



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

JUDICIAL REVIEW NO. 6 OF 2016

IN THE MATTER OF APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF P/NO. 1516 OF KONYANGO ADJUDICATION SECTION

AND

IN THE MATTER OF THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT RACHUONYO SUB-COUNTY

AND

IN THE MATTER OF THE DECISION BY DIRECTOR OF LAND SETTLEMENT RACHUONYO SUB COUNTY AND RACHUONYO SUB COUNTY SURVEYOR TO IMPLEMENT ILLEGAL AND UNLAWFUL ORDER

AND

IN THE MATTER OF APPLICATION BY WILLIAM AWUOR ABONGO

REPUBLIC..... APPLICANT

VERSUS

THE DIRECTOR OF ADJUDICATION AND SETTLEMENT RACHUONYO

NORTH SUBCOUNTY.....1ST RESPONDENT

SURVEYOR RACHUONYO SUB COUNTY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

KEVIN OPIYO AOKO.....INTERESTED PARTY

RULING

1. William Owuor Abongo, the Exparte Applicant, filed the chamber summons dated 1st December 2016 seeking for conservatory order staying the 1st Respondent’s decision to implement an illegal order dated 3rd October 2016 on the 16th December 2016, leave to institute judicial review proceedings for mandamus, certiorari and prohibition orders and costs. The Director of Land Adjudication & Settlement, Rachuonyo North Sub County, The Surveyor, Rachuonyo Sub County and the Attorney General are listed as the 1st to 3rd Respondents respectively. That one Kevin Opiyo Aoko then filed the Notice of Motion dated the 14th June 2017 seeking to be enjoined as an Interested Party on the basis that he is a beneficiary of the land subject matter of this proceedings. The application was not opposed and was granted on the 15th March 2018.

2. The exparte Applicant’s Chamber Summons is based on the eight (8) grounds on its face, the statement of facts and verifying affidavit filed with it.

3. The Chamber Summons is opposed by the Respondents through the replying affidavit of Joan Eredi, the County Land Adjudication Officer, Homa Bay County, sworn on the 7th April 2017.

4. The Chamber Summons is supported by the Interested Party through his replying affidavit sworn on the 4th April 2018.

5. The court gave directions on filing and exchanging the written submissions, among others, on the 15th March 2018. The Exparte Applicant filed their submissions dated 14th July 2017, while the Respondents filed theirs dated the 17th October 2017. The Interested Party filed his written submission dated the 4th April 2018.

6. The following are the issues for the court's determination;

a) **Whether the Applicant has established a prima facie case with a probability of success for conservatory order to issue at this interlocutory stage.**

b) **Whether leave should be granted to institute judicial review proceedings for Mandamus, Certiorari and Prohibition orders.**

c) **Who pays the costs of the application.**

7. The Court has carefully considered the grounds on the Chamber Summons, statement of facts, affidavit evidence by Applicant, Respondents and Interested Party plus the written submissions by the parties Counsel and come to the following findings;

a) That the Applicant has through his depositions at paragraph 2 of the verifying affidavit disclosed that he is now ***"the eldest son of the late Jonathan Abonyo Olenyo after the demise of my eldest brother"***. That the copy of Appeal Proceedings attached to the Applicant's supplementary affidavit sworn on the 22nd December 2016 shows that the late Jonathan Abongo Olenyo was the Respondent in the appeal filed by Joash Mosi Nduri (deceased) through Bernard Samwel Mosi. The appeal proceeding also show that Jonathan Abongo Olenyo (deceased) was represented by Daudi Olenyo Abongo.

b) That the Applicant may be correct on his claim at paragraph 17 of the verifying affidavit, and paragraph 4 of his supplementary affidavit that the appeal was only heard from 4th April 1993 to 26th April 1993. That position is confirmed by the appeal proceeding annexed to the supplementary affidavit which carries at the last page the date of 27th May 1993. That last page and the eight other pages preceding it contains the ***"findings and judgment"***.

c) That the Applicant's claim that the District Commissioner, J.G. Kibera's ruling was in their favour as the appeal was dismissed is however not supported by the available documentary evidence. That the ruling that is contained in the second last page of the proceedings among others ordered as follows;

“... In order that a peaceful solution be arrived at, it is ordered that the land be subdivided as stated below:-

(1) The appellant is awarded that area surrounding his father's grave to enable him perform any traditional rites to appease the Spirits of his dead father. Area awarded to him shall measure one hundred paces in length by seventy paces in width (100 paces x 70 paces) as is shown in the adjacent map. The land shall be given a new parcel number and be registered in the name of Joash Mosi Nduri.

(2) The rest of the Land known as land parcel No. 1516 shall remain and be registered in the name of Jonathan Abongo Olenyo. See sketch map on page (30)".

d) That the proceedings show that the parties to the appeal were given their opportunity to present their case in the appeal. That Applicant's claim that there was fresh hearing in 1996 by the District Commissioner Rachuonyo is not supported by the proceedings. That the whole proceedings and ruling were taken by J. G. Kibera, District Commissioner, Homabay. That the signature and stamp of the Deputy County Commissioner, Rachuonyo on the last page of the proceedings has reasonably been explained by the 1st Respondent at paragraphs 20, 23 to 25 of the replying affidavit sworn by Joan Eredi on the 7th April 2017.

e) That as Judicial Review remedies are about the soundness of the process and not merit of the impugned decision, the court finds that as the parties to the ministers appeal were given reasonable opportunity to be heard and present their witnesses, and there is no basis of faulting the proceedings. That the court has taken note that the Applicant moved the Court about twenty three (23) years after the decision of the 27th May 1993. That period amount to inordinate delay.

8. That in view of the foregoing the Court finds that the Applicant has failed to establish a reasonable basis for issuing of leave to file the substantive application. That the Chamber Summons dated 1st December 2016 is therefore without merit and is dismissed with costs to the Respondents.

It is so ordered.

S.M. KIBUNJA1

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 5TH DAY OF DECEMBER 2018

In the presence of:

Applicant Present

Respondents Absent

Interested Parties Absent

Counsel Ms. Adwar for the Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE