



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC JUDICIAL REVIEW CASE NO. 11 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY COUNTY COMMISSIONER MAARA SUB-COUNTY,

THARAKA NITHIG COUNTY.....1ST RESPONDENT

THE CABINE SECRETARY MINISTRY OF LANDS

AND PHYSICAL PLANNING.....2ND RESPONDENT

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

FRANCIS KITHAKA RIMUNYA.....INTERESTED PARTY -DSD

NJERU NDAKA NGURU.....EXPARTE APPLICANT

JUDGMENT

1. This application was filed by way of Notice of Motion dated **4th September, 2017**. The application seeks the following orders:

i) That this honourable court be pleased to issue an order of certiorari to call unto this court and quash the decision of the Minister for Lands in Appeal Case Number 205 of 2011 dated 14th March, 2017 in respect of Land Parcel number Muthambi/Lower Kandungu/1535.

ii) Orders of prohibition to prohibit the District Land Registrar Meru South and Maara, Districts from implementing the decision of the Minister for Lands in Appeal Case Number 205 of 2011 dated 14th March, 2017 in respect of Land Parcel Number Muthambi/Lower Kandungu/1535.

iii) That costs be provided for.

2. At the leave stage, the exparte applicant had filed a statement of facts which was in the following terms:

STATEMENT OF FACTS

Pursuant to Order 53 Rule 1 (2) Civil Procedure Rules 2010

NAME AND DESCRIPTION OF PARTIES

1. The ex-parte applicant is an adult male of sound mind residing and working for gain within Tharaka Nithi County. His address for purposes of these proceedings shall be care M/S NJERU ITHIGA & CO. ADVOCATES, EMCO HOUSE, 3RD FLOOR, p. o. box 1768-60100, EMBU.

2. The 1st respondent is the Deputy County Commissioner Maara sub-county in Tharaka Nithi County. (Service of summons shall be effected through the ex-parte applicant’s advocate’s office).

3. The 2nd respondent is the cabinet secretary, Ministry of Lands and Physical Planning in the Republic of Kenya. (Service of summons shall be effected through the ex-parte applicant's advocates Office).

4. The 3rd respondent is the Attorney General and the Chief Legal Advisor of the Government of Kenya. The address for service shall be care of the Attorney General's Chambers, Sheria House Nairobi.

5. That the 1st respondent is sued in his capacity as the representative of the 2nd respondent in Minister's Land Appeal Case Number 205 of 2011 before the Minister for Lands.

RELIEFS SOUGHT

6. The ex-parte applicant is praying for:

a) Orders of certiorari to remove to the High Court and to quash the decision of the Minister for Lands in Appeal Case Number 205 of 2011 dated 14th March, 2017 in respect of Land Parcel Number Muthambi/Lower Kandungu/1535.

b) Orders of prohibition to prohibit the District Land Registrar Meru South and Maara District from implementing the decision of the Minister for Lands in Appeal Case No. 205 of 2011 dated 14th March, 2017 in respect of Land Parcel Number Muthambi/Lower Kandungu/1535.

c) That costs be provided for.

GROUND UPON WHICH THE RELIEFS ARE SOUGHT

7. That the ex-parte applicant is the proprietor in absolute Title of Land Parcel Number Muthambi/Lower Kandungu/1535 which the ex-parte applicant acquired in the year 1959, before the process of Land Adjudication and Demarcation.

8. That when the process of Land Adjudication and Demarcation in Lower Kandungu Adjudication section commenced, the ex-parte applicant was away in Mombasa.

9. That the ex-parte applicant's Land Parcel Number Muthambi/Lower Kandungu/1535 borders Land belonging to Francis Kithaka Rimunya (deceased) to the North and River Nithi to the South.

10. That during the process of Land Adjudication and demarcation in Kandungu adjudication section Francis Kithaka Rimunya (deceased) took advantage of the ex-parte applicant's absence and caused the ex-parte applicant's land and his (Francis Kithaka) land to be considered as one parcel of land which was designated as parcel number 576 Kandungu adjudication section, which Francis Kithaka Rimunya then caused to be registered in his name.

11. That when the ex-parte applicant returned to Muthambi after the process of land adjudication and demarcation was completed, he found his neighbour Francis Kithaka Rimunya cultivating his (ex-parte applicant's) land.

12. That upon conducting investigating, the ex-parte applicant discovered that his land had been amalgamated with the land belonging to Francis Kithaka Rimunya (deceased) and the ex-parte applicant's land now formed part of the land that belonged to Francis Kithaka Rimunya and the said land had been designated as parcel Number 576 Kandungu Adjudication Section.

