



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT CHUKA
CHUKA JUDICIAL REVIEW NO. 04 OF 2017
FORMERLY MERU MISCELLANEOUS
APPLICATION CASE NO. 04 OF 2007
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDERS IN THE NATURE OF CERTIORARI, MANDAMUS
AND PROHIBITION OVER THE DECISION OF THE LAND
ADJUDICATION OFFICER MARIANI ADJUDICATION
SECTION MERU SOUTH DISTRICT ADJUDICATION
AREA DATED 29TH SEPTEMBER, 2006
AND
IN THE MATTER OF LAND PLOT NUMBER 160
MARIANI LAND ADJUDICATION SECTION
AND
IN THE MATTER OF OBJECTION NUMBER 1128
BETWEEN
DESIDERIO NKONGE KIRUGU.....APPLICANT
VERSUS
THE LAND ADJUDICATION OFFICER
MARIANI ADJUDICATION SECTION...1ST RESPONDENT
BENSON NCHUNGE KUJOGA.....INTERESTED PARTY
JUDGMENT

1. The Notice of Motion in this matter states that it is predicated upon order **LIII Rule 3 of the defunct Civil Procedure Rules and sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya**. The application seeks the following orders:

1. That this honourable court do grant the ex-parte applicant an order of judicial review in the nature of certiorari to bring up and quash the decision of the Respondent dated 29th September, 2006 pursuant to an objection No. 1128 lodged by the Interested party

which decision was to the effect that land plot No. 160 be awarded to the Interested party.

2. That this honourable court do grant the ex-parte applicant an order of Judicial Review in the nature of Mandamus to compel the Respondent to alter the adjudication records and return land plot No. 160 to the ex-parte applicant as initially registered in the records.

3. That this honourable court do grant the ex-parte applicant an order of judicial review in the nature of prohibition to prohibit the Respondent from any way interfering with the ex-parte applicant (sic) land plot No. 160 Mariani Adjudication Section.

4. That costs be provided for.

2. Inter alia, the application has the following grounds:

a) That the Respondent who initially heard this objection No. 1128 one Mr. A. Khaemba did not conclude the same as Mr. Daniel Mutuku took over and wrote a finding which was followed by a decision completely flawed and thus amounting to a miscarriage of justice as the latter did not appreciate the facts of this case as initially recorded by his predecessor.

b) That regard being had to the foregoing the ex-parte applicant's right to a fair hearing was jeopardised by having an officer who did not hear him write a decision.

c) That the Respondent was biased in his findings and therefore did not discharge his duties as required by law in the objection proceedings NO. 1128 in relation to Land plot No. 160 Mariani Adjudication section as he did not initially hear this dispute.

d) That the decision arrived at by the Respondent in the objection proceedings was without basis regard being had to the facts of the matter and the circumstances of the case.

e) That the manner in which the Respondent exercised (sic) his discretion was unreasonable regard being had to the objection before him and the veracity of the evidence tendered if at all.

f) That the Respondent did not avail a fair hearing to the ex-parte applicant herein.

3. The Statement Of Facts accompanying the application for leave to apply for Judicial leave states:

A. THE NAME AND DESCRIPTION OF THE APPLICANT

1. The name of the ex-parte applicant is Desiderio Nkonge Kirigu

2. The ex-parte applicant is a resident of Meru South District in the Republic of Kenya.

B. THE FACTS RELIED UPON

3. That Interested party herein lodged an objection No. 1128 over land plot No. 160 in Mariani Adjudication Section Meru South Adjudication Area.

4. That Interested party stated that he is claiming land Plot No. 160 because Silas Metha Magambo did not give him a he-goat.

5. That the records showed that the parcel of land belonged to the Applicant herein.

6. That the Interested party testified that the applicant herein had bought the parcel of land from Silas Metha Magambo which fact was not true and not supported by any evidence be it documentary or otherwise.

7. That the Interested party's witnesses testified that Silas Metha Magambo was to give a he goat or the suit land could revert to Nchunge.

8. The ex-parte applicant lamented why the Interested party had sued him when he should have sued Silas Metha Magambo the one who sold him the suit land.

9. That the Respondent stated that elders agreed that the suit land belongs to Nchunge's family which elders were not called to give evidence.

10. The Respondent found that the suit land was subdivided and sold to Nkonge Agustino, (sic) Eustace Kaburu Mutunga.

11. That the Respondent did not visit the locus in quo to be able to appreciate this dispute as it is the ex-parte applicant who is in exclusive occupation of the land plot NO. 160 Mariani Adjudication Area.

C. THE RELIEF SOUGHT IS:

12. That the applicant seeks relief that

- i) An order of certiorari to remove into the High Court and quash the decision made by the Land Adjudication Officer, Mariani Adjudication Section Meru South District Adjudication Area dated 29th September, 2006.
- ii) An order of mandamus to compel the Land Adjudication Officer Mariani, Adjudication Section to alter the Adjudication records and return land plot NO. 160 to the applicant.
- iii) An order of prohibition to prohibit the Land Adjudication Officer Mariani, Adjudication Section Meru South Adjudication Area from in any (sic) interfering with the applicant's land plot No. 160 Mariani Adjudication Section.
- iv) Grant of leave herein do operate as stay of operation of the decision dated 29th September, 2006 as the same relate to land plot No. 160 Mariani Land Adjudication Section pending the hearing and determination of the Notice of Motion to be filed herein.

D. THE GROUNDS ON WHICH THE RELIEF IS SOUGHT

13. That the objection was heard by one A. Khaemba a Land Adjudication Officer but the findings and the ultimate decision was recorded and signed by one Daniel Mutuku N. on 29th September, 2006 who did not have an opportunity to hear the parties.
14. That in essence this objection No. 1128 was adjudicated upon by one officer who apparently did not hear the parties as can be discerned by the proceedings as annexed in the verifying affidavit.
15. That evidently the handwriting of A.KHAEMBA and his signature is different from the handwriting of Daniel Mutuku N as can be discerned from the proceedings (sic) this fortifies the ground that this objection was done by 2 officers. One took down the evidence and the other came in to write the finding and make a decision.
16. That clearly this is unacceptable for reasons that the one who wrote the findings and the decision did not have an opportunity to hear and take the evidence of the witnesses and neither was he in a position to cross-examine them.
17. That in the foregoing no wonder the facts as found by the later (sic) were such that no person acting judicially and properly instructed could have come to the determination of the issue as found.
18. That the decision arrived at by the Respondent was unreasonable regard being had to the objection before him.
19. That in the foregoing the right to a fair hearing was jeopardised.
20. That the decision and the finding was arrived at without a basis by the Respondent.
21. That the manner in which the Respondent excised his discretion was unreasonable regard being had to the objection before him and the veracity of the evidence tendered.
22. That the Respondent did not avail a fair hearing to the applicant and therefore the decision is subject to the supervisory jurisdiction of this court.

DATED AT MERU THIS 10TH DAY APRIL 2007

FOR KIAUTHA ARITHI & CO.

ADVOCATES FOR THE EX-PARTE APPLICANT

4. The parties canvassed the application by way of written submissions which are reproduced in full herebelow:

EX-PARTE APPLICANT'S SUBMISSIONS

ON PLEADINGS

Your Lordship, by his Notice of Motion dated 10.4.2007 the applicant seeks the following reliefs;

1. That this honourable court do grant the ex-parte applicant an order of judicial review in the nature of certiorari to bring up and quash the decision of the respondent dated 29th September, 2006 pursuant to an objection No. 118 lodged by the Interested Party.
2. That this honourable court do grant the ex-parte applicant an order of Judicial Review in the nature of Mandamus to compel the Respondent to alter the adjudication records and return land plot No. 160 to the ex-parte applicant as initially registered in the records.

3. That this honourable court do grant the ex-parte applicant an order of judicial review in the nature of prohibition to prohibit the respondent from any way interfering with the ex-parte applicant land plot NO. 160 Mariani Adjudication section.

The application is supported by the statement of facts and the verifying affidavit dated 10.4.2007.

The 1st Respondent opposes the same by way of grounds of opposition dated 16.10.2014 and filed on 31.10.2014.

The interested party did file his affidavit dated 4.5.207 setting the stage to hearing of this application.

ON THE FACTS AND THE LAW APPLICABLE

Your ladyship, the applicant was a defendant in objection No. 1128 over plot No. 160 Mariani adjudication section in Meru south adjudication area (see the typed proceedings filed on 16.7.2012 and handwritten copies forming annexure DNK1).

The hearing commenced on 24.5.2006 before one A.Khaemba the Land Adjudication officer.

It is not in dispute that A.Khaemba took the evidence of the witnesses when the hearing was adjourned later on the same day (see handwritten proceedings at page 12).

Later my lord, one Daniel Mutuku did the findings and delivered his decision on 29.9.2006 in his capacity as the Land Adjudication Officer.

These events are agreed upon by the parties that the person who heard them is not the one who wrote the decision.

(i) Procedural Ultra vires

My lord, the applicant submits that the procedure in the conduct of proceedings before the Land Adjudication Officer was flawed in the manner the proceedings were conducted. The predecessor to Kahemba, Mr.Mutuku did not have the opportunity to see the witnesses, access their demeanor and make a conclusion thereof.

Objection proceedings my lord are in the nature of Civil Proceedings and common law dictates that in such instances, the new umpire should as a matter of procedure inform the parties of their right to be heard afresh or to forego that right and the officer do write a decision based on the record. This was not done dealing a blow to the right to a fair hearing.

I submit that there was procedural ultra vires. When a body is authorized to take a task by the law herein being the Land Adjudication Act Cap 284 then the law or common law imposes a duty to such body to follow a procedure that is fair, just and not arbitrary as the case herein. My lord where this happens then this court has a duty to call up and quash the ensuing decision.

Your lordship even where no procedure is explicitly prescribed in the Act the common law rules of natural justice and the universal demands of due process and fair play will ordinarily be implied and applied in decision making.

My lord this is what happened in this case. The predecessor herein did not appreciate the facts of this case having not heard the parties herein.

CONCLUSION

Your lordship, the applicant has proved on a balance of probability that he deserves the orders sought.

Allow the motion with costs to the ex-parte applicant.

DATED AT MERU THIS 27TH DAY OF NOVEMBER, 2017

FOR: M/S MUIA MWANZIA & CO.

ADVOCATES FOR THE APPLICANT

B. RESPONDENT'S SUBMISSIONS

May it please your Lordship.

We submit on behalf of the Respondent as follows:

The ex-parte applicant filed Notice of Motion dated 10th April, 2007 seeking for orders of certiorari, mandamus and prohibition against the decision of the Land Adjudication Officer Mariani Adjudication Section dated 29th September, 2006.

Your Lordship, we submit that Judicial Review Orders are discretionary. We further submit that Judicial Review (sic) concerned with decision making process and not the merits of the case.

Your Lordship, the ex-parte applicant in his Notice of Motion states that the respondent was heard. In objection 112 by Mr. Khaemba and later another officer took over one Mr. Mutuku. The later (sic) officer made a decision by making his findings.

We submit that both officers were Land Adjudication Officers mandated and authorized by law to hear objection proceedings. If a government officer is transferred from one office to another, there is always a replacement. This is what happened in this case. The Land Adjudication Officer was competent to take over and make the findings.

Your Lordship, we submit that the ex-parte applicant is challenging the merits of the decision of the Land Adjudication Officer and not the decision making process as required.

Your Lordship, paragraphs 6 and 7 of the statement of facts accompanying application for leave dated 10th April, 2007 the ex-parte applicant mentions interested party (sic) witnesses who he says testified at the hearing. This is an indication that parties were allowed to call their witnesses/ (sic) our Lordship, on this note we submit that the ex-parte applicant was given a fair hearing. The Respondent allowed parties to call their witness. The Respondent thus cannot be condemned for not giving parties a fair hearing.

Your Lordship, in order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...irrationality is when there is such gross unreasonableness in the court is not (sic) reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order (?). I wish the witness had not told me the most stupid of his lies, which both disappointed and made me, feel intellectually insulted (?). In this case the ex-parte has failed to show that.

Your Lordship, we submit that the application dated 10th April, 2007 is an abuse of court process, its (sic) vexatious and cannot stand as the rules of natural justice were adhered to. We submit that the Respondents proceeded with the hearing of the objection as provided by Cap 284 Laws of Kenya thus the application for orders of Judicial Review should be dismissed with costs.

Your Lordship, in support of our submissions, we rely on the case of **Republic –vs- Mount Kenya University & Another 2017 [2017] eKLR (copy annexed.)**

Your Lordship, we pray that you do find that the ex-parte applicant (sic) application is unmerited and dismiss the same with costs to Interested party.

This is our humble prayer and submissions.

We so pray.

DATED AT MERU THIS 27TH DAY OF FEBRUARY, 2018

J. M. KIONGO,

SENIOR LITIGATION COUNSEL,

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE.

C. INTERESTED PARTY'S SUBMISSIONS

May it please your Lordship

I Benson Nchunge Kujoga submit on my behalf as follows:

The ex-parte applicant filed Notice of Motion dated 10th April, 2007 seeking for orders of certiorari. Mandamus and prohibition against the decision of the Land Adjudication Officer Mariani Adjudication Section dated 29th September, 2006.

Your Lordship, I Benson Nchunge Kujoga submit that Judicial Review Orders are discretionary. I Benson Nchunge Kujoga further submit that Judicial Review (sic) concerned with decision making process and not the merits of the case.

Your Lordship, the ex-parte applicant in his Notice of Motion states that the respondent was heard. In objection 112 by Mr. Khaemba and later another officer took over one Mr. Mutuku. The later (sic) officer made a decision by making his findings.

I Benson Nchunge Kujoga submit that both officers were Land Adjudication Officers mandated and authorized by law to hear objection proceedings. If as Government officer is transferred from one office to another, there is always a replacement. This is what happened in this case. The Land Adjudication Officer was competent to take over and make the findings.

Your Lordship, I Benson Nchunge Kujoga submit that the ex-parte applicant is challenging the merits of the decision of the Land Adjudication Officer and not the decision making process as required.

