REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JUDICIAL REVIEW NO. 16 OF 2017

(FORMERLY MERU HIGH COURT JUDICIAL REVIEW NO. 33 OF 2012)

JORAM KABERIA ..... APPLICANT

VERSUS

DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER

IGEMBE SOUTH DISTRICT ..... 1ST RESPONDENT

LAND ADJUDICATION COMMITTEE

-AKIRANGONDU 'A' ADJUDICATION SECTION ..... 2ND RESPONDENT

JULIUS THEURI ..... INTERESTED PARTY

JUDGMENT

The Applicant's Case

1. By a notice of motion dated **28/11/2012** the Ex-parte applicant herein sought the following orders**:-**

> **(1) That this honourable court be pleased the orders of prohibition to remove into this court for purposes of being quashed the decision of A/R decision (sic) in A/R Objection No. 810, 811, 812, 813, 841, 815, and 2301 Akirangondu 'A' adjudication section over parcel Nos. 1516, 5026, 5027, 5032, 5043, 5044 and 5276 made on 13/12/2011.**
>
> **(2) That the cost of this application be provided for.**

2. The application is based on the grounds set out in the statutory statement and the verifying affidavit of the applicant both dated **7/11/2012.**

3. The grounds upon which the relief is sought are that:- the respondents acted in excess of their jurisdiction because by the time the decision was communicated the applicant's father was deceased; that the applicant was not aware or informed of the respondents' decision and only came to learn of it after the demise of his father; that the decision of the 2nd respondent was ultra vires the Land Adjudication Act and rules of Natural Justice and, finally, that the applicant has constructed a home, planted various crops such as *miraa*, maize, beans exotic and indigenous trees and has nowhere else to go. The applicant states that the interested party was his uncle.

The respondents Response

4. I have looked through entire court record and found that the respondents only filed grounds of opposition to the judicial review notice of motion dated 30/4/2014.

The Interested Party's Response

5. The interested party filed his sworn replying affidavit dated 13/12/2012 on 14/12/2012. In the replying affidavit he raised his doubts as to whether the applicant is the administrator of the estate of the late M'Mibuari Mibuari or/and whether he resides on **LR No. 1516, 5043** and **5044 Akirangondu 'A'** Adjudication Section as stated. He states all the cases between him and the applicant's father were decided on

13/12/2011 before the applicant's father passed on. He avers that all the cases and objections were conducted in the presence of the deceased and even the decisions thereon were read on his presence. He avers that he obtained the land parcels by following the due process of or law and without underhand dealings. He further avers that the proceedings were conducted by two District Land adjudication Officers, the second one being the Officer who succeeded the first one in office upon transfer. Lastly he disputed parcel of lands were held in trust by M'Mibuari Mibuari as it is evident from the adjudication record. He states that after the decision was made, he served a notice on the applicant to vacate land parcels Nos. **LR No. 1516, 5043** and **5044 Akirangondu 'A' Adjudication Section**. He further avers that these proceedings are time – barred, incompetent and an abuse of court process as they were filed on **30/11/2012** after the statutory period of six months had elapsed.

Submissions of the Parties

6. The applicant filed his submissions on the substantive notice of motion on 22/11/2016 while the interested party filed his written submissions on 8/5/2017. I have looked through the record and found no submissions on behalf of the respondents. I have considered the notice of motion, the responses of the respondents and the interested parties and those submissions.

Determination

Issues for Determination

7. I have examined the exhibits attached to the verifying affidavit of the applicant and found that he has annexed a copy of a grant of letters of administration to the estate of M'Mibuari Mibuari issued in **Succession Cause No. 95 Of 2012** and this puts to rest the doubts raised by the interested party as to whether or not the applicant is the administrator to the deceased's estate. However the grant shows that he was not the only administrator, for he was appointed in such capacity alongside one **Rael Muontubetwe** who has not been enjoined in these proceedings as a co-applicant. Whether these proceedings are sustainable in the absence of one administrator remains to be seen.

8. The following are the issues for determination in the matter:

> ***a. Whether the respondents acted in excess of their jurisdiction by reason of the fact that by the time the decision was communicated the applicant's father was deceased;***
>
> ***b. Whether the decision of the 2nd respondent was ultra vires the Land Adjudication Act and rules of Natural Justice.***
>
> ***c. Whether these proceedings are time – barred, incompetent and an abuse of court process as they were filed on 30/11/2012 after the statutory period of six months has elapsed.***
>
> ***d. Whether these proceedings are sustainable in view of their being instituted by only one administrator out of the appointed two.***

9. The issues are dealt with as hereunder.

a. Whether the respondents acted in excess of their jurisdiction by reason of the fact that by the time the decision was communicated the applicant's father was deceased;

10. He avers in his verifying affidavit that his father died on 12/2/2012 and that the applicant did not know that some of the cases like A/R **Objection Numbers 810,812,813,814,815** and **2301** had been concluded until two months prior to the filing of the judicial review notice of motion when he was served with a notice to vacate the land issued by the interested party's advocate. He then confirmed from the office of the 2nd respondent that the objections had been concluded and that the **Land Parcels Nos. 5043, 544** and **516** had been transferred to the interested party. He avers that the decision was made in the absence of his father. The record that the applicant annexed to his verifying affidavit shows that the proceedings that led to the impugned decision were conducted on **26th May 2010** and that the applicant's now deceased father was then involved and that he called a witness. The record also shows that the decision was made on **13/12/2011**. This was before the date on which the deceased is said to have died, that is **12/2/2012**.

11. There is no evidence adduced that neither the applicant nor the deceased never knew of the proceedings or the decision made upon adjudication. What the applicant says is that the decision was communicated late, after the deceased's demise.

12. There was bound to be someone affected by the decision. The applicant and others who may have been on the land must be affected. Notice to vacate was issued to them. There is no evidence that the respondents delayed in communicating the decision to the deceased or to the applicant.

13. In any event this court does not find it to be a proper conclusion that the communication of the decision after the deceased's death should render the decision null while that decision was made during the lifetime of the deceased in the proceedings in which he appeared to have willingly participated in. For that reason this ground is rejected.

b). Whether the decision of the 2nd respondent was ultra vires the Land Adjudication Act and rules of Natural Justice.

14. The applicant submits that succession proceedings were never filed in respect of his father's estate and that by ordering that the properties be registered in the name of the interested party the respondents were administering the estate of the deceased through the back door.

15. The effect of the 2nd respondent's decision was to be conducted in the adjudication office and in accordance with the decision made. The

exact time when the change was conducted would have been important in these proceedings, and in particular to support the averment that letters of administration were necessary for the change. The letter dated 1st October 2012 is not helpful in identifying the date of the implementation of the decision of the 2nd respondent. There is no evidence that by the time the registration was done the deceased had passed on or otherwise, legal reasons given for the proposition that letters of administration were needed to effect the change from the name of the deceased to that of the interested party. I would dismiss this ground for those reasons.

c. Whether these proceedings are time – barred, incompetent and an abuse of court process as they were filed on 30/11/2012 after the statutory period of six months has elapsed.

16. The impugned decision was made on the **13th December 2011.** These proceedings were commenced on **9th November 2012.** The date of commencement is clearly outside the 6 month period provided for by the law.

17. Section 9(2) and **9(3)** of the **Law Reform Act Cap 26** state as follows:

> ***2. Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.***
>
> ***3. In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."***

18. Order 53 R 2 of the **Civil Procedure Rules** provides as follows:

> ***Time for applying for certiorari in certain cases [Order 53, rule 2.]***
>
> ***2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."***

19. Though leave had been granted to the ex-parte applicant to bring these proceedings, the observation of this court is that the leave stage is usually conducted ex-parte unless the court gives directions to the contrary.

20. A look at the case of **Rosaline Tubei & 8 others v Patrick K. Cheruiyot & 3 others [2014] eKLR** will underline the seriousness with which the issue of limitation of time in judicial review proceedings must be regarded. In that case the applicant sought for extension of time within which to apply for judicial review orders. While dismissing the application, the court observed as follows:

> ***"16. It follows that a court cannot grant leave to a party seeking to file an application for judicial review out of time, and if such leave is granted, it can be challenged at the substantive hearing of the motion.***
>
> ***17. It is upon the ex-parte applicants to find other avenues to push their grievances, for the door to access the remedy of judicial review, is now firmly shut and the key to open the door is not available, for it was thrown into the proverbial sea by effluxion of time.***
>
> ***18. I do not see how this application can succeed. I decline to extend time for commencement of judicial review and further decline to grant leave to commence judicial review to quash the subject decision of the tribunal and subsequent decree from the Magistrate's Court. This application is hereby dismissed but I make no orders as to costs."***

21. Though this court granted leave ex-parte on the **9th November 2012** and ordered that such leave was also to operate as a stay, it is possible to revisit the grant of such leave where a good reason is provided.

22. In this case an objection has been raised that the proceedings were commenced more than six months from the date of the impugned decision. I have examined the record and from the analysis above, found that this ground has merit. I would therefore uphold the Interested Party's objection regarding time-bar.

d) Whether these proceedings are sustainable in the absence of one administrator.

23. I have already noted that there was only one administrator named as the applicant in these proceedings. There is no averment in the verifying affidavit of the applicant that he swears the affidavit on behalf of the other administrator. Indeed it is not even known from the record whether the other administrator is aware of these proceedings.

24. Order 31 Rule 2 Of The Civil Procedure Rules provides as follows:

Joinder of trustees, executors and administrators [Order 31, rule 2.]

"2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and trustees, executors, and administrators outside Kenya, need not be made parties."

25. It would appear that though the rule provided for joinder of all trustees, executors or administrators to a suit commenced against them, where a suit is commenced by trustees, executors or administrators they must all be enjoined as parties. Several decided cases illustrate this point.

26. In the case of **Raffaella Adiyakhiso Ntotoi V Robert Obrian Lenguro[2012] eKLR** an objection was raised to an application for an injunction on the basis that the application is fatally defective and both cannot stand as the suit and the application was not filed by both administratix and the administrator. Makau J, after citing the decision of Ojwang J (as he then was) in the case of **The Attorney General-Vs-Kenya School Of Flying Ltd Civil Suit 215 Of 1999,** observed as follows:

"The application cannot stand and as such I find that no prima facie case has been established with probability of success. As the plaintiff's application and/or suit stands now without amendment it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country.

The upshot of this application is that the same is found to be incompetent and is struck out with costs to the respondent."

27. It is now clear that the Notice of Motion dated **28th November 2012** has no merits as it has not demonstrated that there was want of jurisdiction or lack of natural justice in the process that gave rise to the impugned decision. It is also incompetent as these proceedings were time barred and only one administrator out of the two appointed to administer the estate of the deceased M'Mibuari M'Mibuari was made an applicant instead of both of them.

28. Consequently I hereby vacate the orders of leave and stay granted by this court on the **9th November 2011** and I dismiss the notice of motion dated **28th November 2012** with costs to the respondents and the interested parties.

Dated and signed at Kitale this **12th** day of **June 2018.**

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this **22nd** day of **June, 2018.**

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

In the presence of:

C/A Janet

Mr. Mutunga holding brief for Kiongo for 1st respondent

N/A for the applicants

N/A for the interested parties