



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC – JUDICIAL REVIEW CASE NO. 04 OF 2019

IN THE MATTER OF AN APPLICATION BY GILBERT JOSEPH KABUNJIA

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. 2022 KAJUKI KAMUTIRIA ADJUDICATION SECTION

AND

IN THE MATTER OF APPEAL NO. 76 OF 2019

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

BETWEEN

GILBERT JOSEPH KABUNJIAAPPLICANT

VERSUS

LAND ADJUDICATION AND SETTLEMENT OFFICER MERU SOUTH1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

COUNTY GOVERNMENT OF THARAKA NITHI.....INTERESTED PARTY

JUDGMENT

1. The Notice of Motion in these Judicial Review proceedings is dated **20th August, 2019** and was filed the same day. It states as follows:

NOTICE OF MOTION

(Under Order 53 r.1 of CPR)

TAKE NOTICE THAT this Honourable Court shall be moved on the 18th day of September, 2019 at 9.00 O'clock in the forenoon or soon thereafter on the hearing of an application by counsel for the Applicant for orders that:

1.That the Honourable Court be pleased to issue an order of certiorari to remove into this honourable Court and quash the entire decision and award passed by M. O. Beja Deputy County Commissioner on behalf of the Cabinet Secretary, Ministry of Lands and Settlement, dated 20th May, 2019.

2.The Respondents and the Interested Party be ordered to pay the costs of this motion.

Which application is based on the reasons set out on the face of the application and supported by the annexed affidavit of Gilbert Joseph Kabunja together with other grounds and reasons to be adduced at the hearing hereof:-

1.That Deputy County Commissioner was not gazetted and as such did not have the requisite jurisdiction to handle the appeal to the minister as obligated by law.

2. That the Deputy County Commissioner did not give audience to the applicant and as such the applicant was condemned unheard by failing to consider the evidence adduced by the applicant.

3. That the Deputy County Commissioner erred in law and in fact by failing to consider that the government surveyor had gone to the ground and surveyed the parcel of land with the help of the applicant.

4. That the Deputy County Commissioner erred in law and in fact by holding that the disputed land was vacant and yet the applicant had been using the same constructively as his grazing land.

5. That the Deputy County Commissioner erred in law and in fact by failing to consider that the applicant has buried the remains of his father, grandfather and great grandfather on the disputed land.

6. That the Deputy County Commissioner erred in law and in fact by failing to consider that Safaricom Ltd built a communications mast on the disputed land and even made lease payment to the applicant.

7. That the Deputy County Commissioner erred in law and in fact by failing to consider that the Interested Party instigated some community members to form a self-help group to claim the land after Safaricom Ltd put up a communication mast on the disputed parcel of land and that before then the disputed parcel of land had been considered to belong to the applicant.

DATED AT THIKA THIS 20TH DAY OF AUGUST, 2019

MUNGAI WAINAINA

MUNGAI & KIBIRIRI & COMPANY

ADVOCATES FOR THE APPLICANT

2. The application was supported by the Affidavit of the applicant sworn on **20th August, 2019** which states as follows:

I, Gilbert Joseph Kabunjia of P. O. Box 708-60400 Chuka in the Republic of Kenya do hereby make oath and state as follows:

1. That I am the applicant herein and therefore competent to make and swear this affidavit.
 2. That I am advised by my advocates on record which advice I verily hold to be true and sound that the decision of the minister is not supported by the evidence on record. (Annexed is a copy of the proceedings and decision marked “G.J.K. “a”)
 3. That I am advised by my advocates on record which advice I verily hold to be true and sound that the Deputy County Commissioner who heard and determined the Appeal on behalf of the Minister of Lands and Settlement did not have the jurisdiction to entertain the Appeal as he was not gazetted as required by law.
 4. That I am advised by my advocates on record which advice I verily hold to be true and sound that the minister erred in fact and in law by failing to consider the evidence adduced by the applicant and was therefore condemned unheard.
 5. That I am advised by my advocates on record which advice I verily hold to be true and sound that the minister erred in act by holding that one is allocated lad where he or she lives or has developed and failed to appreciate that I was in constructive possession of land Reference No. 2022 as I used the same as grazing land and I have also buried the remains of my father, grandfather and great grandfathers there.
 6. That the minister erred in fact by holding that I did not object to the County Government of Tharaka Nithi being awarded the suit land.
 7. That I am advised by my advocates on record which advice I verily hold to be true and sound that the award was not read in open and despite looking for it at the lands offices in Chuka and in Nairobi, I did not get access to the same and only came to learn of the award way after I filed Chuka Misc. Application No. 2 of 2019 yet all other decisions were being delivered in public at Kajuki Kamutiria Adjudication Section.
 8. That the minister erred in fact by holding that Land Reference NO. 2022 was wrongly hived off from Land Reference No. 1508.
 9. That unless the orders are granted, injustice will be done to me as the process of implementation is already on going and vested interests are trying to fast track the process to defeat my interests in the family land.
 10. That I pray that my application be allowed.
 11. That the contents of this affidavit are true to the best of my knowledge, information and belief.
3. On **18th September, 2019** the Respondents filed Grounds of Opposition dated **17th September, 2019**. The Grounds of Opposition are reproduced in full herebelow:

RESPONDENT’S GROUNDS OF OPPOSITION

1. Orders are not tenable against the Respondent
2. Application lacks merit is a non-starter and abuse of court process.
3. Judicial Review orders are discretionary and can be denied even if merited.
4. The decision against which this Judicial review is filed never allocated any land to any of the parties herein.

5. That the interpretation that the exparte applicant attaches to the ruling is contrary to the express words of the ruling.
6. The applicant is insincere and abusing the court process by indirectly attempting to reverse the adjudication process in an entire section to suit his own needs.

Dated at Meru 17th this day of September, 2019

J. M. KIONGO,

SENIOR LITIGATION COUNSEL

FOR: HON. ATTORNEY GENERAL & DEPARTMENT OF JUSTICE.

4. On **4th October, 2019**, the applicant filed a supplementary affidavit sworn on the same day which states as follows:

I, GILBERT JOSEPH KABUNJIA of P. O. Box 708-60400 Chuka in the Republic of Kenya do hereby make oath and state as follows:-

1. That I am a male adult of sound mind and disposition and the applicant herein and therefore competent to make and swear this affidavit.
2. That I have read and understood the Respondent's grounds of opposition dated 19th September, 2019 and the Interested Party's Replying Affidavit sworn on 16th September, 2019 and where I have not understood I have had both read and interpreted to me by my advocates on record and wish to respond as hereunder;
3. That I reiterate the contents of my affidavit sworn on the 20th August, 2019 and further wish to aver as hereunder;
4. That I am advised by my advocates on record which advice I verily hold to be true and sound that this honorable court is clothed with the requisite jurisdiction to grant the orders humbly prayed herein and as such the orders are tenable and the Respondents are only adamant to perpetuate their illegal and unprocedural actions.
5. That I am advised by my advocates on record which advice I verily hold to be true and sound that even if the review orders are discretionary in nature, this honourable court has the latitude and is bound by law to issue such orders where there is merit and evidence has been adduced to support the granting of such orders.
6. That in response to paragraph 4 of the Respondents' grounds of opposition, I am advised by my advocates on record which advice I verily hold to be true and sound that it is untrue that the decision never allocated any land to any of the parties as the decision attached in my earlier affidavit clearly shows that the parcel in dispute was clearly and wrongly declared to be public land held in trust by the Interested Party.
7. That I have been the proprietor and owner of all that is comprised in Adjudication Section Kajuki/Kamutiria/P.NO.2022 (Attached hereto and marked GJK1 is a copy of the adjudication proprietorship note book).
8. That in response to paragraph 5 and 6 of the grounds of opposition, I am advised by my advocates on record, which advice I verily hold to be true and sound that this instant application has been instituted in good faith and based on merit and as such it is not an abuse of the court process as I have my rights as an applicant to approach this honourable court to seek redress as these are the temples of justice open to all and sundry both high and mighty and low and meet such as myself.
9. That I am advised by my advocates on record, which advice I verily hold to be true and sound that non-gazettement of the Deputy County Commissioner is a matter of fact to be proved by the Respondents and not myself.
10. That I am advised by my advocates on record, which advice I verily hold to be true and sound that the requisite procedure

provided in law was not followed and as such, instead of the appeal being heard, the Deputy County Commissioner, Meru South Sub County proceeded to hear a fresh case altogether by hearing new witnesses. (Attached hereto and marked GJK2 and GJK3 are copies of the previous proceedings at the committee and objection stage.)

