REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC MISCELLANEOUS APPLICATION CASE NO. 14 OF 2017

FORMERLY EMBU ELC. 44 OF 2014

ELIAS MICHENI MUGO.....PLAINTIFF

VERSUS

LAND ADJUDICATION OFFICER MERU SOUTH DISTRICT & 2 OTHERS ....DEFENDANTS

JUDGMENT

1. These Judicial Review Proceedings concern an amended Notice of Motion dated **6th March, 2008** which seeks two prayers:

> 1. An order of certiorari to remove into the High Court for the purpose of being quashed the decision of adjudication officer in objection No. 640 MARIANI ADJUDICATION SECTION made and delivered on **18th May, 2006**.
>
> 2. The costs of this application be provided for.

2. After being given enough time to file his submissions, on **10th April, 2018,** Mr. Kiongo of the AG's Office which represents the respondent, told the court that he had been unable to trace the apposite file in Nairobi and Embu. In the circumstances, he intimated to the court that he wholly associated himself with the submissions filed by the Interested Party. He told the court that he would not file written submissions.

3. For reasons unfathomable to this court, this suit has remained in the Judicial system since the **year 2006,** when it was filed. It is because of the age of the suit, at least 12 years, that this court deemed it necessary to hear and determine it expeditiously.

4. The ex-parte applicant's written submissions are reproduced in full herebelow:

APPLICANT'S WRITTEN SUBMISSIONS

Please my lord,

A. INTRODUCTION

The amended Notice of Motion dated the **6th March, 2008** seeks two prayers namely:-

> 1. An order of certiorari to remove into the high court for the purpose of being quashed the decision of the adjudication officer in objection No. 640 Mariani Adjudication Section made and delivered on **18th May, 2006.**
>
> 2. The costs of this application be provided for:-
>
> > The application is made upon the grounds and matters set out in the statutory statement and the further affidavit of Elias Michemi Mugo, the ex-parte applicant, and other grounds and reasons to be adduced at the hearing of this application.

B. THE DECISION CHALLENGED

The decision of the adjudication officer in his objection No. 640 is contained in annexure EMN 1 to the affidavit of Elias Michemi Mugo at page 9 of the handwritten proceedings by the adjudication officer.

At the bottom of page 9 the adjudication officer made the following decision:-

Hearing adjourned

Signed S. Khaemba

LAO.

17.5.2006

DECISION: Objection allowed. Plot sub-divided, plaintiff awarded 4.00acres and defendants retains 5.30 acres. Plaintiff gets new No. 1599.

(See findings obj. 444 & 958)

Signed

A.Khaemba

LAO

18.5.2006

C. FACTS RELIED ON TO CHALLENGE THE DECISION

These are to be found on the statement section E (1 – 20)

The salient ones are:-

i. The ex-parte applicant Elias Michemi Mugo is the one who was registered as the owner of plot number 858/Mariani/Meru South after conclusion of the adjudication exercise (See statement No. 13 and annexure EMM 2 of the affidavit of the applicant at page 10 of the annexure).

ii. That the registration of the applicant as the owner was after the compilation of the demarcation map and the adjudication record pursuant to section 23 and 24 of the Land Adjudication Act Cap 284.

iii. That the respondent was mandated under section 25(b) of the Act to display the original copy of the register for inspection at a convenient place within the adjudication section.

and

Under Section 25 (c) "give notice that the adjudication register has been completed and may be inspected at that place during a period of sixty days from the date of the notice"

iv. There is no indication anywhere that the respondent, The Land Adjudication Officer Mariani Land Adjudication Section complied with that section. Indeed he has not filed any replying affidavit or other response despite having been duly served. The legal presumption is that he failed to comply with the mandatory legal provisions.

v. Section 26 of the Land Adjudication Act provides:-

"Any person named or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may within sixty days of the date upon which the notice of completion of the adjudication register is published object to the adjudication officer in writing."

vi. The interested parties did not file any replying affidavit. They instead filed grounds of opposition on the 7th September, 2006.

My lord, filing of grounds of opposition is provided for in opposition to applications filed under the rest of the Civil Procedure under Order 51 Rule 14 (5) of the Civil Procedure Rules.

This procedure does not apply to Judicial Review Proceedings under Order 52 of the Civil Procedure Rules.

See also. Republic versus Communication Commission of Kenya and others [2001] KLR 82 where it was held at page 83:-

1. "**A motion filed under order 53 Rule 3(1) of the Civil Procedure Rules cannot be equated to one filed pursuant to the provisions of ORDER 50----------**

2. …

3. Name of the provisions of order 6 rule 13 (1) of the Civil Procedure Rules is applicable to proceedings instituted under order 53 of the Rules.

4. …

5. …

6. The power to issue Judicial Review orders of mandamus, prohibition and certiorari is given to the high court by a separate Act of parliament namely the Law Reform Act. Section 8 and 9 of the Law Reform Act set out in full the circumstances under which the high court is entitled to issue the orders and what factors the high court is bound to take into account. <u>The Law Reform Act does not say that these provisions are subject to the provisions of any other Act of parliament.</u>

The grounds of opposition should therefore be struck out, expunged or at best simply ignored as otiose. It also follows that the interested parties submissions dated the 14th MAY, 2012 and filed on the 31ST May, 2012 stand on quick sound in so far as they purport to support the interested parties' version of the case.

vii. Section 26 of the Land Adjudication Act provided for "objections". The respondent heard "plaintiffs and defendant" as recorded in the proceedings. The correct version should have been "objector' and "Respondent."

viii. The said section 26 does not provide for hearing or witnesses and cross examination. The hearings will have been concluded, demarcation map made and adjudication register completed under section 23, 24 and 25 of the Act. The respondent was in error in re-opening the issues and re hearing as a fresh matter.

<u>d. OBJECTION WAS OUT OF TIME</u>

Section 26 of the Land Adjudication Act provides for any objectors to file their objections within 60 days of the publication of the completion of the register.

Such objection to be (sic) writing saying in what respect the objector considers the adjudication register to be incorrect or incomplete.

a. Notice of publication of the register has not been provided for by either the respondent or interested parties.

b. Notice of objection has not been provided by the interested parties (the objectors).

c. According to the copy of the register provided by the applicant EMM 2 (page 10 of the annexures). At item 12 the certificate by the executive officer is dated the 5th August, 2004. According to the proceedings of the adjudication officer. EMM 1 at page 1 of the applicant's annexures. The parties appeared before the adjudication officer (respondent) on the 17.5.2006. This was 17 months after completion which translates to 510 days. The objection was prima facie 450 day out of time.

<u>E. EXCESS OF JURISDICTION</u>

a. The respondent went wrong in entertaining the interested parties who had not participated in the demarcation and the adjudication process.

For them to be entertained as objectors they should have participated and their names should have appeared as claimants to the parcel adjudicated to the applicant in this case parcel no. 858. They had no locus in the circumstances and therefore the respondent acted without jurisdiction.

b. The respondent further erred and went wrong in sub-dividing the applicant's parcel number 858, when he had already adjudicated, awarded and certified it on the adjudication record EMM 2. This was a further instance of acting in excess of jurisdiction.

<u>F. LANGUAGE</u>

The recorded appearance of the parties at page 1 of the EMM 1 and proceedings are as follows:-

MARIAMI ADJUDICATION SECTION

MERU SOUTH ADJUDICATION AREA

OBJ NO. 640

P. NO. 858

NATURE: DISPUTE

PLAINTIFF: 1. FREDRICK MATE M. TURA

ID NO. 2233942

2.GILBERT N. JOTHAM

ID 6095114

WITNESS: GABRIEL KINYUA RUGUTI

ID 1728157

DEFENDANT ELIAS MICHEMI MUGO

ID 3651760

WITNESS M'RITAA M'MUTUARA

ID.4446940

SIGNED A. KAHEMBA

LAO

17.5.2006

The proceedings are recorded in the English language. It is not indicated what language was spoken or if the parties were all proficient in the English language.

