



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW NO. 2 OF 2015

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW FOR
CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

AND

1. TOWN CLERK)

2. MUNICIPAL COUNCIL OF

KERUGOYA-KUTUS.....) RESPONDENTS

SAMUEL NJIRAINI MURAGE.....INTERESTED PARTY

MURIITHI MURAGE.....EX-PARTE APPLICANT

JUDGMENT

By his Notice of Motion dated 19th March 2013 and filed herein on 20th March 2013 the applicant **MURIITHI MURAGE** sought the following orders:-

- 1. An order of certiorari to remove into the High Court for the purpose of being quashed the minute of the Municipal Council of Kerugoya-Kutus Town, Planning, Works and Housing Committee held on 13th December 2012 being MIN. TPW & H 34/2012 which purported to sub-divide plot number 250/92 KERUGOYA into two portions A and B and award plot number 250/92 A to MURIITHI MURAGE and plot number 250/92 B to SAMUEL NJIRAINI MURAGE.***
- 2. An order of certiorari directed at the Town Clerk, Municipal Council of Kerugoya-Kutus prohibiting the respondents by themselves, their servants, agents or other officers from sub-dividing plot number 250/92 KERUGOYA into two portions.***

3. *That the costs of this application be provided for.*

The application was grounded on matters set out in the Statutory Statement and affidavit of the applicant **MURIITHI MURAGE**.

In summary, the applicant's case is that in 1968, he was allocated plot No. KERUGOYA/250/92 then known as plot number 91 KERUGOYA (hereinafter the suit plot) by the Kirinyaga County Council and in 1972, he invited **SAMUEL NJIRAINI MURAGE** the interested party herein who is his younger brother to be a partner in the said suit plot on the understanding that the interested party would contribute towards the development of the same. However, that was not to be and the interested party failed to make any contribution towards the development of the suit plot which is now valued at Ksh. 16,500,000.

In January 2013, the applicant learnt that the respondent had unilaterally and without informing him, decided to sub-divide the suit plot into two equal portions and allocated a plot designed as number 250/92 B to the interested party. That that decision which is contained in the respondents' minute TPW & H 34/2012 was arrived at against the rules of natural justice as the applicant was not consulted or invited to the meeting held on 13th December 2012 although he is the one who developed the suit plot.

The 1st and 2nd respondents did not file any response to the application but instead filed a notice of Preliminary Objection to the effect, inter alia, that the same is defective as it offends the provisions of ***Order 53(1) and 53(4) (1) of the Civil Procedure Rules*** and should therefore be struck out and further, that the respondents have since been dissolved by the new ***Constitution*** specifically ***Article 176(1)*** and are not entities known in law. Finally, it was submitted that the verifying affidavit is deponed by a stranger to this suit one **MURIITHI MURAGE**.

In a replying affidavit in opposition to this application, the interested party deponed that he is a joint tenant in the suit plot and his then advocate A.P. Kariithi had notified the applicant of his intention to apply to the respondent for approval to sub-divide the suit plot as per the letter dated 5th November 2012 – annexure **SNM 1**. That the respondent adhered to the Rules of Natural Justice in arriving at the decision to sub-divide the said plot and the matter at hand is not about the ownership of the same. The other issues raised therein are not really relevant in this application. In a further replying affidavit dated 20th November 2014, the interested party annexed other annexures including orders issued by the Subordinate Court in Kerugoya SRMCC No. 42 of 1991 which were set aside by the High Court in Nairobi High Court Civil Application No. 323 of 1997.

The applicant filed a further supporting affidavit dated 8th December 2014 in which, no doubt in response to the respondent's Preliminary Objection, he deponed that the heading of the Notice of Motion which reads '**IN THE MATTER FOR AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**' instead of '**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW FOR CERTIORARI AND PROHIBITION**' is only a typographical error. He deponed further that the correct position is that he and the interested party are tenants in common in the suit plot and that he was not consulted when the respondent purported to sub-divide it into portions A and B and it was therefore unlawful, illegal and against the rules of natural justice for the respondent to sub-divide the suit plot without giving him an opportunity to be heard.

Submissions have been filed both by the firms of P.M. Muchira Advocate for the applicant and Maina Kagio Advocate for the interested party. Other than file the Preliminary Objection referred to above, the respondents did not participate in these proceedings.

I have considered the Notice of Motion, the parties' rival affidavits and annexures thereto and the submissions by counsel.

Perhaps the starting point should be the Preliminary Objection which, though not prosecuted, I have decided nonetheless to examine it because a proper Preliminary Objection, if up-held, would have the effect of disposing off the whole application in limine. For instance, if such Preliminary Objection successfully raises an issue of jurisdiction, then a Court seized of the matter would be obliged to down its

tools – **OWNERS OF THE MOTOR VEHICLE “LILLIAN S” VS CALTEX OIL (KENYA) LIMITED (1989) K.L.R 1.**

The Preliminary Objection cites non-compliance with the provisions of **Order 53 (1) and 53(4) of the Civil Procedure Rules** and, as I have stated above, it was not prosecuted. Nonetheless, doing the best I can in the circumstances, I would only say that those provisions require that such an application be commenced only when leave has been granted by the Judge (**Order 53 Rule 1**) and that copies of the statement and affidavit accompanying the application for leave be served (**Order 53 (4)**). It is clear from the records that the application for leave was placed before Githua J who granted it on 7th March 2011. It is also clear from the affidavit of service sworn by **Mr. PETER MWANGI MUCHIRA** advocate on 10th April 2013 that the Notice of Motion, statement of facts and verifying affidavit were served upon **Mr. OLIVER RUIRIE** the Deputy Town Clerk of the Municipal Council of Kerugoya-Kutus on 25th March 2013 who acknowledged receipt, signed and stamped the documents. The documents themselves confirm the same. With regard to the objection that the respondents are un-known entities, the **Local Government Act** was repealed on 13th March 2013 with the final announcement of the first General Elections because under **Section 134 of the repealed Local Government Act**, it was provided as follows:-

“The Local Government Act is repealed upon the final announcement of the results of the first elections held under the Constitution”

The **County Government Act** came into force on 13th March 2013 upon the repeal of the **Local Government Act**. This suit was instituted on 7th March 2013 when leave was granted by **Githua J** and by then, the **Local Government Act** was still in force and municipalities were created by **Section 12** of that Act which states that every Municipal Council was a body corporate with Perpetual Succession and all common seal capable in law of suing and being sued and also capable of acquiring, holding and alienating land. **Section 59 of the of the Urban Areas and Cities Act (CAP 275 Laws of Kenya)** which is the transitional provision permits the continuation of existing litigation in the name of former statutory bodies created under the repealed **Local Government Act**. It reads:-

“Any legal right accrued, cause of action commenced in any Court of law or tribunal established under any written law in force, or any defence, appeal, or reference however filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law”.

It cannot therefore be correct to state that the respondents are entities not known in law. It is also not clear to me how one **MURIITHI MURAGE** can be referred to as a stranger to this suit. Finally, the typographical error in the heading of the Notice of Motion is simply that – a typographical error. It does not prejudice any of the parties herein and is certainly curable by **Article 159 (2) of the Constitution**.

The Preliminary Objection raised herein is clearly without merit and must be dismissed.

I now turn to the Notice of Motion application and consider it on its merits.

This being a Judicial Review application, this Court is concerned with how the respondents arrived at the decision to sub-divide the suit plot into two portions. This Court will therefore not dwell on the merits or otherwise of that process but rather, how that decision was made. In the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 OF 2001**, the Court of Appeal described the function of a Court exercising Judicial Review powers as follows:-

“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. The Court

should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was no sufficient evidence to support the decision”.

It is important to remember that the purpose of Judicial Review is to ensure that the party to be affected by the decision made is given fair treatment by the body making the decision. The broad grounds upon which this Court exercises Judicial Review jurisdiction were ably captured in the Uganda Case of **PASTOLI VS KABARE DISTRICT LOCAL GOVERNMENT AND OTHERS (2008) 2 E.A 300** where the Court cited with approval the case of **COUNCIL OF CIVIL UNIONS VS MINISTER FOR THE CIVIL SERVICE 1985 A C 2** and **AN APPLICATION BY BUKOBA GYMKHANA CLUB 1963 E.A 478** and remarked as follows:-

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision Procedural impropriety is when there is a failure on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument to which such authority exercises jurisdiction to make a decision”

It is not in dispute that since 21st May 2012, the applicant and the interested party are jointly registered as owners of the suit plot. The certificate of lease in respect to that property does not indicate whether their ownership of the suit plot is a joint tenancy or a tenancy in common. **Section 91(1) of the Land Registration Act** recognizes both tenancies i.e. tenancy in common and joint tenancy. As the certificate of lease does not specify the type of tenancy the applicant and interested party hold in the suit plot, then this Court will decide on the authority of **MUKAZITONI JOSEPHINE VS ATTORNEY GENERAL 2015 e K.L.R** that the suit plot is held in a joint tenancy. In that case, the Court of Appeal in a five Judge bench held as follows:-

“The Title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in a joint tenancy and not a tenancy in common or a tenancy in entirety”

The applicant and the interested party therefore hold the suit plot in a joint tenancy and therefore under **Section 91(3) of the Land Registration Act**, dispositions in the plot may only be made by all of them jointly.

The applicant’s case is that the sub-division of the suit plot was made by the respondents without involving him. The right to be heard – audi alteram partem or hear the other side – is the more far reaching principle of the Rules of Natural Justice. It is fundamental to fair procedure that both parties to a dispute should be given an opportunity to be heard before a decision that affects them is made. This principle of fairness is also embodied in **Article 47(1) of the Constitution** in the following terms:-

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair” emphasis added

Article 50(1) of the Constitution provides for fair hearing and states:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body” emphasis added

There is no doubt that the then Kerugoya-Kutus Municipal Council had the power under **Section 177(1) (a) of the repealed Local Government Act** to sub-divide the suit plot. That provision provided as follows:-

“A Municipal Council, Town Council or an Urban Council may, subject to any written law relating thereto:

- a. ***lay out building plots or otherwise sub-divide any land acquired or appropriated by it, whether within or without its area, for the purpose of housing for the inhabitants of its area”.***

However, there is a presumption that in the interpretation of statutes, the rules of Natural Justice will apply. Therefore, a body applying any statute is required to do so fairly and to apply the rules of Natural Justice – **ONYANGO OLOO VS ATTORNEY GENERAL 1986 – 1989 E.A 456.**

Similarly, in the case of **PETER OKECH KADAMAS VS MUNICIPAL COUNCIL OF KISUMU (1985) K.L.R 954, PLATT Ag. J.A** citing **REPUBLIC VS ELECTRICITY COMMISSIONER 1924 1 K.B 171** held:-

“Whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law, which affect the common law or statutory right of other persons as individuals, it is amenable to the remedy of Judicial Review of its decision either for error of law in so acting, or for failure to act fairly towards the person who will be adversely affected, viz: by not affording him a reasonable opportunity of learning what is alleged against him of putting forward his own case in answer to it, and to the absence of personal bias against him, on the part of the person by whom the decision falls to be made”.

The respondents not having filed any replying affidavit in response to the applicant’s averments that he was not invited to the meeting held on 13th December 2012 in which the respondents, through its minutes No. TPW & H 34/2012 purported to sub-divide the suit plot into portions A and B, that averment stands un-rebutted and must therefore be believed by this Court. In any event, the applicant annexed to his Notice of Motion the minutes of the said meeting (annexture **MM1**) and it is clear from them that the applicant was not among those in attendance. In view of the substantial developments that the applicant says he has made on the suit plot which is now valued at Ksh. 16,500,000 as per the valuation report (annexture **MM5**), and considering also his claim that the interested party has not made any contribution towards that development, it was only fair and proper that the respondents give him an opportunity to be heard before making the decision that it did. The minutes themselves are very brief and apart from recording the names of those present, (who were all councillors and officers of the 2nd respondent), it is recorded as follows:-

“MIN TPW & H 34/2012 – Application for sub-division of plots

3 Plot No. 250/92 – Kerugoya into two portions A and B as per the sub-division scheme plan plot No. 250/92 A – Muriithi Murage

Plot No. 250/92 B – Samuel Njiraini Murage - Approved”

It is not even clear who made the application and the applicant has pleaded that the proposed sub-division plan was done by the interested party without his involvement.

In his further replying affidavit, the interested party has annexed a letter dated 4th August 1991 (annexture **SNM 5**) and deponed at paragraph 9 that as early as 1991, the applicant and himself had

applied for the sub-division of the suit plot. But in paragraph 9 of his further affidavit, the applicant has denied that averment amongst others. In any case, from a perusal of the minutes of the respondents meeting held on 13th December 2012, there is nothing to suggest that the said decision to sub-divide the suit plot was made on the basis of that letter which was written some 21 years prior to the meeting of 13th December 2012. Besides, nothing would have prevented the respondents from inviting the applicant to the meeting so as to confirm if he authored the said letter which, as I have indicated above, he has denied.

From all the above, it is clear that the respondents in arriving at the decision to sub-divide the suit plot into two portions through their minutes TPW & H 34/2012 in their meeting held on 13th December 2012 failed to hear the applicant yet he owns the plot jointly with the interested party. That was in breach of the Rules of Natural Justice which renders that decision liable for quashing by the writ of certiorari which is the first prayer in the Notice of Motion filed hereon on 20th March 2013. I therefore grant that prayer and move into this Court for purposes of quashing the minutes of the Municipal Council of Kerugoya-Kutus Town Planning, Works and Housing Committee held on 13th December 2012 being MIN TPW & H 34/2012 which purported to sub-divide plot number 250/92 Kerugoya into two portions A and B and award plot number 250/92 A to **MURIITHI MURAGE** and plot number 250/92 B to **SAMUEL NJIRAINI MURAGE**.

The applicant has also sought an order of prohibition directed at the respondents by themselves, their servants, agents or other officers from sub-dividing plot number 250/92 Kerugoya into two portions. The order to sub-divide the plot, and which I have already quashed, was made on 13th December 2012. Only an order of certiorari can quash a decision already made – **KENYA NATIONAL EXAMINATION COUNCIL VS REPUBLIC – EX-PARTE GEOFFREY GATHENJI & OTHERS C.A CIVIL APPEAL NO. 266 OF 1996**. Since I have already quashed the decision arrived at by the respondents, that decision no longer exists and so there is nothing to prohibit. The parties revert back to the position that they were prior to the impugned decision.

Ultimately therefore, judgment is entered for the applicant in terms of his Notice of Motion dated 19th March 2013 and filed herein on 20th March 2013.

The 2nd respondent shall meet the applicant's costs of this application. It is so ordered.

B.N. OLAO

JUDGE

22ND APRIL, 2016

Judgment dated, signed and delivered in open Court this 22nd day of April, 2016.

Mr. Muchira for Applicant present

Mr. Macharia for Mr. Kagio for Interested party present

No appearance for Respondents

Right of appeal explained.

B.N. OLAO

JUDGE

22ND APRIL, 2016