



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 216 OF 2005

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

MAKUENI DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER.....3RD RESPONDENT

AND

WALLANCE MUTUNGWA MATOLO1ST INTERESTED PARTY

PHILIP KILONZO MOKI MATOLO FOR

ESTATE OF MOKI MATOLO.....2ND INTERESTED PARTY

MAUNDU MATOLO.....3RD INTERESTED PARTY

AND

LEVI WILLIAM MUOSO.....1ST EX PARTE

DANIEL MUIA MATOLO.....2ND EX PARTE

R U L I N G

1. The exparte Applicants obtained leave of this court to apply for orders of prohibition and mandamus directed against the Director of Land and Settlement, the Chief Land Registrar whereafter they filed a substantive Notice of Motion seeking orders that:

- i. An order of prohibition to issue against the Director of Land and Settlement from declaring the

Kivani Land Adjudication Section final before **Objection No. 352 of 1983** is heard and determined.

ii. An order of prohibition to issue against the Chief Land Registrar from registering and issuing Title Deeds for the plots Numbers **576, 801, 802, 803, 804, 809, 810, 820** and **948** situated at **Kivani Adjudication Section** in **Makueni District** in the names of the registered owners before hearing and determination of **Objection No. 352 of 1983**.

iii. An order of Mandamus do issue against the Makueni District Land Adjudication and Settlement Officer to hear and determine **Objection No. 352 of 1983** and implement the decision made therein before the Registrar in respect of **Kivani Land Adjudication Section** and in particular for the aforesaid plots numbers **576, 801, 802, 803, 804, 809, 810, 820** and **948** is declared final and closed.

2. Per the statement of facts relied on, Kivani sub-location was declared a Land Adjudication Section on the **28th October 1974** and several people, the interested parties herein **Wallance Mutungwa Matolo, Phillip Kilonzo Moki Matolo** (representing the estate of Moki Matolo) and **Maundu Matolo** were registered as proprietors of plots **Nos. 576, 809,803** and **810** respectively.

3. The exparte Applicant and one **Martin Matolo** (deceased) who were dissatisfied with the adjudication process and the fact that the applicable customary law was ignored filed an **Objection No. 352 of 1983**. The Respondents were **Wallance M. Matolo** (1st interested party and now deceased), **Wilfred Kivanga Matolo** and **Isika Matolo** (deceased).

4. The District Land Adjudication Officer referred the objection to the **Aombe clan** for determination. Before the decision could be adopted by the District Land Adjudication and Settlement Officer, **Wallance Matolo, Wilfred Kivanga** and **Isika Matolo** filed Miscellaneous Application **No. 10 of 1991** against the refusal to be granted by the Land Adjudication Officer.

5. The application in the High Court and the subsequent appeal were struck out. The **Objection No. 352 of 1983** is, therefore, pending as there is no decision made declaring the rights of the parties and issuing of the title deeds without finalizing the same would be prejudicial to the interests and rights of the Applicants herein.

6. The Respondents did not file any response.

7. In response, the interested parties stated that the adjudication process was completed on or about **18th October, 2010** and the final adjudication register with a list of appeals pending before the Minister annexed thereto forwarded by the Director of Land Adjudication and Settlement to the Chief Land Registrar for registration and issuance of title deeds.

8. Further, it was stated that the Director of Land Adjudication and Settlement gave to the Chief Land Registrar a certificate of finality for **Kivani Adjudication Section** and closed the whole exercise of adjudication except for the appeals that were pending before the minister. This being the case the Director of *functus Officio* and hence barred by law from opening the judicial proceedings.

9. In 1975 the Land Adjudication Officer gave consent to **Wilfred Kivanga** and **Muoso Matolo** to proceed with a case in **Kilungu Court DMCC No. 1. 12/74**. The land parcel number in dispute was, however, not indicated which made it difficult to identify the suit premises. Parties to the suit died 20 years ago and the case abated.

10. Therefore, the applicant took the capacity to file the objection and the instant case being against the deceased should be dismissed. The Kamba customary law has been ousted after registration of land. The suit land was not ancestral land to be shared between **Matolo Ndua** and his brother **Kikunze Ndua**. The purported clan proceedings dated **5th March, 1991** are a letter written to the 3rd Respondent which is a

nullity as it is signed by a stranger.

11. In this matter the Respondents did not respond to the application. Affidavit evidence availed is, therefore, of the exparte applicants and the interested parties establish that after an objection was filed challenging the award of plots to various people, the exparte applicants inclusive, the interested parties sought a consent to be heard in court. The Land Adjudication Officer declined to grant the consent. Consequently the objection was referred to the clan elders who were to determine the issue. The decision was to be adopted by the Land Adjudication Officer.

12. The dissatisfied party moved to the High Court by way of Notice of Motion seeking orders of certiorari to quash the decision of the Land Adjudication Officer. The procedure invoked was wrong. They ought to have appealed to the Minister who would have given a final decision. Pursuant to **Section 30(3)** of the **Land Adjudication Act**, the application was struck out. An appeal lodged in the Court of Appeal was also struck out for being incompetent.

13. This, therefore, gave the clan an avenue to hear the matter as directed by the land Adjudication Officer. The clan had been given one (1) month within which to hear the matter from the **5th February, 1991**. There was correspondence (Annexure MMM7(d)) where the District Land Adjudication Settlement Officer was warned about continuing to hear the objection despite contrary instructions having been given by the Director.

14. By a letter dated **15th November, 1994**, (Annexure MMM 7(a)) the District Land Adjudication Settlement Officer had pointed out to the Director that **Objection No. 352** was pending and that is what was impeding the progress of Kivani Adjudication work. It is, therefore, apparent that the objection was not heard.

15. Further affidavit evidence adduced proved that there was a final adjudication register for Kivani Adjudication Section, Makueni. Per the list of appeal to the Minister – Kivani Adjudication Section attached thereto amongst the suit plots – only plot **No. 810** belonging to **Isika Matolo Ndua** who is not a party to this application is mentioned as having preferred an appeal to the Minister.

16. This, therefore, brings us to the issue whether the order of prohibition sought should issue. **Section 26** of the **Land Adjudication Act** provides:

“(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.”

“(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such consultation and inquiries as he thinks fit he shall determine the objection.”

It was mandatory on the part of the Adjudication Officer to determine the objection and come up with the decision. It is apparent that the objection was not heard following allegations of corruption against the officer. The objection having not been heard, the issue raised was not addressed which was contrary to the rules of natural justice. What was done was in disregard of the laid down process. It is apparent that the land adjudication officer failed to exercise his power as provided by the law. He failed to provide natural justice to the applicant which necessitated seeking an order of prohibition.

17. According to annexure MMM 2, the Land Adjudication Officer sent all records in respect of Kivani Adjudication Section to the Director for registration purposes. This would insinuate that the adjudication register had been finalized, subject to appeals. It envisaged a situation where all objections had been determined as envisaged by **Section 17** of the **Land Adjudication Act**.

18. Subsequently a certificate of finality for the Adjudication Section was sent to the Chief Land Registrar (vide annexure “MMM 3).

19. Annexure MMM 4 is evidence of title deeds having been issued to two (2) of the interested parties. The Chief Registrar could only know if there was an appeal if a restriction existed. Evidence of such restriction if any having not been availed the Chief Land Registrar could not be faulted for action taken.

20. There being evidence of registration and issuance of title, this court could only issue an order of prohibition after the decision made by the Director and consequently the Chief Land Registrar had been quashed and expunged from the record. This was well put in the case of **Republic versus Kenya National Examinations Council Exparte Gathenji & Others Civil Appeal No. 266 of 1996** where it was stated:

“Only an order of certiorari can quash a decision already made. An order of certiorari will issue if the decision is without jurisdiction in excess of the jurisdiction, or where the rules of natural justice are not complied with.” (also see Thianie Mbui & Another versus Land Adjudication Officer Tigania West District & Another (2014(eKLR).

21. This court cannot make an order in vain.

22. An order of mandamus could only have issued against the Land Adjudication Officer to hear and determine the objection if the duty he was required to do had not been overtaken by events. Subsequent orders by the Director and the Chief Land Registrar having not been set aside, the officer cannot be commanded to hear the objection in vain.

23. In the result the application fails. The same is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of APRIL, 2015.

L.N. MUTENDE

JUDGE