



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELC JR MISC CIVIL APPLICATION NO. 3 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION, AND CERTIORARI

AND

IN THE MATTER OF AN APPEAL TO THE MINISTER LAND APPEAL CASE NO. 258 OF 2003 FRANCIS NJERU NTHAKANIO (DECEASED) REPRESENTED BY ALBERT NJERU GACHONI

AGAINST

RUGANO NTHIGA

AND

IN THE MATTER OF MBITA LAND ADJUDICATION SECTION

AND

IN THE MATTER OF MBITA LAND ADJUDICATION SECTION

AND

IN THE MATTER OF LAND PARCELS/TITLES NUMBER MBEERE/MBITA/2350, 2351, 2352, 2352, 2353, 2348, 2347, 2349, 2184, 2185, 2186, 2169, 2188, 2189, 2187, 2176, 2171, 2199, 2197, 2196, 2198, 2202, 2203, 2193, 2191, 2190, 2194, AND 4012

JOSPHAT NYAGA MUKEMBO.....APPLICANT

ON BEHALF OF 21 OTHERS AS LISTED)

VERSUS

THE HON. ATTORNEY GENERAL1ST RESPONDENT

MINISTER FOR LANDS.....2ND RESPONDENT

AND

FRANCIS NJERU NTHAKANIO (DECEASED)

REPRESENTED BY ALBERT NJERU GACHONI.....1ST INTERESTED PARTY

RUGANO NTHIGA.....2ND INTERESTED PARTY

THE LAND REGISTRAR MBEERE DISTRICT.....3RD INTERESTED PARTY

JUDGMENT

By a Notice of Motion dated 4th May 2012 and filed herein on 9th May 2012, the applicant herein **JOSPAT NYAGA MUKEMBO** acting on behalf of 21 others seeks the following orders:-

1. *That an order of certiorari be issued bringing into this Court and quashing the decision of the 2nd respondent dated 27th October 2011 in Appeal No. 258 of 2003 depriving the applicants their property without a reasonable cause and for being reasonable (sic), irregular and against the rules of natural justice.*
2. *That an order of prohibition, prohibiting the Land Registrar Mbeere District from registering the disputed portions of land to wit titles No. MBEERE/MBITA/2350, 2351, 2352, 2353, 2347, 2349, 2184, 2185, 2186, 2169, 2188, 2189, 2187, 2176, 2171, 2199, 2197, 2196, 2198, 2203, 2193, 2191, 2190, 2194 and 4012 to the 1st interested party herein pending.*
3. *That a stay of the intended action by the Land Registrar Mbeere District to register the disputed portions of land to wit titles No. MBEERE/MBITA/2350, 2351, 2352, 2353, 2347, 2349, 2184, 2185, 2186, 2169, 2188, 2189, 2187, 2176, 2171, 2199, 2197, 2196, 2198, 2203, 2193, 2191, 2190, 2194 and 4012 to the 1st interested party herein.*
4. *That costs of this application be provided for.*

The applicant swore a verifying affidavit and lodged a statement in support of his application in which he set out the grounds in support thereof. His case is that he represents the other applicants as per the list provided and that the 1st and 2nd interested parties were parties in the Minister's Land Appeal Case No. 258 of 2003 and at the Mbeere District Commissioner's office at Siakago in which the subject matter therein was the same subject matter in this application. That the conduct of the Minister's Land Appeal Case No. 258 of 2003 was done without calling at the parties concerned and whose titles were issued before the commencement of the suit. That the findings and award by the respondent in Minister's Land Appeal Case No. 258 of 2003 is grounded on biased conduct of the dispute and without the representation of either the respondent or the affected parties which is clearly against the rules of natural justice. That the respondent in his ruling dated 27th October 2011 in Appeal Case No. 258 of 2003 irregularly allocated some portions of the land parcels listed above to the 2nd interested party without a reasonable basis whatsoever and did not give any reason or grounds for deviating from the District Commissioner's ruling dated 24th January 1990 in Objection Cases No. 84 of 1981 and 83 of 1980. That the findings by the respondent did not consider the fact that the dispute land had already been awarded to the respondent in Minister's Appeal Case No. 258 of 2003 and who had already sold the land to the applicants and issued titles to them before the appeal was commenced. That the respondent declined the applicant's plea to be enjoined as interested parties in Appeal Case No. 258 of 2003 and therefore in declining to give the applicants a hearing, the respondent was unfair and acted in breach of the rules of natural justice and ultra vires by revoking titles.

The 1st interested party **FRANCIS NJERU NTHAKANIO** (deceased) was represented by **ALBERT NJERU GACHONI** who swore a replying affidavit in which he deponed, inter alia, that the application lacks merit and is an abuse of the Court process. That in the Appeal Case No. 258 of 2003, he was the appellant representing the **IKUNDA CLAN** while **RUGANO NTHIGA** was the respondent representing the **IKANDI CLAN** and vide the decision subject of this application, the Minister awarded the **IKUNDA CLAN** land parcels No. MBEERE/MBITA/2184, 2185, 2186, 2195, 2196, 2197, 2169, 2189, 2187, 2171, 2198, 2203, 2194, 2176, 2199, 2202, 2193, 2191 and 2192. That land parcels No. MBEERE/MBITA/2350, 2353, 2347, 2351, 2348, 2349 and 2352 were not the subject matters in Land Appeal Case No. 258 of 2003 and were instead the subject of Land Appeal Case No. 254 of 2003 which is still pending and which arose from Objection Cases No. 83 of 1981 and 84 of 1981. That the applicant who is a member of the **IKANDI CLAN** of the **MBEERE** Tribe was not a party to Land Appeal Case

No. 258 of 2003 but his interests were represented by **RUGANO NTHIGA** the 2nd interested party who is the Chairman of the **IKANDI CLAN**. That the applicant is purporting to represent 30 people yet one of those persons is **DOUGLAS KARIUKI MUNDIA** who is listed as number 11 and 17 in the list as claiming land parcels No. MBEERE/MBITA/2185 and 2191 who has also filed Judicial Review Application No. 15 of 2012 and 205 of 2011 and the applicant is actually seeking to appeal from the Minister's decision through this application which is un-procedural. That prior to the hearing of the Appeal Case No. 258 of 2003, the summons were served upon the parties through the applicant who is the Chief of Mbita Location and who was also present when the District Commissioner and the parties went round the land parcels subject of this case. That the applicant has not demonstrated that the parcels of land in question belonged to people who were not represented in the Appeal Case No. 258 of 2003 and if the respondent in that appeal **RUGANO NTHIGA** was aggrieved, he would have challenged the decision which he has not done.

In a supplementary affidavit, the applicant reiterated the contents of his verifying affidavit adding that the Minister's award in Appeal Case No. 258 of 2003 to the 2nd interested party was not only irregular but was also illegal and without reasonable basis and no reasons were given for deviating from the District.

Commissioner's ruling of 24th January 1990 in Objection Cases No. 84 of 1981 and No. 83 of 1980. That the **IKUNDA CLAN** is an adopted clan only found in the Mbita adjudication section and not any other place in the larger Mbeere Community region. That in finding for the 1st interested party, the respondent declined to accept the applicant's plea to be enjoined in Appeal Case No. 258 of 2003 and so their interests were not considered and this is not an Appeal from the Minister's decision but rather, what is being questioned is the irregular process by which the decision was arrived at. That **RUGANO NTHIGA** was aggrieved but did not challenge the decision due to old age and died on 6th May 2013 aged over 86 years. That the respondent proceeded to preside over the Appeal Case No. 258 of 2003 against the advice of the Director of Land Adjudication.

Neither the respondent nor the 2nd and 3rd interested parties filed any response to the application.

