



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. JR NO. 32 OF 2015

(FORMERLY KERUGOYA ELC JR NO. 3 OF 2013)

REPUBLIC.....APPLICANT

VERSUS

MINISTER FOR LANDS AND SETTLEMENT.....1ST RESPONDENT

DISTRICT COMMISSIONER MBEERE NORTH.....2ND RESPONDENT

JOHN NGARE MWANIKI.....3RD RESPONDENT

D. EUTON NJUKI.....4TH RESPONDENT

KAHARERI BURI KARUGU.....EX-PARTE APPLICANT

JUDGEMENT

1. By a notice of motion dated 3rd October 2012 brought under **Order 53 Rule 3 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act (Cap 26)** the *ex-parte* Applicant (hereinafter the *Applicant*) sought the following orders;

a. That the honourable court be pleased to issue to the Applicant an order of certiorari to quash proceedings and decision of the Minister and/or District Commissioner – Mbeere North in Appeal Case Nos. 206/99, 228/04 Kirima Adjudication Section all dated 20th December 2012.

b. That costs of this application be provided for.

2. The said application for judicial review was based on the grounds that the 1st and 2nd Respondents had entertained an appeal which was filed out of time and that the 2nd Respondent had relied upon inconsistent evidence in consequence of which the resultant decision was based on factual errors.

3. The said application was supported by the statutory statement and affidavit sworn by the Applicant during the leave stage. The gist of the Applicant's case was that the 3rd and 4th Respondents had filed their respective appeals in the *Minister's Appeal Case Nos. 206 of 1999 and 228 of 2004* outside the period of 60 days prescribed by **section 29 of the Land Adjudication Act**. It was contended that they were filed 15 and 17 years respectively after the decisions of the Land Adjudication Officer. It was also contended that the 2nd Respondent's decision in the said appeals was based on inconsistent evidence hence the application for judicial review.

4. The 1st and 2nd Respondents did not contest the said application for judicial review. Instead, the Attorney General, who appeared for them filed written submissions dated 2nd April 2013 conceding the application. The 1st and 2nd Respondents conceded that their decisions in the two appeal cases were made *ultra vires* since the right of appeal had abated under relevant law.

5. There is no evidence on record of the 3rd Respondent having filed a replying affidavit in response to the application for judicial review. However, he filed written submissions on 14th June 2018 in opposition to the said application.

6. The 4th Respondent filed a replying affidavit sworn on 30th May 2012 in opposition to the said application. It was denied that his appeal was filed out of time as contended by the Applicant. He stated that his appeal was filed in the year 1989 and attached a copy of a certificate of payment of appeal and tracing fees. He, therefore, urged the court to dismiss the application with costs.

7. The record shows that all the concerned parties agreed to canvass the said application through written submissions. The record further shows that the concerned parties had filed their respective submissions by 26th June 2018 when the matter was fixed for judgement.

8. The court has considered the Applicant's application for judicial review, the 4th Respondent's replying affidavit in opposition thereto as well as the submissions filed on behalf of the parties. The court is aware that an application for judicial review is not to be construed as an appeal against the decision the subject of challenge.

9. The purpose of judicial review was summarized in the case of **Municipal Council of Mombasa Vs Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** as follows;

“Judicial review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were 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... The court should not act as a Court of Appeal over the decider which 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...”

10. In the circumstances, the court shall not consider the ground raised by the Applicant to the effect that the 2nd Respondent relied upon contradictory evidence or erroneous factual evidence. A consideration of such a matter goes into the merits of the decision hence outside the province of judicial review.

11. The main question for determination is whether the two appeals in question were filed out of time and, if so, whether such late filing vitiated the proceedings before the 1st and 2nd Respondents. The Applicant's submission was that the Land Adjudication Officer had considered objection case Nos. 1060 and 762 on or about 25th October 1989 whereas the two appeals against the Land Adjudication Officer's decision were filed in 1999 and 2004 respectively. It was submitted that the period of 60 days prescribed by **section 29 of the Land Adjudication Act** had long expired by then. It was further submitted that the 1st and 2nd Respondents thus had no jurisdiction to entertain and determine those appeals.

12. Although the 3rd Respondent did not file a replying affidavit, he submitted that his late brother, Ibara Mwaniki whom he represented in the two appeals was merely a Respondent since he was not the one who filed the appeals. The 3rd Respondent, therefore, blamed the Appellant in that case for the late filing of the appeal. It was his further submission that the Applicant is the representative of the Appellant in **Appeal Case No. 228/2004** hence he should not be heard to complain.

13. By his written submissions filed on 11th May 2018, the 4th Respondent submitted that his **Appeal No. 206 of 1999** was duly filed within time since he paid the filing fee on 18th September 1989 and not 18th October 1999. It was further submitted that the latter date was merely the date appearing on the certification stamp of Land Adjudication Officer (LAO).

14. The court has noted that the decision of the LAO which was the subject of the two appeals to the Minister was made on 25th October 1989. It would, therefore, be strange for the 4th Respondent to claim that he paid the appeal fee on 18th September 1989 more than one month before the decision of the LAO. The court has also noted that the said certificate of payment of appeal and tracing fee does not cite the parcel number, objection case number, or even the appeal case number to which it relates. The 4th Respondent has, therefore, failed to establish any connection between the said certificate and the appeal the subject of the instant judicial review proceedings. It has also not been explained why an appeal filed in 1989 would be assigned a reference of 1999.

15. In the circumstances of this case, the court is satisfied that the two appeals the subject of the application for judicial review were filed out of time. The court is further satisfied that the said appeals were entertained and determined in contravention of express statutory provisions contained in **section 29 of the Land Adjudication Act**. The 1st and 2nd Respondents have conceded as much. Accordingly, such violations are amenable to judicial review of administrative action.

16. The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 3rd October 2012 and the same is hereby allowed in terms of prayer (1) thereof. Each party shall bear his own costs.

17. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 17th day of JANUARY, 2019.

In the presence of Mr Ombachi for the *ex-parte* Applicant and in the absence of all the Respondents.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

17.01.19