



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. 12 OF 2014

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND ADJUDICATION

OFFICER TIGANIA EAST DISTRICT.....RESPONDENT

M'TWAMWARI PAUL KANGERI.....1ST INTERESTED PARTY

MARIMBA ANAMPIU

ALIAS JACOB MARIMBA.....2ND INTERESTED PARTY

JOSEPH NTONGAI.....3RD INTERESTED PARTY

EX-PARTE APPLICANT

JULIUS MARETE IBUTU

JUDGMENT

1. Leave was granted to the ex-parte applicant to file his substantive motion on 7th May 2014. He filed the same on 27th May 2014 seeking the following orders;

(a) An Order of certiorari to remove and quash the whole of the Respondent's proceedings, findings and order in objection No. 798 made on 6/2/2014 referring to R.E.R folio No. 524 and affecting land parcel No. 1527 Akaiga Land Adjudication Section.

(b) An order of prohibition to prohibit implementation of the Respondent's decision and orders in objection No. 798 made on 6/2/2014 referring to subdivisions of land R.E.R. folio No. 524 affecting land parcel No. 1527 Akaiga Land Adjudication Section.

2. The 3rd interested party filed an application to be enjoined in these proceedings on 11.7.2014 of which the said application was allowed on 18.9.2014. During the trial, the exparte applicant passed on and an application dated 20.9.2019 for his substitution was filed, and the same was allowed on 20.1.2020. Thus Priscilla Nkirete Marete is the legal representative of the initial exparte applicant.

3. It is also noted that the 3rd interested party had filed two preliminary Objections dated 6.10.2014 and 27.6.2019, while the exparte applicant filed the preliminary Objection dated 8.11.2017. All these preliminary objections were abandoned on 20.1.2020 to pave way for the hearing of the main suit.

4. The **Exparte applicant** contends that the 2nd interested party gathered 13.34 acres of land, which were entered in the Records of Existing Rights (R.E.R.) as folio no 524 in Akaiga Adjudication Section. That the exparte applicant purchased all the 13 acres from the 2nd interested party through objection No. 1242 (6 acres), Objection 1254 (4 acres) and objection No. 1260 (3 acres). Subsequently all these parcels were demarcated to him and were registered as Parcel No. 1527 measuring 12.04 acres after percentage cuts for public utility.

5. However, 37 years later and after the adjudication register was completed, the 1st Interested party filed an objection against his five

relatives among them, the 2nd interested party stating that his deceased father **Paul M' Twamwari** had said that all the 13.27 acres of land gathered in 1970s were to be returned back and shared with each of their children. All the five respondents in the objection case agreed with him.

6. That the respondent either by design or collusion failed to consider the status of each of the said parcels. That the 1st interested party objection was not within the purview of **Section 26 (1) of the land Consolidation Act**. That the respondent's order directing the Demarcation officer to nullify all subdivisions affecting all the parcels which were subject to that objection reveals that he was aware subdivisions had been done affecting persons other than the respondents therefore his handling of the objection was unfair, unreasonable and against the rules of natural justice especially with regard to the applicant's **parcel No. 1527 Akaiga Land Adjudication Section**. He also contends that he was not a party to the objection proceedings nor was he informed of the same.

7. The 2nd **Interested party** swore a replying affidavit dated 23rd June 2014 where he averred that he indeed sold all the acreage in folio No. 524 to the applicant. That the respondent had given consent to the aforesaid sale and transfer, resulting in **P/No. 1527**. He contends that the respondent dragged him into **Objection No. 798** during hearing of other eight (8) A/R objections without an explanation being issued to him.

8. The 3rd **Interested party, Joseph Ntongai** opposed the motion through his Replying affidavit dated 6th October 2014. He averred that he is a son of the 1st interested party who died on 27.2. 2014, hence these proceedings are misplaced and bad in law. He contends that no grant has been made in respect of his late father.

9. I have not seen any response to the main motion by the respondent but submissions have duly been filed by this party.

10. Parties agreed to canvass the suit through written submissions, of which the said submissions have duly been filed by all the parties.

11. **The applicant** submitted that under **Section 18 (3) of the Land Consolidation Act** it is mandatory that the land adjudication officer hears and decides the objection to any R.E.R -Fr/No with the aid of the Arbitration Board, but the respondent did not adhere to this provision of law. That the respondent also failed to adhere to the mandatory procedure prescribed under **section 26 (1) of the Land Consolidation Act** which means that the respondent single handedly determined the objection proceedings. Further, the exparte applicant avers that he was not given an opportunity to be heard notwithstanding that he was the absolute land owner of P/No. 1527.

