Lithara v Land Adjudication and Settlement Officer Tigania Central; M'Abiru (Interested Party) (Judicial Review E001 of 2023) [2024] KEELC 1775 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1775 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW E001 OF 2023

CK NZILI, J

MARCH 20, 2024

IN THE MATTER OF AN APPLICATION BY IBRAHIM MURUNGI LITHARA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF OBJECTION PROCEEDINGS NO.1877 ANKAMIA ADJUDICATION SECTION – TIGANIA CENTRAL

AND

IN THE MATTER OF LAND PARCEL NO.2366 ANKAMIA ADJUDICATION SECTION

BETWEEN

IBRAHIM MURINGI LITHARA .... APPLICANT

AND

THE LAND ADJUDICATION AND SETTLEMENT OFFICER TIGANIA CENTRAL .... RESPONDENT

AND

IBRAHIM MUTURA M'ABIRU .... INTERESTED PARTY

JUDGMENT

1. The court is asked to issue an order of certiorari to call for and quash the decision by the 1st respondent made on 4.4.2023 in A/R Objection No. 1877 Ankamia Adjudication Section.
2. The grounds and facts are set out in the statutory statement of facts dated 11.7.2023 and in the verifying affidavit sworn by Ibrahim Murungi Lithara, the exparte applicant, on 11.7.2023.
3. The exparte applicant avers he bought L.R No. 2366 Ankamia Adjudication Section from the interested party and later on became the registered owner as per a title deed issued on 29.9.2021. It is

averred that before the registration of the land in his name, the interested party had refused to have the land demarcated and registered in the exparte applicant's name, following which he filed an Objection No. 1877, whose decision was quashed by the court in J.R. No. 15 of 2015, and the objection was remitted for rehearing by the land adjudication officer, which took place on 27.7.2022 and a decision delivered on 4.4.2023. The exparte applicant avers that the respondent dismissed the objection without giving any reasons. He then terms the decision was made irregularly in a biased manner and without looking into the evidence placed before the respondents. The proceedings and the decision are attached with the title deed as I.M. "1" & "2" respectively.

4. In the grounds in the statutory statement of facts, the exparte applicant avers the respondent acted without jurisdiction since the land is already registered and titled under the *Land Registration Act* 2012. The applicant further says the respondents failed to record the views of the committee members and give reasons for the decision based on his perception rather than on the evidence and facts presented and was therefore unfair.

5. The amended notice of motion is opposed through a replying affidavit of Anthony D. Mureithi for the 1st respondent and Ibrahim M'Abiru, the interested party, sworn on 24.11.2023 and 6.11.2023, respectively. The 1st respondent, a subcounty Land Adjudication and Settlement Officer Tigania East and Central, says in the nullified award by the court in J.R. No. 15 of 2015, the applicant had been given one acre from the interested party's Parcel No. 598 Ankamia adjudication section. He says that during the rehearing under the *Land Consolidation Act* (Cap 283), all parties were afforded an opportunity to represent their case and adduce evidence supporting their case, after which the committee made a fair determination going by the proceedings attached in compliance with Section 29 of Cap 283.

6. The 1st respondent avers that the exparte applicant has failed to tender evidence of bias or irregularity on its part in arriving at the determination. The 1st respondent avers that from its record, Parcel No. 598 was recorded in the name of the interested party, following which, after the adjudication process was finalized the suit land was registered in the name of the interested party. It is averred that if the applicant procured a title deed over the land, then the same was in contempt of court orders in Meru ELC No. 25 of 2016 issued on 7.2.2000, nullifying the objection proceedings. The respondent termed the title inadmissible and uncertified by the land registrar and, therefore, a nullity ab initio. The 1st respondent attached copies of the nullified award, a former judgment, records of existing rights, and a certificate of official search as annexures ADM "1-4", respectively.

7. The interested party avers that the rehearing of the A/R objection was above board, fair, just, and due process was followed in deciding the presence of all the committee members. The interested party avers that if the applicant was dissatisfied, he had the option to appeal to the minister and not to challenge the award. Further, it is averred that in a judicial review application, the applicant cannot be allowed to challenge the merit of the decision but only the process. He terms the title deed held by the exparte applicant irregular and a candidate for cancellation to bring this circus to an end.

8. With leave, parties canvassed the amended notice of motion through written submissions. The exparte applicant relied on written submissions dated 13.12.2023. He urges the court to find that the notice of motion satisfies the cardinal principles of illegality, irrationality, and procedural impropriety as set in Pastolii vs Kabale District Local Government Council and others (2008) E. A 304 since the respondent had no jurisdiction to hear the award on titled land.

9. In his view, the exparte applicant under Section 27 of cap 283 upon expiry of 60 days from the date of the decision made under Section 25 or the determination of all objections under Section 26 of the Act, the adjudication register had become final, and therefore the title deed was regularly issued to him.

10. The exparte applicant submitted that notwithstanding the provisions of Section 27 of the Act, the 1st respondent went ahead to order the cancellation of his title without appreciating that he had become an absolute owner under Section 24 of the *Land Registration Act* and therefore, due process was not followed to cancel or revoke the title as per Sections 26 (1) (a) 4 (b) and 101 thereof.

11. The exparte applicant submitted that while he gave evidence on how he bought his land, the transfer was effected and registered under his name; the 1st respondent failed and or ignored all that evidence and arrived at a decision without considering it. The exparte applicant further submitted that whereas the court had ordered a fresh hearing with the assistance of the committee members, the 1st respondent did not record the opinions of the said members save to say that they appeared divided into two and hence the failure to record their views was fatal and amounted to procedural errors.

12. Regarding bias, the exparte applicant submitted the work used by the 1st respondents clearly shows bias and a decision not based on any evidence making it unreasonable and illogical.

13. The respondents relied on written submissions dated 7.12.2023. It is submitted that the 1st respondent exercised a statutory jurisdiction set under Cap 283, and to this end, in the absence of a certificate of the alleged title deed under Section 26 of the *Land Registration Act*, the title deed held by the exparte applicant cannot be taken as conclusive evidence of proprietorship under Sections 79 and 80 of the *Evidence Act*.

14. The respondents submitted that the exparte applicant participated in the previous Judicial review case where the court on 15.7.2016 had issued stay orders, so any title issued was in contempt of court orders. Further, the respondents submitted that they had a statutory duty to obey court orders, and therefore, the 1st respondent heard and determined the objections in a legal, regular, and proper manner. Reliance was placed on Republic vs County Chief Officer Finance and Economic Planning Nairobi City County exparte David Mugo Mwangi (2018) eKLR.

15. The respondents submitted that the exparte applicant did not deserve the order of certiorari. Reliance was placed on Republic vs Director of Immigration Services and others exparte Olamilekan Gbenga Fasuyi & others (2018) eKLR and Republic vs District Land Adjudication and Settlement Officer Maara Subcounty and others exparte M'Nyiri Ragwa Njeru Kirika (IP) (2021) eKLR.

16. The interested party relied on written submissions dated 11.11.2023. It was submitted that given that the rehearing of the A/R objection arose out of an earlier court order, litigation must come to an end, more so since the 1st respondent followed the due process. Further, it was submitted from the averments in these proceedings that the exparte applicant appears to have been desiring a particular outcome no matter what. In this case, the interested party submitted that even though committee members were present, the ultimate or final decision belonged to the 1st respondent.

17. The court has carefully gone through the amended notice of motion dated 5.10.2023, the replying affidavits dated 24.11.2023 and 6.11.2023, and the written submissions. At the outset, I must point out that parties are bound by their pleadings, and issues for the court's determination flow from what the parties have pleaded. See Raila Odinga & others vs. IEBC (2017) eKLR and Stephen Mutinda Mule vs IEBC (2013) eKLR citing with approval Malawi Railways Corporation vs Nyasulu (1998) MWSC 3.

18. Pleadings under judicial review were considered in Commissioner General KRA vs Silvano Owako C.A NO. 45 of 2000. The court cited Supreme Court Practices Rules 1979 Vol. 1 paragraph 53/1/2017 that the application for leave by a statement, the facts relied upon should be stated in the affidavit. The statement should contain nothing more than the name of the relief sought and the grounds on which

it is sought. It is not correct to lodge a statement of all the facts verified by an affidavit". See also Kassim Hamisi Machu Kuhia vs Attorney General (2005) eKLR.

19. The court of appeal said from the above extract that it was the verifying affidavit and not the statement to be verified, which is of evidential value in an application for judicial review. In Tana River Pastoralists Development Organization and others vs NEMA & others (2006) eKLR, the court cited P.L.O Lumumba and P.O Kaluma on Judicial Review of Administration Action in Kenya Law and Procedure Jomo Kenyatta Foundation that the established jurisprudence is that all evidential facts should be set out in an affidavit and not in the statement of facts otherwise the failure to do so renders the application incompetent for want of evidence. The court further cited Nyamu J, in Paul Imison vs A.G. & others Misc Civil Application No. 1604 of 2003, that facts under Order 53 Rule 1 (2) of the Civil Procedure Rules must be exclusively contained in the affidavit, unlike the statement of facts since the former has the evidential value.

20. In the Centre for Peace and Democracy (CEPAD) Board of Governors vs NGO Board (2014) eKLR, the court said that a statutory statement of facts was a mandatory requirement in the grant of leave and for the issue of the substantive order. The court said that leave to amend did not extend to substitution of the applicant, given the provisions of Rules 1 (2) and (4) of Order 53 of the Civil Procedure Rules. The court said a party might not be replaced after the leave has been granted; otherwise, it would invalidate the accompanying documents. The court said the defect in the statutory statement was not a typographical or procedural error curable by Article 159(1) of *the Constitution*.

21. In this proceeding, the exparte applicant sought leave of court to include the 2nd respondent. The court allowed him to do so on 5.10.2023. Unfortunately, made amendment to the notice of motion and not the entire proceedings. In Republic vs Exparte, the Minister for Finance and the Commissioner of Insurance vs Charles Lutta Kassamani Civil Appeal (Application) No. Nai 281 of 2005, the court of appeal said a defect in the form in the title or hearing of an appeal or a misjoinder or non-joinder of parties were irregularities that do not go to the substance of the appeal and could be curable by amendments.

22. Having said this, the grounds to challenge the 1st respondent's decision are set in part B of the statutory statement dated 11.7.2023. The applicant attacks the 1st respondent's process and decision on jurisdiction, the failure to make a finding on the evidence or give reasons thereof, and instead basing it on his perception rather than the evidence and facts, the failure to record the views of the committee members, breach of his legitimate expectation, failure to notify him to attend the delivery of the judgment, bias and lastly denial of the copy on time or at all leading to the expiry of the appeal period. All these issues are captured in the verifying affidavit dated 11.7.2023 and the further affidavit.

23. The mandate and jurisdiction of this court in an application for judicial review brought under Order 53 of the Civil Procedure Rules and Sections 8 & 9 of the *Law Reform Act* were settled by the Supreme Court in Dande & 3 others vs Inspector General National police service and others (2023) KESC 40 (KLR) (16th June 2023) Judgment. The court held that if a party files a suit under Order 53 civil Procedure Rules and does not claim any violation of *the Constitution*, then the court can only limit itself to the process and the manner in which the decision complained of was reached or action taken. The court cited, Republic vs KRA exparte Stanley Mombo Mauti (2018) eKLR, Suchan Investment LTD vs Ministry of Heritage (2016) eKLR, CCK & others vs Royal Media Services Ltd (2014) eKLR that a mere citation of *the constitution* provisions could not elevate a regular judicial review suit into a constitutional rights cases.

24. The amended notice of motion by the exparte applicant is confined to Order 53 of the Civil Procedure Rules and Sections 8 & 9 of the *Law Reform Act*. Therefore, my jurisdiction is tied to the process in

which the decision was made. Prerogative writs are also constitutional reliefs under Article 23(3)f. The supervisory role of this court over inferior tribunals or administrative bodies is to be looked at from the confines of Article 47 of *the Constitution* as read together with the Fair Administrative Actions Act. I, therefore, cannot entirely agree with the averment by the 1st respondent and its submissions that in hearing and determining the minister's appeal, the only applicable law was Section 29 of Cap 283. That law and the section has to be read in line with Article 262 of *the Constitution* and Rule 7 of Schedule 6 thereof.

25. The court's jurisdiction is supervisory in nature. In exercising it, I draw comfort in the words of Lord Diplock, in Council of Civil Service Unions vs Minister for the Civil Service (1985) 1AC 374, where he held that an unlawful decision is looked at from the spectrum of illegality, irrationality, procedural impropriety, and proportionality. The court said illegality is where a decision maker fails to give effect to the law regulating his decision-making power. Irrationality was stated as where the decision is so outrageous in its defiance of logic or of acceptable moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it.

26. On procedural impropriety, the court said it was the failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. See Pastoli vs Kabale District Local Government (supra). Regarding proportionality, it was defined in de Smith Wolf and Jowel Judicial Review of Administrative Action 5th edition, page 594 – 596, as a principle requiring the administrative authority when exercising discretionary power to maintain a proper balance between any adverse effects which its decisions may have on the right or liberties or interests of the person and the purpose of which it pursues.

