



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISC. APPLICATION NO.68 OF 2009

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL
REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 53 3 (1) LAWS OF
KENYA**

LAW REFORM ACT CAP 26

LAND CONSOLIDATION ACT CAP 283 AND

LAND ADJUDICATION ACT CAP 284

PARTIES

REPUBLIC.....APPLICANT

VS

DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....1ST RESPONDENT

DISTRICT LAND ADJUDICATION

OFFICER MERU NORTH.....2ND RESPONDENT

LAND ADJUDICATION OFFICER– TIGANIA/URINGU

SEKUNDU MURIIRA IBAYA1ST INTERESTED PARTY

MONICA GATHONI MBOGORI2ND INTERESTED PARTY

ROMANO NTONGAI.....3RD INTERESTED PARTY

RULING

1. This application is stated to be brought under section 8 & 9 of the Law Reform Act Cap 53 (1) Laws of Kenya. The Law Reform Act is Cap 26 and the provisions for Judicial Review are anchored in Order 53

of the Civil Procedure Rules. I will deal with the application as having been properly brought under those statutes.

2. On the 18/9/09 the Applicant, one Abraham Muthee M'Ethaiba filed an ex-parte Chamber Summons under Order 53 rule 1,2 & 4 of the Civil Procedure Rules and Sections 8(2) and 9 of the Law Reform Act Cap 26, Laws of Kenya and all other enabling provisions of the Law seeking the orders as follows;

a) Spent

b) That the Applicant be granted leave to apply for orders of certiorari to call for and quash the decision of the District Land Adjudication Officer Meru North in objection No. 216 dated 3rd April 2009 awarding Land Parcel No. URINGU 1 ADJUDICATION SECTION NOS 1056 (subdivided into 3020 and 3022) to the interested parties.

c) That the grant of leave above do operate as a stay to the implementation of the District Land Adjudication Officer Meru North in Objection case No. 216, until the substantive motion is heard and determined.

The application is supported by the Affidavit of ABRAHAM MUTHEE M'ETHAIBA sworn on 18/9/09. He has annexed a copy of the decision of the District Land Adjudication Officer dated 5/3/2008 and marked AMM-01, wherein the objection was allowed and 5.90 acres to be subtracted from P/NO 1056, 3020 and 3022. P/NO 1763, 1991 and 1469 to be moved to the position occupied by No. 1056, 3020 and 3022 in line of the developed part where objector's developments are located.

The application is further supported by the statutory statement of facts as follows: -

a) The names of the Applicant are ABRAHAM MUTHEE M'ETHAIBA a male adult Kenyan by birth and working for gain in Meru North District and his address of service for the purpose of this suit if P.O. BOX 636-60200 Meru.

b) The Applicant is the legal owner of Land NO. URINGU (1) ADJUDICATION SECTION NO. 1056(3020 and 3022) respectively.

c) The Respondent is the District Land Adjudication Officer Meru North District.

d) The Interested Party is a Meru Kenyan Citizen by birth residing and working for gain at URINGU (1) Location of Meru North District.

The relief sought is;

a) Leave be granted to the Applicant to apply for orders of Judicial Review in the nature of certiorari and prohibition.

b) An order of certiorari to call and quash the decision of the District Land Adjudication Officer Meru North awarding L.P NO. 1056 (3020, 3022) to the Interested Party which decision was made on 3/3/09.

c) That costs of this application be paid by the Respondent and the Interested Party.

And the grounds upon which the relief is sought are: -

a) The Land District Land Adjudication Officer Meru North Adjudicated on a matter that had already adjudicated by his colleagues previously and by the Court between parties litigating under the same title; over the same subject matter; conclusively hence the matter was res-judicata, previous objection case No. 251 OF 1967, SPMCC NO. 6 of 1977 and Land Case No. 49 OF 1965 respectively.

b) That the District Land Adjudication Officer went outside the provisions of written law the Land Adjudication Act Cap 284 of the Laws of Kenya.

c) That the decision of the District Land Adjudication Officer Meru North was illegal and void for all purposes.

3. On the 23/9/09 the Honourable Court granted leave to the Applicant to apply for orders of Certiorari to call and quash the decision of the Land Adjudication and Settlement Officer Tigania made on 3/4/2004 in objection case No. 216 awarding Land Parcel No. 1052 (subdivided into 3020 and 3022) to the Interested Party. The said leave also operated as a stay.

4. Having been granted leave the Exparte-Applicant filed the Notice of Motion dated 12/10/09 seeking the following orders:-

a) That an order of certiorari do issue to call and quash the decision of the Land Adjudication officer Meru North read on 3rd April 2009 in objection case No. 216 for being a nullity.

b) That, the orders of prohibition do issue to stop the implementation of the said decision in objection No. 216 read on 3rd April 2009 relating to Land Parcel No. 1056 Uringu 1 Adjudication Section now subdivided into 3020, 3022 for being a nullity.

The application is supported by the affidavit of Abraham Muthee M'Ethaiba sworn on the 13/10/09. The statutory statement of facts under Order 53 rules 1 & 2 are similar to the application for leave.

5. On the 9/4/2010 the 1st Interested Party applicant filed a Notice of Motion pursuant to Article 60 of the Constitution of Kenya, Section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya, and Order 53 of the Civil Procedure Rules seeking orders as follows; -

a) That the order for leave to apply for a Judicial Review order of certiorari to call and quash the decision of the 2nd Respondent, allegedly made on 03/04/2009 and the subsequent order for stay of implementation of the said decision in objection case No. 216, granted to the Ex-parte Applicant on 23/9/09 and issued on 28/9/2009, be set aside.

b) That the notice of motion dated 12/10/2009 and filed on 13/10/2009 be dismissed or struck out.

c) That the Ex-parte Applicant/Respondent be condemned to pay costs of this application and the Notice of Motion dated 12/10/2010 and filed on 13/10/2009 to the 1st Interested Party/Applicant.

6. The Application is based on the grounds adduced and listed below:-

a) That the decision sought to be impugned was made on 06/03/2008.

b) That leave to apply for the writ of certiorari was sought and obtained, at least 18 months later.

c) That no decision was made by the 2nd Respondent in objection No. 216, on 3/4/2009.

d) That whereas the statutory statement of facts dated 17/9/2009 states that the beleaguered decision was made on 3/3/2009, the affidavit verifying facts sworn by Ibrahim Muthee M'Ethaiba and the Motion dated 12/10/2009 refer to a decision of 3/4/2009.

e) That the leave and stay orders were granted to the Ex-parte Applicant/Respondent following deliberate concealment of material facts to the Honourable Court.

f) That the 1st Interested Party has expended money by instructing counsel, attending Court and relying to the motion dated 12/10/2009.

It is supported by the Supporting Affidavit of Sekundu Muriira Ibaya, the 1st Interested Party/Applicant which reiterates the grounds stated above. That the objection No. 216 over parcels Nos. 1056, 3020 & 3022 was determined and rendered on 6/3/2008 and not 3/3/2009 or 3/4/2009. He has attached proceedings SMI1 dated 6/3/2008. That leave to apply for certiorari was therefore done out of time i.e. 18 months from 6/3/2008. That leave granted to the applicant to file Judicial Review was done through concealment of a material fact that is to say the exact date that the impugned decision was delivered/rendered. This is the application that is subject of this ruling.

7. As would be expected, the Exparte-Applicant respondent to the application for setting aside vide a replying affidavit filed on the 10/5/2010. That the leave to file Judicial Review proceedings was lawfully and properly obtained. That the decision was read to the parties on the 3/4/09 and referred the Court to a notice dated 31/3/09 addressed to him in respect to Objection No.s 1299, 721 & 216, parties being Abraham Muthee Vs Ibaya Kaimathiri, Nkubiria Kaimathiri and seeking the parties to attend before the District Land Adjudication Officers office for the reading of their ruling/decision in respect to their objection. It is his evidence that the decision was read on the 3/4/09 and thus the application for Judicial Review having been filed on the 18/9/09 was well within time.

