



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW APPLICATION NO. 20 OF 2017

REPUBLIC.....APPLICANT

VERSUS

TIGANIA EAST DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

SHADRACK MUTHEE M' IMANJA.....INTERESTED PARTY

AND

DOMENICA KALOTIA KALALU.....EXPARTE APPLICANT

JUDGMENT

1. On 31st May 2017 this court granted leave to **Domenica Kaloti Kalalu** (*the ex parte applicant herein*) to file a substantive application of which , the same was filed on 6th June 2017 where the ex-parte applicant sought the following orders;

A. THAT an order of Certiorari do issue to remove to this court for the purpose of being quashed and quash the order/decision made by the land adjudication and Settlement officer Tigania Est District on 21st April 2017 in the objection no. 5016 involving land parcel no. 871 Karama Adjudication Section.

2. The suit was supported by a verifying affidavit and statement of facts sworn by the ex-parte applicant. The interested party opposed the suit through his replying affidavit filed in court on 2.10.2018. The respondent was represented in court on several occasions. On 8.7.2019, counsel for the respondent sought for 14 days to file a response to the suit. The court granted them 30 days. However, the respondent did not comply with these directions. Equally no submissions were filed in terms of the prosecution of the suit. Thus the respondent did not participate in the prosecution of this suit though they were aware of it.

Case for the Ex-parte Applicant

3. The case of the ex parte applicant as contained in his affidavit and statutory statement of facts is that he was bequeathed **Land Parcel 871 Karamana Adjudication Section** (the suit premises herein) by his now deceased father **Rafael Mwenda M'imanja** to which he had been in absolute peaceful uninterrupted and undisturbed possession.

4. That the interested party lodged an objection claiming equal shares from the deceased father's land by virtue of them being step brothers. The 1st Respondent heard the objection on 18th April 2017 and delivered its verdict on 21st April 2017 awarding the interested party and one of his brothers 0.55 acres each.

5. The ex parte applicant averred that it is inexplicable why the 1st Respondent made such an award and that his evidence was never considered. That the subject land is governed by Cap 283 Law of Kenya which under Section 26 bounds the adjudication officer to hear and determine the matter with the aid of the committee. That in this case, the adjudication officer refused to involve the committee and therefore

came up with an illegal decision.

6. That the whole process was equally flawed as the objector/interested party had no locus to bring the objection. That the 1st Respondent and the interested party have stormed into the subject land and earmarked two portions for subsequent recording in the name of the interested party and his brother.

7. The ex-parte applicant submitted that the manner in which the 1st Respondent conducted the objection proceedings was wholly improper, unreasonable and offends the provisions of **Sections 9, 11 and 26 of Cap 283 Law of Kenya**. That the 1st Respondent breached the rules of Natural justice since the ex-parte applicant was not fully heard. He also cited the following authorities in support of his submissions i.e. **Meru Hc Misc 101 of 2008 Republic versus Josphat M’Nchebere M’Ithae & anor, Teresia Kabirithu v Land Adjudication and Settlement Officer Tigania East & another [2018] eKLR, Nyeri Civil Appeal No. 28 of 2015 Peter Kimandiu and Land Adjudication Officer Tigania West District vs. Zaverio Mithika & 3 others.**

Case for the interested party

8. The interested party opposed the suit vide the preliminary objection and Replying Affidavit both dated 1st October 2018. In the preliminary objection the interested party had contended that the applicant had not obtained the pre-requisite consent under **Section 8 of the Land Consolidation Act** and that the applicant had also not obtained a grant *adlitem* as contemplated under **Section 2 and 54 of the Law of Succession Act**. This court considered the Preliminary objection and on 20th February 2019 delivered a ruling dismissing the same on the grounds that the consent contemplated under section 8 of cap 283 is not required when filing a Judicial review and that the provisions of the law of Succession Act would not be applicable in this case because in the adjudication processes the rights and interest of the parties are still being ascertained.

9. The interested party averred that the suit land was gathered by his late father who registered the same in his elder brother’s name to hold in trust for him and his brothers who were still minors at the time. That upon the demise of their father, their brother refused to transfer the same to him and his brothers. That he raised the same with the clan elders but his brother died before the same was settled. He similarly raised an objection with the adjudication officer which arrived at the conclusion that the land is family land and should be divided amongst the brothers.

10. The interested party submitted that as per the objection proceedings, the committee was comprised of 33 clan members of the Mucii-O-Mworia clan and therefore the same was properly constituted and in line with provisions of section 9 and 11 of Cap 283. He relied on the following cited authorities; **Republic v Tigania East District Land adjudication and Settlement Officer and 20 others ex-parte Elijah M’ Maitai Chauri (2013) eKLR, Republic v Land Adjudication Officer Athinga Athanja Adjudication Section & Another ex-parte M’Mailanyi M’Iloni (2018) eKLR.**

Analysis and Determination

11. The court in **Republic v Secretary of the Firearms Licensing Board & 2 others Ex -parte: Senator Johnson Muthama [2018] eKLR** went to a great extent to explain the purpose of judicial review and what is sought to be established by an applicant. The court cited the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** where the Court of Appeal stated that in judicial review:

“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.”

12. In the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300 at pages 303 to 304** the court gave an in depth analysis of what a Judicial Review application is as follows:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of

taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

13. In this case, it is clear that the warring parties are fighting over the suit property. The court cannot determine the claim of ownership of the land in this judicial review matter. The court will however interrogate the matter to establish if the decision making process was unlawful. I am able to pick out 3 main issues for determination. **That the Land adjudication officer gave land to a party who was not in the objection proceedings, that applicants evidence was not considered and that the decision was made without the aid of a committee.**

14. On the issue that a party who was not in the proceedings was given land, that is an issue which goes into the merits of the decision and not the decision making process. This is because the committees are mandated under section 13 (3) to consider claims of persons who have not lodged a complaint. In the case of **Timothy Makenge vs. Manunga Ngochi (1979)eKLR**, it was stated that there was no duty placed upon the minister to follow the procedure laid down for hearing of civil suits in respect of appeal proceedings. I would say that the same principle applies in respect of proceedings before other adjudication bodies.

15. On the issue that the evidence of the ex-parte applicant was not considered, I have perused the objection proceedings and I find that the ex-parte applicant gave evidence and was cross examined. His evidence was certainly considered as there was even a scene visit to determine the claim.

16. The final issue to consider is whether the dispute was heard with the aid of a committee. The appointment of a committee is provided for under section 9 of the Land Consolidation Act while its mandate thereof is to be found under section 11.

17. The objection to the Adjudication register is provided for under section 26 (1) of the aforementioned Act as follows;

“Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act”.

18. The interested party avers that the Mucii-O-Mworia Clan sat and heard the matter and came up with a determination that was referred to the land adjudication officer. The interested party annexed a letter dated 5/11/2016 written by the Mucii- O-Mworia Clan and addressed to the Land Adjudication Office, Karama citing the steps they had taken to adjudicate on the matter. It is clear to this court from the contents of the aforesaid letter that Mucii-O-Mworia clan bearing 33 clan members sat on their own instructions and not that of the land adjudication officer and they could not have constituted a committee as envisaged under section 26 of the act.

19. The correct procedure would have been the filing of the objection proceedings with the adjudication officer. The adjudication officer would then constitute a committee and together they would hear and determine the matter, the decision would then be adopted by the adjudication officer. This position was clearly spelt out by the Court of Appeal at Nyeri in the **Peter Kimandiu and Land Adjudication officer Tigania West District vs. Zaverio Mithika** case. There is no evidence to indicate that the objection case no 5016 was heard with the aid of a committee. The suit thus succeeds on this ground.

20. I must however emphasize that blame here lies on the respondents yet they are the ones who have chosen to be missing in action in this suit. In the circumstances, I find merits in this suit and I proceed to grant orders as follows:

(1) An order of Certiorari is hereby issued quashing the order/decision made by the land adjudication and Settlement officer Tigania East District on 21st April 2017 in the objection no. 5016 involving land parcel no. 871 Karama Adjudication Section.

(2) The dispute is remitted back to the land adjudication officer to re- hear the matter in accordance with the law.

(3) Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 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. LUCY N. MBUGUA

ELC JUDGE