



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW APPLICATION NO. 12 OF 2017

IN THE MATTER OF AN APPLICATION FOR AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW
ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ORDER 53 RULE 1 NAD 2 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF OBJECTION NUMBER 4329 IN FOR THE LAND PARCEL NO. 5152 IN KARAMA ADJUDICATION
SECTION

AND

IN THE MATTER OF LAND PARCEL NO. 5152 KARAMA ADJUDICATION SECTION

REPUBLIC.....APPLICANT

VERSUS

THE OFFICER LAND ADJUDICATION AND SETTLEMENT OFFICER (DLASO)

TIGANIA EAST SUB COUNTYRESPONDENT

NGIRI M'AKWALU KARATHOINTERESTED PARTY

AND

SAMUEL MBILI MUGWIKIEXPARTE APPLICANT

JUDGMENT

Introduction

1. The applicant as, is usually the practice, commenced these judicial review proceedings through an exparte chamber summons under order 53 rule 1 (1) and (2) civil procedure rules and section 8 and 9 of the law reform act cap 21 and 26 Laws of Kenya. That exparte chamber summons was brought under certificate of urgency dated 3rd March 2017. When the application was placed before the duty judge for directions the same was certified urgent and the applicant was granted leave to apply for judicial review order in the nature of certiorari and call for and bring before it the decision and/or award of the DLASO Meru North in objection Number 4329 of KARAMA Adjudication Section for purpose quashing. The court also granted the applicant leave to apply for Judicial Review orders in the nature of prohibition stopping the respondent and the interested party from implementing the decision of the respondent delivered on 11th November 2016 in regard to land parcel number 515) KARAMA ADJUDICATION SECTION.

2. The court also directed that the leave so granted to operate as a stay of the decision/award made by the respondent and delivered on 11th

November 2016.

Applicant's Position

3. According to the applicant he was demarcated a parcel of land in 1970 measuring 1.04 acres and the interested party was aggrieved and filed objection number 4329. He stated that on the date of the hearing, he found the respondent and the interested party engaged in discussions without him before the appointed time of the hearing. The applicant also averred that during the scene visit to the property, the respondent and the interested party had discussions he was not privy to. The applicant further complained that at the scene visit the children of the interested party had discussions with the respondent which he was not privy to. The applicant further deponed in his verifying affidavit that at the scene visit, the interested party was completely unable to identify the boundaries of the property which the respondent did not record.

4. He also stated that he asked the interested party several questions and the answers given were not recorded. The applicant deponed that he had brought two witnesses to testify on his behalf but were not given an opportunity

Respondent's position

5. The respondent did not file any response to the applicant's application.

Interested party's position

6. The interested party filed a replying affidavit on 5th September 2018 in which he deponed that the application as filed is time barred in that the decision was made on 11.1.2016 and ex parte applicant filed his application on 3.3.2017. He deponed that the application was to be brought before the expiry of 30 days. The interested party therefore contends that the applicant's application is an afterthought brought too late in the day and that the same amounts to an abuse of court process.

7. The interested party further stated that the applicant would have sought leave to file an application out of time and therefore offends the provisions of section 29 of cap 284 laws of Kenya.

Applicant's submissions

8. When this case came up for directions the parties agreed by consent to canvass the same by way of written submissions. The applicant through the firm of Mbaabu M'Inoti and Co. Advocates submitted that the impugned decision of the DLASO Tigania East was delivered on 11.11.2016 and the present application was filed on 3.3.2017 which is less than 4 months period.

9. He submitted that a judicial review application is required to be instituted within 6 months from the time of the issuance of the award/decision and not thirty (30) days as alleged by the interested party. He cited the case of **Republic Vs Principal Magistrate (Kwale) & 4 others (2014) eKLR**. The learned counsel submitted that the adjudication began its proceedings in the absence of the ex parte applicant who joined the proceedings mid-way. He also submitted that the respondent and the interested party had discussions away from the earshot of the ex parte applicant during the scene visit which discussions the ex parte applicant was not privy to. He also submitted that the respondent selectively made records of the cross-examination of the interested party by the ex parte applicant. The respondent is also said to have failed to record crucial details of the ex parte applicant's knowledge of the suit land. It is further submitted that the respondent denied the ex parte applicant an opportunity to introduce all the witnesses necessary to prove his case. The learned counsel cited the following cases in support of their case:-

- **Republic vs District Land Adjudication and Settlement Officer, Tigania and Igembe interested party M'Ambau Thambau ex parte Musa Ngaruthi (2015) eKLR**

10. In conclusion the counsel submitted that the conduct of the respondent by denying the ex parte applicant opportunity to call his witnesses and failing to record questions and/or doing so selectively means the right of the ex parte applicant to fair trial was compromised and offended the rules of natural justice as though the respondent had a pre-determined outcome of the dispute.

Interested party's submissions

11. The interested party through the firm of Kiogora Mugambi & co. advocates submitted that the application is time barred and that the same offends the mandatory provisions of section 29 of cap 284 Laws of Kenya. He submitted that the ex parte applicant did not exhaust the remedies set out in the land adjudication act by failing to appeal to the minister for lands within 60 days of the decision being challenged.

12. The learned counsel submitted that it was only after the minister has given her decision on appeal that the applicant would have decided to file the present application for Judicial Review proceedings. He submitted that these proceedings are premature and the orders being sought cannot be granted until all remedies provided for by law have been exhausted. The learned counsel also submitted that the ex parte applicant was heard to the fullest and at no time had he complained of the said allegation and that the respondent issued hearing notice to all parties who were present during the hearing of the said objection. The learned counsel cited the following cases.

(1) **Stephen Michuki Surya vs Nkuri & 2 others (2013) ekLR**

(2) **Ransa Co. Ltd & 2 others vs Manca Francesco (2015) eKLR.**

Respondent's submission

13. The respondent did not file any submissions.

Disposition

14. The scope of Judicial Review has been resolved through a myriad of decision which has held again and again that Judicial Review is concerned with the decision making process and not with private rights or merits or the decision being challenged.

15. In the case of **Patoli vs Kabale District Local Government Council and others (2008) 2 EA 300** it was held as follows:

“In order to succeed in an application for Judicial Review the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality”.

16. Both the applicant and the interested party have attached copies of the proceedings and the impugned decision by the respondent. From these proceedings, it is apparent that the hearing of the objection proceedings was on 28.10.2016. The objector is given as Ngiri M’Akwalu Karatho and his witnesses were Teresia Kathura Isaiah, Karani Ezra Muchena and David Kimuudu Muchena.

17. The respondent was also recorded as Samuel Mbiti Mugwika and his witnesses were given as Geoffrey M’Taya and Agnes Agubuku Samwel. The parties and their witnesses testified and were cross examined. There was even a scene visit conducted before the impugned decision was made.

18. The complaint by the applicant that he was not given an opportunity by the respondent to call extra witnesses is not reflected from the proceedings. The applicant did not even follow it put with any letter if indeed he was not given an opportunity to call any other relevant witness.

19. The complaint by the applicant in these judicial proceedings that he was not given a chance at a fair hearing in my view is an afterthought.

20. The applicant fully participated in the objection proceedings and even called witnesses. She never indicated that she wanted to call additional witnesses to those she had given and who testified and were cross-examined. This application in my view lacks merit and the same is hereby dismissed. Since the mistake was not committed by either of the parties, I order each party to bear their own costs.

READ, DELIVERED AND SIGNED AT MERU IN THE OPEN COURT THIS 28TH DAY OF FEBRUARY, 2019

E.C CHERONO - JUDGE

In the presence of:

1. Mr. B. Kimathi for respondent

2. C/A - Kananu