



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**MISC. APPLICATION NO 84 OF 2009**

IN THE MATTER OF AN APPLICATION BY LARU BAICHU FOR LEAVE TO APPLY FOR  
ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ANTUAMBURI ADJUDICATIONS SECTION AND IN THE MATTER OF  
OBJECTION NO. 841

AND

IN THE MATTER OF PLOTS NO.733 & 2441 ANTUAMBURI ADJUDICATION SECTION

AND

IN THE MATTER OF LAND ADJUDICATIONS ACT CAP 284 LAWS OF KENYA

LARU BAICHU.....APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER

ANTUAMBURI ADJUDICATION SECTION.....RESPONDENT

THURANIRA M'BAICHU BAIBAKU.....INTERESTED PARTY

**JUDGMENT**

**Introduction**

1. The Experte Applicant had on 19.11.09 obtained leave to apply for;

1. Orders of judicial review in the nature of certiorari to bring up and quash the decision of the Land Adjudication ANTUAMBURI ADJUDICATION SECTION dated 3.9.2009 in objection No.841 over plots No.733 and 2441.

2. Orders of judicial review in the nature of prohibition to prohibit the Land Adjudication officer

and the Land Adjudication Section from in any way interfering with the Applicant's plots No.733 and 2441.

3. The leave so granted to operate as stay of operation / implementation and or execution of the decision of the Respondent.

2. Thereafter, the Exparte Applicant filed the substantive motion dated 11.12.09. In support of the motion are grounds set out in the statement of facts and in his affidavit. The gist of his case is that he bought the parcels of land in dispute which are No.733 and 2441. The interested party had lodged objection No.841 before the land adjudication officer ANTUAMBURI ADJUDICATION SECTION on 15.7.09. The decision made thereof was that a portion of 1.45 acres was to be excised from parcel No. 2441 to be given to the present interested party.

### **3. Case for the Exparte-Applicant.**

**The Exparte-Applicant** has averred that he had bought the suit land parcel Nos. 733 and 2441 from one Manyara M'Mucheke who also gave evidence before the Adjudication officer. He (applicant) states that his evidence was not considered and that the interested party's evidence did not support the decision. He therefore states that the decision by the respondent had no factual basis, is unreasonable and biased. In his submissions, Exparte- Applicant avers that the proceedings in question do not mention a committee, as is provided for under section 9(1) of the Land Consolidation Act cap 283 laws of Kenya. Applicant submits that this is a pure point of law. He also relies on the Meru High Court Misc. Judicial Review no. 58 of 2009

### **Case for the interested party.**

4. The Interested Party filed a replying affidavit on 23.6.10. He states that he and the Exparte Applicant are brothers and that the bone of contention was in respect of parcel No.2441 ANTUAMBURI ADJUDICATION. Interested party claims that the parcels of land 2441 and 733 belonged to their father.

He further states that he had initially filed the case before the chief then he went to the committee whereby Exparte Applicant refused to comply and eventually Interested party filed the A/R objection No.841 and the decision was delivered. The interested party avers that the objection No.841 was heard fairly and that the suit land has been transferred to his name.

### **The Respondent.**

5. The respondent, (Attorney General) did not file any response but a memorandum of appearance was filed thereof on 12.6.10.

### **Determination.**

6. Way back on 4.7.12, directions were given for the matter to be dealt with by way of written submissions. All the parties were represented on that day and their submissions were subsequently filed.

7. I have weighed all the arguments raised herein and I find that the issues for determination are:

1. Whether the court should consider the issue of "absence of a committee" which was only introduced at the point of submissions by the applicant.
2. Whether the respondent's decision was unreasonable on account of the fact that the evidence of the Exparte-Applicant was not considered and that the evidence of the interested party could not sustain a reasonable decision.
3. Whether there was bias in that no reason is given as to why parcel No. 2441 was adjudicated on family land.

## **Absence of a committee**

8. Judicial review concerns itself with the decision making process. As such, a person aggrieved by that process must point out from the onset the grounds in support of his prayers. "The absence of a committee" goes into the heart of how the decision was heard and cannot therefore be considered as a pure point of law. Raising this ground at the point of submissions would deny the respondent and the interested party a chance to adequately respond to this claim.

9. Pursuant to provision of article 50(1) of the constitution

***"Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court".***

I consider the introduction of a new ground at submission stage as trial by ambush.

10. **Could the motion have succeeded had this ground (absence of a committee) been raised in the substantive Notice of motion?** In the Notice of Motion dated 11<sup>th</sup> December 2009, the applicable law cited in the heading is the;

I. Section 8 and 9 of the Law Reform Act Cap 26 laws of Kenya.

II. The land adjudication act cap 284 laws of Kenya"

11. This implies that the objection proceedings were conducted under the umbrella of cap 284. There is not the slightest possible explanation as to why the applicant has introduced the land consolidation act at the point of submissions. The application of the two acts is to a certain extent different. Under the provisions of S.26 of cap 284, the land Adjudication officer does not need a committee to hear the case, see **Misc. Application no.22/10 Meru ELC Court** where Judge Njoroge held that:

***"It is clear that any proceedings under Section 26 of the Land Adjudication Act do not require the Land Adjudication Officer to sit with a Committee."***

12. It follows that even if this ground had been cited from the onset of this matter, the motion would still have failed.

## **Was the decision unreasonable and or biased?**

13. I have perused the copy of the record in objection proceedings no.841. Both the Exparte-Applicant and the interested party testified. Their respective witnesses also testified. There was cross examination. I find nothing to indicate that the process was unreasonable or biased.

14. The Experte Applicant was aggrieved by the fact that the land which he claims he had bought was given to the interested party. He questions how the respondent arrived at a decision that plot no.2441 was ancestral land.

15. This line of questioning goes into the heart of the merits of the decision. The Judicial Review proceedings should not take the place of the appeal process. Applicant ought to have challenged the merits of the decision in the proper forum but not through the Judicial Review proceedings.

16. All in all, I find that the notice of motion is unmerited. I hereby dismiss the same with costs to the interested party and the respondent.

**DELIVERED, DATED AND SIGNED AT MERU THIS 19TH DAY OF JULY, 2017**

**IN THE PRESENCE OF:**

C:A JANET

Mutegi holding brief for Mwanzia for Exparte Applicant.

B. Kimathi for Respondent.

**HON. L.N. MBUGUA**

**ELC JUDGE**