



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC J.R. MISC. APPL. NO. 10 OF 2015

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER IGEMBE NORTH DISTRICT.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

MOSES ITURU.....INTERESTED PARTY

EX-PARTE APPLICANT.....JOSHUA MUNORU M'LIMBIINE

JUDGMENT

The Applicant's Case

1. By a Notice of Motion dated 8/6/2015 the Ex-parte applicant herein sought the following orders:-

(1) That an Order of Mandamus be issued compelling the 1st respondent to issue the mandatory consent under Section 30 of the Land Adjudication Act to the ex-parte applicant to enable him file suit for recovery of land against the interested party.

(2) That the respondents and interested party be condemned to bear the costs of and incidental to this application.

2. The grounds upon which the relief is sought are that the consent of the 1st respondent is necessary prior to filing suit relating to land situated within an adjudication area and that the refusal by the 1st respondent to issue the consent to the ex parte applicant is without jurisdiction.

The Respondents' Response

3. I have looked through entire court record and found that the respondents only filed submissions to the notice of motion dated 8/6/2015.

The Interested Party's Response

4. The interested party filed his sworn replying affidavit dated 15/7/2015 on 20/7/2015. In the replying affidavit the interested party gave details concerning the suit land, stating that that he purchased the suit land from the ex parte applicant and he has developed the same at a colossal cost; that the same was procedurally transferred to him on 12/11/2001 whereupon he took possession and has been utilizing it since; that the applicant and his family were aware and the family gave consent; that further the applicant's **Objection Number 1298** was procedurally deliberated on and it was determined on 28/5/10 in his favour; that the allegation that the 1st respondent has refused to grant the applicant consent does not concern him and that the application is an afterthought;

Submissions of the Parties

5. The ex parte applicant filed his submissions on 22/5/2018 while the Respondents filed their written submissions on 30/7/2018. I have looked through the record and found no submissions on behalf of the Interested Party. I have considered the notice of motion, the responses

of the respondents and the interested parties and the submissions.

Determination

Issues for Determination

6. The only the issue for determination in this matter is whether this court should grant an order compelling the 1st respondent to issue the applicant with a consent under **Section 30** of the Land Adjudication Act to enable him file suit for the recovery of the land from the interested party.

7. The applicant's case is that the interested party in collusion with the applicant's brother caused **1.30 acres** of land to be hived off the ex parte applicant's land **Parcel No 2214** situate within the Akirang'onde "A" Adjudication section. They then caused the said excised portion to be transferred to the interested party by way of a letter purporting that it was written by the applicant but which the applicant maintains was forged. Upon investigation the police found that the thumbprint appended to the letter did not belong to the applicant. The applicant argues that even in those circumstances filing of a suit without the requisite consent of the 1st respondent would be fatal to the suit, hence this application. He cites the decision of **Msa HC Misc Case No 96 of 2000** in his support.

8. The interested party has not addressed the merits of such an order and seems pre-occupied with the merits of his claim to the land even at this very preliminary stage. The respondents on the other hand aver that under **Section 30** of the Act the condition for the issuance of the consent is that the register must be final; that under **Section 29(3)** of the Act the Director of Land Adjudication takes over from the Land Adjudication Officer; that once all objections are determined by the land adjudication officer he becomes *functus officio*. That until this happens the Land Adjudication Officer has discretion in the matter of issuing a consent or withholding it, depending on a variety of considerations that may arise during the adjudication process, and an order of Mandamus relates to a specific statutory public duty as opposed to such discretionary powers and cannot be used to compel issuance of a consent in the absence of clarity whether such consent is appropriate at the present point in time. It is the further submission of the respondents that the applicant has not explored appeal mechanism provided for by either **Section 29** or by **section 30(3)** of the Act.

9. In the case of **Nakuru Judicial Review No.23 Of 2015 Mary Wangui Parmutia and Moses Nkoi Ole Nkako Versus The District Land Adjudication & Settlement Officer (Narok District (County) The Director Of Land Adjudication And Settlement Cabinet Secretary - The Ministry Of Lands** the court stated as follows:

“Having looked at the provisions of Section 30 above, I am afraid that I am unable to grant leave to the applicant to commence judicial review proceedings for orders of mandamus against the District Land Adjudication Officer and the Director of Land Adjudication. This is because their decisions are appealable to the Minister.”

10. However, at the ex-parte or leave stage, this court was of a different view concerning whether leave should be granted and it therefore granted leave in circumstances similar to those in the **Mary Wangui Parmutia** case cited above.

11. It is notable that the rejection of an application for leave in the **Mary Wangui Parmutia** case (supra) was based on the ground that there were other legal avenues open to the applicant to resolve the issue. These are the same avenues alluded to by the respondents in the instant application and I will examine them in detail below.

12. Under **Section 30(3)** of the Act any **“person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.**

13. **Section 29** of the Act provides that

“(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

14. In my view the decision of the court in the **Mary Wangui Parmutia** case cited above rhymed well with the position taken by the Court of Appeal in the case of **Kenya National Examination Council V Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** on the scope and efficacy of orders of mandamus when the court stated as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAWS OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of

justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.” [Emphasis mine]

15. That there is a specific legal right to a consent to lodge proceedings against the decision of the 1st respondent in a court of law in an ideal situation is not in doubt. It cannot be said that other than an application for the consent made to the 1st respondent, there is no other specific legal remedy available if the 1st respondent, as in the case of the applicant before me, declines to issue consent; The provisions of **Section 30(3)** render possible an appeal to the minister against the refusal by the 1st respondent. It has not been demonstrated that such an appeal was filed.

16. It is necessary for litigants to follow the appropriate mechanisms provided for in law to secure their ends before approaching the court for similar relief that they would have achieved by those stated mechanisms. This much has been emphasized in the cases of **Harrikissoon Vs. Attorney-General Of Trinidad And Tobago [1980] A.C. 202**, the case of **Alphonse Mwangemi Munga & 10 Others V African Safari Club Limited [2008] eKLR** and also the case of **Speaker of National Assembly -vs- Karume (1992) KLR page 425**.

17. In this case however though served the respondents never filed a sworn affidavit indicating whether they received, and if so, what response they gave in respect of the letter addressed to the 1st respondent by the applicant's advocates dated 27/2/2015 seeking the said consent.

18. In a similar case **Meru ELC Misc. Civil Application No. 32 Of 2016, Republic Versus The District Land Adjudication & Settlement Officer Igembe North District The Hon. Attorney General And Japhet Kamonyo; Ex-Parte Applicant Reuben Liria**, the court stated as follows:

“Annexure RL2 in the Ex parte Applicant's documents is the letter written to 1st Respondent on behalf of Ex parte Applicant in order to trigger the process captured under Section 30 of Cap 284. From the contents of paragraph 16 and 18 of the Ex parte Applicant's Affidavit of 17.10.16, the 1st Respondent has simply declined to issue the consent.

Under S. 30(3) of Cap 284, an aggrieved person is supposed to appeal to the Minister within 28 days from the time the consent was denied.

If the Ex parte Applicant was to appeal to the Minister, what would be his reference point?. What date would he quote as the date of refusal of the consent.

This is a case where the Respondent doesn't indicate his stand to the applicant's request for consent.

The case can therefore be distinguished from the authorities cited by Respondent and Interested Party. Section. 30 (3) of Cap 284 contemplates situation where the 1st Respondent makes a formal communication to deny or give consent or to make relevant directions. It is only then that Ex parte Applicant would be able to move to the next step. As at now, I am in agreement with Ex parte Applicant's contention that it is not possible to determine when the 28 days period will run from, unless a formal communication is made.”

19. In **Meru ELC Misc. Civil Application No. 32 of 2016** the court differed from the position taken by the court in the **Mary Wangui Parmutia** case and granted the application for leave to apply for orders of mandamus to compel the Land Adjudication Officer to issue consent.

20. The tragedy of cases in which served public officers abstain from specifically responding by sworn evidence to accusations levelled against them in sworn evidence is that the court will never know their side of the story before making its decision. There is therefore in this case also no reference point from which the applicant may appeal to the minister under **S. 30(3) of Cap 284**.

21. If the 1st respondent had filed a sworn affidavit indicating what his response to the application for consent was, and when it was made this court may have had an entirely different view of this matter. However, in view of the silence of the 1st respondent and despite the need for litigants to follow the legally provided for mechanisms to obtain consent, there would be no need whatsoever in my opinion to send the applicant away from this court empty handed. Granting the application needs be the case herein not necessarily as a punitive measure but as a means of correcting a wrong and opening up the corridors of justice to enable the applicant ventilate his grievance in accordance with **article 50(1)** of the constitution.

22. I therefore grant the application dated **8th June 2018** in terms of **prayers (a) and (b)**.

Dated Signed and Delivered at Meru this **20th** day December of **2018**.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE