



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 159 of 2006

REPUBLIC.....APPELLANT

AND

DISTRICT LAND ADJUDICATION OFFICER, TRANS-MARA DISTRICT)

SAMSON KISERIAN KILERAI.....RESPONDENT

*(Appeal from the Ruling and Decision (Kaburu Bauni J) dated 20<sup>th</sup> June, 2006.*

in

*KISII HCC MISC. NO. 123 OF 2003)*

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JUDGMENT OF THE COURT

On the 13<sup>th</sup> May, 2003 **Samson Kilerai** raised a complaint in writing with the land adjudication officer Kilgoris to the effect that whereas he had been rightfully and legally found to be the rightful and legal owner of plot No 298 Ololchani, Adjudication Section, Transmara District through the adjudication process, it had come to his knowledge that the said plot number 298 had been subdivided into two equal portions and in the process creating parcel number 869 in the name of **Wilson Talengo Lemunge**; that he was not aware of any proceedings in which he had had a case with the said **Wilson Talengo Lemunge** which could have led to the subdivision of his land. Upon receipt of the afore mentioned complaint from **Mr. Samson Kilerai**, the District Land Adjudication officer Transmara District one **J.N. Nziboh** wrote a letter to **Wilson Talengo Lemunge** ref. No.CA/TM/15/VOL.X1/256 bringing to his knowledge the content of the complaint raised by **Samson Kilerai** and at the same time requiring the said **Wilson Talengo Lemunge** to appear before the area Land Adjudication and settlement officer on 20<sup>th</sup> May, 2003 in connection with the said complaint.

In the intervening period, **Samuel Olemunge** filed in the Senior Resident Magistrates' court at Kilgoris Misc. Civil Application No.9/2003 citing **Samson Kilerai** and the land Adjudication and settlement officer Transmara as respondents. It was brought by way of chamber summons brought under section 3 and 3A of the Civil Procedure Act seeking orders that the applicant be granted leave to file an appeal to the Minister out of time in respect of land parcel No. **Ololchani 134/298**; that the second respondent do facilitate the filing of the said appeal if leave is granted by the court and that costs of the application be provided for.

The grounds in support of the said application were set out in the body of the application as well as the contents of the supporting affidavit deponed by **Samwel Ole Munge** to the effect that the deponent applicant is the eldest son of **David Kingetich Munge** who was the owner of land parcel number **Ololchani/134** which was wrongfully subdivided to create another parcel **Ololchani/298** without the late fathers consent; that the deponents late father filed an objection which was not heard till he died; that the deponents other brother took over the objection which was dismissed; that the said brother became aggrieved and desired to appeal to the Minister but he died before presenting the appeal to the Minister; that the deponent had then acquired limited grants to both the estates of his late father and late brother and was ready to file an appeal to the Minister if granted leave to do so; and lastly that the intended appeal to the Minister had chances of success.

The respondents to that application raised a preliminary objection to the said application to the effect that the applicant stood non suited for failure to obtain consent of the area land adjudication officer before presenting the said application to court, a matter confirmed by the applicant. The said objection was heard on its merits. In a ruling delivered on 22<sup>nd</sup> August, 2003, the learned Senior Resident Magistrate Kilgoris **Mrs. Mmasi** revisited the provisions of section 30 of the land Adjudication Act cap 284 laws of Kenya, and confirmed that it was mandatory for the applicant therein to seek consent of the area land adjudication officer before moving to court and on that account dismissed the application for leave.

Mean-while in pursuance to the notice which had been given to the disputants by the area land adjudication and settlement officer of 13<sup>th</sup> May,2003, parties appeared before the said area land adjudication officer with **Samson Kiserian Kilerai** as the petitioner and **Wilson Talengo Lemunge** as the respondent. The complaint was that there had been fraudulent sub division of land parcel number 298 to give rise to parcel number 869. Parties were heard on the merits and the land Adjudication and settlement officer ruled on 1<sup>st</sup> August, 2003 that:-

**“Plot No. Ololchani 869 was a fraud. It is to be cancelled from the register”**

The appellant herein became aggrieved with that decision, and moved to the High Court at Kisii and presented Miscellaneous Civil Application Number 123/2003. It was by way of chamber summons brought under order LIII rule 1&2 of the civil procedure Rules and section 3 and 3A of the CPA. Four reliefs were sought namely that the Honourable Court be pleased to grant leave to the applicant to institute Judicial Review proceedings in the nature of certiorari and prohibition against the respondents herein; that the leave so granted by the Honourable court do operate as an order of stay of proceedings and or decision of the District land Adjudication officer Transmara, made on the 1<sup>st</sup> day of August,2003 in respect of plot **number 869 Ololchani** Adjudication section pending the hearing and determination of the intended Application; that the applicant be at liberty to apply to the Honourable court for all necessary and consequential orders that the Honourable Court may deem fit to grant and that costs of the application do abide the substantive application for judicial review.