Submissions and further submissions have been filed by **KAMUNDA NJUE** advocate for the applicant and **DUNCAN MUYODI** advocate for the 1st interested party.

I have considered the application, the rival affidavits and the submissions by counsel.

In the case of **PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL AND OTHERS (2008) 2 E.A 300** the Court set out the duty of a Court in Judicial Review applications as follows:-

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”

The parameters of Judicial Review were re-affirmed by the Court of Appeal in the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS LTD C.A CIVIL APPEAL NO. 185 of 2001** where it held:-

“Judicial Review is 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 maker 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”

In Judicial Review therefore, the Court must not be seen to be usurping the powers of the body whose conduct is a question. The Court must also be alive to the fact that ordinarily, bodies whose procedures are laid down by statute are masters of their own procedure and must be allowed the latitude to do so as long as they proceed with the degree of fairness expected of them. That is, their procedures must bear in mind the test of illegality, irrationality and procedural impropriety as discussed in the ***PASTOLI*** case (supra).

The applicant’s Notice of Motion must therefore be considered in the light of the above broad principles.

It is not in dispute that the Minister was, by virtue of the provisions of ***Section 29 of the Land Adjudication Act***, empowered to hear Appeal case No. 258 of 2003. In so doing, the Minister’s duty is to ***“determine the appeal and make such orders thereon as he thinks just”*** – ***TIMOTHEO MAKENGE VS MANUNGA OGOCHI 1979 K.L.R 53.*** The Appeal to the Minister in Appeal Case No. 258 of 2003 arose from the awards made on 24th January 1990 by the Land Adjudication Officer Mbita Section in Objection Cases No. 83 of 1980 and No. 84 of 1981. That is clear from the record of the proceedings before the Land Adjudication Officer. The District Commissioner in hearing the Appeal Case No. 258 of 2003 clearly had the jurisdiction to do so on behalf of the Minister as authorized by law did not act ultra vires. The law allows the District Commissioner to exercise such delegated authority. But did the District Commissioner over-step his jurisdiction?

One of the issues raised by the applicant is that the Minister acted ultra vires by revoking titles already issued. A copy of the title to land parcel No. MBEERE/MBITA/4012 was part of the applicant’s annexures **JNM 3**. It is in the names of **ESTON MITARU** who is named as one of the persons on whose behalf this application is filed. That title deed was issued on 27th November 2009 some two years before the decision subject of this application was made. That land parcel is among those subjects of this application. There is also a certificate of search in respect of land parcel No. MBEERE/MBITA/2202 showing that the land is registered in the names of **GACONI KINGETHU** who is also on the list of those persons on whose behalf this application has been filed.

Lastly, there is a letter from the Director Land Adjudication and Settlement dated 27th September 2011 (exactly one month before the appeal No. 258 of 2003 was determined). That letter is addressed to the District Commissioner Mbeere North District (and who heard the appeal on behalf of the Minister. The said letter (annexture **JNY 5**) is important and I shall reproduce its contents. It reads:-

“RE: APPEALS TO THE MINISTER CASE NOS 309/1998 NYAGA KAMAU VS DOUGLAS KARIUKI MONDIA AND RUGANO NTHIGA CASE NO. 258/2003.

Reference is made to a letter to this office by Wilson Muriuki Mategi for Ikanda Clan and Easton Mitaru Njagi for Mbandi Clan regarding their above mentioned appeals.

According to the complaint, the appeals are touching on already registered plots which should not be the case and also it appears that some have been filed out of time.

