



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE JUDICIAL REVIEW NO. 2 OF 2017

(Formerly Kisii Misc .JR No. 2 of 2013)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS

IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAW REFORM ACT SECTION 8 & 9

AND

IN THE MATTER OF SECTION 19 THE PHYSICAL PLANNING ACT CAP 286 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND SURVEYOR.....1ST RESPONDENT

LAND REGISTRAR HOM-BAY DISTRICT.....2ND RESPONDENT

THE HON.ATTORNEY GENERAL.....3RD RESPONDENT

EX-PARTE

RAPHAEL C. ODHIAMBO

JUDGMENT

1. On 2nd May, 2013, the court (Samson Okongo,J) granted the leave sought in prayer (b) of the applicant's exparte chamber summons dated 11th February 2013 and filed in court on 10th February 2013 by his counsel, M/s Nyauke and Company Advocates. However, the issue sought as prayer (c) in the ex-parte application was declined because the court observed that the road of access complained of land already been created. The ex-parte applicant, Raphael C. Odhiambo was given twenty one (21) days from that date to file and serve the instant Judicial Review (JR) application.

2. Accordingly, on 23rd May,2013, the said applicant filed the Judicial Review application by way of a notice of motion dated 20th May,2013 pursuant to orders 53 Rule 3(1) of the Civil Procedure Rules 2010 and section 8 and 9 of the Laws of Reform Act Cap 26 and section 19 of the Physical Planning Act laws of Kenya. The applicant is seeking the following orders:-

a) The honourable court be pleased issue orders against the respondent in the nature of certiorari and prohibition to quash and prohibit the decision by the District Land Surveyor and the District Land Registrar of Homa-Bay County to crate access road on land parcel number Kasgunga/Kamreri/578. (the suit land herein).

b) Costs of and incidental to the application be provided for.

3. The Judicial Review application is anchored on the grounds I to VII set out on the statutory statement dated 11th February 2013, brought under **order 53 Rule 1 of the Civil Procedure Rules, 2010**. The applicant stated inter alia, that he is the proprietor of the suit land. That the District Land Registrar (now the County Land Registrar, 2nd respondent herein) and the Land Surveyor (the 1st respondent) have created an access road right on the suit land without following the regulations set out by Physical planning Act Cap 286 Laws of Kenya) which include that the interested party or the applicant or both given a chance to make representative to the plan during the proposed changes in the physical planning of the affected area.

4. The Judicial Review application is further anchored on the applicant's affidavit, verifying statement of facts together with documents marked as "RCO-1 and 2" namely search and letter respectively pursuant to **Orders 53 Rule 3 (1) of the Civil Procedure Rules, 2010**. The applicant deposed in part that the Land Registrar and Land Surveyor did not notify him of the change in Physical Planning of the area in question for the creation of the access road on the suit land. That it was unfair for the road to be curved out of the suit land wholly instead of each neighbouring proprietor contributing equal portion towards the creation of the proposed road, if necessary. The applicant was aggrieved hence precipitating the instant Judicial Review application.

5. The applicant's counsel filed a notice motion dated 11th May 2016 for transfer of the Judicial Review application to Homa-Bay Chief Magistrates court. However, on 8th February, 2015 the applicants counsel withdrew the said application and it was allowed accordingly.

6. The respondents were duly served on various dates including 14th October 2013, 3rd July, 2017, 8th May 2018 and 19th February, 2019 as discerned in affidavits sworn on 16th October 2013, 4th July, 2017, 15th May 2018 and 8th March 2019 respectively by the applicants counsel, Mr. Samwel Nyauke. The respondents not file any reply to the Judicial Review application or at all.

7. Interestingly, Ms. Esther Opiyo learned counsel for the respondents sought time on 18th April, 2019 to file and serve reply to the Judicial Review application. The court granted her a latitude until 19th September 2019 to do so.