The application for leave was placed before **Wambiliangah J** as he then was on the 15<sup>th</sup> September,2003 and the learned Judge granted leave sought with orders to file the substantive application within 21 days and also that the leave granted to operate as a stay.

The substantive application presented by way of notice of motion was brought under order LIII rule 3, 4, 5 and 7 of the CPR, sections 3A of the CPA and all other enabling provisions of the law. Four reliefs were sought namely that the Honourable Court be pleased to issue an order of Judicial Review in the nature of certiorari to remove into the Honourable court the decision of the District land Adjudication officer Trans-Mara District dated 1<sup>st</sup> August,2003, and consequently quash the said proceedings and/or decision made in respect of plot **number 869 Ololchani** Adjudication section and that the Honourable Court be pleased to issue an order of prohibition, prohibiting the District land Adjudication and settlement officer, Transmara District from implementing the said order made on the 1<sup>st</sup> day of August,2003 in respect of plot **Number 869 Ololchani** Adjudication section and/or any other Decision that may be made in respect thereof; that the Honourable court be pleased to issue an order of prohibition prohibiting the District land Adjudication and settlement officer Trans-mara District and or such other officer from holding any

further and/or other proceedings in respect of plot number **869 Ololchani** Adjudication section which are intended to affect and/or alter the Adjudication Register in respect of that plot and lastly that costs of the application be borne by the respondent. The substantive notice of motion was anchored on the grounds in the body of the application, a supporting affidavit, statement of facts, verifying affidavit and annexures thereto.

In response, the second respondent filed a preliminary objection, grounds of opposition, and a replying affidavit signed by the second respondent on a date not indicated. The preliminary objection was taken as a preliminary issue, urged inter partes, and disallowed although the ruling is not exhibited. On the day fixed for hearing of the notice of motion in the High Court, the respondents were absent and the court being satisfied that they had due notice of the hearing date, allowed the applicant to proceed ex parte. In a ruling delivered on the 20<sup>th</sup> day of June, 2006 the learned trial **Judge Kaburu Bauni** J as he then was dismissed the substantive Notice of Motion for judicial review.

The appellant who was the ex parte applicant **Wilson Talengo Lemuge** became aggrieved with that dismissal order and appealed to this court citing six grounds of appeal namely:-

**“1. That the learned trial Judge erred in fact and in law in holding that the Adjudication Registry in respect of Ololchani Adjudication section had not closed and or been finalized, whereas there was uncontested and or over whelming evidence to the contrary.**

**2. The learned Judge of the superior court misapprehended the gists of the Judicial Review Application, which was before him when he equated closure of the Adjudication Register to finalization of the Adjudication process and Registration of the resultant Adjudication plots, contrary to the express provision of section 26 of the land Adjudication Act.**

**3. The learned trial Judge of the superior Court erred in law in holding that the 1<sup>st</sup> respondent was seized of jurisdiction to hear and determine the purported petition lodged by the 2<sup>nd</sup> respondent in terms of section 11 of the land Adjudication Act, when it was apparent that the Adjudication Register in respect of Ololchani Adjudication section had already been closed. Consequently the learned Judge of the Superior Court misapprehended the purport and/or import of section 11(b) of the land Adjudication Act.**

**4. The learned trial Judge of the superior court erred in law when he laid emphasis on the provisions of section 12 of the land Adjudication Act which section merely stipulated the procedure to be followed, subject to the provisions of section 9&11 of the land Adjudication Act. Consequently the learned trial Judge reached an erroneous decision in finding and holding that the first respondent had acted intra vires in reaching the decision dated 1<sup>st</sup> August, 2003.**

**5. The learned Judge erred in law in not expunging the replying affidavits filed by the respondents which the trial Judge had found to be fatally defective and hence incompetent.**

**6. In a nut shell, the learned Judge of the superior court reached a decision un supportable by the obtaining facts/evidence and the relevant provisions of the land Adjudication Act chapter 284, laws of Kenya. Consequently the decision of the learned Judge of the superior Court constitutes a miscarriage of Justice.”**

In consequence thereof the appellant prayed for the appeal to be allowed and the ruling and decision of the superior court dated 20<sup>th</sup> June, 2006, to be set aside and or quashed and that the Honourable court be pleased to substitute thereof, an order allowing the Appellants’ Notice of Motion application dated 1<sup>st</sup> October, 2003. The appellant also sought costs of this appeal and costs incurred in the superior court to be borne by the Respondents. Lastly he prayed for such further and/or other relief as the court may deem necessary.

