REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

JR E.L.C. NO. 29 OF 2014

FORMERLY EMBU JR 3 OF 2007

EUSTACE NYAGA KIMANI……..……APPLICANT

VERSUS

16 CLANS……RESPONDENT

AND

REPUBLIC……..……APPLICANT

AMBROSE N. NTHIGA…….….EX-PARTE APPLICANT

VERSUS

DISTRICT COMMISSIONER MBEERE DISTRICT…....1ST RESPONDENT

EUSTACE NYAGA KIMANI…….INTERESTED PARTY

JUDGEMENT

1. On or about 21st November 2007, the ex parte applicant, Ambrose N. Nthiga, filed a chamber summons of even date seeking leave to apply for an order of *certiorari* to quash the decision of the District Commissioner, Mbeere District dated 24th May 2007 which allowed Appeal Case No. 176 of 1996 and that such leave do operate as stay of the contested decision.

2. The grounds upon which the orders were sought were stated in the statutory statement and verifying affidavit of the *ex-parte* applicant dated 14th November 2007. It was contended that the Respondent had no jurisdiction to entertain the appeal because there was no previous objection or proceedings which could form the basis of an appeal to the minister under the Land Adjudication Act. It was further contended that the rules of natural justice were violated in that all the affected clans were not heard. The *ex-parte* applicant also faulted the Respondent for alleged bias, unreasonableness and failure to give reasons for the decision. Leave was granted on 22nd November 2007 and the substantive Notice of Motion for judicial review was filed on 6th December 2007.

3. The background facts are not much in dispute except for the final events leading to the lodging, hearing and determination of the appeal. The suit property which is in dispute is Title No. Mbeere/Kirima/2244 measuring approximately 6800 acres. The said land was set aside in varying acreage by each of the 17 clans of the Mbeere tribe for the purpose of leasing it to a company known as Meka Sisal Development

Scheme for sisal and tobacco cultivation for commercial purposes.

4. The said plan was mooted at around 1963 with the involvement of the District Commissioner Embu who in 1965 confirmed to the 17 clans that they were to be compensated for their land at the rate of Kshs 2 per acre. The entire land was apparently registered in the name of the County Council of Embu as a trustee for the purpose of leasing it as a single parcel and registered as Title No. Mbeere/Kirima/2244.

5. It would further appear that the said company utilized the said land for about 15 years before they ceased operations. The 17 clans were also never compensated despite the funds for that purpose having been provided.

6. The history also shows that sometime in 1981 the representatives of the 17 clans sought the assistance of the then President of the Republic of Kenya to recover their land. It would appear that his intervention bore fruit and the said company vacated the suit property. The County Council of Embu in whose name the land was registered failed to return the land to the 17 clans in consequence of which the representatives of the clans filed some claim or objections before the concerned Land Adjudication Officer.

7. The court record shows that there were at least 3 objections which were lodged namely Nos. 172 of 1983, 572 of 1983 and 1130 of 1983. It would further appear that the said objections were heard together and determinations made allowing the claim by the 17 clans. Even though it was clear throughout the proceedings that the clan members wanted to be given back what they had each contributed so that they could share amongst their respective members, the Land Adjudication Officer simply awarded them the land jointly as 17 clans. He did not award each clan what it had contributed in 1963. That determination was made on 11th November 1992 and the parties were informed of their right of appeal to the minister within 60 days.

8. Although the 17 clans succeeded in getting back their land from the County Council of Embu, they were not satisfied because it was merely an award of the entire parcel. Each clan did not get an allocation of what they had contributed.

9. So how did they go about resolving this dilemma? What followed next is not agreed by the parties. There is also no complete record of what actually transpired before the Land Adjudication Officer (LAO). There is very scanty information in the statutory statement and verifying affidavit of the *ex-parte* applicant on this aspect. However, in his further affidavit filed on 16th April 2008, he claimed that another dispute arose amongst the 17 clans on how to share the suit property which was reported to the Land Adjudication Officer. According to his affidavit, the Land Adjudication Officer simply advised the parties to file appeals to the Minister instead of hearing and determining this new dispute. The *ex-parte* applicant stated that this was improper and an abdication of statutory duty.

10. On the other hand, the version of the interested party was that upon the determination of the objection by the Land Adjudication Officer, the clans were aggrieved by his failure to award them the specific acreage which each clan had contributed hence those members who were aggrieved filed an appeal to the Minister in exercise of their right of appeal. According to the interested party, that is how the various appeals to the Minister came into existence. They were, therefore, not based on nothing.

11. The interested party annexed a copy of the statutory form of appeal to the Minister to his replying affidavit. The appeal bears the stamp of the Land Adjudication Department and bears a date stamp of 30th November 1992. The interested party stated in his affidavit that this was the appeal which was later designated as Appeal Case No. 176 of 1996. This latter averment was not disputed on controverted by the ex-parte applicant his further affidavit filed on 16th April 2008.

12. In response to the application for judicial review, the interested party filed a replying affidavit dated and filed on 4th February 2008. The *ex-parte* applicant's grounds for seeking judicial review were all controverted. It was stated that the Appeal to the Minister was based upon objection Nos. 172/83, 572/83

and 1130/1983 which were heard together and determined by the Land Adjudication Officer. It was also denied that the said appeal was heard and determined in the absence of the other 16 clans. It was averred that the other clans participated and that the Mbandi clan to which the *ex-parte* applicant belongs fully participated through its representatives. The Respondent did not appear or file any response to the application.

13. There is no material on record to show that after the award by the Land Adjudication Officer dated 11th November 1992 there was any formal request to the Land Adjudication Officer to make a determination of the acreage to be allocated to each clan. There is also no record to show that the Land Adjudication Officer declined to make a determination thereof and directed the parties to appeal to the Minister instead. The parties have not exhibited any record of further proceedings after the determination or award signed on 11th November 1992. The only documents which appear after the determination are the appeal documents.

14. In my opinion, the main issues for determination in this application are as follows:

a. Whether the Respondent had jurisdiction to entertain the appeal.

b. Whether the said appeal was heard and determined in violation of the rules of natural justice.

c. Whether the decision of the Respondent was biased and unreasonable for failing to give reasons for the decision.

d. Whether the ex-parte applicant is entitled to the receipts sought.

e. Who shall bear the costs of the suit.

15. The court is aware of the confines of the remedy of judicial review. It's purpose is not a re-consideration of the merits of a decision by a public authority but merely to review the decision making process including the question of the existence, lack of or excess of jurisdiction. In the case of ***Commissioner of Lands v. Kunste Hotel Ltd Nakuru Civil Appeal No. 234 of 1995,*** the court stated that:

> *"…But it must remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (see R v. Secretary of State for Education and Science ex-parte Avon County Council [1991] I ALL ER 282, at P. 285). The point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans [1982] IWLR 1155, by Lord Hailsham of St Marylebone, thus:*
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> *"…The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law decide for itself a conclusion which is correct in the eyes of the law."*

16. The 1st issue relates to the jurisdiction of the Respondent to entertain the appeal. The *ex-parte* applicant's counsel submitted that an appeal did not lie since there were no prior proceedings or determination by the Land Adjudication Officer which could form the basis of an appeal under ***section 29 of the Land Adjudication Act.*** In the opinion of the ex-parte applicant, the contested Appeal Case No. 176 of 1996 did not arise from the earlier determination of the Land Adjudication Officer made on 11th November 1992.

17. The interested party was of a different view. It was his submission that being aggrieved by the failure by the Land Adjudication Officer to award specific acreage to each of the 17 clans, various appeals were preferred to the Minister who made his decision on 24th May 2007. A copy of the appeal was exhibited in the replying affidavit sworn and filed on 4th February 2008. A perusal of the said form indicates that it is an appeal against the decision of the Land Adjudication Officer for Embu District made on 11th

November 1992 in respect of parcel No. 2244.

18. So in those circumstances, was there any decision or determination by the Land Adjudication Officer? Was such a decision appealable under the law? Section 26 of the Land Adjudication Act empowers a Land Adjudication Officer to receive, consider and determine an objection by an affected person where such person considers an adjudication register to be incorrect or incomplete. ***Section 29 of the Act*** which provides a right of appeal states as follows:

> ***"Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by:***
>
> > ***a. Delivering to the Minister an appeal in writing specifying the grounds of the appeal; and***
> >
> > ***b. Sending a copy of the appeal to the Director of Land Adjudication;***
>
> ***And the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final".***

19. As I understand the *ex-parte* applicant, he contends that the issue of allocation of specific acreage to individual clans was a totally separate dispute which was not part of the original claim or objection before the Land Adjudication Officer. In his view, the Land Adjudication Officer should have taken it up and determined it as such after which a separate right of appeal would have arisen under ***section 29 of the Act***.

20. In my view, it was clear that the clans wanted the land back so that it should be allocated to the individual members. In those circumstances, the claims could not be reasonably split into two separate claims or objections. The entire matter could be determined at once by the Land Adjudication Officer and if he failed to do so upon awarding the land to the 17 clans, his determination, however incomplete, could be appealable to the Minister under ***section 29 of the Act.*** The court is satisfied that any aggrieved parties were entitled to appeal the decision to the Minister. The court notes that in the appeal, the named Respondents were the other clans of the Mbeere tribe and not the County Council of Embu. That, however, does not prevent it from being an appeal from the determination of the Land Adjudication Officer. In any event, that was an irregularity which was within the competence of the respondent to waive or deal with. The first issue is therefore answered in the affirmative.

21. The second issue relates to violation of the rules of natural justice. It was submitted on behalf of the *ex-parte* applicant that the appeal in issue was heard and disposed of without according an opportunity to the other 16 clans to be heard. The ex-parte applicant is a member of Mbandi clan on whose behalf he appears to be litigating. According to the not so legible copies of proceedings in the appeal case, it would appear that several clans (although not 16) were represented. Some of the clan representatives testified and even cross-examined witnesses. The Mbandi clan was represented.

22. If there were some clans which were not represented, or not served with a hearing notice it was up to them to challenge the appellate proceedings in an appropriate forum. There is no indication from the application and affidavits filed by the *ex-parte* applicant as why some parties were not represented. It was not alleged that they were not served with a notice for hearing of the appeal. The court is, therefore, not satisfied that a violation of the rules of natural justice by the Respondent has been established. Mere absence from proceedings is not a violation of the rules of natural justice.

23. The third issue is whether the decision of the Respondent in the appeal was biased and unreasonable either generally or for failing to give reasons for the decision. The gist of *the ex-parte* applicant's submission was that because the Respondent failed to give specific reasons for the awards or allocation of acreage to the interested party, then his decision was biased and unreasonable. The interested party has submitted that there is no evidence of either bias or unreasonableness on record.

24. The *ex-parte* applicant also relied upon the Constitution of Kenya, 2010 and submitted that the Respondent acted in violation of Article 47 which requires written reasons to be given for any adverse administrative action. The case of ***R v. Kenya National Examinations Council ex-parte Ian Mwamuli [2013] eKLR*** was cited in support of that submission.

25. I have perused the decision of the respondent in this appeal and the other related appeals. It is true that no reasons were given for the various decisions. So was the failure by the Respondent to give reasons for the decisions made on 24th May 2007 fatal? And was it evidence of bias and unreasonableness? I do not think so. First, the legal requirements of Article 47 of the Constitution of Kenya 2010 were not in place at the time the appeals were decided. Secondly, the decisions in the appeal were issued with a complete record of the evidence and proceedings recorded including cross-examination of witnesses. The decision in the appeal was therefore not plucked from the air but should be deemed to have been based on the evidence which formed part of the decision. Third, there was no express requirement under section 29 of the Land Adjudication Act for the Minister to give reasons for the decision.

26. Although it is always a good and desirable practice for the public authority to give reasons for its decisions, such decisions should not be considered void only for failure to give reasons especially when the constitutional requirement for giving written reasons was not in force at the time of decision making. The court is also of the view that failure to give reasons for a decision is not *per se,* evidence of bias or unreasonableness. Conversely, the mere fact of giving reasons for a decision does not *ipso facto* exclude the possibility of bias or unreasonableness.

27. In the circumstances of this case, the court is unable to find any material on record upon which an inference of bias or unreasonableness could be made against the Respondent. There is no material on record to enable me conclude that the Respondent's decision was so unreasonable such that no reasonable tribunal, addressing itself to the facts and the applicable law could have arrived at such a decision. ***In Associated Provincial Picture Houses Ltd Vs Wednesbury Corporation, [1948] 1K.B. 223*** it was stated that an unreasonable decision is one which is *"so outrageous in defiance of logic or accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it"*. The 3rd issue is therefore answered in the negative.

28. The 4th issue is whether the *ex-parte* applicant is entitled to the reliefs sought in the application for judicial review. In view of my holdings on the 1st, 2nd and 3rd issues, it would follow that the *ex-parte* applicant is not entitled to the reliefs sought, or any one of them.

29. It is evident that the instant application raises similar issues of fact and law as; *Embu JR No 29 of 2014 (formerly Embu JR No 3 of 2007), Embu JR ELC No 41/2014 (formerly Embu JR No 7/2007 and Embu JR ELC No 37/2014 (formerly Embu JR No. 4/2007).*

> All these 4 applications relate to appeals to the Minister on the allocation of parts of the suit property Title No. Mbeere/Kirima/2244 to the respective appellants who filed those appeals in similar circumstances. I therefore make an order for the determination in this judgement to apply to those 3 other applications which are also scheduled for judgement on 20th July 2017.

30. The 5th issue relates to costs. The general rule is that costs follow the event unless for good reason the court orders otherwise. The court has taken into account the history of the dispute and the challenges the members of the 17 clans are having in obtaining their respective shares of the suit property owing to no fault of their own. The fault probably lies with the Land Adjudication Officers who were not joined in the proceedings. The court shall therefore make an order for each party to bear own costs.

31. The upshot of the foregoing is that the court finds no merit in the application for judicial review dated 6th December 2007 and the same is hereby dismissed. Each party shall bear own costs.

32. The judgement shall apply to related files being:

a. Embu JR No 40 of 2014 (formerly Embu JR No 6 of 2007).

b. Embu JR ELC No 41/2014 (formerly Embu JR No 7/2007).

c. Embu JR ELC No 37/2014 (formerly Embu JR No. 4/2007).

33. It is so adjudged.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 20th day of JULY, 2017

In the presence of Ms Wairimu for the *ex-parte* applicant and Mr Okwaro for the Interested Party and in the absence of the Respondent.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

20.07.17