



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA JUDICIAL REVIEW CASE NO. 16 OF 2017

NJERU MIRANI.....1ST APPLICANT

DAVID NJIRU MUTUA.....2ND APPLICANT

DANIEL NYAGA.....3RD APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

DISTRICT LAND ADJUDICATION

OFFICER MERU SOUTH/MAARA DISTRICTS.....5TH DEFENDANT

AND

ANDREW NYAGA.....1ST INTERESTED PARTY

JAMES KANGORI.....2ND INTERESTED PARTY

KARUGU KARUGERIA.....3RD INTERESTED PARTY

JUDGMENT

1. These Judicial Review proceedings were brought to court by way of a Notice of Motion application dated **20th September, 2013**. On its face, the application states that it is reliant upon Section 8 of the Law Reform Act, Order 53 rule 3 of the Civil Procedure Rules and all other enabling provisions of the law. The applicant seeks the following orders:

1. An order of prohibition to prohibit the 2nd, 3rd, 4th and 5th respondents from effecting declaration reference number ADM/LA/4/118 OF 4TH October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi location in Igamba Ng’ombe division pending the hearing and determination of the judicial review hereof.

2. That an order of mandamus be issued bringing into this court and compelling the respondents to cancel and remove declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi location in Igamba Ng’ombe division for want of representation.

3. That the costs of this application be provided for.

2. At the leave stage, the applicants had filed their statutory statement which reads as follows:

STATUTORY STATEMENT

(UNDER ORDER 53 RULE 1 (2) OF THE CIVIL PROCEDURE RULES

A. DESCRIPTION OF PARTIES

a) Njeru Mairani, the 1st applicant is an adult male working and residing in Igamba Ng'ombe Division of Meru South District, within the Republic of Kenya. He is the Chairman of the 13 Mbeere Clans in Igamba Ng'ombe Division named and represented as herein below:-

1. Mbuya Clan Daniel Nyaga
2. Mbutha ya Kieramba Nduta Gikombo
3. Muiru Patrick Njogu
4. Gatua Mbutha Njeru Mairani
5. Mukera David Njiru Mutua
6. Magwi Jacob Kiruru
7. Mukene Nyaga Kiborio
8. Ikandi Nthenge Mukandi
9. Nyonga ya Karu Njoka Iruki
10. Kirogi Mbaka Gichobi
11. Mwendia Ileri Mbauro
12. Nyonga ya Njiru Nathan NG'ang'a
13. Nyonga ya Njeru Muturi Mukunye

Applicant herein duly conversant with the matter herein and authorized by the members of the Executive Committee and the members of the above named clans to file this judicial review petition on their behalf and on behalf of the applicants.

B. DAVID NJIRU MUTUA, the 2nd applicant is an adult male working at Igamba Ng'ombe Division of Meru South District, within the Republic of Kenya. He is the secretary of the 13 Mbeere Clans in Igamba Ng'ombe Division named in paragraph a) above. Applicant herein duly conversant with the matter herein and authorized by the members of the executive committee and the members of the above named clans to file this judicial review petition on their behalf and on behalf of the applicants.

C. DANIEL NYAGA, the 3rd applicant is an adult male working at Igamba Ng'ombe division of Meru South district, within the Republic of Kenya. He is the treasurer of the 13 Mbeere Clans in Igamba Ng'ombe Division named in paragraph a) above. Applicant herein duly conversant with the matter herein and authorized by the members of the executive committee and the members of the above named clans to file this judicial review petition on their behalf and on behalf of the applicants.

D. The 1st to 5th respondents are sued on behalf of the Government of the Republic of Kenya. By virtue of declaration reference number ADM/LA/4/118 OF 4TH October, 2012, by the 5th Respondent declaring Kamaindi of Kamaindi location in Igamba Ng'ombe Division of Meru South District amounts to actions of the Government of the Republic of Kenya and therefore for purposes of orders being sought herein the Attorney General is sued on behalf of the state and on behalf of the 2nd to 5th respondents.

B. RELIEF BEING SOUGHT

1. That this honourable court do extend and or excuse the filing and service of the Notice to the Registrar.
2. That an order of prohibition to prohibit the 2nd, 3rd, 4th and 5th respondents from effecting declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi location in Igamba Ng'ombe Division pending the hearing and determination of the judicial review hereof.
3. That an order of Mandamus be issued bringing into this court and compelling the respondents to cancel and remove declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe Division

for want of representation.

4. That grant of leave do operate as a stay of any intended decision, action, execution or enforcement of declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi location in Igamba Ng'ombe Division.

5. That the costs of this application be provided for.

GROUND UPON WHICH RELIEFS ARE SOUGHT

1. The 5th respondent issued to members of the public and the residents of Igamba Ng'ombe Division for purposes of adjudication, alienation, processing and issuance of titles to members of the public, declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi location in Igamba Ng'ombe Division.

2. The 2nd, 3rd, 4th and 5th respondents he (sic) have through the office of the 5th respondent started effecting the declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi location in Igamba Ng'ombe Division.

3. That Igamba Ng'ombe Division and more particularly Kamaindi and Kamwimbi locations are occupied by both Tharaka and Mbeere communities.

4. That sometime on 29th September, 2012, the 5th respondent held a meeting at (sic) in the subject adjudication are (sic) and only called the members of Tharaka community from whom he formed and (sic) exclusive committee.

5. That the said committee did not constitute a proper selection process and therefore left out members of the Mbeere community.

6. That Leadership of the Mbeere community is by way of clans and that the said clans are as listed below forming part of the 39 clans of the Mbeere community as a whole.

7. That on 11th October, 2012, the applicants through the 1st applicant wrote to the 5th respondent as required by section 30 of the Land Adjudication Act requiring him to issue authority in writing for the applicants to challenge the 5th respondent's declaration but the same did not elicit any respond (sic) despite expiry of the requisite 28 days.

8. That article 159 (1)(d) of the Constitution of Kenya clearly stipulates that "Justice shall be administered without undue regard to procedural technicalities" and therefore the applicants did not either:-

a) Wait for the 5th respondent's written authority to institute the current suit; or

b) Appeal to the minister

As stipulated by section 30 of the Land Adjudication ACT, Cap 284, Laws of Kenya.

9. The 5th respondent has to date not responded to the applicant's demand letter dated 11th October, 2012 nor revoked the declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi location in Igamba Ng'ombe Division.

10. The actions of the 2nd, 3rd, 4th and 5th respondents are not only unlawful but also a blatant expression of impunity.

11. That should the actions of the 2nd, 3rd, 4th and 5th respondents implement declaration reference number ADM/LA/4/118 of 4th October, 2012, by the 5th respondent declaring Kamaindi of Kamaindi location in Igamba Ng'ombe Division, the intended judicial review will be rendered nugatory and in total defeat of the rules of natural justice.

DATED AT NAIROBI THIS 13TH DAY F DECEMBER, 2012

KAMUNDA NJUE & COMPANY

ADVOCATES FOR THE APPLICANTS

3. Leave to file these proceedings was granted at Kerugoya by Hon. Justice B. N. Olao, J on **30th September, 2013**. That leave also stayed any intended decision, action, execution or enforcement of the declaration number ADM/LA/4/118 of **4th October, 2012**.

4. This suit was canvassed by way of written submissions. The submissions are pasted in the exact format proffered to court. Any mistakes, if there are any, should be ascribed to the applicants' advocates.

5. The applicants' submissions state as follows:

APPLICANT'S SUBMISSIONS ON THE NOTICE OF MOTION JUDICIAL REVIEW APPLICATION DATED 20TH SEPTEMBER 2013

A. BACKGROUND

Brief Facts

The Applicant's Application arises out of the 5th Respondent's Declaration ADM/LA/4/118 of 4th October 2012 declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe issued to the members of the public and the residents of Igamba Ng'ombe Division for purposes of adjudication, alienation, processing and issuance of titles.

The 2nd, 3rd and 4th Respondents have started through the office of the 5th Respondent effecting the aforementioned Declaration despite the fact that Igamba Ng'ombe Division and more particularly Kamaindi and Kamwimbi locations are occupied by the Tharaka and Mbeere communities.

The Applicants therefore seek the following Orders

1. **THAT** an order of Prohibition to prohibit the 2nd, 3rd, 4th and 5th respondents from effecting Declaration Reference number ADM/LA/4/118 of 4th October 2012, by the 5th Respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe Division pending the hearing and determination of the judicial review hereof.
2. **THAT** an order of Mandamus be issued bringing into this Court and compelling the Respondents to cancel and remove Declaration Reference number ADM/LA/4/118 of 4th October 2012, by the 5th Respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe Division for want of representation.
3. **THAT** the costs of this application be provided for.

May it please this Honourable Court;

The first order has already been spent and thus we will deal with the second order which seeks an order of Mandamus compelling the Respondents to cancel and remove Declaration Reference number ADM/LA/4/118 of 4th October 2012.

B. THE APPLICANTS' CASE

The Applicant's case is that the decision of the 5th Respondent coupled with the actions of the 2nd, 3rd and 4th Respondents are unlawful, unprocedural, an improper exercise of power, made in ignorance of relevant considerations, unreasonable, made in bad faith, an inflexible application of policy and an outright denial of natural justice despite Article 47 of the Constitution of Kenya 2010 which entitles every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

In **Zachariah Wagonza & another v Office of the Registrar Academic Kenyatta University & 2 others [2013] eKLR**, the learned Judge reiterated the broad grounds on which the Court exercises its judicial review jurisdiction as was stated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards..... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process.

In this regard we will submit on the following areas:

1. **Whether the Applicants were denied the right to be heard (procedural impropriety);**
2. **Whether the Respondents have acted irrationally or in bad faith;**
3. **Whether the Respondents acted in ignorance of relevant considerations;**
4. **Whether the orders of Judicial Review are available.**

Whether the Applicants were denied the right to be heard:

As deponed in the 1st Applicant's Verifying Affidavit dated 10th December 2012 the 5th Respondent a few days before the Declaration in question (Declaration Reference number ADM/LA/4/118 of 4th October 2012) on 29th September 2016 held a meeting at the subject adjudication scheme and only called members of the Tharaka community from whom he formed an exclusive committee despite the subject adjudication scheme being occupied by both the Tharaka and Mbeere communities.

In the case of Republic v Nairobi City County Ex-Parte: Gurcharn Singh Sihra & 4 others [2014] eKLR, while placing reliance on Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR the court observed that: -

“...the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power....”

In **James OpiyoWandayi v Kenya National Assembly & 2 others [2016] Eklr** a case where the 2nd Respondent (the speaker of the National Assembly) had arbitrarily invoked the evidently unconstitutional provisions of the Standing Order No. 111 of the **National Assembly Standing Orders** and mentioned the Applicant for contempt alongwith suspending him for the remainder of the session without regard to the unequivocal provisions of the Constitution and law of natural justice requiring any person to be accorded a right to fair hearing and administrative action, it was held that The Speaker ought to have along with granting the Applicant a right to be heard considered the ramifications of his decision not only to the Applicant but also to those whose interests the Applicant represented. In this matter the Applicants represent the 13 Mbeere clans in Igamba Ng'ombe Dision.

The learned Judge in **James OpiyoWandayi v Kenya National Assembly & 2 others [2016] Eklr** went on to explain that the aforementioned position had also been adopted in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

“Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards.”

As a result, in public interest the Honourable Judge issued an order staying the decision made by the 2nd Respondent, the Speaker of the National Assembly, on 31st March, 2016 suspending the applicant from the remainder of the Session of the House pending the hearing and determination of the proceedings or further orders of the Court.

The Respondents' decision suspending the Applicant for one year was thus brought into Court and quashed and also costs awarded to the Applicant.

