



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW APPLICATION NO. 3 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MERU RESPONDENT

BERNARD MWONGELA INTERESTED PARTY

EX-PARTE APPLICANT.....MWENDA MIATHENE WOMEN GROUP

(Through its chairlady, secretary and treasurer)

JUDGMENT

1. vide the Notice of Motion dated 19th February 2018, the Ex-parte Applicants are seeking for the following writs of Judicial Review:
 - a. An order of mandamus be issued compelling the respondent to direct its own planning and markets committee or any other relevant officer(s) in charge of Miathene market in Tigania West sub-county within Meru County, to re-hear the dispute lodged by the ex-parte applicant Mwenda Miathene Women Group against the interested party Bernard Mwangela over plot No. 5 situated in the said Miathene Market in the presence of, or after notifying both parties to attend.
 - b. Costs of this application and the ex/parte chamber summons for leave be borne by the respondents and interested party jointly and severally.
2. The background to this matter is that a previous **Judicial review suit no. 14/12** (MERU ELC) had been filed before this court whereby one Bernard Mwangela the current interested party was the exparte applicant while Mwenda Miathene women group, the current exparte applicant were the interested parties. The matter concerned ownership dispute of a parcel of land where the county council of Nyambene resolved the dispute via town planning and market committee in a meeting held on 8.2.2011.
3. The exparte applicant in the **JR 14/12** (Mwangela) had filed that suit seeking to quash that decision of the town planning and market committee.
4. In the judgment delivered by Cherono J. on 20.6.2017, the court observed as follows: ***“I find that the notice calling for the resolution of a dispute committee meeting dated 26.11.2010 did not invite the exparte applicant who was a joint owner of plot no. 51 Miathene Market...The decision was made contrary to the rules of Natural justice. The exparte applicant should have been called to say his side of the story. To make a decision that affects a party without giving that party a right to be heard is a decision liable to be challenged by way of a judicial review. In the result I find that the decision by the respondent to remove the name of exparte applicant unilaterally who was a joint owner in plot no. 51 Miathene is unfair and in breach of the rules of natural justice. In the upshot, I hereby grant orders of certiorari to call and quash the minutes and decision of the respondent made on 16.12.2012 in minutes of plot 51 Miathene market.....”***
5. This decision of Judge Cherono is what triggered the present dispute as the current exparte applicant avers that the dispute ought to be re-heard by the respondent (County Government of Meru.)

Case for the Ex-parte Applicant

6. The case for the Exparte Applicant is contained in the affidavit verifying facts and supplementary affidavit, both sworn by Agnes Kathao Geoffrey Kaindo who has deponed that she is the chair lady of the ex-parte applicant. She avers that the applicant is the true owner of plot

no. 51 situated in Miathene Market having been allocated the same in 1998. The interested party colluded with his wife, Fridah Gakii Mwangela who was then the secretary of the applicant to forge documents and caused himself to be registered as a co-owner of that plot. When the said forgery was discovered, the interested party's wife was removed from office as the group's secretary. The current officials lodged a dispute to correct the said forgery and they defeated the interested party via the decision of the town planning and market Committee given on 15.3.2012 (see annexure AKGK-2).

7. Agnes Kathao further contended that the interested party went on to sue them vide **MERU ENVIROMENT & LAND COURT J.R CASE NO. 14 OF 2012** claiming that he was condemned unheard. Hon. Justice E.Cherono agreed with him and quashed the said minutes vide a judgement dated 20th June 2017. From June 2017 Agnes Kathao together with other officials have unsuccessfully been pleading with the respondent by visiting its relevant officers namely Mr. Atheru, Mr. Mbai and others so that the relevant town planning and markets committee can be directed to re-hear their unresolved dispute on forgery. Meanwhile, the interested party has started fencing off the suit plot in a bid to forcibly evict them.

8. The Exparte Applicants further contend that after devolution, the functions of the Town Planning and Market Committee were taken over by the office of the Town Administrator and that this is the entity which is clothed with quasi-judicial powers to hear their dispute against the interested parties, as it is the custodian of the documents for the plots in towns and markets like Miathene market where the suit plot is situated.

Case for the Respondent

9. One Irah Nkuubi has deponed that he is the Acting Chief Legal Officer of the Respondent (County government of Meru) and through her replying affidavit, the respondent opposes the suit. She avers that the order of mandamus to compel the respondent to re-hear the dispute lodged by the Ex-parte Applicant is unavailable for the following reasons;

- 1) There is no evidence of written complaint and/or dispute that has been annexed to the affidavit verifying the facts to show that there exists a dispute and of what nature.
- 2) The exparte applicant has not laid any basis to show that statutorily, the alleged dispute between the exparte applicant and the interested party must be heard by the respondent in the first instance.
- 3) The exparte applicant has not shown whether the respondent is seized with the requisite jurisdiction to determine ownership disputes between two warring parties over immovable property.
- 4) The exparte applicant has failed to show if the allegations of fraud and forgery are within the ambit of the respondent.

10. The respondent avers that it does not have the requisite jurisdiction to deal with the dispute between the exparte applicant and the interested party since that jurisdiction rests with the courts. Therefore the respondent is under no duty, either statutory or administrative to hear the dispute of forgery of documents in respect of Plot. No. 51 Miathene Market.

Case for the Interested Party

11. The Interested Party had filed a replying affidavit dated 24.4.2018, but the same was withdrawn on 12.7.2018, where by the Interested party was to file and serve a fresh affidavit within 7 days. This was not done.

Submissions

12. It has been submitted for the Ex-parte Applicant that the pivotal issues for determination arising in this suit are :

- I. Whether or not the order of mandamus sought herein is available to the exparte applicant.*
- II. Whether or not, the respondent herein is seized with the requisite jurisdiction to direct its relevant committee or officer or entity to re-hear the exparte applicant's dispute*
- III. Who should bear the costs of these proceedings*

13. The applicant has submitted that they are the true allottees and owners of the suit plot having been procedurally and lawfully allocated the same in 1998. It is averred that the averments made by the Ex-parte Applicant in the initial chamber summons and in the substantive Notice of Motion have not been challenged in any way.

14. The exparte applicant also submitted that once a verdict was quashed on the ground that a party therein was not heard, the dispute ought to be heard afresh. On this point, the Ex-parte Applicant cited the decision in **Nyeri Court of Appeal, civil appeal no. 28 of 2015: Peter Kimandiu vs Land Adjudication Officer Tigania East District and 4 others** wherein the learned judges quashed a decision and ordered it to be heard afresh. The applicants therefore submit that the dispute ought to be heard afresh.

15. The exparte applicant also urged the court to consider the provisions of **Article 159 (2) (c) of the constitution of Kenya** to the effect that not every dispute should start in court and that Alternative Dispute Resolution Mechanisms should be promoted as appropriate avenues for dispute resolution.

16. The Ex- parte applicant avers that the dispute remained unresolved to-date hence the need to have the orders sought herein granted to compel the town planning and market committee or any other relevant entity to re-hear the dispute.

17. As regards the issue touching on jurisdiction, Ex-parte applicant has submitted that the county council of Nyambene through its Town planning and Market Committee had heard the case of forgery as between the parties herein, and that now the functions of the aforementioned committee have been taken over by the Town administrator who is responsible for safe keeping of all documents regarding the town and market plots. The Ex-parte Applicant therefore submits that the Town administrator has the requisite jurisdiction to re-hear the complaint raised by the Ex-parte Applicant.

18. On costs, the Ex-parte Applicant avers that both the Interested party and the Respondent should shoulder the costs of this suit as the respondent failed to heed the request of the Ex-parte Applicant to have the dispute heard afresh.

19. For the respondent, it was submitted that an order of mandamus should only issue where a duty set out by the statute has not been performed to the detriment of the applicant. On this point the respondents have cited the case of **Republic vs the Principal Secretary State department of Interior, Ministry of Interior and Coordination of National Government and others (2018) eKLR** where the High Court quoted the court of appeal decision in **Republic vs KNEC exparte Gathinji and Others Civil appeal no. 234 of 1996** where the court had observed as follows:

“The order of mandamus is a command..... Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice will be done.....”

20. The respondent has also submitted that there is no specific statute cited by the applicant to demonstrate that a dispute like the one raised by the applicant can be heard by the town planning and market committee. Further the respondent argues that it does not have jurisdiction to hear and determine disputes based on forgery of documents since that jurisdiction vests with the court of law. Therefore the respondents cannot arrogate unto itself a jurisdiction that it lacks in the first instance. The respondent avers that the mere fact that the county council of Nyambene had directed its town planning and market committee to hear the dispute does not clothe the respondent with the jurisdiction to re-hear the dispute.

21. The interested party has submitted that the application dated 19th February 2018 by the exparte applicant offends the doctrine of res judicata as provided for under **section 7 of the Civil Procedure Act**. On this point, reference has been made to the case of **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others Nairobi CA Civil Appeal no. 105 of 2017 eKLR**, where the court of appeal held as follows:

“Thus for the bar of res judicata to be effectively raised and upheld on a count of a former suit the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms”.

22. The interested party has gone ahead to set out those elements of res-judicata as follows;

i. **That the suit was directly and substantially in issue in the former suit.** It is submitted that the issues in contention were well addressed in the **ELC Judicial Review no. 14 of 2012**, where the claims are identical.

ii. **That the former suit was between the same parties or parties under whom they or any of them claim.** It is averred that the parties herein are the same as those ones in **ELC Judicial Review no.14 of 2012**.

iii. **Those parties were litigating under the same title.** It is submitted that the parties in this application are litigating under the same title as was litigated in **ELC Judicial review no. 14 of 2012**.

iv. **The issue was heard and finally determined in the former suit.** It has been submitted that Judge Cheronon heard and finally determined the matter where he conclusively found that the respondent’s decision to remove the interested party’s name unilaterally who was a joint owner in plot no. 51 Miathene was unfair and in breach of the rules of natural justice.

v. **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.** On this point the interested party has basically reiterated what he has stated in point 4 above, that the former suit was fully heard by Judge Cheronon.

23. The interested party concluded his arguments by stating that by virtue of **sections 8 and 9 of the law reform act cap 26 laws of Kenya**, once the court finally determines the application for Judicial Review the only option available is Appeal and that the Ex-parte Applicant failed to pursue this route.

Analysis and determination

24. I have carefully perused through the application, affidavits submissions and the record in its entirety and frame the issues for determination as follows;

a) Whether this suit is res judicata

b) Whether the dispute should be re-heard and whether the Respondent has the jurisdiction to direct its relevant committee to re-hear the dispute

c) Whether this matter should be resolved through Alternative Dispute Resolution Mechanisms

d) Who should bear costs of this suit?

Res Judicata

25. It is contended by the interested party that this suit is res-Judicata to **ELC JR No. 14 of 2012** as the claims are identical and so are the parties and the subject matter. I do agree that the parties in both suits are indeed the same albeit with interchanged positions. The suit parcel is also the same. This far, the two suits are indeed similar.

26. Both suits are in the realm of Judicial review where the concern of the court is the decision making process. The orders sought in **ELC JR 14 of 12** was to quash the decision of the town planning and marketcommittee in the hearing of the ownership dispute. However, in the present suit, the applicant has sought an order of mandamus to compel the respondents to hear the dispute afresh. It follows therefore that the issues in the two suits are different. Furthermore, it is clearly evident that the actual dispute remains un resolved. This suit is therefore not Res Judicata to JR 14/12 (Meru).

Whether the dispute should be re-heard and whether the Respondent has the jurisdiction to direct its relevant committee to re-hear the dispute

27. The applicant contends that that in light of the quashing of the decision of the respondent in **Meru ELC JR. NO 14 OF 2012**, the respondent should re hear the dispute. The applicant has relied on the case of **Peter Kimandiu vs Land Adjudication Officer Tigania East District and 4 others(supra)** to buttress his averment that once a decision is quashed on the grounds that a party was not heard, the dispute should be remitted back to be heard in participation of all the parties. I find that this is not the true interpretation of the aforementioned court of appeal decision.

28. In paragraph 26 of the judgment in the **Peter Kimandiu case**,(supra) the court of appeal observed as follows;’

“Having found as we have, that the dispute in this matter was governed by the Land Consolidation Act and that the Land Adjudication Officer was required to determine the dispute submitted to him in conjunction with the committee and there being no dispute that the land adjudication officer in this matter made the decision on his own, it follows that the decision making process was contrary to the law and thus amenable to the corrective powers of the High Court. A determination of that issue is sufficient to dispose of this appeal and we need not examine the propriety of the decision made by the land adjudication officer. The upshot is that this appeal has merits and is allowed. We set aside the decision of the High Court made on the 21st November 2014 and substitute therefor an order granting the order of certiorari to issue forthwith to bring before the High Court for quashing the decision of the Land Adjudication Officer, Tigania made on 22nd January 2010 in respect of land parcels numbers. 1196, 1249 and 2286 within Antuamburi Adjudication Section. The dispute shall be remitted back to the Land Adjudication officer for hearing and determination in accordance with the law.”

29. It is clear that in the **Peter Kimandiu case**, the court of appeal was dealing with a dispute anchored on known law with clear statutory provisions and mandate of the land Adjudication officer. This is not the situation in the present case.

30. In **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** it was held as follows:

“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...These principles mean that an order of mandamus compels 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.”

31. It has emerged that there is an ownership dispute regarding the suit land between the exparte applicant and the interested party. With the quashing of the decision of the Town Planning Committee, It means that the dispute was left hanging. There are claims of forgeries too. It follows that the parties are yet to establish their legal rights. It cannot be said that the parties lack a specific legal remedy to enforce their rights. After all the courts are there to hear and determine disputes as the ones between the parties herein. Therefore the orders to remedy defects of justice are unwarranted in this case. I am of the opinion that the pending dispute ought to be litigated in a court of law.

32. As rightly submitted by the respondent, there is no specific statute quoted by the applicant to the effect that the dispute pending should be heard by any entity in the county government of Meru. Part 2 of the 4th schedule of the constitution provides for the functions and powers of the county government. However, it does not provide for determination of land ownership disputes.

33. I am aware that there are several quasi – Judicial bodies which have the legal mandate to deal with land matters i.e. Tribunals, Like National Environmental Tribunal, Rent restriction tribunal and committees like those stipulated under land consolidation act and land adjudication act as well as committees such as Physical liaison committees and county wildlife conservation and compensation committees (just to mention some). I have not yet come across a statutory body under the county government clothed with mandate to hear land disputes.

Alternative Dispute Resolution

34. Article 159 2, (3) provides that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted....”

35. Thus the constitution has elevated this method of dispute resolutions into the sphere of the constitution. However Alternative Dispute Resolution itself is anchored on such processes as settlements, mediation, arbitration, negotiation, conciliation **“BUT NOT FORCE”**. An order of mandamus in its nature is a command as rightly stated in the case of **Republic vs Principal Secretary state department of interior, ministry of interior and coordination of national government and others**. Thus the orders sought for herein are not in tandem with Alternative Dispute Resolution mechanism processes.

36. In the final analysis, I find that though the dispute is pending, the respondent doesn't have the requisite mandate to handle the said dispute. The dispute ought to be taken to the ordinary courts of law. For purposes of limitation of actions, and taking into account that the unresolved dispute has been marking time initially in some kind of committee of the county council and later in this court through two Judicial Review suits, **I direct that time runs as from the date of delivery of this judgment.**

37. Consequently I find that the application lacks merit and is therefore dismissed. Considering that there is an ownership dispute pending, then I direct that each party bears its own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF SEPTEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriithi for exparte applicant

Mwirigi for respondent

Miss Soi for interested party

Interested party

Members of Exparte applicant like Naftali Akwalu

HON. LUCY. N. MBUGUA

ELC JUDGE