8. On the 11/5/2010 the Exparte-Applicant sought to amend the Notice of Motion dated 12/10/2009 and leave to amend was granted by the Honourable Court on 3/5/12. The gist of the amendments was to include the Republic as the Applicant and the date of the decision of the District Land Adjudication Officer as 3/4/2009 and not 3/3/2009 as earlier on indicated in the Notice of Motion.

The 1st Interested Party/Applicant submissions.

9. The Applicant has submitted on 3 broad areas: That the Notice of Motion filed on 17/9/09 a period of 18 months from the date of the decision which was decreed on 6/3/08. Maintaining that this is a material fact which was concealed from the Court, the 1st Interested Party/Applicant states that the said leave ought not to have been granted if the said material facts had been revealed to the Court. Further that order 53 rule 2 of Civil Procedure Rules is couched in mandatory terms which requires that leave to apply for an order of certiorari to quash a decision strictly must be made within 6 months from the date when the decision sought to be quashed was made. That leave having been obtained outside the mandatory time should be set aside.

Relying on the cases of **NRB CA 257 of 2003 Agakhan Education Service Kenya vs. Republic and Mombasa HC Misc. Appeal No. 20 of 2004: Republic vs. David M. Githae & Others**, Mr. Mbaabu the learned Counsel for the 1st Interested Party/Applicant urged the Court to set aside the order granting leave.

10. Raising a couched Preliminary Objection, the 1st Interested Party/Applicant maintains that the original and amended Notice of Motion on record should be dismissed for including an additional prayer for prohibition and yet leave was only granted for the prayer of certiorari and not prohibition. That the prayer for prohibition cannot be sustained in that instance.

11. Further that the Exparte-Applicant filed the proceedings against the estate of his father M'ethaiba Mutuoroi without first obtaining letters of grant of administration. Relying on the Court of Appeal decision in **Troustik Union International & Anor. Vs. Jane Mbeyu & Anor @ page 343** which stated that;

“A person cannot sue on behalf of the estate of a deceased person unless they have a grant of letters of administration at the time of filing the suit”, the interested party/applicant maintains that these proceedings are rendered a nullity ab initio.

That an action started by an intestate's intended administrator before the grant of letters of administration before the grant of letters of administration is incompetent at the date of its inception as decided by Emukule J in the case of **Charles Mburugu M'Irambu Vs Isabella Kairuthi Kathurima HCCC No. 431 of 2006** which quoted another Court of Appeal decision in **Virginia Edith Wamboi**

Otieno Vs Joash Achieng Ougo and Omolo Siranga 1982-88 1 KAR 1045.

2nd & 3rd Interested Parties submissions.

12. In supporting the application by the 1st Interested Party/applicant, the 2nd & 3rd interested parties urged the Court to dismiss the Judicial Review proceedings on account of the fact that the amendment had the effect of deleting the name of the Exparte-Applicant; that the District Land Adjudication officer is not bound by strict procedure in discharging his duties; that the Exparte-Applicant has no legal capacity to file the application on account of absence of letters of administration in the estate of his late father; that they themselves are not parties to the objection proceedings and therefore should never have been joined in the application in the first instance.

1st & 2nd Respondents' Submissions

13. In support of the 1st Interested Party's motion, the respondents submitted that the provisions of Order 53 are couched in mandatory terms. That the decision of the 1st respondent relating to objection No 216 was made on the 6/3/2008 as shown on the annexed copies of the proceedings marked AM-01 annexed to the verifying affidavit. That the Exparte-Applicant sought leave of the court exactly one year six months later after the impugned decision had been made, clearly out of time and the order granting leave must be set aside in the face of the provisions of Order 53 of the Civil Procedure Rules.

Ex-parte Applicant's Written Submissions

14. In opposing the application, the ex-parte Applicant stated that application dated 30/3/2010 has been overtaken by events on account of the amended Notice of Motion dated 3/5/12. The issues raised by the current application were dealt with in the said amended Notice of Motion; the amendment corrected the date of the delivery of District Land Adjudication Officer's decision from 3/3/2009 to 3/4/2009. The amendment also cured the format of the Judicial Review by adding Republic which had been omitted before.

15. In respect to legal representation or otherwise, the Exparte-Applicant submitted that both the Exparte-Applicant and the Respondent have been sued on behalf of their deceased fathers. That this was the case obtaining in the Land Adjudication Proceedings and the same position abounds in the Judicial Review proceedings. That the applicant cannot be allowed to apply double standards in this application by raising the issue of legal representation while the same was not raised in the proceedings before by the District Land Adjudication Officer, the basis and subject of this Judicial Review application. Relying on section 159 (2) (d) of the Constitution, the Exparte-Applicant urged the Court to find for him an account of substantive justice and not procedural or technicalities.

Issues for determination and Analysis

16. When was the decision of the District Land Adjudication Officer made?

Whether the application was filed out of time?

Whether the application to set aside the order granting leave is merited?

17. As to when the decision of the District Land Adjudication Officer was made, I have examined the pleadings in this file and am concerned with the muddled manner in which details have been presented. It is regrettable and all I can say is that Counsels on both sides of the contest could have done better. I have been able to piece together and make sense from the pleadings that the subject of the objection in this file is 216. I shall proceed to deal with the same as 216. The dates referred to in the pleadings are also interchanged but I have relied on the dates as per the applications on record.

18. The facts forming the background of this application as I understand are that exparte leave was

granted to the Exparte-Applicant on the 23/9/09 paving way to file a Notice of Motion for an order of certiorari to quash the decision of the District Land Adjudication Officer pleaded to have been made on the 3/3/09. Subsequently to the amended pleadings, the date of the impugned decision for which leave was sought was settled for 3/4/2009. Following granting of leave a formal application filed by way of Notice of Motion was filed on the 13/10/2009. It is after this Notice of Motion was filed that the 1st Interested Party filed a Notice of Motion on 9/4/2010 to set aside the order of 23/9/09 granting leave.

19. Whilst the application to set aside the order granting ex parte leave was pending, the Exparte-Applicant filed an application to amend the Notice of Motion filed on the 13/10/09. This application was allowed by the Court on the 3/5/2011. The application to set aside is supported by the affidavit of the Interested Party to which the proceedings and decisions of the District Land Adjudication Officer in objection No. 216 was annexed. The annexure constitutes the proceedings and findings of the District Land Adjudication Officer and is dated the 6/3/08.

20. I have condensed the submissions of the parties in the preceding paragraphs and I do not wish recite them here save that the Exparte-Applicants explanation is that the decision of the District Land Adjudication Officer was not read on the 3/5/08 but on the 3/4/09. He appears to admit that though the proceedings are dated the 6/3/08, for purposes of delivery, the date is the 3/4/09. He relied on an annexure marked AME-OI dated 31/3/09 supposedly by the District Land Adjudication Officer calling the parties to attend to his office for the reading of the ruling/decision of their objection proceedings. This is the key issue in this application.

21. It is not in dispute that the objection proceedings referred are those relating to Objection No. 216 in relation to Land Parcel Number Uringu (1) adjudication section No 1056. The decision being sought to be quashed are the proceedings, findings and the decision of the District Land Adjudication Officer commonly stated as objection No 216, parcel No 1056, 3020 and 3022 MR No 451555 and 451563.

22. The proceedings are dated 6/3/2008 and have been annexed by both the Exparte-Applicant as well as the 1st Interested Party/applicant in their Motions. The Exparte-Applicant has submitted that the decision was made on 3/4/2009 while the 1st Interested Party contends that it was made on 6/3/2008. I have examined the said Notice dated the 31/3/09 and I noticed that the parties to the objection did not sign to acknowledge receipt of the same. There is no evidence that the parties appeared before the District Land Adjudication Officer nor that the decision in objection No 216 was read on the 3/4/09. The District Land Adjudication Officer who made the decision has not sworn any affidavit to show that he indeed delivered the ruling on another date other than the 6/3/08. He has neither been called to confirm the letter and whether indeed he delivered the decision one year later. This letter is purely correspondence and not part of the proceedings of the District Land Adjudication Officer. Both parties are disagreeing on the date in which the decision was rendered. The 1st Interested Party holds it was on 6/3/08 but the Exparte-Applicant insists it was on 3/4/09.

23. Order 21, Rule 3 of the Civil Procedure Rules provide as follows;

3. (1) A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.

(2) A judgment pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open Court at the time of pronouncing it.

(3) A judgment once signed shall not afterwards be altered or added to save as provided.”

Section 12 of the Land Adjudication Act Cap 284 provides the procedure to be followed by the Adjudication officer as thus;

“ (1) in the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made 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.

(2) Any proceeding conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of Chapters XI and XVIII of the Penal Code (Cap. 63).”

Guided by the above provisions of the law on how judgements, orders, decisions of the Court or quasi-judicial nature such as that of the District Land Adjudication Officer are rendered, and in the absence of evidence that the decision was made on the 3/4/09 being proven by the Exparte-Applicant, I hold and find that the date of the decision that was sought to be impugned was on the 6/3/08 which is the date shown on the proceedings and findings of the District Land Adjudication Officer.

24. Order 53 rule 2 of the CPR States as follows;

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

25. Section 9 of the Law Reform Act, Cap 26 is very explicit in the time frame within which an order for certiorari may be applied and has similar provisions as the Civil Procedure Rules aforesated. Section 9(3) of the Law Reform Act read together with order 53 rule 2 are couched in mandatory terms;

“...leave shall not be granted unless the application for leave is made not later than 6 months after the date of the decision”.

Guided by the above provisions of the law and having found that the decision was delivered as dated on 6/3/08, it then follows that the application for leave having been filed on the 18/9/09 was brought before the Court out of time and the same is time barred having been filed approximately 16 months after the date of the decision. I have not seen any evidence that the Exparte-Applicant made to file the Judicial Review out of time. The order granting leave to amend the Notice of Motion dated 3/5/2011 did little to cure the mandatory requirement. It did nothing to bring the original nor amended Notice of Motion within the statutory 6 months period. I therefore hold and find that the application for leave to file Judicial Review was brought out of time and the order granted by the Honourable Court on 23/9/2009 is therefore set aside.

26. I have examined the other 2 limbs of the issues raised by the parties, which are whether the Exparte-Applicant has locus standi to file Judicial Review Proceedings and Whether the notice of motion is incompetent on account of absence of leave to seek prohibitory orders and I notice that they are not part of the grounds on which the application is premised and I do not find any justifiable reason to address them as they are made outside the main pleadings. I will therefore ignore them.

27. Is the application meritorious? My findings are that the application dated 30/3/10 and filed on 9/4/2010 has merit and is hereby allowed and the leave granted on the 23/9/09 is set aside. Consequently, the Notice of Motion dated 12/10/09 and filed on 13/10/09 is hereby dismissed for having been brought outside the statutory provisions of Order 53 of the Civil Procedure Rules. Costs shall follow the event and therefore costs are in favour of the 1st Interested Party/Applicant.

DATED, DELIVERED AND SIGNED THIS 2ND DAY OF NOVEMBER 2017.

J.G. KEMEI

JUDGE