13. That the ex-parte applicant made several attempts to evict the said Francis Kithaka Rimunya from his (sic) but he (Francis Kithaka) refused to vacate the land.

14. That the ex-parte applicant then filed case number 341 of 2007 before the land adjudication committee against Francis Kithaka Rimunya (deceased) and the land adjudication committee heard the said case and made a finding that the ex-parte applicant was entitled to a portion of parcel number 576 and ordered that the land be sub divided and the ex-parte applicant be given a new number while Francis Kithaka Rimunya retained the old number.

15. That subsequently parcel number 576 was sub-divided and land parcel Number Muthambi/Lower Kandungu/1535 was carved out and registered in the name of the ex-parte applicant.

16. That Francis Kithaka Rimunya (deceased) was dissatisfied with the decision of the land adjudication committee and he filed objection case numbers 100 and 101 of 2008 but the decision of the land adjudication committee was upheld.

17. That Francis Kithaka Rimunya died in May, 2010.

18. That Francis Kithaka Rimunya (deceased) then filed an appeal against the decision in the objection cases numbers 100 and 101 of 2008 being appeal case number 205 of 2011 before the Minister for Lands against the ex-parte applicant and one Virginia Nkuene though it is not clear how the same was filed one year after Francis Kithaka Rimunya had died.

19. That proceedings in the said appeal case commenced on 9th March, 2017, seven years after the death of the appellant therein, Francis Kithaka Rimunya and were chaired by the 1st respondent herein sitting in his capacity as the representative of the 2nd respondent.

20. That the 1st respondent heard the said appeal and made a decision dated 14th March, 2017 and ordered that a portion of land parcel number Muthambi/Lower Kandungu/1535 be awarded to Francis Kithaka Rimunya (deceased).

21. That the entire proceedings before the 1st respondent were a nullity and were tainted with illegality and irrationality as the deceased FRANCIS KITHAKA RIMUNYA could not prosecute his appeal.

22. That the 1st respondent awarded part of the ex-parte applicant's land to Francis Kithaka Rimunya (deceased) who did not participate in the proceedings in appeal case number 205 of 2011 either in person or through a legal representative.

23. That despite the fact that the appellant in appeal case number 205 of 2011 was deceased, the 1st respondent conducted the proceedings and purported to record a statement of the appellant and to cross-examine the appellant and even make a decision in favour of the deceased appellant.

24. That the decision of the 1st respondent was unreasonable and irrational and the ex-parte applicant risks being deprived of his land on the basis of the said irrational decision.

25. That the said decision therefore ought to be quashed.

DATED AT EMBU THIS 29TH DAY OF AUGUST, 2017

NJERU ITHIGA & CO.

ADVOCATES FOR THE EX-PARTE APPLICANT

3. As has happened many times, for veritably unexplained reasons, the Office of the Attorney General which represents the respondents, refused or failed to participate in these proceedings. As the Interested Party is said to have been dead when the impugned proceedings were held, this suit is undefended.

4. The ex-parte applicant has filed submissions in the following terms.

EX-PARTE APPLICANT'S WRITTEN SUBMISSIONS

Your Lordship,

Pursuant to the leave granted on 31st August, 2017 in Chuka Misc. Application No. 11 of 2017 the Ex-parte applicant Njeru Ndaka Nguru filed a Notice of Motion dated 4th September, 2017 preferred under the provisions of section 8 and 9 Law Reform Act (Cap 26 laws of Kenya), section 7 and 9(1) Fair Administrative Action Act 2015 and Order 53 rule 3 Civil Procedure Rules 2010 for orders that this honourable Court do issue an order of Certiorari to call unto the court and quash the decision of the Minister of Lands in Appeal Case No. 205 of 2011 dated 14th March, 2017 in respect of Land Parcel No. Muthambi/Lower Kandungu/1535 and an order of Prohibition to prohibit the District Land Registrar Meru South and Maara District from implementing the decision of the said minister in Appeal Case No. 205 of 2011.

The ex-parte applicant also prayed that costs be awarded to him.

The notice of motion was premised on the grounds listed in the statement of facts and the verifying affidavit sworn by the ex-parte applicant on 4th September, 2017.

The ex-parte applicant's advocates served upon the 1st, 2nd and 3rd respondents with the Notice of Motion. The Interested party was however not served with the application as he was by then deceased and had no legal representative to defend the motion on his behalf.

The 1st, 2nd, 3rd respondents were represented by the Hon. Attorney General through the state counsel Mr. Kiongo. They however did not file any reply or grounds in opposition to the Notice of Motion dated 4th September, 2017.

When the matter came up for directions on 6th February, 2018, the honourable court directed parties to this suit to dispose off the application by way of written submissions. The ex-parte applicant was given 14 days to file and serve his written submissions upon the respondents. These submissions are therefore written against that background.

Your Lordship, the ex-parte applicant's prayer for a prerogative order of Certiorari is based on the ground that the Minister for Lands in Appeal case no. 205 of 2011 through its chairman the 1st respondent herein acted contrary to the law and the laid down procedure in hearing and determining the

Interested party-deceased's appeal notwithstanding the fact that the Interested party had long passed on. The Interested party had as a matter of fact passed on in the year 2010, a year prior to the filing of Appeal Case No. 205 of 2011.

This is very clear from the ex-parte applicant's supporting affidavit and the proceedings conducted by the 1st respondent and marked NNN4.

The 1st respondent asked witness III – when did Kithaka die? The witness answered – May 2010.

The Interested party – deceased was never substituted by a legal representative in the said appeal. It therefore remains strange as to how the Interested party was able to file an appeal and defend the same while in his grave and even more strange – he won the appeal and the disputed land was awarded to him. If the interested party is alive why is the 1st respondent reluctant to swear an affidavit to say so?

In particular the Minister for lands through the 1st respondent acted unreasonably and irrationally in finding and ordering that:-

a) A portion out of Land Parcel No. Muthambi/Lower Kandungu/1535 be awarded to the Interested party – deceased.

The ex-parte applicant had been awarded land parcel No. Muthambi/Lower Kandungu/1535 by the Land Adjudication Committee in the 2008 after he instituted a suit against the interested party who had caused his parcel of land to be amalgamated with the ex-parte applicant's parcel of land during the land adjudication and demarcation. The Land Adjudication Committee made its judgment as follows:-

“From the above finding, the court has awarded a portion of the disputed parcel of land ie parcel Number 576 Kandungu Adjudication Section to the plaintiff (now the ex-parte applicant). The plaintiff to be given new number while defendant (now the Interested party – deceased) to retain the old number, as shown in the sketch.

Any aggrieved party has a right of appeal within 14 days as from 20th March, 2008”.

(This position is clear from the proceedings marked NNN2)

The Interested party herein feeling aggrieved and or dissatisfied with the decision of the Land Adjudication Committee filed objection case numbers 100 and 101 of 2008 before the same Committee which dismissed the said objections and upheld its decision.

The Interested party thereafter passed on in May, 2010.

Strangely, in the year 2011, the Interested party being aggrieved and or dissatisfied with the decision of the committee mysteriously filed an appeal against the judgment of the Land Adjudication Committee in Appeal Case NO. 205 of 2011 against the ex-parte applicant and Virginia Nkuene.

The appeal commenced in the year 2017, seven years after the death of the Interested party with the 1st respondent in his capacity as the representative of the 2nd respondent chairing the proceedings. The 1st respondent heard, allowed and determined the appeal in favour of the Interested party – deceased and ordered that a portion out of the ex-parte applicant's parcel of land namely Muthambi/Lower Kandungu/1535 be awarded to the Interested party – deceased.

The procedure of arrival to the said award is main subject of this application.

Your Lordship, it is our humble submission that the entire proceedings before the 1st respondent were tainted with illegality and irrationality as the Interested party having died in the year 2010 could not have filed the appeal and defend the same in his capacity as the deceased. No one substituted him after his death. It therefore raises eyebrows as to who lodged the appeal on behalf of the Interested party, who recorded his unsigned statement, how he tendered or produced evidence before the 1st respondent and on what principle(s) or grounds did the 1st respondent rely on in awarding the Interested party – deceased a portion of ex-parte applicant's parcel of land.

Your Lordship, it is a known principle of law that suits must be prosecuted by and against living persons. It is further known that in the event of occurrence of death of any person who is a party to a suit, an application in that behalf ought to be made seeking to represent the deceased and to proceed with the suit.

Order 24 of the Civil Procedure Rules 2010 outlines the procedure to be followed by anyone seeking to represent the deceased.

In relation to this suit, order 24 rule 4 states as follows:-

4.“(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the ***cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.***

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.”

Your Lordship, it is our humble submission that the entire proceedings before the 1st respondent were tainted with illegality as the 1st respondent contrary to the law heard and determined an appeal filed by a dead man who does not enjoy legal recognition to defend a matter.

During the hearing of the said appeal, there was no legal representative who is ordinarily mandated to substitute the deceased and protect his interests if any. There is no evidence on record to prove that anyone was ever issued with letters of administration over the Interested party – deceased estate.

It is in the light of the foregoing that we humbly submit that the 1st respondent acted illegally and irrationally by allowing an appeal lodged by a dead man, hearing the same and awarding the deceased with a portion of the ex-parte applicant's parcel of land.

It's quite surprising as to how that the proceedings in Appeal Case NO. 205 of 2011 show that the Interested party – deceased as a matter of fact tendered or produced his evidence.

Your Honour, we seek to rely on the case of **MBUGUA WANGIGE AND ANOTHER VERSUS MUTHANJI WANGIGE AND FOUR OTHERS NYERI ELC. CASE NO. 614 OF 2014** (copy attached).

We further submit that the proceedings before the 1st respondent were tainted with irrationality as the 1st respondent failed to give detailed reasons and analysis for arriving at his decision i.e awarding an unascertained portion of the ex-parte applicant parcel of land to the Interested party-deceased. The 1st respondent decision left the ex-parte applicant with no option but speculate on the circumstances leading to his decision.

Your Lordship, it is of paramount importance that in every decision of a body or authority affecting or threatening fundamental right of an individual be substantiated by sufficient or reasonable grounds. This was never the case in Appeal Case No. 205 of 2011. The 1st respondent merely out of the thin air awarded the Interested party-deceased a portion of the ex-parte applicant's parcel of land without disclosing his reasons for doing so.

CONCLUSION

It is trite law that judicial review orders are applicable against any person, body or authority that exercises a judicial or quasi – judicial function by which a right has been or is likely to be adversely affected.

Article 165 (6) of the Constitution of Kenya confers upon the High Court supervisory jurisdiction over the subordinate courts, any person, body or authority exercising a judicial or quasi-judicial function. The court while considering a Judicial Review matter does not look into the merits or otherwise of a decision of a judicial or quasi-judicial body subordinate to the high court but whether the decision/judgment was arrived at within the law and the laid down procedures.

As earlier stated, we humbly submit that the 1st respondent acted contrary to the law and the laid procedure by hearing an appeal filed by a dead man and awarding him a portion of the ex-parte applicant's parcel of land without offering sufficient or reasonable grounds of doing so. On 9th March, 2017, the ex-parte applicant raised the fact the Interested party had long passed on in the year 2010 but the 1st respondent overruled his objection and ordered the proceedings on appeal to proceed as filed. This is clear from paragraph 8 of the verifying affidavit sworn by the ex-parte applicant.

Your Lordship, it is crystal clear that the 1st respondent acted on ulterior motives calculated to prejudice the ex-parte applicant's proprietary interests in the sense that he allowed, heard and determined an appeal filed/lodged by a dead man who as from the records of the 1st respondent even tendered or produced evidence.

We therefore urge this court to allow the ex-parte applicant's application and grant him orders sought as the 1st respondent acted contrary to the law. The 1st respondent failed to take relevant considerations into account an example being that the Interested Party ought to have been represented by a legal representative in defending the appeal.

Your Lordship, it is only fair that the remedy of judicial Review orders of Certiorari and Prohibition come to the rescue of the ex-parte applicant and his parcel of land No. Muthambi/Lower Kandungu/1535 from unlawful alienation through the decision and orders of the 1st respondent.

We urge this honourable court to find merits in the ex-parte applicant's application and allow the application and issue orders of certiorari and prohibition as prayed.

We also pray that the ex-parte applicant be paid costs.

We rest our humble submissions.

DATED AT EMBU THIS 23RD DAY OF FEBRUARY, 2018

NJERU ITHIGA & CO

ADVOCATES FOR THE EX-PARTE APPLICANT

5. The ex-parte applicant in support of his assertions has proffered the case of *Mbugua Wangige & Another versus Muthee Wangige and 4 others – Nyeri ELC No. 614 of 2014 [2015]eKLR*. I opine that the case is relevant to the facts and circumstances of this case.

6. I have considered the pleadings filed by the ex-parte applicant, his submissions and the one authority he has proffered to buttress his case. I find that the ex-parte applicant has satisfied the court that the orders sought in the application are merited.

7. In the circumstances, the ex-parte applicant is granted orders in terms of prayers (i) (ii) and (iii) in his application dated 4th September, 2017.

8. It is so ordered

Delivered in open court at Chuka this 6th day of March, 2018 in the presence of :

CA: Ndegwa

Njeru Ithiga for the ex-parte applicant

P.M. NJOROGI

JUDGE