



**REPUBLIC OF KENYA**

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

**ELC JUDICIAL REVIEW NO 7 OF 2017**

**REPUBLIC .....APPLICANT**

**VERSUS**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER**

**TIGANIA EAST/WEST DISTRICT.....RESPONDENT**

**PETER KIMANDIU M'TWAMWARI .....INTERESTED PARTY**

**EX PARTE .....ZAVERIO MITHEKA**

**J U D G M E N T**

1. The dispute herein is very old and turbulent. I find it necessary to extract a bit of the history of the dispute from the proceedings in **Court of Appeal Case of 28 of 2015**. In that case, the present Exparte Applicant was the second respondent (Zaverio Mithika) while the present Interested Party, Peter Kimandiu was the Appellant.

2. The record in the Court of Appeal case indicates that:-

**“Peter filed his application for judicial review on 26th March, 2010 asserting that he was the lawful trustee for his family’s ancestral land in Tigania West which was gathered by his father, Thiringi Kitharia during the Land Consolidation Process in the area. A dispute arose between his late father and Joseph Baimuta (or Thaimuta), the late father of Zaverio, who claimed he belonged to the same family through the larger clan known as Ruyo (or Ruuju), and was therefore entitled to a share of it. The dispute went before the Land Adjudication Committee (the Committee) in 1968(case No 60 of 68) and the committee decided that the land be shared by the larger family. Peter’s father appealed the decision to the Arbitration Board in 1985 (case No. 2/76/77) which decided that the two families were not related and overturned the decision of the Committee, giving the entire parcel of land to Peter’s family.**

**When the Adjudication Register was complete and objection to the register became due in 2009, Zaverio filed an objection before the Land Adjudication Officer seeking to have parcel No. 2286, then in the name of Peter, shared with his family. Other objections were also filed by James, Charles and Daniel on behalf of their family known as Kimayo, in respect of parcel Nos. 1196 and 1249 which were also held by Peter. Peter claimed that all the objectors were strangers and were not part of his family. But the Land Adjudication Officer , who sat and heard the dispute on his own or with an improperly constituted Board as claimed by Peter, allowed the objection and held that the land belonged to the larger family of clan and ought to be shared out in the manner he directed. He reversed the decision of the Board and**

**reinstated the decision of the Committee.**

**The specific complaints made by Peter before the High Court were these:-“**

- a) That the board chaired by the Respondent was not properly constituted.**
- b) The dispute had already been determined by a competent tribunal and the respondent lacked jurisdiction.**
- c) The decision was out rightly biased against the ex-parte applicant and was made in consideration of matters that were not placed before the board.**
- d) The decision was unreasonable and untenable”.**

3. In a decision delivered before the ELC Court in Judicial Review case No. 22 of 2010 on 21.11.14, the Judge had declined to grant Judicial Review Order of Certiorari to remove to the Court for quashing the decision of the Land Adjudication Officer Tigania District touching on Parcels Numbers 1196, 1249 and 2286, prompting the appeal case at the Court of appeal.

4. The Court of Appeal had then ruled that the Dispute was governed by the Land Consolidation Act, whereby the Land Adjudication Officer was required to determine the dispute with a Committee.

5. The Court of Appeal went ahead and set aside the High Court decision of 21.11.14. It also granted an order of Certiorari to issue to bring before the High Court for quashing the decision of the Land Adjudication Officer Tigania made on 22:01:10. The Court further stated as follows:

**“The dispute shall be remitted back to the land Adjudication Officer for hearing and determination in accordance with the law...”**

And hence the dispute was back before the Land Adjudication Officer where a decision was delivered on 25.11.16. This decision is now the subject matter in the present proceedings.

6. On 07.02.17, the Exparte Applicant was granted leave to bring forth the Judicial Review Proceedings in nature of Certiorari to bring up and quash the aforementioned decision of the District Land Adjudication and Settlement Officer. Leave was also granted to bring forth the Judicial Review proceedings in nature of Prohibition to prohibit the District Land Adjudication and Settlement officer from implementing the aforementioned decision.

7. The leave granted to apply for orders of Certiorari and Prohibition was to operate as a stay until the main motion was heard and determined.

#### CASE FOR EXPARTE APPLICANT

8. The Applicant avers that the Objection Proceedings No. 176 regarding Parcel No. 1196, 1249 and 2286 were conducted without following the due process and they are unlawful and illegal for want of a Committee.

9. Exparte Applicant avers that in a bid to comply with the Court of appeal decision, the Respondent had appointed a Committee of three people namely Jacob Bariu M'Larama, Joseph Kiramana and Ken Likiremi Mathiu.

10. Exparte Applicant contends that under Section 9 of the Land Consolidation Act Cap 283, the District Land Adjudication and Settlement Officer is supposed to appoint a Committee of not less than 25 numbers.

11. Exparte Applicant relies on the case of **Republic vs. Tigania East and West District Land**

**Adjudication and Settlement Officer an Attorney General, Exparte Applicant Josphat Muchui (2014) e KLR.**

CASE FOR INTERESTED PARTY

12. The Interested Party Swore an affidavit stating that the Objection Proceedings were heard with the aid of a Committee whereby there were 21 members.

13. The Interested Party further avers that this matter should not be litigated upon in light of the proceedings in Meru Misc. Judicial Review Application No. 22 of 2010 and Nyeri Court of Appeal No. 28 of 2015.

14. The Interested Party also states that the decision in question was implemented in January 2017.

15. The Interested Party submits that there is no provision of law that requires that the names of the Committee members be recorded in the proceedings

16. The Interested Party also contends that the Exparte applicant did not appeal to the Minister against the decision in, A/R Proceedings.

17. The interested party has availed the following authorities for the courts attention;

Meru H. C Misc. J.R 86 of 2010: Catherine Muthoni Kiriungi & Another Vs The Chairman, Land Adjudication and Settlement Officer.

Meru H.C ELC Misc. Appl. No. 93 of 2010(JR) Stanley Thiaine Mbui & Another Vs. The Land Adjudication Officer, Tigania West & Another.

Republic Vs Kajiado Lands Disputes Tribunal & Another Ex-Parte Samuel S. Muyaa & 2 Other (2005) E KLR.

Stanley Thiane Mbui & Another vs. Land Adjudication Officer, Tigania West District & Another (2014) E KLR.

CASE FOR RESPONDENT

18. The Respondent did not file any affidavit. However two alleged Committee members namely Jacob Baariu and Joseph Mutwiri did swear an affidavit filed on 14:03:17 stating that they were part of the 21 member Committee whereby Jacob Baaria was the Chairman.

19. They also aver that the decision in question was implemented in January 2017, after the decision was read on 25:11:16.

20. The Respondent submits that the Exparte Applicant participated in the Court of appeal case and hence if there was no Committee in A/R case No. 176, he ought to have raised an objection either by way of a letter or even an order of the Court.

21. Respondents contend that the law applicable was complied with and that the proceedings were conducted with the aid of a Committee.

DETERMINATION

22. The issues for determination are two:-

1) Whether there was a property constituted Committee in A/R Objection 176.

2) Whether the orders sought in the Judicial Review Motion can be granted.

23. Section 9 of the Land Consolidation Act provides that:-

**“(1) The Adjudication Officer within whose district an adjudication section is situate shall appoint a Committee for each adjudication section from amongst persons resident in the adjudication section and each Committee shall consist of not less than twenty-five members.**

24. Section 14 (2) (a) of the Land Consolidation Act provides:-

**“The quorum of a Committee or of an Arbitration Board, where the total number of members thereof is an even number, shall be one-half of that number, and, where the total number of members thereof is an uneven number, shall be one-half of the even number that is greater than that number by one”.**

25. As rightly submitted by the Interested Party, the Act doesn't stipulate that the names of the Committee members be recorded in the proceedings.

26. However, how does the Respondent confirm that he has complied with the applicable law in terms of the presence of a Committee and the quorum thereof, if such names are not reflected in the proceedings? How does one get to know as to who was in the Committee. What is so difficult in tabulating the names in the part headed “introduction” or anywhere else in the objection proceedings?

27. I note that in A/R case No. 176, Respondent has given a brief history of the case indicating why and how the Court of appeal remitted back the dispute to him for hearing and determination in accordance with the law. He went ahead to state that all parties were present but he doesn't mention the Committee members yet this was the reason why the matter was being remitted back to **the District Land and Adjudication Settlement Officer**.

28. In **JR 61 of 2010 Republic Vs. Tigania East & West District Land Adjudication and Settlement Officer and Attorney General Exparte Applicant; Josphat Muchui, Njoroge J** stated thus; **“I also opine that tabulating the names of Committee members, though not specifically prescribed by Section 14 (4) of Land Consolidated Act, it is good practice that will show that Committee members indeed participated in the proceedings and that the necessary quorum had been achieved”.**

29. Notwithstanding the foregoing, I find that there is an affidavit of 14.03.17 sworn by one Jacob Baariu as Chairman of the Committee and Joseph Mutwiri Nchebere as a member of the Committee. They aver that there was a committee of 21 members. No affidavit has been filed to rebut this averment.

30. The decision itself indicates that there were three Committee members when the decision was read. This is an indication that at least a Committee was involved.

31. In his affidavit verifying the statement of the facts, the Exparte Applicant does not state the number of members who were in the Committee. He simply says that there was no quorum.

32. In absence of any evidence to rebut the averments made in paragraph 4 of the Interested Party's affidavit and paragraph 4 of the affidavit of Jacob Baariu and Joseph Mutwiri, to the effect that there were 21 members of the Committee involved in the case, I am inclined to believe that the Committee was properly constituted.

33. This is however a wakeup call for the District Land Adjudication and Settlement Officers to evaluate their format of capturing pertinent information as appertains to the provisions of the law under the Land consolidation Act and the Land Adjudication Act. If only the Respondent had spared even one sentence in the A/R case 176 to give particulars of the committee members, then we would not be having these proceedings. It is rather unfortunate that so much time and resources of the judiciary and the litigants have been consumed by this case for the last 8 or so years in JR 22 of 2010, COURT OF APPEAL CASE

NO. 28 of 2015 and now this case all because the Respondent fails to indicate how they have complied with the relevant law.

34. It has been alleged by the Interested Party that the decision in case No. 176 was implemented in January 2017. This is also buttressed by the averments made by Jacob Baariu and Joseph Mutwiri. By the time Ex-parte Applicant was filing his Submissions on 19.09.17, he was aware of the averments made regarding the implementation of the decision but he has remained mute about this issue.

35. I am therefore in agreement with the Submissions of the Interested Party that the orders sought are not merited, as the decision in A/R Case No. 176 was implemented in January 2017.

36. Judicial Review orders are discretionary in nature. This court must exercise that discretion judiciously. I have taken into consideration all the circumstances of this case including the fact that the dispute has been in the litigation arena for decades and had even gone to the court of appeal. If this court was to allow the motion, then the dispute would be going back to the Respondent for the third time.

37. My conclusion is that this Judicial Review Motion is unmerited and the same is dismissed. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 23<sup>RD</sup> DAY OF JANUARY, 2018**

**IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Miss Njenga for Exparte Applicant present

Mwiti H/B for Carp Peters Mbaabu for Interested Party present

No appearance for Respondent present

**HON. L. N. MBUGUA**

**ELC JUDGE**