REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. JR NO. 5 OF 2019

(FORMERLY MERU ENVIRONMENT AND LAND JUDICIAL REVIEW NO. 122 OF 2007

NJIRU KUGARIURA V DISTRICT COMMISSIONER, MBEERE)

IN THE MATTER OF APPEAL TO THE MINISTER

AND

IN THE MATTER OF THE DECISION OF THE DISTRICT COMMISSIONER

MBEERE DISTRICT IN APPEAL NO. 146/96 AND 171/96

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. DISTRICT COMMISSIONER, MBEERE DISTRICT

2. MINISTER FOR LANDS AND SETTLEMENT.....RESPONDENTS

3. THE DIRECTOR LAND ADJUDICATION & SETTLEMENT OFFICER

AND

NJIRU KUGARIURA (On behalf of IKAMBI CLAN).....EX PARTE APPLICANT

AND

ABIUD WILSON NJUE.....INTERESTED PARTY

JUDGEMENT

A. INTRODUCTION

1. By an *ex parte* chamber summons dated 19th November 2007 and amended on 26th November 2007 brought under the provisions of **Order LIII Rule 1 (2) & 4** of the **Civil Procedure Rules** *(the Rules)* and **Sections 8 and 9** of the **Law Reform Act (Cap. 26)** the *ex parte* Applicant (*the Applicant*) sought the following orders:

> *a) That court do grant leave for the Applicant to apply for orders of certiorari to quash awards in appeals to the Minister No. 146/96 and 171/96 dated 24/5/07.*
>
> *b) That leave be granted to compel the Respondents to award Applicant 269 acres Kiandangwa and 58 acres Ikunja from parcel No. 2244 Mbeere District.*

c) The Applicant be granted leave to apply for orders of prohibition to stop the implementation of awards in appeals to the Minister No. 146/96 and 171/96 dated 24/5/07 until and unless the Applicant gets 269 acres Kiandangwa and 58 Ikunja from parcel No. 2244 Mbeere District.

d) That the grant of leave herein to operate as stay of the implementation of awards in appeals to the Minister No. 146/96 and 171/96 until substantive motion is heard and determined.

e) That costs be provided.

B. THE APPLICANT'S CASE

2. Upon leave being granted on 21st January 2008 the Applicant filed a notice of motion dated 8th February 2008 under the provisions of **Order LIII, Rules 1, 2, 3 & 4** of the **Rules** and **Sections 8 and 9** of the **Law Reform Act (Cap. 26)** seeking the following orders:

a) That an order of certiorari be issued to call into High Court and quash awards in appeal to the Minister No. 146/96 and 171/96 dated 24/5/07.

b) That an order be granted to compel the Respondents to award Applicant 269 acres Kiandangwa and 58 acres Ikunja from parcel No. 2244 Mbeere District.

c) That an order of prohibition be issued to stop implementation of awards in appeals to the Minister No. 146/96 and 171/96 dated 24/5/07 until and unless the Applicant gets 269 acres Kiandangwa and 58 Ikunja from parcel No. 2244 Mbeere District.

d) That costs be provided for.

3. The said motion was grounded upon the statutory statement and verifying affidavit filed with the chamber summons for leave to apply for judicial review. It is clear from the statutory statement that the Applicant instituted the proceedings on behalf of Ikambi clan of which he is a member. The Applicant challenged the decision of the Minister for Lands on the following grounds:

a) THAT Land Appeal Case No. 171 of 1996 was filed out of time.

b) THAT the appeals did not challenge the decision they purported to be appealed from.

c) THAT the appeals were heard as independent causes rather than in the manner appeals should be heard.

d) THAT the decisions were made in violation of the rules of natural justice.

C. THE RESPONDENTS' RESPONSE

4. The Respondents did not file a replying affidavit in response to the application for judicial review. However, the Attorney General filed a letter dated 30th June 2020 from the Director of Land Adjudication and Settlement indicating that the appeals in question were filed on 16th November 1992 within the stipulated statutory period of 60 days. It was explained that it took a long time to process the various appeals hence the reason why they were assigned reference numbers in 1996 when they were forwarded to the concerned District Commissioners for hearing.

D. THE INTERESTED PARTY'S RESPONSE

5. The Interested Party filed a replying affidavit sworn on 10th September 2008 in opposition to the application for judicial review on several grounds. It is apparent from the material on record that he was representing Mururi clan of which he is a member. It was contended that Land Appeal Case No. 146 of 1996 was filed within time on 16th November 1992 and not in 1996 as alleged by the Applicant. It was contended that *Land Appeal Case No. 171 of 1996* was the Applicant's case not the Interested Party's appeal. It was further contended that the application for judicial review had been overtaken by events since the decisions of the Minister had already been implemented and the beneficiaries of the land issued with title deeds.

6. The Interested Party denied that there was anything unprocedural and unlawful in the manner in which the two appeals were heard by the Minister. It was denied that the rules of natural justice were violated in the process. It was further contended that the original property the subject of the dispute, that is, *Title No. Mbeere/Kirima/2244* was no longer in existence since it had been sub-divided severally and distributed to various beneficiaries. The Interested Party considered that the Applicant had not made out a case for the grant of orders of judicial review hence he urged the court to dismiss the application with costs.

E. DIRECTIONS ON SUBMISSIONS

7. Although the original court file went missing without trace, it would appear that directions had been given to the effect that the application for judicial review shall be canvassed through written submissions because the Applicant and the Interested Party had already filed their written submissions by the time the file was transferred from Meru to Embu for trial and disposal.

8. The material on record shows that the Applicant filed his submissions on 24th October 2012 whereas the Interested Party filed his on 28th

January 2013. However, the Attorney General for the Respondents filed submissions on 8th July 2020.

F. THE ISSUES FOR DETERMINATION

9. The court has considered the Applicant's notice of motion, the statutory statement, verifying affidavit and annexures, the Interested Party's replying affidavit in opposition thereto as well as the documents filed by the Attorney General. The court has also considered the respective submissions of the parties. The court is of the opinion that the following issues arise for determination in this matter:

a) Whether Ministers Land Appeal Case Nos. 146 of 1996 and 171 of 1996 were filed out of time and, if so, what is the consequence thereof.

b) Whether the Respondents violated the rules of natural justice in hearing the appeals.

c) Whether the appeals were heard in contravention of the applicable law and procedure.

d) Whether the Applicant has demonstrated a case for the grant of judicial review orders.

e) Who shall bear costs of the application.

G. THE APPLICABLE LAW

10. The application for judicial review was brought pursuant to **Sections 8 and 9** of the **Law Reform Act (Cap. 26)** and **Order LIII** of the **Rules.** At the time of institution of the proceedings the legal regime of judicial review was governed by the said provisions of the law the former of which incorporated the English Common Law. The purpose of judicial review was summarized in the case of **Municipal Council of Mombasa V Republic & Umoja Consultant Limited [2002] eKLR** as follows:

> **"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."**

11. 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."**

12. The main principles to be considered in an application for judicial review were propounded in the Ugandan case of **Pastoli V Kabale District Local Government Council & Others [2008] E.A. 300 at 303-304** 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 or procedural impropriety. See *Council of Civil Service Union v Minister for the Civil Service [1985] A.C.2* and also *Francis Bahikirwe Muntu and Others Vs Kyambogo University, High Court, Kampala, Miscellaneous application number 643 of 2005 (UR).***
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> **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 the 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 exercise jurisdiction to make a decision *(Al-Mehdawi V Secretary of State for the House Department [1990] AC 876)*."**

H. ANALYSIS AND DETERMINATIONS

a) Whether Appeal Nos. 146 of 1996 and 171 of 1996 were filed out of time

13. The court has considered the material on record and the submissions of the parties on this issue. Even though the Applicant contended that the appeals were filed out of time there was no demonstration of this allegation. The Applicant seemed to rely on the fact that the appeals had reference numbers bearing 1996. The court does not agree that the mere fact that a case number bears a reference incorporating 1996 is conclusive evidence that it was filed in that year. That does not always hold true even within the judiciary.

