



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC J. R. 86 OF 2010

CATHERINE MUTHONI KIRIUNGI.....1ST EX-PARTE APPLICANT

DAVID KIMATHI KIRIUNGI.....2ND EX-PARTE APPLICANT

VERSUS

THE CHAIRMAN LAND ADJUDICATION & SETTLEMENT OFFICER

TIGANIA EAST & CENTRAL DIVISION.....1ST RESPONDENT

TIGANIA EAST & WEST DISTRICT LAND

ADJUDICATION AND SETTLEMENT OFFICER.....2ND RESPONDENT

AND

JOSEPH NKINDUKU M'LIBURU.....1ST INTERESTED PARTY

SARAH KABUORO IKUNYUA.....2ND INTERESTED PARTY

J U D G M E N T / R U L I N G

This Judicial Review application dated 9.11.2010 was brought to court under Order LIII of the defunct Civil Procedure Rules, Section 8 and 9 of the Law Reform Act and Section 40 of the then Constitution of Kenya. The application seeks the following orders:

1. **THAT** the order of certiorari be issued to remove into this court Tigania East and Central Division Land Adjudication and settlement office objection Nos.3209 and 3210 and quash proceedings/order/award and/or decision dated 8th July, 2010 with regard to land parcel Nos.3158 and 6073 within Antuamburi Adjudication Section and any other proceedings and orders therein.
2. **THAT** an order of prohibition be issued against the 1st and 2nd Respondents not to issue orders or any further orders with regard to Tigania East and Central Division Land Adjudication Objection Nos.3209 and 3210 which have the effect of depriving the Ex-parte Applicants portions of their land known as Land Parcel Nos.3158 and 6073 Antuamburi Adjudication Section.
3. **THAT** costs be provided for.

The application states that it is based on the following grounds:

- (a) **THAT** the 1st and 2nd Ex-parte applicants are the Administrators of the Estate of Secondo Kiriungi Germano (Deceased) which include Land Parcel Nos.3158 and 6073 within Antuamburi Adjudication Section and comprises of 5 acres and 4.10 acres respectively.
- (b) **THAT** the decision/award of the 8th July, 2010 has the effect of taking away the ex-parte applicants two parcels of land in total disregard of their proprietary rights.
- (c) **THAT** the transfer of land parcel No.3158 Antuamburi Adjudication Section by the Respondents to the 1st interested party and subsequent transfer to the 2nd interested party is illegal, unlawful and fraudulent.
- (d) **THAT** the award/decision therefore is ultravires, null and void as the panel did not have the jurisdiction.
- (e) **THAT** the award/decision offends the rules of natural justice and denies the ex-parte applicants their constitutional rights.
- (f) **THAT** the award/decision should be quashed.

The main motion states that the application also relied upon the grounds in the statement of facts and the verifying affidavit of Catherine Muthoni Kiriungi. I find it necessary to reproduce in this ruling both the statement of facts and the verifying affidavit. The 1st ex-parte's statements of facts dated 4th November, 2010 states:

1. **THAT** the Ex-parte Applicants seek to quash and/or set aside the decision and/or award made by the respondents on the 8th July, 2010 as it is ultravires, unprocedural and it contravenes the constitutional rights of the Ex-parte Applicants and the said decision and/or award offends the rules of Natural Justice.
2. **THAT** the decision and/or award made by the 1st and 2nd Respondents on the 8th July, 2010 to transfer land parcels No's 3158 and 6073 within Antuamburi Land Adjudication Section to the 1st interested party and who has subsequently transferred the same to the 2nd interested party is illegal/unprocedural/irrational and/or unlawful.
3. **THAT** the Ex-parte Applicants being Administrators of the Estate of Secondo Kiriungi Germano (Deceased) and being in actual and/or active occupation and possession of the said land parcels are the legal/bonafide owners of the said portions of land.
4. **THAT** the transfer made by the 1st interested party transferring L P No 3158 Antuamburi Adjudication Section to 2nd interested party is unlawful/illegal and fraudulent.

The statement states the grounds relied upon for the relief sought are:

- (a) **THAT** the 1st and 2nd Respondents failed/ignored and/or refused to recognize the proprietorship rights of the Administrators of the the Estate of Secondo Kiriungi Germano (Deceased) over land parcels Nos. 3158 and 6073 within Antuamburi Adjudication Section.
- (b) **THAT** the said decision made by the Respondents on the 8th July, 2010 awarding the 1st interested party land parcel No.3158 **ANTUAMBURI ADJUDICATION SECTION** is unprocedural, Irregular, ultravires and unconstitutional.
- (c) That the said decision is biased and prejudicial to the rights of the Ex- parte Applicants.

