



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC JUDICIAL REVIEW NO. 8 OF 2016

(Formerly NYERI HCJR 9 OF 2016)

IN THE MATTER OF AN APPLICATION FOR

JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF NOTICE BY DISTRICT LAND REGISTRAR NYERI DATED 23RD FEBRURY, 2016

AND

IN THE MATTER OF OPENING OF ACCESS ROAD

AT THEGENGE/KARAGIA/220

BETWEEN

REPUBLICAPPLICANT

-VERSUS-

DISTRICT LAND REGISTRAR-NYERIRESPONDENT

AND

MICHAEL MBAI NYAGE (As Administrator of the estate of Nyange Geita alias

Nyange s/o Giita alias Benson Nyange Giita.....EX PARTE APPLICANT

RULING

1. Pursuant to the leave granted to the *ex parte* applicant on 24th May, 2016 to apply for judicial review orders of certiorari and prohibition, the *ex parte* applicant filed the notice of motion dated **13th June, 2016** seeking the following orders:-

(i) An order of certiorari to remove to this court for purpose of being quashed a notice by the District Land Registrar, Nyeri (the respondent) dated 23rd February, 2016;

(ii) An order of prohibition to prohibit the respondent or any other person or persons acting under his behest, direction and authority from effecting the notice dated 23rd February 2016;

(iii) Extention of the order of stay of execution of the notice hereto issued on 24.5.2016 until the hearing and determination of the application or further orders of the court.

(iv) Costs of the application.

2. The application is premised on the grounds that the notice sought to be quashed is directed at Nyange Geita, the registered proprietor of Thegenge/Karagia/220 who is deceased; that no consultations or consent has been sought or granted by the beneficiaries of the estate of the deceased; that the notice seeks to open an access road on the deceased parcel of land herein yet no such access road exits on the registry index map (RIM) for the area and that the order for stay issued on 24th May 2016 was to last for 30 days only.

3. Apprehensive that the respondent may upon lapse of the order of stay proceed and create the access road before the application is heard and determined yet he had no power to do so on the deceased's land, the ex parte applicant urges the court to grant the orders sought.

4. The application is supported by the statutory statement and verifying affidavit filed therewith. In support of the averments contained in the notice of motion, the statutory statement and verifying affidavit, the ex parte applicant has annexed the following documents to the verifying affidavit:-

(i) A copy of limited grant of letters of administration ad litem marked **MMN-1**;

(ii) a copy of certificate of title marked **MMN-2**;

(iii) a copy of the letter from the respondent containing the notice sought to be quashed, marked **MMN-3**;

(v) A copy of the area Registry Index Map, marked **MMN-4**.

5. In reply and opposition to the application, the respondent through the affidavit (replying) of Susan Mwanzawa has deposed that her predecessor R.W Ngaanyi issued the impugned notice through the office of the assistant County Commissioner for opening of an access road; that the purpose of the notice was to make the registered proprietors aware of the intention to open the access road; that the map (sheet No.5) for the area was done in 1960; that there exists an access road though left hanging between the parcels of land known as Thegenge/Karangia/220 and 221.

6. Explaining that the purpose of putting the access road is to have it connected to the major road between the parcels of land known as Thegenge/Karangia/220 and 244 and that it is in public interest to create the access road, the respondent terms the map annexed to the ex parte applicant's verifying affidavit misleading in that it is altered to hide the access road.

7. According to the respondent, the correct map is the one annexed to her replying affidavit and marked **SMM-2**.

8. For the reasons given in her replying affidavit, the respondent deposes that the access road should in the interest of justice and fairness, be opened.

9. When the application came up for hearing, counsel for the ex parte applicant relied on the grounds on the face of the application and the verifying affidavit. He also relied on the documents annexed to the verifying affidavit.

10. Pointing out that the notice sought to be quashed is addressed to a deceased person and that no notice was addressed to the legal representatives of the estate of the deceased or the family of the deceased, counsel for the ex parte applicant submitted that the notice offended the provisions of **Section 18** of the Land Registration Act, 2012 and **Sections 9 and 10** of the Public Roads Act, Cap 399 Laws of Kenya which requires that leave be sought from District Road Board and notices be served to affected parties before such an exercise can be undertaken. Because in the instant case no application was made or notices issued to other affected parties, he urged the court to grant the orders sought.

11. In opposing the application, counsel for the respondent relied on the replying affidavit of Susan Mwanzawa. He maintained that the notice served was proper and faulted the *ex parte* applicant for challenging the notice too late in the day (two days to the day slated for opening of the access road). Maintaining that the opening of the access road was due to public interest, he urged the court to dismiss the application.

Analysis and determination

12. From the pleadings filed in this matter and the submissions by the respective counsels, this court finds the sole issue for determination to be whether the ex parte applicant has made up a case for being granted the orders sought.

13. As was pointed out in the case of **Republic v. Vice Chancellor Jomo Kenyatta University of Agriculture and Technology (2008)eKLR**, it is now settled that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.

14. In the case of **Republic v. Judicial Service Commission ex parte Pareno (2004) KLR 203** quoted in the case of **Republic v. Vice Chancellor Jomo Kenyatta University of Agriculture and Technology (supra)** it was stated:

“Under the *Wendesbury* principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached the decision.”

15. From the pleadings filed in this matter and the affidavit evidence adduced in respect thereof, it is not in dispute that one of the persons to

whom the impugned notice was addressed to is deceased. The only lawful way through which the deceased could be involved in the exercise of opening the access road is through his legal representative or administrator. The allegation by the ex parte applicant to the effect that neither the deceased's legal representative nor his family was involved in the intended exercise of opening an access road through the deceased estate brings into question the legality of the process. If implemented without involvement of the deceased's legal representative, it may lead to the deceased's estate being condemned unheard.

16. Whilst the reasons given by the respondent for making the impugned decision are germane, they cannot be an excuse for failing to accord the deceased's estate the right to be heard and/or be involved in the process of establishment of the access road.

17. In the case of **Kenya National Examination Council v. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others (1997) e KLR**, it was held:

“An order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

18. Since the respondent has neither controverted the ex parte applicant's contention that the estate of the deceased was not given an opportunity to participate in the intended process of establishment of the road of access through its legal representative, I find and hold that the *ex parte* applicant has made up a case for issuance of an order of certiorari to remove to this court and to quash the decision of the respondent communicated to him vide the respondent's letter dated 23rd February, 2016.

19. Concerning the order of prohibition, in the case of **Kenya National Examination Council v. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others (supra)**, it was held that an order for prohibition **lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.** It was however, observed that **It does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.** It is, as such, **powerless against a decision which has already been made before such an order is issued as such an order can only prevent the making of a decision.**

20. In applying the above principles to this case, there being no evidence that the notice was acted upon, I find and hold that the *ex parte* applicant has similarly made up a case for issuance of an order of prohibition to prohibit the respondent from proceeding with the opening of the access road between Thegenge/Karangia/220 and 221 on the basis of the notice dated 23rd February, 2016.

21. The upshot of the foregoing is that the notice motion dated 13th June 2016 has merit and is allowed as prayed.

Dated, signed and delivered in open court at Nyeri this 8th day of October, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for exparte applicant

Mr. Gisemba for the respondent

Court assistant - Esther