



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA MISCELLANEOUS JR CASE NO 04 OF 2017

FORMERLY MERU MISCELLANEOUS APPLICATION NO.40 OF 2010

IN THE MATTER OF AN APPLICATION BY MBUGI KIRAKURA 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 LAND COMMITTEE CASE NO. 94/05, 92/05, 232/05, 22/05, 209/05, 228/05

AND

IN THE MATTER OF ARBITRATION BOARD CASES NUMBER 157/08, 158/08, 159/08, 161/08,
166/08

AND

IN THE MATTER OF PARCEL NO.216 – THARAKA ADJUDICATION AREA, GATUNGA
ADJUDICATION SECTION

AND

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN OF THE ARBITRATION

BOARD, THARAKA ADJUDICATION AREA,

GATUNGA ADJUDICATION SECTION.....1ST RESPONDENT

THE LAND ADJUDICATION OFFICER,

THARAKA ADJUDICATION AREA,

GATUNGA ADJUDICATION SECTION.....2ND RESPONDENT

THARAKA COUNTY COUNCILINTERESTED PARTY

EX-PARTE.....MBUGI KIRAKURA

JUDGMENT

1. These Judicial Review proceedings were brought to court by way of a Notice of Motion dated **11th June, 2010**. The ex-parte applicant seeks the following orders:

1. That this honourable court do grant the ex-parte applicant an order of judicial review in the nature of certiorari to bring up and quash the decision made by the arbitration board Tharaka Adjudication Area, Gatunga Adjudication Section over parcel No. 216 on 23.11.2009.

2. That this honourable court be pleased to grant the ex-parte applicant an order of judicial review in the nature of prohibition to prohibit the respondents from interfering with parcel No. 216- Tharaka Adjudication Area, Gatunga Adjudication Section.

3. That costs be provided for.

2. The application has, inter alia, the following grounds:

a) That the respondents found as a matter of fact that the ex-parte applicant was in occupation of land parcel No. 216 since 1962 having gathered the same and still went on to deprive the ex-parte applicant the land in pretext that it is “public land”.

b) That the arbitration board acted unreasonably in view of the fact (sic) of the case regard had being (sic) to the nature of evidence tendered before it by the ex-parte applicant.

c) That the arbitration board was bias (sic) as against the ex-parte applicant and in favour of the interested party.

d) That there was a deliberate move by the respondents to use the process of adjudication to deprive the ex-parte applicant his hard earned land in favour of the interested party without due process.

3. The Statement of Facts accompanying the application is dated 11.6.2010 and reads as follows:

STATEMENT OF FACTS

A. THE NAME AND DESCRIPTION OF THE APPLICANT

1. The name of the Ex-parte applicant is MBUGI KIRAKURA.

2. The Ex-parte applicant is a resident of THARAKA DISTRICT in the Republic of Kenya

B. THE FACTS RELIED UPON:

3. That the Ex-parte Applicant lodged a claim at the arbitration board Tharaka Adjudication Area, Gatunga Adjudication Section over parcel No. 216.

4. That the ex-parte applicant has been residing over that parcel of land which is approximately 42 acres for many years which parcel he gathered in 1962.

5. That the parcel in issue was invaded by people well known to him prompting him to lodge the claim.

6. That the Ex-parte applicant’s land has been invaded by the Tharaka County Council who now

claims a portion without due process.

7. That the Ex-parte applicant has developed the suit land.

8. That the Ex-parte applicant will be deprived his land in the pretext that it is public land without notification and due process.

C. THE RELIEF SOUGHT

9. That the applicant seeks relief as follows:

i. An order of certiorari to move into the high court and quash the decision made by the land arbitration board on 23.11.2009.

ii. An order of prohibition to prohibit the respondent from implementing/executing or whatsoever dealing and/or interfering with land parcel No. 216 Tharaka Adjudication Area, Gatunga Adjudication Section.

iii. Grant of leave herein do operate as stay of implementation/execution and / or operation of the decision dated 23.11.2009 by the arbitration board.

D. THE GROUNDS ON WHICH THE RELIEF IS SOUGHT

10. That the arbitration board found as a matter of fact that the ex-parte applicant was in occupation of the parcel of land way back from 1962.

11. That the arbitration board acted unreasonably in view of the facts of the case regard being had to the evidence tendered before it by the applicant.