Both the applicant and the respondents called their witnesses (sic) they were heard and the case was determined.

Your Lordship, paragraph 6 and 7 of the statement of facts accompanying application for leave dated 10th April, 2007 the ex-parte applicant mentions interested party (sic) witnesses who he says testified at the hearing. This is an indication that parties were allowed to call their witnesses/ (sic) our Lordship, on this note we submit that the ex-parte applicant was given a fair hearing. The Respondent allowed parties to call their witness. The Respondent thus cannot be condemned for not giving parties a fair hearing.

Your Lordship, I Benson Nchunge Kujoga submit that the application dated 10th April, 2007 is an abuse of court process. Its (sic) vexatious and cannot stand as the rules of natural justice were adhered to. We submit that the Respondents proceed (sic) with the hearing of the objection as provided by cap 284 Laws of Kenya thus the application of orders of Judicial Review should be dismissed with costs.

Your Lordship, I pray that you do find that the ex-parte applicant (sic) is unmerited and dismiss the same with costs to interested party.

That is my humble prayer and submissions.

I so pray.

DATED AT CHUKA THIS 28TH DAY OF FEBRUARY, 2018

BENSON NCHUNGE KUJOGA

INTERESTED PARTY

4. From the pleadings and submissions, a concise statement of the case is that:

a) The exparte applicant says that he deserves the orders sought because the apposite objection was heard by a Land Adjudication Officer called A. Khaemba and that findings and the ultimate decision was made by a Land Adjudication Officer called Daniel Mutuku, who did not have an opportunity to hear the parties. He says that no person acting judicially and properly seized of the matter could have arrived at the determination which was finally made. He says that the decision of the Respondent was unreasonable in the circumstances of the evidence adduced in the objection. He submits that fair hearing was jeopardized.

b) The Respondent submits that the court should dismiss the suit with costs. He proffers the case of Republic versus Mount Kenya University, [2017] eKLR as an authority that buttresses his assertions.

c) The Interested Party, by and large, supports the Respondents assertions. He says that it is right for an officer who replaces a transferred officer to make findings and a decision on a matter heard by the transferred officer. He opines that the two officers who dealt with the objection were both adjudication officers who had jurisdiction to hear and determine the objection. They submit that if a government officer is transferred, his or her replacement has the authority to handle the issue. The respondent also submits that the exparte applicant and his witnesses were accorded a fair hearing by the officer who heard the objection. He argues that the ex-parte applicant is challenging the merits of the decision of the Land Adjudication Officer and not the decision making process. He also says that the parties and their witnesses were all accorded a fair hearing. He continues to say that the respondent proceeded with the hearing of the objection in the manner provided by Cap. 284 Laws of Kenya, and for this reason, the exparte applicant's application for orders of Judicial Review should be dismissed with costs.

5. I frame the issues for determination as follows:

a) Was it procedurally right for an officer who did not hear an objection to rely on evidence recorded by a transferred officer to make findings and a determination predicated on evidence he had not heard?

b) Depending on this court's finding concerning (a) above, are the orders prayed for by the exparte applicant tenable?

6. The disputants in this suit are in agreement that the officer who heard the apposite objection was not the officer who made findings and a determination in the objection. From the pleadings, it is clear that the parties were not offered an opportunity to examine the record of proceedings made by the transferred officer which would have allowed them to decide if or if not they were in favour of the matter being started de novo or proceeding from where it had stopped. Or perhaps they would have moved the new Land Adjudication Officer to refer the matter to the transferred officer who had concluded the hearing of the objection so that he could make the apposite findings and the consequent determination.

7. I do not agree with the Respondent that rules of natural justice were observed to the extent that the procedural integrity of the decision

making process can be seen to have not been impeached. I also do not agree with the Interested Party that the ex parte applicant is challenging the merits of the decision made by the Land Adjudication Officer rather than the decision making process. It is pellucid that the ex parte applicant is challenging the integrity of the decision making process in that the impugned decision was made by an officer other than the one who heard the objection without offering the parties an opportunity to decide if or if not the apposite hearing would commence de novo.

8. I do find that an order of certiorari to bring up and quash the decision of the respondent dated 29th September, 2006 pursuant to objection No. 1128 lodged by the Interested Party is meritorious. An order of certiorari is hereby issued.

9. I find no basis for issuing orders of Mandamus and prohibition as prayed for by the ex parte applicant. This is because the impugned objection was not properly heard and determined. It is ordered that an Adjudication Officer, other than the two officers who handled the impugned objection, hears and determines the apposite objection afresh.

10. Parties are ordered to bear their own costs.

Delivered in open court at Chuka this **14th day of May, 2018** in the presence of:

CA: Ndegwa

Mokua h/b Mwanzia for the Ex-parte Applicant

Kiongo for the Respondent

P. M. NJORGE,

JUDGE.