



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC JR NO. 19 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 296) LAWS OF KENYA

AND

IN THE MATTER OF RUIRI/RWARERA/ADJUDICATION SECTION

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY COUNTY COMMISSIONER BUURI EAST, MERU COUNTY.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

EX – PARTE SHAM SATISH KUNDALAL WASON

AND

ISAAC NGEERA 1ST INTERESTED PARTY

ELIZABETH GATITU..... 2ND INTERESTED PARTY

MARY NTHINGA ITHUTA3RD INTERESTED PARTY

STANLEY KARUTI M'MBIRITHI 4TH INTERESTED PARTY

RULING

1. This matter relates to an ex-parte chamber summons dated 25/10/2019 brought pursuant to **Order 53 Rule (1) (2) and (4) of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act (CAP 26)**. The applicant seeks amongst other orders leave to apply for an order of certiorari to remove into the Environment and Land Court and quash the entire undated decision and award by the 1st respondent delivered on 24/09/2019 in appeal to cabinet secretary A/C No. 165 of 2018 over Plot No. 3624 situated in Ruiru/Rwarera Adjudication Section Meru County, and the leave to operate as stay of the said award.

2. The application is premised on the grounds on the face of the application, and the verifying affidavit of Sham Satish Kundanlal Wason sworn on 25/10/2019. It is contended that in the year 1986 the said Sham purchased Plot No. 3624 (*hereinafter Suit Land*) measuring 9.6 Acres from one Paul Kibaya Araiigwa at a consideration of Kshs. 150,000/-. He fenced and leased the Suit Land to a company known as Intex Company as their site office and quarry for many years. Later, the Suit Land was subjected to objection proceedings No. 2224, 2206, 2219 and 3869 where Sham was the respondent. The adjudication officer in his judgment delivered on 16/5/2018 dismissed the objection.

3. The Interested Parties being the applicants appealed to the cabinet secretary who concluded that :

1. There seems to be a dispute in this general area and a case filed in Court of Appeal at Nairobi No. 129 of 2005

2. This resulted into a consent which partly quoted *the Land Adjudication Act CAP 284*

3. From the evidence provided it's the family of Isaac Ngeera that settled on the land first hence they should be the registered owners of the land.

4. The ex-parte applicant contends that the deputy commissioner acting on behalf of the cabinet secretary acted arbitrarily, unreasonably and unfairly for there was no independent advice of a surveyor to confirm that the acreage the Interested Parties were claiming (18.6 acres) covered Sham's property comprising 9.6 Acres. Also signs of construction site and quarry were corroborated by the Interested Party from the proceedings before the Land Adjudication Officer. Moreover, the 1st respondent acted ultra vires as he had no jurisdiction for he was not gazetted, named and or a holder of public office specified in the gazette pursuant to **Section 29 (4) of the Land Adjudication Act**. Therefore, the undated award is illegal and a nullity which amounts to nothing. Hence, the application is merited.

5. The issue of determination before the court is *whether to grant leave to the ex-parte applicant to apply for an order of certiorari and whether such leave should operate as a stay of the implementation of the decision of the 1st respondent*.

6. The importance of obtaining leave is to filter out frivolous applications by testing whether an applicant has an arguable case. This was expressively stated by Waki J (as he then was) in the case of **Republic v County Council of Kwale & another Ex-Parte Kondo & 57 other Mombasa HCMCA No. 384 of 1996** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter parties hearing of the substantive application for judicial review*. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

Also, Mativo J expressed himself as follows in the case of **Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR**:

“ At the leave stage an applicant must show that:- (i) 'sufficient interest' in the matter otherwise known as locus standi; (ii) that he/she is affected in some way by the decision being challenged; (iii) that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; (v) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

At the leave stage, the applicant has the burden of demonstrating that the decision is illegal, unfair and irrational. The applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the Judicial Review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.”

7. When this matter was presented before me for the very first time on 28.10.2019, I made the following observations;

“Noting that the dispute touches on the Ruirii Rwarera Adjudication Section, where there are many disputes arising there on, I direct that the application be heard on 30.10.2019 and service to be effected”.

8. There is no evidence that the said application was ever served upon the Respondents and Interested parties. It was incumbent upon the applicant to comply with courts directions on the issue of service.

9. I further note that the applicant has taken issue with the fact that the 1st respondent relied on a purported or alleged case in Court of Appeal Case No. 129 of 2005 which was hearsay evidence. I take Judicial Notice of the existence of the aforementioned Court of Appeal matter and the consent thereof in light of the avalanche of litigation emanating from Ruirii Rwarera area. In **Petition no. 35 of 2016 ELC Meru**

Johnson Mbaabu & Another vs. Mathiu Nabea & 9 Others, I noted in my ruling of **26.2.2020** that the documents appertaining to the court of appeal order and the consent had been availed, where by the interpretation and implementation of the said order and consent was an issue which invited arguments. In short, the disputes arising from Ruirii Rwarera Area are extremely convoluted. The dispute herein is no exception. The issues raised by the applicant are certainly serious and requires further investigations. However, in light of the findings herein I am inclined not to grant a stay.

10. Final orders:

- 1. Leave is hereby granted to apply for an order of certiorari to remove into the Environment and Land Court and quash the entire undated decision and award by the 1st respondent delivered on 24/09/2019 in appeal to cabinet secretary A/C No. 165 of 2018 over Plot No. 3624 situated in Ruirii/Rwarera Adjudication Section Meru County.**
- 2. Costs shall be in the judicial review.**

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. L. MBUGUA

ELC JUDGE