



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA MISCELLANEOUS JUDICIAL REVIEW CASE NO. 24 OF 2017

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284

AND LAND CONSOLIDATION ACT CAP 283

AND

**IN THE MATTER OF AWARD OF OBJECTION THARAKA APPEAL TO THE MINISTER APPEAL CASE 267 AND 268 2010
OVER PARCELS NUMBERS 736 AND 2125 AND**

IN THE MATTER OF LAW REFORM ACT CAP 26 LAWS OF KENYA

MUTWIRI MUGAMBI DANIEL.....APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER

THARAKA DISTRICT.....RESPONDENT

JERICA KANG'ARU MUGAMBI.....INTERESTED PARTY

JUDGMENT

1. This application was brought to court by way of a Notice of Motion dated **21st November, 2017**. It seeks orders:

1. That this honourable court be pleased to grant the ex-parte applicant an order of judicial review in the nature of certiorari to bring to this court and quash the decision of the appeal to the minister dated **5th July, 2017** relating to Land Parcel Nos. **736 and 2125/CHIAKARIGA A Adjudication Section**.

2. That costs be provided for.

2. It has the following grounds:

a) That the respondent acted unreasonably of the fact of the case regard and the nature of evidence tendered before it by the ex-parte applicant.

b) That the minister was biased as against the ex-parte applicant in favour of the interested party.

c) That minister acted wrongfully and unfairly by making reference, in his findings, to extraneous matters which were not part of the proceedings before him.

3. The annexed statement of facts dated **21st November, 2017** reads as follows:

STATEMENT OF FACTS:

A. Name and description of the applicant

1. The name of the applicant is Mutwiri Mugambi
2. The ex-parte applicant is a resident of Nkubu Meru South Sub County in the Republic of Kenya.

B. FACTS RELIED UPON

1. That I was the plaintiff in the appeal numbers 267 and 268 to the minister Tharaka over parcel Numbers 736 and 2125 CHIAKARIGA A ADJUDICATION SECTION.
2. That the interested party was the defendant.
3. That the minister grossly erred in law and practice and acted irregularly by failing to visit the locus in quo, to make notes and observations that would have assisted him in reaching a reasonable and fair decision.
4. That the minister acted irregularly by making a reference to incorrect evidence in his findings, when indeed there was no such evidence to the suit land and none forms part of the proceedings therein.
5. That the minister failed to consider and take into account the evidence tendered by the applicant and his witnesses, and in particular the fact that the applicant has extensively developed/improved the land and that the Interested Party has never stepped on the land, hence making unreasonable decision.
6. That the minister violated my rights to a fair hearing by failing to visit the locus in quo and the applicant was greatly prejudiced.
7. That the minister acted wrongfully and unfairly by making reference, in his findings, to extraneous matters which were not part of the proceedings before him.
8. That the decision of the minister was arbitrary, irrational and completely unreasonable and the same should be quashed.
9. That the decision of the minister deprives me my property without due process.

C. RELIEFS SOUGHT:-

- a) The applicant herein seeks leave of the court to apply for orders of certiorari removing to this court, and quash the decision of the appeal to the minister No. 267 and 268 of 2010 dated 5th July, 2017 in respect of Land Reference Nos. 736 and 2125/Chiakariga A Adjudication Section in.
- b) That cost of this ex-parte application be provided for.

D. GROUNDS RELIED UPON:

- c) The minister grossly erred in law and practice and acted irregularly by failing to visit the locus in quo, to make notes and observations that would have assisted him in reaching a reasonable and fair decision.
- d) The minister acted irregularly by making a reference to incorrect evidence in his findings, when indeed there was no much evidence to the suit land and none forms part of the proceedings therein.
- e) The minister failed to consider and take into account the evidence tendered by the applicant and his witnesses, and in particular the fact that the applicant has is on the land and that the Interested Party has never stepped on the land, hence making unreasonable decision.
- f) That the minister violated the applicant's rights to a fair hearing by failing to visit the locus in quo and the applicant was greatly prejudiced.
- g) The minister acted wrongfully and unfairly by making reference, in his findings, to extraneous matters which were not part of the proceedings before him.
- h) The decision of the minister was arbitrary, irrational and completely unreasonable.

DATED AT NKUBU THIS 21ST DAY OF NOVEMBER, 2017

MUTWIRI MUGAMBI DANIEL EX-PARTE APPLICANT

4. This suit was canvassed by way of written submissions.

5. The ex-parte applicant's submissions read as follows:

EX-PARTE APPLICANT'S WRITTEN SUBMISSIONS

Your lordship, it is our humble submissions that the ex-parte applicant has proved his case against the respondent and the Interested party as prayed and we urge the court to issue an order of certiorari as prayed in the Notice of Motion dated 21.11.2017.

Your Lordship, we wish to humbly submit very briefly on 4 headings as thus:-

1. On pleadings
2. On the evidence
3. On the law
4. On the costs

1. On the pleadings

The ex-parte applicant instituted this judicial review application pursuant to the leave of the court dated 13.11.2017 and filed in court on 13.11.2017.

At the inception of this judicial review application the ex-parte applicant filed in court the following vital documents.

- (a) Statutory statements of facts
- (b) Affidavit verifying the facts and annexures.
- (c) Certificate of urgency
- (d) Chamber summons
- (e) Notice of motion

Your lordship, as shown by the court record the ex-parte applicant was the plaintiff in the appeal numbers 267 & 268 over parcel numbers 736 and 2125 Chiakariga Adjudication Section. The proceedings of these proceedings are attached.

2. On the Evidence

Your Lordship, it is our submissions that the elders who purported to have entertained the Interested party had no jurisdiction to do so. Further, the respondent thereby acted *ultra vires* the Act. The Interested party's bid demonstrate why she is seeking to acquire the ex-parte applicant's land without filing a substantive suit in a competent court of law.

3. On the law

Your Lordship, as submitted hereinabove the ex-parte applicant then obtained leave before he filed this Judicial Review Orders of Certiorari.

It is our humble submission that the respondent had no jurisdiction to entertain the case and the orders which were issued by the respondent are therefore a nullity in law *ab initio*

It is our humble submissions that jurisdiction is everything and without it a court has no power to make one more stop. On this submission we rely on the authority of *M'Timitu M'Mithirwa v/s Diocese of Meru & Romano Kobia Meru – HCCC No. 52 of 1998*.

Pursuant to Order 53 of the Civil Procedure Rules, we urge the court to find that the issues which have been raised by the Interested Party are not relevant as the elders had no jurisdiction to entertain the proceedings.

On jurisdiction, we also rely on the following authorities in support of the ex-parte applicant's case:-

- (a) **Beatrice M'Marete v/s The Republic & Others CA NO. 259 of 2000**
- (b) **Florence Muthoni Stanley v/s Samwel Kinyua Mugambi HCA No. 76 of 2008.**

It is our submission that Judicial Review Proceedings deal with the decision making process and not the substantial of issues of the case and urge the court to issue orders of certiorari and quash the decision and award which was made by the deputy county commissioner Tharaka Nithi Sub-county.

4. On the costs

As the respondent has not filed any pleadings or challenged to the ex-parte applicant's case, we urge the court to award the costs to ex-parte applicant. We pray that the Interested Party also be ordered to pay the costs as well.

We so humbly pray.

DATED AT MERU THIS 12TH DAY OF FEBRUARY, 2018

FOR: MUTWIRI MUGAMBI DANIEL

6. The Respondent's written submissions read as follows:

RESPONDENT'S SUBMISSIONS

May it please your Lordship.

Before the honourable court is a Notice of Motion dated **21st November, 2017**.

1. The respondent's oppose it by filing grounds of opposition dated **26th January, 2017**.

Your Lordship, provision of section **29(1) Cap 284** Laws of Kenya states that:

1. Any person who is aggrieved by the determination of an objection under **section 26** of this Act may **within 60 days** after the date of the determination, appeal against the determination to the minister by:-

(a) delivering to the minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication.

and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

The Land Adjudication Act is a self-contained statute. A number of issues emerge from this particular provision. An appeal procedure is provided for to any party aggrieved by the decision of the adjudication officer. This procedure has to be complied with before invoking the jurisdiction of the court. The reason being that the statute is a specialized one in which issues dealt with therein must be extensively ventilated. Thereafter a party may invoke the courts Judicial Review Jurisdiction properly grounded on rules of natural justice were violated.

Another issue that emerges from **section 29 (1)**, is that a party cannot again raise issues of ownership. The decision of the minister is final in the sense that in the absence of proper grounds being raised and ventilated in the appeal, no other issue can be raised. A party can only approach the court strictly on the circumscribed grounds of appeal.

Further and connected to this issue is sub-section (sic) of which provides for the ministers power to delegate. It states that such powers held may be delegated to any public office. This provision does not limit persons who may hear appeals as long as they serve as public officers. Any argument such as the one relied by the ex-parte applicant is not only self-serving but misplaced in law. Further there is no evidence to demonstrate the want of jurisdiction.

The applicant cannot approbate and reprobate at the same time. According to the proceedings attached, a certificate of no objection was signed by parties to the appeal. It meant that the jurisdiction was not challenged then but is being done now since the appeal was against the expectation of the applicant/appellant therein. By appearing before the respondent, the applicant acquiesced to the jurisdiction. He cannot be allowed to raise the same issue again in any event the appeal was properly heard.

In view of the foregoing, we urge this honourable court to allow the preliminary objection and dismiss the Notice of Motion dated **6th February, 2018**.

Much obliged.

DATED AT MERU THIS 14TH DAY OF MAY, 2018

J. M. KIONGO,

SENIOR LITIGATION COUNSEL,

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE.

7. The Interested Party's submissions (in her unedited language) read as follows:

REF: DEFENDANT JERICA KANG'ARU MUGUMBI ID NO. 2480720 CHIAKARIGA "A" ADJUDICATION SECTION: PARCELS NO. 736 AND 2125

I Jerica Kang'aru Mugambi in the Chiakariga "A" adjudication section, wish to state the following:-

That I have never encroachment (sic) and illegal (sic) allocation of the portion of land parcel No. **736 and 2125 in the Chiakariga "A" Adjudication** as one **Mutwiri T. Mugambi** could have in his claims.

That I have been working and living in this parcel of land ever before the demarcation and adjudication. Even my six children have been born in this land between the year **1963-1984**, (sic) farming livestock, grazing padlock without interference.

That the clan and the chief (sic) committees registered me first on this land after giving out the required properties, (sic) erected boundaries for my parcel.

That during the demarcation period the demarcation committee registered and saw (sic) me boundaries of parcel **No. 736** in total because I was living here, farming, planted trees and enjoying my living here, that **Mutwiri T. Mugambi** did not show or indicate to have had any land disputes with me – **Jerica Kang'aru Mugambi** after land demarcation and first registration.

That when the adjudication committee started their work (sic) found me here and registered me here as the owner and beneficiary and issued me with **No. 736**.

That I lived on this land with my family and no one raised any concern on this land but I was surprised to find that an objection as filed in **1996** by one **Mutwiri T. Mugambi**.

That **Mutwiri T. Mugambi** did not raise any complaints on the occupation to this land to the clan committee, demarcating committee, and arbitration bond and even to the adjudication committee panel whether he has been utilizing this land or registered under his name (sic). He even has no remarkable developments like ancestral land, homestead, fences, planted trees or any other occupation to support his claims.

That the objection case on the parcel **No. 736** awarded me **one (1) acre** while **Mutwiri T. Mugambi** was awarded the balance of the land creating a new parcel **No. 2125**. I was not satisfied with this decision and appealed this decision to the minister due to the following concerns; that I have been in actual occupation of the land with my family without any concerns raised on my land. This only came about after **Mutwiri T. Mugambi** surprisingly filed an objection case on my land.

