



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. JUDICIAL REVIEW NO. 36 OF 2018

REPUBLICAPPLICANT

VERSUS

DEPUTY COUNTY COMMISSIONER

LOWER YATTA SUB-COUNTY.....1ST RESPONDENT

KITHOME MWAKE.....2ND RESPONDENT

AND

EX-PARTE APPLICANT.....MATHEKA SINI

JUDGMENT

1. In the Notice of Motion dated 14th September, 2018, the Ex-parte Applicant is seeking for the following orders of Judicial Review:

a. An order of mandamus to remove into his Honourable Court and compel the 1st Respondent to review his decision made on or about 21st February, 2017 granting the property known as Plot No. 501 Ndunguni to the 2nd Respondent (herein after referred to as “the suit property) belonging to the Ex-parte Applicant.

b. An order of prohibition directed at 1st and 2nd Respondents (the Respondents) to prohibit the Respondents, their officers and/or any other authority acting on their instructions from evicting or from taking any action on the suit property in any manner that interferes with the Ex-parte Applicant’s quiet possession of the suit property.

c. An order of prohibition directed at the Respondents prohibiting them, whether by themselves or their agents, and/or their servants or otherwise however from purporting to take any action that may violate the rights of the Applicant.

2. The Motion is supported by the Affidavit of the Ex-parte Applicant who has deponed that he is the beneficial and legal owner of parcel of land known as Plot No. 501 Ndunguni (*the suit property*); that he inherited the suit property from his father who died in the year 1988; that he started living on the suit property with his father in the year 1961 and that his late father and the 2nd Respondent’s late father had a dispute in respect to the suit land in the year 1972.

3. According to the Applicant, the 1st Respondent dismissed the Appeal and gave the property to the 2nd Respondent; that the 1st Respondent relied on a decision that was made in 1972 to arrive at his verdict and that the 1972 decision is caught up by the Limitation of Actions Act.

4. The Applicant finally deponed that the 1st Respondent did not consider his submissions to visit the suit land; that due process was not followed in the grant of the suit land to the 2nd Respondent by the 1st Respondent and that the Application should be allowed.

5. In his Replying Affidavit, the 2nd Respondent deponed that he is the registered proprietor of land known as Yatta/Ndunguni/501; that the land was originally owned by his deceased father, Mwake Munuve and that the Application is an abuse of the court process.

6. In his submissions, the Applicant’s advocate submitted that the 1st Respondent never heard the Appeal; that the 1st Respondent only relied on the decision that was made in 1972 and that twelve (12) years having lapsed, the said decision was time barred.

7. On his part, the 2nd Respondent submitted that the Applicant is abusing the court process; that the Applicant has his own land and that the

issue of ownership of the suit land was decided in 1972.

8. The Application before me is seeking for an order of *mandamus* “to remove to this court and compel the 1st Respondent to review his decision made on 21st February, 2017” granting the suit land to the 2nd Respondent. The Applicant is also seeking for an order of prohibition to prohibit the Respondents from evicting him from the suit land.

9. The Applicant’s Application is premised on the ground that in making his decision of 21st February, 2017, the 1st Respondent solely relied on a decision that was made in 1972 in the District Magistrate’s Court at Kitui Civil Case L. 76/72. The Applicant has annexed the 1972 decision on his Affidavit.

10. The decision of the 1st Respondent that the Applicant is challenging shows that the 1st Respondent heard both the Applicant and the 2nd Respondent. After hearing both parties, the 1st Respondent found in favour of the 2nd Respondent as follows:

“Both parties are present and they are second generation since it was their fathers who were involved in Civil Case L. 76/72. All developments witnessed in the disputed land belongs to Appellant. Land in dispute is subject to court of law therefore, this court stands by court of law decision. Appeal is dismissed - Land awarded to Defendant Kithome Mwake”.

11. Although the Applicant is seeking to quash the decision of the 1st Respondent, he has not prayed for an order of certiorari. It is trite that Judicial Review is a process of obtaining a remedy from the superior courts in the form of one of the three prerogatives orders namely, certiorari, prohibition and mandamus. Each of the three orders serve a unique and distinct purpose.

12. The order of certiorari is the only prerogative order of Judicial Review that can remove the decision of an inferior body or tribunal to itself for the purpose of examination, investigation and quashing if found flawed on the basis of any of the recognized grounds for Judicial Review.

13. On the other hand, an order of mandamus is an order directed at an inferior body or tribunal commanding it to perform a duty of a public nature which it has failed or neglected to perform (*See Halsbury’s Laws of England, 4th Edition Vol. 1, paragraphs 89 and 90*). The order of prohibition on the other hand was defined as follows in the case of ***Kenya National Examinations Council Vs. Republic, Ex-parte Geoffrey Gathenji Njoroge & Others, Civil Appeal No. 266 of 1966***:

“What does the order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”

14. It is therefore obvious that an order of mandamus cannot issue in this matter. I say so because the 1st Respondent is not under any legal obligation to review his orders of 29th June, 2017, neither can the court compel him to do so.

15. Having already made a decision, this court cannot issue an order of prohibition in respect of the decision that has already been made. The only available prayer to the Applicant was to apply for an order of certiorari to issue to quash the decision of the 1st Respondent. Having failed to do so, I find the Application dated 14th September, 2018 to be incompetent.

16. The Application dated 14th September, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE