



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. MISC APPLICATION NO. 8 OF 2019 (JR)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF AN APPEAL TO THE CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING BEING
LAND APPEAL CASE**

NO. 571 OF 1996 IN KIRIMA ADJUDICATION SECTION

AND

IN THE MATTER OF LAND PARCEL NO. MBEERE/KIRIMA/240 IN

KIRIMA ADJUDICATION SECTION, MBEERE SOUTH SUB-COUNTY,

EMBU COUNTY

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP. 284)

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

EUSTACE KARIUKI MWATHI.....1ST INTERESTED PARTY

ISAIAH NJERU MBAKA.....2ND INTERESTED PARTY

JUDGEMENT

A. INTRODUCTION

1. By an *ex-parte* chamber summons dated and filed on 22nd November 2019 brought under **Articles 40, 47, & 50 of the Constitution of Kenya 2010, Section 8 of the Law Reform Act, Order 53 Rules 1 & 2 of the Civil Procedure Rules 2010, Sections 26, 27, 28 & 29 of the Land Adjudication Act (Cap. 284) and Sections 79 & 82 of the Law of Succession Act (Cap. 160)** the Applicants sought the following orders:

a. Spent

b. That leave be granted to the Applicants to apply for Orders of Certiorari to call to this court and to quash the decision of the 1st Respondent, the Cabinet Secretary for Lands dated 1st July 2019 in Minister's Land Appeal Case No. 571 of 1996 in respect of land parcel No. Mbeere/Kirima/240 in Kirima Adjudication Section, Mbeere South Sub-County, Embu County in which land parcel No. Mbeere/Kirima/240 was awarded to Gatumu Kiricho's representative that is the 1st Interested Party herein Eustace Kariuki Mwathi.

c. That leave be granted to the Applicants to apply for Orders of Prohibition to prohibit the 1st and 2nd Respondents and the 1st Interested Party from implementing the decision dated 1st July 2019 in Minister's Land Appeal Case No. 571 of 1996 in respect of land parcel No. Mbeere/Kirima/240 in Kirima Adjudication Section Mbeere South Sub-County, Embu County, by registering the said land in the name of the 1st Interested Party and/or issuing a title deed to the 1st Interested Party.

d. That the said leave do operate as stay of the implementation of the Minister's decision dated 1st July 2019 in Minister's Land Appeal Case No. 571 of 1996 in respect of land parcel No. Mbeere/Kirima/240 that is to say that the registration of land parcel No. Mbeere/Kirima/240 in the name of the 1st Respondent pursuant to the said decision be stayed pending the filing of the main motion for Judicial Review, the hearing and determination of the same.

2. The said application was heard *ex-parte* on the date of filing whereby the court granted leave to apply for orders of certiorari and prohibition as prayed. However, the court declined to direct that such leave do operate as stay of implementation of the Minister's decision.

B. THE APPLICANTS' CASE

3. By a notice of motion dated and filed on 18th December 2019 based upon the same provisions as the chamber summons of 22nd November 2019, the Applicants sought the following substantive orders:

a. That an order of Certiorari do issue to call to the Environment and Land Court and to quash the decision of the Minister (Cabinet Secretary) for Lands and Physical Planning, dated 1st July 2019 in Minister's Land Appeal Case No. 571 of 1996 in respect of land parcel No. Mbeere/Kirima/240 in Kirima Adjudication Section, Embu County, between Gatumu Kiricho deceased represented by Eustace Kariuki Mwathi the 1st Interested Party and Samuel Kagunyi Richard Mukunu deceased represented by Isaiah Njeru J. Mbaka, the 2nd Interested Party.

b. That an order of Prohibition do issue prohibiting the Director of Land Adjudication and Settlement and the Chief Land Registrar from implementing the decision of the Minister (Cabinet Secretary) for Lands dated 1st July, 2019 in respect of land parcel No. Mbeere/Kirima/240 in Kirima Adjudication Section, Embu County between Gatumu Kiricho represented by Eustace Kariuki Mwathi and Samuel Kagunyi Richard Mukunu represented by Isaiah Njeru J. Mbaka.

c. Costs of the application.

4. The said motion was grounded upon the statutory statement and verifying affidavit filed with the chamber summons for leave to apply for judicial review. The Applicants stated that they were the personal representatives of their late father Samuel Kagunyi Richard Mukunu (*the deceased*) who was the Respondent in *Minister's Land Appeal Case No. 571 of 1996 (the appeal)* whereby the Appellant was the late Gatumu Kiricho (*Gatumu*).

5. It was contended that both the deceased and Gatumu died before the appeal could be concluded and that the deceased was purportedly represented in the appeal by the 2nd Interested Party who did not have legal authority to do so. The Appellants, therefore, contended that they were not heard in the appeal since the person who represented the deceased had no authority to do so.

6. The Applicants also faulted the Minister for taking into account irrelevant considerations in the appeal and in failing to take into account the previous decisions of other bodies in the process of land adjudication. Finally, it was contended that the appeal was filed out of time hence the Minister had no jurisdiction to entertain it in the first place.

C. THE RESPONDENTS' RESPONSE

7. The Attorney General entered appearance for the 1st, 2nd & 3rd Respondents in the matter. The Attorney General filed grounds dated 4th February 2020 conceding the application in the following terms:

a. The Respondents' decision was ultra vires as the time for appeal had long abated by operation of law.

b. The Minister entertained the appeal way after the expiry of time.

D. THE INTERESTED PARTIES' RESPONSE

a. The 1st Interested Party's response

8. The 1st Interested Party filed a replying affidavit sworn on 12th February 2020 in opposition to the said application. He supported the decision of the Minister in the appeal and stated that it was based on the evidence tendered before him. He stated that he rightfully

represented his deceased father Gatumo in the appeal after being authorized by his mother to do so.

9. The 1st Interested Party denied that the appeal was filed out of time as alleged by the Applicants. He annexed a copy of the receipt for Ksh.135/- dated 28th March 1990 for payment of the appeal fees. He also attached a copy of a letter from the Land Adjudication Officer forwarding the appeal to the Minister under **Section 29 of the Land Adjudication Act (Cap. 284)** in which it was indicated that the appeal fee was paid vide receipt No. AN 201211 dated 28th March 1990.

10. In further opposition to the application, he stated that the deceased was represented by the 2nd Interested Party on the basis of an affidavit he swore on 28th May 2019 indicating that the family of the deceased had authorized him to appear on their behalf in the appeal. It was further stated that the 2nd Interested Party was the brother-in-law of the deceased.

11. The 1st Interested Party therefore considered the application for judicial review to be lacking in merit hence he urged the court to dismiss it with costs.

b. The 2nd Interested Party's response

The 2nd Interested Party did not file any response to the application even though he was present in court when directions on the hearing were given.

E. DIRECTIONS ON THE HEARING OF THE APPLICATION

12. When the said application was listed for directions on 19th February 2020 it was directed, with the consent of the parties, that the application be canvassed through written submissions. The Applicants were granted 30 days within which to file a further affidavit and written submissions. The Respondents and the Interested Parties were granted 30 days upon the lapse of the Applicants' period to file their respective submissions. The record shows that the Applicants filed their submissions on 11th May 2020 whereas the 1st Respondent filed his on 21st May 2020. However, there were no submissions on behalf of the rest of the parties by the time of preparation of the judgement.

F. THE ISSUES FOR DETERMINATION

13. The court has considered the Applicants' notice of motion, the statutory statement, verifying affidavit, the Respondents' response as well as the 1st Interested Party's replying affidavit. The court is of the opinion that the following issues arise for determination:

- a. Whether the Minister proceeded with the appeal in violation of the rules of natural justice.
- b. Whether the appeal was incompetent for having been filed out of time.
- c. Whether the Minister took into account irrelevant considerations and failed to take into account relevant considerations in the appeal.
- d. Whether the Applicants are entitled to the orders sought.
- e. Who shall bear the costs of the application.

G. ANALYSIS AND DETERMINATIONS

a. Whether the Minister violated the rules of natural justice

14. The court has considered the material and submissions on record on the 1st issue. The Applicants submitted that they were the legal representatives of the deceased at least since 30th April 2019. It was submitted that by the time the appeal was heard and decided in 2019 they were not involved in the matter in any way. It was contended that the 2nd Interested Party who purported to represent the deceased was not a member of his family and had no authority to do so.

15. The 1st Interested Party contended in his replying affidavit that the 2nd Interested Party had sworn an affidavit in the appeal indicating that he had the authority to represent the deceased before the Minister. It would appear from the proceedings of the appeal that two witnesses were called on behalf of the deceased who was the Respondent in the appeal. The 1st Interested Party, therefore, contended that the Applicants' complaint of being denied a hearing had no merit.

16. The Applicants relied on the case of **Trouistik Union International and Ingrid Ursula Heinz V Jane Mbuyu & Another [1993] eKLR** for the proposition that a personal representative is the person appointed as such under **Section 3 of the Law of Succession Act (Cap. 160)**. The court is aware that the main issue in that case was whether the widow of a deceased person could file suit on behalf of his estate without a grant issued under the **Law of Succession Act (Cap. 160)**.

