REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC MISC. APPLICATION NO. 15 OF 2014

IN THE MATTER OF THE MINISTERS LAND APPEAL CASE N. 1358 OF 1986

(MAVURIA ADJUDICATION SECTION)

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF PLOTS NOI. 432, 661, 121,122, 448, 452, 572, 108, 569, 606, 607, 608, 609, 6109, 11, 612, 613, 614, 615, 616, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 1104, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, AND 1115

BETWEEN

MAVURIA ADJUDICATION SECTION MBEERE NORTH

FRANCIS NJERU RUNJI.....1ST EXPARTE APPLICANT

JOSPHAT NJAGI NDARU.....2ND EXPARTE APPLICANT

JOSEPH NDARU MATHURI.....3RD EXPARTE APPLICANT

MEMBERS OF IKANDI CLAN.....4TH EXPARTE APPLICANT

VERSUS

SULEIMAN NJIRU CIARA ..... 1ST RESPONDENT

FAUSTIN KITHAKA JUSTUS.....2ND RESPONDENT

MEMBERS OF RWANGONDI CLAN .....3RD RESPONDENT

LAND ADJUDICATION OFFICER, MBEERE SOUTH ……4TH RESPONDENT

THE MINISTER FOR LANDS ..... 5TH RESPONDENT

THE HON. ATTORNEY GENERAL ..... 6TH RESPONDENT

JUDGMENT

What calls for my determination in this Judicial Review Application is whether the hearing of the dispute involving the Applicants and the Respondents herein through the taking of a customary oath known as "***KAURUGO***" was unprocedural and therefore denied the Applicants an opportunity to access fair and full justice by ignoring the testimony tendered in evidence.

The genesis of this application is that the 1st, 2nd, and 3rd Applicants represent the **IKANDI CLAN** which is the 4th Applicant herein while the 1st and 2nd Respondents represent the **RWANGUDI CLAN** the 3rd Respondents herein. The two clans' dispute over some land parcels situated in Mbeere South was placed before the Land Adjudication officer for determination. The record shows that when the **CLANS** representatives appeared before the Land Adjudication Officer for objection proceedings on 17th June 1981, they consented to have the dispute determined through the taking of the customary oath called **KAUROGO**. The Land Adjudication Officer agreed to adopt that procedure and arrived at an award.

Members of the **IKANDI** clan were aggrieved by that decision and exercising their right of appeal under ***Section 29 (1) of the Land Adjudication Act*** filed an appeal to the Minister. That appeal was heard under the Chairmanship of the District Commissioner Mbeere South **MR. J.K. CHELIMO,** this time through oral testimony, and was dismissed on 5th July, 2012 thus giving rise to this Judicial Review application in which the Applicants seek the following substantive orders:

> ***1. An order of certiorari be issued to remove into the High Court for quashing the proceedings, findings and award of the District Commissioner Mbeere North dated 5th July 2012 made, granted and issued in the Land Appeal case No. 1358 of 1986.***
>
> ***2. That the cost of the application be provided for***.

This application is based on the following ground:

> ***1. The original award by the Land Adjudication Officer Mbeere South granted in the objection cases Nos. 432, 661, 121,122, 448 and 452 and the ultimate appellate award by the District Commissioner granted in Land Appeal case No. 1358 of 1996 which awards gave the suit premises to the 1st, 2nd and 3rd Respondents were erroneously and unprocedurally conducted in the sense that the presiding adjudicating officer adopted the taking of the customary oath known locally as "KAURUGO" as the only guiding and determining factor instead of applying the sound substance and procedures laid down by the statutory and natural law of the Republic of Kenya.***
>
> ***2. Both Land Adjudication Officers Mbeere South and the District Commissioner Mbeere erred and denied the Applicants the opportunity to access fair and full justice by ignoring the testimony tendered in evidence and in failing to analyze the weight and merits thereof but instead chose to rely on customary oath as the yardstick to determine the merits of the objection and appeal cases.***

The 4th to 6th Respondents through the Attorney General filed grounds of opposition to the application describing it as vexatious, frivolous and an abuse of the Court process which ought to be dismissed. The 2nd Respondent **FAUSTIN KITHAKA JUSTUS** on behalf of the 1st and 3rd Respondents filed a replying affidavit in which he deponed, inter alia, that the application is defective and an abuse of the process of the Court, that the parties agreed to apply their customary laws which is the taking of the "***KAURUGO***" oath and which is acceptable in their Mbeere community, that a similar procedure had been used by the parties in 1975, that there was a full trial in which the parties were given an opportunity to call their witnesses and in any case, the application is overtaken by events since some of the parties have already obtained titles to their land parcels.