Whether the Respondents have acted irrationally or in bad faith

In **Republic v Kenya Revenue Authority Ex-Parte: Cosmos Limited [2016] eKLR**, a Judicial Review matter wherein the *ex parte* applicant, **Cosmos Limited**, sought inter alia an order of judicial review by way of an order of mandamus to compel the KRA to process and pay the Applicant the Value Added Tax refunds due to it forthwith, the Honourable Judge whilst granting the said order, (an order of mandamus compelling the KRA to process and pay the Applicant the admitted sum of Kshs 11,151,476/- being Value Added Tax refunds due to the Applicant forthwith) quoted **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** a case which explains the concept of unreasonableness and bad faith. In the said case the Honourable Judge stated:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

In the instant case the 5th Respondent's failure to call to his own attention all the residents of the scheme in question including the Mbeere community who form a significant fraction of the residents of Kamaindi before declaring Kamaindi of Kamaindi Location via Declaration Reference number ADM/LA/4/118 of 4th October 2012 is a grand display of lack of reasonable consideration, irrationality and acting in bad faith and the Respondents should be compelled to cancel and remove the said Declaration.

In **Republic v Kenya Revenue Authority Ex-Parte: Cosmos Limited [2016] eKLR** the determination was not arrived at based on the merits and no determination was made on the issue of whether or not there were taxes actually due and owing but merely on the process of recovery thereof. Similarly, our sole contention is that the Declaration by the 5th Respondent was made

without regard for due process.

Whether the Respondents acted in ignorance of relevant considerations:

In **Zachariah Wagonza & another v Office of the Registrar Academic Kenyatta University & 2 others**[2013]eKLR a case that very concisely tackled the issue of reasonable consideration the Applicants therein **Zachariah Wagonza and Kwame Ochola Otinda** by a Notice of Motion dated 13th May 2013 sought the following orders:

1. **THAT the Honourable Court be pleased to issue an order of Certiorari to remove into the high court and quash the decision of the Students Disciplinary Committee of Kenyatta University dated 28th February 2013, and Registrar of Academic suspending the Ex-applicants for one year.**
2. **THAT the costs of this application be provided for.**

The Honourable Judge started out by explaining the parameters of judicial review as set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

In this regard, we place total reliance on the Applicants’ statutory statement, verifying affidavit and submit that the 5th Respondent’s Declaration was made without due regard to the interests of the Mbeere Community despite them being a party to be directly affected by the said Declaration.

Whether the orders of Judicial Review are available

Article 47 of the Constitution of Kenya 2010 entitles every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Section 4 of the Fair Administrative Action Act, 2015 reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4 also states that in all cases where a person’s rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision: prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

Section 11 states that in proceedings for judicial review, the court may grant any order that is just and equitable, including an order compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

C. CONCLUSION

In conclusion my Lord, justice would call upon this Honourable Court to find and hold that our Application dated 20th September 2013 has merit and the orders therein should be allowed as prayed.

We so pray.

DATED at Nairobi this.....10thday of.....October,.....2016

KAMUNDA NJUE & CO. ADVOCATES

ADVOCATES FOR THE APPLICANTS

6. The applicant filed further submissions which state as follows:

FURTHER SUBMISSIONS ON BEHALF OF THE EX PARTE APPLICANTS

May it please the Honorable Court; we hereby wish to make further submissions on behalf of the Ex Parte Applicants. Our further submissions will cover the following the issue of locus standi of the three applicants as raised in the submissions filed by the Interested Parties on 6th Dec 2016

ON LOCUS STANDI: My Lord, it has been argued by the Interested Parties that the three Applicants have no locus standi in this matter because they are not a registered group. We submit to the contrary while seeking to rely on **Michael Osundwa Sakwavs Chief Justice and the President of the Supreme Court of Kenya & Another (2016) Eklr** which recognized that the Constitution 2010 had expanded the horizons of locus standi.

In the Affidavit that accompanied their Statutory Statement the three ex parte applicants described themselves as the Chairperson, Secretary and Treasurer of 13 Mbeere clans residing in the Kamaindi Adjudication Section. They claim that the fundamental rights of the Mbeere community that is resident in the area was breached because they were denied the right to participate in the initial meeting called to discuss the establishment of the Adjudication Section. They also feel that their exclusion from the formed adjudication committees threatens their rights over the land they are occupying and this will affect their livelihood and well-being.

To be specific, the Mbeere Community, being a minority and marginalized group in TharakaNithi County where the suit lands are located are of the view that their fundamental rights including the right to equality and nondiscrimination; the right to public participation; the right to own land as well as the right to fair administrative action is under threat and or has been breached.

