REPUBLIC OF KENYA

IN THE E.L.C. OF KENYA AT EMBU

E.L.C. JUDICIAL REVIEW APPLICATION NO. 31 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION, AND CERTIORARI

AND

IN THE MATTER OF AN APPEAL TO THE MINISTER LAND APPEAL CASE No. 35 OF 1989 MARINGA MURANGA (DECEASED) REPRESENTED BY DOMINIC MIKE KAMINJA AGAINST NGIRI IKUA REPRESENTED BY AGOSTINO NDARU MUITANJAU

AND

IN THE MATTER OF OBJECTION NO. 430 OF 1980 MARINGA MURANGA (DECEASED) AGAINST NGIRI IKUA

AND

IN THE MATTER OF MUVURIA LAND ADJUDICATION SECTION

NGIRI IKUA – (Ex-parte Applicant)

(REPRESENTED BY AGOSTINO NDARU MUITANJAU) …….…….RESPONDENT

VERSUS

MINISTER FOR LANDS……..RESPONDENT

DOMINIC MIKE KAMINJA…….1ST INTERESTED PARTY

THE LAND REGISTRAR MBEERE DISTRICT……..……...2ND INTERESTED PARTY

RULING

1. On or about 5th February, 2016 the 1st Interested Party filed a Notice of Motion dated 4th February 2016 seeking the following orders;

i. That the application be certified urgent and be heard on priority basis.

ii. The order of Hon Justice H.I. Ong'udi made on 17th April 2013 be reviewed and or set aside.

iii. The Interested Party be granted leave to file a replying affidavit to the Notice of Motion dated

16th October, 2012 and the matter be heard and determined on merit.

2. The grounds of the said application were that the 1st Interested Party was never served and consequently the application for judicial review was heard and determined without his participation. The Interested Party was, therefore, seeking an opportunity to be heard on the substantive application for judicial review.

3. On or about 13th January 2017 the 1st Interested Party filed an amended Notice of Motion dated 12th January 2017. It was apparently filed without leave of court and in violation of the general rules on amendment pleadings as to underlining and crossing out. The said "amended" Notice of Motion introduced new additional prayers and grounds of attack.

4. The amended Notice of Motion introduced new prayers for stay of the judicial review order made on 17th April 2013 and sought the striking out of:

i. The chamber summons for leave.

ii. The leave granted on 8th October 2012.

iii. The substantive application for judicial review.

5. The 1st Interested Party also sought a setting aside of the judicial review order granted on 17th April 2013 on the basis that the High Court lacked jurisdiction to hear and determine the application for judicial review by virtue of Article 162 (2) (b) and 165 (5) (b) of the Constitution of Kenya. The prayer for an order for review of the order made on 17th April 2013 to enable the 1st Interested Party to file a replying affidavit so that the application for judicial review may be heard on merit was ***excluded*** in the amended application.

6. The *ex-parte* Applicant filed a notice of preliminary objection raising seven points of objection. It was stated that amended Notice of Motion was:

i. Bad in law since leave of court was not sought under Order 8 of the Civil Procedure Rules.

ii. Bad in law because the Environment and Land Court (ELC) has no jurisdiction to review a High Court decision in a judicial review matter.

iii. Fatally defective for "invoking a collateral attack situation" for a judge of ELC to make a decision against a judgement of a High Court judge.

iv. Bad in law because it was an application of review instead of an appeal in violation of sections 8 and 9 of the Law Reform Act (Cap 26).

v. Bad in law because no leave was sought under Order 45 of the Civil Procedure Rules.

vi. Bad in law because it raised issues of merit rather than procedural issues.

vii. Bad in law because no prayer for leave for extension of time had been prayed.

7. It is clear that objections (i) (v) and (vii) relate to the issue of leave under various provisions of the law. I shall deal with them together as leave issues. The rest of the issues on jurisdiction to review a High Court judgement, whether the Interested Party should have preferred an appeal or review, and the raising of matters of merit in an application for judicial review shall be considered separately.

8. The *ex-parte* Applicant filed his written submissions in support of the said preliminary objections on 29th March 2017 and supplementary submissions on 6th June 2017. The 1st Interested Party filed his

submissions in opposition to the preliminary objection on 19th May 2017.

9. On the issue of failure to seek leave to file an amended application, the *ex-parte* applicant has submitted that leave was required ***under 0.8 Rule 1 Civil Procedure Rule*** and that absence of such leave rendered the amended fatally defective. ***Order 8 Rule 1*** deals with amendment of pleadings. The *ex-parte* Applicant maintained that the Notice of Motion amended on 17th February 2017 was a pleading while the 1st Interested Party took the view that it was not.

10. The court takes the view that an interlocutory application such as the one of 17th February 2017 is not a pleading. However, on the authority of the case of ***Karuri Limited and 34 Others v. Uber Kenya Ltd [2017] eKLR*** there is a general requirement that all amendments to applications be done with leave of court because ***Order 8 Rule 1 of Civil Procedure Rules*** does not apply.

11. So what is the effect of a failure to obtain leave before amending an application? In the case of ***Karuri Limited and 34 Others*** (*supra*) the court stated as follows:

> ***"39. Whilst as a general rule, because of lack of similar provisions to Order 8 Rule 1, all amendments to applications must be made with leave of court, a court should be slow to strike down an amendment brought without leave it if is done before the Respondent has filed an answer or response to the original application unless it can be shown that the amendment prejudices or causes an injustice to the opposite side. The test of prejudice or injustice is important because procedural law is a handmaiden of substantive justice and should not be allowed to obstruct it."***

12. This court takes the same view of the matter. An application should not be struck out for want of leave to amend. For my part, I would go further and state that it should not be struck out or disallowed regardless of whether or not the adverse party had filed a response as long as no prejudice or injustice has been caused which cannot be remedied by an award of costs.

13. I, therefore, hold and find that striking out the amended application would run counter to the overriding objective of the court of dispensing justice in an expeditious, just and cost effective manner. In view of the provisions of ***Article 159 (2) (1) (d) of the Constitution of Kenya and section 19 of the Environment and Land Court Act*** I would dismiss this aspect of the preliminary objection based on technicalities of procedure. That disposes of objections (i) (v) and (vii) of the preliminary objection.

14. Preliminary objection No. (vi) faults the amended application for introducing issues of merit of the decision of the Respondent rather than purely procedural issues. I am not satisfied that this can stand as a preliminary objection on its own. It is rather an ordinary legal ground which can be employed to attach an application in the nature of grounds of opposition. I therefore dismiss this ground as it is not a preliminary objection within the meaning of the case of ***Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696.***

15. The objection relating to the jurisdiction of the ELC to review a decision of the High Court in a judicial review is an interesting one. The 1st Interested Party has submitted that the High Court had no jurisdiction to entertain the application for judicial review by the ex-parte Applicant because it related to a land matter which is reserved for the ELC. He relied upon the provisions of ***Article 162 (2) (b) and 165 (5) b of the Constitution***. The *ex-parte* Applicant did not directly address the point but maintained that a judicial review order is final in nature and cannot be reviewed by virtue of ***sections 8 and 9 of the Law Reform Act (Cap 26).*** The only recourse open to an aggrieved party is an appeal.

16. I have considered the question of review of a judgement or order rendered by a court of co-ordinate jurisdiction and I have come to the conclusion that a review may be available. For instance, in the case of ***James Kanyiita & Another Vs Marcos Philotas Ghikas & Another [2016] eKLR,*** an *ex-parte* judgement entered by a High Court judge was set aside by the ELC Judge and the Court of Appeal did not find fault with that. The cases of ***R Vs Chief Land Registrar & 2 Others*** *ex-parte* ***Michael Njenga Waweru [2017]***

eKLR and Nakumatt Holdings Ltd Vs Commissioner of Value Added Tax [2011] eKLR are authorities for the proposition that a court can correct its own mistakes even in proceedings brought under ***Order 53 Civil Procedure Rules***. They do not directly address the matters in controversy herein.

17. The third (iii) and fourth (iv) objections are related in some way, although they do not appear to have been appropriately worded. The objection that the 1st Interested Party filed an application for "review" rather than an "appeal" is somehow anomalous. This is because as shown in paragraphs 1 and 4 of this ruling the original application for review sought an opportunity for the 1st Interested Party to be allowed to file a replying affidavit so that the substantive application may be heard on merit. (See prayers (b) and (c) of the Notice of Motion dated 4th February 2016). However, by the amended Notice of Motion dated 17th February 2017, the 1st Interested Party changed the character of the application and abandoned the prayer for review and for an opportunity to be heard on the substantive application for judicial review.

18. It is clear from the amended application that the 1st Interested Party took the view that the High Court had no jurisdiction at all to hear the application for judicial review under the Constitution of Kenya. This ground was listed as the first one in the amended application. That probably explains why the prayers changed to striking out of the chamber summons dated 27th February 2012, the leave granted on 8th October 2016 and the Notice of Motion for judicial review dated 16th October 2012, and outright setting aside of the judicial review orders granted on 17th April 2013.

19. In those circumstances, the overall effect of the amended Notice of Motion dated 17th February 2017 was to seek to completely nullify and terminate the proceedings before Hon. Justice H.I. Ong'udi with orders striking out the entire application for judicial review. I am afraid that cannot be achieved without going through an appellate process. The ELC is a court of equal status to the High Court under ***Article 162 of the Constitution*** and it cannot sit on appeal over a decision of the High Court, however, erroneous that decision might be. Even if this court were to agree that the High Court acted without jurisdiction, it would not be tenable for me to overturn and nullify such a decision. It is only higher court which can overturn such orders.

20. In the circumstances, therefore, although I agree that a High Court decision is reviewable (in the technical sense of the word) by the ELC, I do not take the view that the ELC can sit on appeal over decisions of the High Court where they are alleged to have been made without jurisdiction. That would be a matter for appeal.

21. The upshot of the going is that the notice of preliminary objection succeeds in one respect. The 1st Interested Party's remedy in the circumstances can only lie in an appeal. Consequently, the amended Notice of Motion dated 17th February 2017 is hereby struck out with costs.

22. Orders accordingly.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **28th day of JUNE, 2017.**

In the presence of Mr Kamunde for Applicant. No appearance for the Respondent, 1st Interested Party, 2nd Interested Party and the Respondent.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

28.06.17