REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC JR. APP. NO. 11 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE SUB-COUNTY SURVEYOR, MBEERE.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER, MBEERE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

JOSEPH N. MITARU.....EX-PARTE APPLICANT

JUDGEMENT

A. INTRODUCTION

1. By a chamber summons dated 30th August 2018 brought under **Sections 8 & 9** of the **Law Reform Act (Cap. 26)** and **Order 53 Rule 1** of the **Civil Procedure Rules** the *ex Parte* Applicant (the *Applicant)* sought leave of court to apply for an order of *mandamus* to compel the 1st and 2nd Respondents to discharge their duty under **Section 29** of the **Land Adjudication Act (Cap. 284)** by implementing the Minister's decision in *Land Appeal Case No. 153 of 1996* concerning *Plot No. 2244 Kirima Adjudication Section.*

2. Upon leave being granted on 29th July 2019 the Applicant filed a notice of motion dated 8th August 2019 seeking an order of mandamus to compel the 1st and 2nd Respondents to implement the Minister's said decision. The Applicant also sought that costs of the application be provided for.

B. THE APPLICANT'S CASE

3. The said application for judicial review was based upon the grounds set out in the chamber summons dated 30th August 2018, the statutory statement, and the verifying affidavit accompanying the said summons. The Applicant contended that *Minister's Land Appeal Case No. 153 of 1996* was determined on 24th May 2007 whereby he was awarded 10 acres by the Minister.

4. It was the Applicant's contention that the said decision was communicated by the Director of Land Adjudication and Settlement to the 1st and 2nd Respondents vide an implementation order dated 20th June 2008. It was further the Applicant's case that the 1st and 2nd Respondents had without lawful justification or excuse refused, failed or neglected to implement the Minister's said award.

5. The Applicant exhibited a copy of the said award dated 24th May 2007, a letter dated 20th June 2008 from the Director of Land and Settlement (the *Director)* to the District Surveyor asking for implementation of the award, and a letter dated 8th March 2018 from the said Director to the Applicant's advocate by which the 1st and 2nd Respondents were requested to finalize implementation of the award.

C. THE RESPONDENTS' RESPONSE

6. The Attorney General entered appearance on behalf of all the Respondents and filed a replying affidavit sworn on 19th August 2020 by Cyrus Musyoka who was the sub-county surveyor – Mbeere sub-county. The application was opposed on three main grounds. First, that *Plot No. 2244* was no longer in existence since it had been sub divided into various parcels of land. Second, that there are other pending court cases over *Plot No. 2244* arising from other appeals to the Minister. Third, that since there were various awards of the Minister over *Plot No. 2244* which had been implemented over a long period of time implementing the award in favour of the Appellant might overlap with or encroach on other people's property.

7. The deponent annexed two exhibits to his replying affidavit in opposition to the instant application. The first was a mutation form dated 11th January 2008 which showed a proposed sub-division of *Plot 2244.* The form was, however, neither signed nor registered by the Land Registrar. The second exhibit was a copy of a Registry Index Map (RIM) for Kirima Registration system which showed sub-division of *Plot 2244* into *Nos. 2954-2964.*

D. DIRECTIONS ON SUBMISSIONS

8. When the matter came up for directions on the hearing of the application for judicial review it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and serve their submissions. The record indicates that the Applicant filed his submissions on or about 19th December 2019 whereas the Respondents filed theirs on or about 20th August 2020.

E. THE ISSUES FOR DETERMINATION

9. The court has considered the application for judicial review, the Respondents' response in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination:

a. Whether the Applicant has made out a case for the grant of the judicial review order sought.

b. Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

a. Whether the Applicant has made out a case for the grant of the judicial review order sought.

10. The court has considered the material on record and the submissions of the parties on this issue. The court is aware that orders of judicial review are discretionary in nature and that they are not always granted as a matter of right.

