



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC JUDICIAL REVIEW NO. 52 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

**AND**

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

**AND**

**IN THE MATTER OF THE LAND CONSOLIDATION ACT (CAP 283 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF OBJECTION NO. 2997 AND 2998**

**AND**

**IN THE MATTER OF LAND PARCEL NO.S 1842 AND 1863**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF LAND ADJUDICATION AND**

**SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR, LAND ADJUDICATION AND**

**SETTLEMENT OFFICER- TIGANIA DISTRICT.....2<sup>ND</sup> RESPONDENT**

**JAPHET MIRITI THILANGE.....INTERESTED PARTY**

**FREDRICK SIMON MBURUNGA.....1<sup>ST</sup> EX PARTE APPLICANT**

**HUMPHREY MURURU MBURUNGA.....2<sup>ND</sup> EX-PARTE APPLICANT**

**JUDGMENT**

1. Before I delve into this matter, I must mention that the substantive motion herein was filed in the year 2011 and there has been multiple applications ranging from prayers for temporary injunctions, contempt of court proceedings and prayers seeking leave to amend the substantive motion. These Applications naturally have caused a delay spanning eight (8) years in the court corridors.

2. The *ex-parte* applicants herein were granted leave by this Court on 10<sup>th</sup> August 2011 to challenge the decision of the respondent in Relation to Objection No. 2997 and 2998. The *Ex-Parte* Applicants filed the substantive motion on 30<sup>th</sup> August 2011 seeing the following Orders;

**a. That an Order of Certiorari be issued to the ex-parte applicant to call for and quash the proceedings and the award of the 2<sup>nd</sup> Respondent dated 16/6/2011 in Objection Case No.s 2997 and 2998 to the extent that the decision affects the ex-parte applicant's ownership of land parcel no. 1842 and 1863 within Antuamburi Adjudication Section.**

**b. That this Honourable Court be pleased to direct that costs for and incidental to this application be borne by the respondents and the interested parties.**

3. The application was supported by the grounds set out on the face of the application, the statement of facts and the verifying affidavit of **Fredrick Simon Mburunga** (the 1<sup>st</sup> Ex-parte Applicant herein). He averred that the 2<sup>nd</sup> Exparte applicant is his son (Humphrey Mururu). He further stated that he had worked with Antuamburi Adjudication section as a surveyor and had bought land from various people during consolidation. That the interested party was at the time a committee member and that during consolidation period, it is the interested party who informed him where his land was. He therefore allowed the interested party to stay on the land until 2004 when he requested him to vacate the same.

4. That the interested party refused to vacate the land and it took the intervention of the Area Chief Mikinduri West Location where they entered into an agreement that the interested party would vacate the premises in phases. The 1<sup>st</sup> Ex-Parte Applicant took possession of the land in August 2005 and has been in occupation since then. *(He attached copies of the letters from the Area Chief and proceedings before the land adjudication officer those of 10.6.2010 and those of 16.6.2011 to support his averments)*

5. The 1<sup>st</sup> ex-parte applicant also stated that the interested party lodged **objection No. 2997, 2998 and 453** with the 2<sup>nd</sup> Respondent over the suit premises. That the Ex-Parte Applicant was not summoned and it took the intervention of the neighbours who tipped him about the objection proceedings. That the interested party and his protégés disappeared and the adjudication officer dismissed the objections. That the same were however reinstated without an order for reinstatement. It was his averment that the 2<sup>nd</sup> Respondent allowed the same when he had no jurisdiction to do so.

6. The Ex-parte Applicants filed their submissions on 25<sup>th</sup> April 2019 and restated their averments. They added that the 2<sup>nd</sup> respondent and the interested party went ahead to subdivide land parcels no 1842 and 1863 Antuamburi Adjudication Section to resultant parcels numbers 11729, 11730 and 11492 Antuamburi Adjudication Section and they therefore pray that the said sub divisions be revoked and the land to revert back to parcels numbers 1842 and 1863.

7. The Ex-parte applicants also relied on the provisions of **Section 29 of the Land Adjudication Act** and the cited case of **Machakos High Court Miscellaneous Application No. 126 of 2004 Republic versus D.C. Kitui & Others**.

8. The response to the Substantive Judicial Review Motion by the Respondent, (The AG) is contained in the Replying Affidavit dated 12<sup>th</sup> September 2012 sworn by **Amos Muli Musyoka**, who is a Land Adjudication Officer in Tigania District. He averred that there is no legal provision to grant a land Adjudication Officer powers to rehear a matter that had been concluded and/or dismissed by another Adjudication Officer. The Respondent contends that the Land Adjudication Committee had powers under **Section 21 (2) of the Land Consolidation Act Cap 283** to allocate land to the **ex-parte Applicant** and the same amounted to a right of ownership under **Section 15 (1) 2 (a) (b) and (3) of the Land Consolidation Act**. The respondent did not file any submissions.

9. The Interested Party filed numerous Replying affidavits, but these appear to be in opposition to the various applications filed by the Ex-parte applicant. I am un-able to trace any Replying affidavit in response to the main Judicial Review Motion. However, the Interested Party has duly filed submissions where he has taken issue with the locus of the 1<sup>st</sup> Ex-Parte Applicant since the 2<sup>nd</sup> Ex-Parte Applicant is the proprietor of the suit premises and that this 2<sup>nd</sup> applicant was never engaged in the proceedings before the land adjudication committee. He also took issue with the decision dated 10<sup>th</sup> June 2010 and stated that the same is non-existent since during the years 2010 to 2011 there was one adjudication Officer named **Phillip Awando** whose name does not appear in the purported decision but appears in the decision dated 16<sup>th</sup> June 2011. Lastly he stated that the suit premises i.e. **Parcel No. 1863 and 1842** have been non-existent as at the time of the filing of this suit since the land was subdivided to **Parcel No.s 11729, 11730 and 12492**, hence the court would only be engaging in an academic exercise if it was to allow the substantive motion.

#### **Analysis and Determination**

10. From the proceedings, affidavits and submissions filed by the parties, I find that the issue for determination is **"whether 2<sup>nd</sup> respondent acted ultra-vires by entertaining an objection that had already been decided, hence reviewing the decision of an officer of concurrent jurisdiction"**.

11. In **Republic –v- Kenya Revenue Authority ex-parte Yaya Towers Limited (2008) eKLR** the court held that 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. 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 not 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.

12. Accordingly, this court will only concern itself with the process followed by the Respondent in arriving at the impugned decision.

13. I have keenly looked at the two decisions which have been availed by the Ex-parte Applicants as FSM1 (**decision of 10.6.2010**), and FSM3 (**decision of 16.6.2011**) and I make the following observations. Firstly, the decision of 10.6.2010 was dealing with only parcel no **1863** in objection no. **453, 2997** and **2998** while decision of 16.6.2011 concerned both parcels no **1842** and **1863**, in objection no's **2997** and **2998**. Further, the objectors in the decision of 10.6.2010 were the current interested party along with Mwakairu Ciomwereria and M'Ithima M'Limbitu, while in the decision of 16.6.2011, the current interested party was the only objector.

14. Secondly, the decision of 10.6.2010 bears no name, or stamp of the Land Adjudication Officer or the office. Amos Musyoka is apparently a Land Adjudication officer in Tigania and he has deponed that it was un-procedural for a Land Adjudication officer to re-hear the decision of another officer. How comes he could not give particulars of the Land adjudication officer who allegedly heard the case on 10.6.2010. It is rather unfortunate that such an officer who is in a position to give a clear picture of the dispute is the one who is actually convoluting the dispute further by submitting on the merits of the Ex-Parte Applicants' claim to land instead of interrogating the validity of the alleged two decisions. As rightly submitted by the Interested party, the document bearing a decision of 10.6.2010 could have been crafted by any one since its source cannot be ascertained.

15. Thirdly I find that the purported decision of 10.6.2010 does not contain any substantive proceedings. The matter came up on 10.6.2010 and only the 1<sup>st</sup> Ex-Parte Applicant was present. The matter was then dismissed by the unknown entity for non- attendance of the objectors. The dispute presented before the adjudication officer was therefore not considered on its merits.

16. Fourthly, I find that in the decision of 16.6.2011, the current 1<sup>st</sup> ex-parte Applicant wholly submitted himself to the jurisdiction of the Land adjudication officer. This is what was recorded on 14.4.11 (in the alleged second case);

***“The respondent’s father FREDRICK SAIMON MBURUNGA has appeared today on behalf of his son. He requests for this matter to be heard.....Granted”***

17. The 1<sup>st</sup> Ex Parte Applicant then went on to give his testimony regarding how he acquired the land in question. Nowhere in the proceedings did he raise the issue that the matter had been before another Land adjudication officer. Again I do agree with the submissions of the Interested Party to the effect that **“having submitted themselves before the 2<sup>nd</sup> respondent and fully participated in the process, the same ex-parte applicants cannot now turn round and condemn their own process just because they lost”**.

18. The decision of 16.6.2011 was a culmination of a substantive hearing of the proceedings where parties had an opportunity of tendering their side of the case. This is the hall mark of what amounts to a fair hearing. In ***JR NO. 3555 of 2014 Nairobi Judicial Review R Vs. Dr. Samuel Thinguri & 2 Others Ex-parte applicants, Kiambu County Government & 3 Other Respondents, Kiambu Liquor Welfare Group interested Party***, the court stated thus;

***“As part of reasonable, fair and just procedure, the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual are not violated...”***

19. In the instant case, the Ex-Parte Applicants had an opportunity to be heard, where as in the alleged 1<sup>st</sup> decision, the dispute was not subjected to the rules of natural justice. Judicial Review proceedings are meant to look at the propriety and integrity of the decision-making process –See ***JR Misc. Application No. 59 of 2010 Meru R Vs. Lydia Munyatta Ex-parte Applicant, Tigania West Land Adjudication Officer & Another Respondent, Ebuthania Retere Interested Party***. In the present case, the decision of 16.6.2011 clearly factored in the above mentioned principle.

20. It is not lost to this court that even the suit parcels no 1842 and 1863 no longer exists. The Ex-Parte Applicant has through their submissions tried to persuade the court to order for reversion of the suit parcels from 11729, 11730 and 11492/12492 to the original parcels 1842 and 1863. However, I note that way back 22.2.2017 which was the first time that I handled this file, the ex-parte applicants through their advocate sought 14 days to file an amended notice of motion. This was apparently meant to deal with the issue of the new subdivisions. This issue of amendment marked time in court for the next two years until 6.3.2019 when the court declined to grant the Ex-Parte Applicants further extension to amend their pleadings. The Ex-Parte Applicants cannot therefore try to rectify their pleadings through the submissions.

21. I must state that Judicial Review orders are discretionary and are not guaranteed. In the ***Judicial Review case no 355 of 2014 (supra)***, the court held that;

***“a court may refuse to grant Judicial Review orders even where the requisite grounds exist since the court has to weigh one thing against another and see whether the remedy is most efficacious in the circumstances obtaining.”***

22. In the case ***JR No. 328 of 2012 Nairobi Judicial Review Division, R Vs. Rajin Velji Shah Ex-parte Applicant, City Council of Nairobi Respondent***, the court stated that;

***“the court will not exercise its discretion in favour of an applicant where it is clear that the judicial review orders are being sought for an ulterior purpose. Orders of judicial review are meant to assist in the enforcement of the rule of law.”***

23. If this court was to quash the decision of 16.6.2011 on the basis that there exists another decision of 10.6.2010, it would in essence mean that the disputes in the objection proceedings remain undetermined.

24. In conclusion, I find that the decision of 10.6.2010 is not anchored in law as it is not clear as to who made it. Secondly, the decision is of no effect as the same did not deal with the dispute at hand. In the circumstances, the decision of 16.6.2011 was not ultra vires in any way.

25. **Final orders. I find that this suit is not meritorious, and the same is dismissed with costs to the interested party.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2019**

**IN THE PRESENCE OF:-**

C/A: Kananu

Mutungu holding brief for Muthomi for Exparte Applicant

Karanja holding brief for Ndubi for interested party

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**