



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JR NO. 34 OF 2014

IN THE MATTER OF THE APPLICATION BY M'MUKARIA KAILAGUA FOR JUDICIAL REVIEW ORDERS OF PROHIBITION

AND

IN THE MATTER OF LAND CONSOLIDATION ACT, CAP 283

AND

IN THE MATTER OF LAND ADJUDICATION OFFICER IGEMBE NORTH AMWATHI/MUTUATI II A ADJUDICATION SECTION

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26

REPUBLIC.....APPLICANT

VS

THE LAND ADJUDICATION OFFICER

IGEMBE NORTH.....RESPONDENT

AND

M'MUKARIA KALAIGUA.....EXPARTE APPLICANT

RULING

1. By leave of the Court granted on the 7/11/14 the Applicant filed a substantive motion on the 3/12/2014 seeking orders as follows;

“That this honourable Court be pleased to issue prohibition orders to prohibit the District Land Adjudication officer Igembe North District from illegally moving, displacing Parcel no. 5364 and creating the new number 5399 Mutuati/Amwathi/11A Adjudication section because they are under adjudication section under CAP 284 laws of Kenya and the ex-parte Applicant cannot be removed”.

2. The Application is premised on the following grounds;

- a. The Respondent has commenced the process of un-procedurally and illegally acquiring the Applicant's parcels as a public land without the due process of law.
- b. The Respondent has noted the subject matter and marked it as public land.
- c. The Respondent purports to have given the Applicant land which is not existent.

d. The ex-parte Applicant is being moved from a potential land which is near a market where he has lived for over 70 years.

3. In his statement of facts, the Applicant states that he is seeking prohibitory orders to prevent the Respondent from moving his land and allocating it to the public without proper compensation and consent. He claims to be the owner of land parcel number 5364 and 5399 in that adjudication area. He also seeks to restrain the Respondent from forcefully acquiring the land without following proper procedure of acquisition and compensation. That the Respondent alleges to have allocated the Applicant an alternative parcel of land which he claims to be untrue. That the Applicant has lived on the suit land for over 70 years and has buried his parents and grandparents thereon. That he resides on the suit land with his family and are about to be displaced. That the Respondent is acting in violation of the applicants right to ownership of land. He contends that he was not accorded an opportunity to be heard on why his land should be alienated and not compensated. He contends that the Respondent acted in excess of its powers.

4. In his supporting affidavit M'mukaria Kalaigua reiterates the grounds on the face of the application and states that he should have been consulted before the decision was made as he stands to suffer irreparable loss if he is moved from his developments and his family will be rendered destitute. He denies that he was allocated an alternative parcel of land and contends that the Defendant acted illegally for failing to afford him an opportunity to be heard.

5. The Respondent through the Hon Attorney General never entered appearance despite being served nor filed any response to the summons.

6. Parties were then directed to canvass the application through written submissions. According to the record only those of the Applicant were received by the 23.11.2018 as directed by the Court.

7. The Applicant submits that the Respondent failed to follow the procedure set out under Article 40 of the Constitution in respect to compulsory acquisition of privately-owned land for public interest. That the Applicant was not compensated promptly and in full. The Applicant faults the process followed by the Respondent in arriving at a wrong decision to alienate the applicant's land for failing to consult the Applicant before making the decision and for failing to compensate him promptly. He has invited this Court to exercise its supervisory jurisdiction as mandated under section 165(6) of the constitution over the Respondent.

8. In respect to the scope and purpose of judicial review, the Court of Appeal in the case of **Municipal Council of Mombasa v Republic and Another 2002 EKL R 223 CA No 185 of 2001** stated:

“.....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.”

9. In the case of **Republic vs Kenya Power and Lighting Company Limited & another [2013] eKLR** the Court observed that

“...it is not enough for an Applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

10. In the present case I have looked at the letter dated the 9/10/2014 from the DLASO, Igembe North/Central/South sub counties addressed to Meenye & Kirima Advocates which states as follows;

“RE; COMPLAINT OVER DISPLACEMENT OF PARCEL NO 4337 AND 5364 A/MUTUATI II ADJUDICATION SECTION BY M'MUKARIA KALAIKUA KATHOKA AND M'AMWIRI KINAMBE.

