



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL NO. 3 OF 2011 JR

KIMACHIA FARMERS CO-OP SOCIETY.....APPLICANT

VERSUS

LAND ADJUDICATION OFFICER, TIGANIA WEST.....RESPONDENT

ROBERT RUKUNGA.....INTERESTED PARTY

J U D G M E N T

1. The Notice of Motion in this suit is brought to Court under Order 53 Rules 3 and 4 of the Civil Procedure Rules, Sections 8 and 9 of the Law Reform Act, Cap 26, Laws of Kenya and all other enabling provisions of the law. The application seeks:-

1 (a) An order of Certiorari to remove into this Honourable Court and quash the undated decision made by the land Adjudication Officer, Tigania West awarding 3 acres of land out of parcel No. 1322 to Robert Rukunga, the interested Party herein.

(b)An Order of Prohibition directed at the Land Adjudication Officer, Tigania West, the Respondent herein, prohibiting him from implementing the decision made in Objection No. 773 of 2010 wherein he awarded the Interested Party 3 acres out of parcel No. 1322 to Robert Rukunga, the Interested Party herein.

2. The costs of this application be provided for.

3. This application is supported by the grounds on the statement of facts and the Verifying Affidavit of the Applicant filed during leave stage and has the following grounds:-

(1) THAT the Exparte Applicant is the legal owner of parcel No. 1322 Uringu 11 Adjudication Section measuring 8 acres and have been utilizing and developing the same to date.

(2) THAT the interested party herein lodged an objection No. 773 with the Respondent which Objection was heard and decision was made awarding the Interested Party herein 3 acres out of Parcel No. 1322 Uringu 11 Adjudication Section.

(3) THAT the respondent acted in error of law and ultra vires the powers granted to him by failing to constitute a committee to hear the said objection as provided for under the provisions of Section 6 Cap 283 Laws of Kenya.

(4) THAT the respondent violated rules of Natural Justice by failing to give the Exparte Applicant adequate notice of the hearing of the said objection.

(5) THAT the Respondent acted in breach and violation of Rules of Natural Justice by failing to give the Exparte Applicant an opportunity of being heard before arriving at it's decision.

(6) THAT the respondent acted unprocedurally and in abuse of the powers bestowed upon him by making a decision in reliance of proceedings that had already been nullified.

(7) THAT the decision and or award made by the 1st Respondent is null and void and the same ought to be quashed.

4. On 19th January, 2011 the Hon Lady Justice Kassango, Judge, granted the following orders:-

(1) THAT , the applicant herein KIMACHIA FARMERS COOPERATIVE SOCIETY LTD be granted leave to apply for an Order of Certiorari to remove into the High Court and quash the decision made by the Land Adjudication Officer, Tigania West, awarding 3 acres out of parcel No. 1322 to Robert Rukunga, the interested party herein.

(2) THAT the Applicant be granted leave to apply for an Order of Prohibition to prohibit the Land Adjudication Officer, Tigania West, the Respondent herein from implementing the decision made in objection No. 773 of 2010 wherein he awarded the Interested Party 3 acres out of Parcel No. 1322, Uringu 11 Adjudication Section.

(3) THAT grant of the leave do operate as a stay of the said order in question made by the Land Adjudication Officer, Tigania West, until the determination of the application for Orders of Certiorari and Prohibition.

(4) THAT costs of this application be costs in the cause.

5. The Interested Party opposed the application through his Replying Affidavit sworn on 26th April, 2011 and filed on 27th April, 2011. The Affidavit states as follows;

“I, Robert Rukunga, of C/O P.O Box 2387 do hereby make oath and states as follows;

(1) That I am the Interested Party herein conversant with the matter.

(2) That I occupied in (sic) subject herein in 1960.

(3) That in 1967 I had a land case over the same subject parcel of land with M'ARITHI KAILIBA the father of FRANCIS MWORIA and I defeated him.

(4) That in 1967 I donated 5 acres to MIATHENE/KALIATI FARMERS CO-OPERATIVE SOCIETY LTD.

(5) That on 06/09/1989 the 5 acres were demarcated at Kimachia Factory as P/No. 1322 and my P/No. 2057 was demarcated next to Kimachia Factory which they removed later in 1993 and replaced with 3 acres from P/NO. 1311 from Aluchema Pry School to Kimachia Factory.

(6) That I wrote to District Land Adjudication Officer on 15/09/1994 and he promised to return my 3 acres during the E.R. time.

(7) THAT the acres aforesaid was (sic) placed on my ground and my 3 acres taken else where so that the factory could claim my land (3 acres) more on top of 5 acres I gave them.

(8) That I challenged the said arbitrary act and through objection herein my 3 acres were returned to preserve locus in Quo (same place they purported to remove them) and given P/No. 4975 in implementation of the award herein.

(9) That I have been in occupation and use of the same place since 1960s. I have fenced, piped water and water pump as I have also been cultivating and growing various crops.

(10) That in implementation of the award herein, I was shown the ground now P/NO. 4975 on 14/12/2010.

(11) That we were heard in accordance with law and were accorded fair hearing.

(12) That the Secretary manager of the Kimachia Co-operative Society Factory (Applicant) is also a member of the Committee which hears disputes of land together with the District Adjudication office.

(13) That the matter was heard by Land Adjudication Officer with mandate to hear the same and made decision on evidence tendered.

(14) That the other allegations of nullified proceedings and incompetence of the Presiding Officer are figment of Applicant's imaginations .

(15) That what is deponed to herein is true to my best knowledge, information and belief.

6. The Exparte Applicant filed its Written Submissions dated 19th May, 2015, through the Firm of J. Nelima Associates and Company.

7. The Interested Party filed his Written Submissions dated 9th, July, 2015, through the Firm of Charles Kariuki & Kiome Associates.

8. On 5th May, 2015, the Respondent filed his grounds of opposition dated 28th April, 2015. He stated as follows:-

“TAKE NOTICE that the Respondent herein shall at the hearing of the Notice of Motion dated 7th February, 2011 oppose the same on the grounds:-

i. The motion filed herewith lacks merit, is mischievous and an abuse of Court process.

ii. The orders sought against the Respondent are untenable and cannot issue.

iii. Judicial Review orders are discretionary and can be denied even when merited .

REASONS WHEREFORE the Respondent herein prays that the Notice of Motion dated 7th February, 2011 be dismissed with costs.

9. The Respondent filed his Written Submission dated 28th April, 2015 on 5th May, 2015.

10. The Exparte Applicant submits that his application should succeed because the apposite objection was not heard by the District Land Adjudication and Consolidation Officer (DLASO) with the assistance of the Committee. He says that the proceedings do not indicate whether a Committee was constituted or not as they do not indicate the names of the Committee members present or their number. He opines that it is not enough to just state that the parties were cross-examined by a Committee. The Exparte Applicant proffers HCC Misc. 101 of 2008, in support of his assertion that the presence of a Committee is mandatory.

11. The Exparte Applicant submits that the Respondent violated Rules of Natural Justice by failing to give the Exparte Applicant adequate notice of the hearing date of Objection No. 773 of 2010 on 9th March, 2010. The Exparte Applicant claims that the Respondent called the disputants on 9th March, 2010 to his office and forced them to proceed with the objection proceedings. He reiterates that he was not accorded a fair hearing as he was not allowed time to prepare for the proceedings.

12. The Exparte Applicant also submits that the parties had already been heard by a DLASO who was transferred. He argues that the new DLASO should have heard the case afresh. For this reason, he submits that all parties had not been accorded a fair hearing. He claims that the decision made by the DLASO relied on incomplete proceedings.

