REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC JR NO. 4B OF 2019

VICTOR NJERU NJOGU.....1ST APPLICANT

ATANAS NYAGA GATUMU.....2ND APPLICANT

JUSTIN IRERI NJAGI.....3RD APPLICANT

DAVID NJOGU NJAGI.....4TH APPLICANT

DANIEL KITHUMBU KIENGE.....5TH APPLICANT

EUSTANCE NJUE NJAGI.....6TH APPLICANT

VERSUS

MINISTER FOR LANDS AND SETTLEMENT.....1ST RESPONDENT

REGISTRAR OF LANDS MBEERE SOUTH.....2ND RESPONDENT

AND

NJUKI KAIGERI ALIAS NDUMBERI KAIGERI (Deceased)

(Represented by BENJAMIN NYAGA).....INTERESTED PARTY

JUDGEMENT

1. By a chamber summons dated 12th June 2019 the *ex parte* Applicants (hereafter *the Applicants*) sought leave of court to seek judicial review orders of *certiorari* and *prohibition* against the Respondents arising out of the 1st Respondent's decision in *Minister's Appeal Case No. 138 of 1999.* It was contended that the said decision was unreasonable; that it was misguided; and that it had an administrative error arising from wrongful evaluation of evidence.

2. The said chamber summons was accompanied by a statutory statement dated 12th June 2019 setting out the description of the parties, the reliefs sought and the grounds upon which the reliefs were sought. It was accompanied by a verifying affidavit sworn by the 1st Applicant on 12th June 2019. A further affidavit was sworn by the 1st Applicant on 1st July 2019 in support of the said application.

3. The record shows that the Applicants were granted leave on 12th June 2019 whereupon the Applicants were directed to file the substantive application within 21 days and serve all concerned parties. The notice of motion was filed on 1st July 2019. When the matter came up for directions on 4th July 2019 the Respondents and the Interested Party were granted 21 days to file their responses to the application for judicial review. The Applicants were also granted leave to file a further affidavit within 14 days upon service of the responses.

4. The court further directed that the said application for judicial review be canvassed through written submissions. The Applicants were given 14 days upon service of responses to file their written submissions and authorities whereas the Respondents were given 14 days upon the lapse of the period granted to the Applicants to file theirs. The record shows that the Interested Party filed a replying affidavit on 14th August 2019 whereas the Applicants filed a further affidavit on 22nd August 2019. The record further indicates that whereas the Respondents filed their submissions and authorities on 9th October 2019, the Applicants and the Interested Party had not filed any by the time of preparation of the judgement.

5. The Interested Party opposed the application for judicial review on various grounds. First, it was contended that the 1st Respondent properly analyzed the evidence of the parties hence there was no administrative error. Second, that the decision of the 1st Respondent was a final decision which could only be challenged if it was made without jurisdiction. Third, the application was filed so late in the day after the impugned decision had already been implemented and the title documents issued to the beneficiaries. Fourth, that the application was filed outside the statutory limitation period of six (6) months hence incompetent.

6. The court has considered the Applicants' notice of motion dated 1st July 2019, the chamber summons for leave, the statutory statement, verifying affidavits and further affidavits, the Interested Party's replying affidavit in opposition thereto as well as the submissions on record. The court has also considered the exhibits annexed to the various affidavits on record.

7. The court is of the opinion that the following issues arise for determination in this matter:

a) Whether the application for judicial review is time-barred.

b) Whether the Applicants have made out a case for the grant of judicial review orders.

c) Who shall bear the costs of the application.

8. The issue of limitation was raised by the Interested Party who contended that the application for judicial review was filed outside the period of 6 months provided for in law. The court is aware that a limitation period of 6 months is provided for both under **Order 53 Rule 2 of the Civil Procedure Rules** as well as **Section 8 of the Law Reform Act (Cap. 26).** The provisions **Order 53 rule 2** stipulates as follows:

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

9. The court is of the opinion that the phrase "or other proceedings" should be interpreted *ejus dem generis* so that such proceedings must fall within the class of a judgement, order, decree or conviction. It is thus evident that the decision of the Minister under **section 29 of the Land Adjudication Act** is not the product of judicial proceedings. The statutory limitation of 6 months stipulated in both the **Law Reform Act (Cap. 26)** and the **Civil Procedure Rules** are therefore inapplicable.

