



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**JUDICIAL REVIEW NO. 35 OF 2012**

**IN THE MATTER OF AN APPLICATION BY JOSECK**

**MITHEU TO APPLY FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW**

**REFORM ACT, CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCELS NO. 1170 AND NO. 6600 ANKAMIA**

**ADJUDICATION SECTION AND IN THE MATTER OF OBJECTION NO. 214**

**AND**

**IN THE MATTER OF SECTION 26 OF LAND**

**CONSOLIDATION ACT CAP 283 LAWS OF KENYA**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND ADJUDICATION OFFICER TIGANIA DISTRICTS.....RESPONDENT**

**STEPHEN MITHIKA M'MAUTA.....INTERESTED PARTY**

**AND**

**JOSECK MITHEU.....EX-PARTE APPLICANT**

**JUDGMENT**

1. The Judicial Review Notice of Motion dated 27<sup>th</sup> November, 2012 seeks the following orders:-

(1) That this Court be pleased to issue an order of certiorari to remove into this Court the decision of the Land Adjudication Officer, Tigania District made on 11<sup>th</sup> October, 2012 in Objection No. 214 involving land parcel No. 11270 and 6600 Ankamia Adjudication Section and quash the same and other orders made therein without jurisdiction and against the laws of the land.

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

2. The motion is supported by the grounds captured in the statement of facts and further and supplementary verifying affidavit of Joseck Mitheu, the Ex parte Applicant.

### **The Ex-parte Applicant's Case**

3. The applicant states that he purchased a portion of land from one M'MBIRITHI THARUYA (deceased) whose land was **LR. No. 1170 Ankamia Adjudication Section**; that the said portion was 4.85 acres and that in 1992, the ex parte applicant was issued with L.R No. 6600 Ankamia Adjudication Scheme as evidenced by the letter of confirmation from the District Land Adjudication Office Tigania West/East District. He further depones that M'Mbirithi Tharuya (now deceased) went ahead to distribute the rest of Land Parcel No. 1170 Ankamia Adjudication Section to his family members who were subsequently issued with different land parcel numbers thus land reference No. 1170 Ankamia Adjudication Section ceased to exist; that sometimes in October 2012, he learnt that an objection had been filed against the deceased and over land parcel no. 1170 long after objections had been closed. He contends that he became apprehensive since his land parcel No. 6600 was a sub division of what used to be L.R. No. 1170 Ankamia Adjudication Section and went to the lands office to follow up whereby he met the adjudication officer who in turn informed him that he had heard the objection and made his decision which was final.

4. The *Ex-parte* applicant submitted as follows:

- (i) **That he was not summoned by the adjudication officer in order for him to be given a hearing while his land and interests were at stake.**
- (ii) **That the said objection proceedings were made by the Respondent alone and he went ahead to make a single decision as the proceedings do not even name the committee members who were present.**
- (iii) **That the Respondent did not leave the matter to the committee as required under Section 26 of the Act.**
- (iv) **That the objection was invalid as it was against a non-existent parcel number and against a deceased person.**
- (v) **That the decision is bad in law and made in bad faith as the Ex-parte Applicant's land and property will be illegally and unlawfully taken away.**

### **The Interested Party's Case**

5. The interested party's case is that his objection No. 214 in respect of **Land Parcel No. 1170 Ankamai Land Adjudication Section** was heard and determined in accordance with the provisions of the applicable law and procedures. He states that the objection was heard by a qualified land adjudication officer in the presence and participation of members of adjudication committee. He stated that his objection was against the son of M'Mbirithi Ngaruiya and that the law allowed him to file an objection against a relative of the deceased without filing a succession cause; that the applicant's land comprised the excess land that had been wrongfully given to M'Mbirithi Tharuya contrary to the committee decision in **Committee Case 31 of 1978** and that the failure on the part of the land adjudication officer to write the names of the committee members on the record does not affect the decision made in that case. He further averred that he was born and has lived on the suit land and that the ex parte applicant had never taken possession of the suit land.

6. He states that the recorded proceedings of the objection clearly intended to have the decision of the demarcation Committee in **Committee Case No. 31 of 1978** implemented and that in the **Committee Case No 31 of 1978**, it had been decided that the late M'Mbirithi Tharuya be given **0.56 Acres** from his late father's Land Parcel No. 1204 Ankamai Adjudication Section and it also shows that the members of the committee fully participated in the hearing by cross-examining the witnesses and that he lodged the objection within the stipulated period.