12. In support of his arguments, the exparte applicant relied on the case of **Republic vs. The Honourable the Chief Justice of Kenya & Others; Exparte Moijo Ole Keiwua Nairobi HCMCA 1298 of 2004**.

13. The 2nd **interested party** submitted that the decision of the respondent should be quashed. This is because the applicant was an innocent purchaser of all rights and interest made in folio no. 524. That the respondent had no power to revisit the objections to folio No. 524 whose determination was made in the year 1982 when folio 524 was transferred to folio 1527.

14. The 2nd interested party also submitted that the proceedings and in particular the objector's statement during the hearing of 21.1.2014 did not make any reference to p/no. 524 nor folio no. 524. He further states that though he was the 5th respondent in the objection case, he never attended the hearing of 21. 1. 2014. He however did appear before the respondent where he was made to sign and thumb print on a document.

15. The 3rd **interested party** submitted that the ex-parte applicant was not a party to the Objection case No. 798, hence he was a stranger and he did not have locus to bring these Judicial Review proceedings. He contends that the said exparte applicant did not own any of the parcels mentioned namely; 2362, 319, 832, 979, 524, 418, 293, 1247, 116, 199 and 2955.

16. The 3rd interested party further avers that the documents availed by the exparte applicant have been doctored and that no transfer forms were ever signed by the applicant and the 2nd interested party. He also states that the 1st interested party was sued posthumous as he died on 27.2.2014, hence he ought not to be a party to these proceedings. He further states that the ex-parte applicant had a window of 30 days to present his appeal to the Minister as provided under **section 26 (3) of the Land Consolidation Act and Section 29 (4) of the Land Adjudication Act**.

17. In support of his case, the 3rd interested party relied on the following authorities:

- (i) **Meru ELC PET No. 6 of 2017: Reuben Mwangela M'Itelekwa vs Paul Kigea Nabea & others.**
- (ii) **Meru ELC Pet No. 2 of 2012: Zipporah Nkoyai vs James Kaberia M. & 2 others**
- (iii) **Meru E & L case No. 167 of 2011: Nicholas Mugambi & others vs Zachary Baariu & 6 others.**
- (iv) **Ann Awuda & 3 others vs Kenya Airways Corporation & another (2015) eKLR which quotes:-**
 - (a) **Speaker of National Assembly vs Karume (1992) KLR 425**
 - (b) **South Africa case of Andrew Lionel Philips 15 others vs National Director of Public prosecution (CC 55 of 2004).**
 - (c) **Abdallah Mangi Mohammed vs Lazarus & 5 others (2012) eKLR.**

(v) Nyeri Court of Appeal, Civil Appeal no. 221 of 2010: Stephen Kungutia & 2 others vs Severian Nchulubi.

(vi) Meru HCCA No. 306 of 2013: Samuel Kilema and another vs Festus Gituma Kuthuka which quotes:

(a) Supreme Court of Kenya Civil Application no. 11 of 2016: Hon. (Lady) Justice Kalpana H. Rawal vs Judicial Service Commission & others

(b) Owner of Motor vessel "LILLIAN'S" vs Caltex Oil Kenya Ltd (1989) 1 KLR 1;

(c) The Court of Appeal Kakuta Maimai vs Peris Pesi Tobiko & 2 others (2013) eKLR.

18. The Respondent conceded to the claim of the ex parte applicant, while submitting that the Land Adjudication officer failed to adhere to the provisions of **Section 26 of the Land Consolidation Act** hence his decision was heard and determined without the input of the committee. That the applicant was not involved in the proceedings contrary to the rules of natural justice. Similarly the land adjudication officer implemented the transfers and later on purported to reverse the said process contrary to the provisions of **Section 20 of the Land Consolidation Act**. That the full import of **Section 20** of the aforementioned act is that once the procedures provided for in **Section 17** have been heard and determined, the decision of the adjudication officer is final as provided in section 19.

19. The respondent also avers that the proceedings related to a parcel no. 524 as opposed to folio No. 524. However, folio no. 524 did not exist as the same had already been transferred to the ex parte applicant hence the proceedings were a nullity and the case ought to be heard again.

Analysis and Determination

20. In the case of **Municipal Council of Mombasa v Republic and Another [2002] eKLR** it was held that:

“Judicial Review is concerned with the decision-making process, not with the merits of the decision itself The court would only be concerned with the process leading to the making of the decision....”

21. This court will therefore analyse the **objection proceedings in case no. 798** to determine if the decision making process was proper. From the aforementioned proceedings, I discern that the applicable law was the **Land Consolidation Act Cap 283 laws of Kenya**. This statute provides an elaborate mechanism of hearing disputes under section 17, 18 and 26. Under Section 17 and 18 of the said Act, objections lodged touching on the records of existing rights are heard by the committees or the Land adjudication officer with the aid of the arbitration board. The finality of the decision is captured under section 19 and 20 thereof. The objections to the adjudication register are raised under section 26 of the aforementioned Act, whereby the Land Adjudication officer is required to hear a dispute with the aid of a committee.

22. It is crystal clear that the proceedings in objection case no. 798 were flawed as they were conducted without the aid the relevant committees as spelt out in the Land Consolidation Act.

23. In **Republic v Land Adjudication Officer Tigania East & another; Geoffrey M'Itabari (Interested Party) Ex Parte Applicants M'Ithana M'Ithai & another [2019] eKLR** the court in quashing a decision of the Land Adjudication Officer where a committee was not constituted opined as follows;

“I have perused the proceedings relating to the objection proceedings as recorded on 20/4/2017 which are annexed to the affidavit of Applicants. The proceedings do not disclose any other person as being present together with the Land Adjudication Officer. In fact, at page 287 on the heading titled “findings”, there is a clear indication that the adjudication officer was on his own while making decision which is the subject of the application before Court. Both the respondents and the interested party have insisted that there was a committee during the proceedings. The question on my mind is:- if indeed there was a committee, who were these members? Wouldn't it have been prudent to have their names in the proceeding and what they said or asked thereon recorded?”

- Also see the Court of Appeal decision in **Peter Kimandui vs The Land Adjudication Officer Tigania West District and 4 Others (2016) eKLR.**

24. I also find that there is no clarity regarding the inclusion of parcel 524 in the proceedings. Both the ex parte applicant and the 2nd interested party contend that the rights and interests of the 2nd interested party were recorded as folio no 524 which rights and interests in the suit land were passed on to the ex parte applicant. The question is; Have those rights and interests been affected by the decision of the respondent? That is something which has not come out clearly in the objection proceedings hence the need for a fresh hearing.

25. It has also emerged that the ex parte applicant was not in any way involved in the objection case. The ex parte applicant has stated that the implementation order of 6.2.2014 will have the effect of undoing the process of recording of rights conducted 37 years earlier. In the circumstances, I am in agreement with the submissions of the respondent that *audi alteram partem rule* that no man should be heard in his absence was not followed. To this end, I am in agreement with the submissions of the applicant that natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances; See **Republic vs. The Honourable the Chief Justice of Kenya & Others Ex parte Moiwo Ole Keiwua Nairobi Hcma No. 1298 of 2004.**

26. Further, I find that the decision of the respondent is not in tandem with the evidence tendered before him. The objection case was lodged in respect of eleven (11) parcels namely; parcel Nos.2362, 319, 832, 979, 524, 418, 293, 1247, 116, 199 and 2955. However, the objector

only mentioned the parcel with one Obadiah which is no. 2362. As for the respondents, including the 2nd interested party, they conceded to the case without making any reference to the 11 parcels mentioned in the objection claim i.e, the 1st respondent Gabriel Muriira mentioned parcel 922, while the 2nd respondent M'Imaana Nthongo, 3rd respondent Daniel M'iti M'Tarichia and 5th respondent M'Arimba Anampiu (for the 4th respondent) did not make reference to any parcel at all in the proceedings.

27. The decision of the respondent was as follows;

“I award the objector 6.50 acres from each of the respondents totalling to 30.50 acres of which 5 acres is transferred to Allen Njeru after it has been transferred to P/NO. 2133 that originally belonged to the objector's late father Allen Njiru”.

28. It is quite apparent that the decision of the respondent was devoid of reason as it has no nexus with the evidence or admission of the parties to the case.

29. Finally, I note that the 3rd interested party is appearing as the son of the 1st interested party who is apparently deceased. However, in his own words, no grant has been issued in respect of his father and he is therefore not a legal representative of his father's estate. He therefore lacks the locus standi to represent the interests of his father and his claim is hereby disregarded.

30. In conclusion, I find that this is a case where the proceedings before the respondent were out-rihtly flawed. The respondent has admitted that much. This is not a case whereby the court can simply nullify reference to R.E.R No. 524 for parcel No. 1527. This is because as stated earlier in this ruling, there is no clarity regarding reference to parcel No. 524. Further, the decision of the respondent has no nexus with the 11 parcels mentioned in the objection case. In the circumstances I allow the claim of the exparte applicant in the following terms;

1) An Order of certiorari is hereby issued removing and quashing the whole of the respondent's proceedings, findings and order in objection No. 798 made on 6/2/2014.

2) An order of prohibition is hereby issued prohibiting the implementation of the respondent's decision and orders in objection No. 798 made on 6/2/2014.

3) The dispute is remitted back to the respondent to be heard afresh in accordance with the applicable law.

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

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 7.7.2020. 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 Judgment 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