Ratanya v North & 3 others; Muthami, the personal representative of Simon Muthamia Iguatho (Deceased) (Interested Party) (Civil Appeal 2 of 2018) [2024] KECA 1002 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 1002 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 2 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

MAY 24, 2024

BETWEEN

DOMIZIANO M RATANYA ..... APPELLANT

AND

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, MERU NORTH ..... 1ST RESPONDENT

DIRECTOR, LAND ADJUDICATION AND SETTLEMENT NAIROBI ..... 2ND RESPONDENT

LAND ADJUDICATION AND SETTLEMENT OFFICER, URINGU1 ADJUDICATION SECTION ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

SUSAN NKIO MUTHAMI, THE PERSONAL REPRESENTATIVE OF SIMON MUTHAMIA IGUATHO (DECEASED) ..... INTERESTED PARTY

(Being an appeal from the judgment of the Environment and Land Court at Meru (E.C. Cherono, J.) dated 28th September 2017 in ELC JR No. 32 of 2008)

JUDGMENT

Background

1. Before us is an appeal arising from the judgment of the Environment and Land Court (ELC) dated 28th September, 2017 in which Domiziano M. Ratanya (the appellant) moved the trial court by way of notice of motion dated 20th June, 2008 seeking inter alia an order of certiorari to quash

the decision of the Land Adjudication Officer of Igembe/Tigania/Uringu Adjudication Section in objection No. 834/1996 in respect of land parcel No. 2397; and an order of prohibition prohibiting the Director, Land Adjudication and Settlement Nairobi (the 1st respondent), District Land Adjudication and Settlement Officer, Meru North (the 2nd respondent), The Land Adjudication and Settlement Officer, Uringu 1 Adjudication Section (the 3rd respondent) and The Hon. Attorney General the 4th respondent from acting on and/or implementing the decision of the 3rd respondent made on 14th December, 2007 in respect of the above objection.

Susan Nkio Muthami the personal representative of Simon Muthamia Iguatho (deceased) is the Interested Party herein.

2. A brief background will help place the appeal in context. The gist of the notice of motion dated 20th June, 2008 which was filed by the appellant (as the ex parte applicant) was the objection No 834/1996 was set down for hearing on 14th December, 2007.

3. In support of the Application, the appellant swore a verifying affidavit deposing that he is the owner and proprietor of parcel of land known as parcel No. 869 situated within Uringu 1 Adjudication Section where he planted coffee between 1958 and 1961. That the said land was customary land and he was registered as member No. 835 with the Tigania Coffee growers. He annexed a copy of share certificate in proof thereof.

4. The appellant further averred that during demarcation sometime in 1991, the Interested Party was allocated the suit property and plotted on the appellant's coffee plantation by the 3rd respondent. That the appellant had other developments on the land with trees planted along the boundary. The mature coffee trees were estimated at 300 in numbers. It was claimed that after the Interested Party was given the appellant's parcel of land, the Interested Party damaged the land with all the coffee and the damage was estimated at Kshs. 300,000/=.

5. It was the appellant's case that he was dissatisfied by the Land Adjudication Officer's allocation of his land to the Interested Party and he objected vide objection No. 834 filed in 1996. The appellant further averred that the objection was heard and determined in his absence on 14th December, 2007 despite his having communicated to the 2nd respondent through a letter of his absence as he was sitting for the Council of Legal Education examination.

6. The Interested Party opposed the application and filed a reply to the appellant's application through an affidavit sworn on 9th September, 2008 denying the averments by the appellant. The Interested Party averred that during the process of adjudication in 1993, he was allocated parcel No. 2397 Uringu I Adjudication Section.

7. The Interested Party's further response was that he moved to parcel No. 2397 Uringu 1 Adjudication Section and has lived thereon since 1993. It was his further contention that the suit property belongs to him and that it borders the appellant's land who objected to the Interested Party's allocation by filling the objection in 1996 and ever since about 11 years down the line, the objection had not been prosecuted.

8. The Interested Party further averred that he attended the objection hearing on three other occasions in the absence of the appellant who had never attended any of the hearings or gave reasons for his absence. That consequently, on 14th December, 2007 the appellant did not attend the hearing nor give any reasons for this absence and the 2nd respondent dismissed the objection. The Interested Party maintained that the Orders of Certiorari and Prohibition sought were incompetent as the remedy available to the appellant was an appeal to the Minister.

9. The ELC (E.C Cherono J.) determined whether the appellant was given an opportunity to be heard before the objection was dismissed ex-parte. The ELC noted that from the evidence presented, the appellant was duly informed of the hearing of the objection on 14th December, 2007. The ELC found that the appellant's statement before court was contradictory as at one point he denied being summoned to attend the hearing on 14th December, 2017 while in another he claimed to have been engaged in Nairobi with exams at the Kenya School of Law.

10. The ELC relied on the finding in Kenya Commercial Bank Ltd Vs Nyamtange & Another (1990) KLR where it was stated that:-

> "Order l A rule 10 of the civil procedure rules donates a discretionary power to the court to set aside or vary an ex- parte judgement entered in default of appearance or defence and any consequential decree or order upon such terms as are just. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice."

11. In upholding the above finding, the ELC held that the appellant's application was intended to obstruct and delay the cause of justice. Consequently, the application was dismissed with costs to the respondents.

12. Dissatisfied with the judgment, the appellant lodged the instant appeal in which he raised nine (9) grounds of appeal, to wit: that the learned Judge:

    a) Erred in deciding in favour of the respondent and the interested party against the weight of the evidence.

    b) Failed to analyze and find that the appellant had proved his case on a balance of probabilities.

    c) Misdirected himself and relied on the responses and submissions of the interested party only.

    d) Was biased in his decision.

    e) Misinterpreted the appellant's letter to the 2nd respondent.

    f) Failed to analyze and find the breach of natural justice by the 3rd respondent.

    g) Failing to find that the 3rd respondent acted illegally and contrary to precedent and practice as provided for under the Land Consolidation Act.

    h) Failed to consider the appellant's pleadings and documentary evidence.

13. The appellant sought orders that the appeal be allowed and the decision made by the ELC be set aside and judgment entered in his favour.

Submissions by the appellant

14. When the appeal came up for hearing, the appellant who is an advocate represented himself. There was no appearance by the other parties, despite service. The appellant and the Interested Party had filed written submissions.

15. The appellant submitted that his case involved irregularities in the operation of the Land Consolidation Act Cap 283 committed by the adjudication officers sued as respondents. That the illegal actions of the respondents benefitted the Interested Party. That he filed an objection pursuant to section 26 of the Consolidation Act, Cap 283 challenging irregularities in the Adjudication register. The objection was heard on 14th December, 2007 in his absence without notifying him of the hearing

date thereby denying him opportunity to be heard. The appellant further submitted that he was not served with a hearing notice/summons.

16. The appellant further submitted that the ELC favored the respondents and the Interested Party in its judgment for reasons that there was no reply to his application by the respondents yet the application was dismissed with costs to the respondents. The appellant further submitted that "equity does not aid the indolent", thus the absence of a reply to the application by the respondents was enough ground for the ELC to allow the application. The appellant further submitted that the trial court was biased against him.

17. It was the appellant's further submission that the reply by the Interested Party did not cure the lacunae created by the respondents' failure to file a response to his application since the judicial review case was challenging the decision of the respondents and not the Interested Party.

18. Further that the ELC misinterpreted the appellant's letter addressed to the 2nd respondent as the letter was seeking clarification and confirmation of the hearing date of the objection. The appellant submitted that in the said letter he informed the 2nd respondent of his commitments on the hearing date of the objection and requested for re-scheduling of the hearing date. The appellant submitted that there was no response to the letter and no summons or hearing notice was sent to him for the said hearing date.

19. The appellant further submitted that the ELC misused its discretionary power in determining the appellant's application when there was clear evidence of breach of natural justice by the respondents' action of denyin the appellant an opportunity to be heard in respect of his objection.

