



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

JR NO 38 OF 2016

IN THE MATTER OF THE APPLICATION BY JANET NCORORO FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF THE DECISION MADE ON 22/11/2016 BY THE ISEMBE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER IN OBJECTION CASE NO.S 2990 & 2991 IN RELATION TO LAND PARCEL NOS. 4532 & 4533 AMWATHI/MUTUATI II ADJUDICATION SECTION

AND

IN THE MATTER OF LAND PARCEL, NO 3666 AMWATHI/MUTUATI II ADJUDICATION SECTION

AND

IN THE MATTER OF LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

JANET NCORORO.....APPLICANT

VERSUS

THE DLASO, ISEMBE SOUTH.....RESPONDENT

AND

SALESIO NKUNJA MUGA.....1ST INTERESTED PARTY

STEPHEN MIRITI MUCHEKE.....2ND INTERESTED PARTY

JUDGMENT

1. The ex-parte Applicant moved the Court through a certificate of urgency dated 09.12.2016 and a Chamber Summons of same date seeking leave to file a notice of motion for prerogative orders of certiorari, along with a statement of facts. That application was allowed and leave was granted vide a ruling dated 15.12.2016.

2. The Applicant then filed a notice of motion on 03.01.2017 for orders that,

a. That this honourable Court be pleased to issue judicial review orders of certiorari to remove into this Court and quash the proceedings and decision of the district Land Adjudication and Settlement Officer, Isembe District made on 22.11.2016 in objection case No.s 2990 and 2991 relating to land parcel nos. 4532 and 4533 AMWATHI/MUTUATI IIA Adjudication Section.

b. That this honourable Court be pleased to issue judicial review orders of prohibition directed to the Respondent directing the respondent, his agents, servants', employees or any officers working under him or whomsoever else acting on the institutions of the Respondent, from shifting land parcel nos. 4532 and 4533 AMWATHI/MUTUATI IIA Adjudication Section, presently occupied developed and owned by the ex-parte Applicant herein or in any other manner whatsoever tampering and/or interfering with the ex-parte Applicant's ownership, possession, occupation and use of land parcel no. 3666 AMWATHI/MUTUATI IIA Adjudication Section at its present ground condition.

c. That costs be provided for.

3. The Application is premised on the following grounds;

- a. The ex-parte Applicant is the legitimate and bona-fide legal owner of parcel no. 3666 AMWATHI/MUTUATI IIA Adjudication Section (the suit land) and is in possession and occupation of the same and has been for years and has extensively developed the same.
- b. The Applicant inherited a small portion of land from his father one M'Angiru Thanguana then he purchased another 1.5 acres from one M'Imunya which were then consolidated to what is now referred to as the suit land.
- c. That the Respondent has in its decision made on 22.11.2016 in respect to objection numbers 2990 and 2991 directed that parcel numbers 4532 and 4533 in the same adjudication section be shifted from their present ground position and be moved to the present ground position of the suit land owned by the ex-parte Applicant .
- d. The said decision is intended to give the 1st and 2nd interested parties land that presently belongs to the ex-parte Applicant s which will in effect disinherit and disposes the ex-parte Applicant s of her rightful land.
- e. That the ex-parte Applicant was not part of the said proceedings and he was not summoned to participate hence the decision is in breach of natural justice and contravenes the Applicant's right to ownership of land.
- f. The actions of the Respondent were evidently illegal therefore the Applicant is entitled to the orders sought.

4. In her statement of facts, the Applicant reiterates the grounds on the face of the application and in her verifying affidavit she has annexed a copy of the record book and a copy of the said proceedings.

5. The application is opposed through the replying affidavit of the 1st interested party. He deposes that the Applicant is his Aunt. That the original parcel of land from whose parcels numbers 4532, 4533 and 4534 were excised was parcel No. 92 which belonged to their late grandfather who created the said subdivisions and divided it and allocated the three resultant parcels to Salesio Nkunja Muga (0.22acres) Stephen Miriti Mucheke (0.20 acres) and Joshua Murangiri (0.20 acres) respectively. That the Applicant did not inherit any portion of land parcel no. 92 and accuses her of intending to grab what is rightfully theirs. He concedes that the decision by the Respondent was indeed made in respect to objection numbers 2990 and 2991 directing that parcel numbers 4532 and 4533 be shifted back to where parcel no. 92 was initially in absence of the Applicant. He contends that the attendance of the Applicant was not necessary to the said proceedings because she was not one of the beneficiaries of the said parcels of land. That the decision was made through a legal and fair process was presided over by the Respondent and appointed committee members. He considers the application to be an afterthought and incompetent.

6. The Respondent despite being represented on record did not file any response to the motion. On the 7/3/17 the Court ordered the Respondent to avail the sketch map in respect tot parcel No 3666 to the exparte Applicant 's failure to which the DLASO was to attend Court during the hearing of the motion. On the 11/6/18 the Applicant s counsel informed the Court that the sketch map had been availed by the Respondent and sought a hearing date. The Interested Parties asked to be availed the sketch map as they had not been served. On the 11/7/18 the Applicant s counsel again informed the Court that they had served the sketch map upon the Attorney General but had not received a response. It would appear that the said sketch map was not filed on record for the Court to have the benefit of its import. The parties seem to have either received the sketch map but did not share with the Court or that they abandoned it all together.

7. On the date of the hearing the Interested Parties and the Respondent were absent but they were dully represented by counsels Messrs Mbijiwe and Kiongo respectively. The Court being satisfied that the parties had notice of the hearing date proceeded to give directions that the motion be canvassed by way of written submissions. The Court ordered the Applicant to serve the parties with the directions.

8. As at the time of writing this judgment it is only the Applicant that has filed Written Submissions.

9. The ex-parte Applicant submits that the decision that was made by the Respondent was a quasi-judicial decision of an administrative nature which had the effect of disinheriting her of their rightful share of land. There is uncontested evidence on record that she was not involved in the said proceedings that led to the making of that decision, she was therefore not afforded an opportunity to explain her side of the story neither was she given an opportunity to cross examine the witnesses who testified at that hearing. She avers that the process was expressly in breach of natural justice. She has quoted several decisions that have analysed the principles that guide the Courts in respect to judicial review and the scope thereof. Further that the decision of the respect violated her right to ownership of land as guaranteed in the constitution.

10. Having considered the motion, the affidavit evidence on record, the written submissions and all the material placed before me the issues are;

- a. Whether the proceedings of the DLASO should be quashed
- b. Whether the Court should issue orders for prohibition
- c. Who meets the costs of the application?

11. In respect to the scope and purpose judicial review is. The Court of Appeal in the case of **MUNICIPAL COUNCIL OF MOMBASA V REPUBLIC AND ANOTHER 2002 eKLR 223 CIVIL APPEAL NO 185 OF 2001** the Court of appeal stated:

“That is the effect of this Court’s decision in the KENYA NATIONAL EXAMINATION COUNCIL case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the Court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a Court hearing a matter by way of judicial review is concerned with, and such Court is not entitled to act as a Court of appeal over the decider; acting as an appeal Court over the decider 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 – and that, as we have said, is not the province of judicial review.”

12. I have perused the impugned AR proceedings in respect to objection Nos 2990 and 2991 and it is not clear from the proceedings how the Applicant’s parcel No 3666 is related to the original parcel No 92 and its subsequent subdivisions into parcel Nos. 4532, 4533 and 4534. There is no mention of parcel No 3666. The Interested parties have explained that the parcel 92 belonged to their grandfather who subdivided it into 3 parcels stated above and allocated to the Interested parties and one Joshua Murangiri in various sizes. The Interested parties accuse the Applicant of having trespassed onto their land. The Court was not availed the sketch map to be able to appreciate the land on the ground. That notwithstanding I have examined the cards availed by the parties and note that the Applicant land was demarcated in 1995 while that of the Interested parties is demarcated in 1996.

13. Back to the judicial review remedies, being about the process of making the decision and not the merits of the decision. The Applicant has averred that she was not a party to the AR proceedings and neither was she notified. I have perused the proceedings conducted by the DLASO and the Court agrees with the Applicant. There is no summons on record to show that she was notified of the proceedings. The right to be heard as enshrined in Article 50 of the constitution read together with Article 47 has been flouted. The Applicant was not given the opportunity to be heard. The DLASO therefore acted contrary to the principles of natural justice by depriving the Applicant the right to be heard in matter that the outcome had a direct and adverse effect on her right to own property which is a constitutional tenet.

14. The Court answers the 1st issue in the affirmative.

15. In the case of **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** the Court of Appeal held, *inter-alia*, as follows:-

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the Respondents did not apply for an order of certiorari and that is all the Court wants to say on that aspect of the matter.”

16. Given that prohibition looks to the future the Court finds that this is not an efficacious remedy to grant in the circumstances.

17. The upshot is that the application is allowed in terms of prayer a) with costs payable to the Applicant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

In presence of;

C/A Mutwiri

Maheli for exparte Applicant

Ms. Mbijiwe for 1st and 2nd Interested party