### **The Respondent's Response**

7. The respondent never filed any reply to the judicial review notice of motion.

### **Determination**

8. The ex-parte applicant filed submissions on **4/11/2015** while the interested party and the respondent never filed any submissions.

9. I have considered all the arguments raised herein and the issues for determination are;

- (i) **Whether the decision in Objection No. 214 is invalid on account of being made in the absence of a committee.**
- (ii) **Whether the respondent violated the rules of natural justice for failure to give the ex parte applicant a hearing.**

### **Absence of a Committee**

10. This being a Judicial Review motion, the court's concern is the decision making process and not the merits thereof.

11. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001** the Court of Appeal held as follows:-

*“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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. A Court should not act as a Court of Appeal over the decision which would involve going into the merits of the decision itself.”*

12. The applicant has contended that the decision in **Objection No 214** is illegal as there was no constituted committee pursuant to provisions of **section 26 (1)** of the **Land Consolidation Act**. The Applicant has relied on the Court of Appeal case of **Meixner & another - vs- AG (2005) 2 KLR 189** and the case of **Pastoli -vs- Kabale District Local Government & Another (2008) 2 EA 300** quoted with the approval the case of **R V Commissioner of Lands (2013) eKLR**.

13. **Section 11** of the **Land Consolidation Act** provides as follows:

**“ (1) The Committee appointed for an adjudication section shall adjudicate upon and determine in accordance with African customary law the claim of any individual person to any right or interest in any land within the adjudication section.**

**(2) If a Committee is unable to reach a decision in accordance with African customary law it shall refer the matter to the Arbitration Board which shall decide the matter and shall inform the Committee of its decision.”**

14. In the instant case, I am unable to decipher from the scanty handwritten proceedings whether the Adjudication Officer involved the committee as provided by Section 9(1). It was the burden of the respondent and the interested party to prove to this court that a committee was involved. The Land Adjudication officer has not sworn any affidavit to show that the committee was involved. The interested party has intimated in his replying affidavit that the committee sat, but the respondent failed to write down the names of the members on the record. However in a case of this nature proof of their participation not being evident from the record of the impugned proceedings, this court is at a loss as to how their presence can be established. It cannot be left to sheer guess work.

15. In the absence of documentary evidence to the involvement of a committee, this court cannot therefore make any assumptions. This court is therefore not convinced that a committee was involved in the hearing.

16. In regard to participation of the ex-parte applicant in the proceedings, upon perusal of the said objection proceedings I find that indeed the ex-parte applicant was not named as a party in the proceedings. The Respondent in the objection proceedings was the deceased who was represented by Joseph M’Itimitu. It appears that the objection proceedings were in relation to parcel **No. 11270** which land had been subdivided to give rise to several other parcels including land reference **no. 6600** Ankamia Adjudication section.

17. It is clear from the record that in **Committee Case Number 31 of 1978** the suit land was awarded to M’Mbirithi Tharuya without mention of any subdivision as alleged in these proceedings by the interested party. M’Mbirithi is the person who sold the land to the applicant. He was deceased by the time the case was heard. The proceedings that the applicant exhibits show that the land adjudication officer directed the summons in the case to the deceased. I have not heard the interested party state that the applicant was served or attended the hearing.

18. The Land Adjudication Officer in **Objection No 214** must have been aware of the applicant’s presence on the suit land; the record of cross-examination of the objector by the respondents in that case revealed that the objector knew of the presence of other persons on the suit land. They also stated the occupants’ names.

19. There is no good ground as to why the applicant who was in actual occupation of the land was not summoned to explain his presence thereon before the decision in the objection was made yet that decision was bound to seriously affect his interest in the land.

20. It is evident that the ex-parte applicant was not a party to the objection proceedings. He was not summoned by the adjudication officer. Consequently, the decision making process was unfair and against the rules of natural justice.

21. I find that the Judicial Review Motion is meritorious and I proceed to grant the following orders:

**(a) An order of certiorari is hereby issued calling to this court and quashing the proceedings and award dated 11/10/2012 made by the respondent in objection number 214 involving land parcel No. 11270 and 6600 Ankamia Adjudication Section.**

**(b) The respondent and the interested party shall jointly and severally bear the costs of these proceedings.**

**Dated and signed at Kitale this day of 2019.**

**MWANGI NJORGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**

**Delivered in open court at Meru this 31st day of October 2019.**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MERU**