



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

MISC. APPLICATION NO. 115 OF 2017

REPUBLIC APPLICANT

VERSUS

CABINET SECRETARY

MINISTRY OF LANDS AND PHYSICAL PLANNING.....RESPONDENT

EX PARTE HEZBON ODHIAMBO ONGANY

AND

LUCAS OLOO OWITI..... INTERESTED PARTY

JUDGMENT

The ex-parte Applicant filed a Notice of Motion Application dated 17th October 2017 seeking an order of Certiorari directed to the Respondent, the Cabinet Secretary Ministry of Lands and Physical Planning to remove to the court for the purpose of being quashed the decision of the Minister delivered on 28/3/2017 awarding parcel of land No. KISUMU/NYAMWARE/3411 to Alfred Nyateng Muga or his successors/

The application is based on the grounds set forth in the face of the application and the supporting affidavit sworn by the ex parte Applicant dated 17th October 2017, which can be summarised as follows:

The ex-parte Applicant states that he is the administrator of the estate of Tobias Ongany Okuom (deceased) who is the registered proprietor of the suit parcel. That at adjudication, the suit parcel was registered in the deceased's favour and the family of the Interested Party objected vide Objection Case No. 53 of 1992. That the objection was dismissed after the elders from the same village with the proper background of land ownership in the area heard both parties and found that the objection lacked merit.

That the Interested Party appealed against the findings of the objection proceedings, raising numerous irrelevant grounds of appeal touching on a different parcel of land that was separate and distinct from the suit parcel. That the appeal to the Minister was heard in March 2017 and the Minister misdirected himself in law by allowing the appeal by considering cases that were subject to different parcels of land, that is a boundary established by African Court Case No. 57/1930 and appeal No. 67/1931 which cases were between different parties.

That the findings of the Minister are incapable of being enforced since the interested parties are only claiming a small portion of the suit parcel while the registered owner's homestead is in a bigger portion.

Respondent's Reply

The Respondent replied through the affidavit of George Oluoch Ogutu, the Land Adjudication and Settlement Officer Kisumu/Nyando. He averred that the land appeal case was heard by the Deputy County Commissioner Nyando Sub-County, following the gazettement of DCCs to hear land appeals on behalf of the Cabinet Secretary. He asserted that the appeal was heard and determined procedurally as per the Land Adjudication Act. That the DCC considered all the relevant facts and evidence in arriving at the findings and the Applicant's claims were baseless and misconceived.

Interested Party's Reply

The Interested Party filed a replying affidavit in opposition to the application. The Interested Party stated that the application and supporting affidavit was construed to mean that the ex parte Applicant is challenging the decision of the Minister rather than the procedural process of arriving at the decision which is the crux of judicial review proceedings. That lacking reference to the Respondent's process of arriving at the

decision, the entire suit was misconceived and should be dismissed. The matter proceeded by way of written submissions.

Ex-parte Applicant's Submissions

Counsel for the ex-parte Applicant submitted that the main contention of the Applicant is the manner in which the Respondent arrived at the decision. That among the issues interrogated in judicial review is whether the decision maker took into account irrelevant matters. Counsel cited the case of **Republic v Commissioner of Lands & another, ex-parte Hammer Heads Limited [2013] eKLR**.

Counsel submitted that the Respondent took into account irrelevant grounds of appeal that touched on different parcels of land separate and distinct from the suit parcel, and even considered cases concerning different parcels, that is the boundary established by African Court Case No. 57 of 1930 and Appeal No. 67 of 1931.

Interested Party's Submissions

Counsel for the Interested Party submitted that the wording of paragraphs 4 and 5 of the application and paragraphs v and vi of the supporting affidavit is construed to mean that the ex-parte Applicant is challenging the Respondent's decision proper, rather than the procedure followed by Respondent in arriving at the decision. That the Applicant's averment that the Respondent's decision was "based on irrelevant facts, evidence and law and as such should be quashed" goes to the merits rather than the process if the Respondent's decision, which is not a part of judicial review proceedings. Counsel cited the case of **Republic v National Land Commission Ex-parte Ephraim Muriuki Wilson & others [2018] eKLR** for the proposition that judicial review is about the decision making process, not the decision itself, and that judicial review is not an appeal and should not attempt to approach the forbidden appellate approach.