27. Lord Steyn in Republic (Daly) vs Secretary of State for Home Department (2001) 2 AC 532 said the court is required to assess the balance that the decision maker has struck not merely to see whether it is within the range of rational or reasonable decision. See also Lord Neuberger Keyu vs Foreign Secretary (2015) 3WLR 1665

28. Article 47 of *the Constitution* and the *Fair Administrative Action Act*, therefore, commands this court to look into and check on whether quasi-judicial tribunals or administrative bodies act within their mandate, that they do not exceed their jurisdiction, and that in carrying out their statutory duties, they do not do so in a manner that is detrimental to the public at large, and that the decisions they make are within the limits of *the Constitution* as to expedition, efficiency, lawfulness, reasonableness, and procedural fairness.

29. In Suchan Investments Ltd vs Ministry of National Heritage & Culture and others (2016) eKLR, the court said Section 7 (2) (1) of the *Fair Administrative Action Act* provides proportionality as one of the grounds for statutory judicial reviews. The test leads to a greater intensity of review than the traditional grounds.

30. The exparte applicant, therefore, must show that the 1st respondent's decision or act was tainted with illegality, irrationality, procedural impropriety, and lack of proportionality. He has to show that the 1st respondent committed an error of law, acted without jurisdiction, or was contrary to the law or its principles. He has to show that the decision is devoid of logic, as held in Bukoba Gymkhana Club (1963) E.A 478. He has to show that there was a failure to act fairly, non-observance of rules of natural justice, there was abuse of discretion, improper purpose, and breach of duty with a view of frustrating the law. See Republic vs Office of the Director of Public Prosecution & others Exparte Nomani Saisi (2016) eKLR.

31. Applying the preceding guiding principles, has the exparte applicant surmounted the hurdles and proved that the process leading to the decision by the 1st respondent was tainted with illegalities, irrationality, and procedural impropriety, was a nullity, and was not proportional. The 1st respondent thinks otherwise. It is averred in the replying affidavit by both the 1st respondent and the interested party that due process was followed, the order for rehearing the objection was followed, each of the parties was given an opportunity to ventilate their claims, and that the decision and the process adhered to the law.

32. On 10.2.2020, this court differently constituted quashed the proceedings, and an award made on 6.6.2016 in Objection No. 1877 Ankamia Adjudication Section Tigania East regarding Parcel No. 598, and ordered for a fresh hearing in line with Cap 283. The 1st respondent, in paragraph 10 of his replying affidavit, avers the parcel of land is registered in the name of the interested party going by the record of existing rights and an official search as per annexure ADM "3" and "4," respectively. The date when the record of existing rights and the opening of the register was made not stated by the 1st respondent again the certificate of finality for the Adjudication section was issued, and the adjudication records forwarded for titling to the Director of Land Adjudication for onward transmission to the Chief Land registrar for the registration of the section is not stated.

33. Further, since this particular Parcel No. 598 was subject to a court challenge; the 1st respondent has not told the court whether a restriction was registered under Section 28 of Cap 284 to forestall any issuance of a title deed since there was an order of stay of the decision made on 16.6.2016 against the Land Adjudication Officer upon the issuance of leave to commence judicial review proceedings. The natural effect of the court in quashing the proceedings and the decision on 7.2.2020 was that Parcel No. 598 could not be registered for anyone until the A/R Objection was heard afresh.

34. The fresh decision sought to be quashed herein was made on 4.4.2023. This court, on 27.7.2023, issued leave to commence judicial review proceedings to quash the said proceedings and the decision. Leave was also to act as a stay of the implementation of the decision for a period of one year.

35. In the decision attached as annexure L.M. "2" on page 3 of the proceedings, the exparte applicant says that before the orders in the initial case were served upon the 1st respondent, the objection decision had been implemented, and one acre of land subdivided from Parcel No. 598 and Parcel No. 2366. On page 6 the exparte applicant has admitted that he had already obtained a title deed for Parcel No. 23 66. On page (13), the record shows that Parcel No. 598 was subdivided during the pendency of the court case and registered as L.R No. 2366 and 14675. The interested party terms the act as an illegal excision. He sought their reinstatement to his initial land before the minister even though he had not filed a cross-appeal.

36. On pages 14 & 15 of the decision, it is clear that the 1st respondent was dealing with titled land. He went to the extent of saying, in my view without basis, that there was an erroneous implementation of the 1st objection case leading to a reduction of Parcel No. 598 to 3.48 acres, yet in the Record of Existing Rights, it should have been 5.84 acres. The 1st respondent went on to determine and hold that Parcel No. 2366 (0.98 acres), Parcel No. 598 (3.48 acres) and Parcel No. 14675 (1.00) acres would total to a figure less than 5.84 acres, making the interested party suffer loss.