The three applicants are therefore seeking a constitutional relief in order to ensure that their rights are safeguarded and due to this the argument that they have no legal right to bring this suit is an anomaly.

It is our humble submission that the Constitution recognizes that *‘a person acting as a member of, or in the interest of, a group or class of persons can institute proceedings’ to protect their constitutional and fundamental rights.*

See Articles 22 (Enforcement of Fundamental Rights) subsections 2 (b) and Articles 258 (Enforcement of this Constitution) Subsection 2 (b) of the Constitution of Kenya 2010.

See also 2 of the Land Adjudication Act which provides as follows

‘A group means a tribe, clan, section, family, or other group of persons whose land under recognized customary law belongs communally to the persons who are for the time being members of the group together with any other person of whose land the group is determined to be the owner under the provisions of section 23 (2) of this Act.’

The Land Adjudication Act section 23 (2) recognizes that customary law shall be used to determine ownership and claim over land during the adjudication process. Among the Mbeere community, claims over land are determined by intricate customary laws and practices which are the preserve of clan elders such as the ones listed in the supporting affidavit. My Lord not a single of these clan elders, who are elected by their clans to represent their concerns in various forums were selected to sit in the committee that was established. The majority of the committee members were hand picked by the 5th Respondent and there are no representatives from the Mbeere Community.

We submit humbly that failure to include representatives of the Mbeere Community in this committee is not only callous and discriminative but is meant to deny the Mbeere residents a chance to have their claims and complaints adjudicated upon during the process. We refer to **sections 20 and 21 of the Land Adjudication Act** that lists down the critical role and functions of land adjudication committees.

My Lord the Mbeere community is a homogeneous group where clans play a critical role in cementing social, economic and political relationships; they are the custodians of community knowledge and practices including customary practices that guide customary claims over land. My Lord, Article 11 of the Constitution which *‘recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.’*

Locking them out of the Land Adjudication Committees established for the Kamaindi Land Adjudication Section will deny the Mbeere an opportunity to have their claims recognized and adjudicated on. Their complaints will not be taken into consideration since those who would voice their concerns have been locked out. They risk losing the land that belongs to them and which they have occupied for generations. This risk will affect their livelihood and their future generations. My Lord the Mbeere community living in TharakaNithi is a minority and politically marginalized; they need the special protection of this Court so that they do not lose their ancestral lands during the adjudication process in Kamaindi Adjudication Section.

We pray that this application be allowed and that the Mbeere community be allowed to participate in the Committee going forward.

We rely on

DATED THIS.....OF2018

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NJIRU KITHAKA & CO

ADVOCATES FOR APPLICANTS

7. The applicants proffered the following authorities in support of their assertions.

1. Judicial Review Application No. 155 of 2013 Zachariah Wangunza & another v Office of the Registrar Academic Kenyatta

University & 2 Others [2013]

2. Misc. Civil Application (Jr) No. 59 of 2014 Republic v Nairobi City County Ex-parte:

Gurcham Singh Sihra & 4 Others [2014] eKLR.

3. Judicial Review Application No. 258 of 2016 James Opiyo Wandayi v Kenya National Assembly & 2 Others [2016] eKLR.

4. Judicial Review Misc. Civil Application No. 478 of 2014 Republic V Keny Revenue Authority Ex-parte: Cosmos Limited [2016] eKLR.

5. Article 47 of the Constitution of Kenya 2010.

6. Section 4 and 11 of the Fair Administrative Actions Act, 2015.

8. The applicants also proffered the following case in further support of their assertions:

Michael Osundwa Sakwa Petitioner

Versus

Chief Justice and President of the Supreme Court of Kenya & Another – Respondent

And

Kenya magistrates and judges association and 3 others.....interested parties

9. The Interested parties submissions state as follows:

INTERESTED PARTIES' SUBMISSIONS

INTRODUCTION

This is a judicial Review application brought under the provisions of Order 53 of the Civil procedure Act and Section 8 9 of the Law Reform Act.

The applicants seek to quash the declaration by the 4th Respondent establishing Kamaindi Location as Adjudication Section. They further seek orders compelling the 4th Respondent to cancel the declarations.

