REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC JR 52 OF 2014

FORMERLY KERUGOYA JR NO. 4 OF 2014

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

AND

IN THE MATTER OF AN APPEAL TO THE MINISTER LAND APPEAL CASE NUMBER 129 OF 1991

JOHN KARANI KEBERENGE (DECEASED)

REPRESENTED BY TIMOTHY MUGO KARANI…….....APPELLANT

AGAINST

NGARI KITHAKA (DECEASED)……..…….....RESPONDENT

AND

IN THE MATTER OF OBJECTION NUMBER 33/74-75

JOHN KARANI KIBERENGE…….....….PLAINTIFF

AGAINST

NJAGI KITHAKA (DECEASED)…….……..…….....DEFENDANT

AND

IN THE MATTER OF MUTITU LAND ADJUDICATION SECTION NJAGI KITHAKA (DECEASED)

REPRESENTED BY STEPHEN MENYI KITHAKA.....…APPLICANT

VERSUS

MINISTER FOR LANDS……...…….....….RESPONDENT

AND

THE LAND REGISTRAR MBEERE DISTRICT…….1ST INTERESTED PARTY

JOHN KARANI KIBERENGE

REPRESENTED BY TIMOTHY MUGO KARANI…2ND INTERESTED PARTY

JUDGEMENT

1. By a chamber summons dated 17th December 2013, the Applicant sought leave to institute judicial review proceedings against the Respondents in which he intended to seek orders of *certiorari* and *prohibition*. The grounds for the said application were contained in the statutory statement and verifying affidavit filed contemporaneously with the said chamber summons.

2. According to the record, the said application was heard before the Hon. Justice Boaz Olao who granted the leave sought on 31st January 2014 and made an order for the said leave to operate as stay of the decision of the Respondent. The Applicant was thereupon directed to file the substantive application within 21 days and to serve all parties who may be affected thereby within 14 days of filing.

3. On 26th February 2014, the Applicant filed a notice of motion dated 18th February 2014 seeking the following orders;

> *a.* That an order of certiorari issued bringing into this court and quashing the decision of the Respondent in Appeal Number 129 of 1991 made on 31st July 2013 for allocating land which had been registered in favour of the Respondent.
>
> b. That an order of certiorari be issued bringing into this court and quashing the findings and the award by the Respondent dated 31st July 2013 for disregarding the findings in Committee Case No. 33/74 - 75 in favour of the applicant.
>
> *c.* That an order of prohibition be issued barring the interested party herein and the Land Registrar Mbeere District from commencing the process of land alienation, demarcation, transfer and registration of the suit prop*erty being parcel 54, in pursuance of the decision made on 31st July 2013.*
>
> d. That the costs of this application be provided for.

4. The said notice of motion was expressed to be based upon the statutory statement dated 17th December 2013 and the Applicant's verifying affidavit filed on 14th January 2014. It is evident straight away that the substantive notice of motion was filed out of time. The 21 days granted by the court expired on or about 21st February 2014. There is no indication in the court file to show that the Applicant ever sought and obtained an extension of time.

5. As is evident from the Applicant's statutory statement and verifying affidavit, he was aggrieved because he lost Appeal Case No. 129 of 1991 before the Respondent whereas he had previously succeeded in proceedings before the Land Adjudication Committee (hereinafter the "committee") and objection proceedings before the Land Adjudication Officer (LAO). He accused the Minister of departing from the earlier decisions in his favour without giving reasons. He also stated that there was bias and breach of the rules of natural justice since the Minister did not consider his side of the story or the history of the land before awarding plot No. 54 to the 2nd interested party.

6. The Applicant therefore asserted that the decision of the Minister in Appeal Case No. 129 of 1991 was *ultra vires*, unfair, unreasonable, biased, illegal and against the rules of natural justice. He, therefore, urged the court to quash the Minister's decision and issue an order of prohibition prohibiting the Land Registrar and the 2nd interested party from implementing it.

7. The 2nd interested party filed a replying affidavit in opposition of the said application for judicial review. He raised 3 main grounds. First, it was stated that the application was incompetent because the Applicant had not established legal capacity to institute the proceedings on behalf of the late Njagi Kithaka. Second, that the application was an attack on the merits of the findings of the Minister which was outside the purview of judicial review. Third, that the Applicant's own documents demonstrated that all parties fully participated in the proceedings and cross-examined witnesses.

8. The Respondent did not file any replying affidavit but grounds of opposition were filed by the Attorney General on behalf of both the Respondent and the Land Registrar who was joined as the 1st Interested Party. The Attorney General contended that the application for judicial review was grounded on the merits of the Minister's decision; that the said application was filed out of time; that the annextures to the verifying affidavit demonstrated that all parties were heard before a decision was made; and that the orders of *certiorari* and *prohibition* sought were not merited.

9. When this matter was listed for hearing on 16th March 2015 before Hon Justice Momanyi Bwonwonga, the parties present agreed to dispose of the said application through written submissions. The parties were granted time until 14th April 2015 to file their respective submissions and the matter was thereupon fixed for judgement on 6th May 2015. However, due to pressure of work and other intervening circumstances, judgement was never delivered by Justice Bwongonga.

