REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

JR. MISC. APPLICATION NO. 30 OF 2017

(Formerly Machakos ELC Misc Appl. 130/2012)

IN THE MATTER OF APPLICATION FOR ORDERS OF JUDICIAL REVIEW BY GATHECHA NG'ANG'A KIOI

AND

IN THE MATTER OF LAND PARCEL NO. NGONG/NGONG/3524 IN KAJIADO AND THE DECISION MADE BY THE LAND REGISTRAR, KAJIADO NORTH CONCERNING THE SAID PARCEL ON UNKNOWN DATE BUT AFTER 7TH FEBRUARY 2012

AND

IN THE MATTER OF VARIOUS MAPS BY DIRECTOR OF SURVEY REGARDING THE SAID PARCEL OF LAND

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

AND

JAMES KARANJA GATHECHA (Suing as the personal representative to the estate of

GATHECHA NGANGA KIOI).....EX PARTE APPLICANT

VERSUS

THE LAND REGISTRAR KAJIADO NORTH.....1ST RESPONDENT

THE DIRECTOR OF SURVEY.....2ND RESPONDENT

IRENE M. ONSUMO.....1st INTERESTED PARTY

PHILIP KIVUVA NZIOKA.....2nd INTERESTED PARTY

JUDGMENT

What is before Court for determination is the Ex parte Applicant's Notice of Motion Application dated the 6th August, 2012 brought pursuant to Order 53 Rule (1) of the Civil Procedure Rules. The Ex parte Applicant seeks the following orders:

1. The Honourable Court do make an Order calling for, and removing to it, the decision of the 1st Respondent in favour of the Interested Party and against the ex parte Applicant in the undated decision given after 7th February, 2012.

2. That the costs of the Application be provided for.

The application is premised on the summarized grounds that the undated ruling of the 1st Respondent given after a hearing at the site on 7th February, 2012 was unlawful, ultra vires, contrary to reasonable expectation of the ex parte applicant that the access road to his land NGONG/ NGONG/ 3524 indicated in the official map of the said parcel, by the 2nd Respondent, would be respected unless it was changed

with the knowledge as well as consent of the parties concerned. Further, that the undated Ruling of the 1st Respondent was given to the ex parte Applicant on 5th April, 2012 (and not 4th May, 2012) as indicated in the statement of facts), had allowed the ex parte Applicant 30 days to Appeal to the High Court, thereby making the right of appeal a travesty. The 1st Respondent failed to proceed to the site as ordered on 25th May, 2012 by the Complaints Office, Ardhi House.

The Application is supported by the affidavit of GATHECHA NGANGA KIOI sworn on 21st June, 2012 and Statement of Facts. In his affidavit he confirms that on the 11th May 2012 the 1stRespondent, the District Surveyor, Kajiado North and others met at the site, after which the 1st Respondent promised to communicate his decision. He explains that the local Assistant Chief later called him to collect the Ruling by the 1st Respondent from the District Officer, Kajiado which he did on the same day. Further, that he found the Ruling was undated although the date of hearing was correctly indicated as 7th February 2012. He avers that the 1st Respondent ruled that the road of access he claimed, did not exist on the map. He lodged a complaint at Complaints Office Ardhi House and as a result one Richard Abura who wrote on behalf of the PS, Lands noted that the "matter needed to be revisited" as the road reserve addressed by the surveyor during the site visit on 7th February 2012 was in variation "from the road reserve provided initially for parcel 1152 (applicant's original land parcel) which was subdivided in 3524 and 3525 respectively".

The Application is opposed by IRENE ONSOMU the 1st Interested Party where she confirms purchasing land from one one Monica Kauki the administrator of the estate of Ole Kondii in 1998. She disputes the location of the access road as claimed by the Ex parte Applicant and insists the said road of access is as per the map in her custody. She contends that the Ruling was delivered much earlier and the Ex parte Applicant is guilty of material non disclosure.

The 2nd Interested Party was also enjoined in the suit much later and disputed the instant application. He insisted the access road was as per the map with the 1st Interested party.

The Attorney General for the Respondents conceded to the Application vide his letter dated the and submissions dated the 15th February, 2013.

The Ex parte Applicant and the 1st Interested Party filed their respective submissions which I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 6th August, 2012 including the statement of facts; respective parties affidavits as well as the annexures thereon including the submissions, the following are the issues for determination:

· Whether the ex parte applicant is entitled to the orders sought in this substantive application.

· Who should bear the costs of this proceedings

As to whether the ex parte applicant is entitled to the orders sought in this substantive application. It is not in dispute that both the Applicant and the 1st Interested party are registered proprietors of their respective parcels of land. It is further not in dispute that the Land Registrar deliberated over the issue of road of access between the two parcels of land. The Applicant submitted that the failure by the Land Registrar to date his Ruling and deliver the written Ruling much later despite granting a right of Appeal in 30 days is a travesty justice. The Interested Party submitted that the Land Registrar followed the due process as there was a meeting held on the 7th February 2012 where all parties were present on the site in dispute, with the Land Registrar allowing the claimant and the respondent to present their respective positions while on the ground as recorded in the ruling. She insists the Land Registrar invited the District Surveyor to measure the ground using available (RIMs, mutations, survey maps). The surveyor performed his work and produced a sketch on how the road is and should be on the ground. Further, that the Land Registrar then made his findings on the spot in her favour, pointed out to the parties present the beacons on the ground and gave a right of appeal within Thirty (30) days to the High Court and promised to issue a written decision later. She reiterates that the undated Ruling was just the written decision promised to the parties and the right of appeal was to be within thirty (30) days from the date of ruling done on the 7th February 2012. Further, that the right of Appeal was not from the date of the written ruling as alleged by the applicant. She has relied on the cases of **JR MISC. APPLICATION NO. 39 of 2013. MUYA MAILU KAMENE- VS- KENYA BUREAU OF STANDARDS & OTHERS referred to the Nairobi High Court Misc. Appl. 1249/2007 BEJA MNYIKA BEJA –V-S ELECTORAL COMMISSION OF KENYA**

She insists the remedy available to the applicant could have been to lodge appeal out of time. Further that he should have sought leave to enlarge time as provided for under the civil Procedure Rules.

The Attorney General acting for the Respondents conceded to the Application and submitted that the undated Ruling was invalid and did not support it

Judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the standards of judicial review when he stated that:-

> **"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the**

decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'

In the case of Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR the Court of Appeal held that:' "*Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers – versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.'*

In line with these set standards, it is hence pertinent to decipher whether Respondents proceedings were rational, reasonable and that they observed the basic rules of natural justice. I note that the proceedings were held on 7th February, 2012 when all the parties were present. Further, the Respondent delivered its oral findings on the same date, gave a 30 days right of Appeal to any aggrieved party but deferred the delivery of the written Ruling for later. The Applicant confirmed that he obtained a Copy of the Written Ruling in April, 2012, which was after the lapse of the 30 days and that is the fulcrum of the dispute herein.

Section 47 of the Constitution provides that: **'(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration'.

In the current scenario, I note the Land Registrar who is a public officer was legally mandated to resolve the issue of road of access proceeded to the disputed site where he heard all the parties in the dispute herein. Further, his mandate was to be confined to the Constitution and the available Land Laws. He however never delivered a written ruling despite stating on the ground that the right of appeal is 30 days. The Applicant has hence sought to quash the decision as it was delivered much later than the 30 days period. Further, that the said written Ruling was simply handed over to the Applicant through the District Commissioner's Office. It is trite law that judicial review is about the process and not the merits of the decisions. For a process to be deemed complete, a written well reasoned and dated decision had to be delivered in the presence of all the disputing parties. . In the instant case, it was admitted that on the 7th February 2012 the Land Registrar delivered an oral Ruling. I opine that even if an aggrieved party would have wanted to lodge an Appeal against it, there would be no evidence nor reasons of the decision being appealed from. Further the applicant had a constitutional right to administrative action as enshrined in article 47 of the constitution. To my mind, I opine that the Land Registrar failed to complete his administrative assignment which he was mandated by the law to do.. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001,** it was held that:

"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…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

In the current scenario, the Attorney General who represented the Respondents conceded to the instant application and never filed any documentation to oppose it. Based on my analysis above, and associating myself with the cited decisions, it is my view that there was 'procedural impropriety' during the determination of the dispute herein as the Land Registrar failed to deliver a written decision on time and simply sent a copy of the written Ruling to the District Office to transmit to the Ex parte Applicant. Further, it is evident that the basic rules of natural justice as well as procedural fairness was not fully observed. In the circumstance, I find the instant application merited.

On the issue of costs, since this generally abides the outcome of the suit, I find that since the Attorney General conceded to the Application, it should not be made to bear the costs.

It is against the foregoing that I find the Notice of Motion dated the 6th August, 2012 merited and proceed to allow it in the following terms:

1. An order of Certiorari be and is hereby issued to quash the undated decision of the Land Registrar given after the 7th February, 2012 in respect of the determination of the Road of Access

2. The Land Registrar Kajiado North be and is hereby directed to proceed to the disputed site and determine the boundary including road of access between NGONG/ NGONG/ 20348 and NGONG/ NGONG/ 3524 within 90 days from the date hereof and submit a report to Court.

3. Each party to bear their own costs.

Dated signed and delivered in open court at Kajiado this 14th day of November, 2019

CHRISTINE OCHIENG

JUDGE