When the application was placed before me on 1st February 2016 during my tour of duty at Embu, it was agreed by Counsel for the parties that written submissions be filed on or before 8th March 2016. However by 6th June 2016, when my tour of duty at Embu came to an end, only the Applicants' Counsel had filed submissions and it was agreed that the Respondent file theirs, within 14 days after which the file would be dispatched to me to write a judgment. However, when the file was eventually dispatched to me, only the submissions by the Applicants' counsel were on the record. I have therefore not had the advantage of submissions from the Respondents in drafting this judgment.

I have considered the application, the statement of facts, the grounds of opposition and replying affidavit as well as the submissions by counsel for the applicants.

This is a Judicial Review Application and in ***MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTING LTD CIVIL APPEAL No. 185 of 2001***, the Court of Appeal expressed itself as follows:

> ***"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 no sufficient evidence to support the decision".***

It is important to remember that in every case where Judicial Review remedies are sought, the role of the Court is to ensure that the party was given fair treatment by the authorities concerned in arriving at the decision complained of. It is not the duty of the Court to substitute the decision of the decision maker with its own. So where procedural impropriety is alleged, as is the case in the application now before me, the Court will want to know if there was any breach of the rules of Natural Justice. Generally, other than Courts and other bodies whose procedures are laid down by statute, decision making bodies are masters of their own procedures. In ***KENYA REVENUE AUTHORITY VS MENGINYA SALIM MURGAN C.A CIVIL APPEAL No. 108 of 2009***, the Court of Appeal held thus:

> ***"The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that the decision making bodies other than Courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to the task, it is for them to decide how they will proceed and there is no rule that fairness always require an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision made"*** Emphasis added.

The applicants' complaint is that the Land Adjudication Officer ***"did not conduct a full trial but chose to adopt the unorthodox and unlawful method that involves the administrating of a traditional oath called "KAURUGO".*** The objection proceedings which led to this application were obviously conducted pursuant to powers donated by the ***Land Adjudication Act*** which allows a party to file objection proceedings if he feels that the adjudication process and the register made are incomplete or incorrect. ***Section 12 (1) of the Land Act*** which empowers the adjudication officer to consider any objections states that:

> ***"In the hearing of any objection or petition made in writing, the adjudication officer shall make a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a Court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord"*** Emphasis added.

In the circumstances of this case, the adjudication officer's record of proceedings is very clear that the

parties opted to have their dispute resolved through their customary "**KAURUGO"** oath. That was a custom to which both parties subscribed. The record of 17th June 1981 reads as follows:

> ***"All the parties are present apart from plaintiff No. 4. They all opted their case to be conducted customarily by taking "KAURUGO".***

It is the parties themselves who decided on the procedure to resolve their dispute and following that decision, the Land Adjudication Officer made the following remarks before the oath was finally administered on 22nd June 1981 with the results being in favour of the 1st to 3rd respondents:

> ***"In view of the application made by the parties and considering the believe (sic) they have, I have allowed KAURUGO to be taken on 22nd June 1981. Parties shall select their wazees on the sport'".***

Prior to that, the parties representing the two clans had infact signed an undertaking that their dispute be resolved through the customary oath of "**KAURUGO".** Indeed, they even went further to undertake that there would be no appeal thereafter to the Minister although that was promptly discarded because an appeal was subsequently filed by the applicants to the Minister which they again lost. Given those circumstances, the applicants cannot now complain, as they have, that the adjudication officer ***"did not conduct a full trial but chose to adopt the unorthodox and unlawful method that involves the administrating of a traditional oath called "KAURUGO".*** It has not been suggested that the traditional "**KAURUGO"** oath is alien to the applicants. They themselves opted for that procedure in solving their dispute. They wanted the Land Adjudication Officer to recognize and apply their culture. ***Article 11 (1) of the Constitution*** recognizes culture as the foundation of this nation. ***Article 159 (2) (c) of the Constitution*** similarly encourages "***alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms".*** The only provisal with regard to such traditional dispute resolution mechanisms is that:

> ***a. they are not in contravention of the Bill of Rights;***
>
> ***b. they are not repugnant to justice and morality or result in outcomes that are repugnant to justice or morality or***
>
> ***c. are inconsistent with the Constitution or any written law***

I have not heard the applicants allege that the taking of the "**KAURUGO"** oath contravened the Bill of Rights, is repugnant to justice or morality or is inconsistent with the Constitution or any other written law.

The "***unorthodox"*** procedure of resolving their dispute through the "**KAURUGO"** oath was chosen by the parties themselves who not only appended their signatures as a sign of good faith but went even further to agree that no appeal would be pursued after that procedure. They cannot now claim that the procedure was "***unorthodox"***. The Land Adjudication Officer afforded them an opportunity to be heard. They chose that route which then now claim was "***unorthodox***". Having been given an opportunity to be heard and having squandered it through the route of the "**KAURUGO**" oath, they cannot be heard to complain, as they have done, that "***no witnesses were called and no testimony or other evidence was taken and recorded***". There is nothing on the record to demonstrate that the Land Adjudication Officer refused to hear the applicants or their witnesses in support of their claim. In ***UNION INSURANCE COMPANY OF KENYA LTD VS RAMZAN ABDUL DHANJI C.A CIVIL APPLICATION No. 179 of 1998***, the Court held that:

> "***The law is that parties must be given a reasonable opportunity to be heard and once that opportunity is given and is not utilized, then the only point which the party not utilizing the opportunity can be heard is why he did not utilize it"***

The applicants themselves chose the procedure to be adopted by the Land Adjudication Officer. As is clear from the case of ***KENYA REVENUE AUTHORITY VS MENGINYA SALIM MURGANI*** (supra),

the hearing need not have been by oral evidence more so given the parties own options of applying their traditional dispute resolution mechanism. In my view, the process adopted by the Land Adjudication Officer having been chosen by the parties themselves cannot now be faulted.

What about the procedure adopted by the District Commissioner on Appeal? The applicants complain that "***on the basis of the said oath (KAURUGO) the District Commissioner wrongly upheld and justified the award of the Land Adjudication Officer and swiftly dismissed their appeal"*** Far from it. The record shows that during the hearing of the appeal, the applicants were represented by **JOSPHAT NJAGI NDARU** who testified at length. He then called his witness **NGARI KIBANDI** who also gave oral evidence. They were then cross-examined by the 1st respondent **SULEIMAN NJIRU CIARA** who also called as his witnesses **NELSON RUNJI NJIRA, NJAGI MUCOGO** and **RUNJI KINYUIRO**. Whereas the Land Adjudication Officer was required, "***so far as practicable***", to follow the procedure in hearing civil suits, the District Commissioner was infact under no obligation to hear the parties witnesses as he did. In ***TIMOTHEO MAKENGE VS MANUNGA NGOCHI C.A CIVIL APPEAL No. 25 of 1978 (1979 K.L.R 53),*** the Court stated as follows:

> ***"But no such duty to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, under Section 29 of the Act is to "determine the appeal and make such orders thereon as he thinks just"***

There is no doubt in my mind that the District Commissioner, exercising his powers on behalf of the Minister under ***Section 29 of the Land Adjudication Act,*** did not determine the appeal on the basis of the "**KAURUGO"** oath administered earlier but went further to hear oral evidence by the parties, make findings before arriving at a decision to dismiss the appeal as is clear from the record herein. There can therefore be no justification in the claim by the applicants that their dispute was determined without ***"applying the sound substance and procedures laid down by the Statutory and Natural law of the Republic of Kenya***". The Land Adjudication Officer applied their own customary practice which the Constitution recognizes and the District Commissioner went beyond his call of duty and heard oral testimony. It is clear therefore that this application is devoid of merit and must be dismissed.

Finally, orders in Judicial Review are at the discretion of the Court. They are primarily meant to ensure that bodies entrusted with the responsibility of determining the rights of parties appearing before them for adjudication of their grievances do not abuse such powers and therefore trample on the rights of such parties. Therefore, unless such bodies exceed their mandates or are shown to have conducted themselves in such an unreasonable manner thereby arrived at a decision that is illogical, Courts will be slow to intervene. In the circumstances of this case, I am not persuaded that I should exercise my discretion in favour of the Applicants.

The up-shot of the above is that the Notice of Motion dated 29th April 2013 is dismissed with costs.

B.N. OLAO

JUDGE

19TH MAY, 2017

Judgment dated, delivered and signed in open Court this 19th day of May 2017

Mr. Muchira for Mr. Mogusu for the Respondents present

Mr. Njiru for the Applicants absent

Right of appeal explained.

B.N. OLAO

JUDGE

19TH MAY, 2017