We have received your letter seeking to know the status of the above parcels of land which pends AR objection. According to our records, parcel No 5364 is currently registered in the names of KALILABUA KATHOKA, but a portion of it has been set aside to serve as KABACHI MARKET and KABACHI CHIEF'S OFFICE and the new number allocated as parcel No 5399 MUTUATI/AMWATHI/IIA.

However, a portion equivalent to the size setting out parcel No 5399 has been displaced and given its ground within the same fragment as pertains parcel No 4637 which belongs to MIMWRIRI KINAMBE the same case applies and the new number demarcated as plot No 2828 which has also been compensated within the same fragment.

MUTUATI/AMWANTHI/II A Adjudication section is pending AR exercise and the aggrieved parties shall be heard during the establishment of the AR proceedings.”

11. From the above letter it is clear that the subject land is under adjudication and there are AR objections that are pending. The Applicant seeks orders from this Court to prohibit the Respondent from moving his parcel Nos. 5364 and 5399 and allocating them for public use. That this amounts to compulsory acquisition without proper prompt and full compensation.

12. The suit properties are situated in an adjudication area which was declared as such under the Land Consolidation Act Cap. 283, Laws of

Kenya (the Act).The object of this Act is stated in its preamble is to provide the ascertainment of rights and interests in, and for the consolidation of land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto.

13. *The Act provides an elaborate dispute resolution mechanism for example the starting point is the land committee under section 9, then section 10 advances the dispute to the arbitration board. If the dispute is not resolved then it moves to the Adjudication officer under section 26 of the Act. The adjudication officer shall consider the objection with the committee and may dismiss it or may order the committee to rectify the matter and for this purpose the committee may exercise its powers under section 21 of the Act. Section 21 of the Act empowers the committee to set aside out of the adjudication section such land as may be required for public use. The committee has powers to deal with compensation to such land owner who may have lost land for community needs which may be paid in kind or cash. The decision of the adjudication officer is final however in the event of any grievance the Minister may apply to a subordinate Court for revision of the decision.*

14. *From the letter on record the matter is at the adjudication of AR objections. In my view this is a matter that is pending adjudication. The Applicant has not demonstrated the steps or processes that the Respondent has flouted. In Judicial review proceedings as stated in the case of **Republic vs Kenya Power and Lighting Company Limited (supra)**, the actual sins of a tribunal must be exhibited for judicial review remedies to be granted. The Applicant has not exhibited any irrationality, illegality and or breach of natural justice. The letter states that the AR objections exercise is pending and that any party who is aggrieved shall be heard during the AR Proceedings.*

15. *According to the material on record the application is brought prematurely. If the Court issues the Prohibition, it has the likelihood of injunction the AR processes as provided in the law. Consequently, the DLASO will be stopped from performing actions under his mandate thus halting the process in which the germane issues raised by the Applicant are to be resolved. The Court will be prohibiting a process that is yet to take place. The Applicant will equally be affected because this is the process through which his rights and interest shall be ascertained and finally be issued with a title deed. The delay that will result will occasion the Applicant and other land owners prejudice as they wait indefinitely for the titles. Section 21 provides what the committee should consider in the event of provision of land for community needs. The issue of setting aside land for community use rests with the land committee with an appeal to the Adjudication officer who is legally bound to consider the matter with the committee.*

16. *The bottom line is the application is bought prematurely. The mechanism provided under Cap 283 must be allowed to finality. It is only then that an aggrieved party can file judicial review proceedings proper in this Court.*

17. *The application is dismissed with no orders as to costs.*

Orders accordingly.

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

J. G. KEMEI

JUDGE

In presence of;

C/A Mutwiri

Ms. Soy for Exparte Applicant