The 1st Ex-parte Applicant's verifying affidavit avers as follows:

1. **THAT** I am an adult female of sound mind, working for gain and residing at Mikinduri Meru County within the Republic of Kenya
2. **THAT** I am the 1st Ex-parte Applicant herein and one of the administrators of the Estate of Secondo Kiriundi Germano (deceased and well conversant with the matters herein (annexed

- herein and marked “**CMK1**” is a copy of the letters of Administration ad litem).
3. **THAT** my late husband Secondo Kiriungi Germano was the lawful and bona fide owner of land parcels Nos.3158 and 6073 Antuamburi Adjudication Section and upon his demise I jointly obtained with my son David Kimathi Kiriungi letters of administration of the Estate of my late husband.
 4. **THAT** I and my family have been in actual and active occupation of the said parcels of land since we are the legal/lawful owners and occupants of the said portions of land
 5. **THAT** the 1st and 2nd Respondents made a decision and/or award illegally/unlawfully transferring land parcels Nos.3158 and 6073 Antuamburi Adjudication Section to the 1st interested party (see annexure “**CMK2**”).
 6. **THAT** the 1st interested party has subsequently transferred illegally and fraudulently land parcel No.3158 Antuamburi Adjudication Section to the 2nd interested party.
 7. **THAT** the decision and/or award made by the Respondents on the 8th July 2010 is illegal/ultravires/unprocedural/biased and it contravenes my constitutional rights and offends the rules of natural justice.
 8. **THAT** it is necessary I be allowed to have the award and/or decision made by the Respondents on the 8th July 2010 moved to this Court for purposes of them being quashed.
 9. **THAT** the statement of facts annexed herein is true and correct and I verify the same as set out therein.
 10. **THAT** all that is deponed to herein above is true to the best of my knowledge, information and belief.

The application was handled by way of written submissions.

THE EX-PARTE APPLICANT'S

SUBMISSIONS

For the exparte applicant, it was submitted that the decision of the District Land Adjudication and Settlement Officer (DLASO in Objection Nos.3209 and 3210 was ultravires Sections 26(1) and Section 9(1) of the Land Consolidation Act as the Committee assisting the Adjudication and Settlement Officer comprised 21 members instead of the required 25 members. It was also argued that the action of the DLASO to proceed in the absence of Court appointed Legal Representatives of the late Secondo Kiriungi Germano as parties was a total disregard of the provisions of Sections 35 and 45 of the Law of Succession Act. The submissions pointed out that the deceased person had died on 17.3.2009 and that it was only in October, 2010 when a Limited Grant was issued to the Ex-parte Applicants. It was also argued that the action of proceeding with hearing the subject proceedings by the DLASO amounted to intermeddling with the property of a deceased person contrary to the law.

The exparte applicants' lawyers opined that it would have been logical for the DLASO to have substituted the deceased person with a more obvious Beneficiary of his estate such as his wife who was more familiar with the deceased's assets and his liabilities. It was further stated that the person who represented the deceased person at the proceedings, was his father who at 95 years of age was nearly senile. The exparte applicants submitted that by summoning someone with diminished capacity to participate in the objection proceedings, the DLASO had subjected them to blatant disregard for Articles 47 and 50 of the Constitution on the right to fair administration and right to a fair trial. They concluded their submissions by stating.

1. By conducting the objection proceedings in absence of the named respondent or a legal representative, the DLASO condemned the parties unheard and was unfair, unreasonable and in violation of the principles of natural justice.
2. By not constituting the prescribed number of members in the Land Adjudication Committee, the arising decision was arrived at unprocedurally.

For these reasons the exparte applicants prayed that the decision of the DLASO in objection Nos.3209

and 3210 be declared a nullity. The applicants have referred me to the following cases: HC Misc Application No. 101 of 2008 (Meru) Republic V. Land Adjudication Officer Igembe/Tigania & Another and H.C. Misc. Application No.58 of 2009 (Meru) Republic V Land Adjudication Officer Tigania & Another.

THE 1ST AND 2ND INTERESTED PARTIES SUBMISSIONS

It was submitted that the prayer for prohibition had been overtaken by events as by the time this suit was filed the decision being challenged in this suit had already been fully implemented and the land had been transferred to the 1st Interested Party who had in turn sold one of the parcels to the 2nd Interested Party.

It was submitted that the purpose of Judicial Review Proceedings was to ensure that the individual received fair treatment and not to ensure that the body or authority after according fair treatment, reaches on a matter which is authorized by law to decide for itself, a conclusion which is correct in the eyes of the Court. They quoted the case of Chief Constable of the North Wales Police Versus Evans [1982] IWLR, 1155 to support this position. They also quoted the Court of Appeal in the case of KNEC versus R (Exparte Geoffrey Gathenji Njoroge & 9 others) C.O.A. CA No.266 of 1996 [1997] eKLR as holding that:

“an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

The interested parties submitted that the DLASO had not failed in any of the respects contained in their authorities. They pointed out that the ex parte applicants in their averments had not pinpointed any illegalities capable of being subjected to Judicial Review Proceedings. Regarding the issue of Succession Law, they said that Section 11(1) of the Land Consolidation Act, allowed Land Adjudication committees to adjudicate upon and determine all claims to land in accordance with African Customary Law and this includes Customary Law of Succession. It was pointed out that the Law of Succession Act, Cap.160 at Section 4 (1) (a) allowed immovable property of a deceased person to be regulated and succession thereof undertaken as provided by “any other written law” which in this case is the said section 11(1) of the Land Consolidation Act.

The Interested parties also submitted that under the provisions of Section 13(1) and (4) of the Land Consolidation Act, African Customary Law is also applied and it is provided that where any one heir appears on behalf of other heirs, all the other heirs of a deceased person shall be deemed to have appeared. According to them, therefore, the respondents were legally justified to proceed with the matter when the deceased's family was represented by his father. It was further submitted that the degree of Consanguinity was not a key factor in Land Adjudication Proceedings. They stated that rules of natural justice were observed in accordance with the applicable law.

The interested parties said that the pleadings of the 1st ex parte applicant found at paragraphs 11-14 of her further affidavit shows that her complaints were a basis for an appeal to the Minister but not for Judicial Review. They pointed out that the facts sought to be deposed therein were unfounded and not supported by any authentic documents. It was also claimed that these pleadings were contrary to the sworn evidence of the deceased's persons father in the land Adjudication proceedings and further that they bore no official rubber stamp of the respondents.

The interested parties felt that the ex parte applicants had misapprehended the law regarding the Constitution of Land Adjudication Committees and argued that Section 9(1) of the Land Consolidation Act, only dealt with the Constitution whereas the issue of Quorum was handled by Section 14 (3) (a) of the Land Consolidation Act which provides that the Quorum shall be more than half of the total number of committee members. This meant that the minimum number of Committee members who can transact business was 13 and not 25. The sitting whose decision the ex parte applicants seek to impugn, had 21 sitting members and therefore was way above the number required by law.

Regarding the claims that the decision complained of was in blatant breach of Articles 40 and 50 of the

Constitution, the Interested parties laconic response is that the decision complained of was made on 8.7.2010 while the Constitution was promulgated on 27.8.2010, one month and nineteen days later. They opined that there was no way the Interested parties could have breached a non-existent Constitutional provision.

The Interested Parties reiterated that the ex parte applicants submission that there was breach of the rules of natural justice by “abuse of discretion, unfairness, unreasonableness, irrationality and failure to properly exercise jurisdiction” was unfounded. They countered that the deceased person, the ex parte applicants representative, had used his position as the Vice Chairman of the Local Adjudication Committee to grab the 1st Interested Party's Land while he had neither gathered any land at that locality nor occupied the suit parcels of land which facts were not disputed in the objection proceedings. They reiterated that the 1st Interested Party had no position or authority whatsoever to influence the adjudication process.

The Interested Parties concluded by submitting that no case for Judicial Review had been proved by the ex parte applicants and prayed that the suit be dismissed with costs to the Interested Parties.

THE 1ST AND 2ND RESPONDENTS' SUBMISSIONS

The Respondents submitted that the Lands Adjudication and Settlement Officer who heard the objection proceedings which have spawned this suit had acted reasonably and did all that was expected of him based on the issues raised in the proceedings. On the issue of the locus of the representative of the applicants before the adjudication officer, it was submitted that no letters of administration were required since the apposite claim concerned customary rights. It was further submitted that the ex parte applicants were not parties in the objection proceedings ought to be impugned. The respondents also submitted that the proper cause of action would have been an Appeal to the Minister as provided by Section 29 (1) of the Land Adjudication Act. By failing to Appeal to the Minister, the ex parte applicants had not exhausted available remedies and had therefore filed a misconceived application which was an abuse of the court process and, therefore, did not merit the grant of the discretionary orders of Judicial Review.

Regarding the submission that the Adjudication Committee fell short of its requisite number by 4 members, the respondents quoted Halsbury Laws of England 4th Edition Vol.11 page 805 paragraph 1508 as follows:

“the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the Court being a judicial one must be exercised on the evidence of sound legal principles.”

The respondents referred the Court to the fact that the issues in this suit had previously been heard by an earlier Committee and had gone all the way to the arbitration Board. They submitted that the applicants were seeking to reinstate a hopeless case mischievously. They stated that the 2nd respondent had merely restated what had transpired in the previous proceedings before the Committee and the findings thereto.

The respondents concluded by submitting that the 2nd respondent had accorded the representative of the applicants a fair hearing and had properly applied his mind to the issues raised in the objection proceedings and followed the rules of natural justice.

I have examined the averments and the submissions of the parties. I have also looked at the authorities proffered by the parties.

I will first of all deal with the 2nd prayer in the main motion. It is a prayer for prohibition. I note that in ground (c) of the Motion, it is stated : **“THAT** the transfer of land parcel NO. 3158 Antuamburi Adjudication Section by the respondents to the 1st interested party and subsequent transfer to 2nd interested party is illegal, unlawful and fraudulent.” The interested parties have re-affirmed that position that the decision being challenged was fully implemented and the suit parcels of land were transferred to the 1st interested party who in turn sold one of the parcels to the 2nd interested party before this suit was

filed. I agree that this prayer for prohibition is not available to the ex parte applicants.

I now turn to the prayer for order of certiorari. Having considered the pleadings, attached proceedings of the apposite objection proceedings and the submissions, I find that Adjudication proceedings are by law allowed to apply African Customary Law. I note that before the objection proceedings which the ex parte applicants seek to be impugned, there were other proceedings before another Committee which had proceeded to an Arbitration Board. In my view, the case brought out by the ex parte applicant's pleadings is a case which should have been taken as an Appeal to the minister, within 60 days of the making of the challenged decision, in accordance with Section 29 of the Land Adjudication Act.

Judicial Review proceedings are not essentially concerned with the merits of the decision. They look at the propriety and integrity of the process. They are meant to ensure that the individual concerned receives fair treatment, and not to ensure that the body or authority after according fair treatment, reaches on a matter which it is authorized by law to decide by itself, a conclusion which is correct in the eyes of the court.

I wish to say something about the Constitution of the Adjudication Committee which heard the objection proceedings. I wish to particularly touch on the decision in Misc JR 58 of 2009 (Meru) where the judge allowed the ex parte applicant's application on the ground that the Adjudication Officer had not constituted a Committee as required by Section 9 (1) of the Land Adjudication Act. In the present case there is no dispute that a Committee had been constituted. The only claim made by the ex-parte applicants is that it had 21 members instead of 25 when the objection proceedings took place. Proper quorum for a Committee to conduct its business is half of 25 members which is 12 plus 1 members (13). There is no doubt that the Committee which handled the apposite objection proceedings had more than adequate members to form a quorum. This is clearly set out in Section 14 (3) (a) of the Land Consolidation Act.

I note that Judicial Review orders are discretionary in nature. A court must, however, exercise that discretion judicially and , obviously, not capriciously.

Considering all the circumstances of this case, including the facts that the dispute herein had in earlier objection proceedings gone even to the arbitration board, the fact that the ex parte applicants had not exhausted available remedies as allowed by Section 29 of the Land Adjudication Act, my finding that customary law is applicable in Adjudication proceedings and my finding that the apposite adjudication committee had the quorum required to conduct its business, among other considerations, I am of the view that this application does not merit the Judicial Review Orders sought. Indeed, right from the word go, the order of prohibition was not available to the ex parte applicants as by the time the suit was filed, the challenged decision had already been implemented.

In the circumstances, this suit is dismissed. Costs are awarded to the interested parties and to the respondents.

It is so ordered.

Delivered in Open Court at Meru this 4th day of June, 2014 in the presence of:

Cc. Daniel

M/s Kiome h/b Miss Mutinda for Ex parte Applicants

Kiongo present for respondents

Akwalu for interested parties.

P. M. NJORGE

JUDGE