



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE

MISC. APPL. NO. 21 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

DISTRICT COMMISSIONER POKOT SOUTH.....2ND RESPONDENT

ATODOSIA CHEMOTWO.....3RD RESPONDENT

EXPARTEEMMANUEL POGHISIO

JUDGMENT

1. The Judicial Review Notice of Motion dated 5/4/2013 in this matter was filed on 5/4/2013 pursuant to leave granted by his court on 19/3/2013. The grounds upon which the application is brought are that:-

1) Contrary to Section 29 of the Land Adjudication Act, the District Commissioner Pokot South failed to consider the grounds of appeal lodged by the appellant and further failed to consider the objection proceedings and the ruling appealed from.

2) Instead of hearing an appeal, the District Commissioner Pokot South heard a fresh case altogether.

3) No reason were given for overturning the findings made by the District Land Adjudication Officer West Pokot.

4) The District Commissioner exceeded his jurisdiction.

2. The brief facts of this case are that objection proceedings were heard and determined by the District Land Adjudication Officer West Pokot, involving the Ex-parte applicant and the 3rd respondent herein. From the record of the proceedings before the District Land Adjudication Officer that both parties were heard in the first instance. The Ex-parte applicant herein who was the claimant then gave sworn evidence and he was cross examined by the 3rd respondent herein. The 3rd respondent also gave sworn evidence but he was not cross examined by the claimant. The District Land Adjudication Officer's findings *inter alia*, that the land in dispute was given to the Ex-parte applicant herein by the parties' father and that the 3rd respondent is not the right owner.

3. The District Land Adjudication Officer gave orders as follows:-

(a) Objection No. 44 was allowed and part of Plot No. 447 was to be excised and be registered in the Ex parte applicant's name and a new number to be given to Plot No. 732.

(b) Objection No. 51 was allowed and a new number to be given to the buyer since there was no dispute that he had paid Kshs.19,000/=.

(c) Objection No. 130 was allowed and the buyer was to get a new Plot No. (not clear) sold to him after paying Kshs.23,000/=.

(d) Objection No. 89 is withdrawn by consent of the appellant because the appellant's interest is catered for in objection No. 130 of Paul Kemernyang.

(e) Objection No. 156 is dismissed because the appellant brought it out of malice.

4. The Memorandum of Appeal that the 3rd respondent lodged against the Land Adjudication Committee was exhibited in the verifying affidavit as "Exhibit EP2". The grounds therein are restated verbatim herein as follows:-

(1) That the Land Adjudication Committee was biased against me and that they considered irrelevant and false evidence in arriving at their decision.

(2) That the Land Adjudication Officer caused my land to be demarcated without giving notice to me to be present during the demarcation exercise.

(3) That the said secret demarcation enable the respondent Emmanuel Poghiso excise over 45 acres from my parcel forming Parcel No. 450 and 732 instead of holding only 20 acres which I had given him voluntarily as Plot No. 450.

(4) That part of Plot No. 450 is my land whereas the whole Plot No. 732 is my land that the Adjudication Committee simply wants to rob me off.

(5) That the Land Adjudication Officer dismissed my objection without visiting the land, the subject of my objection, to understand the true picture on the ground and/or verify my testimony before the committee.

(6) That the Land Adjudication Committee's secretary failed to put on record crucial bits of my evidence thus making it possible to dismiss my objection as if it had no basis.

(7) That I was prevented from calling a crucial witness to testify in my favour although the witness was present and a document I wanted to produce was also rejected without giving any reasons.

5. It is alleged failure to consider these grounds that forms part of the grounds for the Judicial Review application herein. The 3rd respondent opposed the motion. He filed his sworn replying affidavit dated 7/6/2013. He avers that the appeal was heard by the District Commissioner and it was properly determined and that the 7 grounds of appeal were fully addressed. The 3rd respondent also avers, upon advice of his advocate the under **Section 29 of the Land Adjudication Act** the Minister has a wide discretion to determine his own procedure in hearing the appeal and in making orders as he thinks just and that such an order made by the Minister is final. It was further stated that the minister did not act in excess of his powers under **Section 29 of the Land Adjudication Act** since in his view all the parties were granted an equal opportunity to be heard before the final decision was made.

6. The 3rd respondent states that the District Commissioner visited the disputed land on 4/1/2012. He posits that he had granted the Ex-parte applicant only 5 acres which was comprised in Plot No. 450 but the Ex-parte applicant and the Land Adjudication Officer had secretly carved 45 acres out of the 3rd

respondent's Plot No. 447; it is this 45 acres portion that the District Commissioner ordered to be restored to Plot No. 447. According to the 3rd respondent the District Commissioner gave sound reasons for his ruling and for the Judicial Review Notice of Motion herein should be dismissed.

7. The 1st and 2nd respondents did not file any replying affidavit, grounds of opposition but they filed their submissions on 7/11/2017 opposing the motion.

8. The Ex-parte applicant filed his submissions on the motion on 27/7/2017 while the 3rd respondent filed his on 18/10/2017.

The Ex Parte Applicant's Submissions

9. The Ex-parte applicant restates the 7 grounds of appeal that the 3rd respondent had presented before the District Commissioner and sets out the provisions of **Section 29** of the **Land Adjudication Act** in his submissions.

10. The Ex-parte applicant disputes the 3rd respondent's allegation that the District Commissioner fully addressed the 7 grounds. He states that though there is no mention of Plot No. 447 in the grounds of appeal the District Commissioner purported that Plot No. 732 be joined to Plot No. 447 as one parcel after unprocedurally hearing the case afresh in contravention of **Regulation 4(4)** of the **Land Adjudication Regulation** which required the District Commissioner to seek leave from the minister before rehearing the case afresh. The Ex-parte applicant relied on **Machakos Misc. Civil Appeal No. 183 of 2004**.

11. The Ex-parte applicant submitted that the duty of the District Commissioner was to review the evidence on the record and not to rehear the case afresh and he did not seek the leave of the minister as required by **Rule 4 (4)** of the **Land Adjudication Rules** despite the fact that he was exercising delegated power.

12. On the ground that no reasons were given for overturning the District Land Adjudication Officer's decision in his ruling, it is submitted that the District Land Adjudication Officer gave reasons, but the District Commissioner did not.

13. Regarding the issue excess of jurisdiction the Ex-parte applicant has submitted that the only way that the 2nd respondent could have ascertained the true picture on the ground would have been by way of a visit to the ground either alone or with a surveyor. He urges that from the contents of the map exhibited as "AC2" by the 3rd respondent, it is not clear which parcel was carved out of another. It is therefore urged that the District Commissioner's decision was not a decision over the appeal preferred by the 3rd respondent.

The 1st and 2nd Respondents' Submissions

14. The 1st and 2nd respondents urge this court to keep its decision in this matter within the scope of Judicial Review lest the decision be "ultra vires itself". They urge that Judicial Review orders are discretionary. However they concede that they never filed any response to the motion. Citing the case of **CCSU -vs- Minister for the Civil Service, 1985 AC 384** they identify the grounds of Judicial Review as illegality, irrationality and procedural impropriety and urge that the Ex-parte applicant has not satisfied the grounds for Judicial Review orders. In their view the verifying affidavit does not demonstrate that the impugned decision is illegal irrational or procedurally improper. They cite the case of **Timotheo Makenge -vs- Maunga Ngochi Civil Appeal No. 25 of 1978 [1979] KLR 53** and urge that there is no evidence that the District Commissioner breached any procedural rules by not including the reasons for overturning the decision of the District Land Adjudication Officer, or that his decision was irrational. The 1st and 2nd respondents aver that it was not incumbent upon the District Commissioner to rely on the proceedings and findings of the District Land Adjudication Officer in his determination of the matter. They court is urged that his mandate was to, re-evaluate the evidence that was brought before him and

come to a conclusion on the merits. The 1st and 2nd respondents cite the case of **Republic -vs- Cabinet Secretary Ministry of Lands & Housing & 3 Others ex-parte Mavuti Mwange Nthei 2015 eKLR**.

15. The 1st and 2nd respondents aver that this court is vested with discretion to assess whether the remedy sought is the most efficacious in the circumstances and may deny the reliefs sought. The 1st and 2nd respondents further aver that the application before the court is “more concerned with the merits of the decision rather than the decision making process taken by the District Commissioner. They cite the case **Republic -vs- Cabinet Secretary Ministry of Lands and Housing (Supra)** and urge this court to uphold the 2nd respondent’s decision.

The 3rd Respondent’s Submissions

16. The 3rd respondent avers that under **Section 29 (4)** of the Land Adjudication Act the Minister may delegate power to hear an appeal and that power was delegated and properly exercised by the District Commissioner. The 3rd respondent urges that **Regulation 4(1)** of the Land Adjudication Regulations entitles any party appearing before the Minister for the hearing of his appeal to call witnesses subject to leave being granted by the Minister for the purpose. In the 3rd respondent’s view, the delegation of the minister’s power under **Section 29(4)** delegates all powers including the power to grant leave to the parties to call witnesses. The 3rd respondent argues that he and the *Ex-parte* applicant testified at the hearing of the appeal and the *Ex-parte* applicant, in addition also called two witnesses; he therefore urges that all the parties were given an opportunity to be heard. According to the 3rd respondent, the District Commissioner’s decision was based on the evidence given at the appeal and the grounds of appeal, the District Commissioner visited the disputed land and none of the parties were prejudiced by the decision to hear the parties and their witnesses or by the visit to the land. According to the 3rd respondent the 2nd respondent was not demonstrated to have violated principles of natural justice or to have acted ultra vires and his decision has not prejudiced any of the parties. The 3rd respondent attempted to distinguish the case of **Republic -vs- A.G. & Another Ex-parte Minyokwang Kiyer & 3 Others**. In that case, the 3rd respondent states, the court’s attention appeared not to have been drawn to the provisions of **Regulation 4 (4) of the Land Adjudication Regulations**.

17. It is the submission of the 3rd respondent that under **Section 38(2)** of the interpretation and general provision **Act Cap 2** power to hear an appeal cannot be delegated in peace meal such that the District Commissioner would require “the parties to go back to the Minister to grant leave for witnesses to be called”. That delegation of the power to hear an appeal, urges the 3rd respondent, is inclusive of the power to grant leave for the calling of witnesses.

18. The 3rd respondent further submitted that the concern of this court lies not in examining whether the decision of the District Commissioner had merit but in determining whether he acted *intra vires* and in doing so, observed the rules of natural justice. The reasons for the 2nd respondent’s decision are, in the 3rd respondent’s view, to be found in the findings and ruling and the ruling demonstrates that the grounds of appeal were considered in arriving at the decision. The 3rd respondent concludes by saying that **Section 29(1) (b) of the Land Adjudication Act** empowers the Minister to determine the appeal and make such order as he thinks fit and such order shall be final, and that the 2nd respondent acted according to law.

Issues for Determination

19. It is common ground that the powers of the Minister can be delegated. It is also common ground that the District Commissioner West Pokot had delegated power to hear and determined the appeal subject matter of the instant Judicial Review Application and that he re-heard the case. In my view the issues for determination in this matter are as follows:-

(1) Was there need to seek the leave of the Minister in order for the parties to be allowed to

testify afresh and call evidence and did he act ultra vires?

(2) Did the District Commissioner fail to consider the written grounds of appeal and the objection proceedings in arriving at his determination and did the procedure breach natural justice?

(3) Were there reasons given for the District Commissioner decision?

These issues are considered herein below:-

(1) Was there need to seek the leave of the Minister in order for the parties to be allowed to testify afresh and call evidence and did he act ultra vires?

20. It is not expressly provided in **Section 29(1)** of the **Land Adjudication Act** does not expressly provide for the procedure to be followed by the person to whom the Minister has delegated power to hear an appeal. Subsidiary legislation usually has, where Parliament has provided for such, the effect of filling in gaps left by principal legislation. In this case the appropriate subsidiary legislation is the **Land Adjudication Regulations**. **Regulation 4** thereof is applicable in this case.

21. In this court's view the subject of delegation of power is addressed by the principal Act and not by the Land Adjudication Regulations. Ordinarily the duty to hear appeal involves consideration by the appellate court or tribunal of the evidence and findings already on record as taken or arrived at respectively by the court or tribunal below. I do not find any substantive provision for a re-hearing of the case or calling of witnesses in **Section 29(1) - (4) of the Land Adjudication Act**. It is only proper in the circumstances to hold that even where the power of the Minister has been delegated to the District Commissioner to hear an appeal under **Section 29(1)**, leave of the Minister must be sought in accordance with **Rule 4(4)** if the appellant or any other party to the appeal wishes to attend in person or by a duly authorized agent and call witnesses.

22. This court put it aptly in the case of **Republic -vs- Machakos District Commissioner 2009 eKLR** as follows:

“I have seen the proceedings before the District Commissioner to whom the Minister delegated his powers to hear the appeal. There is no evidence that the leave of the Minister was ever sought to call witnesses as per requirements of Rule 4(4) of the Land Adjudication Regulations. The respondent could not purport to call witnesses unless leave was sought to do so. Witnesses cannot be called as a matter of course. Even if the DC could exercise his discretion to call the witnesses, the necessity to call the witnesses should have been recorded. I would agree with the applicant that the procedure of taking evidence was not in accordance with the Regulations and was uncalled for and the procedure was therefore flawed”.

23. I am therefore persuaded and do indeed find that there was need to secure the leave of the Minister before parties could be allowed to appear either by themselves and or call evidence. In allowing the parties to appear and testify and call evidence without leave, the 2nd respondent therefore acted contrary to the provisions of **Section 29(1)** and therefore acted beyond his powers.