14. The Interested Party has, on the other hand, exhibited copies of the appeal and payment receipt which indicates that *Appeal No. 146 of 1996* was filed within time. The Applicant did not contend that those documents were forgeries. In fact, there is no indication on record to demonstrate that the Applicant filed a further affidavit disputing the genuinness of the Interested Party's said exhibits. The court has also considered the letter dated 30th June 2020 from the Director of Land Adjudication and Settlement on the issue together with its attachments which indicated that both appeals were filed within the statutory period. The court is satisfied that the appeal was duly filed within time and that the assignment of the appeal numbers was an internal administrative matter on the part of the Minister. It is interesting that the Applicant is taking issue with the validity of *Appeal No. 171 of 1996* whereas he was the *Appellant* in the matter.

15. Even if the appeals had, in fact, been filed out of time that would not necessarily invalidate the appeals. It was held by the Court of Appeal **in Watuku Mutsiemi & Another V Republic and 5 Others [2018] eKLR** that an objection to the Minister's jurisdiction should be taken at the earliest opportunity and that the aggrieved party had to demonstrate the prejudice suffered by such late filing. In the instant case, there is no evidence that any such objection was taken before the Minister. Equally, the Applicant did not demonstrate that he suffered any prejudice.

b) Whether the Respondents violated the rules of natural justice

16. The court has considered the material and submissions on record on this issue. Apart from a bare statement in paragraph 17 of the Applicant's statutory statement, there was no demonstration whatsoever of how the Minister allegedly violated the rules of natural justice. The verifying affidavit did not provide any particulars or demonstration of the alleged violation either. It was not demonstrated or even alleged that the Applicant had been denied a hearing. It was not alleged or demonstrated that the Minister was biased or that he had a personal interest in the appeals. The proceedings in the two appeals show that the concerned clans were accorded an opportunity of calling and cross-examining witness. Accordingly, the court finds and holds that this allegation has not been proved.

c) Whether the appeals were heard in contravention of the applicable law and procedure

17. The Applicant contended that the Minister erred in conducting the appeals as if they were fresh claims. The Minister was faulted for taking evidence and visiting the suit property before determining the appeals. It is interesting that the Applicant did not in either his statutory statement or verifying affidavit identify a single statutory or procedural provision which was allegedly violated by the Cabinet Secretary. The Applicant's advocates did not in their written submissions point out any procedural or statutory provisions of the law which were allegedly violated.

18. The statutory right of appeal to the Minister is governed by **Section 29** of the **Land Adjudication Act (Cap. 284) Section 29 (1)** of the Act stipulates as follows:

> **"(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—**
>
> **(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and**
>
> **(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."**

19. It is thus apparent that **Section 29** does not provide for any particular procedure to be followed by the Minister in the hearing of the appeal. The court agrees with the Attorney General's submissions that such procedural aspects are left to the discretion of the Minister. The law does not require the Minister to either take evidence or to refrain from taking evidence. Accordingly, the taking of evidence or a site visit cannot deprive the 1st Respondent of jurisdiction to entertain and determine an appeal. It is also noteworthy that the concerned clans actively took part in the appeal by calling and cross-examining witnesses. It would be utterly hypocritical for the Applicant to turn round after determination of appeal to condemn the process he participated in.

20. The court has perused the decision of the Land Adjudication Officer dated 11th November 1992 which precipitated the two appeals to the Minister. It is clear that apart from setting aside 26 portions of land for various public utilities and purposes, the Land Adjudication Officer did not allocate definite portions to the 17 clans of the Mbeere tribe. He merely declared that he had awarded parcel 2244 *jointly* to the seventeen (17) clans which he then listed by name.

21. It would appear that each of the 17 clans were dissatisfied by the failure or omission by the Land Adjudication Officer to distribute or allocate specific portions of land to each one of them hence the appeals. The court finds nothing wrong in the actions which the clans took in lodging appeals to the Minister. Even though they had no problem in the decision awarding them parcel 2244 yet they were aggrieved by the failure of the Land Adjudicating Officer to distribute it amongst the 17 clans.

d) Whether the Applicants have demonstrated a case for the grant of judicial review orders

22. Although the Applicant challenged the 1st Respondent's decisions on several grounds, the court is not satisfied that the Applicant has

demonstrated any of the grounds. The mere fact that the 1st Respondent did not give specific reasons for declining the Applicant's claim for 269 acres could not, without more, constitute a ground for judicial review. The two appeals in question were heard and determined before the **Fair Administrative Action Act, 2016** came into existence. Prior to its enactment, there was no specific legal requirement for the 1st Respondent to give reasons.

23. The court finds that the Applicant's claim for allocation of 269 acres of *Kiandangwa* to be legally untenable for at least two reasons. First, there is absolutely no evidence on record to demonstrate that the Applicant or his clan is entitled to the 269 acres of land. The basis of the claim was not demonstrated either in the statutory statement or the verifying affidavit. Second, the legal mandate of adjudicating and allocating land rests with the officers and institutions set out in the **Land Adjudication Act (Cap. 284).** A court of law has not business usurping the powers of such officers and institutions.

24. In the case of **Lucy Mirigo & 550 Others V Minister for Lands & 4 Others [2014] eKLR** the Court of Appeal held that a court of law should be reluctant to usurp the role of administrators in the allocation of resources amongst competing interests. The court held, *inter alia*, that:

> **"In the case of *R – v- Lancashire County Council Ex p Gayer (1980) 1 WLR 1024* it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in *R –v- Lachashire County Council Ex p Gayer (supra)* and observe that it is not the duty of the courts to allocate land and decide how national resources are to be allocated between competing claims."**

25. Having considered the entire material on record, the court is of the opinion that the Applicant is really aggrieved by the merits of the Minister's decisions in the two appeals hence the reason he sought to have them overturned. It would thus appear that the Applicant is mounting an appeal against the Minister's decisions in the two appeals through the back door. **Section 29** of the **Land Adjudication Act** is clear that the decision of the Minister on appeal is final. The legislature did not provide an avenue of a second appeal even though the remedy of judicial review may be available on the decision making process as opposed to the merits of the decision itself. However, on the basis of the material on record the Applicant has failed to demonstrate any of the grounds for judicial review hence he is not entitled to the orders sought or any one of them.

e) Who shall bear the costs of the application

26. Although costs of an action or proceeding 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).** Accordingly, the successful party should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA. 287.** The court finds no good reason why the successful parties should be deprived of costs of the suit. Accordingly, the Respondents and the Interested Party shall be awarded costs of the judicial review application.

I. SUMMARY OF THE COURT'S FINDINGS

27. In summary, the court makes the following findings and holdings on the issues for determination:

a) The Applicant has not demonstrated that *Minister's Land Appeal Case Nos. 146 of 1996* and *171 of 1996* were filed out of time. On the contrary, there is ample evidence on record to demonstrate that they were filed within time.

b) There was no demonstration that the Respondents violated the rules of natural justice in the hearing and determination of the two appeals.

c) There was no evidence to demonstrate that the two appeals were heard in contravention of the applicable law and procedures.

d) The Applicant has failed to demonstrate a case for the grant of the judicial review orders sought.

e) The Respondents and the Interested Party shall be awarded costs of the action.

J. CONCLUSION AND DISPOSAL ORDERS

28. The upshot of the foregoing is that the court finds no merit in the application for judicial review. Accordingly, the Applicant's notice of motion dated 8th February 2008 is hereby dismissed in its entirety with costs to the Respondents and the Interested Party. For the avoidance of doubt any orders of stay in force are hereby vacated.

29. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **27TH DAY** of **JULY, 2020** delivered via Microsoft Teams platform in the presence of Mr. Morara Omoke for the Applicant, Mrs. Njoroge for the Attorney General for the Respondents and Ms. Nzekele holding brief for Mr. Okwaro for the Interested Party.

Y.M. ANGIMA

JUDGE

27.07.2020