12. That the arbitration board was bias (sic) as against the ex-parte applicant.

13. That there was a deliberate move by the arbitration board to use the process of adjudication to deprive the ex-parte applicant his hard earned land in favour of the county council of Tharaka without due process.

14. That no reasonable tribunal would have come to the conclusion the 1st respondent did in view of the facts of this case.

DATED AT MERU THIS 11TH DAY OF JUNE, 2010

FOR: MUIA MWANZIA & CO.

ADVOCATES FOR THE APPLICANT

4. The apposite facts are verified by the exparte applicants affidavit sworn on 11.6.2010 which states as follows:

I MBUGI KIRAKURA OF P. O. BOX 1568-60200 MERU do hereby make oath and state as follows:

1. That I am the Ex-parte applicant herein well versed with the facts of this matter and therefore competent to make and swear this affidavit.

2. That I acquired the suit land being parcel No. 216 Tharaka Adjudication Area, Gatunga Adjudication Section in the year 1962.

3. That by the time I acquired the area, there was no one on the parcel of land.
4. That over the years, I have lived peacefully on the parcel I have made some developments to wit, put up my bee hives, built houses, planted subsistence crops and graze my cattle on the parcel.
5. That the suit land is not an inheritance from my father but I acquired it personally through the process of gathering.
6. That the arbitration board have unreasonably taken away my land and given me only 3 ½ acres thereof without a justifiable cause.
7. That this is unfair because they are hiding under the disguise the suit land is “public land”.
8. That if indeed it has been gazette (sic) as a public land which is not the case, I wonder what criteria they have used to find it fit to leave me with 3 ½ Acres.
9. That from my knowledge, it was declared “public land” by the then area chief in 1999 after about 37 years of my occupation. Clearly am being deprived of my land without due process.
10. That I should be compensated for my land if at all the government deems it fit to evict me.
11. That the arbitration board did not order any compensation having noted that the county council of Tharaka had not placed any dispute over the parcels of land, yet it proceeded to award it my parcels of land without basis.
12. That annexed and marked MK 1 is a copy of the proceedings before the arbitration board.
13. That I have read the statement of facts hereto and verify the same as true and correct.
14. That what is deponed to herein above is true to the best of my knowledge, information and belief.

DATED AT MERU THIS 11TH DAY OF JUNE, 2010

5. I opine that there has been inordinate delay in the hearing and determination of this Judicial Review application. It was filed on 11th June, 2010 and over 7 years later it has not been disposed of. Indeed on 15th March, 2017, this suit was dismissed for lack of prosecution in terms of the provisions of order 17 rule 2(1) of the Civil Procedure Rules. The suit was, however, reinstated on 21st June, 2017.
6. The exparte applicant in his submission says that he has been in occupation of the suit land, which he says measures approximately 42 acres, since 1962. He claims that the area chief declared the suit land as public land in 1999, 37 years after his occupation of the land.
7. The exparte applicant states that the Arbitration Board ignored the facts that he lived on the land and had gathered it in 1962. He claims that the board was biased and had no basis for reaching its decision. He proffers Meru High Court Judicial Review No. 7 of 2012, **JACOB ATELA INGA’LA VERSUS JULIUS MURIUKI & ANOTHER** and quotes the presiding Judge as having opined as follows:

“Having carefully gone through the objection proceedings, I agree that what is contained in the proceedings does not support the decision reached by the Adjudication Officer. There is lack of proportionality and rationality. By saying this, I am not delving into mere consideration of the merits of the decision. A decision must have basis. Where there is no basis, there is no fair hearing. This then becomes the province and realm of Judicial Review.
8. The exparte application asserts that the land which is claimed as public land has not been gazetted as

such. He also decries that the Arbitration Board did not compensate him for loss of his land.

9. The respondents in their submissions have explained that the suit land, parcel No. 216, is in Gatunga Adjudication Section which is undergoing the adjudication process to facilitate issuance of title deeds. They say that the local community set aside the suit land as a public utility, and as is normal with such cases is registered in the name of Tharaka County Council (Now the County Government of Tharaka Nithi). They say that the suit land is reserved for use by Gatunga Police Station.

10. The respondents explain that the *exparte* applicant, together with others, lodged a land committee case as provided for in Cap. 284, Laws of Kenya and that the case was dismissed. They appealed to the Arbitration Board which gave the complainant 3.5 acres and another complainant 1.5 acres.