It is apparent that some of the parties were illiterate.

i. The first plaintiff who was sworn at page 1 (language not indicated) is recorded as having thumb printed his statement at page 2.

ii. The second plaintiff at page 4 is also recorded as having thumb printed his evidence; the language he was speaking is not indicated.

iii. The plaintiff's witness was also sworn in a language that was not indicated. He thumb printed his evidence.

iv. Even when it came to the defendant and his witness. Mr. Khaemba did not record the language they testified in. they both thumb printed their testimonies.

It is submitted that failure by the adjudication officer to indicate the language of the proceedings is an error of law:-

a. Natural justice and the constitution provide for a person to be tried in the language that he understands.

b. The adjudication regulations provide for interpretation, where local languages are not used.

c. Section 12(1) of the adjudication Act provides for recording of proceedings as provided for in recording of civil proceedings.

"12(1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of The proceedings and shall so far as practicable follow the procedure directed to be observed in the hearing of civil disputes……."

and

"12 (2) Proceedings conducted under this Act is a judicial proceeding for the purposes of Chapter XI and XVII of the penal Code. Chapter XI, Section 109 creates offences for false interpretation"

G. IRRATIONALITY

In his decision, the adjudication officer referred to other findings in "Obj 444 and 958" as being part of his decision in subdividing the

applicant's land parcel No. 858. The adjudication officer did not elaborate or indicate in what way the findings in Obj No. 444 and 958 were relevant to the particular Obj No. 640.

His findings were therefore capricious and irrational.

H. CONCLUSION

My lord, the ex-parte applicant has demonstrated and proved that certiorari should issue in respect of the decision of the adjudication officer in objection 640 Mariani Adjudication Section made on 18th May, 2006.

a. The land adjudication officer (the respondent) was in error in entertaining a so called objection, when there was no valid objection as mandated by the statue under sections 23, 24, 25 and 26 of the Land Adjudication Act Cap 284. As has been amply demonstrated, the land adjudication officer is a creature of statute.

The exercise of his powers requires strict compliance with the prescribed procedures.

The officer having failed to comply, his decision is null and void. It cannot stand. It should be quashed.

b. The land adjudication officer having completed the demarcation and adjudication of the applicant's parcel No. 858 Mariani/Meru South and having further issued him with a record of adjudication register; and there having been no objection within the proscribed period (60 days) the decision of the land adjudication officer is a nullity. Certiorari is called for.

c. The land adjudication officer committed an error of jurisdiction in hearing the interested parties at the "objection stage" when they were not part of the adjudication process from the committee stage under section 6 or arbitration process under section 7 of the Adjudication Act 284.

Objection under section 26 of the Act, comprise the final stage in adjudication before the final appeals to the minister under section 29 of the same act.

Certiorari should issue.

d. The land Adjudication officer is guilty of acting in excess of jurisdiction in ordering the sub-division of the ex-parte applicant's piece of land, when it had been demarcated, adjudicated and regularly certified to the applicant and without any appearance or participation of the interested parties at either the committee or arbitration proceedings which are the precursor to the objection proceedings. Certiorari should issue.

e. Irrationality and failure of natural justice in denying the parties a right to be heard in their own language or the language they understood have all been pointed out and demonstrated. Certiorari should issue.

The applicant will rely on the case of James Gilo versus Republic and 2 others CA NO. 133 of 2009 [2010] eKLR. Where the court of appeal was considering judicial review in a decision of a land adjudication officer.

My lord, I rely on holding number 1, 2, 3, 4 and 5 which held:-

1. The rightful claimants in the suit were not accorded the right of hearing which in turn constituted a breach of natural justice.

2. The adjudication officer relied on irrelevant considerations or failed to take into account relevant considerations, namely the proper parcels and the matching claimants.

3. The decision maker acted without jurisdiction that the procedure set out in section 12 of the Land Adjudicaation Act (Cap 284) was never followed.

4. In view of the mix up of the parcels and claimants as out lined, the decision was irrational in that it was not based on any valid reasons in the circumstances. The adjudication officer should have adopted a fair procedure giving those affected a fair and informed say.

5. The adjudication officer has stepped out of jurisdiction and this in turn justified the high court's intervention. The high court specifically pegged its intervention on the ground that the adjudication officer violated the rules of natural justice and therefore the high court could not be faulted.

