



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JUDICIAL REVIEW NO. 37 OF 2010

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN LAND DISPUTES

TRIBUNAL MERU CENTRAL DISTRICT.....1ST RESPONDENT

KIMWERE MUTUOTA.....1ST INTERESTED PARTY

DIRECTOR OF LAND ADJUDICATION AND

SETTLEMENT.....2ND INTERESTED PARTY

AND

EXPARTE

ZACHARIA MPUTHIA M'THIRAI

JUDGMENT

The Applicant's Case

1. By a notice of motion dated 7/6/2010 the Ex-parte applicant herein sought the following orders:-

(1) That an of certiorari be issued to remove to this court the decision of Meru Central District Land Disputes Tribunal made on 29th of December, 2009, read to the parties by J. Ndubi on 24/2/2010 in Land Dispute Tribunal No. 48 of 2009 registered at the Chief Magistrates Court LDT No. 4 of 2010 in respect of LR No. IGOJIU/MWERU II/934 and quash the same and other orders therein made without jurisdiction and contrary to law of land.

(2) That the cost of this application be provided for.

2. The application is based on the grounds set out in the statement of facts dated 11/5/2010 and the verifying affidavit of the Ex-parte applicant of the same date.

3. The grounds upon which the relief is sought are that the Land Disputes Tribunal dealt with a matter which had been previously adjudicated upon substantially and judgment given and which was therefore *res judicata*; that the Land Disputes Tribunal lacked jurisdiction to deal with a matter under **Caps. 283** and **284** respectively as the two Acts stipulate a clear procedure on how to deal with disputes and that decision of the Land Disputes Tribunal was illegal and void *ab initio*.

4. In his verifying affidavit the Ex-parte applicant stated that the said land is under a Land Adjudication process and that the 1st and 2nd interested parties are his neighbours at home. In 1969 he filed an **Objection No. 26 of 1969** which was heard and determined pursuant to the laid down law regarding adjudication and he exhibits the proceedings therefrom as **Exhibit ZM-01**; by that decision, he avers the Committee ruled the suit land belongs to him and the interested party and that it ought to be subdivided equally between them. He averred that he did not appeal that Committee decision as he was satisfied and that the decision was later implemented.

5. However on 1st December, 2009 the Interested Party filed a case before the Land Disputes Tribunal and it was heard. The proceedings

therefore are exhibited as **ZMT-02**. The applicant, on the basis on his advocate's advice which he believes to be true states that the matter is *res judicata* and the Land Disputes Tribunal could not sit on an appeal from the decision of a Committee established under the Land Adjudication Act. He also exhibits as **ZMT-03** a copy of a letter confirming that the Committee decision in **Objection Case No. 26 of 1969** was implemented.

6. The 1st interested party filed a response to the motion vide his sworn affidavit dated 24/3/2010. In that affidavit he stated that the Ex-parte applicant is a member of their clan and a neighbour and that the subject land; that is **Igoji/Mweru II/934** is owned by both of them in equal shares. He agreed with the Ex-parte applicant that the land was ordered to be subdivided equally between them in **Objection No. 26 of 1969** and that that decision has never been challenged to date. However he alleges that from his position as the chairman of the Land Adjudication Committee of the area the Ex-parte applicant has perpetually frustrated the implementation of the decision by taking him "in rounds" hence the decision to lodge a complaint with the Tribunal which heard the complaint and gave its award which is the subject of this judicial review notice to motion.

7. The Interested Party averred the Tribunal did not arrive at a holding different from that of the Committee in **Objection No. 26/69** but only ordered the Adjudication Officer and Land Registrar to implement the award in **Objection No. 26/69**. The interested party further avers that the Ex-parte applicant has been in possession and user of the entire land parcel since 1969 to date and has never allowed the interested party utilize his entitlement of a half share. On that basis he avers that he was only agitating for his right to occupy his rightful share and that the applicant had basically trespassed into his entitlement of half share of the land. The Interested Party expresses surprise that the entire land, contrary to the award in **Objection No. 26/69**, was registered in the name of the Ex-parte applicant contrary to the award and avers that such registration was illegal. He argues that even if the Tribunal award is quashed nothing would change as the award in **Objection No. 26/69** still stands in his favour. He adds that no prejudice will be occasioned to the applicant if the Tribunal award is implemented since that award concurs with the Committee decision in **Objection No. 26/69**. He urges that this court should look into the substance of his complaint before the Tribunal uphold the Tribunal findings in order to meet the ends of justice. In his view the applicant should be ordered to respect the decision in **Objection No. 26/69** and should not be allowed the hide behind this proceedings to propagate his own fraud and illegality by having the land registered absolutely in his names. Therefore, the applicant should be ordered to surrender a half-share of the land to be registered in the name of the interested party. He differs with the Ex-parte applicant by stating that the letter dated 14/4/2010 from the District Land Adjudication and settlement Officer which alleged that the award in the **Objection No. 26/69** has been implemented did not represent the true position on the ground as that that decision has never been implemented. The urges that this court rejects the application and that the Tribunal award and objection award should be ordered to be implemented forthwith. He points the Land Disputes Tribunal as evidence of that want of implementation of the objection award.

8. In the course of these proceedings, the Ex-parte applicant passed on on 7th December, 2012 and, armed with his death certificate and Limited Grant of Letters Of Administration in respect of his estate, his son one Mputhia Nkonge Lawrence applied vide an application dated 9/11/2016 to be enjoined in this proceedings as the administrator of the deceased's estate. An amended notice of motion dated 21/6/2017 reflecting the substitution was filed on 27/6/2017.

9. Before this substitution the Ex-parte applicant had filed his written submission on 26/7/2012 and the 1st interested party had filed his on 28/8/2012.

10. In the Ex-parte applicant's submissions he reiterates that the matter is *res judicata* and that no appeal was lodged to the award in **Objection No. 26 of 1969**. He avers that the land measures 8.22 acres and submits that the award was duly implemented. He placed great emphasis on the contents of **exhibit "ZM-03"** which is a letter from the Land District Adjudication and Settlement Officer which reads as follows: -

14th April, 2010

Zacharia Mputhia

RE: MWERU II P/NO. 934

Please refer to your letter dated 8th April, 2010 on the above mentioned subject matter. The parcel of land Committee case No. 26/69 was implemented.

This office would wish to state that the Committee case was implemented as per the proceedings and 4.11 acres extracted and issued with a new number combined with other parcels as per Cap. 283 to make parcel no. 442.

Attached herewith are copies showing demarcation book (R.E.R of P/No. 5 & 442). The area has since been registered.

Signed

JAMES G. KAMAU

DISTRICT LAND ADJ & SETT OFFICER

IMENTI NORTH DISTRICT

11. However it is noted that this evidence is insufficient as no copies of the demarcation book are attached to that letter. No other evidence is exhibited by the Ex-parte applicant to support the allegation that the decision of the Committee was implemented. He however has admitted that his suit land measures 8.22 acres at the time objection.

12. I have examined exhibit “**KM1**” exhibited in the affidavit of the 1st Interested Party. It is a copy of the green card for **Parcel No. Igoji/Mweru II/934**. The important thing to note here is the size of that plot which is given as **3.94 hectares**. Conversion of this into acres gives 9.735 acres. If the land was originally 8.22 acres at the time of the objection and the objection award ordered that it be subdivided between the Ex-parte applicant and the 1st interested party it is not possible that the Ex-parte applicant would, after the implementation of the award be left with more than 4.11 acres. In my view each party should have obtained 4.11 acres after subdivision and had the same registered in their respective names.

13. The Committee Award in **Objection No. 26/69** does not mention any number. The green card shows that the first registration of the land comprised of **Parcel No. Igoji/Mweru II/934** was effected on 7/11/2008. In view of admission by the Ex-parte applicant and evidence on the green card the land comprised in **Parcel No. Igoji/Mweru II/934** is more than 4.11 acres and in the absence of any other evidence from the Ex-parte applicant that the disputed land was subdivided equally between him and the interested party I find that the decision was not implemented and that the decision of the Land Disputes Tribunal was right.

14. The plea of *res judicata* has been raised by the Ex-parte applicant. However the decision of the Land Disputes Tribunal is in accord with the Objection Committee decision that first decided the dispute between the two parties herein the substantive justice in the case lies in the full implementation of the Committee decision. There is no good reason why that decision has not been implemented almost 50 years after it was made. The Interested Party’s version is that the non-implementation was caused by the interference by the Ex-parte applicant who abused his office of the chairman of the Committee to thwart the implementation this could be the case. That may or may not be the case.

15. Judicial Review remedies are discretionary and the court may, even where the criteria of issuance of orders sought has been met, decline to issue those orders provided there is a good reason for denying them. In this particular case, I find that the issuance of the judicial review order would perpetuate a fraud on the part and for the benefit of the Ex-Parte applicant and at the same time deny the 1st Interested Party his rightful share of the suit land thus leading an unjust outcome which would not in the interests of justice. I find that this is a good case for exercise of the discretion of this court to deny the orders sought. I therefore find that the prayers in notice of motion dated 7/6/2010 and as amended on 21/6/2017 cannot be granted and I therefore dismiss that notice of motion with costs to the respondent and the interested parties.

Dated, signed at Kitale this 12th 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 for the interested party

No appearance for the applicant

No appearance for respondents