37. The record shows the adjudication committee was not unanimous in the finding, yet the 1st respondent went ahead to make a unilateral decision. More curious and disturbing is that the 1st respondent made a decision that registered title numbers 2366 and 14675 be canceled and the Registry Index Map be amended to consolidate Parcel No's. 2366 and 14675 to become Parcel No. 598. The committee members did not sign the said decision.

38. The 1st respondent has averred that it followed the dictates of section 29 of Cap 283. The 1st respondent, in paragraph 7, admits that the title deed held by the exparte applicant was based on the earlier objection proceedings and the decision made on 16.6.2016. It, therefore means that the 1st respondent had failed in its mandate to restrict the adjudication records for Parcel No. 598, when the order of leave to act as stay was granted in the previous case. See Simba & another vs DLASO M'Itonga and others (2022) KEELC 15050 (KLR) (23rd November 2022) Judgment.

39. The Record of Existing Rights bears the fact that entries were made even after Objection No. 1877 was remitted for rehearing. The legal implications are profound. The 1st respondent, in the handling of the A/R objections and determining it, went beyond Cap 283, overstepped a mandate and usurped powers under the *Land Registration Act*, which belongs to the land registrar and this court. The mandate to cancel a title deed and to make amendments to the Registry Index Map falls under the court and the land registrar as per Sections 26 and 80 of the *Land Registration Act*.

40. A land adjudication and settlement officer has no mandate in law to cancel title deeds, and order for an amendment of a registry index map. Section 29 of the *Land Consolidation Act* does not grant a land adjudication officer those powers. A public officer can only exercise a power donated to him by a statute and not otherwise. To do so otherwise, would amount to abuse or excess of power. It will be tantamount to committing an error of law. Abuse of power includes the use of power for collateral purposes. See Keroche Industries Ltd vs KRA & another (2007) KLR 240.

41. In Republic vs. KNEC exparte Geoffrey Gathenji and others C.A No. 266 of 1996 (1997), the court said that judicial review supervises public bodies to ensure that they do not make decisions or undertake activities that are ultra vires their statutory mandate in which are irrational, illegal, unfair, or abuse of power. In Republic vs. DLASO Igamba Ng'ombe Sub County & others (2023) KEELC 18955 (KLR) (26th July 2023) Judgment, Yano J held that the law grants the court powers to handle matters concerning cancellation of title and the rectification of a title register. The court said the minister had no powers to make a decision that amounted and or cancellation of a title. The court said that in doing so, the minister had acted without jurisdiction, and the action was ultra vires. See also M'bechi Nkandau and 19 others vs. A.G. & others (2019) eKLR, Joseph Mudamaba Ojwang vs Julia Opondo Onyango, & others (2022) eKLR.

42. In my considered view, the 1st respondent had no powers under Section 101 of the *Land Registration Act* to hear and determine disputes on actions and proceedings concerning land falling under the *Land Registration Act*. The 1st respondent was already aware of the status of the subject parcel number. It is the 1st respondent who should have upheld the law and court orders by registering a restriction to the adjudication record for Parcel No. 598 in the 1st instance. Had the 1st respondents considered the evidence tendered by the parties from inception, it would have been clear that it was arrogating to itself powers it did not have in the first instance. Further, the A/R objections were brought by the exparte applicant for a specific claim. The 1st respondent enlarged its mandate and handled and determined issues in favor of the interested party, which had not been raised in his defense, through a cross-appeal and or evidence.

43. On the issue of bias, it is defined in the Oxford English Dictionary as an inclination or prejudice for or against one thing or person. In Metropolitan Properties Co. Ltd vs Lannon (1969) QB 577, it was said bias is established if any person looking at what the court has done will have the impression in the circumstances of the case that there was a real likelihood of bias. It was said justice shouldn't only be done but should manifestly and undoubtedly be seen to be done. In Kimani vs Kimani (1995 – 98) 1 EA 134 the court held that the test to apply is whether there is the appearance of him rather than whether there is actual bias.

44. Looking at the proceedings on pages 14 – 16, the 1st respondent went out of his way to determine issues in favor of the interested party, which had not been raised in the A/R objection. The interested party had not cross-appealed to the alleged subdivision of his land into Parcel No's. 598, 2366, and 14675. The 1st respondent in the circumstances was bending toward one side instead of being a neutral arbiter in the decision. The omission of the reasons why the adjudication committee was divided into two leaves no doubt that the decision was not made in consultation.

45. The upshot is that I quash the decision in its entirety as it was therefore made without jurisdiction and was a nullity ab initio. Costs to the exparte applicant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH DAY OF MARCH, 2024

In presence of

C.A Kananu

Gitonga for applicant

HON. C K NZILI

JUDGE