



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. JR APPLICATION No. 4 OF 2013

BETWEEN

REPUBLIC.....APPLICANT

VS.

DISTRICT COMMISSIONER IGEMBE SOUTH DISTRICT....1ST RESPONDENT

IBRAHIM KARAGARA MWAMBIA.....INTERESTED PARTY

EX PARTE: JOSEPH NDUNGU NJUGUNA.

JUDGMENT

1. The Notice of Motion dated 5th March 2013 seeks two prayers. I will replicate them herein below verbatim as follows:

i. That the honourable court be pleased to issue an order of certiorari to quash the decision/ruling of the Appeal to the Minister Case No 338/2010 delivered on 19/12/2012 at Igembe South District;

ii. That cost of the Application be in the cause.

2. The notice of motion is brought under **Order 53 Rules 3(1), (2), (3), and (4)** Of The **Civil Procedure Rules (Cap 21)** and **Sections 8 and 9** of the **Law Reform Act (Cap 26)**.

3. The Notice of Motion is founded on the grounds that the appeal is an abuse of the court process and the respondent lacked jurisdiction to hear and determine it as he had heard another similar appeal arising out of the same cause of action being **Appeal Number 224 of 2010** in which a different finding was made. The doctrine of *res judicata* is pleaded by the applicant.

4. The motion is supported by an affidavit of the applicant sworn on the 5th March 2013. This is a different affidavit from that sworn on 19/2/2013 in support of the application for leave. Since no leave of court has been demonstrated to have been secured in order for the applicant to file and serve that affidavit and for purposes of the record this court will rely on the verifying affidavit of 19/2/2013.

5. The interested party filed his response by way of an affidavit he swore on the 2nd July 2013. In that affidavit he averred that the agreement over the suit land was between the fathers of the applicant and the father of the interested party both who are deceased and in respect of whose estates the two opposing parties have not respectively obtained letters of administration. He therefore opines that both the applicant and the respondent herein lack locus standi in these proceedings. In the same vein he also avers that the proceedings before the Land Board and the Appeal to the Minister were nullities *ab initio* and do not affect the *status quo* as it exists now. In the same breath he lauds the ruling by the District Commissioner in the second appeal as it appears to him that it laid down the correct factual and legal position. He castigates the ruling in **Appeal Number 224 of 2010** as a nullity.

6. Further the interested party avers that the applicant is estopped from challenging the proceedings in **Appeal Number 338/2010** as he participated fully therein.

7. The respondent also filed grounds of opposition dated 30/9/2013 in response to the motion. The grounds filed by the respondent fault the grounds relied on by the ex parte applicant as not being proper for orders of judicial review and also state that **Section 7** of the **Civil Procedure Act** is not applicable in judicial review proceedings. They also state that the application offends the provisions of **Order 53 Rule 4(1) and (2)** of the **Civil Procedure Act**.

8. The ex parte applicant filed his submissions in this matter on the 11th October 2013. The interested party filed his submissions on the 15th

October 2013 and the respondent on 3rd December 2014.

9. In my view the main issue that arises here is whether the doctrine of *res judicata* applies to the proceedings before the Minister.

10. The facts in this case are that the interested party gathered land belonging to his deceased father and therein included land that had allegedly been purchased by the applicant's father. The applicant filed objection proceedings before Board and the Board ruled against him. He filed an appeal against the decision of the board being the first **Appeal No. 224 of 2010** which was decided in his favour and by which decision he was given 5 acres. Later the interested party filed the second appeal that is **Appeal Number 338/2010** which was heard and determined on the **19th December 2012** in which the applicant lost the entire land that he had been awarded in **Appeal Number 224/2010**.

11. It is the fact of entertaining a second appeal that made the applicant an aggrieved party and he now challenges it in these proceedings, stating that it is an abuse of the respondent's office, an abuse of the process of the law and a nullity.

12. It has not been disputed by the respondent and the interested party that there were two appeals. As I have noted before the interested party, like the aesopian satyr, seems to be blowing both hot and cold with the same mouth by stating that though both parties lacked letters of administration to their respective fathers' estates at the time of institution of both appeals, the decision in the appeal that he lodged that is **Appeal Number 338 /2010** was the correct one. The interested party cites the case of **Katumo and Another [2003] 2 EA 509**.

13. In my view the proceedings in **Appeal Number 224/2010** still stand as the interested party never set the decision aside by way of judicial review or otherwise. In view of that confirmed finding, was the respondent entitled to file the second appeal, which is **Appeal Number 338 of 2010**.

14. The provisions in the **Land Adjudication Act Cap 284** of the Laws of Kenya provide for one appeal to the minister. **Section 29** of that Act states as follows:

(1) 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—

(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.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall—

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

(4) Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister."

15. According to the provisions of that section, which is the only section under which each of the parties could have appealed to the minister, there is no provision for a second appeal to the minister.

16. I have perused the response and the submissions of the interested party and I have found no legal basis for the appeal that he filed before the minister after an earlier appeal had been lodged and determined by the minister in respect of the same dispute.

17. The applicant on the other hand relies on the decision in **Anisminic Limited Vs The Foreign Compensation Commission [1969] 2 AC 147**. He submits that what belonged to his father before his demise automatically passed on to him. He further relied on the case of **R Versus The Minister For Information And Broadcasting Ex Parte Ahmed Jibril Ex Parte East African Television Network Nbi Miscellaneous Application 403 Of 1998**.

18. Concerning *locus standi* of the parties in this appeal, the case cited by the interested party has facts of a drastically different nature from those in the instant case. That cited case concerned the interest of a disputed creditor who wished to have the court order the taking into protective custody of the vehicle belonging to a deceased debtor to prevent it from being reduced to a shell by the respondents. It is in those circumstances that the court held as it did.

19. In this case the subject matter is land that was subject of the land adjudication process under the Land Adjudication Act Cap 284.

20. I am in great doubt as to whether the defence that the applicant lacks *locus standi* can stand in this case. I subscribe to the dicta of the

court in the decision in **R Versus The Minister For Information And Broadcasting Ex Parte Ahmed Jibril Ex Parte East African Television Network Nbi Miscellaneous Application 403 Of 1998** as cited by the applicant herein.

21. Also, in the case of **Tobias Achola Osindi And 13 Others Vs Cyprianus Otieno Ogalo & 6 Others Kisii Civil Case No 4 Of 2011**, the court observed as follows:

“A claim for an interest in land made under the Land Adjudication Act, Cap. 284, Laws of Kenya (hereinafter referred to only as “the Act”) following the declaration of an area as an Adjudication Area or an Adjudication Section cannot be equated to a claim before this court. A claim under the Act pursuant to section 13 thereof can be made by “every person who considers that he has an interest in land within an adjudication section”. A claim under section 13 of the Act can be made by successors of a deceased person and not necessarily the deceased’s legal representatives. See, section 13 (5) of the Act. The purpose of a claim under the Act is to aid in the ascertainment of the rights and interest of persons in the land within an adjudication area.”

22. The applicant’s lack of letters of administration did not therefore matter as he was pursuing an interest under the Act. This court has also found that a second appeal before the minister is not envisaged within the rubric of **section 29** of the Act.

23. The illegality of the second appeal from its very inception having been exposed, this court must quash the decision made in that appeal as it amounts to a nullity.

24. I therefore find that the applicant’s application dated **5th March 2018** has merit. I therefore enter judgment against the respondent and the interested party and I issue an order of certiorari to bring up into this court for quashing and quash the decision/ruling of the **Appeal to the Minister Case No 338/2010** delivered on **19/12/2012** at Igembe South District. The costs of this judicial review proceedings shall be jointly and severally borne by the respondent and the interested party.

Dated, and signed at Kitale on this 1st day of August, 2018.

MWANGI NJOROGÉ

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August, 2018 in open court in the presence of:

Mr. Mutunga holding brief for Mr. Kariuki for interested party

N/A for applicant

Mr. Kiongo for respondent

C/A Mutua

MWANGI NJOROGÉ

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.