13. The Exparte Applicant claims that after the Applicants had complained that the apposite proceedings were incomplete, the DLASO agreed to re-start the process afresh and served the Applicants with fresh summons dated 4th November, 2010. After perusing the records in this file, I am unable to establish the veracity or integrity of this claim.

14. The Respondent submits that annexure "RK4" of the Exparte Applicant's Verifying Affidavit shows that a Committee participated in the proceedings and cross-examined the parties. He asserts that the Exparte Applicant is insincere and only wishes to mislead the Court. For this reason, he opines that the Exparte Applicant's ground germane to this issue fails.

15. Concerning the Exparte Applicant's grounds numbers 2 and 3 that he was not given adequate notice or an opportunity to be heard the Respondent submits that this ground lacks merit in that the Exparte Applicant has neither annexed the alleged hearing notice concerning a fresh hearing of the objection nor given evidence showing the date he was notified and the new date when the matter was to be heard. The Respondent points out that the proceedings annexed by the Exparte Applicant show that one Robert Kirimana, the Exparte Applicant's factory Secretary participated in the proceedings on its behalf.

16. The Respondent submits that the Exparte Applicant's representative participated extensively in the proceedings and even Cross-Examined the Objector. The Respondent asserts that this being the case, the Exparte Applicant can not be heard to say that he was forced to participate in the proceedings and especially when its representative put a thumb imprint on the record of proceedings once he was through with his evidence. The Respondent further states that the Exparte Applicant does not demonstrate what prejudice he suffered as a result of the alleged short notice. The Respondent submits that the Exparte Applicant's grounds 2 and 3 fail.

17. With regard to ground 4 that the Respondent acted unprocedurally by relying on nullified proceedings, the Respondent opines that this ground is an afterthought and an attempt to revive a hopeless claim. The Respondent points out that the Exparte Applicant relies on annexure "RK5" in paragraph 14 of the Verifying Affidavit dated 18th January, 2010. He says that the said annexure is a letter dated 9th July, 2010 addressed to the DLASO seeking to have A/R Objection 773 heard afresh. The Respondent argues that the letter does not constitute evidence of nullification of proceedings as suggested by the Exparte Applicant's Verifying Affidavit. The Respondent opines that, in any event, the issues raised in the letter go to the merits whose consideration fall outside the purview of Judicial Review.

18. Regarding the order of prohibition, the Respondent laconically submits that it can not issue as the decision being challenged has already been issued. He argues that Prohibition looks into the future and not in the past. He asserts that as there is nothing to be prohibited, a Court of law cannot issue orders in vain. He says that once the apposite objection was allowed, a new parcel was created to implement the decision. He also proffers that, in any case, implementation is a process of execution of a decision on the ground, which role is performed by a Demarcation Officer who is not party to these proceedings. He also argues that implementation cannot amount to a decision that can be prohibited.

19. The Respondent submits that upon weighing the apposite evidence, taking into account that he had demonstrated that he had done all that was expected of him, this Court should not exercise its judicial Review discretion in favour of the Exparte Applicant.

20. The Interested Party has submitted that annexure "RK4" to the Exparte Applicant's Verifying Affidavit shows that he fully participated in the impugned proceedings. He also states that "RK5" alluded to in paragraph 14 of the Verifying Affidavit dated 18th January, 2016 does not amount to evidence of nullification or illegality of the proceedings which spawned the decision being challenged by the Exparte Applicant.

