



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**JUDICIAL REVIEW No. 9 OF 2019**

**(FORMERLY NAKURU HC JUDICIAL REVIEW No. 116 OF 2011)**

REPUBLIC.....APPLICANT

AND

THE DISTRICT COMMISSIONER, NAROK SOUTH DISTRICT.....1<sup>ST</sup> RESPONDENT

THE DISTRICT COMMISSIONER, NAROK SOUTH DISTRICT.....2<sup>ND</sup> RESPONDENT

THE PERMANENT SECRETARY, PROVINCIAL

ADMINISTRATION AND INTERNAL SECURITY..... 3<sup>RD</sup> RESPONDENT

EX PARTE:

1. SALATON OLE NADUNGWENKOP
2. KOILEKEN OLE SANDIKO
3. PARKIRE OLE NADUNGWENKOP & 408 OTHERS

**JUDGMENT**

1. By Notice of Motion dated 16<sup>th</sup> December 2011, the ex parte applicants seek the following orders:

1. *An order of certiorari to remove into this Honourable Court and quash the decision of the 1<sup>st</sup> respondent conveyed by Narok South D.C. Chimwanga Mongo and Narok North D.C. Godfrey Kigochi purporting to evict the applicants from their respective parcels of land with effect from 29<sup>th</sup> September 2011;*
2. *An order of prohibition to remove into this Honourable Court and prohibit the 1<sup>st</sup> respondent from carrying out the eviction of the applicants from their respective parcels of land;*
3. *Costs of and incidental to the application be provided for;*
4. *Such further and other reliefs that the Honourable Court may deem just and expedient to grant.*

2. The application is supported by a statement of facts and a verifying affidavit sworn by Salaton Ole Nadungwenkop, the first ex parte applicant. He deposed that the ex parte applicants are the registered owners of parcels of land within Nkareta Adjudication Section having lived there since 1996. He annexed copies of title deeds and certificates of search in respect of parcels of land known as Narok/Cismara/Nkareta/988, Narok/Cis Mara/Nkareta/1178 and Narok/Cismara/Nkareta/1173. He added that the first respondent made a decision to evict the ex parte applicants from their parcels through its officers with the assistance of Administration Police officers since the 29<sup>th</sup> September 2011. That there was no prior notification to the ex parte applicants and the first respondent had embarked on the process of forcefully evicting the ex parte applicants without any lawful cause by demolishing and burning their homes thus rendering them homeless and forcing them to abandon their crops. They annexed some photographs.

3. The respondents answered the application through a replying affidavit sworn by Chimwanga M. Mongo, the District Commissioner of Narok South District. He deposed that sometime during mid-September 2011, he received reports that there was an invasion of certain parts of the Maasai Mau forest specifically at the Nkoban area. He immediately instructed one Mr Nicholas Oyoko the Senior Superintendent of Police (SSP) In charge of securing that part of the Mau against invasion, to liaise with the chief of Nkoban area and to investigate those reports. On 19<sup>th</sup> September 2011, the team reported back to him that while the forest looked intact from the Nkoban side, people were establishing farms inside the forest while others were putting up temporary structures inside it. That it was clear to him that the people had invaded the forest by crossing Nkoban River which was the boundary demarcating the forest from the other land.

4. He further stated that together with the District Commissioner for Narok North District within whose jurisdiction the forest is located, he held a joint public meeting at Nkoban area on 23<sup>rd</sup> September 2011 during which it emerged that there were persons who were misleading the locals that they could legitimately sell and transfer parcels of land that were located inside the forest. It was decided at the meeting that those who had invaded the forest be given 7 days from the date of the meeting to move out of the forest, failing which they would be forcefully evicted. The decision was communicated to all present at the meeting. When the notice lapsed on the 29<sup>th</sup> September 2011, administration police moved in to evict the invaders and to destroy their temporary structures.

