



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 114 OF 2017**

**MANKA SALIM YUSUF.....APPLICANT**

**VERSUS**

**DEMARICATION OFFICER NDARA “A”**

**ADJUDICATION SECTION VOI SUB-COUNTY.....DEFENDANT**

**B.O.M. KALELA PRIMARY SCHOOL.....1<sup>ST</sup> INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Exparte Applicant’s notice of motion is dated 19<sup>th</sup> April 2017. It is brought under Section 8 7 9 of the Law Reform Act, Chapter 26 (Laws of Kenya) Section 8, 9, 10, 11, 12 & 21 of the Land Adjudication Act, Order 53 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders;

**i) That an order of Certiorari to issue to remove to the Environment and Land Court and quash the decision of the Demarcation Officer Ndara “A” Adjudication Officer Voi Sub-county dated 22<sup>nd</sup> December, 2016 granting ownership of parcel number 1137 Ndara “A” Adjudication Section Voi to Kalela Primary School, the interested party.**

**ii) That costs of this application be provided for.**

3. The grounds are on the face of the application and are listed as paragraphs i-xv. The main ground being the Arbitration board decided to hear an unknown third party in the name of Juma Fundi Mohammed who is not a relative nor the administrator of the estate of the deceased despite letters of Administration over the deceased’s estate being held by the applicant.

That by reasons of the faulty and illegal decisions of the demarcation officer Ndara “A” Adjudication Section Voi, the Applicant and two others have lost their land unlawfully.

4. The application is opposed. There is a replying affidavit sworn by Hamisi Kidoki , patron of Kalela Primary School, sworn on the 12<sup>th</sup> September, 2017.

5. On the 15<sup>th</sup> June, 2017, it was agreed between the parties that the application be disposed by way of written submissions. On the 8<sup>th</sup> November, 2017 when the matter came up for mention to confirm filing of submissions, only the Applicant’s counsel had filed submissions. The court proceeded to give a date for ruling.

6. It is the Exparte Applicant’s case that she is the legal administrator of the estate of her late husband, Salim Juma Kisumu. That Plot Number 1137 Kaloleni Ndara “A” Adjudication section is one of the properties mentioned in the grant. The deceased Salim Juma Kisumu filed an arbitration case on the 5<sup>th</sup> October, 2007 against the interested party. The matter proceeded on 4<sup>th</sup> July, 2008 and a decision was given by the arbitration board.

7. The deceased was to get half the parcel and the other half to go to the interested party. The deceased was given a new number and the

interested party was to retain the original number 704. No party appealed against the said decision. Plot Number 1137 was then registered in the name of Salim Juma Kisumu and number 704 in the name of Kalela Primary School.

8. Salim Juma Kisumu sub-divided his parcel no. 1137 into three parcels 1137, 3522 & 3523. He sold parcel numbers 3222 & 3523 to Joyce Wanjala Maghema and Omar Abdullahi respectively. The letters from the ministry of lands urban development dated 15<sup>th</sup> June, 2016 and 22<sup>nd</sup> February, 2017 confirm this position.

9. No appeal was preferred within the stipulated period and the parties could not reopen the matter in form of another arbitration after nine years. The Demarcation officer unlawfully allowed another Arbitration case to be filed as Arbitration case No. 168 of 2016 affecting the Exparte Applicants portion No. 1137.

That the decision rendered on 22<sup>nd</sup> December, 2016 by the Arbitration board erraneously and without any basis in law decided that Plot No. 1137 belongs to the interested party. That the Exparte Applicant was not called to testify.

10. I have considered the Notice of Motion, the supporting affidavit and the annexures. I have considered the replying affidavit and the submissions of counsel. The issue for determination is whether this application is merited.

11. Section 9(3) of the Law Reform Act states;

**“In the case of an application for an order of Certiorari to remove any judgment, order, decree conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where judgment, order, decree, conviction or other proceeding is subject to appeal and a time is limited by law for the bringing of the appeal; the court may adjourn the application for leave until the appeal is determined for appealing has expired.”**

12. I have looked at the above provision and I find that the present application has been brought within the stipulated period. It is therefore proper before court.

