



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 2 OF 2019

BEATRICE CHEPTAUS KOKWO ALIAS

CHEPKOKWO.....1ST APPLICANT

MONICA CHEMAKWANY PATRICK.....2ND APPLICANT

VERSUS

DIRECTOR OF LAND

ADJUDICATION AND SETTLEMENT.....1ST RESPONDENT

FRANCIS DOCTOR KEDIPA.....INTERESTED PARTY

JUDGMENT

1. Before me is a judicial review notice of motion application dated **1/4/2019** and filed in court on the same date. In it the applicant seeking the following orders:

(1) That an order of certiorari be issued to remove into this court and quash the proceeding directions and decisions of the Cabinet Secretary in Case No. 380 of 1997 LR No. 328, Adj. Section Chepareria, Soi Rutowei Kamketo vs Losekwang Kedipa.

(2) That the costs of this application be provided for.

2. The application is premised on grounds set out in the statutory statement and is supported by a verifying affidavit of the 1st applicant dated **1/4/2019**. It is brought under the **Order 53 Rule 1(2)** of the Civil Procedure Rules.

3. The grounds upon which the application is made are that the 1st respondent and the interested party conspired to illegally and unconstitutionally deprive the estate of the deceased title to property known as **West Pokot/Chepareria/328** fully well knowing that the respondent had no jurisdiction over the land whose owner had died; that the ex parte applicants are the administrators of the deceased's estate who have been cultivating the suit land for 16 years while the interested party is their brother; that the land was registered in the deceased's name; that the land had a dispute between the deceased and Soi Rutowu Kamketo before the land disputes tribunal which the latter had filed and which was dismissed; that an appeal filed by Kamketo was also dismissed; that the interested party never informed the applicants of the outcome of the appeal; that despite the fact that the registered owner was deceased the Cabinet Secretary proceeded to hear the appeal and issue directions in favour of the interested party; that the interested party had no *locus standi*; that the interested party has commenced a suit seeking the eviction of the applicants and that the Director of Adjudication has no jurisdiction to deal with the suit land to effect the settlement of the interested party thereon to the detriment of the applicants who will be dispossessed of the land.

4. The respondent opposes the application in his grounds of opposition filed on **25/11/2019**. He contends that the application herein is fatally defective; that it offends the provisions of **Order 52 Rule 2**; that a necessary party has not been enjoined to the proceedings and that this court lacks jurisdiction to determine the motion in view of the ongoing related case on ownership of the suit land.

5. The replying affidavit of the interested party was also filed in opposition to the motion stating as follows: that the decision of the Cabinet Secretary in **Case Number 380 of 1997** was properly made; that the ex parte applicant is guilty of laches; that the application is time barred; that a previous application seeking to set aside the Minister's decision was filed being **Kitale HC Misc. 3 of 2019**; that the application offends the provisions of the **Land Adjudication Act Cap 284**.

6. On the **7/5/2019** the court ordered that the application be disposed of by way of written submissions and that parties do file written submissions in respect of the motion within a given time frame.

7. The issues for determination as far as this court perceives, are:-

(a) *Whether the application is time barred.*

(b) *Whether the respondent had jurisdiction to deal with the suit land.*

(c) *Whether there is illegality in the decision of the respondent to have the interested party registered as proprietor of the suit land.*

(a) *Is the application time barred?*

8. Order 52 rule 2 provides as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

9. The initial decision on the dispute that this matter originated from was made on **18/9/1992**. An appeal was lodged. The decision on the appeal, which is impugned in these proceedings was made on **8/7/2015**.

10. In the case of **Republic -vs- Kenya National Highways Authority & 2 others ex-parte Amica Business Solutions Limited [2016] eKLR** the Court Of Appeal stated as follows:

“The decision complained of is unique in the sense that the decision of the 1st respondent arose out of the request by the 3rd respondent. At no time were there formal proceedings leading to the decision. The decision was in a letter responding to 3rd respondent’s request for permission to erect and maintain billboards and gantries. The elephant in the room here is whether that communication qualifies as one of the acts contemplated under Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

There has been debate as to whether the six months limitation envisaged in order 53 Rule 2 of the Civil Procedure Rules applies strictly to “any judgment, order, decree, or conviction, or other proceedings”, or whether this also includes decisions of other kinds, or letters such as the one that is the subject of this case.

In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.”

