



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC JUDICIAL REVIEW NO. 64 OF 2009

REPUBLIC.....APPLICANT

VERSUS

LAND ADJUDICATION OFFICER -

TIGANIA EAST.....RESPONDENT

JOANINA KARUKE.....INTERESTED PARTY

AND

LYDIA MUKUBU NTIKA.....EXPARTE APPLICANT

JUDGMENT

The Ex-parte Applicant's Case

1. By a notice of motion dated **10/9/2009** the Ex-parte applicant herein sought the following orders:-

(1) That an order of certiorari be issued to remove to this court the decision of the Land Adjudication Officer Tigania District made on 25th June, 2009 in Objection Case involving Land parcel No. 602 Antuamburi Adjudication Section and quash the same and other orders made therein without jurisdiction and against the laws of the land.

(2) That an order of prohibition be issued prohibiting the Land Adjudication Officer Tigania District from implementing his decision dated 25th June, 2009 or distributing Parcel No. 602 Antuamburi Adjudication Section without a proper order under the Succession Act Cap 160 Laws of Kenya.

(3) The costs of this application be provided for.

2. The application is based on the grounds set out in the statement of facts filed on **1/9/2009** and the verifying affidavit of the Ex-parte applicant of the same date.

3. The grounds in the statement are the crucial grounds as far as a judicial review application is concerned, for it is stated in **Order 53 Rule 4(1)** and **(2)** of the Civil Procedure Rules as follows:

(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits."

4. The grounds in the instant case are as follows:

(a) *That the respondent's decision is a nullity as it was made without jurisdiction under Section 26 of the Land Consolidation Act Cap 283. Laws of Kenya,*

(b) *The respondent had no jurisdiction to distribute the Estate of deceased person which is the province of succession law.*

(c) *The decision of the respondent was made without jurisdiction the objection having been brought by the interested party who had no locus standi and no letters of administration.*

(d) *The decision of the respondent was made in error, is unlawful, a complete nullity and therefore fit for quashing.*

(e) *The basis of the application is to prevent an illegality being perpetrated.*

5. The applicant's case is that she is the widow to **Joseph Ntika Mcheene** who was the owner of **Land Parcel 602 Antuamburi Adjudication Section**. Sometime in the year **2009** the interested party lodged an objection with the Land Adjudication Office claiming half a share of the said parcel claiming that she was a widow too. The Land Adjudication Officer gave his decision on the matter and ordered the subdivision of the parcel into two, giving the interested party a share of the same. The applicant avers that the interested party divorced from the deceased long before his demise. The applicant states that she believes that the Land Adjudication Officer has no jurisdiction to hear the matter under **section 26** of the **Land Consolidation Act Cap 283** of the Laws of Kenya. She also believes that there was no objection lodged by the objector and that neither the interested party nor the applicant had letters of administration to the estate of the deceased. The actions of the Land Adjudication Officer are considered by the applicant to amount to a distribution of the deceased's estate and the applicant believes that the interested party's claim, if any, lay in the law of succession.

The Interested Party's Case

6. The interested party filed a replying affidavit dated **27th January 2010** on **28/1/2010**. In that reply she contended that she had filed a claim before the Land Adjudication Officer Tigania claiming a half share of her deceased husband's land and the Land Adjudication Officer ruled that she and the ex parte applicant being the widows of the deceased should share the land equally and demarcated the land parcel into two equal shares. She avers that she is the first wife of the deceased, that she had 4 children with him and that she is entitled to have a share of his property just as the ex parte applicant and her children have. She avers that the land in question is in the **Mikinduri Antuamburi Section** which falls under the **Land Consolidation Act Cap 283** of the Laws of Kenya and that **section 6** of that Act mandates the Land Adjudication Officer to adjudicate and determine the rights and interests of the parties who make an "application of claim." To her the ex parte applicant's allegation that the Land Adjudication Officer has no power determine issues relating to land falling under the Land Consolidation Act is "*bogus*" as he has authority to deal with objections raised by aggrieved persons and act as appropriate in each situation. She avers that the ex parte applicant's application can only be allowed if she shows that the procedure laid out in **section 14** of the Act was not followed. She avers that not even the Law of Succession can find that she is not entitled to the land and she terms her rights in the land as indefeasible, and prays that the motion be dismissed and the Land Adjudication Officer's award dated **25th June 2009** be confirmed by this court.

The Respondent's Response.

In the replying affidavit sworn on the **19/2/2018** by the Respondent, **Kepher Ouru Obingo** who is the Land Adjudication Officer in-charge Tigania East District. He states as follows:-

(1) **That the applicant is seeking to prohibit the Land Adjudication Officer from implementing the decision dated 25th June, 2009 against Parcel No. 602 Antuamburi Adjudication Section.**

(2) **That the Land Adjudication Officer who heard the objection was an authorized officer under the law and he heard the objection and hence ruled for a sub-division to be done to facilitate the distribution of the Estate of the deceased. Joanina Karuke was awarded a new number and Lydia to Mukubu was to retain the old No. 602.**

(3) **That the decision of the Land Adjudication Officer was implemented on delivery of Land Adjudication Officer's decision and the order sought has been overtaken by events.**

The application for dismissal.

Before the motion was heard the interested party filed a Notice of Motion dated **27/9/2016** and sought the following orders:-

(1) **That the court do certify the matter as urgent.**

(2) **That the honourable court do notify the ex-parte applicant to show cause why the suit should not be dismissed for want of prosecution.**

(3) **That the honourable court do dismiss the suit for want of prosecution should the ex-parte applicant either fail to show cause or the reasons given thereto are insufficient.**

(4) **That the costs of the application and the suit be awarded to the interested party herein.**

7. The grounds on which the said application is made are as follows:-

(i) That the interested party and ex-parte applicant are both wives of Joseph Nkita (deceased) who prior to his death was registered holder of F/NO. 602 Antuamburi Adjudication Section. Subsequently, the land was shared among the parties herein pursuant to adjudication proceedings as provided under Cap 283.

(ii) The ex-parte applicant obtained leave to apply for orders of certiorari and prohibition on 3rd September, 2009, which leave was to operate as a stay.

(iii) That more than 7 years since the said leave was issued, the ex parte applicant has not taken any steps to prosecute her application.

8. The Interested Party filed her sworn replying affidavit dated 1/12/2017 on the same date. In the replying affidavit she opposed the application dated 27/9/2016 and avers that she has been interested in the case for Judicial Review but getting a date was not easy as the file got misplaced; that the file has now been re-constructed and should be given chance to argue the case; that she has a good a good case and that is the interested party is panicking and that the interested party's application be dismissed and they proceed with the hearing of the Judicial Review.

9. That application was marked as abandoned on the 19th February 2018 when parties opted to have the substantive motion for judicial review heard instead.

10. It is common ground that the land belonged to the deceased, that the land fell under the **Land Consolidation Act** and that the land was subdivided by the Land Adjudication Officer into two equal portions the instance of the interested party. It is also common ground that the interested party's claim does not originate from outside family of the deceased that is if the claims to relation by marriage by marriage between the deceased and the interested party are anything to go by. The integrity of the rights of the deceased's estate's rights to the land in question is therefore not under any challenge. It is confirmed that the land is the deceased's property. The question is how it should be distributed now that the owner is deceased.

11. The issue that arises in this matter is whether the respondent's decision was made without jurisdiction and is therefore a nullity. An examination of the provisions of the Act is sufficient to indicate whether the Land Adjudication Officer acted within the law.

12. **Section 6** of the Act provides for Adjudication Officer's powers as follows:

(1) The Minister may appoint any fit and proper person to be Adjudication Officer for each adjudication area, and the Adjudication Officer may appoint such Demarcation Officers and Recording Officers as may be necessary for carrying out the adjudication, demarcation and registration of the adjudication area.

(2) The Adjudication Officer shall exercise general control and supervision over the adjudication and registration of the adjudication area and may issue such general or special directions as he thinks necessary to the officers appointed by him under subsection (1) of this section.

(3) The Adjudication Officer may exercise all or any of the powers given under this Act to officers appointed by him.

13. The above stated section therefore gives the land Adjudication Officer general powers to administer land in an Adjudication Area under the Act either through officers under him or directly.

14. The interested party relies on **Section 26** of the Act. The same states as follows:

Objection to Adjudication Register.

26. (1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.

(2). If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate.

(3). No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.

(4). Any compensation awarded by the Adjudication Officer under this section, together with such costs as the Court may award, shall be paid by the Minister.

15. The question is whether the interested party was any such person a). named in or affected by the Adjudication Register;

b).who considers such Register to be inaccurate or incomplete in **any respect**; or

c). who is aggrieved by the allocation of land as entered in the **Adjudication Register for the purpose of enabling the Land Adjudication Officer exercise his power under the Act to effect subdivision of the land.**

16. The interested party does not claim to have been named in the register before she lodged her objection. She may be deemed affected by the register, subject to proof of her claim of marriage to the deceased, especially if the said register was to be rectified in favour of another person. Proof of that fact is not the concern of this court as there is a law that addresses family matters and a court vested with jurisdiction over such.

17. I also observe that the interested party can not validly state that she can be described as one *“who considers such Register to be inaccurate or incomplete in any respect”* for the purposes of that section as her claim is not adverse to the rights of the deceased’s estate to the suit land. This view is buttressed by the fact that the ex parte applicant has conceded that the land belonged to the deceased and she does not claim ownership thereto save as beneficiary to the deceased’s estate.

18. Thirdly the applicant can not be considered by this court as one who can validly deem herself as *“one who is aggrieved by the allocation of land as entered in the Adjudication Register”* for the same reasons that have been outlined in the paragraph immediately above.

19. In my view **Section 26** does not offer the respondent and the interested party any defence in this matter.

20. Having regard to the above observations regarding **Section 26** of the Act, it then becomes futile to examine whether any procedure under **section 14** of the Act was violated.

21. It is also sufficient to state that the land had already been determined to be the property of the deceased and in this republic there is a law, the law of succession that governs matters relating to the estates of deceased persons. That is the law that was applicable in respect of the suit land by any party that wished to deal with it. The issues as to whether any of the parties were married to the deceased or whether they are entitled under a will or upon intestacy are supposed to be addressed in the High Court which according to **section 47** of that Act is the right court to hear and determine them.

22. It matters not that the Land Adjudication Officer has pleaded that the subdivision has already been implemented, for going by the findings above, he did not have jurisdiction to entertain the kind of objection raised by the interested party. His decision can not therefore withstand scrutiny. *Certiorari* is the remedy fit for the occasion, for indeed prohibition, which looks to preventing a certain event from happening, looks to the future only and is obviously overtaken by events in the circumstances of this case.

23. For the afore going reasons I find that the ex-parte applicant’s motion has merit and I hereby issue the following orders:

(1) An order of certiorari to remove to this court the decision of the Land Adjudication Officer Tigania District made on 25th June, 2009 in Objection Case involving Land parcel No. 602 Antuamburi Adjudication Section and quashing the same and other subsequent orders made therein without jurisdiction;

(2) The costs of this application shall be borne by the respondent and the interested party.

It is so ordered.

Dated, and signed at Kitale on this 1st day of August, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August, 2018 in open court in the presence of:

Mr. Kiongo for respondents

Ms. Rimita for Exparte applicant

No appearance for interested party

C/A Mutua

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.