



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND MISC APPLICATION NO. 5 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF ESTATE OF ORDER 53 RULE 1 & 2 CIVIL PROCEDURE RULES AND SECTIONS 8 & 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF SECTION 30 OF LAND ADJUDICATION

AND

IN THE MATTER OF REFUSAL BY ADJUDICATION OFFICER TO GRANT CONSENT TO INSTITUTE PROCEDURE

PAUL MUTETHIA MBOROKI.....EXPARTE APPLICANT

VERSUS

LAND ADJUDICATION & SETTLEMENT

OFFICER, BUURI SUB-COUNTY1ST RESPONDENT

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

AND

CATHERINE NGIRITU MARETE.....INTERESTED PARTY

RULING

The applicant Paul Mutethia Mboroki has instituted this application under order 53 rule 1 & 2 civil procedure rules section 8 and 9 of the law reform act cap 26 law of Kenya and section 30 of the land adjudication act cap 284 Laws of Kenya.

The applicant is seeking an order of Mandamus to compel the land adjudication (1st respondent) to issue a consent under section 30 of the land adjudication act to enable him file a suit against the interested party in respect of land registration No. Ruiru/Rwarera/112.

The applicant is also seeking the costs of the application to be costs in the cause. In his verifying affidavit sworn on 28th February, 2018, the applicant deposed that he was the owner of land parcel no. Ruiru/Rwarera adjudication section/5311 measuring approximately 3.63 acres or thereabouts. The applicant further contends that he was given the land by his mother who shared out her original land reference no. Ruiru/Rwarera/112 to her children in the year 1997. He took possession of the land and fenced the same and commenced extensive development therein. After his mother shared her land to her children, she retained a portion for herself under land reference no. Ruiru/Rwarera/112. His mother later sold her portion of land registration no. Ruiru/Rwarera/112 to the interested party herein. The applicant deposed that after the interested party bought the land from his mother, she used her influence as an employee of Government working with the department of land adjudication and settlement to harass him by acquiring and extending her boundary into his land parcel Ruiru/Rwarera/5311 parcel no. Ruiru/Rwarera/5311. The applicant further stated that the interested party took demarcation officers to the land in his absence and expanded the boundary of her land to include almost 0.5 acres of his land. He then instructed his advocates Ms. Murango Mwenda to request the 1st respondent to give consent to institute proceedings against the respondents and the interested party but the 1st respondent refused. He now wants this court to issue an order of mandamus to compel the 1st respondent to issue him consent to file

the necessary court papers for the appropriate orders.

In a replying affidavit sworn on 7th May 2018, the interested party stated that she has no duty whatsoever in the issuance or otherwise of consents to the exparte applicant or any other party since that is a preserve of the 1st respondent.

The interested party however confirmed having bought a portion of land from the exparte applicant's mother and expressed no objection to the applicant being given consent for filing any perceived boundary dispute between him and her to enable them live harmoniously in good neighborliness. The interested party wonders how she had been made a party to these proceedings and of what assistance he can play in getting the applicant obtain the orders sought.

The respondents on the other hand filed grounds of opposition through E.M Kieti senior litigation counsel as follows:

- (1) That the application is premature and offends the provisions of the land adjudication act, cap 284 section 30 (3)
- (2) That further application offends the pre-conditions set out in section 30 (1) of the land adjudication act.
- (3) That the orders of judicial review being discretionary are not warranted in this instance.

When the matter came for directions, the parties agreed to dispose of the application by way of written submissions except the respondents who stated that they will be relying on the grounds of opposition as filed.

EXPARTE APPLICANTS SUBMISSIONS

The exparte applicant submitted that the adjudication officer has a statutory mandate to issue consent to aggrieved parties to allow them institute proceedings where the adjudication register for that adjudication section has not become final.

He submitted that the exparte applicant being aggrieved by the acts of the interested party to encroach and acquire part of his land known as L.R No. Ruiiri/Rwarera/5311, required to institute a civil proceedings against the interested party to enable him get recourse since the adjudication register for that adjudication section has not become final. He further submitted that the adjudication officer failed and declined to do so without justifiable cause.

He stated that order 53 civil procedure rules provides for the applications of Judicial Review. He cited the following cases:

- (1) Chief Constable of the North Wales Police vs Evans (1982) IWLR 1155
- (2) Commissioner of lands vs Kunste hotels Limited (1997) eKLR

INTERESTED PARTY'S SUBMISSIONS

The interested party on her part submitted that the application as drawn is fatally defective in that prerogatory orders are issued in the name of the crown (republic). He stated that the application before court is not. It submitted that failure by the applicant to institute these proceedings in the name of the republic is fatally defective for want of form and goes to the root of the proceeding and therefore calls for the dismissal of the same.

The interested party also submitted that the applicant has jumped the gun by bringing forth these proceedings instead of following proper channels as provided under section 30 (3) of the land adjudication act. The interested party also submitted that she has wrongly and without justification been enjoined in these proceedings and that this application must fail. He relied in the following cases:

1. Farmers Bus Service & Others Vs The Transport Licensing Appeal Tribunal (1959) EA 779
2. Ndete vs Chairman Land Disputes Tribunal & Another (2002) IKLR 392
3. Jotham M. Gituma vs Florence Karema & another (2012) eKLR
4. Republic vs DCIO District Criminal Officer (DCIO) Busia District Exparte Manuel Otiangala

I have considered with anxious care the applicant's application and the materials placed before me both in support and in opposition to the same. I have also considered the submissions and the applicable law. First, the application has been brought under section 30 of cap 284 laws of Kenya. That section of the law reads as follows:

***“30 (1) Except with the consent in writing of the adjudication officer, no person shall institute and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication section has become final in all respect under section 29 (3) of this act. Where any such proceedings were begun before the publication of the notice under section 5 of this act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached otherwise directs.*”**

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make directions 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.

(4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed if at the time this act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired”.

The framework law for the adjudication of land has provided clear procedural mechanism for addressing grievances by any aggrieved person from the decision of the district land and settlement adjudication officer. The applicant has stated that he sought leave from the 1st respondent to institute civil proceedings against the intended interested party but the 1st respondent has failed to respond to two demand letters written by his advocate which were annexed to the supporting affidavit. If that be the case the inference to be made is that the 1st respondent refused and or declined to give consent. The applicant’s remedy was to exhaust the procedural mechanism provided under section 30 (3) of the land adjudication act by appealing to the minister.

I find that the applicant jumped the gun by not exhausting the provisions of the framework law.

It was imperative for the applicant to bring himself within the statute law before looking for remedies outside that statute. This court has pronounced itself on this issue in several decisions. In the case of the **Speaker of National Assembly vs Karume (1992) KLR at page 425**, the court held as follows:

“Where there is a clear procedure for the redress of any particular grievance prescribed by the constitution of an act of parliament, that procedure should be strictly followed”.

Again in **Nartosa & Others vs Minister of Educaiton for Westerncape & others**, which quoted with approval in **Mombasa petition case no. 18 of 2013 between Abdalla Mangi Mohamed vs Lazarus & 5 others (2012) eKLR**, it was held thus:

“The court was concerned with the appropriateness or otherwise of granting relief directly under the constitution without a complaint that an act of parliament was constitutionally deficient in the remedies it provides. The court could not conceive that it is permissible for an applicant, save by attacking the constitutionality of the statute to go beyond the regulatory framework which is established”.

I totally associate with the interpretation of the law by the learned judge.

In the upshot I find the application before me misconceived premature and lacking in merit. The same is hereby dismissed. I make no order as to costs.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 7TH DAY OF DECEMBER, 2018.

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In the presence of:

Mr. Githinji for interested party

C/A: Janet