



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JR NO 16 OF 2011

IN THE MATTER OF THE APPLICATION BY SAMWEL KUBAI M'ITHIRA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

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

AND

IN THE MATTER OF KINEGU/KANJOO LAND PARCEL NUMBER 756

SAMWEL KUBAI M'ITHIRIA.....APPLICANT

VERSUS

THE DISTRICT COMMISSIONER

IGEMBE CENTRAL DISTRICT.....RESPONDENT

AND

AWA KAMOTHO MUSA.....INTERESTED PARTY

JUDGMENT

1. The exparte Chamber summons dated 10/3/2011 by the exparte Applicant and filed on 18/3/2011 for the following orders;
 - a. THAT this Honourable Court be pleased to grant leave to the Applicant to apply for the order of Certiorari to move to this Court and Quash forthwith the proceedings and the decision of the District Commissioner Igembe District in the Appeal to the Minister No. 214 of 2010 in relation to Land Parcel No. 756 KIENGU/KANJOO Land Adjudication Section.
 - b. THAT the said leave if granted to operate as a stay of enforcement of the District Commissioner's decision pending the filing and thereafter determination of the substantive motion for Judicial Review.
 - c. THAT costs of this application be in the cause.
2. The summons is based on the following grounds;
 - a. The Applicant has been the owner and in actual possession of Land Parcel No. 756 KIENGU/KANJOO Land Adjudication section since 1979.
 - b. The Interested Party has never occupied or worked on the suit land at any time at all.
 - c. The interested party has no interests at all over the said land.
 - d. The decision of the District Commissioner totally violates the Applicant's proprietorship rights to the land as guaranteed by the Constitution of Kenya.

- e. The Decision of the District Commissioner is contrary to the evidence before him and the same is unreasonable in the circumstances.
- f. The proceedings and the decision of the District Commissioner were biased against the Applicant and the same are a nullity.
- g. The Applicant has extensively developed the suit land and built a homestead thereon that he has lived in with his family since 1979 to date.
- h. The District Commissioner did not visit the said land to ascertain who has been in occupation and has developed the land.

3. The facts relied upon are that the Applicant settled on the land at Kanjoo Sub- location in Nguyuyu location (now Igembe South District) in 1979 before the area was declared a land adjudication section. The land generally belonged to the Kanjoo clan and was by and large bushy. He claims that in that year he was allocated the parcel of land and the clan elders pointed out the boundaries. The Applicant took possession and occupation of the land allocated to him and made the following developments; planted over 2 acres of Miraa plants, orange and Mango trees, Banana plants, constructed temporary houses and connected piped water.

4. In 1986 that the area was declared an adjudication section in accordance with Cap 284 Laws of Kenya. The Applicant proceeded to gather the suit land in his name and was given number 756 and later in 1998 during land demarcation the suit land was demarcated in the Applicants name. He claims that all that while no one raised any claim in respect to his ownership of the suit land.

5. That he continued to enjoy possession and use of the suit land until 2006 when he received summons from the Adjudication committee for hearing of a complaint lodged by the interested party. The dispute was heard by the Adjudication committee vide committee case no. 87/98 and made a verdict that the land belonged to the interested party. That the Applicant appealed to the District Land Arbitration board which overturned the decision of the Adjudication Committee and ruled in his favour. The interested party then appealed to the Provincial Land Adjudication Officer during the A/R objections which appeal was ruled in favour of the interested party. The Applicant in turn lodged an appeal to the Minister which was heard at the District Commissioner's office at Maua, chaired by the District Commissioner on the 22/10/2010 who delivered a verdict in favour of the interested party and awarded the land to the interested party.

6. He claims that the District Commissioner's decision was wrong for the following reasons;

- a. The D.C. did visit the site to confirm the status quo.
- b. The D.C failed to consider the evidence tendered before him thus arriving at a decision that was against the weight of the evidence produced.
- c. The D.C failed to consider the fact that the Applicant in ownership, and actual possession of the land since 1979.
- d. The D.C failed to consider the fact that the Applicant established a homestead on the said land and had extensively developed the same.

7. The Applicant in his verifying affidavit reiterates the grounds and facts on the face of the summons and has annexed copies of proceedings and decision of the Adjudication Committee and copies of proceedings of subsequent appeals by the Applicant and the interested party. He claims that the decision of the D.C deprived him of his right to ownership of land which he has occupied since land in 1979.

8. Leave to file this Judicial Review was granted vide orders issued on 29/3/2011. The Applicant then filed Notice of Motion dated 14/4/2011 seeking as follows;

- a. That this honourable Court do issue an order of certiorari to remove into this Honourable Court and quash the decision of the Respondent in the Appeal to the Minster No 214 of 2010 in relation to Parcel No 756 KIENGU/KANJOO land adjudication unit.
- b. That the costs of this application be borne by the Respondent.

9. The interested party filed an undated replying affidavit filed on 10/10/2011 in which she deposes that her several claims against the Applicant have been determined at various levels as provided for in law in her favour. She faults the Applicant for failing to disclose that there is a pending case No. Maua SPMCC No. 34 of 2011 filed by the interested party against the appellant seeking eviction orders and is apprehensive that the instant application is calculated at delaying the conclusion of the said matter. She claims that the Applicant has un-procedurally moved this Court in failing to demonstrate the anomalies that Order 53 seeks to cure in that he has not established any breach of procedure by the tribunal neither does he have any claim against the jurisdiction of the tribunal whose orders he wishes to quash. She also faults the Applicant for failing to enjoin the Attorney General and the Minister in the Review Proceedings. She avers that since the Applicant was the appellant in the decision he wishes to quash, he is estopped from condemning a process he personally initiated, sponsored and participated in but lost. She contends that the motion as filed is bad in law for want of form, procedure and substance and prays for it to be dismissed with costs.

10. The Applicant later died on 13/5/2013 and he was substituted by Amos Thurairia Kubai as his/Legal representative vide a ruling dated 27/3/2014.

11. The Respondent through their Litigation counsel E.M. Kinoti on behalf of Attorney General filed written submissions and grounds of opposition dated 27/3/2014 on grounds that the application is defective as it is not properly entitled, that is to say, it is not sought in the name

of the Republic as required in law instead it is sought in the name of the Applicant. The Respondent contends that for that reason the jurisdiction of the Court has not been properly invoked which goes to the root of the motion. Secondly that the application offends the express provisions of Order 53 rule (1) of the Civil Procedure Rules for failing to adhere to the 21 days period after grant of leave within which to file Notice of Motion to the High Court. Thirdly that the grounds relied upon are not amenable to Judicial Review which is a special jurisdiction of the High Court, in which the Court does not concern itself with the merits of the case but the process of the decision making. He contends that the Applicant has failed to satisfy the Court that either the tribunal/decision making body exceeded its powers or the Applicant was not given an opportunity to be heard or acted illegally or unreasonably or that there was procedural impropriety. He contends that looking at the impugned proceedings as relied upon by the Applicant, Samuel Kubai M'ithiria was present as the appellant with one witness Ishmael Muroro and both were given an opportunity to be heard. That the Applicant participated in the hearing and cross-examined the Respondent herein together with his witness. That the Applicant's complaint is that the decision of the Respondent was improperly based on evidence presented that speaks to the merits of the decision other than the process followed at arriving at that decision. Fourthly, that Judicial Review orders being discretionary powers and since the Applicant has not faulted the process followed at arriving to the verdict, the motion falls outside the ambit of Judicial Review and should be dismissed.

12. Directions were given on 23/10/2018 for parties to file written submissions. None are in the file at the date of writing this judgment. Even the Applicant did not file written submissions.

13. The key issue that fall for determination is whether the Judicial reviewed as filed is merited.

14. Order 53 Rule 3(1) provides as follows;

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, **the application shall be made within twenty-one days** by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing”.

15. In this case leave to file judicial review was granted by the Court on the 27/3/11 and it follows that the substantive motion ought to have been filed on the 20th April 2011. It was filed on the 15/4/2011 well within time. The Court does not agree with the Respondents contention that it was filed out of time.

16. 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.”

17. Equally 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.”

18. Section 29 of the Land Adjudication Act, cap 284 states as follows;

“Any person who is aggrieved by the determination of an objection under [section 26](#) of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication,

and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final

19. The Court has perused the record of the proceedings of the Appeal conducted by the District Commissioner on behalf of the Minister and observe that the decision of the DLASO complained about was made on the 21/7/09. There is no evidence whether the applicant appealed to the Minister within the stipulated time of 60 days contemplated under section 29 above. What is clear on the record is that the appeal was heard and determined on the 22/11/2010. According to the record the Appellant and his witness testified as well as the Interested party. Both parties were heard and were also allowed to cross examine their opponents before a decision was reached. The complaint of the Appellant is that the District Commissioner's (DC) decision was wrong on account that he made the decision without visiting the locus quo to establish the position on the ground. There is no evidence that the applicant applied for site visit, gave reasons and the DC declined his request.

Further that the DC did not evaluate the evidence of the applicant. With due respect this goes to the merit of the decision, which is outside the domain of Judicial review. Judicial review is about the process and not the merit or correctness of the decision. Further the decision of the DC was faulted for failing to consider that the applicant had been in possession of the suit land since 1979. The Court is of the view that not all claims should be addressed through Judicial review. Judicial review is best deployed to challenge the process and not the merit of the decision. See **Municipal Council** case above.

20. The Court guided by the legal principles enunciated above and case law, and the mainstay averments herein the Court concurs with the grounds of opposition raised by the respondent that the issues raised do not fall within the realm of judicial review proceedings as they seem to relate to the merits of decision made by the respondent rather than the procedure followed at arriving at the impugned decision. The Court is satisfied that instances of irrationality, unreasonableness, illegality were not proved to call in aid of judicial review remedies.

21. The Notice of Motion is not merited. It is dismissed with costs payable by 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

Harun Gitonga for Applicant