



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CAUSE NO. 116 OF 2013**

**IN THE MATTER OF AN APPLICATION BY ONESMUS WAMBUA KASIVO FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE MINISTER OF LANDS**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL AT MBOONI EAST BY THE CHAIRMAN (DISTRICT COMMISSIONER)**

**AND**

**IN THE MATTER OF MBOONI EAST DISTRICT LAND DISPUTES TRIBUNAL UNDER CAP 18 OF 1990 LAWS OF KENYA (REPEALED)**

**AND**

**IN THE MATTER OF THE ENVIROMENTAL AND LAND ACT CAP 19 OF 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE HONOURABLE ATTORNEY.....1ST RESPONDENT**

**THE DISTRICT COMMISSIONER, MBOONI EAST**

**MBOONI EAST LAND DISPUTES TRIBUNAL.....2ND RESPONDENT**

**AND**

**BENSON MAKUMBI MASILA.....INTERESTED PARTY**

**EX-PARTE APPLICANT: ONESMUS WAMBUA KASIVO**

**JUDGEMENT**

**Introduction**

1. By a Motion on Notice dated 2nd May 2013, the *ex parte* applicant herein, **Onesmus Wambua Kasivo** seeks the following orders:

1. **THAT an Order of Certiorari to remove into this Honourable Court for the purposes of being quashed an Award of Mbooni East Land Disputes Tribunal Appeal case number 239 of 2010 dated 23rd January 2013 Benson Makumbi Masila –VS-Onesums Wambua Kasivo do issue.**
2. **THAT an Order of Prohibition to prohibit the Respondents, interested party or such other party, persons, servants or agents claiming under their title from sub-dividing parcel number 332 Mangani Adjudication Section or any manner purporting to effect the Award of Mbooni East Land Disputes Tribunal Appeal case number 239 of 2010 dated 23rd January 2013 Benson Makumbi Masila –VS- Onesums Wambua Kasivo.**
3. **THAT costs be provided for.**

**Applicant's Case**

2. The same Motion is supported by Statutory Statements filed together with the Chamber Summons herein and the verifying affidavit sworn by the applicant on 25th March, 2013.
3. The applicants' case from the said documents is that on or about the 8/3/1987 he bought the entire plot No.332 from **Kitema Kathele** (now deceased) at a cost of Kshs.35,000/= (thirty five thousand) and it is registered in his names. According to him, he has been in occupation of the entire parcel of land since 1987 and nobody has ever raised any complain until seven (7) years later in 1994 during land demarcation when **Benson Makumbi Masila** (the interested party herein) alleged that he had bought a portion of the said land in 1986 from the deceased at Kshs.2,000/= (two thousand). On 4th July, 1995 the portion in dispute was hived of the applicant's land and a boundary fixed and it is after this that on 5th July, 1995 the applicant filed case No. MANG/COMM/43-44/95 at the lands tribunal lands committee (sic) and the same was heard on 26th July, 1995. According to the applicant, the committee's decision was in his favour and he was awarded the portion of land in dispute.
4. However, being dissatisfied with the decision of the lands committee, the interested party appealed to the Arbitration Board which delivered its judgement on 4th June, 1998, dismissing the appeal and awarding the applicant the portion in dispute. The Board gave the interested party was given 60 to appeal but the interested party never brought the appeal until the year 2007. The said interested party's object to the Arbitration Board being objection No.146 to the Land Adjudication Officer was heard on 30th May, 2007 and the Land adjudication Officer in his findings concurred with the findings of the Land Adjudication Committee and the Arbitration Board and the applicant was awarded the portion of land in dispute. Undeterred the interested party appealed the decision to the Minister for Lands which appeal was heard on the 27/09/2012 and the Minister for Lands and the appeal was heard on the 27th September, 2012 and the Minister for Lands who without due regard to the prevailing law overruled the 3 previous judgments and awarded the portion in dispute to the interested party on the 23rd January, 2013.
5. According to the applicant, at the time of hearing the appeal to the Minister for Lands, the ***Land Disputes Tribunal Act*** which initially gave the Minister for Lands the jurisdiction to hear and determine such appeals had already been repealed by Section 31 Cap 19 of 2011 (***Environment and Land Court Act***) hence the Minister for Lands in hearing the appeal committed a jurisdictional error as he had no jurisdiction to hear such appeals as the jurisdiction to hear and determine such appeals from the Land Disputes Tribunals had already been vested in the Environment and Land Court.

**Respondent's case.**

6. In opposition to the application the respondent filed the following grounds of opposition:

1. **That the application as drawn and taken out is bad in law, incompetent, and otherwise an**

**abuse of the process of this Honourable Court.**

2. **That the decision which forms the basis of the applicant's application was made under the provisions of the Land Adjudication Act and not under the provisions of the repealed Land Disputes Tribunal Act as alleged.**
3. **That the decision was not ultra vires the powers of the Minister as the Land Adjudication Act is still in force and has not been repealed.**
4. **That accordingly, the application lacks merit and ought to be dismissed forthwith with costs to the Respondents.**

**Interested Party's Case**

7. The application was opposed by a replying affidavit sworn by **Benson Makumbi Masila**, the said interested party on 5th June 2013.
8. According to him, he entered into an agreement with the deceased for the purchase Plot No.332 for Kenya Shillings two thousand (kshs.2,000/=). He however fell ill in the same year causing him to delay in paying the balance of the purchase price, leading to an agreement wherein the deceased gave him the portion equivalent to the monies he had already paid him, being 20 x 90ft. In 1987, the Applicant removed the boundaries which had been had put purporting to be the owner of the suit premises. By that time the deceased was nowhere to be found as he had hurriedly moved his family to a different area unknown to the interested party. While admitting the contents of paragraphs 4 to 8 of the verifying affidavit, the interested party deposed that the appeal was lodged on the 9th day of August 2010 by which time, the ***Environment and Land Court Act*** 2011 had not been established. Apart from that the appeal was filed at the Ministry in the adjudication section and adjudication of land falls under the ***Land Adjudication Act*** Cap 284 which is still in force hence he was within his rights to appeal to the Minister as provided for under Section 29 of the ***Land Adjudication Act***.
9. According to the interested party, in reaching his decision, the Minister the applied the rules of natural justice which at all times was ignored by the Land Dispute Tribunal, hence the Applicant's application, which lacks merit, ought to be dismissed with costs.

**Applicant's submissions**

10. On behalf of the applicant it was submitted that under Article 159(d) (sic) of the Constitution the fact that the applicant pleads the ***Land Disputes Tribunal Act*** rather than the ***Land Adjudication Act*** is not fatal since the decision sought to be quashed has been exhibited. In the applicant's view, section 29 of the ***Land Adjudication Act*** provides that an appeal to the Minister be within 60 days. It was submitted that since the interested party never appealed to the Minster after the first objection proceedings but sought to commence fresh objection proceedings, the matters which were before the Minister had already been dealt with hence the matter was res judicata. It was therefore submitted that the Minister did not have the jurisdiction to entertain the appeal since the same was premised on an objection which was res judicata. While conceding that the issue of res judicata was not raised in the Motion, the applicant submitted that being a matter of law, it may be raised even if not pleaded.
11. It was further submitted that as the issue in dispute arose from a contract, the same did not qualify as a matter of the correctness or incompleteness of the register pursuant to section 26 of the ***Land Adjudication Act*** cap 284.
12. According to the applicant in arriving at the impugned decision the rules of natural justice were not applied since the Minister failed to consider the fact that the applicant had been in occupation of the suit land for over twenty years. The applicant therefore prayed that the orders sought be granted.

**Respondent's submissions**

13. On behalf of the respondent, it was submitted that judicial review is not concerned with the merits of the decision but by the decision making process and that the court will not interfere with the exercise of any power or discretion which has been conferred on a body unless it has been

exercised in a way which is not within its jurisdiction or unreasonably and reliance was placed on **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209 and Chief Constable of Northern Wales Police vs. Evan [1983] 3 All ER**

14. It was submitted that the subject appeal was heard under the provisions of the ***Land Adjudication Act*** and not under the ***Land Disputes Tribunal Act*** hence the provisions of the ***Environment and Land Court Act*** are inapplicable as the ***Land Adjudication Act*** has never been repealed. Therefore the applicant's contention in so far as it is based on the provisions of the former Act, are incorrect.
15. It was submitted that the Minister acted well within his powers in hearing the appeal as provided under section 29 of the ***Land Adjudication Act*** and since at the time of the hearing of the appeal by the Minister on 27th September 2012 the Environment and Land Court whose judges were gazetted vide Gazette Notice dated 5th October 2012, had not commenced operation, under section 30(1) of the ***Environment and Land Court Act***, the proceedings under the ***Land Adjudication Act*** continued thereunder. It was therefore submitted that this application ought to be dismissed with costs to the respondents.

**Interested Party's submissions**

16. On behalf of the interested party, it was submitted that the appeal to the Minster was lodged pursuant to section 26 of the ***Land Adjudication Act*** after the Land Disputes Tribunal failed to adhere to the rules of natural justice. According to the interested party the Minister followed the law to the letter hence the application lacks merit and ought to be dismissed with costs.

**Determinations**

17. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.
18. Although the applicant pleaded that the Minister entertained the appeal pursuant to the provisions of the ***Land Disputes Tribunal Act*** which had been repealed, it is clear even from the applicant's submissions that that contention was incorrect as the proceedings before the Minister were clearly under the Provisions of the ***Land Adjudication Act***. Accordingly that issue nolonger falls for determination.
19. However, in the submissions of the applicant two issues were raised. The first issue was that the Minister entertained an appeal in respect of an issue which was res judicata. Although the applicant conceded that this issue was not raised in the Notice of Motion, it was his contention that under Article 159(2) (d) of the Constitution as well as section 1A of the ***Civil Procedure Act***, res judicata being appoint of law could be raised despite lack of a pleading to the effect.
20. With respect to the provisions of section 1A of the ***Civil Procedure Act***, section 3 of the ***Civil Procedure Act*** on the other hand provides:

    ***In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.***

21. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the ***Civil Procedure Act*** are inapplicable. It must be remembered that apart from Order 53 of the ***Civil Procedure Rules***, the provisions of the ***Civil Procedure Act*** and the Rules made thereunder do not apply to judicial review proceedings. The overriding objective in section 1A aforesaid, in my view, does not give the Court jurisdiction but is a case management tool meant to ensure that justice is attained by the Court in the process of determining the proceedings before the Court. In any case that section only applies to strictly civil proceedings pursuant to the preamble to the Act which provides that it is "***An Act of Parliament to make provision for procedure in civil courts"*.** In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the ***Civil Procedure Act*** and Rules do not apply unless expressly provided by such an Act and the provisions of the ***Civil***

***Procedure Act*** and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the ***Civil Procedure Rules*** render the application wholly incompetent. In fact in **Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003**, it was held that the Court has no powers to vary, review or set aside the *ex parte* order firstly because under Section 9 of the ***Law Reform Act,*** the procedure has been prescribed and Order 53 does not give any such powers and secondly because the purpose of the special jurisdiction has not been said to have been defeated by lack of such powers to enable the Court invent any such procedure the only relief being the statutory right of appeal against the judicial orders and thirdly the ***Civil Procedure Rules*** do not apply to judicial review in view of the clear provisions of section 3 of the ***Civil Procedure Act*** concerning special jurisdiction. Similarly in **Republic vs. Lutta Kasamani Ex Parte United Insurance Company Limited Nairobi HCMCA No. 1047 of 2004**, it was held that in exercising its powers under section 8(2) of the ***Law Reform Act,*** the High Court is exercising its Civil jurisdiction though the jurisdiction is undoubtedly special in the sense that it is created pursuant to section 8 of ***Law Reform Act***. The Court further held that although the Court in judicial review proceedings would be exercising civil jurisdiction, it is a special jurisdiction which in itself does not mean that the ***Civil Procedure Act*** and the rules made thereunder are applicable as where an Act of Parliament confers special jurisdiction, ***Civil Procedure Act*** and the Rules made thereunder do not apply.

22. With respect to Article 159(2)(d) of the Constitution the Supreme Court in **Petition No. 5 of 2013, Raila Odinga versus Independent Electoral and Boundaries Commission & Others** expressed itself as follows:

**"…...Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law."**

23. The ground upon which these proceedings were commenced according to the statement were as follows:

**1. THAT the Minister for lands through Makueni District Commissioner in hearing the appeal from the Land Adjudication Officer on the 27/09/2012 and delivering award on 23/01/13 committed a jurisdictional error in hearing the appeal since at that time jurisdiction to hear and determine land disputes had already been ousted of him and the tribunals.**

**2. THAT the Land Dispute Tribunal Act which vested the minister for lands with the jurisdiction to hear land appeal cases from the tribunals was repealed by the Environment Land Act cap 19 of 2011.**

**3. THAT the Environment and Land Court Act cap 19 of 2011 under section 4 (1) established the Environment and Land Court and section 13(1) states the courts jurisdiction the Act expressly states:**

**(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes-**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts; choses in action or other instruments granting any enforceable interests in land; and**

**(e) any other dispute relating to environment and land.**

**(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, right or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**

4. **THAT under section 13(4) the Environment and Land Court have also been vested with the appellate jurisdiction over the decisions of subordinate courts in respect to matters falling under its jurisdiction.**

24. Order 53 rule 4(1) of the Civil Procedure Rules provides as follows:

***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

25. What this provision provides is that a party is not permitted to mutate its grounds as it were as the proceedings for judicial review progresses.
26. It is clear that the applicant's application was hinged on the ground that the Minister had no jurisdiction to entertain the appeal since the legal framework which donated to him the jurisdiction to do so, the ***Land Disputes Tribunal Act***, had been repealed. It is now clear that this position was incorrect.
27. The attempt by the applicant to introduce new grounds of res judicata and the fact that the issues before the Minister were contractual in the submissions, is in my view unacceptable and incurable under the provisions of Article 159(2)(d) of the Constitution. In my view the provisions of Order

53 rule 4(1) are meant to bring to the notice of the parties the precise grounds upon which the application is based in order to enable the other parties adequately prepare. In other words the said provision is aimed at the attainment of the rules of natural justice. The rules of natural justice cannot in my respectful view be ignored under the guise of the provisions of Article 159(2)(d) of the Constitution since that requirement is a universally accepted principle which is similarly constitutionally underpinned under Article 25(c) of the Constitution.

28. Apart from that it is doubtful whether the doctrine of res judicata applies to the land adjudication process. In **Timotheo Makenge vs. Manunga Ngochi Civil Appeal No. 25 of 1978 [1979] KLR 53; [1976-80] 1 KLR 1136, Law JA** expressed himself *inter alia* as follows:

**"Section 12(1) of the Act imposes on the adjudication officer the duty, when hearing an objection, "so far as is practicable" to follow the procedure directed to be observed in the hearing of civil suits. Section 7 of the Civil Procedure Act precludes any court from trying an issue, which has been heard and finally decided, by another court. Order 20, rule 4, of the Civil Procedure Rules lays down that a judgement shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. But no such duty to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, under section 29 of the Act is to "determine the appeal and make such order thereon as he thinks just" and that is exactly what the Minister did in this case. He had in mind the previous litigation, but gave no effect to it and he was justified in doing so since the exact area was not precisely defined in the decisions, presumably because it could not be precisely defined. This lack of precision as to the extent of the claims means that *res judicata* could not have applied to the proceedings before the Minister, and no breach of the rules of natural justice resulted from the Minister's refusal to give effect to the decisions in earlier litigation. It is also arguable that the principles of *res judicata* have no bearing on disputes under the Act, except to the extent of showing whether a claimant has a *bona fide* claim or not. Interests in land within adjudication areas previously recognised by the Courts are not binding in land adjudication proceedings, and are only relevant as a factor to be taken into account. Where the interest relates to a disputed clan land, the question of the overriding interest in that land is an open question, at any rate so far as the Minister is concerned. No title to such land exists, it is the right of a particular clan to use that land as a clan, which is in question. In accordance with the preamble to the Act, that its object is to enable the ascertainment of rights and interests in trust. These rights and interests arise out of customary law, and are normally of an imprecise and vague character. The Minister is the final arbiter as to the extent of these rights. The Minister had the jurisdiction to entertain the appeal, and even if he has reached a wrong decision, which may well be the case, his jurisdiction is not destroyed since if he has jurisdiction to go right he has jurisdiction to go wrong."**

29. I have considered the application and it is my view that the Minister had the power under section 26 of the ***Land Adjudication Act*** and it matters not whether the parties to the dispute under the land adjudication process based their claim to land on contractual basis. It is not contended that the Minister did not afford the applicant an opportunity of being heard. Whether or not the Minister's decision was merited is not for this Court in this kind of proceedings to determine as this court is only concerned with the decision making process rather than the merits thereof. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

**"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 makers 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."**

30. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

**Order**

Accordingly it must now be clear that the Notice of Motion dated 2nd May 2013 is unmerited. In the result the same is dismissed with costs to the 1st Respondent and the interested party.

**Dated at Nairobi this 29th day of January 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Makau for the applicant***

***Ms Chilaka for Miss Maina for the Respondent***