



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JR 6 OF 2017

TERESA KABIRITHU M'MUKETHA.....EXPARTE APPLICANT

VERSUS

LAND ADJUDICATION AND SETTLEMENT

OFFICER TIGANIA EAST.....RESPONDENT

ZAKAYO MUCHEKE M'THIRINGI..... INTERESTED PARTY

JUDGMENT

1. This suit is in a series of two other suits that is Judicial Review Case No. 4 and No. 5 of 2017. In all the three suits, the Ex-parte Applicant is one, Teresa Kabirithu whereby the land parcel is no.4773. The interested parties are Miceck Mugambi Thiringi in JR. case No. 4 of 2017 in respect of objection case no. 1689, William Mwenda Gichwili in JR case No. 5 of 2017 in respect of objection no. 1901 and Zakayo Muccheke M'thiringi in JR case No. 6 of 2017 in respect of objection no. 1756.

2. The documents in JR case No. 5 and in JR case No. 6 of 2017 have been mixed up by the ex-parte applicant. In both these cases the verifying affidavit in support of the application for leave is the same and it indicates the interested party as William Mwenda Gichwili. The documents annexed to that affidavit are in reference to objection proceedings case No. 1901 only. Those proceedings, annexure "T.K.Ma" bear the name of William Mwenda Gichwili as the Objector. The proceedings in objection case No. 1756 have not been availed.

3. Leave to commence the Judicial Review proceedings herein was obtained on 3.2.2017. The substantive Notice of Motion was filed thereafter on 13.2.2017.

4. The orders sought in the Judicial Review motion are **"an order of Certiorari to issue to remove to this court for purposes of being quashed the order/ decision made by the Land Adjudication and Settlement Officer Tigania East District on 22.11.2016 in objection No. 1756 in respect of land reference no. 4773 in Karama Adjudication section"**. Costs have also been prayed for.

5. The Case for the exparte applicant is that her deceased husband was the registered owner of parcel No. 4773 Karama Adjudication Section.

6. The Exparte applicant contends that the proceedings in objection case no. 1756 were heard without the aid of a committee contrary to the provisions of section 26 of the Land Consolidation Act (Cap 283 Laws of Kenya). He further states that there was biasness on the part of the respondent.

7. The Interested Party filed a response by way of a replying affidavit where she states that there was no evidence of bias in the objection proceedings and that the case was properly heard. The respondent did not file any response.

8. The Substantive motion was canvased by way of written submissions. Both the exparte applicant and the interested party did file their submissions. The respondent did not file any submissions.

9. Despite the mix-up in the objection case no 1901 and 1756, this court will still proceed to determine the issues in dispute since the existence of the aforementioned proceedings is not disputed. Zakayo Muccheke has after all filed his replying affidavit of 22.6.2017 in the present matter, where in paragraph 11, he confirms that he indeed filed objection case no. 1756.

10. The ex-parte applicant avers that respondent failed to constitute a committee as is required under section 9 (1) of Cap 283 laws of Kenya.

11. Further, ex parte applicant avers that respondent had failed to appoint one person to be an executive officer as is required under section 9 (2) of Cap 283 laws of Kenya.
12. The ex parte applicant also submits that the respondent was statutory bound to hear the objection with the aid of a committee as stipulated under section 26 of Cap 283.
13. Ex parte applicant contends that the rules of natural practices were breached due to the short comings in compliance with the law, and hence there was breach of legitimate expectation to an impartial, fair and just hearing.
14. It is further submitted for the ex parte applicant that extraneous matters were considered and that respondent's decision was arbitrary and vague.
15. The ex parte applicant proffered the following authorities for court's consideration;
 - **Meru H.C Misc 101/2008; Republic versus Josphat M'Ncebere M'Ithae & another.**
 - **Meru H.C Misc J.R No. 58 of 2009; Republic versus Gervasio Mugambi Thitira & 2 others**
 - **Meru H.C Misc application No. 24 of 2006; Republic versus Peter Rwanda & others.**
 - **Nyeri Civil Appeal no. 28 of 2015 Peter Kimandiu and Land Adjudication Officer Tigania West District v. Zaverio Mithika and 3 others.**
16. For the Interested Party, it is submitted that the ex parte applicant has no locus standi to bring forth these Judicial proceedings as the land in question is registered in name of ex parte applicant's deceased's husband yet she (ex parte applicant) has not obtained grant of letters Administration. On this point the interested party has relied on the case of **Virginia Edith Wamboi versus Joash Ochieng Ougo & another (1982 – 1988) IKLR** and the case of **Transik Union International & another versus Jane Mbeyu and another, Civil Appeal No. 145 of 1990.**
17. The interested party has also submitted that the objection no. 1756 for parcel 4773 was properly constituted and that the law does not stipulate that a number of the committee should sign or record their names in the objection proceedings. Interested party avers that it is upon the ex parte applicant to provide proof that the committee was not properly constituted.
18. On the allegation of bias the interested party avers that all parties were present during the objection proceedings including the Ex-parte Applicant.
19. The interested party has also submitted that the evidence adduced did support the decision reached by the respondent. In particular the interested party avers that the respondent and the adjudication committee had visited the suit parcel and had noted that the interested party had occupied and developed a distinct portion.
20. From the onset I must state that Judicial Review is concerned with the decision making process and not the merits of the decision. In **Municipal Council of Mombasa versus Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that *"Judicial Review is concerned with the decision making process, not the merits of the decision itself..... 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....."*
21. In **Republic versus Kenya Revenue Authority Ex parte Yaya Towers Limited (2003) eKLR**, it was held that *"The remedy of Judicial Review is concerned with reviewing not the merits of the decision of which the application for Judicial Review is made but the decision making process itself....."*
22. Against this back ground, it is not the place for this court to determine as to who is the rightful owner of the suit land. The court can only interrogate the decision making process based on the issues raised by the parties.
23. In his submissions, the interested party has raised the issue of locus, that ex parte applicant's claim is tied to her deceased's husband's property yet she had no letters of administration. Nowhere in the interested party's replying affidavit filed on 2.6.2017 is that issue raised. To advance this ground at the stage of submissions is actually an ambush. It is a violation of a right to a fair trial as stipulated under article 50 (1) of the constitution.
24. In any event, the Land consolidation Act was enacted to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas. Section 13 (1) of the said act provides that **"Every individual person claiming any right or interest in any land within an adjudication section, and any person whose presence is required by a Committee or Arbitration Board, shall attend in person, or by representative according to African customary law, as required by the Committee or Arbitration Board..."**
25. Section 13 (4) of the aforementioned act further provides that **"Where one or more of several heirs of a deceased person, or one or more out of a group of heirs, claiming a separate interest from another group or groups, appears, his or their appearance shall be deemed to be the appearance of all such heirs or all such groups, as the case may be, unless the Committee otherwise directs"**.
26. From the foregoing provisions of cap 283, it is apparent that a claim under the act can be made by persons who desire to have their rights

and interest in the land ascertained including successors of a deceased persons and not necessarily legal representatives of a deceased.

27. On the claim that respondent was biased and that respondent considered matters that were not placed before the board, I find no evidence to support such allegations. If anything parties were given a chance to tender their testimony and were cross examined. There was even a ground visit on the suit land.

28. As to whether the objection proceedings were conducted with the aid of a committee, the applicable provision of the law is section 26 of the Land Consolidation Act where it is provided that; ***“Any person named in or affected by the Adjudication Register who considers such register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the ADJUDICATION OFFICER SHALL CONSIDER THE MATTER WITH THE COMMITTEE and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act. ..”***.

29. The interested party has stated that **“It is not provided in any law that a member or members of a committee should sign or record their names in objection proceedings”**. That is indeed true. But again, how else does the respondent comply with the law if such compliance is not discernible from the proceedings. If indeed there was a committee, who were these members?, How many were they?. What was so difficult in availing information regarding the composition of the committee, if indeed there was a committee. These are the questions I have previously posed in **JR 36/12 Exparte applicant Henry Mwika M’Aramba versus DLASO Igembe and Koome Geoffrey**, and the case **JR 24 of 2015, Exparte applicant Jacob Mururu Thiribi versus LAO Akaiga Adjudication section, Attorney General and Peter Kiremba M’rukwaru**.

30. The case of Peter Kimandiu and land Adjudication officer Tigania West District versus Zaverio Mithika & 3 others Nyeri Civil Appeal ,cited by the Exparte Applicant aptly captures the importance of complying with section 26 of Cap 283. The onus of demonstrating that there was compliance with the law fell upon the Respondent and not the Ex-parte Applicant. Sadly the respondent continues to display a lackluster attitude on these matters of compliance with the law resulting in untold misery to the parties and waste of precious judicial time and resources.

31. All in all, I find that the motion succeeds on the grounds of lack of a committee.

32. I therefore allow the motion on the following terms;

(i) An order of Certiorari is hereby issued to remove to this court for the purpose of being quashed the Order/Decision made by the Land Adjudication and settlement Officer Tigania East District on the 22nd November 2016 in Objection No. 1756 involving Land Reference No. 4773 KARAMA ADJUDICATION SECTION.

(ii) The matter is remitted back to the respondent for the objection proceedings to be conducted all over again in compliance with the applicable law.

(iii) As respondent is responsible for the impasse then each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 18th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Muthamia holding brief for Rimita for exparte applicant

Interested party represented by Mutinda – absent

Kiongo for respondents present

HON. LUCY. N. MBUGUA

ELC JUDGE