10. When this matter was listed for mention before me on 31st May 2017, only the Applicant's counsel was in attendance. There being no evidence of service upon the other parties, the court fixed the matter for further mention on 10th July 2017 and directed the Applicant to serve all concerned parties and file an affidavit of service.

11. On 10th July 2017, the matter was listed for mention but again only the Applicant's counsel was present. The Respondent and interested parties were absent. The court stood the matter to 27th September 2017 for further mention. On 27th September 2017, counsels for the Applicant and the 2nd interested party did not attend. The only person who was represented was the Attorney General. He sought 14 days to file written submissions. The time sought was granted and the matter fixed for further mention on 1st November 2017.

12. On 1st November 2017 only the Applicant's counsel was present in court. He informed the court that only the Applicant and the 2nd interested party had filed written submissions. The Attorney General was yet to file any. The court thereupon fixed the matter for judgement on 8th February 2018 and directed the Applicant to serve notice of judgement upon the respondent and interested parties.

13. The court has noted from the court file that the 2nd interested party first filed written submissions on 30th March 2015 whereas the Applicant filed his on 13th April 2015. The 2nd interested party thereafter filed supplementary submissions on 8th May 2015 challenging the legal capacity of the Applicant to institute the judicial review application.

14. The court has considered the material on record and is of the opinion that the following issues fall for determination;

a. Whether the Applicant had legal capacity to institute and prosecute the judicial review application.

b. Whether the application was filed out of time.

c. Whether the decision of the Respondent was made in breach of the rules of natural justice.

d. Whether the decision of the Respondent was *ultra vires*, unfair, unreasonable, biased or tainted

with illegality.

e. Whether the Applicant is entitled to the reliefs of *certiorari* and *prohibition*.

f. Who shall bear the costs of the application.

15. On the first issue, it is not disputed that the Applicant instituted the instant proceedings on behalf of a deceased person one, Njagi Kithaka. The Applicant described himself as a "representative" of the deceased applicant in the verifying affidavit. The 2nd interested party has submitted that the only person who has capacity to file suit on behalf of a deceased person is a legal representative as known to law. He relied on the case of ***Michael Mukhobi & 2 Others Vs Hezron Charles Lutta [2014] eKLR*** and the Court of Appeal decision in **Trouistik International Union and Ingrid Vs Jane Mbeyu & Another Civil Appeal No. 145 of 1990.**

16. The Applicant's counsel submitted that his client had always represented the deceased in previous proceedings on the land dispute including Appeal Case No. 129 of 1991 without objection from the 2nd interested party.

17. The court takes the view that in order to undertake legal proceedings in a court of law on behalf of a deceased person, there must be legal authority for it. The mere fact that the Applicant had undertaken such representation before other fora without objection is immaterial. It cannot confer legal capacity where there is none. According to ***Black's Law Dictionary (9th Edition),*** a legal representative may refer to either a lawful representative or personal representative. A personal representative is described as;

> **"A person who manages the legal affairs of another because of incapacity or death, such as the executor of an estate. Technically, an executor is a personal representative named in a will, while an administrator is a personal representative not named in a will."**

18. In the Kenyan context, a personal representative is defined in ***section 3 of the Law of Succession Act (Cap 160)*** as follows;

> ***"Personal representative means the executor or administrator of a deceased person"***

An executor is defined in the same section to mean the person to whom the execution of the last will of the deceased person is confided whereas an administrator is defined as a person to whom a grant of letters of administration has been granted.

19. In the case of **Trouistik International Union and Ingrid Vs Jane Mbeyu & Another Civil Appeal No. 145 of 1990** ***[1993] eKLR***, the Court of Appeal made the following observations in respect of a person's legal capacity to undertake legal proceedings on behalf of a deceased person;

> **"To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all inclusive answer."**

20. The court has noted that despite this objection having been raised in the replying affidavit of the 2nd interested party filed way back on 13th June 2014, the Applicant has not been able to demonstrate that he is either an executor or administrator of the deceased, Kariuki Ngari. The court consequently finds and holds that the Applicant has no legal capacity to commence or prosecute legal proceedings before this court. The instant application for judicial review is therefore incompetent.

21. The 2nd issue relates to the timeliness of filling the instant proceedings. The Applicant has submitted that the application for leave was made well within the timeline provided for under ***Order 53 of the Civil***

Procedure Rules. It was further submitted that the substantive notice of motion was filed within 21 **working** days from the date leave was granted.

22. It is common ground that the leave to commence the judicial review proceedings was granted on 31st January 2014. The Applicant was given 21 days to file the notice of motion. There is no dispute that the notice of motion dated 18th February 2014 was filed on 26th February 2014 i.e. about 26 days after grant of leave. The Applicant's argument is that only working days are to be reckoned in the computation of time.

23. The provisions of law relating to computation of time are found in ***Order 50 of the Civil Procedure Rules.*** ***Rule 2*** of the said Order provides as follows;

> **"Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time."**

24. Under the provisions of Rule 3 of the said Order, when the last day for doing any act or taking any proceedings expires on a Sunday or other day when offices are closed, then the act shall be deemed to have been done within time if done on the day when the offices shall open next.

25. In view of the above provisions of the Civil Procedure Rules, there is no merit in the Applicant's suggestion that weekends are to be excluded from computation of time where the time limited for filing an application for judicial review is 21 days. It is, therefore, evident that the Applicant's notice of motion dated 18th February 2014 and filed on 26th February 2014 was filed out of time. It is also apparent that the Applicant did not bother to seek and obtain an extension of time for the period of 4 years the matter has been pending in court. The court finds, and holds, that the instant application for judicial review is time barred hence a non-starter.

26. The third issue relates to the allegation of breach of the rules of natural justice. The court has perused the court record, including the proceedings in Appeal Case No. 129 of 1991 which were conducted before the District Commissioner Mbeere North District on account of delegated authority from the Minister. Those proceedings are the first exhibit to the Applicant's verifying affidavit in support of the chamber summons for leave. The court is satisfied that the Applicant actively participated in the said proceedings and even cross-examined witnesses.

27. The court, therefore, finds that the Applicant was accorded an opportunity of being heard and that he utilized the same. There is no merit in the complaint alleging violation of rules of natural justice. If his participation did not tilt the scales of justice in his favour, that cannot be a legitimate complaint in an application for judicial review.

28. The 4th issue is whether the decision of the Respondent was *ultra vires*, unfair, unreasonable, biased or tainted with illegality. As I understand the matter, the appeal in issue was an appeal to the Minister under ***section 29 of the Land Adjudication Act.*** It is a final appeal under the Land Adjudication process, subject only to the judicial review jurisdiction of the court. The court process is not an avenue for an appeal on the merits of the case.

29. It was held in the case of ***Municipal Council of Mombasa Vs and Umoja Consultants Ltd Civil Appeal No. 185 of 2001*** 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…"

30. So far as is discernible from the record, there is no demonstration that the Minister went beyond his power under ***section 29 of the Land Adjudication Act.*** It was not demonstrated that the Respondent did not appreciate his decision making power. There was no demonstration of any form of illegality in as far as the decision in the appeal was concerned. The Respondent was not obligated to follow or affirm the decision from any previous adjudication. Those previous decisions in which the Applicant was successful were not binding on the Minister. In my opinion, he had a duty to correct them if he found them to have been erroneous.

31. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the Respondent was biased or unfair towards the Applicant or whoever he was representing. The Applicant gave his testimony, he was allowed to cross-examine witnesses and fully participate in the proceedings. The District Commissioner who was hearing the appeal even took time to visit the site in order to appreciate the nature of the dispute better. The court finds absolutely no evidence of bias or unfair treatment.

32. What about unreasonableness? This ground for judicial review was considered in the case of ***Associated Provincial Picture Houses Ltd Vs Wednesbury Corporation [1948] IKB 223.*** It was said that a decision was unreasonable if it was;

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

33. So, could the decision of the Respondent in Appeal Case No. 129 of 1991 be said to fall within the sphere of Wednesbury unreasonableness? It was submitted on behalf of the Applicant that the Respondent had failed to give reasons for the decision and, especially, reasons for overturning the earlier decision of the Adjudication Officer and Committee which had found in favour of the Applicant. The court has perused the record of proceedings before the District Commissioner Mbeere North who heard the appeal. It is not true that he did not give reasons for the decision. The reasons are contained in the "findings" section of the proceedings. The reasons given do not fall within the description of Wednesbury unreasonableness. The court finds that the Applicant has not established this ground at all.

34. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is in reality aggrieved by the merits of the decision of the Respondent. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a judicial review application. He was aggrieved because the respondent overturned the earlier decisions which were in his favour. In my opinion, a judicial review remedy would not be available in those circumstances.

35. On a wholesome consideration of the 4th issue, the court finds and holds that the Applicant has failed to establish or demonstrate that the decision of the Respondent was *ultra vires*, unfair, unreasonable, biased or tainted with illegality.

36. The 5th issue is whether the Applicant is entitled to the reliefs of *certiorari* and *prohibition* sought. In view of my findings and holdings hereinbefore, it would follow that the Applicant is not entitled to the reliefs sought or any of them. The Applicant has no legal capacity to maintain the proceedings; the substantive application was filed out of time; and he has failed to demonstrate the grounds for judicial review as known to law.

37. The 6th and final issue relates to costs. Although the costs of an action are at the discretion of the court, the general and well established rule is that costs follow the event. See ***Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.*** So, a successful party should be awarded costs, unless, for good reason, the court orders otherwise as provided for under ***section 27 (1) of the Civil Procedure Act (Cap 21).***

38. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 18th February 2014 and the same is hereby dismissed with costs to the 2nd interested party.

39. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **8th** day of **FEBRUARY, 2018**

In the presence of Ms Muriuki holding brief for Mr Kamunda for the Applicant, Mr Karanja holding brief for Mr Mutiso for the 2nd Interested Party and in the absence of the Attorney General for the respondent and 1st Interested Party.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

08.02.18.