



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 8 OF 2012**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE DISTRICT LAND ADJUDICATION OFFICER .....RESPONDENT**

**ANASTACIA IGOKI.....INTERESTED PARTY**

**AND**

**JULIUS M'IKUNYUA M'MAINGI.....EX-PARTE APPLICANT**

**JUDGMENT**

1.The Notice of Motion dated 11th April, 2012 seeks the following orders:-

(1) That the Honourable Court be pleased to issue an order of certiorari to bring to this Court and quash the decision/award of the Land Adjudication & Settlement Officer, Tigania District (Respondent) made on the 14/12/2011 in the objection No. 596, in respect of L.R URINGU 11 Adjudication Section /1641.

(2) That the Honourable Court be pleased to issue an order of Mandamus compelling the Respondent herein (Land Adjudication & Settlement officer, Tigania) to register the Ex-parte Applicant, JULIUS M'IKUNYUA as the owner of URINGU 11 ADJUDICATION SECTION/1641.

(3) The Respondent and the Interested Party do pay costs of this motion.

2.The Application is based on the grounds:-

(a) The Respondent conducted the objection proceedings without the aid of a Committee.

(b) That the Respondent failed to record and omitted from the proceedings the evidence of Ex-parte Applicant's 3 witnesses who testified on the hearing date. namely Kellah Karambu Mbaine, Samuel M'Igweta and Mwonjiru Karuu.

(c) That the Respondent failed to record the evidence of one Kirema M'Kirigia, who had been called as a witness by the Interested Party, and who testified.

(d) The Respondent failed to record the evidence that was tendered when the land was visited. which evidence was crucial to the proceeding and the final decision.

(e) The decision of the Respondent was clearly and manifestly unreasonable in the circumstances of this case.

3. Further, the motion is supported by the grounds captured in the statement of facts as well as in the affidavit of Julius M'Ikinyua M'Mwangi the Exparte Applicant.

4. On 26.3.12, the Ex-parte Applicant obtained leave to bring forth the aforementioned notice of motion which leave was to operate as a stay of the execution/ implementation of the decision of the Respondent dated 14.12.11 pending the hearing and determination of the substantive motion.

#### 5. **Ex-parte applicant 's case**

The applicant states that the suit land is number 1641 in Uringu 11 adjudication section, and that this was his ancestral land where he had buried his father and brother. However, during demarcation, the land was given to Stephen Mungathia (now deceased) and that is why the Exparte Applicant filed objection No. 596 before the respondent. He further states that during the objection proceedings, him and his three witnesses testified and were cross examined. There was also a scene visit where another witness testified. At the end of it all, he lost the case.

6. The Exparte applicant claim is summarized as follows;

- i) His evidence was not considered
- ii) That the evidence gathered during the scene visit was also not considered.
- iii) That respondent had considered extraneous evidence and was therefore unreasonable.
- iv) That respondent was biased
- v) That Respondent did not involve the committee

#### 7. **Interested party's case**

The interested party's case is that parcel No Uringu 11 adjudication section 1641 is registered in the name of Stephen Mungathia (deceased) who was her husband.

She states that the demarcation of the land occurred way back in 1989 but that sometime in 1994, the Exparte-Applicant moved onto the land and started farming. The family of the interested party reported the matter to the chief. The Exparte-Applicant then filed the Chief Magistrates' Court Case No. 416 of 2010 at Meru and he also filed objection No. 596 before the Respondent.

8. The objection was dismissed while the fate of the CM'S Court case is not known.

9. The respondent did not file any responses to the application. Directions were given on 5.6.14 for the suit to be heard by way of written submissions. All parties including the respondent have filed their submissions.

10. A short history of the case is necessary before I set out the issues for determination. From the record especially the decision in objection No. 596 Uringu II Adjudication Section, Julius m' Kinyua is a son of Anyuki M' Maingi. Apparently, Anyuki M' Maingi sold the disputed piece of land to one Stephen Mungathia who then became the registered owner of parcel No. 1641 as per adjudication records. This happened many years ago during the time of gathering .

11. By the time the objection was being lodged, the father of the applicant as well as Stephen Mungathia had passed on.

12. The Exparte Applicant filed the chamber summons of 22.3.12 whereby, he obtained a stay of the implementation of the decision of 14.12.11 in objection No 596.

13. Thereafter, the Exparte Applicant filed a Notice of Motion dated 18.5.12 praying for an order of injunction restraining the Interested Party from entering and or cultivating on the suit land. He obtained the injunctive orders on 7.6.12. This appears to have triggered an avalanche of acrimonious events.

14. The Exparte-Applicant then moved into the suit land and started to harvest crops therein. He was arrested and charged with a criminal case for the offence of Theft of farm produce contrary to section 8 (1) of the stock and farm produce act cap 355 laws of Kenya. (see charge sheet marked AGM 7).

15. Meanwhile the interested party was back in court with her own application filed on 24.10.12 under a certificate of urgency. She was seeking for orders to have the injunctive orders vacated, claiming that she was not just in possession of the suit land but that the suitland URINGU 11ADJUDICATION SECTION 1641 is registered in the name of her deceased husband, STEPHEN MUNGATHIA RUKUNGA. The application was allowed on 29.10.12 and hence the orders of injunction given on 7.6.12 were vacated.

16. Prior to these proceedings, the Exparte-Applicant had filed CMCC No. 416/10 at Meru vide the plaint dated 27.9.10. He was seeking for a declaratory order to the effect that he is the right full owner of the land parcel no URINGU 11/59. A defense was also filed in that case. However, there is nothing to indicate the current status of the case. None of the parties have clarified whether the subject matter before the magistrates court is the same as that in objection proceedings No.596 since the parcel numbers are different.

### **Determination**

17. Having weighed all the arguments raised herein, I sum up the issues for determination as follows:

- i) Whether the decision in objection no 596 is invalid on account of “absence of a committee”.
- ii) Whether the decision in objection no 596 was unreasonable on account of failure to record the evidence of the Exparte-Applicant’s witnesses and that of the interested party’s witness called Kiremia M’Kirigia.

### **Absence of a committee**

18. It is contended by the applicant that the decision in objection no 596 is illegal as there was no constituted committee pursuant to provisions of section 26 (1) of the land consolidation act. Applicant has made reference to the case of H.C JR no 56 of 2010 and in H.C JR no 101 of 2008 both in Meru. He submits that in both cases the suits succeeded on the bases that the Adjudication officer had heard the matter without constituting a committee.

19. I find that it is only during the submissions that the Exparte-Applicant has invoked the provisions of the Land Consolidation act (cap283 laws of Kenya). In the H.C misc 101/2008 (Meru) the proceedings are clearly headed **“in the matter of section 26 of the land consolidation act cap 283 laws of Kenya”**. In H.C JR no 56/10, the judge noted that **“the objection which was considered by the respondent was filed by exparte applicant as provided for under section 26(1) of the land consolidation act”**

20. In the present case the Exparte-Applicant did not indicate what the applicable law was during the objection proceedings. The law cited in his substantive motion is the:

- a) LAW REFORM ACT CAP 26 SEC 8&9
- b) CIVIL PROCEDURE ACT, order 53 (3) (1) of the civil procedure rules.

21. It is trite law that he who alleges must prove. It was therefore not enough for the Ex-parte-Applicant to state that the Respondent conducted the objection proceedings without the aid of a committee contrary to the law without indicating which law was applicable at that time.

22. However, even if the court was to consider that the Land Consolidation Act is the applicable law, there is no basis upon which the objection No.596 was filed.

Section 11 of the Land Consolidation Act provides that;

**the Committee appointed for an adjudication section shall adjudicate upon and determine in accordance with African customary law the claim of any individual person to any right or interest in any land within the adjudication section.**

**(2) If a Committee is unable to reach a decision in accordance with African customary law it shall refer the matter to the Arbitration Board which shall decide the matter and shall inform the Committee of its decision.**

23. Section 12, 13 and 14 goes on to provide for issuance of notices, attendance as well as procedures to be followed before the committee and the Arbitration board.

24. Section 15 then makes provisions for the recording of the rights in a register 'in accordance with the findings of the Committee or Arbitration Board, as the case may be'.

25. Section 16 deals with notice of completion of the recording of rights, **Section 17 and 18 deals with objection and procedures in respect of those objections to the record of existing rights**, while the finality of the decision of the adjudication officer is captured under section 19.

26. Section 20 then provides that;

**"After the expiry of sixty days from the date mentioned in section 17, or on the date upon which all alterations to the Record of Existing Rights have been made in accordance with section 19, of this Act, whichever is the later, the Record shall be deemed to be a true and complete record of all existing rights and interests in the adjudication section to which the Record relates"**.

27. Did the Ex-parte applicant follow these procedures particularly when his father and Stephen Mungathia were alive?. This question was posed in the objection proceedings No 596 as captured in the findings ;"**why is it that he never filed a committee case?. it shows that the father to the objector had no problem with Stephen Mungathia and his land?"**.

28. To this end, I find that the Ex-parte Applicant's averment ( in Paragraph 6 of his affidavit filed on 22.3.12) that "**when the land in question was recorded in the name of Stephen Mungathia, who is now deceased, I filed my objection No. 596**" is inconsistent with the record in proceedings No..596. The truth of the matter is that the Ex-parte Applicant waited for the demise of his father and Stephen Mungathia to bring forth his claim.

29. The preamble of the act ( The Land Consolidation Act ), states that;

**"It is An Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas; for the registration of title to, and of transaction and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto."**

30. It is clear that the Act was enacted to provide for transition from one land regime to another ,that is from customary land rights to individual land rights. Its operations were therefore not meant to last forever. The proceedings as the ones brought in Objection No 596 as well as in the present matter fly

against the spirit of the act.

31. The Exparte-Applicant did not go through the stages of Committee Adjudication as well as Land Adjudication Officer/ Arbitration board objections as outlined in the act. He has therefore not laid a basis upon which he was filing the Objection Number 596 under Section 26(1) of the Land Consolidation on Act.

On the ground of absence of a Committee, the motion fails.

32. **Was the decision in Objection No 596 unreasonable and or biased?**

I have perused the record of the proceedings in objection no 596. The history of the dispute is clearly captured in the findings where it is stated that;

*“the transactions of the land was done during the gathering, because according to our record, this land came from Parcel No 1134 which is registered under the defendant Stephen Mungathia.*

*According to our record this parcel no 1641 was demarcated in 1981 and the father of the objector was present. So , a question arises, how comes the father of the objector never queried when the land was demarcated and registered under Stephen Mungathia yet he was also alive at that time.”*

33. This being a J.R motion, the court’s concern is the decision making process and not the merits thereof. This position was clearly stated in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001** where the Court of Appeal held:-

*“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. A Court should not act as a Court of Appeal over the decision which would involve going into the merits of the decision itself.”*

34. This is a case where the parties testified and were cross examined. The decision making process was therefore reasonable and there is no evidence of bias.

**CONCLUSION**

35. I must point out that the present suit, and the objection proceedings No. 596 are a Classic example of how the legal platform has been used to perpetuate intergenerational/historical injustices in view of the fact that, the family of the Interested Party got the land in 1981, but the dispute continues.

36. I also find that this is a case where it’s a no win situation for the Exparte Applicant. Had the court (for any reason) arrived at a conclusion that the Judicial Review motion is merited, then the status of the parties would revert to what they were before the objection No. 596 was lodged. The said status is that the suit land was and is still in the name of Stephen Mungathia, the deceased husband of the Interested party.

37. The final finding of this court is that the Judicial Review Motion is unmerited and I proceed to dismiss the suit with costs to the Respondent and the interested party.

**DELIVERED, DATED AND SIGNED AT MERU THIS 19TH DAY OF JULY, 2017 IN THE PRESENCE OF:**

C:A JANET

Gichuki H/B for Murango Mwenda for Exparte Applicant

Mutegi for Interested Party

Kimathi for Respondent.

**HON. L. N. MBUGUA**

**ELC JUDGE**