



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JUDICIAL REVIEW CASE NO.12 OF 2018

IN THE MATTER OF AN APPLICATION BY PAUL NZOMO MWITIKI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF LAND ADJUDICATION ACT (CAP. 284)

AND

IN THE MATTER OF PLOT NO.131 KILOME ADJUDICATION SECTION

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS AND PROCEDURE OF LAW

BETWEEN

PAUL NZOMO MWITIKI APPLICANT

VERSUS

THE MINISTER OF LANDS (through the District Commissioner

Mukaa Sub-County in Appeal No.89 of 2015 1ST RESPONDENT

DIRECTOR OF LANDS ADJUDICATION2ND RESPONDENT

CHIEF LANDS REGISTRAR 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL4TH RESPONDENT

AND

DAVID MUTOKO MUSYIMIINTERESTED PARTY

JUDGEMENT

1) By his Notice of Motion application dated 24th October, 2018 and filed in court on 25th October, 2018 pursuant to the leave granted on 09th October, 2018, the Ex parte Applicant prays for orders:-

(i) Certiorari directed to the 1st Respondent to bring to the High Court to be quashed the 1st Respondents decision (through Deputy County Commissioner Mukaa Sub County) by the delegated powers dated 13/09/2018 dismissing the Applicant’s appeal No.89 of 2015 and upholding the decision of the Land Adjudication Officer and Arbitration Board awarding Plot No.131 (Plot No.1557) to DAVID MUTOKO MUSYIMI as owner which formal notice of finalization of Minister’s decision was communicated to the Applicant on 25/09/2018.

(ii) Prohibition directed to the 1st Respondent, the Director of Lands Adjudication and Chief Lands Registrar Nairobi, their servants and/or agents or others whomsoever from in any way dealing with Plot No.131 (Plot No.1557) Kilome Adjudication Section and or from implementing the award of the Minister aforesaid.

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

2) The application is expressed to be brought under Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010, Sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya and all enabling provisions of the law and procedure. It is accompanied by the statutory statement dated 08th October, 2018 and a verifying affidavit sworn by the Ex parte Applicant at Machakos on 08th October, 2018. In addition, the Ex parte Applicant filed a further affidavit sworn at Machakos on 13th March, 2019.

3) The Respondents have opposed the application vide their grounds of opposition dated 21st November, 2018 and filed in court on 26th November, 2018.

4) In their grounds of opposition, the Respondents have raised the following grounds:-

1. THAT there is no cause of action against the Respondents' since the Deputy County Commissioner Mukaa Sub County acted within his powers as set out in section 29 of the Land Adjudication Act Chapter 284, Laws of Kenya in determining the said appeal.

2. THAT the 1st Respondent determined the appeal in a just manner as provided for under Section 29(1) of Land Adjudication Act Chapter 284, Laws of Kenya and observed the rules of natural justice as the parties to this appeal were both heard.

3. THAT the application is frivolous, vexatious and misconceived as against the Respondents'.

4. THAT the application is devoid of any merit as against the Respondents' and is therefore an abuse of Court process.

5) The Interested Party, David Mutoko Musyimi, has also opposed the application vide his grounds of opposition dated 26th November and a replying affidavit sworn at Machakos on 23rd November, 2018 and filed in court on 26th November, 2018 together with the grounds of opposition.

6) In his grounds of opposition, the Interested Party has stated that:-

1. The Notice of motion dated 24/10/2018 is improper and baseless and does not raise any grounds to warrant orders of Judicial review or any other orders for this Court's determination.

2. The Ministerial decision was proper and well within the powers as provided by law and that no rules of natural justice are demonstrated to have been breached, the respondents' orders were not made ultra vires.

3. The Notice of motion dated 24/10/2018 fails to disclose that the Ministerial decision dated 13/9/2018 was unprocedural and ultra vires the provisions of the Lands Adjudication Act.