20. On provisions of the Land Consolidation Act, Cap 283, the appellant submitted that there was conflict of interest in the hearing of his objection contrary to section 14 of the said Act. The appellant submitted that the Interested Party was a member of the Adjudication Committee that deliberated on his objection No. 834 of 1996 in respect of parcel no. 2397.

21. The appellant relied on the authority of Lord Hailsman in the case of Chief Constable of the North Wales police vs Evans 1982 WLR 1155 that:

> "The purpose of Judicial Review is to ensure that an individual is given fair treatment by a wide range of authorities, whether judicial, quasi-judicial or administrative, to which the individual has been subject.
>
> ..."

22. The appellant further submitted that the learned Judge was biased in his determination in favor of the respondents since they did not respond or file submissions. In the circumstances, the court ought to have determined the application in his favor as the respondents were indolent and the law does not aid the indolent.

Submissions by the Interested Party

23. Counsel for the Interested Party opposed the application and submitted that the appellant was aware of the hearing dates. That the appellant filed the objection 5 years after the decision of the adjudicator when Section 17 of the Land Consolidation Act provides that any objection must be filed within 60 days. He further submitted that the court was exercising its discretion and as such the decision of the court should not be interfered with.

24. Counsel further submitted that under Order 12 of the Civil Procedure Rules, 2010, the ELC has been granted wide discretionary powers to deal with ex parte decisions. That is denying or allowing setting

aside of such decisions the court considers factors in support of a motion to set aside as well as facts in which it can deny such a motion.

25. It was counsel's further submission that the appellant does not contest the ownership of the land by the interested part. In the circumstances, the outcome of the instant appeal will not affect any interests over the land.

26. Counsel emphasized that the court when sitting on appeal can only interfere with the decision of the trial court when the decision is itself bad in law and unsupported. Counsel asserted that in the instant case, the appellant was granted numerous opportunities to ventilate his claim for compensation but failed to attend hearings despite service of notices.

27. Counsel urged us to be guided by the decision of this Court in J.S.M. vs. E.N.B. [2015] eKLR where the role of the 1st appellate court was defined in the following terms:

> "We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

28. Counsel asserted that there are no cogent reasons given by the appellant that warrant this Court to depart from the determination of the trial court. Counsel further asserted that the decision rendered was sound and supported by facts presented and the legal principles.

29. Counsel concluded that the appellant does not contest the ownership of the land owned by the Interested Party. Counsel urged the appeal be dismissed with costs.

Determination

30. We have carefully considered the appeal, the submissions, the authorities cited, and the law. The main issue for determination is whether or not the appellant is deserving of the order of certiorari as sought before the trial court.

31. This is an appeal against the discretion of the ELC. It is trite that judicial review matters are discretionary. In the case of Shah v Mbogo [1979] EA 116 the court held as follows:

> "...this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or other wise to obstruct or delay the cause of justice."

32. The appellant's main contention before the trial court was that he was not accorded a hearing in the objection proceedings. It was his contention that he was never issued with a hearing notice for the hearing of 14th December, 2007. He further contended that he informed the ELC that he had informed the 2nd respondent of his absence from the hearing due to examinations that he was writing at the time. It was on the strength of this contradiction that the learned Judge dismissed the appellant's application.

33. The matter before the ELC was a judicial review application. It is therefore central to highlight the purpose of judicial review as a guide in determination whether the appellant was entitled to the Orders

of Certiorari and Prohibition sought. This Court (differently constituted) in the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR, held that:

> "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 not sufficient evidence to support the decision."

34. From the record, the genesis of the appeal was the appellant's exercise of his rights under section 26 of the Land Consolidation Act. The said section of the law provides for objection to the Adjudication Register. It provides under section 26(1) of the said Act that:

> "Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice ... is published ... inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter ..."

35. The above provisions vest the power to deal with objections upon the adjudication officer of the subject area together with the adjudication committee duly formed. Notably, not every objection will be remedied by rectification of the register. The Adjudication officer may order compensation to the objector as provided under section 21(2) of the Act.

36. It is common ground that the appellant had lodged objection No. 834 of 1996 against the adjudication register. The same was dismissed by the 2nd respondent on the hearing date for non-attendance of the appellant (objector).

37. Aggrieved by that decision, the appellant moved the trial court through a judicial review application seeking to quash the decision to dismiss his objection. It is trite that judicial review matters are discretionary.

38. It is notable that this was a judicial review application against a decision arrived at by an independent judicial process, and that it was not an appeal against the 3rd respondent's decision. The court cannot in judicial review proceedings sit on appeal on the decision of an independent body. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR, the High Court (Mativo, J. – as he then was) stated that:

> "To put it differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

39. It follows that the ELC was exercising its discretion when determining the appellant's application, and this Court will not interfere with such discretion unless it was based on the wrong principles of law.

40. For the court to exercise discretion in favor of the appellant, he was to satisfy the court that there was sufficient cause to warrant the orders sought. Sufficient cause was defined in the case of Wachira Karani

v Bildad Wachira [2016] eKLR where Mativo, J. – as he then was) while quoting the Supreme Court of India in Parimal v Veena (2011) 3 SCC 545 stated as follows:

> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

41. Mativo, J. – (as he then was), went on to hold that:

> "The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight- jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause." [Emphasis supplied].

42. The merits or otherwise of the appellant's non-attendance due to an examination and the failure to be informed of the hearing date were considered by the trial court and found wanting. The learned Judge found the explanation to be contradictory, and that the appellant changed his explanation from that of failing to attend due to the fact that he was undertaking an examination to being unaware of the hearing date.

43. From the record, the objection was coming up for hearing on 14th December, 2007 for the second time. The hearing was scheduled at the appellant's request for that particular date, the appellant having been unavailable for the previous hearing date.

44. The ELC observed in the impugned judgment that:-

> "Having looked at the verifying affidavit of the applicant and the submissions it is clear in my mind that the applicant was duly informed of the hearing of this objection on 14/12/2007. From the document in support of the application marked DR 3 the applicant in paragraph 6 states that he was not summoned to attend the hearing on 14/12/2007. From his submission through the firm of B.G Kariuki and co advocates dated 23rd May 2017 the applicant stated that he was sitting for the examination of the council of legal education as per gazette notice no.10524 of 9/11/2007. The evidence being presented to this court by the applicant are therefore contradictory and, in my view, not worthy of belief."

45. Like the trial court, we do not find the appellant's explanation for the failure to attend the objection hearing convincing. The appellant demonstrated some degree of laxity in prosecuting the objection. It was his obligation to ensure that the hearing proceeded without delay. In the case of Utalii Transport Co. Ltd & 3 Others v N.I.C. Bank & Another [2014] eKLR, the High Court (F. Gikonyo, J.) held that:

> "It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."

46. The appellant claims that the respondents were biased in dismissing his objection. Natural justice requires that a person receive a fair and unbiased hearing before a decision is made, that will negatively affect them. The three main requirements of natural justice that must be met are adequate notice, fair hearing, and the absence of bias.

47. In the instant appeal, the appellant did not plead or prove the particulars of unfairness or bias. The appellant denied being informed of the hearing date but also informed the court that he had written a letter to the 2nd respondent informing him of his unavailability on the hearing date. It is therefore not clear whether the appellant was aware of the hearing date or not.

48. The appellant faulted the learned Judge for failing to analyze the breach of natural justice and relying on the evidence of the Interested Party and not the respondents. We find that the court's mandate in a matter concerning the fair administration of justice was not to delve into the merits of the decision or sit on appeal on the respondents' decision but rather to interrogate whether the due procedure was followed.

49. In the result, we find that the appellant has failed to prove that the proceedings and decisions of the respondents violated the rules of natural justice and that the respondents and the ELC were biased. The appellant has also not shown that the decision was contrary to the evidence adduced to warrant interference by this Court.

50. For the above reasons, the appeal is without merit and is dismissed with costs.

51. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF MAY, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR