



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC J.R. MISC. APPL. NO. 34 OF 2008

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF LAND

ADJUDICATION & SETTLEMENT OFFICER.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION & SETTLEMENT

OFFICER MERU NORTH.....2ND RESPONDENT

URINGU 1 ADJUDICATION SETTLEMENT.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

GITONGA NARANGWI.....INTERESTED PARTY

EX PARTE: DOMIZIANO RATANYA

JUDGMENT

The Ex-parte Applicant's Case

1. By a further amended notice of Motion dated **11/4/2018** and filed in court on **12/4/2018** the Ex-parte applicant herein sought the following orders:-

1. This Honourable Court be pleased to issue the orders of certiorari to bring before this court for being quashed the decision of the Land Adjudication Officer Igembe/Tigania Uringu 1 Adjudication Section Objection No. 832 in Parcel No. 161, issued on 30/11/2007.

2. This Honourable Court be pleased to issue an order of prohibition prohibiting the 1st, 2nd and 3rd respondents from acting on or implementing the decision made by the 3rd respondent in respect of the objection named in (1) above on the 30/11/2007.

3. The costs of this application be provided for.

2. The grounds at the foot of the application are that the 3rd respondent in cahoots with the 1st and 2nd respondents and in collaboration with the interested party, acted unfairly and contrary to the Rules of Natural Justice, by determining and issuing the decision of **Objection No. 832, Land Parcel No. 161 on 30/11/2007** in absence of the applicant; that the 3rd respondent failed to act justly and judiciously in the discharge of his duties further failed to summon or notify the applicant of the actual date of the continuation of hearing of the objection, but proceeded to hear and issue his decision; that the 3rd respondent with fully knowledge of 1st and the 2nd respondents and in co-operation with the interested party, exceeded his power subdividing the dispute parcel **No. 161** into several small fragments, and illegally creating new parcels of land; that the 3rd respondent erred by implementing his decision in respect of the suit land despite the stay orders issued by the Honourable Court on **16th June, 2008**; that the 3rd respondent denied the applicant his constitutional right by alienating and displacing his land from the fertile prime land, moving it to a stony and unproductive hill top and that the 3rd respondent failed to observe the provisions of the **Land Consolidation Act**.

3. The application is based on the grounds the Amended Statutory Statement of Facts dated 2/5/2017, namely that:-

- 1. The 3rd respondent acted unfairly and contrary to the rules of the natural justice;**
- 2. The 3rd respondent in corroboration with the interested party failed to involve the adjudication committee contrary to Cap 283;**
- 3. The 3rd respondent acted unfairly to favour the interested party by re-subdividing the suit land into several portion despite a stay order issued by this court;**
- 4. The 3rd respondent acted in excess of his power by alienating the applicant's land whose ownership had been confirmed during the record of existing rights stage;**
- 5. That the decision by the 3rd respondent was unreasonable and biased in that it transferred the applicant's developed land which is futile to a stony area.**

4. The application is supported by two affidavits: the verifying affidavit dated 22/5/08 filed with the application for leave and a further verifying affidavit sworn on 2/5/2017; the affidavits show that the application is based on the grounds that:- the land was part of his ancestral land; that he gathered the land in 1967; that the same was recorded under his ownership under the record of existing rights after winning all disputes between 1968 and 1985; that he has lived on the said land for over 50 years and considerably developed the land; that during consolidation and demarcation in or about 1991 the portion was allocated to the interested party and a large portion of his land was transferred to the top of a hill that is bare stony and unproductive in contrast with his land which was prime and productive; that he filed objection 832 in 1996; that the same was heard in 1999 and 2007; that the final part of the objection and the decision was made while he was away and committed in Nairobi and he was not notified of the hearing; that the 1st 2nd and 3rd respondents acted illegally by working with the interested party to subdivide the suit land despite a stay granted by this court; that further the 3rd respondent has by way of further subdivisions tried to subvert the applicant's claim; that different adjudication officers heard the objection and had two sets of proceedings full of irregularities; that the 3rd respondent heard the objection without the assistance of the committee and that currently the applicant is in currently possession of the suit land.

The Respondents' Response.

5. The respondents filed their grounds of opposition dated **25th June 2018** on the same date. They term the application as incurably defective and state that it does not lie; that the ex parte applicant was given four opportunities to appear before the adjudication officer and committee but failed to do so, and that it was due to his absence that the objections were dispensed with.

6. According to the affidavit of service filed in this court the interested party and the respondents were served on 19/6/2018 for the hearing scheduled for **28/6/2018**. On the **28th June, 2018** the parties were ordered to file submissions on the judicial review notice of motion.

7. Only the ex parte applicant filed submissions in respect of the judicial review notice of motion.

8. I have perused the entire record and I have found no affidavits in opposition to the motion. This court must take the facts as deponed to by the applicant as not controverted. Also though the respondent filed grounds of opposition in respect of the notice of motion on the 28th June 2018, no submissions were filed to elaborate on those grounds. The grounds are of the nature that would require a replying affidavit to be filed in opposition to the motion if they were to be considered. Without any sworn affidavit evidence those grounds are of no value to the court in making its decision in this matter. As was stated in the case of Commissioner General Kenya Revenue Authority vs Silvano Onema Owaki T/A Mahenya filing station C.A, Kisumu Civil Appeal no. 45/2000, it is the verifying affidavit that contains evidence to be relied on by the applicant in the motion. Similarly it must be a replying affidavit which can effectively counter the factual statements put forward in the verifying affidavit. Grounds of opposition cannot.

9. However the claimant is expected to prove his case even in the absence of a response by his adversary. This is recognized in the case Hon Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi Civil Appeal No240 of 2011 eKLR.

10. The evidence of the applicant is not controverted. However, I find that the notice of motion application for Judicial Review is defective in one grave respect: the proceedings and the decision impugned by the applicant are not attached to the verifying affidavit. In the absence of any acknowledgement by the respondents and the interested party as to whether those proceedings and decision exist this court would not be able to verify them or their contents. I am persuaded that this court has nothing placed before it to examine for legality or irregularity, bias, breach of natural justice, failure to involve the committee, unfairness and excess of jurisdiction, or even violation of this court's orders as alleged by the applicant.

11. The notice of motion for judicial review is hereby struck out for that reason. There will be no orders as to costs.

It is so ordered.

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

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE