



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

JUDICIAL REVIEW APPLICATION NO. 20 OF 2017

IN THE MATTER OF AN APPLICATION BY DOMENICA KALOTIA KALALU TO APPLY FOR A JUDICIAL REVIEW WRIT OF CERTIORARI

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA

IN THE MATTER OF THE FINDINGS, PROCEEDINGS AND ORDER MADE ON THE 21ST DAY OF APRIL 2017 IN OBJECTION NO. 5016 OVER LAND PARCEL NO. 871 SITUATED IN KARAMA ADJUDICATION SECTION

BETWEEN

DOMENICA KALOTIA KALALU.....EXPARTE APPLICANT

VERSUS

TIGANIA EAST DISTRICT LAND AND

SETTLEMENT OFFICER.....1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

AND

SHADRACK MUTHEE M'IMANJA..... INTERESTED PARTY

RULING

1. This ruling is in respect of the notice of preliminary objection filed on 2.10.2018 by the interested party where he avers that;

(i) This suit offends section 8 of the land consolidation act as there is no consent in writing of the adjudication officer to the institution of this suit.

(ii) That the honourable court lacks jurisdiction to entertain the suit as the same is improperly before the honourable court.

(iii) This suit offends section 54 of the succession act cap 160 Laws of Kenya.

(iv) That the applicant lacks the capacity to bring any suit in her name without the grant Ad litem as the said estate is in the names of the deceased and Limited Grant of letters of administration Ad Litem which is provided for under Form 14 of the Fifth schedule of the Succession Act and deals with suits was not issued.

(v) The Judicial Review offends section 2(1) of the succession act cap 160 laws of Kenya.

(vi) This judicial review offends order 53 of the civil procedure act cap 21 laws of Kenya.

(vii) That this suit has been brought to this court in clear disregard of the land consolidation act and is an abuse of the due process of court.

2. Directions were given for the Preliminary Objection to be canvassed by way of written submissions. Counsel for respondent (the Attorney General) stated that they would be associating themselves with the arguments of the interested party hence they would not file any submissions.

Submissions of the interested party

3. In summary the issues raised by the interested party are that the Judicial Review motion offends the provisions of section 8 of the land consolidation act and section 30 of the land adjudication act as no consent was obtained when filing the suit.

4. The interested party avers that the preliminary objection is merited as it raises pure points of law considering that the dispute was in the adjudication arena.

5. In support of this argument the interested party relied on the following authorities;

- **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969.**

- **Civil case no. 164/2015 Isaiah Muturi Mucee vs Lucy Chabari & 2 others (unreported).**

- **H.C civil Suit No. 90/12 Kitale Nicholas Tukei vs Chepochekatang Lounek & 2 others.**

- **Nicholas Kiptoo Arap Korir vs independent electoral and boundaries commission and 6 others 2013.**

6. The other issue raised by the interested party is whether the exparte applicant was required to have a grant in respect of the estate of deceased before filing the suit. On this point, it is submitted that deceased died after the commencement of the succession Act hence the exparte applicant needed to obtain a grant Ad litem under section 54 of the law of succession Act.

Submissions of the exparte applicant

7. On the issue of the consent, the exparte applicant avers that judicial Review proceedings are not subject to the land consolidation act. On this point, the Exparte applicant relied on the case of;

- **Commissioner of Lands vs Kunste Hotel Ltd Civil Appeal no.234/1995.**

- **Republic vs Town clerk Kisumu Municipality – exparte East A.E consultants (2007) 2 page 441.**

8. On the issue that the exparte applicant had no grant of letters of administration, it is submitted that it is the interested party who filed the objection case no. 5016 naming the Exparte Applicant as the respondent (rightly or wrongly). The Exparte Applicant did not therefore elect to be a party but was forced by the interested party and the respondent.

9. On ground no. 6, the Exparte Applicant avers that she doesn't know how the Judicial Review offends the provisions of order 53 of Cap 21.

Determination:

10. I have carefully analyzed all the arguments advanced herein and I have also considered the rival submissions of the parties. I will deal with grounds 1, 2 & 7 together, then ground 3, 4 and 5, while ground 6 will be considered separately.

Grounds 1, 2 & 7

11. The objection proceedings in case no. 5016 were brought under the land consolidation act cap 283 Laws of Kenya,- see annexure DKKI. **Section 8** thereof provides that;

Subject to the provisions of this section, no person shall institute and no court whatever shall take cognizance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given”.

12. The dispute here in was under the adjudication processes. No consent was obtained before the filing of the Judicial Review. However the question is; Does a party need to have the aforementioned consent before commencement of Judicial Review proceedings?

