



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

JUDICIAL REVIEW NO.14 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER

MUKAA SUB-COUNTY, MAKUENI COUNTY.....RESPONDENT

MBENI MATHEKA

HARLEY MAKUMI WAMBUA

MUTEI MATHEKA

NGEI WAMBUA

MULANDI WAMBUA

VITI MATHEKA

MUTETI WAMBUA

LELI MATHEKA.....INTERESTED PARTIES

EX-PARTE: AGNES WAKI MUINDI, MUEMA MUINDI,

MUTUKU MASILA & PAUL KALIKYA NGOVI

JUDGEMENT

1) By their Notice of Motion application expressed to be brought under Order 53 Rule 3(1) of the Civil Procedure Rules, Law Reform Act (Cap 26) of the Laws of Kenya, Section 29 of the Land Adjudication Act (cap 284) of the Laws of Kenya, Article 159(1) of the Constitution and Sections 7(1), 7(2)(a) (ii)(d) and 11(a), (b) of the Fair Administrative (sic) Act of the Laws of Kenya and all other enabling provisions of the law pursuant to leave granted on 13th November, 2018, the Ex-parte Applicants pray for orders:-

1. THAT an Order of Certiorari do issue to remove into the High Court and quash the judgment and order made by the Deputy County Commissioner, Mukaa Sub-County, Makueni County in Ministers Appeal Case No.574 of 2015 between Paul Kalikya Ngovi, Agnes Waki Muindi and Mutuku Masila –vs- Mbeni Matheka delivered the 14th May 2018.

2. THAT an Order of prohibition directed at the Deputy County Commissioner, Mukaa Sub-County, Makueni County do issue prohibiting the Deputy County Commissioner and the Interested Parties from acting on the said judgment and the Interested Parties be prohibited from entering, interfering, trespassing, transferring and/or alienating plot No.2948 Kasikeu Adjudication and further be prohibited from harassing and/or evicting the Ex-parte Applicants from the said land parcel plot No.2948 Kasikeu Adjudication.

3. THAT the decision by Land Adjudication Officer (LAO) made on 14th/1/2015 in objection No.8 affecting plot No..2948 Kasikeu Adjudication directing land parcel plot No.2948 to be registered in the name of Mbeni Kitheka and Katiku Wambua be quashed and cancelled the said parcel do revert to its original Plot No.609 Kasikeu Adjudication whose owners are Ex-parte Applicants and an Order of Mandamus do issue compelling the Deputy County Commissioner and the Minister of Lands and Settlement to cancel the Registration of plot No.2948 in the name Mbeni Kitheka.

4. THAT costs of this application be provided for in any event.

The application is dated 23rd November, 2018 and was filed in court on even date. It is accompanied by the statutory statement dated 08th November, 2018 and a verifying affidavit sworn at Nairobi on 08th November, 2018 by Agnes Waki Muindi, the 1st Ex-parte Applicant on her own behalf and on behalf of her co-Exparte Applicants.

2) The Respondent has opposed the application vide his grounds of opposition dated 25th March, 2019 and filed in court on 17th April, 2019. In opposition to the application, the Respondent has stated that:-

- 1. THAT the Notice of motion application is defective, has no merit and is based on a misconception of the law.**
- 2. THAT through the gazette Notice No.6854 dated 3rd October, 2014 the Cabinet Secretary for Lands, Housing and Urban Development delegated the powers to hear and determine appeals under Section 29 of the Land Adjudication Act to the Deputy County Commissioners.**
- 3. THAT the Respondent acted within the Jurisdiction conferred to him by the aforementioned Gazette Notice.**
- 4. THAT the proceedings and judgment marked 'AWM6' relied by the Applicants in this application, clearly indicates that it is the Respondent who heard and determined the matter.**
- 5. THAT no objection was raised on the manner the Appeal proceedings were being conducted.**
- 6. THAT the Respondent in hearing and determining the matter IS NOT bound by the rules of procedure.**
- 7. THAT the Respondent did not violate the rules of Natural Justice in the hearing and determination of the aforesaid matter. All parties were accorded a fair chance to canvas their case and a determination was made.**
- 8. THAT the application is an abuse of the court process and subject for dismissal.**

Similarly, the eight interested parties have opposed the application vide their grounds of opposition dated 20th February, 2019 and filed in court on 21st February, 2019, the interested parties contend that:-

- 1. That the Adjudication Officer has jurisdiction in all claims made under the act relating to the interest in land in the Adjudication area.**
- 2. That challenging the merit of Respondent finding is not a ground for judicial review but a civil dispute.**
- 3. That the Applicant has not shown the law that was breached or misapplied or if claim was lodged before the wrong forum.**
- 4. That the Respondent had not exceeded his mandate.**
- 5. Respondent handled the objection within his jurisdiction and never exceeded mandate.**
- 6. Applicant should have appealed if he is aggrieved by the decision.**
- 7. Section 1 of Land Consolidation Act gives Respondents power and legal mandate to hear objection.**

Pursuant to the directions made on 21st February, 2019 to dispose off the application by way of written submissions, the Ex-parte Applicants, Respondent and the Interested Parties filed their respective submissions on 24th May, 2019, 17th April, 2019 and 08th July, 2019.

