



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS JUDICIAL REVIEW CIVIL APPLICATION NO. NO. 221 OF 2013

IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS

AND

**IN THE MATTER OF AN APPLICATION BY JOHNSTONE MAINA KISENGI FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS
AGAINST THE RESPONDENTS**

AND

**IN THE MATTER OF THE ASSISTANT COUNTY COMMISSIONER, MUTITU SUB-COUNTY
FORMERLY THE DISTRICT OFFICER, MWITIKA DIVISION IN THE LAND DISPUTE
REFERENCE NO. MTT/MTK/ADM/VOLI/382**

**IN THE MATTER OF ALL THAT UNSURVEYED LAND SITUATED ALONG VOO-MWITIKA
ROAD IN NDULANI VILLAGE, NZANZU SUB-LOCATION COUNTY AS DELIENATED IN
THE AOMBE CLAN ELDERS VERDICT DATED 18TH JUNE 2011**

REPUBLIC.....APPLICANT

BETWEEN

THE ASSISTANT COUNTY COMMISSIONER,

**MUTITU SUB COUNTY FORMERLY THE DISTRICT OFFICER MWITIKA
DIVISION 1ST RESPONDENT**

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

KULA IKANZA 3RD RESPONDENT

KAMUTI KILONZO 4TH RESPONDENT

AND

NZUKUU KATUMO 5TH RESPONDENT

MUSANGO KATUMO	6 TH RESPONDENT
SAA MUSANGO	7 TH RESPONDENT
KAMETA NZUKUU	8 TH RESPONDENT
MUVEVA NZUKUU	9 TH RESPONDENT
JUMA NZUKUU	10 TH RESPONDENT
MULU NZUKUU	11 TH RESPONDENT

RULING

1. The amended notice of motion dated 26.3.2014 seeks orders that;
 1. That this Honourable court be pleased to issue Judicial Review Order of Certiorari to remove to this court and quash the whole of that panel of Elders decision of the first respondent pronounced on 13th July 2013 and contained in his letter dated 6th August 2013 where it was held that:-
 - a. The elders through the assistance of some family members subdivided the land according to Katumo Mulandi's wives-Kambua and Mukei equally.
 - b. Any person aggrieved by the decision of the elders should seek court redress. The office only arbitrated and found out that an anomaly was done during subdivision by the Aombe clan members.
 - c. The decision of the elders should be respected pending the outcome from a competent jurisdiction.
 2. That this honourable court be pleased to issue Judicial orders of Mandamus compelling the first respondent, his agents and/or servants to remove or evict the 5th, 6th, 7th, 9th, 10th and 11th respondents by themselves, their representatives, servants and or agents from the suit land suit forthwith failure to which the Officer Commanding the nearest Police station do evict the said 5th, 6th, 7th, 8th, 9th, 10th and 11th by respondents themselves, their representatives, servants and/or agents from the suit land forthwith.
 3. That costs of these proceedings be paid by the respondents in any event.
2. The application was filed pursuant to the leave of the court granted herein on 5/9/2013. According to the verifying affidavits and the statement of grounds and facts, the ex parte applicant, Johnstone Maina Kisengi (hereinafter applicant), the land the subject matter of there proceedings is a subdivision of the late Katumo Mulandi's unsurveyed land. That the suit land was subdivided by the Aombe clan elders between the two widows of the deceased, Mukei and Kambua. Subsequently, the applicant purchased the land allocated to the house of Kambua. The members of family of the Mukei house who were not satisfied with the elders decision complained to the Chief and to the District Officer Mwitika Division, now Assistant Sub-county commissioner (1st respondent). That the Assistant-sub county Commissioner arbitrated over the matter and in a letter dated 6-8-2013 communicated a decision which he termed as "PANEL OF ELDERS DECISION". The said decision marked a new boundary on the land of the late Katumo Mulandi, thereby hiving off some of the land that had been purchased by the applicant. According to the applicant, the decision by the 1st respondent offended the principles of natural justice and was *ultra vires*.
3. The 1st Respondent, the Assistant Commissioner Mutitu sub-county filed a replying affidavit in opposition in the application. He stated that when the land dispute was referred to his office he appointed some elders to establish the nature of the dispute. That the elders subdivided the land afresh in accordance with kamba customary law. The Assistant commissioner then communicated the elders decision to the parties. That no grant of letters of Administration have been obtained in the estate of the late Katumo Mulandi and therefore the parties herein lack the requisite legal

capacity to bring these proceedings.

4. The 5th Respondent, Nzukuu Katumo opposed the application. His replying affidavit gives the history of the family's land dispute.
5. The application was argued by way of written submissions which I have duly considered.
6. It is abundantly clear that the dispute herein is a succession dispute relating to the estate of the Late Katumo Mulandi. The dispute therefore falls squarely within the law of succession Act cap 160 Laws of Kenya. The "panel of elders" constituted by the Assistant commissioner is a creature that is not know in law. The Assistant commissioner clearly acted *ultra vires*. Consequently, the decision of the panel of elders is void *ab nitio*.
7. With the foregoing, I find merits in prayer no. 1 of the application and allow the same. Prayer no. 2 deals with merits of the case and can only be determined when the disputes has been heard by a court of competent jurisdiction. For the avoidance of doubt, the land dispute remains undetermined. The parties should therefore maintain the *status quo* which was the existence prior the decision of the "panel of elders" communicated in the letter dated 6/8/2013. Each party to meet own costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 16th day of December, 2015.

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B. THURANIRA JADEN

JUDGE