



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. MISC APPLICATION NO. 5 OF 2020 (JR)

**IN THE MATTER OF AN APPLICATION BY DANSON KIRUNYU REPRESENTED BY DEDAN MAINA GATHARA TO
APPLY FOR AN ORDER 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. 398 OF 2011 IN WACHORO ADJUDICATION SECTION

AND

IN THE MATTER OF LAND PARCEL NO. WACHORO/1180 IN

WACHORO ADJUDICATION SECTION, MBEERE SOUTH SUB-COUNTY,

EMBU COUNTY

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT

BETWEEN

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

MARY WANDAMA GACHOKI.....INTERESTED PARTY

DANSON KIRUNYU REPRESENTED BY

DEDAN MAINA GATHARA.....EX PARTE APPLICANT

JUDGEMENT

A. INTRODUCTION

1. By an *ex-parte* chamber summons dated and filed on 10th March 2020 expressed to be brought under **Order 53 Rules 1 & 2 of the Civil Procedure Rules (the Rules), Section 9 of the Law Reform Act (Cap. 26) and Section 29 of the Land Adjudication Act Cap. (284)** the *ex-parte* Applicant (*the Applicant*) sought leave to apply for the following orders:

a) *Spent.*

b) *That leave be granted to the Applicant to apply orders of certiorari to call to this court and to quash the decision of the 1st Respondent, the Cabinet Secretary for Lands dated 13th February 2020 in Minister's Land Appeal Case No. 398 of 2011 in respect of land Parcel No. Wachoro/1180 in Wachoro Adjudication Section, Mbeere South Sub-County, Embu County in which land parcel No. Wachoro/1180 was awarded to Nyamu Njagi (deceased) represented by Mary Wandama Gachoki that is the Interested Party herein.*

c) *That leave be granted to the Applicant to apply for orders of prohibition to prohibit the 1st and 2nd Respondents and the Interested Party from implementing the decision dated 13th February, 2020 in Minister's Land Appeal Case No. 398 of 2011 in respect of land Parcel No. Wachoro/1180 in Wachoro Adjudication Section, Mbeere South Sub-County, Embu County, by registering the said land in the name of the Interested Party and/or issuing a Title Deed to the Interested Party.*

d) *That the said leave do operate as stay of the implementation of the Minister's decision dated 13th February, 2020 in Minister's land Appeal Case No. 398 of 2011 in respect of land parcel No. Wachoro/1180, that is to say that the registration of land parcel No. Wachoro/1180 in the name of the Interested Party and the occupation of the land by the Interested Party pursuant to the said decision be stayed pending the filing of the main motion for judicial review, the hearing and determination of the same.*

e) *That leave be granted to the Applicant to apply for judicial review orders of mandamus to issue, compelling the 2nd and 3rd Respondents to register the *ex parte* Applicant as owner of land parcel No. Wachoro/1180 in Wachoro Adjudication Section, Mbeere South Sub-County and consequently issue him with title deed for the said parcel of land.*

f) *That costs of this application be provided for.*

2. The said application was heard *ex-parte* on 11th March 2020 when the court granted leave for the Applicant to apply for orders of *certiorari* and *prohibition* only. The court declined to grant leave with respect to an order of *mandamus* since the same was not anchored in the statutory statement filed with the chamber summons. The court directed the Applicant to file the substantive notice of motion within 21 days and serve it upon all affected parties and file an affidavit of service.

3. When the matter was listed for directions on 14th May 2020, the Applicant had not complied with the directions as to filing and service of the substantive motion. As a consequence, the court extended the time for compliance and directed the Applicants to comply within 14 days in default of which the leave granted on 11th March 2020 would lapse automatically. The record shows that the judicial review motion was ultimately filed on 27th May 2020.

B. THE APPLICANT'S CASE

4. By a notice of motion dated 21st May 2020 brought under **Order 53 Rule 3 of the Rules**, the Applicant sought the following reliefs:

a) *That an order of certiorari to call to this court and to quash the decision of the 1st Respondent, the Cabinet Secretary for Lands dated 13th February, 2020 in Minister's Land Appeal Case No. 398 of 2011 in respect of land parcel No. Wachoro/1180 in Wachoro Adjudication Section, Mbeere South Sub-County, Embu County in which land parcel No. Wachoro/1180 was awarded to Nyamu Njagi (deceased) represented by Mary Wandama Gachoki that is the Interested Party herein.*

b) *That an order of prohibition to prohibit the 1st and 2nd Respondents and the Interested Party from implementing the decision dated 13th February, 2020 in Minister's Land Appeal Case No. 398 of 2011 in respect of land parcel No. Wachoro Adjudication Section, Mbeere South Sub-County, Embu County, by registering the said land in the name of the Interested Party and/or issuing a Title deed to the Interested Party.*

c) *That the costs of this application be provided for.*

5. The said motion was grounded upon the statutory statement and verifying affidavit filed with the *ex parte* chamber summons for leave to apply for judicial review. The Applicant challenged the decision of the 1st Respondent on appeal on the following grounds:

a) *That the Interested Party did not have locus standi to file the appeal since she had not obtained a grant to the estate of her deceased husband.*

b) *That the decision was biased and whimsical.*

c) *That the decision was based on irrelevant considerations.*

- d) *That it was irrational and based on errors of fact and law.*
- e) *That it was not supported by the evidence on record.*
- f) *That the Interested Party did not file any grounds of appeal as required by law.*

C. THE RESPONDENTS' AND INTERESTED PARTY'S RESPONSE

6. The Respondents and the Interested Party did not any response to the application for judicial review. It is not clear whether or not they were properly served as directed by the court on 14th May 2020. The court shall examine the issue of service in depth later in the judgement.

D. DIRECTIONS ON SUBMISSIONS

7. When the matter was listed for directions on 14th May 2020 it was directed that the judicial review application shall be canvassed through written submissions. The Applicant was given 14 days to file and serve his written submissions upon the lapse of the period granted to the Respondents and the Interested Party to file their responses to the application. The Respondents and the Interested Party were granted 14 days upon the lapse of the Applicant's period to file their submissions. The Applicant was further directed to extract and serve the orders made on 14th May 2020 upon the Respondents and the Interested Party within 21 days.

8. The material on record shows that none of the parties had filed written submissions by the time of preparation of the judgement. The record further shows that the Applicant never extracted the orders made on 14th May 2020 hence the Respondents and the Interested Party were never served with the orders made on 14th May 2020 as directed by the court.

E. THE ISSUES FOR DETERMINATION

9. The court has considered the Applicant's notice of motion dated 21st May 2020, the affidavit in support thereof, the statutory statement, verifying affidavit and the documents on record. The court is of the opinion that the following issues arise for determination in this matter:

- a) *Whether the Applicant duly served the Respondents and the Interested Party as directed by the court and, if not, what is the consequence thereof.*
- b) *Whether the Applicant complied with the directions on service of the orders made on 14th May 2020 and, if not, what is the consequence thereof.*
- c) *Whether the Interested Party had locus standi to institute or prosecute the appeal before the Minister.*
- d) *Whether the Applicant has made out a case for the grant of the judicial review orders sought.*
- e) *Who shall bear the costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a) Whether the Applicant duly served the application upon the Respondents and the Interested Party

10. The court has perused the affidavit of service sworn by one Francis Nyakeoga Ongati on 12th June 2020 which was filed by the Applicant on 16th June 2020. The process server stated that he received a copy of the judicial review application dated 21st May 2020 from the Applicant's advocates on 29th May 2020 with instructions to serve the Respondents and the Interested Party. He deponed that on 3rd June 2020 he visited Ardhi House in Nairobi where the offices of the 1st, 2nd and 3rd Respondents are located and served an unnamed secretary who purportedly received the application on behalf of the 1st, 2nd and 3rd Respondents.

11. The 1st Respondent is the Cabinet Secretary for Lands, the 2nd Respondent is the Director of Land Adjudication and Settlement whereas the 3rd Respondent is the Chief Land Registrar. The court is not satisfied that the three Respondents share a common secretary. The stamp appearing on the copy of the notice of motion simply reads "Ministry of Lands and Physical Planning". It does not refer to either the 1st, 2nd or 3rd Respondents. This being a judicial review application, the cited Respondents must be served separately or through the Office of the Attorney General. There is also no indication that copies of the chamber summons for leave, statutory statement and verifying affidavit were served since they are not captured in the affidavit of service. The court therefore, finds that there was no proper service upon the 1st, 2nd and 3rd Respondents.

12. It is evident from the affidavit of service that the Interested Party was not served at all. The process server made only one attempt at service after which he gave up. There was no application for substituted service after the Applicant failed to serve the Interested Party. Accordingly, the court finds that there was no service of the application at all upon the Interested Party.

13. The next aspect for consideration is the consequence of failure to serve or to properly serve the Respondents and the Interested Party. The court is of the opinion that those parties were not accorded an opportunity of being heard as required by the rules of natural justice. There was an express order for the Applicant to serve them but the Applicant did not fulfil that obligation as required under the Rules.

Accordingly, the court is of the opinion that the appropriate sanction for such default is striking out of the application for judicial review.

b) Whether the Applicant complied with directions on service of the orders made on 14th May 2020, and if not, the consequence thereof

14. The material on record indicates that when the court gave directions on the hearing of the application for judicial review on 14th May 2020 it directed the Applicant to extract the orders made and serve them upon the Respondents and the Interested Party within 21 days. The record shows that those orders were never extracted within time or at all. Service of the orders was meant to inform the Respondents and the Interested Parties of the directions made so that they may comply therewith. It is apparent from the affidavit of service on record that the process server was never given the orders of 14th May 2020 to serve them as directed by the court.

15. In the circumstances, the court finds that the Applicant once again failed to comply with specific directions given by the court. Such failure runs contrary to the overriding objectives of the **Civil Procedure Act (Cap. 21)** as stipulated in **Sections 1A** and **1B** thereof. Accordingly, the court is of the opinion that the appropriate sanction for such violation is the striking out of the application for judicial review.

c) Whether the Interested party had locus standi to institute the appeal without a grant to the estate of the deceased

16. Since the court has found that the Applicant has failed to comply with the two orders meant to facilitate a just, effective and timely resolution of the judicial review application, it shall not be necessary to determine the application on merit. The court has already held that the sanction to be imposed is striking out. However, since this is purely a matter of law, the court shall express its opinion thereon.

17. The court is of the opinion that there is no legal requirement for a person to take out a grant of letters of administration or grant of probate before pursuing an appeal before the Cabinet Secretary under **Section 29** of the **Land Adjudication Act (Cap. 284)**. In the case of **Dominic Musei Ikombo V Kyule Makau [2019] eKLR** the Court of Appeal when faced with a similar question 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”

Accordingly, the court finds nothing wrong with the institution and prosecution of the appeal by the Interested Party before the Cabinet Secretary.

d) Whether the Applicant has made out a case for the grant of judicial review orders

18. For reasons given on the 1st and 2nd issues, the court finds that it not necessary to delve into the merits of the judicial review application. There can be no proper trial on the merits where no proper service was effected upon all the concerned parties.

e) Who shall bear the costs of the application

19. Although the 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)**. However, in view of the fact that the Respondents and the Interested Party were not properly served and they did not enter appearance, the court is of the opinion that there should be no order as to costs.

G. CONCLUSION AND DISPOSAL ORDER

20. The upshot of the foregoing is that the court finds and holds that there was no proper service of the application for judicial review upon the Respondents and the Interested Party. The court also finds and holds that there was no service of the orders made on 14th May 2020 upon the Respondents and the Interested Party. Accordingly, the Applicant’s notice of motion dated 21st May 2020 is hereby struck out with no order as to costs under the inherent power of the court. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **27TH DAY** of **JULY, 2020** and delivered via Microsoft Teams platform in the presence of Ms. Nzekele holding brief for Vusha Onsembe Advocates and in the absence of the Respondents and the Interested Party.

Y.M. ANGIMA

JUDGE

27.07.2020