11. The nature of the order of mandamus and the circumstances in which it may be granted were considered by the Court of Appeal in the case of **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR** (quoting from **Halsbury's Laws of England** as follows:

> **"The order of mandamus is of a most extensive remedial nature, and is, in form a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."**

12. The Applicant contended that having succeeded in the *Minister's Land Appeal Case No. 153 of 1996* and having been awarded 10 acres of land as per the sketch map picked by the District Surveyor, the 1st and 2nd Respondents were legally bound to implement the award under **Section 29** of the **Land Adjudication Act (Cap. 284).**

13. Section 29 of the said **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.**
>
> **(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar**
>
> **(3) When the appeals have been determined, the Director of Land Adjudication shall—**
>
> **a. alter the duplicate adjudication register to conform with the determinations; and**

b. certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly

(4) Notwithstanding the provisions of section 38 (2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the *Gazette*, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister."

14. It is thus evident that there is a clear statutory duty on the part of the Director to implement the Minister's decision on appeal and to amend the relevant records accordingly. There is also documentary evidence in form of letters to demonstrate that the 1st and 2nd Respondents were required by the Director to implement the Minister's award way back in 2008. A reminder was also sent in 2018 but there was no compliance and there is no indication on record what explanation, if any, was rendered for non-compliance.

15. The court has considered the Respondents' explanation for non-compliance. The court does not agree that the mere fact that *Plot 2244* was sub-divided (hence ceased to exist on its own) could have made it impossible to implement the award. In deed, it was expected that upon distribution of *Plot 2244* to the various claimants the land would have to be sub divided. The Respondents conceded that there were several appeals to the Minister concerning *Plot 2244* and that there were several awards or decisions in that regard which had been implemented over the years. So, the disappearance of the original *Plot 2244* was a natural consequence of implementation of the various awards.

16. The court does not also accept the Respondents' contention that implementation of the award has been pending for so long that it has become difficult, cumbersome or impossible to implement it. Mere inconvenience or difficulty is not sufficient reason to neglect performance of a statutory duty imposed by **Section 29** of the **Land Adjudication Act.** The court may perhaps be prepared to accept impossibility as an excuse. However, the court shall deal with this aspect later in the judgement.

17. The court has noted that the Respondents did not render any explanation for the delay of about eleven (11) years in implementation of the award. If such delay made it difficult or cumbersome to implement the award then it can only be a form of self-induced or self-inflicted handicap. In the case of **Republic v Kenya Revenue Authority ex parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530,** it was held that a public authority may not vary the scope of its statutory duties as a result of its own errors or omissions.

18. The Respondents also submitted that it had become impossible to implement the Minister's award because its implementation may overlap with other people's land. It is noteworthy that although letters from the Director calling for implementation of the award were exhibited, there were no letters from the 1st and 2nd Respondents communicating the alleged impossibility and the risk of overlap. It was not explained when the alleged impossibility arose and why it was not communicated to the Applicant or the Director or even the decision maker. On the contrary, as late as 8th March 2018 the Director was still following up on implementation and asking the 1st and 2nd Respondents to finalize the process.

19. The court is also not satisfied that the alleged overlap has been demonstrated on the basis of the material on record. The copies of the Registry Index Map (RIM) and the mutation form exhibited by the Respondents do not demonstrate the risk of an overlap if the Applicant is granted 10 acres. It was not demonstrated which parcels of land would be affected by an overlap if the award was implemented. The award dated 24th May 2007 specified that the Applicant's portion was already described in a sketch map picked by the District Surveyor Mbeere. It was not demonstrated that the District Surveyor had mistakenly picked an area which would overlap with other people's land.

b) Who shall bear costs of the application

20. 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)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful party should not be awarded costs of the action. Accordingly the Applicant shall be awarded costs of the application for judicial review.

G. CONCLUSION AND DISPOSAL ORDER

21. The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 8th August 2019 for judicial review. Accordingly the same is hereby allowed in the following terms:

a. An order of *mandamus* be and is hereby issued compelling the 1st and 2nd Respondents to discharge their statutory duty by implementing the Minister's decision in Minister's Land Appeal Case No. 153 of 1996.

b. The *ex parte* Applicant is hereby awarded costs of the application.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **22ND DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Mrs. Njoroge for the Attorney General for the Respondents and in the absence of the Applicants.

Y.M. ANGIMA

JUDGE

22.10.2020