17. The court is aware that the Minister entertained the impugned appeal in the course of the land adjudication process under **Section 29 of the Land Adjudication Act (Cap. 284)**. Although the Minister had a duty to act fairly and in accordance with the rules of natural justice, the appeal was not a suit or judicial proceeding within the contemplation of the authority cited by the Applicants. The court is of the opinion

that the process of land adjudication is not a judicial process which bound the Minister to apply the **Civil Procedure Rules** on substitution of deceased parties under **Order 24** of the **Rules**. See **Timotheo Makenge V Manunga Ngochi [1979] eKLR**. It is, therefore, possible for family members or other duly authorized persons to represent others in the process of land adjudication.

18. The Advocate for the 1st Interested Party has drawn the court's attention to the case of **Dominic Musei Ikombo V Kyule Makau [2019] eKLR** which was determined by the Court of Appeal on 19th July 2019. One of the issues for determination was whether it was mandatory for persons representing deceased persons in proceedings under the **Land Adjudication Act (Cap. 284)** to take out letters of administration before representing them. In answering the issue in the negative, the court held as follows:

“On the second issue, our view is that proceedings under the Land Adjudication Act are not strictly speaking akin to proceedings under the Civil Procedure Act. The District Commissioner acting on behalf of the Minister has wide latitude of conducting the proceedings in a manner that meets the substantive ends of justice. Section 13 of the Land Adjudication Act talks of “guardian” or “representative according to African Law.” It does not refer to legal representatives. The strict rules of civil litigation as relates to capacity to sue or be sued do not apply to proceedings before the committee or the Minister. It is therefore not necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant. The parties therefore had *locus standi* to appear before the adjudication committee lack of letters of administration notwithstanding”

19. In the instant case, however, there is no certainty that the 2nd Interested Party had any authority from the family of the deceased to represent him in the appeal. The Applicants, who are the personal representative of the deceased, have denied granting the 2nd Interested Party authority to defend the appeal on their behalf. The 2nd Interested Party has failed to file an affidavit in this matter to disclose the source of whatever authority he may have had. The affidavit exhibited by the 1st Interested Party does not disclose whom within the family of the deceased had authorized the 2nd Interested Party to represent the family. In the circumstances, the court is inclined to accept the Applicants' contention that the 2nd Interested Party had no authority to represent the deceased in the appeal even though the Applicants were a bit economical with the truth in failing to disclose that the 2nd Interested Party was a relative of the deceased. Accordingly, the court finds that there was a violation of the rules of natural justice.

b. Whether the appeal was incompetent for having been filed out of time

20. The Applicants contended that the appeal was filed about 6 years out of time hence the Minister had no jurisdiction to entertain the appeal. The Attorney General conceded that the appeal had abated due to effluxion of time. The 1st Interested party, on the other hand, disputed that the appeal was filed out of time.

21. The court has considered the material on record on this issue. The Applicants did not place any documentary evidence before court to demonstrate that the appeal was actually filed out of time. The proceedings of the appeal do not indicate when the appeal was filed. The Applicants did not exhibit a copy of the relevant appeals register. No material was placed before the court on how the appeal numbers are assigned by the Minister. The only argument by the Applicants to demonstrate that the appeal was filed out of time is the appeal case number which reads 571 of 1996. It was contended that the citation is an indication that the appeal was filed in 1996 and not 1990 when objection proceedings were determined.

22. The court is unable to accept the Applicants' argument as sound in law. The year appearing in the citation of a case is not necessarily indicative or conclusive of the year of filing as at times happens before our courts. Although the Attorney General conceded that the appeal was filed out of time, there is some evidence in the 1st Interested Party's replying affidavit to the contrary. There is a copy of a payment receipt and forwarding letter tending to show that the appeal was not filed out of time. Even if the court were to find that the appeal was filed out of time an issue would arise as to the legal consequence of such late filing of the appeal. The Applicants and the Respondents were of the view that such appeal would be incompetent and that the Minister would have no jurisdiction to entertain it.

23. The Applicants and the Respondents did not cite any authority to support their position on the legal consequence of filing an appeal to the Minister out of time. In the case of **Republic V Ministry of Lands & Settlement & 3 Others ex parte Kahareri Buri Karugu Embu ELC JR No. 32 of 2015** this court held that an appeal which had been filed out of time was incompetent and that the Minister had no jurisdiction to entertain it.