21. The Interested Party submits that a Judicial Review application can only succeed where an Applicant satisfies the Court that a Public Officer has acted unprocedurally, that his decision was unreasonable and that the apposite process was illegal.
22. The Interested Party reiterates that the Exparte Applicant was accorded fair hearing during the proceedings and Rules of Natural Justice were not breached.
23. Regarding the Order of Prohibition, it is unmerited as a new parcel was created after the challenged decision was issued and, therefore, there was nothing to be prohibited.
24. I have carefully considered the pleadings and the Submissions proffered by the parties. I have also carefully considered the one authority proffered by the Exparte Applicant which is MERU HCC MISC. APPLICATION 101 OF 2008.
25. I opine that MERU HCC MISC APPLICATION 101 OF 2001, is good law and authority in its circumstances and facts. In this case the DLASO had referred the apposite dispute to a clan, contrary to the applicable law. I do not agree that non exhaustive numbering of Committee members is evidence of the non-participation of a Committee or the non-appointment of the 25 persons from whom a Committee is constituted by the DLASO. Suffice it to say that the circumstances apposite to MERU HCC MISC. APPLICATION 101 OF 2008 and this case are diametrically distinguishable.
26. I do find that the Exparte Applicant, through his representative, robustly participated in the challenged proceedings. He cross-examined the Interested Party.
27. Regarding the Submission that the Exparte Applicant was not given adequate hearing notice, I find that he has failed in his pleadings and in his submissions to satisfy the Court that this was the case.
28. Concerning the Submission that the Respondent had acted in error of law and ultravires the powers granted to him by failing to constitute a Committee to hear the apposite Objection as required by the law, I find that the Exparte Applicant has not satisfied the Court that no Committee participated in the proceedings. There is clear evidence that a Committee participated in the proceedings.
29. I do not agree that the Respondent acted in breach and violation of Rules of Natural Justice by failing to give the Exparte Applicant an opportunity of being heard before he arrived at his decision. As I have already said, the Exparte Applicant, through its representative participated in the proceedings that spawned the challenged decision. I do note that the Exparte Applicant has not claimed that the Respondent was biased.
30. Regarding the Exparte Applicant's ground that the Respondent acted unprocedurally and in abuse of the powers bestowed upon him by making a decision in reliance of proceedings that had already been nullified, I find that no evidence has been proffered in support of this claim. Annexure "RK5" to the Exparte Applicant's Verifying Affidavit is a letter addressed to the DLASO, Tigania West by one Robert Kiriamana, the Secretary Manager of the Exparte Applicant. It sought to persuade the DLASO to hear the apposite objection. The letter does not, by whatever stretch of imagination, constitute evidence that the DLASO had nullified the proceedings of 07/03/2010.
31. For the reasons proffered above, I find myself unable to exercise the Courts Judicial Review discretion to grant the orders of Certiorari and prohibition sought by the Exparte Applicant.
32. I find it necessary to deal with one other issue. *Prayer 1 (a)* in the Exparte Applicant's application refers to an "*undated decision made by the Land Adjudication Officer, Tigania West*". Whereas the Exparte Applicant may have genuinely thought that the decision was undated, it should have, through its representative known the date on which the DLASO's decision was made. In the letter written to the DLASO by Robert Kiriamana, the Exparte Applicant's Secretary Manager, (op. Cit), it is pellucidly made clear that the challenged Judgment was delivered on 03/07/2010.

33. The refusal to disclose the date of the challenged decision was made to circumvent a legal requirement. Order 53, Rule 2 of the Civil Procedure Rules prescribes as follows:-

Order 53(2):

“Leave shall not be granted to apply for an order of Certiorari to remove any Judgment, Order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of an appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

34. A plethora of cases have definitively decided that Judicial Review proceedings are *sui Generis* and an Applicant must pay obeisance to the requirements of Order 53 of the Civil Procedure Rules and the requirements of the Law Reform Act. The requirement to seek leave within 6 months of the process being challenged is not a procedural technicality. It is a legal imperative.

35. In the Circumstances, this application is dismissed. Any stay granted at the Leave stage is vacated.

36. Costs are awarded to the Respondent and to the Interested Party.

DELIVERED IN OPEN COURT AT MERU THIS 14th DAY OF SEPTEMBER, 2016 IN THE PRESENCE OF:-

CC: Daniel/Lilian

Miss Kiome for Interested Party

Kimathi for Respondent

P. M. NJOROGE

JUDGE