



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

JUDICIAL REVIEW NO. 6 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 23(3) (F)

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA SECTIONS 8 AND 9

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE CABINET SECRETARY FOR

LANDS & NATURAL RESOURCES.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION.....2ND RESPONDENT

THE DEPUTY COUNTY COMMISSIONER

MBOONI WEST SUB-COUNTY.....3RD RESPONDENT

THE MAKUENI DISTRICT LAND

ADJUDICATION & SETTLEMENT OFFICER.....4TH RESPONDENT

THE LAND REGISTRAR – MAKUENI.....5TH RESPONDENT

GEORGE MUTUNGA MUINDE.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

JUDGEMENT

1. By his Notice of Motion application expressed to be brought under Order 53 Rules 1 and 2 of the Civil Procedure Rules 2010, Sections 8 & 9 of the Law Reform Act Chapter 26 Laws of Kenya and all other enabling provisions of the law, the Ex-parte Applicant, Mbondo Matheka Munyu, prays for orders:-

1) AN ORDER OF CERTIORARI to remove into this Honourable court and quash the decisions of the 1st Respondent conveyed through the 3rd Respondent in Appeal to minister case No.43 of 2011 dated 28/03/2018 dismissing the Applicants Appeal over LAND PLOT NO.2667 UTANGWA ADJUDICATION SECTION lodged on 11/10/2010 and the previous decision of the 4th Respondent delivered on 26/08/2010 in Objection No.689 over LAND PLOT NO. 2667 UTANGWA ADJUDICATION SECTION which decision was the subject of the Appeal by the Applicant.

2) AN ORDER OF PROHIBITION directed at the 2nd, 4th and 5th Respondents from implementing the decision of the 1st Respondent conveyed through 3rd Respondent in Appeal No.43 of 2011 over LAND PLOT NO.2667 UTANGWA ADJUDICATION SECTION.

3) AN ORDER OF MANDAMUS compelling the 1st, 2nd, 4th and 5th Respondent to reinstate the name of the Applicant in the Adjudication records as the original owner of LAND PLOT NO.2667 UTANGWA ADJUDICATION SECTION and subsequently issue him with a title deed.

4) Costs of this suit and incidentals to the application be provided for.

5) Such further and other reliefs that the Honourable court may deem just and expedient to grant.

2. The application is accompanied by the statutory statement and verifying affidavit of the Ex-parte Applicant sworn on the 14th May, 2018 accompanying the application for leave and filed in court on 21st May, 2018.

3. The affidavits of service sworn by Ali Simba Kalii on 12th June, 2018 and 16th July, 2018 show that the Respondents were served with the application dated 04th June, 2018. It is only the 6th Respondent who entered appearance on the 23rd July, 2018 vide the notice of appointment of advocates dated on the same day. On the 01st October, 2018, the 6th Respondent proceeded to file a replying affidavit sworn at Nairobi on 28th September, 2018 in opposition to the application.

4. The 6th Respondent was the only one who filed his submissions pursuant to the Courts direction to dispose off the application by way of written submissions.

5. The Counsel for the 6th Respondent framed five (5) issues for determination. These issues were: -

(a) What is the purpose of the remedy of Judicial Review?

(b) Are there grounds raised by the Ex-parte Applicant to warrant grant of the orders sought herein?

(c) Was there procedural flaw during the proceedings at the Adjudication stage?

(d) Has the Ex-parte Applicant proved as required his assertions that the implementation of the decision of the 4th Respondent was done while an Appeal was still pending hence an illegality?

(e) Is the Ex-parte Applicant entitled to the reliefs sought?

6. The Counsel submitted that the basis for these proceedings is the determination in Appeal No.43 of 2011 before the Minister. The Counsel pointed out that even though the Ex-parte Applicant has averred that the Minister's decision was rendered on 28th March, 2018, according to the 6th Respondent, the same was delivered on 05th December, 2017. The Counsel was of the view that as such, there is no decision dated 28th March, 2018 capable of being quashed by this court.

7. The Counsel went on to submit that the court has no jurisdiction to entertain the application on the grounds that: -

“(i) This being a Judicial review process, the court cannot be called upon to evaluate the evidence before the Minister as the same may amount to the reviewing the merits of the decision instead of the decision making process itself. The Ex-parte Applicant alleges that:

(a) The decision of the 1st Respondent conveyed through the 3rd Respondent and the decision of the 4th Respondent in holding that PLOT NO.2667 UTANGWA ADJUDICATION SECTION was bought by the 6th Respondent from one Mutile whom land was not recorded in her names but in the names of the Applicant was illegal and void ab initio;

(b) The decision of the 1st Respondent conveyed through the 3rd Respondent and the decision of the 4th Respondent relied on a sale agreement between MUTILE and the 6th Respondent which agreement was never produced as an exhibit during the hearing of both the Objection and the Appeal to the Minister which is an affront to the rules of natural justice.

(ii) *That the merits of the decision complained off is not within the purview of judicial review in that the Ex-parte Applicant herein attended the proceedings in both the objection stage and appeal and therefore, he cannot be heard to say that rules of natural justice were breached.*”

8. The Counsel cited the case of ***Republic vs. Kenya Revenue Authority Ex-parte Yaya Towers Ltd [2008] eKLR*** where it was held thus: -

“Judicial Review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.”

9. The Counsel further submitted that there were no procedural flaws in the proceedings as alleged by the Ex-parte Applicant *in that the procedure provided for under the Land Adjudication Act was followed.* (emphasis are mine).

10. The Counsel added that the Ex-parte Applicant has not shown that the decision of the Minister is tainted with illegality, irrationality and procedural impropriety.

11. Arising from the above, the Counsel concluded by submitting that the reliefs sought by the Ex-parte Applicant cannot be granted.

12. Having read the notice of motion application, the statutory statement and the verifying affidavit filed by the Ex-parte Applicant and having read the replying affidavit filed by the 6th Respondent herein as well as the submissions that were filed by the Counsel for the latter, it is clear that the Ex-parte Applicant participated in the objection proceedings No.689 as well as Appeal No.43 of 2011. As such, the Ex-parte Applicant was given a hearing and he cannot be heard to say that rules of nature were breached by the Minister.

13. It has emerged out that in filing these proceedings, the Ex-parte Applicant is out to challenge the merit of the decision in Appeal No.43 of 2011. In my view, the Minister was entitled to arrive at a wrong decision in the aforesaid Appeal No.43 of 2011 so long as he did not act with illegality, irrationality and impropriety of procedure. The Ex-parte Applicant has not shown whether the Minister in rendering his decision in the aforementioned appeal acted with illegality, irrationality and impropriety of procedure. Secondly, as was pointed out by the Counsel for the 6th Respondent the Minister’s decision was delivered on 05th December, 2017. The same was certified on 28th March, 2018. In my view, this is an error which is curable as the Minister’s record speaks for itself.

14. In the case of ***Ransa 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 the merits of the case. It is also restrictive in the nature that of the remedies or reliefs available to the parties.”

15. The upshot of the foregoing is that the application by the Ex-parte Applicant is devoid of merit and same must fail. In the circumstances, I hereby proceed to dismiss it with costs to the 6th Respondent.

Signed, Dated and Delivered at Makueni this 28th day of November, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Masaku holding brief for Mrs. Kamende for the 6th Respondent

No appearance for the Ex-parte Applicant

Mr. Kwemboi – Court Assistant

MBOGO C. G., JUDGE,

28/11/2019.