



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JR MISC APPLICATION 30 OF 2014

SAMUEL MURIUNGI M'ERUAKI.....APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION AND

SETTLEMENT IGEMBE DISTRICT.....RESPONDENT

DAVID M'MUNYURI M'LIRIA.....INTERESTED PARTY

JUDGMENT

1. By way of a notice of motion dated and filed on 22.9.2014, the Ex-parte Applicant is seeking an order of certiorari to call to this court and quash the respondent's decision of 5.8.2014 made in objection no. 3080 of 2010 which allowed 1.70 acres to be deducted from the applicant's land parcel no. 1427 in Antubetwe/Kiongo Adjudication section and be transferred to the interested party. The applicant also prays for costs of the suit.
2. Earlier on 3.9.2014, the exparte applicant had obtained leave to file the aforementioned substantive motion which leave was to operate as a stay of the implementation of the respondent's decision.
3. The motion has been opposed by the interested party through his replying affidavit filed in court on 18.2.2016.
4. The respondent though aware of this matter did not file any response to the main motion or submissions. Instead, he opted to associate himself with the averments of the interested party.
5. The brief background to this matter is that the Exparte Applicant and the interested party are relatives. The suit land is no. 1427 at Kiongo which was apparently registered in name of the Ex-parte Applicant at the time of demarcation. The Ex-parte Applicant is claiming whole entitlement to this land which is 3.8 acres or there about.
6. The interested party is claiming part of this land to the tune of 1.7 acres. The matter has been litigated upon through the committee stage and through the A/R objection stage.
7. Exparte applicant identified the interested party as his uncle as applicant is apparently the son of the interested party's step brother. This relationship is also confirmed in the objection proceedings no. 3080/10. The interested party however identifies exparte applicant as his cousin in paragraph 4 of his Replying affidavit.

Case for the exparte applicant

8. The case for the Exparte Applicant is contained in the Notice of Motion, his statement of facts and in the verifying affidavit. What the Exparte Applicant states is that the land reference no. 1427 A/Kiongo was gathered in his name, while the interested party got his land registered as parcel no. 1428/Kiongo. The Exparte Applicant avers that in 1985, the interested party colluded with the demarcation committee secretly and hence caused the fraudulent transfer of 1.70 acres of land from parcel 1427 which land was given to the interested party. Thus prompted the Exparte Applicant to lodge a complaint with the District Land Adjudication Officer (DLASO) who ordered the cancellation of the alleged illegal transfer.
9. The interested party then filed the A/R objection no. 3080 where a decision was given on 5.8.2014 where again, the Exparte Applicant's land to the tune of 1.7 acres was given to the interested party.
10. Ex-parte Applicant therefore avers that:

- (i) The respondent failed to consider the applicant's evidence on record.
- (ii) The respondent wrongfully relied on false evidence from the interested party and his witnesses.
- (iii) The respondent failed to invite, record or consider the views and or opinion of the committee members as required by the law.
- (iv) The respondent failed to investigate or consider the applicant's evidence to the effect that the interested party had gathered his own share of family land.
- (v) The respondent's decision is not fair, judicious, was unlawful, biased and made in bad faith.

Case for the Interested party

11. The interested party's case is contained in his Replying affidavit filed on 18.2.2016. He avers that the suit land is part of the family ancestral land which was allegedly gathered by exparte applicant's father who then registered the same in the name of the exparte applicant. The interested party states that the dispute regarding the 1.7 acres was heard way back in 1998. In 2010, the interested party lodged the A/R objection No. 3080 where he was given the land. He avers that the decision of the respondent was properly arrived at.

Determination

12. I summarize the points of determination as follows;

- 1) **Ownership of the land**
- 2) **Presence of a Committee**
- 3) **Irregularity, biasness**
- 4) **Dispute Resolution Mechanism in Adjudication Processes.**

Ownership of the land

13. Going by the contents of paragraph 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18 and 23 of the exparte applicant verifying affidavit of 3.9.2014, it is clear that the Exparte Applicant's claim is touching on the ownership of the land. The interested party has not been left behind on this issue as is reflected in paragraph 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, of his replying affidavit filed in court on 18.2.2016.

14. In **Municipal council of Mombasa vs. Republic & Umoja consultants Ltd Civil Appeal no 185 of 2001**, it was held that *"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 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."*

15. It follows that the concern of the court is with regard to the decision making process. See- **NBI JR Case No 447 of 2014 In the matter of Judicial Review by Republic vs. The National Transport and Safety Authority Ex-parte Applicant James Maina Mugo; Judicial Review Misc. Application No. 73 of 2015 NBI Republic vs. County Government of Kiambu Ex-parte Applicant FECHIMINVESTMENT LIMITED**. This court cannot therefore purport to determine as to who the rightful owner of the land is or who gathered it.

Presence of a Committee

16. In paragraph 22 of the statement of fact, Exparte Applicant has averred that the respondent failed to determine the matter with aid of a committee as required by the law. He has not cited the law applicable. The interested party has made reference to the land adjudication Act (cap 284). If this was the applicable law (Cap 284), then certainly there was no requirement for the District Land Adjudication and Settlement Officer to determine the matter with the aid of a committee- see **section 26 of the aforementioned Act**. It would have been necessary for the DLASO to determine the matter with the aid of the committee if the proceedings were being conducted under the Land Consolidation Act Cap 283 laws of Kenya, see- **Court of Appeal civil appeal No. 28 of 2015 Peter Kimandiu vs. Land Adjudication Officer Tigania West District and 4 Others**.

Irregularity, Biasness.

17. The Ex-parte Applicant has averred that his evidence and that of his witnesses was not considered, that the case was not conducted properly and that the decision was biased. I have perused the entire record availed as "SMI" by the Exparte Applicant, and it clearly indicates that all parties and their witnesses testified. The Exparte Applicant had identified his father as his witness and certainly M'Eruaki (the said witness) did testify. The findings of the District land and Settlement officer are contained in page 75, 76, 86, 87 and 88 of the proceedings. The District Land and Settlement Officer has clearly analyzed the evidence of the parties and I find no evidence of bias or bad faith.

Dispute Resolution Mechanism in adjudication processes

18. The dispute herein was litigated upon way back in 1986-88 via committee land case no. 9687/88 where Judgment was delivered in favour of the present interested party on 5.4.1988 (see-SM3). The subsequent directions given by the District Land Adjudication and Settlement on 9.11.1995 (see-SM4) had the effect of overturning the committee's decision.

19. Under what provisions of law could the District Land Adjudication and settlement officer purport to overturn the decision of the committee. The dispute falls within the ambit of the adjudication process. The applicable law must have been either the land consolidation act (cap 283) or land Adjudication Act cap 284). In both statutes, the next stage of litigation after the committee stage was the arbitration board see **section 11-18 of the land consolidation Act** and **section 21-22 of land adjudication act**. My conclusion on this point is that the actions of the District Land Adjudication Officer through his letter of 9.11.1995 were not anchored under the law. Perhaps the DLASO was aware of this short coming since in the aforementioned letter of 9.11.1995, he did inform the present interested party that he had to file the A/R objection case. That is exactly what the interested party did and he won the case.

Final Orders

20. I find not the slightest reason to interfere with the respondents findings. This JR motion is dismissed with costs to the interested party. The orders of stay of implementation of respondent's decision are hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 7TH JANUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

All parties absent

HON. LUCY. N. MBUGUA

ELC JUDGE