4. The application is frivolous, vexatious and an abuse of the Court process.

7) Directions to dispose off the application by way of written submissions were issued on the 24th April, 2019. The parties herein have since then filed and served their respective submissions.

8) The Counsel for the Ex parte Applicant was of the view that the issue for determination is who is entitled to the legal ownership and possession of plot No.131 (plot No.1557) Kilome Adjudication Section.

9) On the other hand, the Respondents' Counsel's view was that the issues for determination were:-

i) Whether the Applicant is entitled to the orders sought?

ii) Whether the Decision by the Deputy County commissioner should be quashed and set aside?

iii) Whether the application has been commenced properly before this court;

iv) Whether the Judicial Review Application on its own can resolve the question of ownership?

10) The Counsel for the Interested Party's position was that the issue for determination is whether or not the application meets the threshold for grant of orders of certiorari and prohibition.

11) Having carefully read the submissions filed, I am of the view that the issues for determination are as framed by the Respondents and the Interested Party. Those issues can be condensed to one namely, whether the application meets the threshold for the grant of Judicial review orders of certiorari and prohibition.

12) The Counsel for the Ex parte applicant submitted that the Minister ought to have decided the matter (read appeal) on its merits and as such, an illegality was committed.

13) The submissions by the Counsel for the Respondents was that Judicial review orders are not concerned with the merits of the decision but rather the decision making process. That the purpose of the remedy of Judicial review is to ensure that the individual is given fair treatment to which he has been subjected. The Counsel pointed out that the Ex parte Applicant has not demonstrated in any way that the decision making process was not justified as he was given a fair hearing by the 1st Respondent.

14) The Counsel further submitted that the supporting affidavit to the substantive application contains information whose sources are not attached as annexures to the application thus offending **Order 19 Rule 3(1) of the Civil Procedure Rules** which provides as follows:-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

The Counsel added that the supporting affidavit should be struck out. It was further submitted that the issue of ownership of plot number 131 Kilome Adjudication Section can only be determined in another forum and not in this Judicial review proceedings.

15) The Counsel for the Interested Party submitted that in order for the grant of the orders sought for certiorari and prohibition, the Ex parte Applicant must prove that due process was not complied with in the making of the Minister’s decision of the 13th September, 2018. The Counsel went on to submit that the Ex parte Applicant’s submissions that the court should determine who is entitled to the legal ownership and possession of plot number 131 (plot 1557) Kilome Adjudication Section is misleading and unsustainable. That the Ex parte Applicant failed to demonstrate in what ways the rules of natural justice were breached in the decision making of the 1st Respondent since parties called be the Ex parte Applicant were heard.

16) Arising from the above, I do agree with the Counsel for the Respondents and the Interested Party that in Judicial Review proceedings, the court is concerned with the process rather than merits of a case. As such, the Ex parte Applicant cannot be heard to call upon this court to determine the issue of ownership and possession of plot number 131 (plot No.1557) Kilome Adjudication Section. That can be decided in another forum and not in these judicial review proceedings.

17) In the case of **Ransa Company Ltd vs. Manca Francesco & 2 Others [2015] eKLR** the Court of Appeal expressed itself thus:-

“As we all appreciate, a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues like excessive jurisdiction, rather than the merits of the case. It is also restrictive in the nature that of the remedies or reliefs available to the parties.”

18) In the application before me, the Ex parte Applicant has tacitly admitted that parties were given a hearing in the Ministers Appeal No.85 of 2015. The Ex parte Applicant has not in any way demonstrated that the Minister acted with illegality, irrationality and impropriety of procedure. In the circumstances, therefore, my finding is that the application is devoid of merit and I will proceed to dismiss it with costs to the Respondents and the Interested Party.

Signed, Dated and Delivered at Makueni this 26th day of September, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Makundi for the Interested Party

Mr. Mwangela for the Ex-parte Applicant

No appearance for the 1st to 4th Respondents

Mr. Kwemboi – Court Assistant

MBOGO C. G., JUDGE,

26/09/2019.