



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC JUDICIAL REVIEW CASE NO. 21 OF 2017**

**FORMERLY MERU ELC JUDICIAL REVIEW CASE NO. 615OF 2013**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND ADJUDICATION OFFICER**

**MERU SOUTH/MAARA DISTRICTS.....RESPONDENT**

**M'RIBA RUMUKIA.....1<sup>ST</sup> INTERESTED PARTY**

**MWENDA KAJOGI.....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE:**

**ZACHARY NJERU MUGAMBI.....1<sup>ST</sup> APPLICANT**

**M'NDEREBA MAGIRI.....2<sup>ND</sup> APPLICANT**

**FRANCIS KABURU JOHNSON.....3<sup>RD</sup> APPLICANT**

**JUDGMENT**

1. These judicial review proceedings were brought to court by way of Notice of Motion dated **28<sup>th</sup> May,2013**. In the application, the ex-parte applicants seek the following reliefs:-

A. The honourable court be pleased to issue an order of Mandamus compelling the respondent to implement the lower Kandugu Adjudication Committee decision made on **20.3.2001**.

B. Costs be in the cause.

2. The application is buttressed by the following grounds:-

A. The respondent has failed, refused and/or ignored to implement the committee decision.

B. Statutory statement of facts.

3. The apposite statutory statement of facts is in the following form:

**STATUTORY STATEMENT OF FACTS**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants are adult male all residing within Meru South/Maara district and their address of service shall be C/O

**L.KIMATHI KIARA & CO. ADV,**

**NCHEEGE PLAZA 2<sup>ND</sup> FLOOR,**

**P. O. BOX 2403-60200,**

**MERU.**

2. The respondent is the land adjudication officer Meru South/Maara district (service to be effected through applicants counsel office).

3. The Interested Parties are adult males of sound mind residing within Meru South/Maara district (service through applicants counsel office).

4. Relief sought.

a. An order of Mandamus directed to the respondent to implement the committee ruling made on 15.2.2001 to the effect that the applicants get 5.88 acres out of L.R. NO. Kandugu Adjudication Section L.R. No. 87.

b. Any other relief the court may deem just to grant.

c. Costs of the application.

**GROUND UPON WHICH RELIEF IS SOUGHT**

a. The respondent has for the last 10 years failed to implement the ruling of Kandungu Land Adjudication Committee despite there being no pending Appeal or dispute.

**DATED AT MERU THIS 22<sup>ND</sup> DAY OF MAY 2013**

**FOR: L. KIMATHI KIARA & CO. ADVO.**

**FOR:THE APPLICANT**

4. The application is supported by the affidavit of Francis Kaburu Johnson sworn on **28<sup>th</sup> May, 2013** which states as follows:

**I, FRANCIS KABURU JOHNSON of P. O. Box 171 CHUKA** do make oath and state as follows:

1. That I am the 3<sup>rd</sup> ex-parte /applicant herein and thus competent to swear this affidavit.

2. That on **20.3.2001** the land committee of lower Kandungu Adjudication Section after hearing a case filed by M'RIBA RUMUKIA made a decision that land parcel No. 87 sub-divided into 5 portions of approximately 5.88 acres each and be transferred to the ex-parte applicant and the Interested parties (proceedings annexed and marked F.K. "1").

3. That later an appeal was filed in the arbitration board and was dismissed and the board directed that the committee decision do stand (annexed are proceedings and decision of the arbitration board marked F.K. "2").

4. That we have on several occasions (sic) we have sought the implementation of the decision but the respondent has failed to implement it despite direction from the director of land adjudication (annexed are the letter marked F.K. "3").

5. That there is no appeal is (sic) pending nor any other legal hurdle to prevent the implementation of the committee decision.