The interested parties have opposed the application and have filed affidavits in that regard. They hold that the reliefs sought are not merited. They seek the dismissal of the motion with costs.

APPLICANTS' CASE

The applicants claim to be Chairman, Secretary and Treasurer of 13 clans of Mbeere sub-Tribe and bring these proceedings in that capacity. Their case is that when the 4th Respondent called a public meeting to declare the area adjudication section, on

The 29/9/2012, he invited only members of Tharaka Community ad excluded the members of Mbeere community. They also allege that the adjudication committee selected by the 4th Respondent to assist in the adjudication process was not properly selected as it excluded members of the Mbeere Community. They appear also to allege that the 4th Respondent refused to give them consent to institute legal proceedings as required under S. 30 of Land Adjudication Act, a strange contention as we shall demonstrate later in these submissions.

THE LAW

It is trite law that for a party to bring any proceedings in a court of law, the party must first and foremost establish that he has the necessary capacity to bring the proceedings and seek the reliefs sought. The party must demonstrate, through pleadings what loss or injury he stands to suffer.

In this case, the applicants describe their capacity I paragraph 'A' of the Statutory Statement that was filed in support of the motion. They describe themselves as Chairman, Secretary and Treasurer of 13 Mbeere Clans. You will note, Your Honour, from their descriptions, they do not allege to be residents of KAMAINDI LOCATION, which was declared adjudication section. In this regard, they do not stand to suffer any loss or injury. They do not own any land within the adjudication section that would possible be affected by the adjudication to their prejudice. They are busy bodies and have no claim or interest in the area affected by the declaration. If they were residents or owned any land within the adjudication section, they would have stated so clearly in their pleadings.

They further claim to be acting as officials of 13 Mbeere Clans. What is this body of 13 Mbeere Clans, an Association, a Self-Help Group, a Society, a Company or what is it? Does it have any legal entity? It has no legal entity and is none existence in the eyes of law. If the 13 clans do not constitute a legal entity, then it can not sue through the alleged officials. If the applicants intended to bring the proceedings in a representative capacity then, the prescribed procedure for instituting such a suit was not followed. We urge you to find and hold that the applicants lack the capacity to bring these proceedings.

Even if the court were to find that they have any capacity to bring these proceedings which we submit they do not have, we urge you to find that on the facts before you and the law, they do not deserve the reliefs sought in these proceedings.

The remedy of judicial review is not concerned with the merits of the decision made but rather with the decision making process. In this case, this court will not be concerned with the merits of the declaration or the selection or composition of the adjudication committee. To do so, would amount to usurpation of the powers vested in another authority. The applicants have submitted, very strangely, that the meeting held at the chief's camp, where the declaration for the establishment of the adjudication section was read, was attended by the members of Tharaka Community to the exclusion of the members of the Mbeere Community. Where is the evidence to support that sweeping statement?

The Interested Parties have sworn that the meeting was in an open public place. It was open to be attended by all the residents of Kamaindi Location. It was attended by district Commissioner, Meru South district, besides other leaders. The applicants have not placed before you any evidence to show that the meeting was attended by one community. Is there evidence that attendance was by individual invitation, restricted to the people of Tharaka? The Tharaka people and the Mbeere, who are residents of Kamaindi, are neighbours, subjects of one chief and the meeting took place in a public place. There is no evidence that Mbeere people living within the location were denied a chance to attend the meeting.

By the 4th respondent convening the meeting, and reading out the declaration in public was in compliance with Section 5 of the Land Adjudication Act, which empowers the Adjudication Officer to establish Adjudication section within adjudication areas by giving notice. The notice in this particular case is the one dated 4/10/2012, and read to the public during the baraza. This was procedural and in compliance with Article 47 of the constitution. There is no illegality or procedural impropriety exhibited by the 4th respondent. He acted within the law.

Aware of the requirements of the law, the 4th respondent directed that the residents of the location, which he declared adjudication section, do elect as committee from amongst themselves. This was in fulfillment of Section 6 of the Land Adjudication Act.

Which provides:-

“In respect of each adjudication section, the Adjudication Officer, after constitution with the District Commissioner of the District within which the Adjudication section lies, shall appoint not less than ten persons residents within the adjudication committee for that adjudication section.”

Indeed the law mandates the Adjudication officer to appoint committee members, from among the residents of the adjudication section. In recognition of the new constitutional order and fidelity to fairness, the 4th respondent allowed the residents to choose the committee members using the administrative units. This was to ensure balance and equity in composition of the committee. The affidavit of JASMES KANGORI dated 18/12/2014 beginning paragraphs 8 – 12 clearly spells out the procedure used, the names of those appointed and the units they represent. They have deponed that the committee has members of the 3 communities' residents in the area, the Tharaka, the Mbeere and the Chuka.

We submit that there is nothing unprocedural, irrational and unfair in the manner the committee was appointed. If the applicants intend the court to find that the committee is composed of people from Tharaka, they should have filed the list of the committee members indicating their ethnicity; otherwise the court is being asked to proceed on guess work. It is to be noted that Section 6 demands that the members of the committee must be residents of the area under adjudication, not ethnicity. The committee so appointed is composed of both gender and can not be faulted.

The Interested Parties have deponed that it is the residents of Kamaindi Location who approached the government with a request that the area be declared adjudication section. This is a matter of great public interest and the court will always take that into account while dealing with matters of this nature.

There is no claim by the applicant that the declaration or the appointment of the committee will in any way prejudice their claim over any parcel of land or deprive them of their properties. There is no evidence of breach of Article 40 of the Constitution. In the declaration sought to be quashed, the 4th Respondent, in the 4th paragraph gives notice to any person claiming right or interest in the land, to record his claim with the recording officer by the 4/3/2013. The applicants have not attached evidence of any claim by any person over any parcel of land falling within the adjudication section.

We further submit that, in bringing these proceedings, the applicants defiled the clear and mandatory provisions of Order 53 Civil Procedure Rules which states:-

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days, by Notice of motion to the High Court.”

The use of the word **shall** make it mandatory for a party so granted leave to make the application within 21 days. The motion herein was filed long after the expiry of 21 days granted by the court and the law. In this regard, we reiterate our position that the motion before you is incompetent. This is not a situation that can be cured by invoking Article 159 of the constitution or the so called oxygen principles.

In *HC Misc Application No 3 of 2012 at Kerugoya High Court*, Justice B. N. Olao enumerated various situations when the oxygen principle can not aid an applicant. He quoted with approval the well known case of **CITY CHEMIST & ANO –VS-ORIENTAL COMMERCIAL BANK LTD – CIVIL APPLICATION NO 302 OF 2008**, where the court stated the new approach as:-

“It is not to say that the new thinking totally uproots well established principles or precedents in the exercise of courts discretion which is a judicial process devoid whim and caprice. On the contrary the enactment enriches those principles and emboldens the court to be guided by broad of justice and fairness as it applies the principles. The application is clear on unambiguous principles and precedents assists litigants and legal practioners in determining some measure of certainty, the validity of claims long before they are instituted.”

The provisions of the law regarding the time frame within which judicial review proceedings are to be filed are clear and unambiguous. Time and again, courts in this country have stated that judicial review proceedings are special in nature and are not governed by the provisions of the Civil Procedure. Once the stipulated time for bringing judicial proceedings is over, period. It can not be enlarged.

These proceedings are plagued by another problem. They are instituted improperly. The law requires that the Republic be the applicant. In this case, the applicants filed the proceedings in their names. We refer to court to the well known case of **Farmers Bus Services & Ano –VS-Transport Licensing Tribunal**, which clearly spells out how the Judicial Review Proceedings should be instituted. These proceedings are none starter and are dead abi initio.

CONCLUSION

For these reasons stated herein, we submit that the applicants have not placed any material before the court to warrant the reliefs sought. The motion itself is incompetent for being properly instituted and having been filed without leave. To grant the relief sought would occasion great injustice to the residents of Kamaindi

Location, while protecting nothing, as the applicants have not shown any interest in the area under adjudication. The orders sought would amount to a serious violation of Article 40 of the constitution of Kenya, as it will deny the residents of Kamaindi the right to have their property rights adjudicated.

We pray that the motion be dismissed with costs.