10. The second issue is whether the Applicants have demonstrated any of the grounds for judicial review known to law. In the case of **Municipal Council of Mombasa V Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the purpose of judicial review was summarized 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… The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision…"**

11. Similarly, in **Republic V Secretary of the Firearms Licensing Board & 2 Others ex parte Senator Johnstone Muthama [2018] eKLR,** it was held, *inter alia*, that:

> **"The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in Republic V Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR, the remedy of 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."**

12. So, what are the factors to be considered by the court in an application for judicial review? In the Ugandan case of **Pastoli Vs Kabale District Local Government Council & Others [2008] 2 E.A. 300** the grounds for judicial review were summarized as follows at pages 303-304:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. See *Council of Civil Service Union v Minister for the Civil Service [1985] A.C.2* and also *Francis Bahikirwe Muntu and Others Vs Kyambogo University, High Court, Kampala, Miscellaneous application number 643 of 2005 (UR).***
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles are instances of illegality.**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of**

logic and acceptable moral standards. *Re an application* by *Bukoba Gymkhana Club [1963] EA 478* at page 479 paragraph E.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercise jurisdiction to make a decision *(Al-Mehdawi V Secretary of State for the House Department [1990] AC 876)*."

13. The court has considered the Applicants' grievances in light of the above principles. The Applicants were aggrieved because they considered that the 1st Respondent erred in the evaluation of the evidence before him. It was contended that the resultant decision was misguided and tainted by "administrative error". The Applicants put emphasis on the fact that their witnesses were able to easily identify the boundaries of the land belonging to their Ikandi clan as opposed to the witnesses for the Interested Party who appeared to be unsure of their boundaries. That much is clear from the contents of paragraphs 17, 18, 9, 20 and 21 of the statutory statement dated 12th June 2019 which was verified by an affidavit. It is thus clear that the Appellants are challenging the decision of the 1st Respondent on its merits. Essentially they wanted the court to sit on appeal against the said decision and arrive at a different conclusion on the evidence tendered before the 1st Respondent.

14. The court has also noted that the Applicants were aggrieved because the 1st Respondent departed from the previous decisions by the Land Adjudication Officer in which the Applicants' clan appeared to have been successful. The Applicants also appear to have succeeded in previous proceedings in *Committee Case No. 86 of 1973 and Arbitration Board No. 98 of 1980.* The Applicants were of the view that the Minister ought to have followed the earlier findings made during the land adjudication process.

15. In the case of **Timotheo Makenge V manunga Nguchi [1976-80] 1 KLR 1136** the Respondent had obtained an order of certiorari before the High Court to quash the decision of the Minister under **section 29 of the Land Adjudication Act (Cap. 284)** on various grounds including breach of the rules of natural justice, error of law on the face of the record and excess of jurisdiction. It was also contended that the Minister had erred in departing from previous decisions of other adjudicating bodies under the **Act.** In overturning the decision of the High Court, the Court of Appeal held *inter alia*, that although the Minister would ordinarily bear in mind the previous decisions by other adjudicating bodies, he was not bound to follow such decisions.

16. This court, too, is of the opinion that the 1st Respondent was not bound by the previous authorities such as the Arbitration Board and the Land Adjudication Officer. The 1st Respondent was perfectly entitled to come to a different decision on the basis of the material and evidence before him. This court is not satisfied that the Minister's departure from previous decisions was unlawful or unreasonable.

17. A decision cannot be considered to be unreasonable simply because it is a departure from previous decisions by different adjudicating authorities. It cannot be considered as unreasonable just because it is unfavourable to the Applicants. The court considered the meaning of the term "unreasonabless" in **Associated Provincial Picture Houses Ltd Vs Wednesbury Corporation [1948] 1 KB. 223** as a decision which is:

"… so outrageous in defiance of logic or accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it."

The court is unable to find any material on record from which it may be concluded that the 1st Respondent's decision was unreasonable.

18. The 3rd and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason to deprive the successful litigants of the costs of the action. Accordingly, the Applicants shall be awarded costs of the action.

19. The upshot of the foregoing is that the court finds that the Applicants have failed to demonstrate any of the grounds for judicial review known to law. The Applicants were simply challenging the merits of the 1st Respondent's decision by mounting an appeal disguised as a judicial review application. Accordingly, the Applicant's notice of motion dated 1st July 2019 is hereby dismissed in its entirety with costs to the Respondents and the Interested Party. For the avoidance of doubt, any order of stay in force is hereby vacated.

20. It is so decided.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF NOVEMBER, 2019

In the presence of Mr. Kamunda for the Applicants, Mr. Mayaka for Respondents and Ms. Nzekele holding brief for Mr. Andande for the Interested Party.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

21.11.19