6. That we are unable to develop our respective portions due to the failure of the implementation of the said decision.

7. That all what is deponed to herein is true to the best of my knowledge, belief and understanding.

**DATED AT MERU THIS 28<sup>TH</sup> DAY OF MAY, 2013**

5. As the Respondent is the person who is alleged not to have performed his/her legal duty, I deem it fit to produce the respondent's replying affidavit in full herebelow:

**REPLYING AFFIDAVIT**

**I, DIANA NYAMBURA** the District Land Adjudication & Settlement Officer, Meru South / Maara District, **P. O. Box 485-60400, Chuka**, state as follows:

1. That during demarcation, the disputed land was initially registered to M'Riba Rumukia and issued with P/NO.87.
2. That one Mwenda Kajogi filed a committee case No. 14/94 which was heard first on **15.2.2001** and in a ruling/decision delivered on 20.3.2001, the committee decided that the land be subdivided into five (5) equal portions amongst:
  - a) M'Riba Rumukia
  - b) Birisi Maeti
  - c) Ndereba Magiri
  - d) Zachary Njeru
  - e) Mwenda Kajogi
3. That however, after the ruling by the committee, one M'Birisi Maeti expressed his dissatisfaction with that decision and for purposes for him to file an appeal to the Arbitration Board, the five persons who were to benefit from the committee decision were issued with new parcel numbers even though there was no implementation done on the PID nor on the ground (NB: an appeal to the Arb/Board is done within 14 days after the committee decision).
4. That new numbers were issued as follows:
  - a) M'Riba Rumukia – P/No. 87
  - b) Birisi Maeti – P/No. 1411
  - c) Ndereba Magiri – P/No.1409
  - d) Zachary Njeru – P/No. 1410
  - e) Mwenda Kajogi – P/No. 1408
5. That it was after the numbers were issued that M'Birisi Maeti lodged arbitration board cases against the rest for persons, in appeals number 33/1, 34/1, 35/1 and 36/1 for P/No.1409, 87, 1410 and 1408 respectively.
6. That these appeals were first heard on **25.01.2005** and in a decision/ruling made on **04.02.2005**, the claim by the appellant was dismissed and also upheld the committee decision.
7. That going by the sketch attached to the proceedings of the Arb/Board (page 26) drawn on **03/02/2005** a day before the ruling, the Arb/Board was very clean (sic) and categorical on how the land in dispute was to be subdivided into five (5) equal portions and where each of the five benefactors was to be located within the original P/No.87.
8. That from what you (all the parties involved in the dispute over the land) have confirmed, at the time the adjudication register of this adjudication section was being published complete, the decision by the Arb/Board had not been implemented and P/No. 87 was infact as it were during the initial demarcation.
9. That however, during the 60 days notice for the inspection of register one M'Riba Rumukia and Mwiandi Mukira filed objections 305 and 286 against P/No. 87 respectively.
10. That the two A/R objections were consolidated and heard no **13.7.2010**. In a ruling dated **14.06.2011**, objections 286 and 305 were both dismissed. The LAO also upheld the decision of the arbitration board which according to his ruling was the decision to be implemented.
11. That having said that, after checking the PID, I have found that the original land which was demarcated as P/No.87, now comprises of eight (8) portions i.e P/No.1408, 1409, 1410, 1411, 1944, 1945, 1946 and 87. Thus a part from the first five (5) portions which were to be implemented, three more portions P/NO.1944, 1945 and 1946 have been added and according to my investigations these three parcels should have been excised off from the 1/5 (one fifth) of the original disputed land since it was a sub-division allowed after the ownership claim was heard and determined.
12. That it's obvious the decision of the arbitration board which was upheld by the LAO in his ruling was never implemented. It's also obvious that there are no physical boundaries on the ground wither (sic) put as per the said decision as reference to the way they were hypothetically put on the PID with no reference or any authority or ruling otherwise contrary to the officially known rulings (see the attached exb. 2.)
13. That it's my view that if the decision referred to in the foregoing findings were to be implemented the original P/NO. 1408, 1409,1410,1411 and 87 should be as shown in exb. 3.

14. That the adjudication section was registered sometime in the **year 2014** and titles issued therefore the **District Surveyor** and the **Land Registrar** should be directed to carry out the necessary **amendments** to reflect the said ruling so that justice and fairness may be seen to be done to the aggrieved parties.