11. The applicants aver that they were not aware of the proceedings and the respondent and the interested party have not challenged this averment. The 1st applicant states as follows at **paragraph 10** of the verifying affidavit:

“That my brother Francis Doctor Kedipa the interested party took advantage of my ignorance and proceeded with the appeal to the Cabinet Secretary/Minister in place of my late father without my knowledge and my other siblings (sic).”

12. In **paragraph 11** the 1st applicant depones that the interested party never sought any permission from them to pursue the dispute while at **paragraph 13** she states as follows:

“That I and the other beneficiaries of the estate of my late father Losekwang Kedipa were not notified of the appeal to the Cabinet Secretary/Minister No 380 of 1997.”

13. At **paragraph 14** she avers that the beneficiaries came to learn of the registration of the entire parcel in the interested party’s name when he filed **Kitale ELC No. 59 of 2017** against them seeking eviction orders.

14. It may be true that the applicants herein never knew of the proceedings before the Provincial Appeals Committee or even the Land Disputes Tribunal. The record of those proceedings which is exhibited in the verifying affidavit does not mention their presence thereat and I find that they did not participate in those two sets of proceedings.

15. In the judicial review case of **Republic v District Commissioner, Narok North District & 4 others Ex-Parte Jane Naserian Enelokula [2016] eKLR**, Munyao J. had this to say:

“It is therefore apparent to me that this suit was commenced one day late, as it was filed on 10 March 2011. On that point alone the suit is out of time and fails.”

16. I find that even after they came to know of the decision through the eviction proceedings instituted vide **Kitale ELC No. 59 of 2017**, the applicants still failed to file any judicial review proceedings until this application was filed in **2019**.

17. I would have adopted the stance Munyao J took in and dismiss the application for being time barred.

(b) Whether the respondent had jurisdiction to deal with the suit land.

18. Though judicial review is normally meant for review of the procedure by which the decision was arrived at, this court is also mandated to inquire into the issue of the jurisdiction of an authority and where it finds there was none, quash it.

19. In **Republic vs. Commissioner of Lands & Another, ex-parte Hammer Heads Limited [2013] eKLR** where the court held:

“A judicial review application does not deal with the merits of the case but only with the process. In other words judicial review applications do determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view of determining contested matters of fact and in effect determine the merits of the dispute the court would not have jurisdiction in judicial review proceedings to determine such dispute and would leave the parties to ventilate the merits of the dispute in the ordinary suits.”

20. I would in other circumstances have inquired into this issue and come up with a conclusion thereon. However the applicants have named the Director of Land Adjudication and Settlement as respondent. Though joined he had no role in the decision sought to be quashed. His role was purely in the implementation thereof and no orders of prohibition feature in the Judicial Review Notice of Motion.

21. It is clear from the proceedings of the Provincial Lands Appeals Committee that the proper office to be enjoined in these proceedings was the Deputy County Commissioner. He is the Officer who acted on behalf of the Minister in the appeal. For the reason that he was omitted as a party, this court has no alternative but to dismiss this application on that ground.

(c) Whether there is illegality in the decision of the respondent to have the interested party registered as proprietor of the suit land.

22. There is clear evidence that the Deputy County Commissioner ordered that the appeal was dismissed and that the interested party be registered as the proprietor of the suit land. The interested party averred at the hearing of the appeal that he was of tender age at the time the matters relating to the dispute occurred and relied on the evidence of the appellant's widow.

23. The original appellant and the original respondent were deceased by the time that the appeal was heard. The record does not demonstrate that he had letters of administration to the estate of Losekwang Kedipa to warrant an order that he be registered as proprietor of the suit land.

24. There is virtually no reason in the record of the appeal before the Deputy County Commissioner that may have informed the decision. The appeal was simply dismissed because the parties therein had reached a certain agreement. The interested party merely happened to be present as son to the deceased respondent. I find that the decision of the Minister is tainted with illegality.

(d) What orders should issue?

25. The upshot of the foregoing is that the application fails for being time barred and for having been commenced against the wrong respondent.

26. Each party shall bear their own costs of these judicial review proceedings.

Dated, signed and delivered at Kitale on this 18th day of July, 2019.

MWANGI NJOROGE

JUDGE

18/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Bett holding brief for Mr. Murei for applicant

N/A for the Interested Party

N/A for the Respondent

COURT

Judgment read in open court.

MWANGI NJORGE

JUDGE

18/7/2019