On the day fixed for hearing learned counsel **Mr. J.M. Oguttu** appeared for the appellant. While learned

counsel, **J.E.A. Maroro**, appeared for the first respondent and learned counsel **P. Ochieng Ochieng** appeared for the second respondent. In his oral address to court, **Mr. J.M. Oguttu** urged us to allow the appeal because the decision of the High Court stands faulted as the learned trial Judge was wrong in equating the process of adjudication with that of registration; in misconstruing the provisions of section 11 of the land adjudication Act, cap 284 laws of Kenya; in failing to note that there was no proof that the adjudication process had closed; in failing to expunge the offending replying affidavits of the respondents; in failing to note that existence of an alternative remedy did not rob the appellant of his right to a relief by way of judicial review; in failing to note that the suit land still exists; in failing to note that the person who lodged the objection was one **Ole Munge** while the appellant is **Lemunge** which is an indication that they are not one and the same person, in failing to note that the proceedings in the Kilgoris Senior Resident Magistrates court related to plot number 134 and 298 and not the subject plot; in failing to note that determination of allegations of fraud are a preserve of a court of law and lastly in failing to note that completion of the adjudication process is not equivalent to finalization of the same process.

In response **Mr. J.E.A. Maroro** urged us not to disturb the ruling of the learned trial Judge because it was properly arrived at as parcel number 869 does not exist on the ground and was just super imposed in the records. He further submitted that the land adjudication officer has the proper and authority to call for the adjudication records, scrutinize them and then order their rectification; that the claim over the said parcel of land had not been backed up by land adjudication data such as survey and or demarcation map; that the appellant had prior to the presentation of the application for judicial review moved a court of law seeking leave to appeal to the Minister out of time which means he recognized the fact that the adjudication process was still going on, and as such the appellants decision to seek judicial review was an afterthought; that the land adjudication officers' mention of fraud is a matter of semantics and lastly that the learned trial Judge acted within the law and for those reasons the appeal has no merit and it should be dismissed.

**Mr. P. Ochieng Ochieng** on the other hand opposed the appeal on the ground that the learned Judge's ruling is sound and should not be upset because no material was placed before the trial Judge to show that the adjudication process had been completed; that the land Adjudication and settlement officer acted within his powers and the law when he called for the records, scrutinized them as a basis for rectification. The Land Adjudication Officer also visited the site and confirmed that the plot in question did not exist on the ground.

Parties also referred us to principles of law and case law on the subject which we have perused and taken into consideration in the disposal of this appeal.

This being a first appeal we are reminded of our primary role as a first appellate court namely to analyse and re-evaluate the facts that were placed before the learned trial Judge, consider application of law on to those facts by the learned Judge and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way but always bearing in mind that the trial court had the advantage of seeking and hearing the witnesses and give allowance for the same. We have done so and we proceed to make the following findings.

We are in agreement with the learned trial Judges' decision to proceed to hearing of the substantive Notice of Motion for judicial review in the absence of the respondents as they had due notice of the hearing date and no reasons had been given for their non attendance. We note that the said decision to so proceed *ex parte* did not occasion any miscarriage of justice to either party to the said proceedings as the court proceeded to consider the merits of the application on the basis of the documentation that had been placed before the learned trial Judge.

We note from the content of the subject ruling that the learned trial Judge declined relief to the appellant because in the learned trial Judges' opinion, the appellant had not demonstrated to court that the adjudication process in the Ololchani Adjudication section had been finalized; secondly that the suit land had been registered; thirdly that vide section 11 of the land adjudication Act there is no exclusive mandate to the adjudication committee and the minister to nullify any registration and for this reason, the Adjudication officer has the mandate to do so; fourthly that section 12 of the land Adjudication Act

spells out the procedures which were supposed to be followed by the Adjudication officer when hearing a petition or objection and which procedures were found to have been followed by the land adjudication officer in the circumstances of this case and lastly, that section 12 does not state that the land Adjudication officer has to sit with the land Adjudication committee when hearing objection.

