name of the Republic.

18. Further it was not clear when leave was granted to the Applicants to bring the instant Application. That the Applicants alluded to an Application for leave dated 31<sup>st</sup> August 2018, which meant that the impugned notices of 8<sup>th</sup> May 2018 and 7<sup>th</sup> June 2018 had already either been complied with, or acted upon over three months as at 31<sup>st</sup> August 2018. The Court could therefore not act in vain or make orders in vain. That not only had the Application for leave been overtaken by events, but the substantive motion too as at the time they were filed.

19. That in the absence of when the orders granting leave were issued, he could not tell for sure whether or not the substantive motion filed on 15<sup>th</sup> October 2018 was brought within time stipulated by the order granting leave or not. That the motion appeared to have been brought about 45 days from the date when leave was granted and therefore the same was outside the period provided and ought to be struck out too.

20. That the impugned notices dated 8<sup>th</sup> May 2018 and 7<sup>th</sup> June 2018 had neither mentioned the Applicant's or the 7<sup>th</sup> Respondent's name and therefore the Applicants had no locus standi to challenge the same hence the 7<sup>th</sup> Respondent had been wrongly enjoined in the suit.

21. The 7<sup>th</sup> Respondent also took issue with the proprietorship of the suit land to which he submitted was registered to the Settlement Fund Trustees and yet they had not been sued and no adverse orders could be made against it in any event.

22. He submitted that this was a land matter disguised as a Judicial Review Application which did not set any single complaint against the notices. That the prayer sought by the Applicant was wanting, ambiguous and incapable of being granted. The Applicant relied on the provisions of Section 9(2) of the Fair Administrative Actions Act to submit that the Applicants had not demonstrated that they had exhausted all other available avenues and remedies such as those provided for under the Environment and Land Court Act before rushing to Court for review of an administrative action. That the Application thus offended the doctrine of exhaustion of statutory remedies. The 7<sup>th</sup> Respondent relied on the decided case of **Saul Benard Nzeki Wambua Alias Benard Saul Nzeki vs The Permanent Secretary Ministry of Finance & Another [2013] eKLR** to submit that the Applicant's case was incompetent, incurably defective and bad in law.

#### **Determination**

23. **Briefly, the Applicant's grievance is to the effect that his late father** Peter Mbugua Mwicigi purchased a parcel of land being Plot No. 564 Kirima Settlement Scheme where subsequently they had obtained Consent from the Land Control Board and transfer was effected to his deceased father. That subsequently the 1<sup>st</sup> Applicant had received information that the Assistant Chief, Kirima Location and Nyandarua North Sub County Land Adjudication and Settlement Officer were colluding with Nduati Njoroge the 7<sup>th</sup> Respondent herein to fraudulently allot him (Respondent) a substantial part of the suit land. The turn of events then gave rise to the impugned notices herein dated 8<sup>th</sup> May 2018 and 7<sup>th</sup> June 2018 which were authorities to prepare mutations for the suit land. The Applicant thus filed the present Application seeking orders in the nature of Certiorari and Prohibition against the said notices.

24. The Attorney General entered an appearance on behalf of the 1<sup>st</sup> -6<sup>th</sup> Respondent herein and filed grounds of Objection dated 7<sup>th</sup> March 2018 on the following grounds:-

i. That the Application does not raise any issue triable within the purview of Judicial Review proceedings.

ii. That the Application raises issues of merit which are not triable within the purview of Judicial Review.

iii. the Application raises issue of ownership and sale of land parcel which issues can be ventilated by way of viva voice evidence and not through Judicial Review proceedings which is only limited to affidavit evidence

25. The 7<sup>th</sup> Respondent equally filed his replying affidavit dated 3<sup>rd</sup> December 2018 which in essence was in support of the preliminary objection, the 7<sup>th</sup> Respondent contended that the Application was frivolous, scandalous, vexatious, incompetent and an abuse of the Court process.

26. The purpose of Judicial Review as set out in the case of **Municipal Council of Mombasa vs Republic, Umoja Consultant Ltd, (2002) eKLR** is :-

*“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 make the decision have the power i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a Court hearing a matter 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”.

27. It is also trite that in Judicial Review, the Court does not deal with the merits of the case but the process of administrative decision making only. In **Commissioner of Land v. Kunste Hotel Ltd**, (1995-98) EA the Court of Appeal held that –

“Judicial Review is not concerned with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected (**Republic v. Secretary of State for education and Science ex parte Avon County Council** [1991] 1 ALL ER 282 and **Chief Constable of the North Wales Police v. Evans** [1982] 1 WLR 1155 adopted)

28. In the case of **Kenya National Examination Council. vs. Republic (Exparte Geoffrey Gathenji & 9 Others [1997] eKLR** the Court of Appeal held that;-

“... an order of certiorari will issue if the decision is made without or in excess of jurisdiction or when the rules of justice are not complied with...”

29. Further in the same case **Kenya National Examination Council (supra)**, the Court of Appeal stated the grounds upon which such an order may issue as follows;

*What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition, and Vol.1 at pg. 37 paragraphs 128*

30. Similarly, the Court in addressing whether the order of prohibition should issue in the case of **Kuria & others vs AG [2002] 2 KLR 69**, the High Court held:

*It does not matter whether the decision has been made or not, what matters is the objectives for which the Court procedures are being utilized. Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all parties. The duty of the Court in such instances is to purge itself of such proceedings. Thus whereas the Court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued prosecution be stayed. An order of prohibition can be issued to prohibit the continued hearing. ...*

*An order of prohibition should be granted where there is an abuse of the process of the Court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by the staying of the prosecution*

31. I have considered the matter before me and it is clear that the issues herein raised are matters touching on the sale and ownership and /or proprietorship of the suit land herein. It is not the duty of the Environment and Land Court in Judicial Review proceedings to evaluate the sufficiency or insufficiency of the evidence therein as that is the function of the trial Court in a normal proceedings that will require viva voce evidence. A Judicial Review Court should not usurp the functions of a trial Court, except in the clearest of the cases and this is not one of such cases.

32. I find that this matter can only be finally adjudicated before the Environment and Land Court in the normal proceedings and therefore the remedies of Prohibition and Certiorari are not the appropriate ones to grant.

33. In the premises thereto the Application dated the 12<sup>th</sup> October 2018 is herein dismissed with costs.

**Dated and delivered at Nyahururu this 4<sup>th</sup> day of February 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**