5. The deponent further stated that the District Commissioner Narok North District, requested the District Land Registrar Narok North & South District to confirm the authenticity of the copies of title deeds annexed to Salaton Ole Nadungwenkop's affidavit and that through a letter dated 18<sup>th</sup> October 2011, the registrar stated that the purported title deeds were forgeries. He annexed a copy of the said letter and added that there were various criminal cases pending against some of the invaders at the Narok Law Courts. He also annexed copies of charge sheets and added that the ex parte applicants had not been evicted from their parcels of land, but from a state forest.

6. The application was canvassed through written submissions. The ex parte applicants duly filed submissions. Although state counsel appearing for the respondents repeatedly sought and was granted time to file submissions, none was filed by the respondents.

7. The ex parte applicants argued that they were registered owners of parcels of land within Nkareta Adjudication Section since its inception in 1996 and that they were forcefully evicted from their homes without prior notice and the homes destroyed thus rendering them homeless. That in carrying out the evictions, the respondents acted unlawfully and beyond their jurisdiction since the ex parte applicants were not granted an opportunity for genuine consultation, adequate and reasonable notice, any alternative land or housing, there was no oversight of the eviction by an independent organisation or representatives of the ex parte applicants and that no compensation was availed.

8. It was further argued that the third respondent acted unlawfully and in excess of his powers and that the decision amounted to deciding matters of ownership of land contrary to the provisions of **Article 40(3) of the Constitution**. The ex parte applicants therefore urged the court to allow the application.

9. I have considered the application, the affidavits and the submissions. The mandate of a judicial review court was stated by the Court of Appeal in **Municipal Council of Mombasa v Republic & another [2002] eKLR** as follows:

*... 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. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.*

10. The same court later reiterated in **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** as follows:

*Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.*

11. The ex parte applicants have argued that the respondents' action and decision amounted to deciding matters of ownership of land. That forms a crucial entry point in this matter. The ex parte applicants contend that they variously own the parcels of land known as Narok/Cismara/Nkareta/988, Narok/Cis Mara/Nkareta/1178 and Narok/Cismara/Nkareta/1173. To support that position, they have exhibited copies of the respective title deeds and certificates of search dated 12<sup>th</sup> October 2011. The said documents only purport to show ownership by the first three ex parte applicants. There is absolutely nothing put before the court to show that the remaining 408 ex parte applicants have any claim to any land in the affected area.

12. The respondents maintain that the documents of title that the ex parte applicants have exhibited are forgeries. A perusal of the letter dated 18<sup>th</sup> October 2011 from the District Land Registrar Narok North/South Districts shows that the said officer who is the custodian of land ownership records took the position that no such parcels as Narok/Cismara/Nkareta/988, Narok/Cis Mara/Nkareta/1178 and Narok/Cismara/Nkareta/1173 existed in his jurisdiction and that the purported signatory of both the title documents and the certificates of search did not work in his office. The respondents also contended that there were various criminal cases pending in court against some of the ex parte applicants. A perusal of the charge sheets annexed shows that the accused persons faced such charges as illegal cultivation of land

within a state forest contrary to **Section 51 (2)** of the **Forest Act 2005** and being in possession of forest produce without a licence contrary to **Section 51 (2)** of the same statute. The ex parte applicants did not file any further affidavit to respond to the respondents' contention.

13. It is therefore manifest that even as they mentioned issues of ownership of land in their submissions, the ex parte applicants were fully aware or ought to have been aware that their case raises contested matters of facts which in effect seek to determine the merits of the dispute as to whether they own land within Maasai Mau Forest. This court, sitting as a judicial review court, does not have jurisdiction to determine ownership of land or contested questions of fact. A suit filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR.**

14. In view of the foregoing, Notice of Motion dated 16<sup>th</sup> December 2011 is struck out. Owing to the respondents' failure to file any submissions, I make no order as to costs.

15. It is so ordered.

**Dated, signed and delivered at Nakuru this 3<sup>rd</sup> day of December 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the ex parte applicants

No appearance for the respondents

Court Assistants: B. Jelimo & J. Lotkomoi