



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

JR MISC. CAUSE NO. 16 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE MINISTER FOR LANDS.....1ST RESPONDENT

THE LAND REGISTRAR, BONDO.....2ND RESPONDENT

EX PARTE JOASH ONYANGO OPIYO

AND

DANIEL OMONDI OWIRA.....1ST INTERESTED PARTY

SAMSON OKOME MORE.....2ND INTERESTED PARTY

JUDGMENT

The ex-parte Applicant is seeking an order of Certiorari to remove into this Honourable Court and quash the decision of the Minister dated 14th July 2017 in which the said Minister through the Assistant County Commissioner at Bondo issued an order cancelling the title of that parcel of land known as Usenge Adjudication Section No. 2606 and reverting it to Usenge Adjudication Section No. 860;

Moreover, an order of Mandamus directed to the District Land Registrar Bondo, the 2nd Respondent herein, compelling him to reinstate in the name of Willis Oduor Opiyo (deceased) the title to all that parcel of land known as Usenge Adjudication Section No. 2606 and to make the same and relevant entries in the register;

Last but not least, a declaration that Civil Suit No. 96 of 2015 which was filed by the 1st and 2nd Interested Parties be and is hereby set for hearing before this Honourable Court, subject to the Court's diary, to determine the substantive rights of both the ex-parte Applicant and the Interested Parties.

The application is based on the grounds that the decision by the Minister was made without jurisdiction; the decision was made with blithe disregard to the rules of natural justice as the ex-parte Applicant was not afforded an opportunity to give his side of the story and the same was not captured in the Minister's decision; and that Civil Suit No. 96 of 2015 filed by the Interested Parties is still pending before the court.

The ex-parte Applicant swore an affidavit dated 15th August 2018 stating that in 1979 the adjudication process in the area where the suit land is situate began and the suit parcel was registered in the name of the father of one Zedekia Owira Nyadenge as Usenge Adjudication Section No. 860. That the ex-parte Applicant's grandfather, Absalom Nyamhore, raised an objection No. 897 and on 17th August 1992, the District Adjudication Officers made a decision in his favour resulting in the carving of Usenge Adjudication Section No. 2606 (the suit parcel) from Usenge Adjudication Section 860. That the suit parcel was registered in the name of the ex-parte Applicant's late father Willis Oduor Opiyo.

That Zedekia Owira Nyadenge appealed the District Adjudication Officers' decision to the Minister in 1995 vide Appeal Case No. 134 of 1995 and cited Opiyo Matewa Nyamhore as the Respondent, who died during the pendency of the case. That Zedekia Owira Nyadenge also passed on before the case could be concluded, leaving behind his sons who obtained limited grant of letters ad litem to sue on behalf of their father. That prior to obtaining the limited grant, the said sons had obtained the consent to transfer the appeal and they filed Civil Suit No. 96 of 2015 before the High Court at Kisumu.

That by filing Civil Suit No. 96 of 2015, the case before the Minister abated and the Minister lost jurisdiction over the matter Zedekia Owira Nyadenge and that with the operationalization of the Environment and Land Court, the matter was accordingly transferred to the said specialised court.

That the decision of the Minister was made on 17th June 2017 ex-parte and without notice to the ex-parte Applicant, until the ex-parte Applicant received a notice from the Bondo Lands Office about the decision to cancel his father's title.

Interested Parties' Response

The Interested Parties filed a statement of opposition to the application. The Interested Parties faulted the Applicant seeking orders for both certiorari and mandamus as contradictory. That the Minister did not cancel any title but determined the appeal in favour of the Interested Parties based on the evidence before him. That the Director of Land Adjudication was not a party in this proceedings therefore the application as incompetent to that extent.

The Interested Parties stated that all parties were duly notified of the hearing of Land Appeal Case No. 134 of 1995 and there is no evidence of impropriety against the manner in which the appeal was conducted. That a determination of Ministerial appeal under Section 29 of the Land Adjudication Act is final and closes the adjudication process. That the court cannot overrule a Ministerial appeal but may order a rehearing if there is sufficient reason for doing so.

The Interested Parties stated that registration of a parcel under the Land Registration Act extinguishes all claims under the Land Adjudication Act and such a first registration is not challengeable unless under claims of fraud or misrepresentation. That Civil Suit No. 96 of 2015 was not relevant and had already been determined.

Respondents' Reply

The Respondents opposed the application and responded through the replying affidavit of the 2nd Respondent dated 19th July 2019. The 2nd Respondent averred that the Appeal Case No. 34 of 1995 was lodged by Zedekia Owira Nyadenge and heard on 14th July 2017 by the Deputy County Commissioner. That the case was heard before the Appellant's brother Samson Okome More and the Respondent's family refused to be part of the hearing, walked out of the session and hence were not represented.

That it emerged at the appeal hearing that the Respondent and Appellant had no blood relations and that the Appellant's grandfather had given part of his land to the Respondent's family to stay temporarily in 1963 during a floods crisis. That despite the temporary stay, the Respondent went ahead to build permanent structures. That the Deputy County Commissioner found that these historical facts were not taken into account hence there was bias on the side of the Adjudication Officer.

That the ex-parte Applicant cannot fault the Respondents herein as due process was followed but the Applicant's family walked out during the hearing of the appeal. That the Respondents herein were not parties to Kisumu HCC ELC No. 96 of 2015 hence there was no order stopping them from hearing the appeal.

That the decision of the appeal was implemented after the Director of Land Adjudication communicated to the Chief Land Registrar who later communicated to the District Land Registrar Bondo.

Ex-Parte Applicant's Submission

Counsel for the ex-parte Applicant filed written submissions submitting that at the time the Minister heard the appeal he/she did not have the jurisdiction to do so as the Interested Parties had sought and obtained the consent of the District Land Adjudication Officer and filed ELC No. 96 of 2015 which contained prayers similar to the ones in the appeal, and which is still undetermined.

Counsel submitted that the ex-parte Applicant was not afforded a fair hearing in the case before the Minister. That the Interested Parties had enjoined people who had no interest in the case at all, which was confirmed in the ruling of the court in ELC No. 96 of 2015. That the ex-parte Applicant as the heir apparent of the late Absalom Opiyo Nyamhore was not a party to the appeal and was not privy to its proceedings.

Respondents' Submissions

Counsel for the Respondents also filed written submissions. She submitted that due process was followed in Appeal Case No 134 of 1995 and the ex-parte Applicant given a hearing. That they chose to walk out of the proceedings, leaving no choice for the members present than to proceed and make a determination. That no order was served on the Respondents stopping them from determining the appeal or implementing the said decision. That even after a suit was filed in the ELC court by the Interested Parties, the same was ever brought to the attention of the Respondents for their action and neither were they parties to it.

Counsel submitted that one party cannot frustrate and use delaying tactics to stop a hearing from proceeding. That it is only when the decision was implemented that the ex-parte Applicant approached the court yet he had an opportunity to do so but never made use of it.

Issues for Determination

1. Whether the Minister had jurisdiction to hear and determine the appeal

Section 30 (1) of the Land Adjudication Act provides:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has

become final in all respects under section 29(3) of this Act.”

Odeny, J. in Samuel Busiega v Jane Jemaiyo Ng'arng'ar (sued as the Legal Administrator of the Estate of William Eliud Nga'rnga'r (Deceased) [2019] eKLR held that:

“Section 30 of the Land Adjudication Act is very clear that a consent of the land Adjudication Officer must be sought and obtained before filing a suit in court. Where a party is dissatisfied with the decision of the Land Adjudication Officer and have preferred an Appeal to the Minister, the same must be heard or withdrawn before a party can file suit in court.”

In this case, the ex-parte Applicant has shown that the Interested Parties obtained the consent of the Land Adjudication Officer to institute civil proceedings in respect of Usenge Adjudication Section No. 2606. However, an appeal against the 1992 decision of the Land Adjudication Officer to Minister, Appeal No. 1345 of 1995, concerning the same adjudication section was still pending. No evidence has been tendered to show that the appeal to the Minister was withdrawn.

The Interested Parties' action of filing ELC No. 96 of 2015 without withdrawing the appeal to the Minister could not therefore have the effect of ousting the Minister's jurisdiction to hear appeals as provided under Section 29 of the Land Adjudication Act. By not withdrawing the pending appeal and proceeding to file a suit in this court, the Interested Parties actions can only be viewed as forum shopping or setting up parallel processes to pursue their claim. This amounts to an abuse of the court process.

Therefore, the Minister had the proper jurisdiction to hear and determine the appeal.

2. Whether the ex-parte Applicant was not afforded a fair hearing

The initial objection was brought by Absalom Nyamhore Opiyo, the ex-parte Applicant's grandfather, against Zedekia Owira Nyadenge and a decision made in 1992. Adjudication Section Usenge No. 2606 was created and registered in the name of the ex-parte Applicant's father on 27th July 2016 according to the green card.

In the appeal to the Minister dated 14th July 2017, the 2nd Interested Party was representing Zedekia Owira Nyadenge (deceased) as his brother and the respondent cited as Opiyo Matewa Nyamhore (deceased) represented by his next of kin Jael Nyangun Opiyo and sons Caleb Ochieng Matewa and Osewe Matewa. It is unclear why Opiyo Matewa was cited as the Respondent yet the suit land had been registered in the name of Willis Opiyo Oduor. The capacity of Opiyo Matewa to be a party to the matter was not clarified and his next of kin were evidently not keen in being involved in the matter and walked out of the hearing for unclear reasons.

In ELC No. 96 of 2015, Interested Parties again attempted to enjoin Jael Nyangun Opiyo and Caleb Ochieng Matewa in place of Absalom Opiyo Nyamhore but they declined stating that they have no interests over the suit land. The Court found that the Interested Parties had not disclosed why their claim could not be pursued against the legal representatives of Willis Oduor Opiyo, the registered owner of the suit land.

The ex-parte Applicant has therefore proved on the balance of probabilities that the appeal before the Minister involved parties who had no interest in the suit parcel and that the legal representatives of the Willis Oduor Opiyo had no notice of the appeal and were deprived the opportunity of a fair hearing. The decision ought to be quashed and Interested Parties be at liberty to lodge a fresh appeal.

3. Whether order of mandamus can issue against 2nd Respondent

The Court of Appeal in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR held as follows regarding the application of the order of mandamus:

“an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

The appeal having been determined by the Minister, the 2nd Respondent acted altered the adjudication register to reflect the determination as was required under Section 29 (3) of the Land Adjudication Act. It follows therefore that the order of mandamus cannot issue for the legitimate actions of the 2nd Respondent. The 2nd Respondent could not have been expected to reinstate the original entries in the register without a Ministerial decision to that effect.

The upshot of the above is that the prayer for an order for Certiorari quashing the decision of the Minister in Appeal Case No. 134 of 1995 dated 14th July 2017 ought to be, and is hereby granted. The 2nd Respondent ought to revert the adjudication register to reflect the outcome of the initial adjudication objection of 1992 and the Interested Parties be at liberty to appeal afresh before the Minister within 60 days as provided under Section 29 (1) of the Land Adjudication Act. Half Cost of the application to the exparte applicant.

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