24. Since that decision, however, the court has come across the Court of Appeal decision in **Watuku Mutsiemi & Another V Republic & 5 Others [2018] eKLR**. In the said case, the Appellant had challenged the decision of the Minister on appeal on various grounds which included the fact that the appeal had been filed out of time. In dismissing the appeal, the court held, *inter alia*, that an objection as to jurisdiction ought to have been raised at the *earliest opportunity* and that the Appellant had not suffered any *prejudice* by the late filing of the appeal. The court is, therefore, of the view that filing an appeal out of time is not necessarily fatal. Its fate largely depends on other factors such as prejudice and raising an objection thereto at the earliest opportunity. In the circumstances of this case the court is not satisfied that the Applicants suffered any prejudice in case the appeal was filed out of time. Accordingly, court is not satisfied that the appeal was incompetent or that the Minister had no jurisdiction to entertain the appeal.

c. Whether the Minister took into account irrelevant considerations and failed to take into account relevant considerations

25. The Applicants contended that the Minister had taken into account some irrelevant considerations and failed to take into account some relevant considerations in the appeal. The Minister was also accused of failing to properly evaluate the evidence before him and of failing to take into account the decisions of previous adjudicating authorities. The court is of the opinion that the Applicants are really challenging the merits of the Minister's decision in the appeal. The question of sufficiency or otherwise of the evidence before the Minister is matter essentially within his jurisdiction. The court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicants have not demonstrated that

such was case in the instant application. Accordingly, the 3rd issue is answered in the negative.

d. Whether the Applicants are entitled to the orders sought

26. The court has already found that the rules of natural justice were violated in relation to the estate of the deceased. Although the court is not satisfied that the other two grounds have been demonstrated, the Applicants are entitled to succeed on that ground alone. In the case of **Municipal Council of Mombasa V Republic & Umoja Consultant Limited [2002] eKLR** which was cited by the Applicants, it was held, *inter alia*, 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 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 he 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 there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

27. Similarly, in **Republic V Secretary of the Firearms Licensing Board & 2 Others ex parte Senator Johnstone Muthama [2018] eKLR** it was held, *inter alia*, that:

“The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.”

28. The court is, therefore, inclined to issue an order of *certiorari* to remove into this court and quash the decision of the Minister in the appeal solely for violation of the rules of natural justice. The prayer for prohibition shall not issue since it would not serve any useful purpose in view of the quashing order being granted herein. However, the order of *certiorari* would not be able to resolve the land dispute amongst the concerned parties. The court is thus of the opinion that the matter should be remitted to the Minister to determine the appeal upon according the Applicants a hearing in accordance with the law.

e. Who shall bear costs of the suit

29. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Jannohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is of the opinion that since the Applicants and the 1st Interested Party who are the real disputing parties were not responsible for the violation of the rules of natural justice with respect to the appeal, each party to the proceedings shall bear his own costs.

H. SUMMARY OF THE COURT’S FINDINGS

30. In summary, the court makes the following findings on the issues for determination:

- a. There is evidence to demonstrate that the Minister proceeded in violation of the rules of natural justice in the appeal in relation to the estate of the deceased.
- b. The court is not satisfied that the appeal was incompetent or that the Minister had no jurisdiction to entertain it.
- c. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal.
- d. The Applicants are entitled to the order of *certiorari* to quash the Minister’s decision dated 1st July 2019 in the appeal. However, the matter shall be remitted to the Minister for hearing of the appeal *de novo*.
- e. Each party to the proceedings shall bear its own costs.

I. CONCLUSION AND DISPOSAL ORDERS

31. The upshot of the foregoing is the court finds merit in the Application for judication review. Accordingly, the notice of motion dated 18th December 2019 is hereby allowed in the following terms:

- a. An order of *certiorari* be and is hereby issued to remove into this court and quash the decision of the 1st Respondent dated 1st July 2019 in Minister’s Land Appeal Case No. 571 of 1996 relating to Parcel No. Mbeere/Kirima/240 in Kirima Adjudication Section Embu between Gatimu Kiricho (Appellant) and Gatumu Kiricho (Respondent).
- b. The prayer for an order of prohibition is hereby declined.

c. The matter is hereby remitted to the 1st Respondent for hearing of the appeal de novo within 6 months whilst according the Applicants a hearing in the appeal.

d. Each party shall bear its own costs.

32. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **28TH DAY** of **MAY, 2020**. Judgement delivered through zoom platform in the presence of Mr. Okwaro for the Applicant, Mr. Andande for the 1st Interested Party and in the absence of the Respondents and the 2nd Interested Party.

Y.M. ANGIMA

JUDGE

28.05.2020