It is my opinion that you suspend the hearing of these appeals and send the files back to this office for my further scrutiny and advice on the way forward

P.K. MWANIKI

FOR: DIRECTOR LAND ADJUDICATION & SETTLEMENT”

The 1st and 2nd respondents who would have responded to this letter have, as indicated above, not participated in these proceedings. What is important however, is that notwithstanding the contents of that letter and the fact that there was evidence that some of the land parcels had titles already issued, the District Commissioner arrived at the decision that he did which was to award the land to **FRANCIS NJERU NTHAKANIO** (deceased) who is represented herein by the 1st interested party **ALBERT NJERU GACHONI**. Even in his own proceedings at the hearing of the appeal, the District Commissioner **Mr. J.K. CHELIMO** has recorded as:-

“After Rugano Nthiga won the case at objection stage, he sub-divided the land into 21 parcels and sold to several buyers. They include some of the following:-

Parcel number 2192 – Mate Mate sold to Patrick Muriithi Mwaniki, 2186 sold to Kamau Muchiri (title deed issued), 2185 sold to Douglas Kariuki Mundia (one of the respondent)”

It is clear from the above that even as the District Commissioner was hearing the appeal, it was made known to him that titles had been issued to some of the land parcels in dispute and he was advised by none other than the Director, Land Adjudication to “**suspend the hearing of these appeals**” and return the files to the Department. That advice was ignored with the result that the District Commissioner proceeded to make the orders that he did which were ultra-vires because he had no jurisdiction to revoke titles. Lack of jurisdiction, as **MADAN J.A** (as he then was) held in the case of **CHOITRAM & OTHERS VS MUSTERY MODEL HAIR SALOON 1972 E.A 525**, can arise in two ways firstly, where the Tribunal is not permitted by law to hear the dispute before it or secondly, where the Tribunal, though clothed with the power to hear a dispute steps out of its jurisdiction. See also **OWNERS OF THE MOTOR VESSEL ‘LILLIAN S’ VS CALTEX OIL (KENYA) LTD (1989) K.L.R 1** where the Court of Appeal held that jurisdiction is everything and once there is no jurisdiction, the Tribunal must down its tools and further, that if such jurisdiction depends on the existence of a particular state of facts, the Court or Tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction over the dispute before it. In this case, the Land Adjudication and Settlement Department brought to the attention of the District Commissioner that facts existed that placed the dispute beyond his jurisdiction but that advice was not heeded. Counsel for the 1st interested party has interpreted **Section 28 of the Land Adjudication Act** as providing that any registration done during the pendency of an appeal under **Section 29** of the said Act is only provisional to endure until the appeal is determined. That is correct but there is no evidence placed before me to demonstrate that the registration of some of the land parcels subject of this application was provisional or that any restriction was made and registered in respect of those parcels of land pending the determination of the Appeal.

Having considered all the materials herein, it is clear to me that the decision of the Minister (the 2nd respondent) issued on 27th October 2011 in Appeal Case No. 258 of 2003 was irregular in that it purported to cancel a title already issued which was the preserve of the High Court then, and now this Court, by virtue of **Section 80 of the Land Registration Act**. That decision is therefore amenable to being quashed.

The applicant did seek orders of prohibition, prohibiting the Land Registrar Mbeere District from registering the disputed portion of land to wit Titles numbers MBEERE/MBITA/2350, 2351, 2352, 2353, 2347, 2349, 2184, 2185, 2186, 2169, 2188, 2189, 2187, 2176, 2171, 2199, 2197, 2196, 2198, 2203, 2193, 2191, 2190, 2194 and 4012 to the 1st interested party herein. This Court having quashed the Minister’s decision dated 27th October 2011 in Minister’s Appeal Case No. 258 of 2003, it follows that there is nothing to prohibit as the registration cannot proceed. However, for avoidance of doubt, the order of prohibition is merited. It is issued.

Ultimately therefore, the applicant’s Notice of Motion dated 4th May 2012 and filed herein on 9th May 2012 is allowed as prayed. Each party to meet their own costs.

B.N. OLAO

JUDGE

9TH JUNE, 2016

Judgment delivered, dated and signed in open Court this 9th day of June 2016.

Ms Ndorongo for Mr. Kamunda for the Applicant present

Mr. Muyodi for the 1st Interested party present

Attorney General for the Respondent absent

Right of appeal explained.

B.N. OLAO

JUDGE

9TH JUNE, 2016