



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. JR 49 OF 2014

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR MBEERE.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

BONIFACE NJERU NJUE & 170 OTHERS.....INTERESTED PARTIES

AND

FRED RIKANA NGOCHI & 3 OTHERS.....EX-PARTE APPLICANTS

JUDGEMENT

1. Pursuant to leave granted on 11th March 2015, the *ex-parte* Applicants (hereinafter the *Applicants*) filed a notice of motion dated 20th March 2015 brought under **sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21), Order 53 Rule 3 of the Civil Procedure Rules and all enabling provisions and precedents of law** seeking the following orders;

a. An order of mandamus directed at the Respondents jointly and severally that they rectify the register of the suit lands by removing the names of the interested parties and replacing with the Applicants' names and issuing titles accordingly.

b. Costs be borne by the Respondents.

2. The said motion was based upon the grounds set out on the face thereof, the chamber summons for leave to file the application, the statutory statement and verifying affidavit all dated 14th December 2014. The gist of the application was that the Respondents had irregularly cancelled the registration of the Applicants as proprietors of various parcels of land (hereinafter the *suit properties*) listed in the schedule filed with the chamber summons and instead registered the interested parties as proprietors without due process. It was contended that the said action was *ultra vires*, unreasonable, capricious and oppressive.

3. It would appear that in the course of the proceedings, more parties applied to be joined as additional interested parties and Fred Rikana Ngochi was added as the 1st Applicant in place of Elton Njue. It would also appear that some of the suit properties may have either been sub-divided or changed numbers over the years.

4. The court record also shows that on the 19th September 2018, the 1st Applicant, Fred Rikana Ngochi, applied to be removed from the proceedings on the basis that his name had been included without his knowledge and authority. He denied being the personal representative of his late grandfather, Njeru Mukundie (deceased), his uncle, Elton Njue (deceased) or his father Nicholas Ngochi (deceased). He also denied being a leader or representative of Mukera clan or holding any leadership position within the clan. He denied having instructed any advocate to file the instant application for judicial review. His said application was granted on 23rd January 2019 since there was opposition thereto.

5. When the substantive application for judicial review was listed for directions on 25th July 2018, the court gave the following directions for its disposal;

a. That the Respondents and the interested parties shall file and serve their responses to the application within 30 days.

b. That the Applicants shall thereafter file and serve their written submissions and authorities within 30 days upon service of the last of the responses to the application.

c. The Respondents and the interested parties shall thereafter file and serve their respective submissions within 30 days upon service of the Applicants' submissions.

d. That the Applicants shall have a right to reply on points of law only within 14 days upon service of the last of the submissions by the Respondents and the interested parties.

e. The matter be mentioned on 20th November 2018 to confirm compliance.

f. That judgement shall be delivered on 14th February 2019.

6. The record shows that none of the parties had complied by 20th November 2018. In spite of this, the court still confirmed the judgement date of 14th February 2019. The record shows that on 24th July 2018 a supplementary affidavit sworn on the same date was filed by one Norman Njue Misheck who claimed to be the 3rd Applicant herein. The said affidavit was filed without leave of court as required under **Order 53 Rule 4 (2) of the Civil Procedure Rules**.

7. The record further shows that the 33rd interested party, Jamlick Njiru Nthuni alias Njiru Hesbon, filed a replying affidavit sworn on 15th January 2019 on his own behalf and on behalf of several other interested parties in opposition to the application for judicial review. He stated that his deceased father, Hesbon Nthuni was listed as the 13th, 14th and 57th interested parties and that the Applicants had never applied for his substitution. It was further stated that the Applicants were members of Mukera clan who had unsuccessfully litigated with members of Nditi clan over the suit properties for a very long time.

8. It was further stated that the Applicants' titles were properly cancelled following the conclusion of the adjudication process in which members of Mukera clan lost in the **Minister's Appeal Case No. 1 of 1976**. It was further stated that the Applicants' Mukera clan challenged their loss before both the High Court and the Court of Appeal but lost in both instances. It was contended that the instant application was a scheme to re-litigate a matter which was concluded a long time ago and after several interested parties had passed on. There were several copies of death certificates and burial permits annexed to the said replying affidavit.

9. The Applicants filed their written submissions on 22nd January 2019 through the firm of Rose Njeru & Co Advocates whereas the firm of P.N. Mugo & Co. Advocates filed theirs on behalf of some of the interested parties on 5th February 2019. The firm of Beth Ndorongo & Co filed their submissions on behalf of the 20th, 27th, 39th, 41st, 42nd, 43rd, 49th, 54th, 60th, 68th, 94th, 100th, 101st, 129th, 131st and 162nd interested parties. There is no indication on record of the Respondents or the rest of the interested parties having filed submissions.

10. The court has considered the application for judicial review, the response thereto by some of the interested parties as well the submissions on record. The material on record shows that the clans to which the Applicants and the interested parties belong have had a long standing dispute over the suit properties dating back to the 1960s. The Applicants were not keen to bring out the entire history of the dispute and put it into perspective.

11. The Applicants simply truncated the history of the land dispute to a much shorter period. They were mainly concerned with the events of 1997 or 1998 when their titles and those of their clansmen were cancelled by the 1st Respondent and the interested parties registered as proprietors in their stead. They were not forthcoming and generous with the prior adjudication and litigation processes in which their clan apparently lost to Nditi clan.

12. The court has perused the entire material on record. There is no doubt that the Applicants are members of Mukera clan and that the interested parties are mainly members of Nditi clan. There is also no doubt that the two clans have been involved in disputes over the suit properties since the 1960s. When the area in dispute was declared an adjudication section in the 1970's the land demarcation and adjudications process was undertaken. The process ran its full course culminating in an appeal to the Minister under **section 29 of the Land Adjudication Act (Cap 284)**.

13. The main challenge which arose ultimately was implementation of the award or decision of the minister. It would appear that there were two versions of the decision of the Minister which were contradictory in content. The 2nd version was adverse to members of Mukera clan which was represented by Njeru Mukundie, the grandfather of the 1st Applicant (who later bowed out of the instant proceedings). The leaders of Mukera clan sought to challenge the adverse decision through various proceedings without success. Their suit in *Embu HCCC No. 165 of 2008*, Njeru Mukundie & Others Vs the AG and 8 Others was dismissed by the High Court on 15th March 2011. The subsequent appeal to the *Court of Appeal in Nyeri Civil Appeal No. 110 of 2011* was similarly dismissed on 10th October 2013.

14. One would have thought that members of Mukera clan would have rested the matter there. However, they decided to re-invent their case and come up with a new cause of action. They faulted the 1st Respondent for implementing the adverse decision of the minister without due process. The Applicants contended that the 1st Respondent used a non-existent letter to cancel their titles and to have the interested parties registered as proprietors of the suit properties. In other words, they are challenging the mode or process by which the decision of the Minister was implemented by the 1st Respondent.

15. The court has seen the communication between officers in the office of the 2nd Respondent and the 1st Respondent. Whereas the 2nd Respondent did not dispute the existence of the decision of the Minister adverse to Mukera clan, he insisted that the letter upon which the 1st Respondent acted did not originate from his office. The correspondence indicates that the 1st Respondent was intimidated and arm-twisted into reinstating one of the members of Mukera clan into the land register. It is not clear why the same tactic was not employed with respect to the rest of the members of Mukera clan who were similarly aggrieved.

16. Although the Applicants are entitled to question the decision making process and the process of implementation of a decision, every complaint or grievance must be viewed in its proper context. The court is aware that under **section 29 (3) of the Land Adjudication Act (Cap 284)**, the Chief Land Registrar is entitled to rectifying the register upon finalization of the appeal to the minister. The parcels of land the subject of an appeal are usually restricted pending the outcome of the appeal.

17. The question of when and how the Chief Land Registrar communicates with his Registrars in the field to rectify the adjudication register is an internal matter within the concerned government agency. Whether it is done by letter, fax or email or other means it is of no concern to the disputing parties. What is important is the implementation of the Minister's decision. As long as the implementation is not contrary to the Minister's decision, the Applicants in the instant case would have no legitimate grievance. The 1st Respondent did not alter the Minister's decision and neither did he make a new decision. He did not violate any of the Applicant's legal rights.

18. The court has noted from the annexures to the affidavit of the 33rd interested party that the Director of Land Adjudication was alive to the fact that the implementation of the Minister's decision was long overdue. In his letter dated 8th February 1982 to the Land Registrar, Embu he stated as follows;

“MINISTER'S LAND APEAL CASE NO. 1 OF 1976 EVURORE – NGUTHI

I refer to your letter LND/EBU/10/A/II of 31/12/81. The above appeal was heard and decided by the Minister on 27th May 1976 but it would appear that no action was taken on the Minister's decision thereon.

In order to have the matter sorted out, I have asked the Chief Land Registrar in a separate letter to take necessary action in accordance with the judgement and order of the Minister on the appeal.

In the meantime, I am requesting you to enter restrictions on the titles of the following parcels which were affected by the Minister's order on the appeal (enclosed) if no such restrictions were entered against Evurore-Nguthi parcels Nos...”

19. The court has noted that the list of the several parcels of land which are contained in the said letter is substantially the same as the ones contained in the Applicants' notice of motion dated 18th May 2018 which was said to belong to members of Mukera clan. The court is of the opinion that the manner in which government agencies communicate internally on implementation of a Minister's decision under **section 29 of the Land Adjudication Act** cannot found a course of action in favour of the Applicants. The 1st Respondent in this matter did not make any new decision or take any action contrary to the Minister's decision.

20. The court is not inclined to allow the Applicants' motion for another reason. It is evident from the material on record that members of Mukera clan lost their bid, on merit, to retain the suit properties all the way from the Minister's appeal, the High Court and the Court of Appeal. It would make a mockery of the justice system to allow them to obtain the same remedy which they could not obtain in previous proceedings. The net effect of allowing the instant application would be to allow members of Mukera clan to retain the suit properties through the back door. The Minister's decision which was adverse to Mukera clan has never been nullified. Both the High Court and the Court of Appeal declined to interfere with it.

21. The court is aware that some of the parcels of land the subject of previous proceedings may have changed owing to sub-division and other reasons. This is confirmed from the Applicants' notice of motion dated and filed on 18th May 2018 seeking orders of inhibition against the various parcels of land set out on the face of the motion. Some of the parcel numbers have, of course, remained unchanged since the decision of the Minister in **Appeal Case No. 1 of 1976**. That, however, does not change the nature and character of the dispute between the two clans.

22. Before concluding this judgement, the court would like to refer to what appears to be a prophetic statement in the judgement of the High Court in **Embu HCCC No. 165 of 2008 – Njeru Mukundie & Others Vs The Attorney General and 8 Others**. In paragraph 2 of the said judgement, the court observed as follows;

“The Plaintiffs have then reinvented it and bounced it back to this court. I am convinced that whichever way this judgment goes, the courts are not likely to see the end of this matter soon. It may find its way to the Court of Appeal and maybe even to the Supreme Court once that court is established and becomes operational. The subject matter of this suit is land which is claimed by two clans. The Plaintiffs represent the Mukera Clan while the 4th and 5th Defendants are sued as representatives of the Nditi clan.”

It is thus evident that this prophetic statement which was pronounced in 2011 is still very much alive. The litigation between the two clans has truly continued unabated over the years and there are no signs that the legal battle is about to abate. The prophecy of the High Court shall continue to hold true.

23. For the foregoing reasons, the court finds that the Applicants have not demonstrated a case for the grant of the prerogative order sought. They have failed to demonstrate that the 1st Respondent acted in a manner *ultra vires* unreasonably, capriciously, oppressively or in violation of the rules of natural justice. The representatives of Mukera clan were accorded a chance to be heard before the Minister hence they did not require another hearing before the 1st Respondent on the same issue. Consequently, the court finds no merit in the Applicants' notice of motion dated 20th March 2015 and the same is hereby dismissed in its entirety. Each party shall bear his own costs.

24. It is so decided

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **FEBRUARY, 2019**

In the presence of Ms. Maina holding brief for Rose Njeru for the *ex-parte* Applicants, Mr Siro for the Respondents, Mr Okwaro holding brief for Ms. Ndorongo for 20th, 27th, 36th, 39th, 41st, 42nd, 45th, 49th, 52nd, 60th, 94th, 100th, 109th, 129th, 131st and 162nd interested parties, Miss Ann Thungu for P.N. Mugo for some interested parties and Mr Siro holding brief for Mr Njiru Mbogo for some interested parties.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

14.02.19