8. On 19th September 2019, Mr. D. Adawa learned counsel holding brief for Esther Opiyo learned counsel for the respondents sought an extension of orders granted on 1st April, 2019. The court granted counsel last chance until 27th November 2019 to file and serve reply, if any, to the Judicial Review application. There was no such reply as ordered by the court.

9. The Judicial Review application was argued by written submissions further to the directions of the court given on 19th September 2019. The applicants counsel filed and served submissions dated 5th November 2019. He urged the court to grant the orders sought in the Judicial Review application.

10. To buttress his submissions, counsel relied on **Articles 40 (1) and 47 (1) of the Constitution of Kenya, 2010** on the right to fair administrative action and right to protection of property respectively. Counsel further relied on **Re- Insurance Corporation –vs- National Land Commission (2018) eKLR** and **David Oloo Onyango –vs- Attorney General (1987) eKLR** regarding the right to administrative action and natural justice respectively.

11. It is noted that on 27th November 2019, the respondents did not appear in court. They did not file reply to the Judicial Review application or at all. The Deputy Registrar of this court issued notice of Judgment on 28/11/2019.

12. I have carefully, noted the entire Judicial Review application and submissions of the applicants including the issues for determination and authorities cited therein. To that extend, has the applicant proved his claim for the grant of the orders sought in the Judicial Review application?

13. The applicant stated that on 9th May in the year 2012, the 2nd respondent gave him a letter dated 23rd May 2012 (RCO-2) with regard to the opening of access road which passes between the suit land and other parcels of land in question to Lake Victoria. That the 2nd respondent never notified him of the changes in the Physical Planning of the road contrary to **section 19 of the Physical Planning Act (Cap 286)** which I note accordingly.

14. The applicant also claimed that he was never given a chance to make representation or objection to the plan. It is discernable from the evidence of the applicant that he was not heard on the likely effects of the letter marked as "RCO-2" as held in **Sceneries Ltd –vs- National Land Commission (2017) eKLR**.

15. The argument of the applicant hinges on **Article 47 (1) (supra)** which provides;-

“ (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.”

16. In **Re-insurance Corporation case (supra)**, it was held that the aforesaid Article must be read with **Article 40 (1) and (3) of the same Constitution** on the right to protection of property. Clearly, the document marked as RCO-1 shows that the applicant is the proprietor of the suit land and he is entitled to the same unless it is proved that he unlawfully acquired the land.

17. In the case of Eunice **Grace Njambi Kamau and another –v- the Hon. Attorney General and 4 others (2013) eKLR**, it was held that due process must be followed even in the finding of unlawful acquisition as contemplated in **Article 40 (6) (supra)**. In the obtaining scenario, the respondents violated the principle of natural Justice (**audi alteram partem rule**) as observed in **David Oloo Onyango case (supra)** and **Re- Hebtulla Properties Limited (1976-80) 1 KLR 1195 at 1209**.

18. Admittedly, Judicial Review remedy is concerned with the decision making process and not with the merits of the decision; see **Republic –v- Kenya Revenue Authority ex-parte Yaya Tours Limited (2008) KLR**.

19. This Judicial Review application was heard after the court was satisfied that the respondents were duly served for it's hearing In the case of **Kirugi and another –v- Kabiya and 3 others (1987) KLR 347**, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the absence of probabilities and that such burden is not lessened even when the case was heard by way of formal proof.

20. The applicant's case was plainly uncontroverted. It is cogent and steadfast. I find that it has been proved against the respondents on the balance of probabilities.

21. In the upshot, I enter Judgment for the applicants against the respondents jointly and severally in terms of certiorari and prohibition orders sought as prayer (1) in the Judicial Review application dated 20th May 2013.

22. Costs of the Judicial Review application be in the cause.

DATED, SIGNED and DELIVERED at MIGORI this 18th day of DECEMBER 2019

G.M.A. ONGONDO

JUDGE

In the presence of :-

The applicant- Absent

Respondent - Absent

Court Assistant – Tom Maurice