We have on our own revisited and considered the content of the relevant provisions of the Act namely section 9,10,11, 12 and 30 and looked at them globally and applied them to the reasoning of the learned Judge with regard to the powers of the land Adjudication officer afore said, as well as the entire record of evidence that was before the learned trial Judge and we have come to the conclusion that the reasoning of the learned trial Judge cannot be faulted because vide section 9, of the said Act the said land Adjudication officer had power to determine petitions alone; under the same section 9(b) he had power to receive and hear objections made with regard to the adjudication register; section 10 mandates the land Adjudication officer to conduct proceedings by way of adduction of evidence, section 11(b) of the Act gives the land Adjudication officer to correct any error made in the adjudication register following complaints raised with regard to the same. Whereas under section 12, the Land Adjudication Officer power had an absolute discretion in determining the conduct of the proceedings before him so long as he was within the principles governing the conduct of civil proceedings in a court of law i.e such as requiring the attendance of parties, allowing the calling of witnesses, administering of oaths and allowing for cross-examination as well as tendering of exhibits if any, a process clearly shown to have been complied with by the land Adjudication officer in this case as demonstrated by the content of the record of proceedings as well as the correspondences exchanged by the said then area land Adjudication officer exhibited herein.

With regard to the learned Judges reasoning as regards whether the adjudication process had been completed or not, we have once again on our own revisited and construed the provisions of section 23,24,26,27,28,29 and 30 of the same Act and applied them to the reasoning of the said learned Judge on this issue and we are also satisfied that the same reasoning cannot be faulted. Section 23(1) stipulates clearly what forms an adjudication record namely the forms prepared by the recording officer under section 19 of the Act together with the demarcation map. Whereas the demarcation map and the adjudication record are what collectively become known as the adjudication register. Proof of completion of the adjudication register is catered for under section 25 of the Act. The section stipulates clearly that this arises when the land Adjudication officer certifies the adjudication record and demarcation map and delivers the duplicate of these to the Director of land Adjudication and further displays the original for inspection at a convenient place within the adjudication section. He thereafter gives notice that the adjudication register had been completed and could be inspected at the place where it has been displayed within a period of sixty days from the date of the notice. A revisit to the content of the entire record that was placed before the learned trial Judge does not reveal presence of forms prepared by the recording officer or the demarcation map in order for these to form proof of existence of an adjudication register.

The activities anticipated to take place during the 60 days notice period as contemplated by sections 26,26 (A), 27,28 and 29 are those relating to objections to the completed register and hearing of those objections by the adjudication officer resulting in the rectification of the register under sections 27 or appeals to the minister under section 29 of the Act where applicable. When activities under sections 27 and appeals permitted under section 29 are finalized, that is when the land Adjudication officer prepares a **No objection Register** under section 26A of the Act and hands it over to the chief land Registrar under section 28, in pursuance of which the Chief land Registrar causes the registration of the adjudicated plots which registration are to be effected in accordance with the Adjudication Register. It is only then that it can be stated that the adjudication process is complete. In the absence of satisfaction of the afore set out procedures, there is no way the appellant could have accessed the court by way of judicial review without complying with the requirements of section 30(1) of the Act. It provides:-

**“Except with the consent in writing of the adjudication officer, no person shall institute and no court shall entertain civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has been final in all respects under section 29(3) of the Act.”**

Turning to the law, we are in agreement that the decisions of this court cited to us by learned counsel for

the appellant namely **Kenya National Examination Council versus Republic Exparte Geoffrey Gathanji Njoroge and 9 Others Nairobi CA 266 of 1996 and the Commissioner of Lands and another versus Coastal Aqua culture Limited KLR (E&C) 1** state the crystallized position in law as to when the relief of Judicial review can be granted and or with held by a court of law. We have accordingly revisited these principles and applied them to the reasoning of the learned trial judge and we find he was within the ambit of the parameters set out by these principles when he with held the relief of judicial review from the appellant.

For the reasons given above, we are satisfied that there is no merit in this appeal. We accordingly dismiss the same. The respondents will have costs of appeal. The respondents will not have costs on the application for judicial review in the High Court as they did not participate in the hearing for its disposal. Each party will therefore pay own costs in the High Court.

*Dated and delivered at Kisumu this 28<sup>th</sup> day of November, 2012.*

**J.W.ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**