15. That what is deponed herein above is true to the best of my knowledge, information and belief.

6. The application was canvassed by way of written submissions.

7. In their written submissions dated **20<sup>th</sup> July, 2015**, and filed by their lawyer L. Kimathi, the ex-parte applicants say that on **20<sup>th</sup> March, 2001**, the land adjudication committee of Lower Kandungu Adjudication Section after hearing a case filed by one M'Riba Rumukia made a decision that land parcel No. 87 be sub-divided into 5 portions of approximately 5.88 acres each and that they be transferred to the ex-parte applicants and the Interested parties. They continue to say that an appeal was filed in the arbitration board which was dismissed and the board directed that the committee's decision to stand. The Land Adjudication Officer upheld this decision. They lament that this decision was not implemented and as a result the ex-parte applicants have been unable to exercise their rights regarding ownership of parcel No. 87. They assert that the respondent has a legal duty to implement the apposite decision. They cite the case for **JOTHAM MULATI WELAMONDI AND THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA [2002] eKLR** as their authority for their assertion that an order of mandamus is tenable in this case.

In this case, the court held that: **"... mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he/she has refused to perform to the detriment of the applicant"**.

8. In his submissions, the Respondent did not deny that the apposite decision had not been implemented. He argued that an order of mandamus was not tenable and referred the court to paragraph 14 of the respondent's replying affidavit. That paragraph states: **"That the adjudication section was registered in the year 2014 and titles issued therefore the District Surveyor and the Land Registrar should be directed to carry out the necessary amendments to reflect the said ruling so that justice and fairness may be seen to be done to the aggrieved parties."**

9. The 1<sup>st</sup> Interested Party filed written submissions dated **6<sup>th</sup> December, 2016**. He says that any Judicial Review must be made within one year of the challenged decision. I do not think that this is right. In this matter, the applicants are not challenging any decision. They seek an order of mandamus to compel the implementation of a decision. However, section 9(2) of the Law Reform Act provides that rules may be made to prescribe that applications for orders of mandamus, prohibition or Certiorari shall be made within 6 months or such other period as may be prescribed. The 1<sup>st</sup> Interested Party has not brought to my attention such rules. On the other hand, only an application for leave to apply for an order of certiorari is required to be made within 6 months after the date of the impugned decision. This stricture does not apply to applications apposite to mandamus and prohibition.

10. Nevertheless, the Interested Party does not controvert the existence of an unimplemented decision.

11. The 2<sup>nd</sup> Interested Party was unequivocal that he would not file written submissions.

12. I find that the only issue for determination is if or if not the order of mandamus is tenable in this matter if the respondent had a legal duty to implement the decision of the Lower Kandugu Adjudication Committee made on **20<sup>th</sup> March, 2001**.

13. None of the parties have controverted the existence of the decision the ex-parte applicants want implemented.

14. I find that the proper Judicial process had been undergone before the decision of the Lower Kandugu Adjudication Committee was made and eventually upheld by both the Arbitration Board and by the Land Adjudication Officer. No appeal was made to a higher tribunal. In the circumstances, the respondent had a legal duty to implement the said decision.

15. The respondent states that titles were issued in **2014**. This means that for 13 years he had refused and / or for any other reason only known to him failed to implement the decision which has spawned this suit. A court of law should not allow him to evade the appropriate sting of the law after he has contrived circumstances which made it difficult for the ex-parte applicants to access justice.

16. I find that an order of mandamus is merited. The court will also go behind the veil and facilitate the implementation of its orders.

17. It is decided as follows:

(i) An order of mandamus is issued to compel the Land Adjudication Officer, Meru South/Maara Districts to implement the decision of Lower Kandungu Adjudication Committee made on **20.3.2001**.

(ii) In implementing that order the Land Adjudication Officer, Meru South/Maara District is ordered to liaise with the concerned Land Registrar and Surveyor who are hereby directed to carry out the necessary amendments so that the decision of Lower Kandugu Adjudication Committee made on 20.3.2001 is implemented.

(iii) Costs are awarded to the ex-parte applicants against the Respondent only.

18. Orders accordingly.

**Delivered in open Court at Chuka this 25<sup>th</sup> day of July, 2018 in the presence of:**

CA: Ndegwa

Zachary Njeru Mugambi – 1<sup>st</sup> Applicant

M'Ndereba Magiri – 2<sup>nd</sup> Applicant

Francis Kaburu Johnson – 3<sup>rd</sup> Applicant

Mark Muriithi h/b Kiongo for the Respondent

M'Riba Rumukia – 1<sup>st</sup> Interested Party

Mwenda Kajogi – 2<sup>nd</sup> Interested Party

**P.M. NJORGE**

**JUDGE**