



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC JR CASE NO. 17 OF 2015**

**JOHN KIUNJURI M'MWITHA ..... 1<sup>ST</sup> EXPARTE APPLICANT**

**JOSEPH KUBAI ..... 2<sup>ND</sup> EXPARTE APPLICANT**

**FRANCIS MIRITI NGERA ..... 3<sup>RD</sup> EXPARTE APPLICANT**

**VERSUS**

**THE LAND ADJUDICATION OFFICER**

**ANTUAMBURI ADJUDICATION SECTION ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The notice of motion dated 18.8.2015 and filed on 19.8.2015 seeks the following orders; That an order of certiorari be issued bringing into this court and quashing the proceedings, findings and decision of the 1<sup>st</sup> respondent in objection case no. 688, 689 and 690 in respect of land parcels no. 608, 1252, and 6038 in Antuamburi adjudication section. The exparte applicants are also seeking for costs of the suit.

**Case for Exparte Applicants**

2. The exparte applicants were initially three namely John Kiunjuri M'Mwitha (1<sup>st</sup> exparte applicant), Joseph Kubai (2<sup>nd</sup> exparte applicant) and Francis Miriti Ngera (3<sup>rd</sup> exparte applicant). During the trial, the 2<sup>nd</sup> Exparte applicant died. He was substituted with Francis Miriti who is already the 3<sup>rd</sup> Exparte applicant.

3. The case of the Exparte Applicants is advanced by the 3<sup>rd</sup> exparte applicant vide his affidavit in verification of the facts filed on 29.7.2015. The applicants aver that they are close relatives, and are the respective recorded owners and are in absolute possession, occupation, cultivation, user, development and enjoyment of their land parcel No's. 608, 1252 and 6038 measuring about 1.86 acres, 1.00 acre and 2.00 acres respectively. Documents marked "FMN2" are their respective ownership confirmation letters.

4. The Exparte- Applicants further state that the suit lands are portions of their extended family's ancestral land, having been acquired by their great grandfather one Kandura in or about 1920's, and that they inherited these parcels around 1960s.

5. The Exparte applicants contend that they have developments on the suit land including their Dwelling houses, Livestock, Trees, fruits and food crops.

6. The Exparte- Applicants aver that the interested party is not related to them and has no form of justiciable right or interest in the suit lands, and has never utilized any portion thereof whatsoever.

7. The Exparte Applicants claim that they were not given an opportunity to be heard. They only saw the interested party and the surveyor visiting their parcels of land in July, 2015. They obtained the purported proceedings in July 2015 only to realize that the decision had no date or its maker.

8. The Exparte- Applicants therefore contend that the rules of natural justice were violated as they were condemned unheard.

9. The Exparte- Applicants also claim that the impugned decision is illegal as the purported objections were "cooked" to fall within Ankamia adjudication section yet the suit lands are in Antuamburi adjudication section. Reference has been made to the top of page 1 of the

proceedings marked “FMN3.

10. The exparte applicants claim that the challenged decision is unlawful ab initio in that the purported objections were not heard with the aid of a committee as required under sections 9, 11 and 26 of the Land Consolidation Act, Cap 283, Laws of Kenya. They also claim that their legitimate expectations to be heard were trampled upon as the purported objections were not determined through application of their Meru Customary laws as required by the law.

11. The Exparte Applicants claim that the 1<sup>st</sup> respondent and the interested party intend to delete their names from the records and indicate the interested party as the recorded owner of the suit lands, and that the interested party has vowed to marshal rogue youth to forcibly evict them from the suit lands so that the interested party can assume vacant possession of the same.

#### **Case for the interested party.**

(i) The interested party contends that the suit parcels were a block of land which was gathered by his father, one M'Lincuni M'Ithiri, which land had been illegally held and subdivided by the exparte applicants but there were directions that the same be returned.

(ii) The interested party claims that the objection proceedings related to the parcels at Antuamburi Adjudication section and the indication that the same related to Ankamia must have been a typographical oversight considering even that the name Ankamia appears nowhere else in the proceedings.

(iii) The interested party further avers that the proceedings in question were determined on 18.7.2012 and the exparte applicants were present during the hearings, presented their evidence and were granted all opportunities to be heard. He claims that the exparte applicants took no steps and only came to court when the interested party started taking vacant possession.

#### **Case for the respondent**

12. The respondent through the office of the Attorney General did not file any response to the main motion, despite numerous promises to do so. On 4.4.2018 the respondent through their advocate addressed the court as follows: ***“I concede to the application (in the main motion). May the objections be referred back to the DLASO as per the land consolidation Act”***. In essence, the respondent is not opposing the prayers sought in this suit.

#### **Submissions.**

13. The exparte applicants have submitted that the respondents have not opposed this suit. They also aver that 1<sup>st</sup> respondent breached the rules of Natural Justice as the exparte applicants were condemned unheard. They also submit that the decision in objection proceedings was cooked up as the said proceedings make reference to Ankamia Adjudication section yet the suit parcels are in Antuamburi adjudication section.

14. On the issue of breach of rules of natural justice the exparte applicants have relied on the case of **Catherine Muthoni Kirungi & another versus Chairman land adjudication and settlement officer & 3 others Nyeri Court of appeal civil appeal case no 21 of 2016.**

15. The exparte applicants have also submitted that the impugned decision was made unprocedurally without the aid of a committee as required by the law. On this point, the exparte applicants have relied on the case of **Peter Kimandui versus land adjudication officer Tigania East District & 4 others Nyeri court of appeal, civil appeal no. 28 of 2015.**

16. The interested party has on the other hand submitted that the Judicial Review case is time barred and ought to be dismissed because the findings and decision sought to be quashed were made on 12.7.2012 and 18.7.2012. The interested party contends that the application for leave to apply for orders of certiorari was made three years after the date of the decision in the objection proceedings contrary to the law as provided under section 9 (3) of the law reform Act cap 26 laws of Kenya and order 53 rule 2 of the civil procedure rules.

17. The exparte applicant have rebutted this allegation by stating that the decision itself is undated.

18. The interested party also states that there is nothing in the proceedings to indicate that the applicable law was the Land Consolidation Act (cap 283 and that, even the Land adjudication act (cap 284) could have been the law applicable. It is also submitted that even if the applicable law was cap 283, there is nothing in the act which requires that all committee members be listed. Interested party further states that the committee members did ask questions and this confirms that committee members were present.

19. On issue of breach of rules of natural justice, the interested party contends that the exparte applicants were present during the proceedings.

#### **Determination**

20. The first issue to determine is whether this Judicial Review motion is time barred?. Section 9 (3) of the law reform Act (cap 26) provides as follows: ***“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.....”***

21. Order 53 rule 2 of the Civil Procedure Rules provide that “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.

22. In both the application for leave (dated 29.7.2015) and the main J.R motion dated 18.8.2015) the exparte applicants have not indicated the date of the 1<sup>st</sup> respondent’s decision. They claim that the decision was not dated. On the other hand, the interested party contends that the proceedings in question were determined on 18/7/2012 and that the applicants were aware of this.

23. I have perused the Objection proceedings marked EMN3 and they indicate that the case was heard on 12.7.2012. The record at the end of the hearing reads as follows: **“Court adjourned for Judgment on 18.7.2012 at 10.00 am”**. The findings and decision are then recorded thereafter. Whether the decision was delivered on 18/7.2012 remains a matter of speculation as the decision bears no date. That being the case, it is not possible to state with certainty the period within which the Ex-parte Applicant were supposed to comply with the law regarding timelines of filing a Judicial Review Motion. I therefore find that the suit is not time barred.

24. The exparte applicant contends that the applicable law was the Land Consolidation Act which requires that the proceedings be heard by aid of a committee as per section 9, 11, and 26 of the aforementioned Act; but the interested party states that there is nothing on record to show that the land consolidation Act was the applicable law.

25. I have perused the objection proceedings marked “FMN 3”. There is no indication as to which law was being applied. However, there is a record of five committees who were present. This is an indication that the respondent was attempting to comply with the law. It is section 26 of the Land Consolidation Act which requires that objection proceedings before the DLASO be heard with the aid of a committee. Further the exparte applicants have availed a document marked “FMN” a letter from DLASO indicating that the law applicable in the objection case for suit parcel no. 1252 was the land consolidation act. In light of the foregoing, I am inclined to believe that the applicable law was the land consolidation act (cap 283 laws of Kenya).

26. Section 9 of the land Consolidation Act deals with the appointment of committee members whereas section 14 deals with procedure and quorum. Section 26 of the land consolidation Act stipulates that the DLASO is supposed to hear a case with the aid of a committee ..... **Peter Kimandiu vs. DLASO & 4 others Civil Appeal No. 28 of 2015**. The proceedings marked FMN 3 do not indicate that the law was complied. No committee member is indicated as having signed the decision. I must also point out that the burden is not upon the exparte applicant to prove which law was applicable. That burden squarely falls upon the respondent. Perhaps the 2<sup>nd</sup> respondent had noticed this anomaly and that is why he is not opposing the motion. This far, I find that the motion is merited on the basis that the applicable law was not clearly indicated and complied with.

27. The proceedings marked “FMN 3” indicate that the suit parcels were in Ankamia Adjudication section. The interested party states that this must have been a typographical error. However the objection proceedings form a very important part of the dispute resolution mechanism in adjudication process. Such proceedings remain the point of reference at the final stage of ascertainment of rights and interests in land. The respondent is mute on this issue. It is therefore necessary to have the record corrected to reflect the proper adjudication section which is Antuamburi.

28. On the issue of breach of rules of natural justice, I find that the exparte applicants were present during the trial. They gave evidence and they had also conducted cross examination.

29. However, as earlier stated, there is no certainty as to when the decision was given. There is also no indication that the exparte applicants were present when the decision was delivered. I can only conclude that the rules of natural justice were breached in so far as the decision of respondent was delivered without indicating the presence of the exparte applicants.

### **30. Final orders;**

(i) An order of certiorari is hereby issued bringing into this court and quashing the proceedings, findings and decision of the 1<sup>st</sup> respondent in objection case no. 688, 689 and 690 in respect of land parcel no. 608, 1252 and 6038 in Antuamburi adjudication section.

(ii) The matter is be remitted back to the respondent for hearing and determination in accordance with the applicable law and the rules of natural justice.

(iii) The 1<sup>st</sup> respondent was responsible for the shortcomings in the objection proceedings. In the circumstances, each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 26<sup>TH</sup> DAY OF JULY, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

E. Kimathi for interested party

K. Gitonga for Exparte applicant

B. Kimathi for respondent

Exparte applicant

Interested party

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**