



**REPUBLIC OF KENYA**

**Court of Appeal at Nairobi**

**Judicial Review 24 of 2011**

***IN THE MATTER OF AN APPLICATION BY PETERSON NTHIGA MUKORA JUDICIAL  
REVIEW FOR AN ORDER OF CERTIORARI***

**AND**

***IN THE MATTER OF THE LAND ADJUDICATION ACT CAP. 284***

**AND**

***IN THE MATTER OF LAND APPEAL CASE NO. 178 OF 1999 TO THE MINISTER FOR LANDS***

***BETWEEN***

**REPUBLIC.....APPLICANT**

**VERSUS**

**MINISTER FOR LANDS.....RESPONDENT**

**AND**

**PERTERSON THIGA MUKORA.....EXPARTE APPLICANT**

**AND**

**JOHNAM GICHOHI HAZARON.....INTERESTED PARTY**

**R U L I N G**

This is the Notice of Motion dated 5/8/2011 brought under Order 53 Rule 3 & 4 of the Civil Procedure Rules and Section 9 Law Reform Act & Section 29 of the Land Adjudication Act. The applicant seeks an order of certiorari to remove to the High Court and have quashed the decision of the Minister for Lands (as represented by the District Commissioner Mbeere North District) dated 28/11/2010 in the Minister's Appeal case No. 178/1999 between Peterson Nthiga Mukora and Jonathan Gichohi Hazaron represented by Murage Jonah Cirigu vide which decision the said Appeal was dismissed and Land Parcel No. MBEERE/MBITA/1899 awarded to Jonathan Gichohi Hazaron.

He further wants the Minister's Land Appeal Case No. 178/99 heard afresh. He has raised several grounds which are:-

6. ***The Applicant is a member of the Nditi Clan, the house of Namu which is part of the***

**Mbeere Tribe.**

7. ***That Land parcel Number Mbeere/Mbita/1899 belongs to the Nditi Clan, House of Namu which house is represented by the applicant.***
8. ***That there are other houses in the said Clan namely Mbue house and CiangiCinga house.***
9. ***That the said Clan owned land jointly prior to the commencement of the process of land Adjudication and demarcation.***
10. ***That the said land was later sub-divide among he said three houses of the Nditi Clan and the house of Namu was given what is now land Parcel number Mbeere/Mbita/1899.***
11. ***There were various cases during the process of Land Adjudication and demarcation involving Land Parcel No. Mbeete/Mbita/1899 namely:-***
  - (i) ***Land Adjudication committee case Number 74 of 1973 before the Land Adjudication Committee.***
  - (ii) ***Arbitration Board Case Number 58 of 1974 before the Arbitration Board.***
  - (iii) ***Objection Number 208 of 1980 before the Land Adjudication Officer.***
12. ***The Nditi Clan, house of Namu was variously represented by the leaders/chairmen of the said house of Namu.***
13. ***The said cases of the Nditi Clan, house of Namu was initially being represented by Kithande Riuki now deceased who was the Grandfather of the Applicant and later by Nyaga Furana who was the Applicant's elder brother and who is also deceased and now by the Applicant who is the current Chairman of the Nditi Clan, house of Namu.***
14. ***During the hearing of Appeal No. 178/1999, the representative of the Minister for Lands;***
  - (i) ***Was biased in the way he conducted the hearing***
  - (ii) ***Misconducted himself and made an irrational finding***
  - (iii) ***Disregarded important evidence.***
  - (iv) ***Considered irrelevant evidence.***
  - (v) ***Considered evidence that was never adduced during the hearing.***
  - (vi) ***Acted whimsically without any basis/or support by facts.***
  - (vii) ***Arrived at a finding that was irrational and unsupported by evidence.***
  - (viii) ***Caused injustice to the Applicant by the said misconduct, bias, impartiality and irrationality.***
  - (ix) ***Subjected the Applicant to an unfair hearing.***
15. ***The Respondent in Land appeal No. 178/1999 who is the interested party herein was purportedly being represented by one Murage Cirigu whose status and relationship with the Respondent was never stated.***
16. ***No reason was given why the interested party who was the Respondent in Appeal No.***

**178/1999 and who is presumably a person of sound mind did not give evidence or participator in the said Appeal himself and why he had to be represented by one Murage Jonah Cirigu and by allowing that to happen the representative of the Minister Misconducted himself.**

**17. The representative of the Minister for Lands never recorded in the proceedings to the alleged visit in his findings. The alleged visit is unsupported by evidence of the same.**

**18. The representative of the Minister for Lands erroneously considered occupation of the said land as proof of ownership and disregarded the fact that there was independent and sufficient evidence to prove ownership of the said land on the part of the applicant.**

**19. The representative of the Minister for Lands treated the Applicant's witnesses as the witnesses for the interested party herein and disregarded their evidence unfairly thus exhibiting bias and impartiality in favour of the interested party.**

**20. That allowing a non party to participate and to purportedly represent the Respondent in Appeal No. 178 of 1999 was not only misconduct on the part of the representative of the Minister for Lands, the same was also unfair, irrational and prejudicial to the Applicant.**

**21. The conduct of the representative of the Minister for Lands demonstrated that there was a predetermined decision not based on the evidence that was adduced during the hearing which amounted to unfair treatment of the Applicant.**

**22. There was irrelevant consideration of facts/matters that were immaterial to the hearing.**

He also filed a verifying affidavit attaching all the relevant proceedings and relevant documents (PNM1-5).

The Attorney General for the Respondent filed the following grounds of opposition dated 18<sup>th</sup> April 2012.

- 1. The applicant has not satisfied the conditions for the grant of orders being sought against the Respondent.**
- 2. The application is premised on alleged error of facts and evidence which matter is not amenable to Judicial Review but appeal in civil court.**
- 3. The Respondent has Acted within his jurisdiction in a fair manner and in accordance with the rules of natural justice and the application is bad in law and misconceived.**
- 4. Judicial review is concerned with the decision making process and jurisdiction of the decision maker and not with the merit of a case.**
- 5. The application has an alternative remedy of appeal which has not been exhausted before the judicial review remedy.**
- 6. Judicial review is discretionary in nature and orders sought can be declined even where they deserve.**

The interested party in his replying affidavit gave a history of the suit land Mbeere/Mbita/1899 which was registered in his name on 7th February 2011. He states that the same was registered in his name after the Minister's Appeal No. 178/1999.

All the three counsels appearing agreed to file written submissions which they did. Mr. Okwaro for the ex parte applicant argued that in the Minister's appeal the interested party was represented by one Murage Jonah Cirigu whose relationship to the interested party was unknown. That there was no visit to the land and so that evidence can not be supported. He submitted that rules of natural justice were not followed as the applicant and his witnesses were not given a fair hearing.

The Attorney General for the Respondent supported the decision by the Minister's representative. She also complained that she had not been served with any leave preceding the filing of the Judicial Review. She further submitted that Judicial Review deals with procedures and not the merit

of the decision. She cited the case of **REPUBLIC VERSUS CHAIRMAN MAKUENI DISTRICT LAND DISPUTE TRIBUNAL IN THE HIGH COURT OF KENYA AT MACHAKOS MISC. CIVIL APPLICATION NO.112/02.**

Ms. Muthigani for the interested party in their submissions stated that the processes under the Land Adjudication Act had been exhausted. They cited Section 143 (1) of the Registered Land Act (now repealed) referred to were:-

1. **MAHAJA VS KHUTWALO [1983] KLR 553**
2. **MUGOGO VS STIHWI [1988] KLR 256**
3. **GATHIBA VS GATHIBA KLR (E&L) 256**
4. **MISC. CIVIL APPLICATION NO. 2/2012 REPUBLIC VS LAND REGISTRAR, KILIFI & 2 OTHERS**

On 18/7/2011 the ex parte applicant herein was granted leave to file Judicial Review in this matter. His chamber summons for that purpose was dated 19/4/2011. The leave was to operate as stay of the implementation of the decision. The stay was inconsequential because the decision had already been implemented and a title deed issued on 7<sup>th</sup> February, 2011.

There is no dispute that the person whom the Applicant allegedly bought this piece of land from is deceased. There have been two previous objections concerning this land. The objections were against the award of this land to the interested party herein. (PNM2,3&4). These are objections No. 189/1980 AMD 2-08/80, which were heard together.

The ex parte applicant herein was dissatisfied with the results of the objection and so appealed vide Minister's Appeal No. 179/1999. The appeal was heard and a decision made, dismissing the appeal. It is this decision of the Minister's Appeal that is the subject of the Judicial Review. The Applicant has listed so many grounds to support his application.

Before getting to those grounds, I wish to reiterate that Judicial Review is not an appeal. An appeal reconsiders and re-evaluates the evidence. But a Judicial review considers the process/procedure used to arrive at a decision. Judicial Review is not concerned with the merit of the decision as there is a forum for that.

Under ground 21 the ex parte applicant states that a non party participated in the proceedings. The proceedings show that the person referred to as a non party was Murage Jonah Cirigu representing the interested party herein. The evidence taken shows that Murage is a son of the person who sold land to the interested party herein.

The proceedings under the Land Adjudication Act do not strictly follow the procedures under the Civil Procedure Act. Section 13(3) & 4 of the Land Adjudication Act provides for one to send a duly authorized agent or any successor to appear on behalf of others. And if the applicant was dissatisfied with the presence of Murage Cirigu he ought to have done so at the time of the appeal, and I am sure the Minister's representative would have dealt with it.

I don't find that to be a ground for Judicial Review. Judicial Review will look at excesses of jurisdiction and failure to observe rules of natural justice. Ref. **KNEC VS REPUBLIC – CIVIL APPEAL NO. 266/1996 (UR)**. The ex parte applicant has not raised any issue about the jurisdiction of the Minister in making the decision. I also do not find any excesses with his jurisdiction determining the appeal. The only ground that touches on Judicial Review which the ex parte applicant has raised is ground No. 14(i) (ii) (viii) & (ix).

To support these grounds cited, the ex parte applicant and his counsel submitted that he included a visit to the land in his ruling yet it was not in the proceedings. And that he did not consider the witnesses testimony and this amounted to unfair treatment. The record of the proceedings availed to the court shows that the applicant attended the proceedings, he was heard and was cross examined.

The Respondent testified and was cross examined. Two witnesses called. The Respondent referred to a land visit in his Ruling. The applicant has not denied that such a visit was made. What he states is that it was not recorded in the proceedings. For the Respondent to have referred to it means the land was visited. In an appeal, other previous records may also be referred to.

The exparte applicant states that the Respondent was biased and made an irrational decision. He who pleads a fact must prove it. It was the duty of the applicant to prove all these allegations against the Respondent. There is no evidence that the applicant and/or his witnesses were denied a hearing.

The other grounds raised touch on evidence which the exparte applicant believes was not properly analyzed by the Respondent. That does not fall within the parameters of judicial review.

After due consideration of all the material before this court, I do find that the exparte applicant has failed to demonstrate any element of bias or breach of rules of natural justice by the Respondent. The Respondent acted within his jurisdiction and arrived at the decision that he did. Any challenge of that decision cannot be the subject of judicial review.

I therefore find no merit in the notice of motion dated 5/8/2011 which I dismiss with costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF MAY 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Nyaosi for Okwaro for Applicants**

**Ms. Wairimu for Murhigani for Interested Party**

**Ms. Chimau for Mrs. Sirai for Respondent**

**Njue CC**