(2) Did the District Commissioner fail to consider the written grounds of appeal and the objection proceedings in arriving at his determination and did the procedure employed breach the rules of natural justice?

24. It would have been expected that the District Commissioner would hear the appeal by reference to the grounds of appeal and the record from the Land Adjudication Office. In so far as first the District Commissioner proceeded to rehear the case afresh, this was contrary to the ordinary expectations of the Ex-parte applicant. Secondly, there is no evidence on the record that the District Commissioner addressed the grounds of appeal before him, or that he relied on the findings of the District Land Adjudication Officer; Thirdly there is no evidence on the record that he visited the disputed land or that, if

he actually did so, he never invited the disputants to the said land. The respondents do not insist that the Ex-parte applicant was issued with notice of the visit to the site or that he knew about it, or that he ever attended. It is the Ex-parte applicant's complaint that the District Commissioner never made a visit to the land yet he made a decision with far reaching implication in respect of the Ex-parte applicant's land. In this court's view it matters not if the District Commissioner would have arrived at the same decision he arrived at the same decision had he invited the Ex-parte applicant while visiting the land. The important fact is that the said visit either did not take place or, if it took place, it prejudiced the Ex-parte applicant's rights to be heard at the site as he was never invited.

25. In the case of *Republic -vs- Minister for Lands and Settlement and 2 Others Exparte Robert Musili Mwenzwa 2006 eKLR* the court stated as follows:

“I am conscious of the fact that such a tribunal has no procedural method set down for it to follow like ordinary courts order. The court however in my view is a quasi-judicial tribunal which cannot ignore the basic principles of our justice system in determining the appeal and in making such orders thereon as it though just, as provided under Section 29 (1) of the Land Adjudication Act aforementioned. Such a court is therefore bound to observe the basic principles of natural justice. It must make sure that all the parties for example are given adequate or reasonable time to put up their cases including calling the witnesses they wish to call. The parties should also be given opportunity to cross-examine the other side and its witnesses. They must as well be given adequate notice of the venue and time of the court proceedings

In this case the court visited the disputed land on 7/7/2004 in the absence of the appellant/Ex-parte applicant. No explanation is given for his absence. The court examined the land and relied on the evidence it picked on the land as to who was occupying the land and whether the land had been developed as claimed by the Ex-parte applicant or not. It cannot be easily argued that this did not prejudice Ex-parte applicant's case, especially where the judgement appears to have not considered other grounds of appeal before it. It is my view and finding that the Ex-parte applicant's basic rights were violated and the situation cries for help and rectification”

26. In the instant case the District Commissioner failed to consider the grounds of appeal presented by the 3rd respondent and reheard the case afresh. If, as purported by the 3rd respondent he went to the site, this in the absence of the Ex-parte applicant or an invitation to him in that regard to attend during the visit, this was unprocedural. The upshot of the foregoing is that this court finds that the Rules of Natural Justice were breached in respect of the Ex-parte applicant.

(3) Were there reasons given for the District Commissioner decision?

27. If the grounds of appeal were not considered it naturally follows that the decision of the District Commissioner may have been based on reasons other than those that he would have given had he dealt with the grounds, or which would have naturally flowed from those grounds. I have examined the record and there are no reasons given for the decision. In the instant case the reasons this court would consider have to be reasons that spring from an analysis of each of the grounds of appeal, and not any other matters outside the grounds. The merits of those reasons would not matter. However, I do not find any reasons on the record.

28. In conclusion, I find that the decision of the District Commissioner was arrived at in contravention of the Law, procedure and Rules of Natural Justice. The District Commissioner also exceeded his mandate by rehearing the case afresh and allowing the calling of evidence without leave of the Minister as required by the regulations.

29. For the foregoing reasons, I hereby allow the Notice of Motion dated 5/4/2013. The decision of the Minister for Lands and Housing made on 4/12/2012 on his behalf by the District Commissioner Pokot South is hereby recalled to this court and is hereby quashed.

30. It is also ordered that the said appeal shall now be heard afresh by the Minister. The costs of the application shall be paid to the Ex-parte applicant by the respondents.

Dated, signed and delivered at Kitale on this 16th day of January, 2017.

MWANGI NJOROGE

JUDGE

16/1/2018

Coram - Before Mwangi Njoroge - Judge

Court Assistant - Picoty

Ms. Kiarie for Ex-parte Applicant

N/A for the 1st and 2nd Respondents

N/A for the 3rd Respondent

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

16/01/2018