3) The Counsel for the Ex-parte Applicants listed the issues for determination as follows:-

- (i) Whether the portion now registered as plot No.2948 Kasikeu Adjudication section was part or a portion of plot No.609 Kasikeu Adjudication.**
- (ii) Whether the creation of the said Plot No.2948 Kasikeu Adjudication Section was lawful and justified.**
- (iii) Whether the registration of the said plot No.2948 Kasikeu Adjudication section in the name of Mbeni Matheka was lawful.**

(iv) *Whether the LAO was justified in ordering the registration of plot No.2948 Kasikeu Adjudication Section in the name of Mbeni Matheka.*

(v) *Whether the Deputy County Commissioner on behalf of the Minister in the Minister's Appeal acted procedurally and lawfully by failing to call the registered proprietor of the premises Mbeni Matheka, who was alive and a party in the appeal before making his decision.*

(vi) *Whether the Deputy County Commissioner acted within the law and within the provisions of the Fair Administrative Action Act when he failed to take into account the fact that, the premises in dispute Plot No.2948 was unlawfully created and curved from plot No.609 Kasikeu Adjudication Section.*

(vii) *Whether the Deputy County Commissioner upheld the principles of justice in his decision.*

In my view, only issues numbers v, vi and vii are relevant in the determination of this application. The other issues are attacking the merit of the Land Adjudication Officer as well as the Deputy Commissioner who sat in appeal No.574 of 2015 vide the delegation of the appropriate authority by the Minister.

4) On the other hand, the Respondent framed the issues for determination as follows: -

(a) *Whether the Respondent had jurisdiction to hear and determine the matter?*

(b) *Whether the Respondent acted in excess of jurisdiction by taking up fresh evidence from people who were not parties in the suit?*

On their part, the Interested Parties dwelt on the issue of jurisdiction.

5) In my judgement, I shall confine myself to the issue of process and technical jurisdiction rather than merits of the Minister's decision.

6) The Counsel for the Ex-parte Applicant submitted that the Deputy Commissioner acted wrongly and unprocedurally in the appeal which was essentially a boundary dispute. The Counsel further went on to submit that the Deputy County Commissioner failed to exercise his mandate fairly and justifiably in dealing with the matter before him.

7) On the other hand, the Counsel for the Respondent submitted that vide gazette notice No.6854, the Minister delegated the power to hear and determine appeals and perform related duties and functions under Section 29 of the Land Adjudication Act to the Deputy County Commissioners of all Sub-Counties except the Sub-Counties in Nairobi and thus the Respondent had jurisdiction. The Counsel cited **Section 29 of the Land Adjudication Act** which provides that: -

“(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

Section 29 (4) states that

Notwithstanding the provisions of Section 38(2) of the Interpretation and General Provisions Act (Cap.2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.”

8) On whether or not the Respondent acted in excess of jurisdiction by taking fresh evidence from the people who were not parties to the suit, the Counsel cited the case of **Republic vs. Minister of Lands and Housing [2009] eKLR** where the Court held that;

“I say this with respect because the Commissioner became seized of the appeal and the ex-parte Applicant did not anywhere protest that either of the two actions were not taken. I have taken into account the reasoning of Onyancha, J. in Republic vs. Special District Commissioner, Kitui (supra) and I agree with the learned Judge that it is on the basis of the written grounds of appeal that an appeal of this nature is determined and in the instant case, there is no evidence that the contrary was done. The ex-parte Applicant did not expect the Minister or his delegate to act like a court and strictly follow the rules of procedure prescribed for courts....”

The Counsel further submitted that the Applicants herein participated in the process before the Respondent and were given an opportunity to tender their evidence and cross-examine the other party's witnesses and as such, the application does not bring forth any issues with regards to the decision or acts complained of as being tainted with illegality, irrationality and procedural impropriety.

9) The Counsel for the Interested Parties submissions were that the Ex-parte Applicant admitted that the Respondent had the legal power to

hear and determine the appeal. The Counsel added that the Applicants have not met the case for judicial review.

10) During the highlighting of submissions, the Counsel for the Ex-parte Applicants and the Interested Parties reiterated their written submissions.

11) I have read the application, the statutory statement as well as the verifying affidavit and the grounds of opposition. I have also read the submissions that were filed by the Counsel on record for the parties. From the evidence on record, it is clear that the Ex-parte Applicant was given a chance to present his evidence, cross examine the opposing parties in the appeal No.574 of 2015 that was before the Minister. There is no doubt that the Respondent heard the appeal on account of delegated authority vide gazette notice No.6854. In my view, there is nothing on record to suggest that the Respondent breached the rules of natural justice or that his decision is tainted with illegality, irrationality and procedural impropriety. This Court, therefore, cannot be called upon to delve into the merits of the decision that the Respondent arrived at. This is better left to Civil Proceedings.

12) In the case of **Ransca 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 merits of the case. It is also restrictive in the nature of the remedies or reliefs available to the parties.”

13) The remedies that the Ex-parte Applicant seems to seek by implication of his line of argument before me cannot be granted by this court. In the circumstances, therefore, my finding is that the application lacks merit and same is dismissed with costs to the Respondent and the Interested parties.

Signed, Dated and Delivered at Makueni this 14th day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Ms. Kyalo holding for Mr. V. M. Muia for the Ex-parte Applicant present

No appearance for the Respondent

No appearance for the Interested Parties

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

14/10/2019.