



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JUDICIAL REVIEW NO. 2 OF 2020

IN THE MATTER OF:

AN APPLICATION BY DANIEL MAKAU MUNGUTI, JAMES KITUKU MUNGUTI

AND

PETER KIMEU MUNGUTI

IN THE MATTER OF:

THE DECISION BY THE DEPUTY COUNTY COMMISSIONER, MAKUENI COUNTY

AND

IN THE MATTER OF:

APPEAL NO. 17 OF 2012 TO THE MINISTER OF LANDS

IN THE MATTER OF:

THE LAND ADJUDICATIONS PLOT 1959

EX PARTE:

DANIEL MAKAU MUNGUTI, JAMES KITUKU MUNGUTI

AND

PETER KIMEU MUNGUTI.

INTERESTED PARTIES:

SYOKIWI MUTISYA MAKUSYA & JOSEPH MWALILI MUTISYA

JUDGMENT

1. The *ex- parte* applicants filed the substantive notice of motion on 17th July 2020 and sought inter alia:

a) THAT an Order of Certiorari do issue to remove into the high court and quash the judgment and order by the deputy county commissioner, Makueni in minister's appeal case no. 17 of 2012 between Daniel Makueni Munguti & 2 others versus Syokwia Mutisya Mukusya & Another delivered on 20.1.2020.

b) THAT an order of prohibition directed at the County Commissioner, Makueni County Commissioner and the interested parties from acting on the said judgment and the interested parties be prohibited from entering, interfering, trespassing, transferring and / or alienating plot no. 1959 Kisunguni adjudication and further be prohibited from harassing and/ or evicting the *EX-parte* applicants from the said land parcel plot No. 1959 Kasunguni Adjudication.

c) THAT costs of this application be provided for in any event.

2. The application was supported by the affidavit of **Daniel Makau Munguti** sworn 16th July 2020.
3. He deponed *inter alia* that the respondents are the family of the applicants. The applicants had been in continuous occupation of the suit land since 1945. The sub division was done in total breach of the court order dated 25/7/1986. The respondents sub-divided the land and registered in themselves. The division was unfair. The court order dated 25th July 1986 directing the land adjudication officer to sub divide into three was not obeyed. They appealed to the minister vide cause no. 17 of 2012, however the minister declined to uphold their appeal notwithstanding the fact that; she did not handle the case herself, delegated the case to her juniors and decision was not signed or dated.
4. A further affidavit was sworn on 9th November 2020 by **Daniel Makau Munguti** deponed *inter alia* that the case decision was made by a clerk in the office of the Assistant Deputy Commissioner at Kasunguni. The respondent admitted that she did not conduct the proceedings. The Cabinet Secretary vide Gazette Notice No. 6854 dated 13th September 2014 delegated power to hear appeals to the Deputy Commissioner. The said Deputy Commissioner could not delegate duties to another person hence the maxim *delegate protestus non protest delegani*.
5. The deponent further argued that the proceedings by the Deputy County Commissioner were *ultravires* null and void, abuse of power contrary to Section 7(1) of the Fair Administrative Action Act. The impugned decision went or goes against the legislative expectation. The Deputy County Commissioner abdicated his responsibilities. The quasi-judicial bodies and judicial bodies derive their mandate expressly from the statutes and not from consent of parties. The powers and procedures cannot be extended to decision making duties in contravention of statutes. The duty of the court is to declare such decision or actions a nullity.
6. That the judicial function cannot be delegated. Quasi-judicial officers cannot expand their jurisdiction through administrative graft or innovation. What matters is the taking of the decision and not the signature. He prayed that the application be allowed as the purported decision dated 20.1.2020 is null and void.
7. In response, the respondents filed a replying affidavit on 7th October, 2020 sworn by **Joseph Mwalili Mutisya** that he swore on his own behalf and that of Syokwia Mutisya Makusya who is his mother. He deponed *inter alia* that the dispute herein has its origins in the 1970s when Kilungu Civil Case No. L 155 of 1973 was filed. The court held that the land in dispute should be subdivided into three (3) equal portions between the plaintiffs on the one hand and the Defendant in that suit. The judgment was annexed as '**JMM1**'.
8. The Defendant in that suit was dissatisfied with the judgment and filed an appeal before the Resident Magistrate Court at Machakos in civil case no. L81 of 1980. The appeal was dismissed. The court however directed that the suit land be sub divided into three (3) portions with the Plaintiff (Munguti Mukusya) getting 10 paces more than his other two brothers. The judgment was annexed as '**JMM2**'.
9. No further appeal was filed by any of the parties after the said judgment of the court.
10. The court in a letter dated 25th July 1986 wrote to the District land adjudication officer Machakos notifying him its decision and required him to proceed and effect the orders of the court by subdividing the suit land as ordered and ensure that Munguti Mukusya gets 10 paces more than the other two. The letter is annexed as '**JMM3**'.
11. The land in dispute was sub divided as directed by the court resulting to three parcels namely:
 - i. Makueni/Kasunguni/484 (Munguti Mukusya)
 - ii. Makueni/ Kasunguni/ 1959 (Munguti Mukusya)
 - iii. Makueni/Kasunguni/1960 (Kyengo Mukusya)
12. The copy of a search Makueni/Kasunguni/1959 and a title for Makueni/Kasunguni/1960 were annexed as '**JMM4**'.
13. The three proprietors are all brothers. However, they are now all deceased. The applicants are all the children of Munguti Mukusya while the Respondents are wife and children of Mutisya Mukusya.
14. The applicants were dissatisfied with the sub divisions of suit land. They then lodged a claim before the Land Adjudication Officer and claimed fresh subdivision of plot no, 1959. The Tribunal found that it had no powers to change or alter the sub division as sought and the prayers before the Tribunal were impractical and proceeded to dismiss the objection. It ordered the land to remain as recorded in parcel identifier and on the ground. The copies of proceedings and the findings of the Tribunal on 18/10/2011 were annexed as '**JMM5**'.
15. The Tribunal gave sixty (60) days right of appeal to any party who may have been dissatisfied with the decision.
16. The applicants were not again satisfied with the decision of the Tribunal and filed an appeal before the Minister. The appeal was once again dismissed and a right of appeal to the High Court in a period of sixty (60) days was granted. The copy of the judgment dated 20th January 2020 was annexed as '**JMM6**'.
17. The applicants did not file any appeal to the High Court but instead filed the proceedings herein.
18. It is worth to note that it is the applicants who filed an appeal before the Minister who directed the Deputy County Commissioner to hear and determine the appeal.

19. The applicants were invited for the hearing of the appeal by the office of the Deputy County Commissioner but they never raised any objection as to the hearing of the appeal by the said officer. The applicants only raised the issue after their appeal was dismissed.
20. There is no evidence that the Deputy Commissioner was unqualified to hear and determine the appeal or he acted in excess of jurisdiction or delegated the duties to any other or unauthorized person.
21. The decision of the Deputy County Commissioner is signed and dated contrary to what is alleged by the applicants. The allegation is contradictory in term and substance since it is the same decision the applicants are faulting in the proceedings herein.
22. The issue of plot no. 1959 Kasunguni being unlawfully, illegally and unprocedural created from plot 484 does not arise in the first place. The said allegations are self-defeating.
23. That it is not true that the sub division of plot no. 484 was done in the absence of the applicants, unfairly or contrary to the court order of 25th July 1986. In fact the subdivision was done in the absence of all the deceased proprietors.
24. The issues raised in the proceedings herein do not fall within the purview of judicial review as the major complaint relates to substantive issues among them the sub-division of plot no. 484 into three equal portions.
25. The deponent in conclusion opposed the proceedings and application herein. He prayed that the application should be dismissed and this court awards the respondents' costs.
26. The state law office on behalf of the Deputy Commissioner Makueni County filed grounds of opposition dated 9th October 2020 in opposition to the application.
27. That there is no cause of action against the respondent's since the Deputy County Commissioner Makueni sub county acted within his powers as set out in **Section 29 of the Land Adjudication Act Chapter 284, Laws of Kenya**. The applicant's fully participated in the adjudication process and invoked the dispute resolution mechanism resulting in the decision of the minister on the appeal.
28. The respondents' relied on the case of **Reuben Mwongela M'itelekwa (Suing As The Legal Representative Of The Estate Of M'itelekwa M'mucheke Naituri Alias M'itelekwa Mucheke) V Paul Kigea Nabea & 2 Others [2019] eKLR**, where the learned judge made reference to the case of **Meru ELC No 167 of 2011 Nicholas Mugambi and Others Vs Zachary Baariu & Others** where judge P.M. Njoroge made reference to the case of **Abdallah Mangi Mohamed Versus Lazarus & 5 Others [2012] eKLR** where Muriithi J stated that;-
- "... where there is a dispute as to the applicant's entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicant's claim to the property"*.
29. That the judicial review application has been filed contrary to Article 159(2) (c) of the Constitution that has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Alternative dispute resolution mechanism are anchored in the Kenya 2010 Constitution to the extent that the Constitution requires these forms of dispute resolution mechanism to be promoted, usurpation of their jurisdiction by the High Court would not be promoting but rather undermining a clear constitutional objective.
30. That the respondents' referred to Section 34 of the Land Adjudication Act chapter 284 which provides for the protection of officers under the act. Section 34 of the act states that;
- 'any officer appointed under this act, and any other person appointed for the purpose of adjudication proceedings under this act, shall not be liable to any action, suit or proceedings for or in respect of any act or matter in good faith done or omitted to be done in exercise or supposed exercise of the powers given under this act or any regulations made under.'*
31. The state therefore prayed that the application be dismissed with costs to the respondents.
32. The applicants submitted that the primary ground is that the appeal was not heard by the Minister through Deputy Commissioner but by a junior male officer in the office of Assistant County Commissioner at Kasunguni. Therefore the decision is a nullity. In response, the Deputy County Commissioner has admitted the claim that she did not conduct the proceedings but says vide grounds dated 9th October 202 that she invoked a dispute resolution mechanism resulting in the decision of the Minister and that the applicant agreed to participate in the process.
33. The applicants submitted that quasi- judicial bodies derive their mandate expressly from the statutes and not consent of parties. That the power to establish procedures cannot be extended to decision making duties in contravention of the statutes. Therefore a specific order to use the office of Assistant County Commissioner as appropriate resolution of appeal is tantamount to abduction and delegation of judicial function and is unconstitutional, null and void.
34. The Applicants submitted that vide gazette notice no. 6854 the Cabinet Secretary delegated power to hear appeals to Deputy County Commissioner. The Deputy County Commissioner cannot delegate to another person (ungazetted) hence the maxim "***delegate protestus non protest delagant***".
35. The applicants submitted the following concerning the decision dated 20.1.2020:-

- i. It was purportedly heard on 17.10.2019.
- ii. It was not signed on the same day.
- iii. Signed three months after the decision was made by director of lands.
- iv. Identity of the author not disclosed.
- v. not stamped by the deputy county commissioner
- vi. Only stamped by a person acting for director of land adjudication.

36. In conclusion, the Applicants submitted that the delegation of power by Deputy County Commissioner to another person is an abuse of power contrary to **Section 7(1)** of the **Fair Administrative Action Act**. Therefore the proceedings were ultra vires and void. They prayed that the impugned decision be quashed and await a valid one.

37. The applicants' relied on the following authorities;

- i. *Motor Vessel Lilian 'S' Versus Caltex (K) Ltd (1989) KLR*
- ii. *Mefoy Versus United Africa Co. Ltd (1961) 3 All ER 1169 At 1172*
- iii. *Minister appeal case no. 17 of 2012 between Daniel Makau Munguti & 2 others versus Syokwia Mutisya Mukusya & another.*
- iv. *Republic Versus Geronri of Brixton Prison, Expart Enahord {1963} 2 (9) B*
- v. *Telkom Kenya Ltd Versus John Ochwada (2014) eKLR*
- vi. *Republic Versus Attorney General, Cabinet Secretary For Lands & 4 Others Exparte Paul Mwau Mwonga [2019] eKLR.*
- vii. *Republic Versus Cons Court Kisumu Ex parte Micah Kisoo [2016] eKLR*
- viii. *Kenya Hospital Association T/A Nairobi Hospital Versus Medical Practitioners & Dentist Board & 4 Others[2018] eKLR*
- ix. *Kenya Airports Authority Versus Mitu Bell Welfare Society & 2 Others [2016] eKLR*
- x. *Keroche Industries Ltd Versus Kenya Revenue Authorities & 5 Others [2007] eKLR*

38. The interested parties submitted that the Deputy County Commissioner, Makueni Sub County had jurisdiction to hear appeal no 17 of 2012. Vide gazette notice no. 6854 dated 13th September 2014 the Cabinet Secretary delegated power to hear appeals to the Deputy County Commissioner. The County Commissioner, Makueni Sub County namely Florence Obunga invited the parties for hearing of the appeal vide a letter dated 1st October 2019. The hearing was scheduled for 17th October 2019. According to the said letter the Deputy County Commissioner herself was to hear the matter and nobody else. That the proceedings of the appeal leaves no doubt that Florence Obunga, the Deputy County Commissioner is the one who heard the appeal as evidenced at the 1st page and last page which is dated 20th January 2020 and signed.

39. The interested parties' further submitted that they did not at any point, before, during and after the proceedings raise an objection as to the jurisdiction of the Deputy County Commissioner to hear the appeal or even raise an issue that the person they appeared before was not the Deputy County Commissioner but another person. The fact that the applicants agreed to continue with the appeal before the Deputy County Commissioner and even waited for the final decision meant that they had admitted the jurisdiction of the officer in charge. Therefore the whole application anchored on jurisdiction is self-defeating and an afterthought.

40. The interested parties submitted that the principle of *delegate protestes non delegate* has no application in this case since there is no factual basis to support it.

41. The interested parties submitted that the applicants failed to show how the final decision by the Deputy County Commissioner was made in excess of the jurisdiction. The applicants had to meet the threshold of proof as prescribed under **Section 107** of the Evidence Act.

42. In conclusion on the issue of jurisdiction of the County Commissioner to hear the appeal, the interested parties submitted that the Deputy County Commissioner, Makueni Sub County acted within her powers as had been delegated to her by the Cabinet Secretary. The applicants have not stated the name of the person they allege heard the appeal.

43. The interested parties submitted that judicial review does not deal with the merits of the case but the process of administrative decision making only. That the ex parte applicants in the supporting affidavit raised the following issues:-

i. That they had been in continuous occupation of the suit land since 1945

ii. The sub division was done in total breach of a court order.

iii. The division was unfair.

iv. The court order dated 25/7/1986 directing the land adjudication officer to sub divide the land into three portions was not obeyed.

44. The interested parties went on to submit that the listed issues would require this court to go to the merits of the decision of the Deputy County Commissioner. In their view, this would lead this court to be acting an appellate court over the decision of the Deputy County Commissioner. The issues raised in the proceedings herein do not fall within the purview of judicial review as the major complaint relates to substantive issues among them the sub division of plot no. 484 into three equal portions.

45. The interested parties submitted that applicants remedy was to move the High Court by way of an appeal if they were not satisfied with decision.

46. In conclusion, the interested parties prayed that the notice of motion dated 16th July 2020 should be dismissed with costs.

47. The interested parties relied on the following authorities;

i. Republic V Minister, Ministry Of Lands, Through The Sub County Administrator Gatunga Adjudication Section & 2 Others Ex Parte Stephen Mwathi Rugera [2018] eKLR

ii. Paul Mwicigi Mbugua & another V Attorney General & 7 others [2020] eKLR.

iii. Municipal Council of Mombasa Vs Republic, Umoja Consultant Ltd (2002) eKLR.

iv. Commissioner Of Land V Kunste Hotel Ltd(1995-98) EA

v. Republic V Secretary Of State For Education And Science Ex Parte Avon County Council [1991] 1 All ER 282 And . Chief Constable Of The North Wales Police V Evans [1982] 1 WLR 1155 Adopted)

48. I have considered the pleadings and the written submissions filed by the rival parties herein and I wish to state hereinbelow:-

49. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. The ultimate goal is to ensure that the applicant is given a fair treatment by the relevant authorities he complains of. The court should not at all times venture into the roles and duties of the said body nor usurp its powers.

50. Judicial Review is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. This Court cannot in exercise of its Judicial Review powers purport to review or upset the decision rendered by judicial body or quasi -judicial body. The grounds cited by the applicants and the submissions advanced by the applicants' counsel are an open invitation to this Court to venture into a merit review of the decision or exercise appellate jurisdiction. I decline the invitation to do so.

51. Beyond peradventure, all authorities relied upon by the parties are clear that Judicial Review concerns itself with the integrity of the process rather than the merits of the decision made in the impugned proceedings.

52. In their ground 1 as set out in the Notice of Motion, the applicants asserts that the Deputy Commissioner who heard the appeal at the ministerial level lacked jurisdiction because he had not been gazetted as an officer to whom the Minister had delegated appellate responsibilities on his behalf. The respondents and the Interested Party have proffered Gazette Notice No. 6854 extracted from the Kenya Gazette of 3rd October, 2014 through which the Minister delegated powers to hear and determine appeals and perform related duties and functions under **Section 29** of the **Land Adjudication Act** to the Deputy Commissioners of all sub-counties except the sub-counties in Nairobi City County.

53. Grounds 2, and 3 claim that Deputy County Commissioner delegated her duty to an unauthorized person and/or unqualified person. I have perused the proceedings held at the ministerial level. Although the Applicants deponed that the person who heard the Appeal was not the Deputy County Commissioner, there is no evidence to that effect that was placed before me. That allegation therefore just remains that, an unproved allegation. Ipso facto, this ground is dismissed.

54. Ground 4 claims that the Deputy Commissioner failed to date and sign her decision. I have perused the proceedings and findings of the appeal at the ministerial level. I find that the decision is dated and signed contrary to the allegations made by the applicants herein. I, therefore, find that this ground lacks merit.

55. Grounds 5 and 6 do not attack the integrity of the process that led to the impugned decision. I do not find them tenable grounds in Judicial Review proceedings. I hereby dismiss them.

56. Having considered the decision of the Minister, which is accompanied by the typed proceedings of the Land Adjudication Officer, it

is my finding that the Respondent did not act illegally or unprocedurally. In the circumstances, I hereby proceed to dismiss the application with costs to the respondents and the interested parties.

DATED, SIGNED AND DELIVERED AT NAROK VIA EMAIL 22ND MARCH,2022.

MBOGO C.G

JUDGE

22/3/2022

In the presence of:

CA: T.Chuma