That even during the time the case/appeal to the minister was still in court before determination, I met a stiff opposition with **Mutwiri T. Mugambi** taking me to court under falsely (sic) pretense of me forcefully invading his land and malicious damage. I was locked up and denied the charges asking the magistrate to visit the ground to establish the truth. On visiting (sic) the charges were false and I was set free having (sic) deprived my rights forcedly.

Following the appeal to the minister (sic) decision which awarded me back my land Parcel No. **736 and Parcel No. 2125** which was curved out of my original parcel No. **736**. **Mutwiri T. Mugambi** decided to lodge a separate allegation of encroachment and office (sic) collusion that I have taken his land by exchanging it with his.

Why **Mutwiri T. Mugambi** did not appeal to the high court on the verdict of the appeal to the minister on **parcel 736 and 2125** respectively is suspect since he has approached the same high court on claims of exchange (sic) parcel of land and office collision in order to favour him in obtaining **parcels 736 and 2125** from the rightful owner **Jerica Kang'aru Mugambi**.

I ask that (sic) court to strike out this case with cost since it is malicious (sic) attempt by **Mutwiri T. Mugambi** to falsely (sic) facts once again through the use of facts (sic) hoping that the court will not do its due diligence and award me my land.

I too request the court to visit this parcel in order to establish the truth even inquire from neighbours who borders (sic) me and far.

8. The court appreciates that the Interested Party is a lay lady who is representing herself. A conspectus of her submissions is that she has always lived on her land and that her children were born and brought up on that land between the years 1963 and 1984. She avers that the clan and the demarcation committee were responsible for showing her her land and that the ex-parte applicant had not at the time of demarcation indicated that he had any dispute with her. She says that the demarcation process found her on her land. She asserts that she has all along been in occupation of the disputed land.

9. The Interested Party avers that the ex-parte applicant had harassed her and at one time had alleged that she had invaded her land and had her locked up and charged in court. She, however, says that when she moved the magistrate to visit the *locus quo*, he found that the allegations which spawned her being charged with a criminal case had no basis and acquitted her.

10. She asks the court to dismiss the suit since, in her view, the false facts alleged by the ex-parte applicant are malicious and, therefore, cannot form the basis for the court to find in his favour. She prays for costs.

11. The Respondent had filed grounds of opposition dated 26th January, 2017. They were in the following form:

GROUNDS OF OPPOSITION

TAKE NOTICE that the respondent herein shall at the hearing of the Notice of Motion dated **21st November, 2017** oppose the same on the following grounds:

- (i) That the motion is a non-starter and misconceived for enjoining the wrong respondent.
- (ii) That the motion lacks merit by delving into the merits of the decision dated **5th July, 2017** as opposed to the process.
- (iii) That judicial review orders are discretionary and not warranted even in the most merited circumstances.
- (iv) The applicant is only seeking to resuscitate a stale claim that has exhaustively been heard and determined.

12. Based on the above grounds, the respondent prays that the suit be dismissed.

13. I opine that the first ground amounts to a good ground for dismissal of the suit. The ex-parte applicant should have cited the minister as the Respondent. I will deal with this issue when determining this suit.

14. Regarding the argument that the suit lacks merit because the ex-parte applicant delved into the merits of the decision dated **5th July, 2017** as opposed to the process, I note that the ex-parte applicant himself rightly points out in his submissions that: "Judicial Review Proceedings deal with the decision making process and not the substantial issues of the case...." The ex-parte applicant and the respondent seem to have congruent positions regarding this matter.

15. I have considered the pleadings and submissions proffered by the parties in support of their diametrically incongruent assertions. The authorities cited by the ex-parte applicant regarding the issue of jurisdiction are good authorities in their factual circumstances. They are:

- a) M'MITHIRWA VERSUS DIOCESE OF MERU & ROMANO KOBIA – MERU – HCCC NO. 52 OF 1998.**
- b) BEATRICE M'MARETE VERSUS THE REPUBLIC & OTHERS – CA NO. 259 OF 2006**
- c) FLORENCE MUTHONI STANLEY VERSUS SAMUEL KINYUA MUGAMBI – HCA NO. 76 OF 2008.**

16. It is noted that the ex-parte applicant only produced the case of Florence Muthoni Stanley versus Samuel Kinyua Mugambi (**op.cit**). In that case the court found that the Appeals Committee lacked jurisdiction. This was a case concerning the Land Disputes Tribunal's Act. This case is predicated upon the Land Adjudication Act and the Land Consolidation Act. This authority is, therefore, not relevant to the circumstances of this case. It is clear that the ex-parte applicant has conflated issues.

17. On the issue of jurisdiction, it is pellucid that both the ex-parte applicant and the Interested Party had signed the apposite certificate of no objection. The Ex-parte Applicant had therefore subjected himself to the jurisdiction of the officer to whom the minister had delegated the apposite responsibility. You cannot eat your cake and still have it. You cannot willingly subject yourself to a jurisdiction and when the matter goes against you, you seek to disown that jurisdiction. Indeed, the issue of jurisdiction should be raised at the earliest possible time. At that earliest possible time, the ex-parte applicant subjected himself to the jurisdiction he is seeking to impugn.

18. On the ground that the minister erred in law and practice and acted irregularly by failing to visit the locus in quo and to make notes and observations, there is no iota of evidence to support this ground. Indeed, the minister was handling an appeal and the usual practice when courts and tribunals handle appeals is to rely on the impugned decision, the proceedings it is predicated upon and the submissions proffered by the parties. It is not usually the responsibility of an appellate court or tribunal to nilly willy embark itself on evidence fishing expeditious.

19. On the ground that the minister made reference to incorrect evidence in his findings, upon perusal of the proceedings, I do not find any good ground that would persuade this court to overrule the minister's decision.

20. On the ground that the minister did not take into account the evidence tendered by the ex-parte applicant and his witnesses, I find this assertion to be untenable. The ex-parte applicant has not pointed out the areas where this happened. I note that the Interested Party's assertions that she has lived on her land even before the adjudication process and that her children were brought up and raised on the suit land was not controverted, at all, by the ex-parte applicant.

21. On the ground that the ex-parte applicant had not been given a fair hearing because the minister did not visit the locus in quo, I find that this ground lacks merit. In this matter the minister was handling an appeal and there was no compelling justification for the minister to visit the locus in quo. By doing so, the minister would have done his duty in an unorthodox manner in that he would be opening issues meant to be handled by the lower levels in the adjudication pipeline.

22. I do not find any wrongful and unfair references to extraneous matters which would persuade me to overturn the minister's decision.

23. I find that the minister's decision was not arbitrary, irrational or in any way unreasonable.

24. Regarding the assertion that the suit be dismissed because the ex-parte applicant had sued the Land Adjudication Officer, Tharaka District instead of the Minister, I opine that this is a weighty issue which could lead a court of law to dismiss Judicial Review Proceedings. I

will, however, not dismiss this suit on this ground. It is a moot point if or if not this mistake on the part of the ex-parte applicant could be cured by the invocation of **Article 159(d)** of the constitution as a procedural technicality.

25. I agree with the respondent that by and large, the ex-parte applicant was attacking the merits of the minister's decision and not the process that spawned the decision. From the proceedings and the decision made by the minister, I do not find evidence that the minister was biased, that he did not give a fair hearing to the ex-parte applicant and that he trampled upon the rules of natural justice.

26. In the circumstances, this Judicial Review application is dismissed.

27. Costs will follow the event and are awarded to the Respondent and to the Interested Party.

28. It is so ordered.

Delivered in open court at Chuka this 26th day of June, 2018 in the presence of:

CA: Ndegwa

Mutwiri Mugambi Dniel – Ex-parte Applicant

Jerica Kangaru Mugambi - Interested Party

P. M. NJORGE,

JUDGE.