13. Under Section 21(3) of the Land Adjudication Act, any person who is not satisfied with the decision of the Arbitration board has a right to file a complaint within fourteen days to the Executive Officer of the Board.

14. It is the Applicants contention that the interested party did not appeal against the decision of the board in Arbitration case No. 62 of 2007.

Paragraph 9 of the replying affidavit by Hamisi Kidoki, the patron of the school confirms that the interested party's appeal was not heard because they did not have faith in the committee.

15. In paragraph 12 of the replying affidavit he states;

**“That the interested party was allowed for late arbitration vide a letter dated 30<sup>th</sup> November, 2016. Annexed is a copy of the letter marked HKM-4”**

In paragraph 14 he states;

**“The Applicant was present during the hearing and one named Juma Fundi Mohammed was also present representing the Applicant.”**

16. One is at pains to understand this averment. It means the Applicant was not present during the hearing. The Exparte Applicant has denied any knowledge of Juma Fundi Mohammed. She stated that he is not a family member of the deceased Salim Juma Kisumu.

It is therefore clear that the Applicant was not heard during the so called late arbitration which gave rise to the decision of 22<sup>nd</sup> December, 2016.

17. In the case of *Gerald Wanjohi & Another –versus- The District Forest Officer, Koibatek (2011) eKLR*; It was held that,

**“An order of Certiorari will lie from the High Court to quash a decision of a lower court, or tribunal if the decision making body acts in excess or without jurisdiction or if it acts in breach of the rules of natural justice.”**

I find that the Exparte Applicant has not been given an opportunity to be heard before the decision of 22<sup>nd</sup> December, 2016 was reached.

18. I have gone through Annexure MA-“6” to the Notice of Motion. It is a letter dated 15<sup>th</sup> March 2017 from the County Land Adjudication Settlement Officer, Taita, Voi & Mwatate Sub-counties, Taita Taveta County. The said officer expresses concern in the manner in which Arbitration Case No. 168 of 2016 was lodged Nine years later. His opinion was that the ruling was erroneous and in bad taste.

19. Order 53 of the Civil Procedure Rules provides for the procedure of filing an application for an order of prohibition, Mandamus and

Certiorari. In the case of Municipal Council of Mombasa –versus- Republic & Umoja Consultants Limited, Civil Appeal No 185 of 2001 cited in the case of Republic –versus- Chief Magistrate Milimani Commercial Court And 2 Others, Exparte Violet Ndanu Mutinda And 5 Others (2014) eKLR it was held;

**“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 decision which would involve going into the merits of the decision itself such as there was or there was not sufficient evidence to support the decision.”**

20. The Exparte Applicant in this application has told the court she was not given an opportunity to be heard before the Arbitration board gave their decision on 22<sup>nd</sup> December, 2016. This is against the rules of natural justice.

The late arbitration was illegal and unlawful since the time for appeal had lapsed. The Applicant has raised the issue of non-observation of the rules of natural justice by the 1<sup>st</sup> Respondent. Judicial Review is the right channel to seek a remedy.

21. I find the Exparte Applicant has demonstrated that she deserves the orders sought.

22. I find merit in this application and I grant the orders sought namely;

**a) That an order of Certiorari do hereby issue to remove into the Environment and Land Court and quash the decision of the Demarcation Officer Ndara “A” Adjudication Officer Voi Sub-county dated 22<sup>nd</sup> December, 2016 granting ownership of parcel No. 1137 Ndara “A” Adjudication Section Voi to Kalela Primary school the interested party.**

**b) Each party to bear her/its own costs.**

It is ordered.

**Dated, signed and delivered at Mombasa on the 8<sup>th</sup> day of March 2018.**

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**L. KOMINGOI**

**JUDGE**

**8/3/2018**