11. That I am advised by my advocates on record, which advice I verily hold to be true and sound that pursuant to the provisions of Section 26, 29 (1) of the Land Adjudication Act and Regulation 4(1) of the Land Adjudication Regulations, no copy of the grounds of appeal was sent to Director of Land Adjudication, no tracing from the map of the boundaries of the holding in dispute was either provided and as such the full and true letter of the law was not strictly followed as required by law.

12. That I am advised by my advocates on record, which advice I verily hold to be true and sound that if the law and procedure was strictly followed to the latter, then I wouldn't have been prejudiced as a litigant.

13. That I therefore, based on the facts deponed to hereinabove, pray that my application be allowed as it is based on merit.

14. That the contents of this affidavit are true to the best of my knowledge, information and belief.

5. On **17th September, 2019**, the Interested Party filed a Replying Affidavit sworn on **16th September, 2019** which states as follows:

I, FAITH KALUNDA KYUNGA of P. O. Box Number 10 Kathwana in the Republic of Kenya do hereby make oath and state as follows:

1. That I am a Kenyan citizen currently serving as the Chief Officer of Lands Physical Planning Urban Development and Natural resources of Tharaka Nithi County Government.

2. That I have been read to the contents of the Notice of Motion dated 20th August, 2019 filed on the same date and have understood the same and I wish to oppose the same.

3. That I now wish to aver that the suit land in dispute is public land vested with the people of Kajuki/Kamutiria which dispute arose from the applicant declaring that it is not public land but his own private land. A dispute which was determined by the minister being responsible for adjudication matters. It is the decision that is contested before this honourable court.

4. That in reference to Section 3(1)(a) of the Land Adjudication Act a county government in which a particular ascertained land vests may request for the application of the Act on such land, meaning that such adjudication may only be initiated at the request of the County Government.

5. That I am advised by our advocates on record whose advice I verily believe to be true that pursuant to provisions of Article 62(1) (2) (3) of the Constitution of Kenya public land is defined as land lawfully held as public land by the County Government hence the County Government of Tharaka Nithi holds in trust all the public land including the subject suit land on behalf of the people residing in Kajuki/Kamutiria.

6. That in compliance with its constitutional and statutory duties the county government of Tharaka Nithi resolved that the Land Adjudication Officer Meru South, Land Registrar and Director of Land Adjudication with a view of adjudicating sections within Tharaka Nithi County one of them being Land Reference No. 2022 Kajuki Kamutiria Adjudication Section which was public land held in trust by the County Government on behalf of the people of Kajuki/Kamutiria.

7. That the suit land has been used by community. It is evident that the community members have similar community of interest hence the claim of public land held as set out as the requirements of Article 62(1)(2)(3) of the Constitution of Kenya and the suit land is anchored on ancestry; and common interest.

8. That the provisions of the Constitution provide for the role of County Governments in relation to public land and for connected purposes, which places the Interested Party in this suit in a fiduciary relationship with the residents in the county.

9. That the Interested Party supports the adjudication process but that should only be done in full compliance with the law and that the adjudication process has been received positively by the area residents.

10. That the right to development is an integral part of fundamental human rights and as such the community are entitled to enjoy this right. The petitioners application only intends to operate to disturb the aura of development in the area.

11. That the land in question belongs to community members and have a legitimate expectation that the land will be used for growth and development of Kajuki/Kamutiria area after the process of ascertainment of rights and interests in the land has been accomplished through the adjudication process and that their legitimate expectation stands to be thwarted should the adjudication process be stopped.