The applicant should also be awarded costs.

It is so submitted.

DATED AT EMBU THIS 24TH DAY OF APRIL, 2015

MORRIS NJAGE & CO.

ADVOCATES FOR THE ALIAS MICHEMI MUGO.

5. The ex-parte applicant proffered the following authorities:

1. Republic Versus Communications Commission of Kenya ex-parte East Africa Television Networks Ltd, Court of Appeal at Nairobi [2001] KLR 82.

2. James Gilo Versus R & 2 Others, Court of Appeal at Nairobi [2010] eKLR

6. The Interested Party's written submissions are reproduced in full herebelow:

INTERESTED PARTIES' (SIC) SUBMISSIONS

YOUR LORDSHIP

The amended notice of motion dated **6th March, 2008** was brought to this court by the ex-parte applicant against the Respondent and the Interested Parties seeking for orders of certiorari to quash the decision of the respondent dated **18th May, 2006**.

The Interested parties were served with the Notice of Motion and the amended Notice of Notion together with the statement of facts, chamber summons and verifying affidavit and they are opposing the same and did file their grounds of opposition dated **7th September, 2006.**

There is no evidence on record whether the respondent or the Attorney General was ever served.

If the court finds that indeed the Respondent whose decision has been challenged herein was not served as required under the provisions of order 53 of the Civil Procedure Rules, we shall apply to the court to have the entire case struck out for being an abuse of court process.

We summit that the applicant's application is bad in law and incompetent.

Firstly the applicant did not give a 24 hour Notice to the Registrar as required by the Mandatory Provisions of order 53 of the Civil Procedure Rules which was operational at the time of filing the application.

Secondly the annextures are not commissioned by a commissioner of oaths as required under the provision of oaths and statutory declaration act chapter 15 laws of Kenya.

Thirdly the applicant swore no affidavit in support of the Notice of Motion although mentioned of the phase (sic) of both the Notice of Motion and the amended Notice of Motion other than the verifying Affidavit which only contains the fact that the applicant had read and understood the statement of facts and nothing more.

Your lordship Judicial Review matters are concerned with process through which the decision being challenged was arrived at and not the merits of the decision which can only be challenged by way of Appeal.

The applicant herein is challenging the merit of the decision of the respondent herein by way of judicial review yet he did not file any appeal (See the amended statement of facts).

We submit the ex-parte applicant herein was given a hearing in which he testified, was cross examined and called three witness (sic) namely who all testified and were cross-examined before the decision of **18th May, 2006** was arrived at by the respondent as seen from the proceedings. He was also allowed to cross examine the interested parties and their witnesses.

The respondent's decision was proper and impartial and should not be disturbed by the honourable court.

All the procedures under land adjudication Act were properly followed before the decision that is being challenged herein was arrived at.

In the evidence before the respondent the ex-parte applicant claims to have purchased the land subject of the objection that is plot number 858 from the late NTIBA NKOROI the uncle of the interested parties but he did not provide any agreement or proof of any payment of the purchase price.

The respondent was therefore correct to ignore the fact that the applicant had purchased the said land.

Further from the evidence there was no dispute that the land subject matter of the objection was ancestral land. The applicant did not demonstrate that he belonged to the interested parties' clan and what came out in evidence was that he was only related to the interested parties through marriage to the family of Ntiba Nkoroi by virtue of his cousin being so married.

There was also no dispute that the father of the interested parties predeceased the (sic) Ntiba Nkoroi who was his brother and that by the time the interested parties' father died, the ancestral land had not been subdivided and the entire land was therefore left in the hands of the said Ntiba Nkoroi who instead of giving to the interested parties their father's share decided to give it to his in law for free and in the process

disinherited the interested parties.

We submit that the said Ntiba Nkoroi had no legal right to sell ancestral land before making sure that each and every son of his brothers and his own sons had been given their share. Such a sale, if indeed it took place was illegal, null and void.

There is no dispute that the interested parties just like the children of Ntiba Nkoroi and the other siblings were entitled to a share of their ancestral land.

Faced with the above situation the respondent was perfectly right in reading the judgment the (sic) he did.

Your Lordship the applicant has raised the issue of whether the respondent understood the language being used during the objection proceedings. However in the proceedings none of those who appeared as parties or the respondent raised any issue of failing to understand the language used as between one another as the proceedings went on until they were concluded. Indeed the language used from the proceedings was Kiswahili. Furthermore the applicant has not raised any issue with the proceedings as to the manner in which they were recorded. See paragraph 20 of the statement of claim.

Further the applicant has not stated in his application whether there was anything he talked in his evidence which has not been reflected in the proceedings. The mere fact that the respondent did not come from the local area does not mean he did not understand the local language or that they could not understand one another with the parties and their witnesses.

The contents of paragraph 12 of the statement of facts is not supported by the proceedings. There is nowhere in the proceedings the applicant ever requested for adjournment to call for more witnesses.

The fact that the other objections were rejected does not automatically mean that the objection by the third parties was also going to be dismissed. The objections which were dismissed were so dismissed because of lack of evidence to back them up and not because the respondent was biased against the applicant see paragraph 9 and 10 of the statement of facts.

From the proceedings the interested parties have explained that at the time the gathering was being conducted, they were in school and they were not aware of the intention of their uncle to disinherit them of their entitlement from their ancestors.

Your Lordship we submit the applicant has misinterpreted section 26 of the land adjudication action addressing the parties to objections proceedings as plaintiff defendant and witness. The respondent addressed the parties properly and if the applicant had an issue with that he ought to have raised it during objection proceedings. Furthermore the applicant has not shown the prejudice he has suffered, if any, as a result of the said address. See paragraphs 16 and 17 of the statement of facts.

On page 11 of the judgment, a reference has been made to Supreme Court practice 1997 Volume 53/1-14/6 which lays down the cases that qualify to be handled by the judicial review court. Quote " The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which an application for judicial review is made, but the decision making process itself"

AUTHORITIES

1. MOMBASA HCCC JR. NO. 16 OF 2016

HILARY KIPRUTO BETT VERSUS DIRECTOR OF PUBLIC PROSECUTION AND 2 OTHERS

In this case the court found that the remedy for judicial review is discretionally.

It was further determined that the remedy for judicial review is concerned with reviewing not the merits of the decision but the decision making process.

YOUR LORDSHIP the respondent acted in compliance with section 26 of the Land Adjudication Act and the principles of natural justice and we urge the court to find the application for judicial review by the applicant has no merit and dismiss the same with costs.

DATED AT NAIROBI THIS 4TH DAY OF DECEMBER, 2017

M'NJAU AND MAGETO

ADVOCATES FOR THE INTERESTED PARTIES

7. I have considered the pleadings proffered by the parties to buttress their assertions. I have considered their submissions and the authorities they have proffered.

8. At the outset, I find it necessary to comment on two issues. First is the submission that the grounds of opposition filed by the Interested parties on **7th September, 2006** should be struck out because they can only be filed in applications filed under **Order 51 Rule 14 of the Civil Procedure Rules**. I agree that Judicial Review Proceedings constitute a sui generis genre. However, the grounds of opposition filed by the Interested parties are meant to answer the claim made by the ex-parte applicant, which claim was made in these Judicial Review proceedings. Among other things, the grounds of opposition were raising pertinent issues such as that the apposite 24 hours notice had not

been given to the Registrar, the application was not supported by an affidavit, that the apposite annextures had not been commissioned etc etc. A conspectus of the Grounds of opposition is that the ex-parte applicant did not faithfully follow the strictures to be observed before Judicial Review Proceedings are filed. It can be said that the grounds of opposition were a warning to the ex-parte applicant that the **2nd and 3rd** Respondents would raise the mentioned procedural infractions during the hearing of the notice of motion dated **4th July, 2006** which, I think, their advocate thought would be heard orally. I do not find merit in the submission by the ex-parte applicant that these grounds merit being struck out. Indeed, the two respondents did not, at no place in the document that included their grounds of opposition, indicate that they were filing them under **Order 51 Rule 14 (5) of the Civil Procedure Rules**. In my view, the two respondents were not subjecting Judicial Review Proceedings to this order.

9. Regarding **section 26** of the **Land Adjudication Act**, it is pellucid that the Interested Parties, as persons affected by the adjudication register had locus to be heard in adjudication proceedings. The subject matter constituted their ancestral land. Indeed they have claimed that they were minors in school at the time the adjudication process was taking place.

10. As concerns the language used in the impugned proceedings, I find that the ex-parte applicant has not complained that he did not understand the proceedings in which it has not been controverted that the parties participated in. I do not find it necessary to say any more regarding the issue of language. The mere failure to mention the language which was used during the proceedings is not enough to render them invalid. Indeed no evidence was proffered by the ex-parte applicant that, if it was necessary, no interpretation took place.

11. Regarding excess of jurisdiction, I do not agree that the Interested Parties had no locus in participating in the impugned proceedings. This is not a good ground to deny the respondent jurisdiction. **Section 26** of the **Land Adjudication Act** is pellucid that the Interested Parties were affected parties who felt the adjudication register was not complete as they were left out. I also do not find satisfactory evidence that the apposite objection was heard outside the stipulated period.

12. Having perused the pleadings filed by the parties, I am not persuaded that there was irrationality on the part of the Respondent which would move this court to issue an order of certiorari against the respondent. Reference to objection Numbers **444 and 958** is veritably within his responsibility as provided for **in section 26 (2) of the Land Adjudication Act** which states:

> **"The Adjudication Officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection."**

Clearly referring to other objections and other matters which can help him to determine an objection is within "further consultations and inquiries" as the respondent thinks fit.

13. I agree with the Interested Parties that Judicial Review is concerned mainly with the process that leads to the impugned decision and not with the merits of the decision. However some of the claims made by the applicant such as lack of jurisdiction, irrationally etc, though not proved, were challenging the process rather than the decision.

14. I am not persuaded by the argument made by the Interested Parties, ***inter alia,***

a. That because a 24 hour Notice to the Registrar as required by the provisions of Order 53 of the Civil Procedure Rules, operating at the time of filing the application was not given;

b. That because the annextures were not commissioned by a commissioner for oaths as required under the provisions of the Oaths and Statutory Declarations Act

c. That because the applicant swore no affidavit in support of the Notice of Motion

d. That because the application may not have been served upon the Respondents

THAT for those reasons, alone, this application should be found lacking in merit. Indeed, there was no iota of evidence proffered by the Interested Party to prove that the application had not been served upon the Respondent.

15. What is the subject of this dispute is ancestral land. I agree that the Interested Parties, just like other close relatives are entitled to their share of their ancestral land.

16. I find that the ex-parte applicant did not prosecute this application timeously. I also find that the authorities (op.cit) cited by the parties are relevant in their exposition of precedents. The case proffered by the applicant, to wit, ***Republic Versus Communications Commission of Kenya ex-parte East Africa Television Network Ltd, [2001] KLR 82*** is a good authority that other statutes cannot displace the provisions of the Law Reform Act upon which Judicial Review proceedings are anchored. In this suit the grounds of opposition filed by the Interested Party were a mere response to the procedural infractions inherent in the application and which the Interested Parties wanted to be heard before this application proceeded to full hearing. They were not anchored on the Civil Procedure Rules at all.

17. The authority proffered by the Interested Parties, to wit, Mombasa HCCC J.R. NO. 16 of 2016, ***Hilary Kipruto Bett Versus Director of Public Prosecutions and 2 Others***, is good exposition of the principles that Judicial Review is discretionary and that Judicial Review should be concerned with reviewing not the merits of the decision but the decision making process.

18. I do find that the Oder of certiorari prayed for by the ex-parte applicant is not merited.

19. This application is, therefore, dismissed.

20. Although costs generally follow the event, and because the parties are relatives, I exercise my judicial discretion, and do order that no order as to costs is issued. This means that parties will bear own costs.

21. It is so ordered.

Delivered in open court at Chuka this 27th day of June, 2018 in the presence of:

CA:Ndegwa

Miss Kaaria h/b Mageto for the Interested Party

George Kamau h/b Morris Njagi for the ex-parte Applicant

P. M. NJOROGE

JUDGE