Counsel contended that the application was an exercise to make the court an appellate court as it was more concerned with the merits of the Respondent's decision rather than the process followed in rendering the decision. Counsel cited **Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji** for the proposition that judicial review application do not deal with the merits of the case but only with the process.

Counsel submitted that a quasi-judicial decision can only be challenged for illegality, irrationality and procedural impropriety. That the decision of the Respondent has not be shown to fall under any of those faults.

Issues for Determination

1. Whether the Respondent considered irrelevant matters in arriving at its decision

In the decision in Appeal Case No. 93 of 1994, the Deputy County Commissioner first took into account the Ahero African Court Case No. 57 of 1930 and Appeal No. 67 of 1931 which the Applicant contends was irrelevant as it concerned parcels separate and distinct from the suit parcel. The DCC explained that those cases were relevant because they settled the boundary that separated the land belonging to the Kawuonda and the Kamwane clans of which the Interested Party and ex-parte Applicant respectively belonged. His conclusion was that all the adjoining land parcels followed the boundary set in those cases save for two parcels 3411 and 3412. That without any sufficient evidence to the contrary, the boundaries in these parcels should have been in line with the original one set in the 1930 case. The DCC also cited a number land committee cases between these two clans that fell back on the African Court case and appeal of 1930 and 1931 to settle the boundaries between neighbouring parcels 3402 and 4102; and the boundary within parcel 3412, holding that:

"They then awarded both parcels 3402 and 4102 to Philip Awiti Muga. By so doing they affirmed and upheld the Ahero court boundary that stretched from where 4102 starts to where 3411 ends. This is a crucial fact that cannot be overlooked if we have to be fair in determining this case. Then came objection case number 154/92 heard on 19/1/1993 between Nyateng Muga vs Andrew Odida Oyoo where Muga was claiming part of the parcel number 3412 claiming it was annexed to Andrew Odida's homestead.

In its findings, the court stated that: "Before 1985 and after 1931 there was no land problem between Nyateng Muga and Andrew Odida Oyoo because the owners were following the laid down boundary (sisal) of 1930 by Nyando court case No. 57 and appeal case No. 67 of 1931... In effect this was a boundary dividing the two clans Kamwani to the south of the boundary and Kawuonda to the north. The whole of Kawuonda's land ranging from parcel 3413 up to 3402 was taken by Muga and his family."

The DCC's decision was also based on a visit to the site and information from the neighbouring community about the land and the access roads thereon:

"Visited the site on 27/2/2017 and gathered a lot both from the family members, neighbours, opinion leaders and local administration... This set of arrangement on the ground and that of the parcels below the tarmac on your way to Kisumu and directly opposite the contentious parcel (3411) belonging to Muga family further convinces me that the contentious parcel belonged to Nyateng Muga too."

The DCC also faulted the Land Adjudication Officer for dismissing the objection on a technicality despite reaching the same conclusion. In the objection case, the Land Adjudication stated that:

"I am convinced beyond any reasonable doubt that the African Court Case No. 57/30 had fixed a common boundary between Ong'any Anyango and Muga Olouch. I have found that the Arbitration Board Case Nos. 23/84/85 and 25/84/85 as well as objection No. 154/92 confirmed the boundary of the African Court Case No. 57/30."

From the foregoing, the African Court Case No. 57 of 1930 and appeal case No. 67 of 1931 were not irrelevant with regard to the suit parcel. In fact, the case was pivotal in establishing the common boundary between land belonging to the Kamwane and the Kawuonda clans stretching from parcel 3402 to parcel 3413, including the suit parcel. It was demonstrated that the 1930 decision was consistently used as an authoritative precedent in determining boundary disputes of parcels adjoining the suit parcel and involving the same families.

The ex-parte applicant has therefore failed to demonstrate that the facts, evidence and law relied upon by the Respondent in reaching their decisions were irrelevant.

The upshot of the above is that the application ought to be and is hereby dismissed in toto with costs to the Respondent and Interested Party.

DATED, DELIVERED and SIGNED THIS 22nd DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE