



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MAKUENI**  
**JUDICIAL REVIEW APPLICATION NO.1 OF 2017**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT AND  
ARTICLE 23(3) (f) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**PETER SILETA MUTHOKA**

**DANIEL MUTUNE MUTHOKA**

**JOHN MUTISYA MUTHOKA**

**JULIUS MUTINDA MUTHOKA.....APPLICANTS**

**VERSUS**

**MINISTER FOR LANDS.....1<sup>ST</sup> RESPONDENT**

**PASCAL MUIVA NZYUKO.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. By their notice of motion application expressed to be brought under Order 53 Rule (1), (2) and (3) of the Civil Procedure Rules, Sections 8 and 9 of the Law Reform Act (cap 26) and all the enabling provisions of the law, the exparte applicants pray for:-

1) An **ORDER OF CERTIORARI** to remove to this Honourable court for purpose of being quashed the Award made by the 1<sup>st</sup> Respondent (Cabinet Secretary/Minister for Lands) on 28.7.2015 in Appeal to the Minister No.41 of 2011 awarding Plots Nos. 2039 and 2456 and 2458 in Utangwa Adjudication Section to the 2<sup>nd</sup> Respondent.

2) An **ORDER OF PROHIBITION** directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent or their agents from implementing the Award of the 1<sup>st</sup> Respondent (Cabinet Secretary/Minister for Lands) made on 28.7.2015 in Appeal to the Minister No.41 of 2011 awarding Plots Nos. 2039, 2056 and 2458 in Utangwa Adjudication Section to the 2<sup>nd</sup> Respondent.

3) An **ORDER OF MANDAMUS** directed to the 1<sup>st</sup> Respondent compelling it to furnish the applicants with or bring to the Honourable court the award of the (Cabinet Secretary/Minister for Lands) made on 28.7.2015 in Appeal to the Minister No.41 of 2011 awarding Plots Nos. 2039, 2056 and 2458 in Utangwa Adjudication Section to the 2<sup>nd</sup> Respondent.

**4) The costs of this application be borne by the Respondents.**

**5) Such further and other relief be granted to the applicant as this court deems fit.**

2. The application is dated 16<sup>th</sup> October, 2017 and was filed in court on 17<sup>th</sup> October, 2017. It is accompanied by a statutory statement as well as an affidavit headed "Supporting affidavit." The applicants have also filed a supplementary affidavit by Peter Sileta Muthoka, the 1<sup>st</sup> Applicant herein, sworn at Machakos on the 10<sup>th</sup> May, 2018 and filed in court on 14<sup>th</sup> May, 2018.

3. The application is opposed by the 2<sup>nd</sup> Respondent vide his replying and further affidavits sworn at Machakos on 05<sup>th</sup> April, 2018 and 25<sup>th</sup> May, 2018 and filed in court on 06<sup>th</sup> April, 2018 and 25<sup>th</sup> May, 2018 respectively.

4. Both parties have filed their submissions pursuant to the court's directions to dispose off the application by way of written submissions.

5. In their submissions the ex parte applicants' counsel framed the following issues for determination: -

***(a) Whether the 1<sup>st</sup> Respondent heard a case of ownership of Plots Nos.2039, 2056 and 2458 in Utangwa Adjudication Section and awarded the said Plots to the 2<sup>nd</sup> Respondent.***

***(b) Whether the issue of ownership of plots Nos.2039, 2056 and 2458 had been heard and finally determined by the High Court at Nairobi in NRB HCCA No.234 of 1981 and whether the applicants had been awarded the said plots by the High Court.***

***(c) Whether the 1<sup>st</sup> Respondent had the Jurisdiction to hear and determine a matter that had been heard and finally determined by the High Court, a Superior Court of Record.***

***(d) Whether the Principles of Natural Justice were duly followed by the 1<sup>st</sup> Respondent in hearing and determining the ownership of Plots Nos.2039, 2056 and 2456 in Utangwa Adjudication.***

***(e) Whether an Order of Certiorari should issue to quash the Award of the Minister for Lands (1<sup>st</sup> Respondent herein).***

***(f) Whether an Order of Certiorari should issue to quash the Award of the Minister for Lands (the 1<sup>st</sup> Respondent herein).***

***(g) Who will bear the costs of this suit.***

On the other hand, the Counsel for the 2<sup>nd</sup> Respondent framed four (4) issues for determination. These were:-

***1) Whether the Ministerial decision making process was legal.***

***2) Whether the orders of certiorari and prohibition should issue.***

***3) Whether injunction is available in judicial review proceedings.***

***4) Who should bear the costs.***

6. The submissions by the ex parte applicants' counsel touching on the seven (7) issues that they framed are as follows:-

That the ex parte applicants have proved that appeal to the minister being No.41 of 2011 was heard and plot Nos.2039, 2056 and 2458 in Utangwa Adjudication Section were awarded to the 2<sup>nd</sup> Respondent. That the issue of ownership of the plot numbers 2039, 2056 and 2458 was dealt with by the High Court sitting in Nairobi vide HCCA No.234 of 1981. That the aforementioned land parcels were awarded to the 1<sup>st</sup> Applicant who was the appellant in HCCA No.234 of 1981. That any dissatisfied party in NBI HCCA No.234 of 1981 ought to have appealed against the High Court decision to the Court of Appeal instead of appealing before the Minister. That the ex parte applicants were never accorded a fair opportunity to present their case during the hearing of the appeal to the Minister. Further the Counsel submitted that the ex parte applicants were denied the chance to produce a copy of the court's ruling in NBI HCCA No.234 of 1981 that was delivered on 28<sup>th</sup> March 1983. That parties were not given a chance to cross-examine and re-examine during the hearing before the Minister and as such there was blatant contravention of the principles of natural justice.

7. It was further submitted that the ex parte applicants had demonstrated that the 1<sup>st</sup> Respondent had no jurisdiction to entertain, hear and determine the claim of ownership of plot Nos. 2039, 2056 and 2458 in Utangwa Adjudication Section and hence, an order of judicial review should issue. In support of the proposition for an order of judicial review, the counsel cited several authorities. As for the order of mandamus, it was submitted that the same has been overtaken by events since the Respondents did issue the ex parte applicants with the proceedings and the award.

8. Regarding the issue of costs, the counsel submitted that the ex parte applicants are entitled to costs since it is a cardinal principle that costs follow the events in a suit.

9. On the other hand, the counsel for the 2<sup>nd</sup> Respondent submitted that the Minister heard and determined appeal No.41 of 2011 pursuant to the jurisdiction conferred upon him by Section 29(1) of the Land Adjudication Act Chapter 284 of the Laws of Kenya. That during the hearing, parties were given ample time to present their evidence and produce the documents they wished to rely on. That the 2<sup>nd</sup> Respondent who was the appellant produced the proceedings in Nairobi HCCA No.234 of 1981 while the ex-parte applicants who were the Respondents produced an agreement which was devoid of signatures.

10. It was further submitted that judicial review deals with the judicial making process and not with the merits of the decision itself. That the Minister did not in any way overturn the decision in NBI HCCA No.234 of 1981 since the aforesaid appeal was dismissed with costs on 16<sup>th</sup> September, 1998 under Order 41 Rule 31(2) of the Civil Procedure Rules. It was also submitted that the exparte applicants have not shown reasons to warrant the quashing of the orders by the Minister. Regarding the issue of whether an injunction is available in judicial review proceedings, the counsel submitted that the only orders available are certiorari, prohibition and mandamus as is envisaged under Section 8 of the Law Reforms Act Chapter 26 of the Laws of Kenya.

11. Regarding the issue of who should bear the costs, the Counsel for the 2<sup>nd</sup> Respondent cited Section 27(1) of the Civil Procedure Act Chapter 21 of the Laws of Kenya and submitted that costs of and incidental to all proceedings are at the discretion of the court. That even though costs follow the event, the application herein being destitute of merit, the court should dismiss it with costs to the 2<sup>nd</sup> Respondent

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

***“As we 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 very restrictive in nature of the remedies or reliefs available to the parties.”***

13. Bearing the holding of the above authority in mind, I do note that the issue of ownership of plot Nos. 2039, 2056 and 2458 is yet to be determined with finality. I say so because whereas the exparte applicants have annexed an order of the High court in Nairobi HCCA No.234 of 1981 that shows judgment was entered in favour of Peter Sileta Muthoka, who is the 1<sup>st</sup> exparte applicant, the 2<sup>nd</sup> Respondent maintains that the appeal was dismissed on 16<sup>th</sup> September, 1998.

14. In paragraph 11 of the Respondent’s replying affidavit, there is annexed copies of proceedings marked PMN3 showing that HCCA No.234 of 1981 was dismissed on 16<sup>th</sup> September, 1998. This presupposes that the judgement that was entered in favour of the 1<sup>st</sup> Exparte applicant on the 28<sup>th</sup> March, 1983 was set aside. Further, the 2<sup>nd</sup> Respondent has deposed in paragraph 7 of his replying affidavit that apart from NBI HCCA No.234 of 1981 which was filed by the 1<sup>st</sup> exparte applicant, he too filed HCCA No.246 of 1981 which could not be heard due to the fact the court file is said to have gone missing.

15. The issue of ownership has to be determined in some other proceedings other than this one.

16. It is for the above reason that I agree with the counsel for the 2<sup>nd</sup> Respondent that an order of injunction cannot be granted in these proceedings which are not concerned with the merits of the case contrary to what was propounded by the exparte applicants. Suffice it to say, there is an alternative remedy for the exparte applicants to ventilate the issue of ownership in the form of civil proceedings.

17. The counsel for the exparte applicants’ counsel has submitted that the prayer for an order of mandamus directed against the 1<sup>st</sup> Respondent has been overtaken by events since the Respondents were issued with the proceedings and the award in the Minister’s Appeal No.41/2011. The exparte applicants have stated that they were never given a chance to cross-examine or re-examine and thus the proceedings before the Minister did not follow the rules of evidence and procedure. In my view even though it seems that parties were never granted a chance to cross-examine and re-examine their witnesses, there is nothing in the proceedings to show that the parties were not accorded a chance to present their respective cases before the Minister. It is clear that the exparte applicants were heard and therefore my finding is that the application lacks merit. The application must fail. It follows therefore the exparte applicants must be condemned to pay costs. In the circumstances, I hereby proceed to dismiss the exparte applicant’s application for judicial review with costs to the 1<sup>st</sup> Respondent. It is so ordered.

Signed, Dated and Delivered at Makueni on this 06<sup>th</sup> Day of September, 2019.

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

4<sup>th</sup> Exparte Applicant

No appearance for the 2<sup>nd</sup> Respondent

C. Nzioka – Court Assistant

**MBOGO C. G.,**

**JUDGE.**