13. In **Judicial Review No. 17 of 2012 Kisii, Antina Mahammed Hamisi Exparte Applicant vs Suba District and Others**, the court while dealing with the issue of consent under section 30 of the Land Adjudication Act stated thus;

“What are barred by the Act under section 30 (1) are, civil proceedings. Since Judicial Review proceedings are neither civil nor criminal in nature, it is my finding that judicial review proceedings are not subject to the provisions of section 30 (1) of the Act. No consent was therefore required from the land adjudication officer before the institution of these proceedings. The application herein is therefore not bad in law for want of such consent as contended by the interested parties”.

14. A similar question arose in JR No. 13/14 Nakuru Joseph Lesalol Lekitio & Others Exparte Applicant vs. Musanka Ole Runtus Tarakwa & Others where it was held that;

“In a situation regarding land under adjudication, there is an elaborate process that is laid down by the Land Adjudication Act, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication. There would be no bar to instituting Judicial Review proceedings, to question the process being undertaken, and in my view, such proceedings, which go to question the process undertaken in the adjudication process would not require the consent of the Land Adjudication Officer. This is because such a dispute would not be a dispute “concerning an interest in land” which is what Section 30 (1) specifically bars. The term “interest”, in relation to land under adjudication, as defined by Section 2 of the Land Adjudication Act, “... includes absolute ownership of the land and any right or interest in or over the land which is capable of being registered under the Registered Land Act (Cap. 300)”

15. In B & M Mining Co. Ltd applicant minister of environment and mineral Resources, commissioner for mines & Geology, JR no. 20/11 Kisumu, it was held that;

“It is now settled law that in Judicial Review proceedings, courts exercise jurisdiction *suis generis*. The only applicable part of the Civil Procedure to such proceedings is order 53 of the Civil Procedure Rules Judicial Review Proceedings provided for under order 53 of the Civil Procedure rules are special in procedure, which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either criminal or Civil Proceedings. In exercising powers under order 53, the court is exercising neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *suis generis*”.

16. I find nothing useful to add save to restate the legal position that the consent is not required when one is filing a Judicial Review case.

Grounds 3, 4 & 5;

17. **Whether the Judicial Review case was filed in violations of the provisions of section 2 (1) and section 54 of the law of succession act?**

Section 2 (1) of the Law of Succession Act provides that;

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons”.

18. In the objection case no. 5016, the Exparte Applicant was the respondent which means that she was pulled into the matter by the interested party. However even if she had participated in the proceedings through her own prompting, the aforementioned provisions of law under the Law of Succession Act would not have been applicable in her case. This is primarily because in the adjudication processes the rights and interest of the parties are still being ascertained.

19. Section 13 of the land consolidation Act provides that

“(1) Every individual person claiming any right or interest in any land within an adjudication section, and any person whose presence is required by a Committee or Arbitration Board, shall attend in person, or by representative according to African customary law, as required by the Committee or Arbitration Board, at the time and place specified in the warning referred to in section 12 of this Act. (4) Where one or more of several heirs of a deceased person, or one or more out of a group of heirs, claiming a separate interest from another group or groups, appears, his or their appearance shall be deemed to be the appearance of all such heirs or all such groups, as the case may be, unless the Committee otherwise directs”.

20. In Kisii H.C CIVIL CASE NO. 4 OF 2011, TOBIAS ACHOLA OSINDI & 13 OTHERS VERSUS CYPRIANUS OTIENO OGALO & 6 OTHERS where the court was dealing with issue of locus under the land Adjudication Act, it was held that;

“A claim under the Act pursuant to section 13 thereof can be made by “every person who considers that he has an interest in land within an adjudication section”. A claim under section 13 of the Act can be made by successors of a deceased person and not necessarily the deceased’s legal representatives. See, section 13 (5) of the Act. The purpose of a claim under the Act is to aid in the ascertainment of the rights and interest of persons in the land within an adjudication area”

21. I therefore find that the Exparte applicant had capacity to appear in the objection proceedings. She is also properly before this court as she is challenging the decision making process.

Ground 6

22. It is averred that this Judicial Review case offends the provisions of order 53 of the civil procedure rules. This is however not the case as leave was duly obtained and the substantive motion was properly filed. The court has not been told in which way the motion is offensive to the cited provisions of law.

23. The upshot of my findings are that the preliminary objection fails. The same is dismissed with costs to Exparte Applicant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20TH FEBRUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Miss Munga for exparte applicant

Aketch for the interested party

Interested party

HON. LUCY. N. MBUGUA

ELC JUDGE