11. The respondents state that parcel Number 216 is approximately 35 acres but after the *exparte* applicant and the other complainants were awarded 5 acres, the remaining land is 30 acres in area. They say that the *exparte* applicant lives on parcel No. 208 and merely wants to extend his land through encroachment of parcel No. 216 which is a public utility. They further state that it is the province of the adjudication process to identify and delineate land ownership through occupation and development among other considerations. They laconically state that the *exparte* applicant did not collaborate the necessary factors in order for him to warrant his ownership of the entire parcel No. 216.

12. The respondents submit to the court that there is a pending objection filed by the *exparte* applicant which is meant to determine ownership of the suit land. They say that he has not exhausted the applicable process.

13. The respondents also complain that the *exparte* applicant did not obtain the consent of the Adjudication officer as required by Section 30 of the Land Adjudication Act. They suggest that the *exparte* applicant merely wants to encroach on the suit land because it is at Gatunga Trading Centre, which is the Head quarters of Tharaka North District, where value of the land has phenomenally escalated.

14. The respondents urge the court to dismiss this suit. They say that he who goes to equity must have clean hands and since the applicant has not exhausted available remedies, this court should dismiss this suit.

15. The respondents submit that Judicial Review orders are discretionary and cannot be mandatorily granted. They say that Judicial Review is concerned with the integrity of the process and not the outcome of the process. For this proposition, the respondents proffer the case of ***REPUBLIC VERSUS MOUNT KENYA UNIVERSITY AND ANOTHER [2017]eKLR.***

16. I frame the issues for determination as:

a) Did the *exparte* applicant gather the suit land in 1962 or thereabout?

b) Did the Arbitration Board possess authority to declare the suit land public land to be used as a police station and to be registered in the name of Tharaka Nithi County Council (now the County Government of Tharaka Nithi)?

17. I have carefully considered the pleadings and the submissions proffered by the parties in support of their varied assertions. At the outset, I opine that the authorities proffered by the parties are good authorities in their circumstances. I, however, add that no facts and circumstances of a case can, in a situation similar in mathematical certitude, be congruent to the facts and circumstances of another. I agree with the respondents that Judicial Review orders are discretionary. But that discretion must be exercised in a Judicial and not in a capricious manner.

18. Regarding the authority proffered by the *exparte* applicant, Meru High Court Judicial Review No. 7 of 2012, it is a good authority in its circumstances. However, having perused the proceedings that culminated in the impugned decision, I do not agree that there was no basis for the board to reach its

decision.

19. The *ex parte* applicant asserts that he gathered the suit land in 1962. He does not elucidate on the process he used to gather his land. One cannot use an autonomous process, not recognized by the law, to self-declare ownership of land. The Land Adjudication Act provides for the ascertainment and recording of rights in community land. The Land Consolidation Act provides for the ascertainment of rights and interest in, and for the consolidation of land in the special areas AND for the registration of title to and of transactions and devolutions affecting such land. Simply put, the *ex parte* applicant cannot on his own avoid the processes attendant to ascertainment of rights to land.

20. I do note that the *ex parte* applicant has not controverted the claim that he has a pending Objection concerning the suit land. I agree with the respondents' submissions that "one cannot have his cake and still eat it". You cannot have an appeal in the name of an objection still pending and also file Judicial Review proceedings concerning the same matter.

21. Article 61(2) of the Constitution of Kenya decrees that land in Kenya is classified as public, community or private. In the case of the suit land, it is pellucid to me that it is community land. Ascertainment of rights to such land must be subjected to the processes encapsulated in the Land Adjudication Act and the Land Consolidation Act. One cannot escape these processes.

22. I find that the impugned decision was arrived at following the right process. The Arbitration Board had jurisdiction to have the suit land set aside for a police station, which is a public utility and to have the land registered in the name of Tharaka Nithi County Council (Now the County Government of Tharaka Nithi).

23. In the circumstances, this Judicial Review suit is dismissed.

24. Orders granted at the *ex parte* stage are vacated.

25. Costs are awarded to the Respondents and to the Interested party.

26. It is so ordered.

Delivered in open court at Chuka this 6th day of December, 2017

in the presence of:

CA: Ndegwa

Mbugi Kirakura – *Ex parte* Applicant

Advocates and other parties absent

P.M. NJOROGE

JUDGE