



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC J.R. MISC. APPL. NO. 50 OF 2014

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LANDS AND ADJUDICATION & SETTLEMENT OFFICER

IGEMBE/TIGANIA DISTRICT.....RESPONDENT

AND

JOSEPH M'IKWINGA M'ABURI.....INTERESTED PARTY

PETER MWANGI.....1ST EX-PARTE APPLICANT

SIMON MWANGI.....2ND EX-PARTE APPLICANT

JUDGMENT

The Ex-parte Case

1. By a Notice of Motion dated 6/11/2014 and filed in court on the same date the Ex-parte Applicants herein sought the following orders:-

(1) An order of prohibition to prohibit the respondent and the interested party from implementing any of the decisions with respect to ownership, possession or occupation of the ex parte applicants' land parcel numbers 441, 1460 and 1461 AKAIGA ADJUDICATION SECTION.

(2) That proceedings and findings of an objection by the interested party through the Department of Lands and Settlement in Maua via a letter dated 9th September, 2008 to the demarcation officer Akaiga Adjudication Section be declared as null and void *ab initio*.

(3) Costs of and incidental to the application be provided.

(4) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

2. The application is based on the grounds set out in the Chamber Summons and the Verifying Affidavit of 2nd Ex-parte applicant sworn on 14th October, 2014 and filed on the same date.

In that affidavit the 2nd ex parte applicant depones that he swears the affidavit on his own behalf and on that of the 1st applicant; that they are the bona fide owners of **Parcels Nos. 1460 And 1461 Akaiga Adjudication Section**; that in **1975** they entered into a sale agreement with the respondent from the purchase of the sale of land through **Karaya Gikundi (deceased)** and subsequently the land was registered in their names at the registry as Nos. **1460** and **1461** Akaiga Adjudication Section; that however in **1982** they discovered that the vendor clandestinely caused the alteration of the names in the records to read his name; that later in **1985** they discovered it had been alleged that they died; that subsequently the interested party was summoned to the Land's Office and after a hearing before Adjudication Officer and the Land Committee their names were restored back into the record; that upon demarcation of the land in **2005** the applicants fenced the land; that thereafter the interested party filed an objection in Maua; that his fingerprints were taken to ascertain whether he was a signatory to the agreement; that the CID findings were in the interested party's favour and the land was given back to him; that since **2008** when the respondent was given back the land the applicants have been utilizing the land.

3. I have looked through the record and found no response filed on the part of the interested party. However there is an affidavit of one

Kalvin Willy Otieno, Advocate dated 3/5/2016 stating that he served the interested party with a hearing notice. The case came up for notice to show cause why the same should not be dismissed on 19/6/2018. However the same was spared for dismissal for want of prosecution when the *ex parte* applicants appeared in person whereupon the court ordered them to file their submissions within 30 days and serve and that any response by the interested party and the respondent be filed within 7 days of service.

Submissions of the Parties

4. The *Ex parte* Applicants filed their submissions on 27/7/2018 and the Respondent filed his submissions on 30/7/2018. The *ex parte* applicants' submissions reiterated the matters contained in their verifying affidavits. In the submissions they also added that they entered into an agreement with the interested party whom they leased the land on 11/10/2005 for a period of one year after this the interested party filed an objection at Maua. It is alleged that the filing of this objection was aided by the interested party's son who had been appointed a committee member. The *ex parte* applicants urged that the substantive justice should be done without regard to the technicalities of procedure. They quoted the decision in *Republic -vs- Chairman Tribunal Kirinyaga District & Another Ex parte Peter Maru (2015) eKLR*. They referred the court to **Section 26 (1)** of the **Land Consolidation Act**.

4. They urged that **Part 2** of the **Land Consolidation Act** provides for ascertainment and recording of rights and interests in land, consolidation and demarcation and creation of an adjudication register; that the land adjudication officer is appointed by the Minister to superintend the whole process with the aid of demarcation officers and recording officers; that a Committee must be constituted under **Section 9**; that it is the Committee that has a mandate under **Section 11** to adjudicate upon and determine in accordance with African Customary Law the claim of any individual person to any right or interest to any land within their adjudication section. It is the further submission of the applicants that only when it is unable to reach an adjudication in accordance with African customary law will it refer the matter to the Arbitration Board and even then the Board has to inform the Committee of its decision.

5. The respondent submitted that the initial order sought to be prohibited has not been quashed and that therefore an order of prohibition is likely to cause chaos and is not the most efficacious remedy in the situation. Further the respondent submits that the evidence in the verifying affidavit relates to merits of the applicant's claim before the respondent as opposed to the decision making process whileas judicial review is concerned with the latter. For that reason the respondent submits that a civil suit is the process suited to deal with the claim. Lastly the respondent states that judicial review relates only to orders of mandamus, certiorari and prohibition and a declaratory order can be issued in a civil suit.

6. In the applicant's statement of facts filed together with the *ex parte* application for leave the grounds stated are as follows:-

(1) That the decision of the respondent is legally flawed null and void for want of jurisdiction.

(2) The respondent alienated the applicants' parcel of land to the interested party without any colour of right whatsoever.

(3) The respondent acted arbitrarily without jurisdiction and with biased against the applicants.

7. In this court's view the only issue that arises is the issue of jurisdiction: whether the respondent acted within the powers granted by the law in doing the acts complained of.

However, what is the respondent claimed to have done?

8. The allegations against the respondent are not clearly stated in the verifying affidavit dated 14/10/2014. However it is discernible that the applicant's complaint is that someone (without naming who) falsely alleged that they were dead and subsequently their names were removed from the records. When they discovered this, the interested party was summoned and a case before the land adjudication officer ensued at the end of which the applicant's names were reinstated. Later on the interested party lodged an objection at Maua. During that objection the matter of ownership of fingerprints appearing on the sale agreement was referred to the Police. The decision of the Police regarding the fingerprints was in favour of the interested party and he was subsequently awarded the land.

9. The quality of draftsmanship evinced by this judicial review application leaves a lot to be desired. In my view it does not link the respondent with any wrongdoing, or state the law that he is alleged to have breached yet the bulk of the prayers are directed against him. It is regrettable that the applicants decided to proceed with the hearing of the application as drawn. I would have expected a further affidavit to shed light on what the land adjudication officer did that warrants the judicial review orders sought; however the history of the land and the events described as surrounding its ownership are so sketchily done as not to raise any case at all. The annexures to the affidavit are not explained at all in the body of the affidavit. The Court Of Appeal decision in the case of *Commissioner General, Kenya Revenue Authority (Through Republic) vs. Silvano Onema Owaki T/A Marenga Filling Station, C.A at Kisumu Civil Appeal No. 45 of 2000* demonstrates the importance of an affidavit in judicial review proceedings: it is the verifying affidavit that carries the proof of the facts which are alleged or contained in the statement of facts. Yet the verifying affidavit in these proceedings does not aid the applicants at all.

10. I must also add that even where a claim is not defended the claimant must prove his claim to the required standard in law. That much was stated in the case of *Hon. Daniel Toroitich arap Moi -vs- Mwangi Stephen Muriithi NBI Civil Appeal NO. 240 of 2011, eKLR*.

11. I have examined investigation report from the CID dated 12/3/2018 and noted that the recommendation therein is that the Investigation Officer "concur" with the previous decision of the Land adjudication and Settlement officer Tigania District to return the suit land **parcels numbers 1460 and 1461** to the interested party. It therefore appears from the contents of the police report that a decision had already been made by the respondent to award the ownership of the land to the interested party even before the fingerprints were investigated. The whole report from the police department also appears to be of very questionable quality.

It may be as well that the applicants wish to take issue with the implementation of the findings of the police. However this does not come out

clearly in the documents filed by the applicant.

11. In our adversarial justice system, the court works only with whatever facts have been presented before it. It is not for the court to guess what the applicants wish to say in their documents. The facts and allegations in pleadings in any case need to be so clearly stated that the court does not have to grope around in the dark seeking to find what the litigant meant or wanted. Unclear pleadings end up wasting the court's and the litigant's precious time.

12. I therefore find that the applicant's documents filed herein have not made out a case that can be determined by this court and I hereby strike out the entire notice of motion dated **6/11/2014**. There will be no orders as to costs.

Dated, signed at Kitale this 15th day of October, 2018

MWANGI NJORGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 31st day of October, 2018

JUDGE

ENVIRONMENT AND LAND COURT, MERU.