



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 24 OF 2008**

**IN THE MATTER OF: AN APPLICATION TO APPLY FOR JUDICIAL REVIEW AND FOR ORDERS OF MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE LAND ADJUDICATION ACT, CHAPTER 284 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT, CHAPTER 300 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE REPUBLIC**

**BETWEEN**

**1. HUMPHREY MWAMBURI KIGOMBE**

**2. ROPHUS MWAMBURI**

**3. HENRY MWANYUMBA.....APPLICANTS**

**VERSUS**

**1. THE CHIEF LAND REGISTRAR**

**2. THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT**

**3. THE DISTRICT LAND REGISTRAR, TAITA/TAVETA DISTRICT**

**4. THE HON. MINISTER FOR LANDS AND SETTLEMENT**

**5. THE DISTRICT COMMISSIONER TAITA/TAVETA**

**6. THE DISTRICT LAND ADJUDICATION**

**AND SETTLEMENT OFFICER,TAITA/TAVETA.....RESPONDENTS**

**AND**

**1. JACOB MWALUKUKU**

**2. HENRY MWANYUMBA.....INTERESTED PARTIES**

**RULING**

**The Application**

1. By a Notice of Motion application herein dated 7<sup>th</sup> October, 2004 the Ex parte Applicants seek the following Judicial Review orders, namely:

(a) THAT certiorari do issue to the Minister for Lands and Settlement to quash his decision read on the 22<sup>nd</sup> of April 2004 that the Applicants' appeal was time barred and the decision that the two plots No. 2220 and 2221 which are part of the Applicants' land be awarded to their opponents be quashed.

(b) THAT certiorari do issue to the District Commissioner to quash the decision of dismissal of and declaration that the Applicants' appeal to the Minister against the decision of Adjudication Officer for Taita Taveta District on the Award of parcel No. 2220/2221, formally Plot No. 1443 in the Rong'e Nyika Adjudication Section was time barred.

(c) THAT certiorari do issue to the District Commissioner and the District Land Adjudication and Settlement calling up the record of the proceedings and events following the judgment of the District Land Adjudication and Settlement given on the 30<sup>th</sup> October 1998 for review.

(d) THAT mandamus do issue to the Honourable Minister for Lands and Settlement to hear the Appeal lodged by the Applicants on 22<sup>nd</sup> January 1999 in accordance with the provisions of section 29 (1) of the Land Adjudication Act Cap. 284 of the Laws of Kenya.

(e) THAT mandamus so issue to the District Commissioner who had a delegated duty under the Minister to hear this matter but did not and thereby breached the rules of Natural Justice by allowing the Applicants' appeal to be dismissed without a hearing.

(f) THAT mandamus do issue to the District Land Adjudication and Settlement Officer to compel him to fulfill his duties and process the Applicants appeal in accordance with section 29 (1) of the Land Adjudication Act Cap 284, after failing to perform his duty to facilitating and avail the relevant records and documents which are crucial in the appeal process, and actively obstructing the course of justice.

(g) THAT prohibition do issue to the District Land Adjudication and Settlement Officer to prohibit him from altering the lands in dispute pending the appeal of his decision in the Objection to Adjudication Register Objection No. 59 P/NO. 1443 O/R BH6 38674 and from further abusing the rights of the Applicants to appeal his judgment and to cease abusing his office and defeating the ends of justice, thereby causing irreparable injuries to the Applicants.

(h) THAT prohibition do issue to the interested parties to prohibit them from transferring, altering or otherwise dealing with the Plot No. 14433 and status quo to be maintained until the final determination of this application.

(i) THAT prohibition do issue to the Land Adjudication Officer from further interfering in this matter in any way that would be prejudicial to the applicant's Application.

(j) THAT the costs of this application abide in the result of the Judicial Review application.

2. The application is premised on grounds set out therein and is supported by statement of grounds signed by Stephen Musalia Mwenesi on 28<sup>th</sup> September, 2004 and Verifying Affidavit of Humphrey Mwamburi Kigombe sworn on 28<sup>th</sup> September, 2004.

3. The ex parte Applicants are inhabitants of Rong'e Nyika Adjudication Section, Taita/Taveta District parcel No. 2220/2221(formally Plot No. 1443) and claim to be entitled to property rights in or over land within the section pursuant to provisions of section 23 of the Land Adjudication Act Cap 284 of the Laws of Kenya. The Applicants allege that they have occupied the parcel No. 2220/2221 (formally Plot No. 1443) in the Ronge Nyika Adjudication Section of Taita/Taveta since 1942 and that their grandfather was the pioneer on that piece of land. The Land Adjudication and Settlement Officer and his subordinate officials denied the Applicants their right of appeal by withholding the relevant documents relating to the parcel in dispute for the necessary action and intentionally caused them to delay their appeal by willfully misguiding them about the appeal process. They allege that the Land Adjudication and Settlement Officer maliciously or willfully refused to release the documentary evidence relevant to the Applicants' appeal claiming they could not be found. Following numerous requests by way of letters to the District Commissioner of Taita/Taveta District and to the District Land Adjudication and Settlement Officer, the minutes of the Objection case that the Applicants wished to appeal were not availed until Friday 7<sup>th</sup> May 2004, just over 2 weeks after the decision to summarily dismiss their appeal. The District Land Adjudication and Settlement Officer further barred the Applicants attempt to appeal his decision by fraudulently advising them that the appeal period was 60 days from the date of implementation and not from the date of judgment which was 30<sup>th</sup> October 1998. Despite attempts made by the District Commissioner to assist in putting the Applicants' Appeal process back on track, and to put right the injustice committed by the District Land Adjudication and Settlement Officer, the District Land Adjudication and Settlement Officer persisted in obstructing, violating and being an impediment to the Applicants' right of appeal against the decision given on 30<sup>th</sup> October 1998 in the Objection stages on Plot No. 1443 Ronge Nyika Adjudication Section. The Applicants state that this was a gross injustice and breach of procedure in accordance with the provisions of the Land Adjudication Act, Cap 284 of the Laws of Kenya. The Land Adjudication and Settlement Officer openly showed bias against the Applicants. He disregarded a letter from the District

Commissioner dated 2<sup>nd</sup> February 1999 which was an extension of time for the Applicants to lodge their appeal. The Applicants state that their case is meritorious and should be allowed.

### **The Response**

4. The application is opposed by the 6<sup>th</sup> Respondent Kennedy Njenga, who is the District Land Adjudication and Settlement Officer, Taita Taveta. The 6<sup>th</sup> Respondent has filed a replying affidavit sworn by himself on 20<sup>th</sup> June, 2008. The 6<sup>th</sup> Respondent is the District Land Adjudication and Settlement Officer in Taita/Taveta District. His case is that Objection Number 113 of Plot No. 1443 was heard and determined on 30<sup>th</sup> October, 1998 in favour of Henry Mwanyumba Madeda, the Plaintiff by being awarded a portion of the above plot P/No. 2220. That the party aggrieved by the said decision was given 60 days from 30<sup>th</sup> October, 1998 to file an appeal to the Minister as per the provisions of Section 29 (1) of the Land Adjudication Act, Cap 284. Pursuant to that, Humphrey Kigombe appealed on 22<sup>nd</sup> January, 1999 and paid for the appeal vide receipt No. BP 782551 of 4<sup>th</sup> March, 1999. However, the appeal was filed out of time since 60 days expired on 30<sup>th</sup> December, 1998 and the file was not forwarded to the Minister for reasons that the appeal was filed out of time and did not contain Grounds of Appeal. This prompted the Director of Land Adjudication and Settlement vide his letter Ref. No. LA/S/4/24/82 of 6<sup>th</sup> March, 2002 to ask for the file to be processed and forwarded to the Minister. Humphrey Kigombe was requested to forward his Memorandum of appeal vide letter Ref. LAS/31/32/164 of 2<sup>nd</sup> April, 2002 which he did and the file forwarded to the Director vide letter Ref. LAS/31/32/167 of 19<sup>th</sup> June, 2002. The same file was forwarded to the District Commissioner by the Director of Land Adjudication and Settlement on 1<sup>st</sup> July, 2002 vide his letter Ref. LA/5/4/9.XVII/203 for determination of appeal to the Minister in the normal manner. The Minister's decision through the District Commissioner was that the appeal was filed out of time contrary to provisions of Section 29(1) of the Land Adjudication Act Cap 284 of the Laws of Kenya. The 6<sup>th</sup> Respondent states that the grounds raised herein for the application are frivolous and have no basis and should be dismissed.

The 1<sup>st</sup> to 5<sup>th</sup> Respondents relied on the 6<sup>th</sup> Respondent's replying affidavit aforesaid.

### **Submissions**

5. Parties filed submissions. The ex parte Applicant submitted that the Applicants have been inhabitants of Rong'e Nyika Adjudication Section Taita/Taveta District parcel No. 2220/2221 (formally Plot No. 1443) and are entitled to property rights in or over the land within the section pursuant to provisions of section 23 of the Land Adjudication Act Cap 284 of the Laws of Kenya. It was submitted that the Applicants have occupied the parcel since 1942. Their grandfather was the pioneer of the piece of land. The Land Adjudication and Settlement Officer and his subordinate officials denied the Applicants their rights of appeal by withholding the relevant documents relating to the parcel in dispute for the necessary action and intentionally caused them to delay their appeal by willfully misguiding them about the appeal process. The Applicants submitted that Judicial Review is concerned with procedure.

***“Judicial Review is concerned not with private rights on the merits of the decision ... but with the decision making process ... purpose is to ensure individual is given fair treatment by the authority to which he has been subjected.” [C.A. No. 234 of 1995 The Commissioner of Lands vs. Kunste Hotel Ltd.]***

Relying on this maxim it was submitted that the Land Adjudication and Settlement Officer maliciously refused to release the documentary evidence relevant to the Applicant's appeal claiming they could not be found. Following numerous requests by way of letters to the District Commissioner of Taita/Taveta District and to the District Land Adjudication and Settlement Officer, the minutes of the Objection case that the Applicants wished to appeal were not availed until Friday 7<sup>th</sup> May 2004, just over two weeks after the decision to summarily dismiss the Applicants' appeal. The Applicants relied on *Section 29 (10) and 2 of Land Adjudication Act, Cap 284 of the Laws of Kenya on right of appeals.*

The District Land Adjudication and Settlement Officer further barred the Applicants attempt to appeal his decision by fraudulently advising them that the appeal period was 60 days from the date of implementation and not from the date of judgment which was 30<sup>th</sup> October 1998. The District Commissioner instructed him to put this in writing, which he accepted in the presence of the District Commissioner but later refused and further frustrate the Applicants attempt to appeal. It was submitted that in *contravention of the Land Adjudication Act, Cap 284, the Land Adjudication Officers conducted themselves in a manner departing from the rules of natural justice and so prohibition should issue to stop them from continuing to enforce their irregular proceedings. [C.A. No. 266/96 Kenya National Examination Council vs. Geoffrey Njoroge & Others]*

Despite attempts made by the District Commissioner to assist in putting the Applicants' Appeal process back on track, and to put right the injustice committed by the District Land Adjudication and Settlement Officer the District Land Adjudication and Settlement Officer persisted in obstructing, violating and being an impediment to the Applicants' right of appeal the very same District Land Adjudication and Settlement Officer, decision given on 30<sup>th</sup> October 1998 in the Objection stages on Plot No. 1443 Rong'e Nyika Adjudication Section. This was a gross injustice and breach of procedure in accordance with the provisions of the Land Adjudication Act, Cap 284 of the Laws of Kenya. The Applicants submitted that the *Land Adjudication Officers hold public offices appointed as such under the Land Adjudication Act Cap. 284 of the Laws of Kenya created by parliament and thus amenable to the supervisory jurisdiction of this High Court. [C.A. No. 266/96 Kenya National Examination Council vs. Geoffrey Njoroge & Others]*

The Applicants submitted that the Land Adjudication and Settlement Officer openly showed bias against the applicants. He confirmed the decision of a Committee that was composed of the other parties' kinsmen and did not specify the grounds on which he based his order to award the Applicants opponents the disputed land and why he overruled the decision of the Arbitration Board and allowed the Opponents' objections. The Applicants case is that a letter from the District Commissioner dated 2<sup>nd</sup> February 1999 acted as an extension of time for the Applicants to lodge their appeal. *See Section 29 (4) of Land Adjudication Act, Cap 284 of the Laws of Kenya on delegation of powers of the Minister to the District Commissioner.*

**“... anybody of persons is a court if it has a legal authority to determine questions affecting the rights of subjects, and is under a duty to act judicially ...” [Re Kisima Farm Ltd (1978) K.L.R. 36]**

6. On their part the Respondents submitted that the purported Statement of Grounds and Facts offends the clear provisions of Order LIII Rule (2) of the Civil Procedure Rules. The Statement of Facts is signed by counsel who should have sworn a Verifying Affidavit in terms of Order LIII rule 1 (2) of the Civil Procedure Rules. The orders of certiorari sought against the Respondents do not lie, the same having been sought nearly seven years after the alleged decision was made. The order of prohibition sought can only issue to prevent the making of a contemplated decision. The Respondents submitted that no evidence has been led to show that there is a contemplated decision. Evidence on record shows that the decision has been made. It was submitted that mandamus issues to compel performance of public duty imposed by statute where a person/body on whom it is imposed by statute fails/refuses to perform the same. The Applicant seeks for an order of mandamus to issue to the Honourable Minister of Lands and Settlement and/or the District Commissioner to hear the appeal lodged by them on 22<sup>nd</sup> January, 1999, and this is not proper. The Respondents state that mandamus does not lie. The application is incompetent and the orders sought do not lie.

### **The Determination**

7. I have carefully considered the application. Justice Tuiyott, who had earlier on dealt with this matter had directed that the Interested Parties – Jacob Mwalukuku and Henry Mwanjumba - who would be affected if the orders asked for in this application were to be given be served and appear in this matter so that they can defend their interest. Pursuant to that, this court directed that the said Interested Parties be served with the notice of this matter. Upon proper service pursuant to the return of service on court file, a Mr. Chrispus Mwaipala Mwaladi came to court on 30<sup>th</sup> October, 2017 and testified that Danson Kimoto Mwaladi was his elder brother. He is deceased and so the witness came to testify on behalf of the deceased’s estate.

8. The witness also testified that Henry Mwanjumba Madada is his neighbor. He was served with the court process but did not come to court. The witness testified that he was aware of the dispute but that he did not have a direct interest. The suit property belonged to his maternal grandfather Jacob Mwalukuku.

9. However, the witness testified that he had no interest in the suit property. On this ground Mr. Mwenesi, counsel for the ex parte Applicants submitted that the alleged Interested Parties had no interest in the suit property and that the court should proceed and determine the application. Counsel for the Respondents Ms. Waswa did not submit on this issue.

10. This court is satisfied that the alleged Interested Parties were served, and Mr. Chrispus who is grandson of Jacob Mwalukuku testified that he has no interest in the suit property.

11. It is the finding of this court that the alleged interests of the Interested Parties have been fully taken care of and that this court can now proceed to determine the motion before the court.

12. On the substantive issue, this court is concerned with the process under which the impugned decision was made. Because of the emotive land issue, it is important that people tasked with the responsibility of making decisions touching on land do so with a sense of justice and sensitivity. The issue at hand is whether the Respondents provided the ex parte Applicants with an opportunity to appeal their decision. The main argument on the part of the Applicants is that the Respondents declined to avail in time minutes of the objection case to enable the Applicants lodge an Appeal in time. The Judgment was delivered by Mr. Odari on 30<sup>th</sup> October 1998 and in the Judgment Mr. Odari subdivided the land into 3 portions where one portion was awarded to Mr. Jacob Mwalukuku, a second portion was awarded to Mr. Henry Mwanjumba and a 3<sup>rd</sup> portion was awarded to Humphrey Mwamburi, the father to the Applicants – **see paragraph 15 of the Verifying Affidavit sworn by Rophus Mwamburi dated 28<sup>th</sup> September 2004.**

At paragraph 16 of the Verifying Affidavit sworn by Rophus Mwamburi dated 28<sup>th</sup> September 2008, it is averred that Rophus Mwamburi requested for minutes of the objection case to enable him to appeal the aforesaid Judgment. However the minutes were not availed to Rophus Mwamburi in time.

The court was referred to the court exhibit HRWM20 which is a letter dated 26<sup>th</sup> April, 2004. The letter is a follow up on the application made on 16<sup>th</sup> November, 1998 requesting for the minutes of objection and Judgment to enable the Applicants file their appeal. It is clear that the application for minutes was made on 16<sup>th</sup> November, 1998. It is not in dispute that the Judgment was made on 30<sup>th</sup> October, 1998. Had the Applicants been provided with the minutes of objection the appeal would have been filed in time.

The Respondents have not commented on the letter dated 26<sup>th</sup> April, 2004 requesting for minutes in their Replying Affidavit. The Respondents, in the affidavit sworn by Kennedy Njenga have not at all commented on the very important point that they declined to forward the minutes to the Applicants to enable them make the appeal in time.

This is an admission on the part of the Respondents that indeed they declined to process the minutes and forward the same to the Applicants for purposes of appeal.

It is admitted by the Respondents in their Replying Affidavit sworn by Kennedy Njenga that the appeal by the Applicants was filed out of time – see paragraphs 5 of the Replying Affidavit. However the most important point put forth by the Applicants is that they were denied necessary documents to enable them file the appeal, as stated above, the Respondents have not denied this fact. Clearly it was impossible on the part of the Applicants to file an appeal against the decision of the Respondents delivered on 30<sup>th</sup> October, 1998 without the minutes of the objection which gave rise to the Judgment.

If the minutes were forwarded to the Applicants on 7<sup>th</sup> May 2004 and yet the Judgment was made on 30<sup>th</sup> October, 1998, and the Applicants had only 60 days as advised by the Respondents, how could the Applicants appeal within the stipulated time? The court has looked at exhibit HRWM15 annexed to the affidavit of Humphrey Mwamburi. This is a letter from the District Land Adjudication/Settlement Office dated 2<sup>nd</sup> April, 2002 requesting for Memorandum of Appeal from Humphrey Kigombe, the 1<sup>st</sup> Applicant herein. The question to ask is, how could Humphrey Kigombe come up with a Memorandum of Appeal without the minutes of the objection giving rise to the Judgment delivered on 30<sup>th</sup> October, 1998? It is after going through the minutes that the Applicants would have been in a position to draft the Grounds of Appeal. The court also considered exhibit HRWM17 annexed to the Verifying Affidavit of Humphrey Mwamburi, the 1<sup>st</sup> Applicant herein. The exhibit is a letter dated 2<sup>nd</sup> February, 1999 from the District Commissioner addressed to the District Land Adjudication & Settlement Officer. The letter highlights on the issue of the minutes of objection case which the Applicant applied for. This letter confirms that the Applicants were really desperate to be supplied with the minutes to enable them file an appeal.

13. The Respondents had submitted that the application was filed seven (7) years after the decision sought to be quashed, and that because of this the motion should be dismissed. Indeed in Judicial Review the decision to be quashed should have been made within six (6) months preceding the filing of the motion. This motion was filed on 7<sup>th</sup> October, 2004 while the decision to be quashed was made on 30<sup>th</sup> October, 1998. However, the correspondences and documentary evidence herein show that the Applicants severally sought the minutes of the decision from the Respondents but the same were not availed until Friday 7<sup>th</sup> May, 2004. This is the date deemed to be the date of decision, because an appeal can only be lodged with the documents including the minutes of the decision to be impugned. So, if the minutes were availed on 7<sup>th</sup> May, 2004, and the motion here filed on 7<sup>th</sup> October, 2004, the application herein was filed within the time allowed in the Judicial Review proceedings.

14. For all the foregoing reasons, the motion herein is allowed as prayed with costs to the ex parte Applicants.

Orders accordingly.

**Dated, Signed and Delivered in Mombasa this 20<sup>th</sup> day of March, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Mutiso holding brief Mwenesi for Applicant

Ms. Kiti holding brief Ms. Wasuna for Respondents

Mr. Kaunda Court Assistant