12. That the basis of this application is that the Deputy County Commissioner was not gazetted and as such did not have requisite jurisdiction to handle the appeal to the minister as obligated by law yet the applicant did not annex any documentary evidence in support of his allegation. I am aware that this is the threshold set out in High Court Miscellaneous Cause No. 116 of 2013 Republic V The Honourable Attorney General, The District Commissioner Mbooni East and Benson Makumbi Masila; Ex-parte Applicant Onesmus Wambua Kasivo.

13. That the Deputy County Commissioner being the agent of Government who is entirely blamed for the grounds adduced in grounds 2, 3, 4, 5, 6 and 7 ought to have been enjoined in this application whereas the Attorney General so sued is only the Principal.

14. That I am informed by our advocates on record which advise I verily believe to be true that the Judicial Review Application herein is fatally defective as it lacks a statement of facts as required by Order 53 Rule 2 of the Civil Procedure Rules and hence should be struck out as it is full of conjecture and lacks evidential matter critical for determination of the issues raised.

15. That the applicant has not annexed any documents to prove that he is the absolute registered proprietor of Land Parcel 2022 hereinafter referred to as the suit land.

16. That I have been advised by our advocates on record which advise I verily believe to be true that despite the subject suit land being vested with in (sic) trust, the Interested Party in this matter there is no cause of action against it.

17. That the Interested Party prays that the honorable court do find that the application herein is unmerited and an abuse of the court process and dismiss the same with costs to the interested party.

18. That what is deponed herein is true to the best of my knowledge information and belief.

6. The Judicial Review application was canvassed by way of written submissions.

7. The Applicant's written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if any exist:

APPLICANT'S WRITTEN SUBMISSIONS.

May it please your Lordship,

On behalf of the Applicant, we humbly pray to submit as hereunder;

BACKGROUND

This instant Application was brought and filed on 20th August, 2019 after having been granted leave to apply for an order of certiorari to remove into this Court the decision of the Minister made on 20th May, 2019 in Appeal no. 76 of 2019 involving land reference No. 2022 Kajuki/Kamutiria Adjudication Section and quash the same, the proceedings therein and any other orders made therein without jurisdiction and against the Laws of the Land.

It is the Applicant's contention that the procedure and the manner in which the Appeal was heard did not go in line with the provisions of law as provided in Sections 26, 29 of the Land Adjudication Act Cap 284 Laws of Kenya and Regulation 4(1) of the Adjudication Regulations which covers appeals before the Minister of Lands and Housing.

As a matter of fact, deponed in the Supplementary Affidavit sworn on 4th October, 2019, the Deputy County Commissioner did not have grounds of appeal and the proceedings of the previous objection as a matter of law and procedure. The Minister in the initial stages also did not forward the grounds of appeal to the Director of Land Adjudication. In fact, the Deputy County Commissioner on behalf of the Minister besides not having the grounds of appeal before him for determination, neither did he have a tracing of the boundaries in dispute and he further went ahead to hear the matter de novo and also heard new witnesses. It is on this premise that the Applicant instituted this instant Judicial Review proceedings.

THE LAW AND ANALYSIS

Section 29 (1) of the Land Adjudication Act Cap 284 Laws of Kenya thus provides:

Any person who is aggrieved by the determination of an objection under [section 26](#) of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

- (1)
 - (a) ***delivering to the Minister an appeal in writing specifying the grounds of appeal; and***
 - (b) ***sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.***

Regulation 4 (1) of the Adjudication Regulations provide thus:

(1) Any person submitting an appeal to the Minister under section 29 of the Act shall attach to his appeal a tracing from the demarcation map of the boundaries of the holdings in dispute.

Even though no strict procedure is given in the hearing of the appeals, section 29 clearly shows how the appeal must be instituted. It is quite clear from the evidence adduced before this Honourable Court that no grounds of appeal were placed before the Deputy County Commissioner and as such he proceeded to hear the matter de novo which is not as per the procedure laid down. We beg to rely on the case of **Republic v Attorney General & another Exparte Munyokwang Kiyer & 3 others [2014] eKLR** where Justice J. R. Karanja thus enunciated,

“...Even if the decision of the second respondent was final as provided by section 29 of the Land Adjudication Act, it had to be arrived at in accordance with the law and the procedure laid down failure to which it would be amenable to judicial review and hence within the jurisdiction of this court. The law and its procedure are in existence to be followed and obeyed. Any individual and/or public body is expected to adhere to what is provided under the law before arriving at a decision touching on any individual lest the decision be rendered null and void by way of judicial review...”

It therefore goes without saying, automatically if there is a scintilla of evidence showing that the procedure followed during the hearing of the Appeal by the Minister was not as per the provisions of law under Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya, the decision or the holding must be quashed. This is the law as it is.

It is also evident from the proceedings in the appeal that the Deputy County Commissioner showed open bias in the manner that he treated the evidence of the Appellant and his witnesses. Even though this ground slightly leans to determining the merits or demerits of the case, where it is clearly showed that the decision maker did not hear the appellant or completely ignored his evidence, then the decision was made prejudicing the appellant by condemning him unheard. This is an iconic pillar of the rules of natural justice; ***audi alteram partem***. The proceedings reek of the same injustice. These cannot be ignored in any way whatsoever and must be considered in determining this instant Judicial Review.

The other issue is on the issue of jurisdiction. It was the Applicant's deposition that the Deputy County Commissioner did not have the requisite jurisdiction to determine the matter. He was not appropriately gazetted to determine such matters and the Respondents have not yet substantiated the same and only a proper gazette notice can prove that the Minister in charge of Lands and Housing had delegated such mandate to him. If the same is not proved, then the Deputy County Commissioner acted ultra vires.

CONCLUSION

Therefore my Lord, it is our humble opinion that this instant Application is with merit and it is also our humble prayer that the Application be allowed as prayed. The procedure laid down in law is crystal and if one step is missed, then the decision is ripe for a judicial review without determining the merits or demerits of the dispute. That is the strict reading of the law. Furthermore, this Honourable Court is clothed with the requisite jurisdiction and mandate to issue such orders where merit lies and it is without a doubt, that the procedures followed were dived with spots red as crimson that would warrant your orders being granted to right that which is wrong. Before you is a decision of the Minister that was birthed by a process that did not follow the book, it is a still birth that the Respondents are portraying as a normal birth and the Interested Party is enjoying such birth because of vested interests, it would only be fair to have the sword which cuts both ways cut the dangerous fangs of the high and mighty which are used to troll the downtrodden.

We so humbly pray.

DATED AT THIKA THIS.....4TH ...DAY OF...OCTOBER,.....2019

FOR: MUNGAI & KIBIRI & CO.

ADVOCATES FOR THE APPLICANT

8. The Interested party's written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if any exist:

INTERESTED PARTY'S WRITTEN SUBMISSIONS

The Plaintiff/Applicant has instituted this cause vide notice of Motion 20.8.2019 for orders that

- 1. The Honourable Court be pleased to issue an order of certiorari to remove into this Honourable Court and quash the entire decision and award passed by M.O Beja Deputy County Commissioner on behalf of the Cabinet Secretary, Ministry of Lands and Settlement dated 20th May 2019.**
2. The Respondents and the interested party be ordered to pay the costs of this motion.

The plaintiff applicant has also filed a supplementary affidavit sworn on 4.10.2019 in support of his Notice of motion.

Your Honour, the interested party reiterates all the averments pleaded in the Interested party's Replying affidavit sworn on 16th September 2019 and will wholly rely on them.

It is on this premise that we make our submissions and frame our issues as thus;

(i) Whether the Deputy County Commissioner had jurisdiction to determine the appeal No 76 of 2019

Your Lordship on the issue of jurisdiction and gazettement of the Deputy County Commissioner who heard the appeal is exclusively rebutted and sufficiently settled vide section 29(4) of Land Adjudication Act Cap 284 extract marked herein as CGTN I which the cabinet secretary for land (

Minister for land) delegated/donated her powers to hear appeal of this nature to the person holding the public office of Deputy

County Commissioner of the County Vifir Gazette Notice 6854 of 3.10.14 and extract herein marked Red CGTN II is annexed hereto

The applicants submissions or objection to jurisdiction is thus without merit,outrageous and fails in the face of law.

Your Honour,grounds 2,3,4,5,6,7 of the application are misplaced and can only be applied in an appeal but not in a judicial review application. The interested party prays that he grounds be struck out for being misplaced and untenable within the parameters of judicial review.

It is trite law that he who alleges must prove.The applicant has not made any effort to prove that the Deputy County Commissioner was gazetted. Your Honour this is deponed in paragraph 12 of the Interested party's replying affidavit and buttressed by **High Court Miscellaneous casue no 116 of 2013 Republic V The Honourable Attorney General, The District Commissioner Mbooni East and Benson Makumbui Masila;Ex parte Applicant Onsemsus Wambua Kasivo.**

(ii) **Whether the Judicial review herein was properly instituted**

Your Honour the interested party in paragraph 14 of its replying affidavit has deponed that the judicial review herein is fatally defective as it lacks statement of facts as required by Order 53 Rule 2 of the Civil procedure rules and should be struck out as it is full of conjecture and lacks evidential matter critical for determination. It is salient to note that the applicant has not controverted this fact in his supplementary affidavit yet it goes to the root of the application hence the interested party humbly submits that the judicial review application should be struck out with costs to the interested party.

Order 53 Rules 3 and 4 unequivocally state that copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits.....subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement. This position was held in the case of **Michael Mungai v The Hon Attorney General & Others Judicial Review Application No 9 of 2015.**

(ii) **Whether the applicant was accorded a fair hearing in the appeal**

From the pleadings filed by the applicant the interested party contends that the applicant was given a fair hearing where all the parties together with their witnesses were given a chance to ventilate their issues. The proceedings and the ruling of Appeal case No 76/2019 form the subject of this judicial review. Any other decisions made previously and annexed in the applicants supplementary affidavit have no bearing in this case as they were heard and determined in the respective forums.

It is apparent from the applicants own filing GJK 2",GJK3" the proceedings GJK a" that the matter proceeded as provided by the provisions.

The decisions on the forum proceedings that the committee and Arbitration were concluded as required by the Act. That the decision that is subject to this judicial review were conducted by the Deputy County Commissioner and all parties concerned were afforded a hearing by the public officer as can be discerned from the proceedings. The proceedings being quasi judicial the manner of their conduct does not relat to the strict appeal procedure as provided in civil procedure.

We entertain no doubts in our mind that since the parties were given a fair hearing as envisaged by the proceedings,it is therefore trite law that **Judicial review is only 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. This was the holding in the case of Municipal Council of Mombasa V Republic & Umoja Consultants Ltd Civil Appeal No 185 of 2001.**

Consequently the interested party will wholly rely on the proceedings and ruling in the appeal as filed by the applicant in the supporting affidavit and marked as G.J.K "a" in paragraph 2.

(iii) **Whether the interested party is properly enjoined as a party before this court.**

The interested party is improperly enjoined in the suit as no leave was sought to enjoin it and it was not party in the appeal proceedings which is the subject of this judicial review and therefore leave was mandatory to enjoin the interested party as was held in the case of **Mohamed Suleiman Shee & Bakari Omari Chala V Suleiman Omari challa, Ali Omari Challa & Others ELC Suit No 51 of 2017 that upon perusal of court record it is apparent that the 1st interested party did not seek leave of the court to be enjoined in the suit and that in the application there were no prayers for a joinder and as such the 1st interested party was not properly before the court.**

Your Honour the interested party in paragraph 16 of the replying affidavit has pleaded that there is no cause of action against it. This is because it was not a party in the appeal the subject of this case and for it to be enjoined leave was MANDATORY after filing of the application.

In conclusion the application dated 20.8.2019 is fatally defective and should be dismissed with costs to the Interested party.

The Interested party will rely on the following authorities

1. **Mohamed Suleiman Shee & Bakari Omari Chala V Suleiman Omari challa, Ali Omari Challa & Others ELC Suit No 51 of 2017**
2. **Municipal Council of Mombasa V Republic & Umoja Consultants Ltd Civil Appeal No 185 of 2001**
3. **Copy of Gazette Notice No 6854 dated 13th September 2014 and published on 3rd October 2014 giving the Deputy County Commissioner powers to hear and determine appeals under Cap 284 Laws of Kenya.**
4. **Michael Mungai V The Hon Attorney General & Others Judicial Review Misc. Application No 9 of 2015.**

DATED at Nyeri this 14th day of October, 2019

G.K.KIBIRA & CO.

Advocates for the Interested Party

9. The respondents did not file written submissions although they had filed Grounds of Opposition.

10. I have considered the pleadings, the legal and statutory authorities and the written submissions filed by the parties in support of their veritably incongruent assertions. For the authorities cited or proffered by the parties, I unreservedly opine that they are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. I have taken those authorities into account when arriving at my decision in this judgment. I need not regurgitate those authorities in view of the fact that the principles and precedents they espouse have been fully enunciated in the parties' submissions (op.cit) which have been reproduced in full in the earlier part of this judgment.

11. Judicial Review is a sui generis procedure governed by the Law Reform Act and order 53 of the Civil Procedure Rules. This application was filed within the time frame stipulated by the law. However, the Applicant has not controverted the assertion by the Interested Party that at the leave stage he did not accompany his application with the necessary statement of facts. Order 53 Rule 4 subrule 1 states as follows:

"1. Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief sought out in the said statement."

12. The word used in Order 53 Rule 4 subrule 1 is "shall". This makes the filing of the statement crucial in Judicial Review

proceedings. It is pellucid that no relief can be sought except on the grounds and relief set out in the statement.

13. Nevertheless, leave was granted. I do not find it necessary to delve into the issue of if or if not this court properly granted leave to the applicant. Doing so will be akin to this court sitting on an appeal against its own infraction. I will, therefore, proceed to deal with other issues.

14. Beyond peradventure, all authorities are clear that Judicial Review concerns itself with the integrity of the process RATHER THAN the merits of the decision made in the impugned proceedings.

15. In his ground number one as set out in the Notice of Motion, the applicant asserts that the Deputy Commissioner who heard the apposite appeal at the ministerial level lacked jurisdiction because he had not been gazetted as an officer to whom the minister had delegated appellate responsibilities on his behalf. This assertion is pellucidly false. The respondents and the Interested Party have proffered Gazette Notice No. 6854 extracted from the Kenya Gazette of 3rd October, 2014 through which the Minister delegated powers to hear and determine appeals and perform related duties and functions under section 29 of the Land Adjudication Act to the Deputy Commissioners of all sub-counties except the sub-counties in Nairobi City County. Ipso facto, this ground is dismissed.

16. Ground 2 claims that the applicant was condemned unheard. I have perused the proceedings held at the ministerial level. I find that the applicant robustly participated in the impugned proceedings. I, therefore, find that this ground lacks merit.

17. Grounds 3, 4, 5, 6 and 7 do not attack the integrity of the process that led to the impugned decision. I do not find them tenable grounds in Judicial Review proceedings. I hereby dismiss them.

18. In the circumstances, I enter judgment for the Respondents and the Interested Party and against the applicant in the following terms:

- a) This Judicial Review suit is hereby dismissed.
- b) The order of stay of further proceedings and the implementation of the impugned decision of the Land Adjudication and Settlement Officer granted by this court on 31st July, 2019 is hereby vacated.
- c) Costs are awarded to the Respondents and to the Interested Party.

19. Orders accordingly.

Delivered in open Court at Chuka this **16th day of December, 2019** in the presence of:

CA: Ndegwa

Kirimi h/b Mungai for the Applicant

Kiongo for the AG for the Respondents

Mark Muriithi h/b Kibira for the Interested Party

P.M. NJOROGE

JUDGE



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