INTERESTED PARTIES LIST OF AUTHORITIES

1. HC MISC ELC CASE NO 3 OF 2012 – KERUGYA

SALESIO NJAGI NTHIRIMANO –VS- ROSALINE RUGURU WAWERU OTHERS

2. HC MISC JR APPLCIATION NO 104 OF 2010

COSMAS MURIUNGI THAMBO –VS- DIST LAND ADJ OFFICER ,TIGANIA

EAST & MAGARET KABERIA M'TWANKOROI

3. COURT OF APEPAL CIVIL APPEAL NO 27 OF 1989

AKO –VS- SPECIAL DISTRICT COMMISSIONER, KISUMU & ANO

DATED AT MERU THIS.....6THDAY OF.....DECEMBER.....2016

FOR:- MURANGO MWENDA & CO.

ADVOCATES FOR THE INTERESTED PARTIES

10. In support of their assertions, the interested parties proffered the following authorities:-

a) HC Misc ELC Case NO. 3 of 2012 – Kerugoya – Saleio Njagi Nthirimano versus Rosaline Ruguru Waweru & 3 Others

b) HC Misc JR Application No. 104 of 2010 – Cosmas Muriungi Thambo versus District Land Adjudication officer Tigania East and Margaret Kaberia M'Twankoroi

c) Court of Appeal Civil Appeal No. 27 of 1989 – Ako versus Special District Commissioner, Kisumu and Another.

11. The Respondents to whom this application was mainly directed did not file their submissions. I find that they were aware of these proceedings and were given a chance to file their proceedings.

12. I do not find it necessary to delve into discussing the authorities proffered by the parties as the parties' submissions have been reproduced

in full and the assertions the parties make have been clearly brought out. I find that all the authorities the parties have proffered are good authorities in their facts and circumstances. I will put into consideration the principles enunciated by those authorities.

13. I note that the Interested parties have submitted that granting the orders sought by the applicants would amount to a violation of Article 40 of the Constitution of Kenya in that it will deny the residents of Kamaindi the right to have their property rights adjudicated upon. The applicants riposte that discrimination against them as a distinct minority is denial of a fundamental right and thus against the provisions of the constitution.

14. The only issues for determination here is if or if not the applicants are entitled to an order of prohibition against the 2nd, 3rd, 4th and 5th defendants from effecting Declaration Reference No.ADM/LA/4/118 of 4th October, 2012, by the 5th Respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe Division as an adjudication section AND an order of Mandamus bringing into this court and compelling the Respondent to cancel and remove Declaration Reference number ADM/LA/4/118 of 4th October, 2012 by the 5th Respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe Division an adjudication Section for lack of representation.

15. I have considered the pleadings and the submissions proffered by the applicants and the interested parties in support of their diametrically incongruent assertions. I have considered the authorities they have proffered.

16. It is clear that the respondents have not denied that they discriminated against the applicants who represent the Mbeere Community in this suit. I find that the applicants merit the issuance of the orders they seek.

17. I note that this application has a strong veneer of public interest litigation. I will, therefore, exercise my judicial discretion and order that the parties do bear their own costs.

18. In the circumstances, judgment is issued for the applicants in the following terms:

a) An order of prohibition is hereby issued prohibiting the 2nd, 3rd, 4th and 5th respondents from effecting Declaration Reference number ADM/LA/4/118 of 4th October, 2012 by the 5th Respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe Division.

b) An order of mandamus is hereby issued bringing into this court and compelling the Respondents to cancel and remove Declaration Reference Number ADM/LA/4/118 of 4th October, 2012 by the 5th Respondent declaring Kamaindi of Kamaindi Location in Igamba Ng'ombe Division for want of representation.

c) This being a matter that evinces public interest litigation, parties are to bear their own costs.

19. It is clarified that the Respondents may issue another Declaration which does not breach the constitutional rights of the applicants.

20. Orders accordingly.

Delivered in open Court at Chuka this 18th day of December, 2018 in the presence of:

CA: Ndegwa

Miss Kithaka for the Exparte Applicant

Andrew Nyaga – 1st Interested Party

James Kang'ori – 2nd Interested Party

Karuguka Kugeria – 3rd Interested Party

AG for Respondents Absent

P.M. NJOROGE

JUDGE