



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
MISC. APPLICATION NO. 37 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL

DISTRICT COMMISSIONER, POKOT SOUTH.....RESPONDENTS

AND

SAMSON LOSIWANYANG

JACKSON PTIONY.....INTERESTED PARTY

MERI LIMA RUTO JOEL

MUNYOKWANG KIYER.....EXPARTE

R U L I N G

Pursuant to an appeal to the relevant Minister lodged by **Samson Losiwanyang**, **Jackson Ptiony** and **Meruria Ruto Joel** (herein, the first, second and third interested parties respectively) against **Munyokwang Kiyer** (herein, the applicant), the decision of a Land Committee of elders was upheld to the extent that a portion of land awarded to one Muselelion Ptiony (now deceased) be registered in the names of the interested parties as the administrators of the estate of the said Muselelion Ptiony.

The said portion of land was described as LR. No. 45 Chepkono Adj. Section and the appeal by the interested parties to the Minister was finalized in a decision made on the 17th April, 2013.

Being aggrieved with the decision, the applicant sought and was granted leave to apply for an order of certiorari to bring to this court and quash the said decision which was made by the District Commissioner Pokot South District on behalf of the Minister for Lands and Housing.

Leave was granted by this court on 9th May, 2013 in Misc. Civil Application No. 32 of 2013 and was to operate as stay of enforcement of the disputed decision.

Accordingly and by a Notice of Motion dated 24th My, 2013, the applicant now prays for an order of certiorari to remove into this court and quash the aforementioned decision made on the 17th April, 2013 on grounds that the provisions of section 29 of the Land Adjudication Act (Cap 284 LOK) were

contravened and that instead of the appeal being heard, the District Commissioner Pokot South (herein, the second respondent) heard a fresh case altogether contrary to the law and in excess of jurisdiction. That, the decision was not a decision over the appeal preferred to the Minister by the late Muselelion Ptiony and that the decision of the Land Adjudication and Settlement Officer in the objection proceedings was very well informed for it was found as a fact that the land occupied by the applicant had been demarcated and was different from the land held by the then objector. That, no reasons were given for overturning the findings made by the District Land Adjudication officer in his ruling on the objection proceedings and without visiting the land of the applicant, the second respondent ruled on how the new boundary was to run without reference to the decision of the Land Adjudication Committee thereby exceeding his jurisdiction.

That, the second respondent further exceeded his jurisdiction when he ordered that the surveyor was to determine the size of the applicants' land awarded to the interested parties and that part of the land be registered in the names of the interested parties as opposed to the estate of the late Muselelion Ptiony. That, one of the assessors who assisted the second respondent in the matter was a chief called John Mwok who had earlier signed a letter on 13th October, 1968 acknowledging that the land had been demarcated for the applicant and was therefore not competent to serve as an assessor.

The foregoing grounds are enhanced and fortified by a supporting affidavit dated 24th May, 2013, the statement of particulars dated 7th May, 2013 and the verifying affidavit dated 8th May, 2013.

The interested parties opposed the application on the basis of the facts contained in a verifying affidavit dated 4th February, 2014 deposed by the second interested party on behalf of himself and interest of the interested parties. He averred that he was one of the administrators of the estate of his late father Muselelion Ptiony and that the application is devoid of merit, frivolous and an abuse of the court process. He contends that the material parcel of land being West Pokot/Chepkoro/45 belonged to his late father and had been demarcated to him by elders on the 12th July, 1964. That, the applicant lived in Kapenguria Forest from where he was evicted by the Government of Kenya in 1968. That, upon eviction, the applicant approached the late Muselelion Ptiony and requested to be assisted with a parcel of land to stay thereon as he looked and searched for his own land elsewhere. That, the applicant and the late Muselelion were great friends and therefore, the applicant was shown and allowed to temporarily stay on a portion of land belonging to the late Muselelion as he looked for his own. That, the applicant never moved out of the land as expected and instead in the year 1980 during the Land Adjudication process he registered the late Muselelion's land in his name prompting the late Muselelion to file a case before the land committee with a view to getting back the portion of his land occupied by the applicant. That, the Land Committee ruled in favour of the late Muselelion and ordered that the land be split and a portion thereof be given to the late Muselelion.

The second interested party averred further that the applicant was dissatisfied with the decision of the Land Committee and opted to appeal to the Adjudication Board which reversed the decision of the land committee in its decisions made in 1988 and 1992 which decisions were unfair, casual and not based on any legal or logical ground. That, the said decisions awarded the land to the applicant and being aggrieved by the same, the late Muselelion appealed to the Minister but he passed away prior to the conclusion of the appeal thereby prompting the appointment of the three interested parties as the administrators of his estate. That, after the appeal was heard, the decisions of the District Land Adjudication officer West Pokot made in 1988 and 1992 were set aside and the decision made in 1981 by the Land Committee was restored. That, the applicant was unsure of the time when he was evicted from the forest and the time that the disputed land was demarcated to him by the elders. That, the title deed issued to the applicant was issued while the appeal to the Minister was pending and was therefore issued irregularly, illegally and fraudulently.

The second interested party contends that the second respondent did not contravene the provisions of section 29 of the Land Adjudication Act as he considered the grounds of appeal lodged by the late Muselelion, the objection proceedings and the ruling made by the District Land Adjudication Officer West Pokot. That, no fresh case was heard by the second respondent but only the appeal lodged by the late Muselelion and therefore the second respondent did not exceed his jurisdiction. That, the second

respondent acted in accordance with the law, he visited the disputed land and acted within his mandate to order that the surveyor does determine the size of each parties land and a view boundary be created for purpose of execution of his decision. That, the second respondent did not exceed his jurisdiction that the awarded portion be registered in the names of the administrator on behalf of the estate of the late Muselelion and therefore the decision made on 17th April, 2013, was proper and lawful such that the applicant is not entitled to the orders sought in this application.

At the hearing of the application, the applicant was represented by Learned Counsel, **Mr. Kiarie**, while the interested parties were represented by the Learned Counsel, **Mr. Omwenga**.

The second and first respondents did not file any response to the application and did not also appear for the hearing of the application.

Written submissions were filed and relied upon by the applicant and the interested parties.

Basically, the gist of the applicant's argument is that the Minister through the second respondent exceeded his jurisdiction by hearing an entirely fresh case instead of hearing the appeal on the objection determination made by the Land Adjudication Act and in particular section 29 of the said Act.

The applicant argues that the procedure in the presentation of the appeal to the Minister and the hearing of the same were not followed and even through the Minister was not bound to follow the Civil Procedure Rules or strict rules of evidence he was performing a quasi-judicial function in hearing and determining the appeal thus coming under the purview of judicial review.

The applicant further argues that the Minister heard an entirely new case. That, he heard the case “de-novo”. That, he did not receive the grounds of appeal and the record of the objection proceedings as required by the law and went ahead to receive fresh evidence from the second interested party and one Pkuman Achipa who had not given evidence in the objection proceedings. He (Minister) also heard the applicant and then made findings which were in contrast to the findings of the Land Adjudication Officer.

For all the foregoing reasons, the applicant urged this court to allow his application. He relied on the decision in the case of **Republic Vs. Special District Commissioner & Another (2006) e KLR**, to fortify his case.

On their part, the interested parties argue that the applicant's argument that the decision of the Minister was not a decision over the appeal preferred by the late Muselelion is tantamount to invoking this court to look into the merits of the decision of the Minister which is not a function of judicial review which is basically concerned with the decision making process rather than the merits of the decision.

The interested parties argue that under section 29 of the Land Adjudication Act, the Minister's decision is final and therefore this court would have no jurisdiction to analyze the decision of the Minister as these proceedings are not an appeal. In that regard, the interested parties relied on the decision in **Nicholas Njeru vs. Attorney General & Other (2013) e KLR**.

The interested parties argued further that the copies of proceedings exhibited herein clearly indicated that the Minister heard and determined the appeal and came up with his findings as required by section 29 of the Land Adjudication Act. That, the Minister was not bound to give reasons since he is not bound to follow the procedure prescribed for hearing civil suit under the Civil Procedure Act and that, in any event, the findings of the Minister sufficed as reasons for overturning the decision of the District Land Adjudication Committee. In that regard, the interested parties relied on the decision in **Timotheo Makenge Vs. Manuga Ngonchi (1979) e KLR**.

They further argued that under section 4 of the Land Adjudication Act, the Minister was empowered to appoint adjudication officers including survey officers and therefore, the second respondent did not exceed his jurisdiction when he ordered that the size of the land be determined and that part of the applicant's land be registered in the names of the interested parties. In any event, the boundary had

already been determined and all that the surveyor did was to determine the acreage as a way of implementing the decision of the second respondent.

The interested parties contended that, as opposed to the estate of the late Muselelion, part of the applicants' land was to be registered in their names as ordered by the second respondent because they were the administrators of the estate and not beneficiaries. That, in making such order, the second respondent did not exceed his jurisdiction. That, there was no evidence showing that the assessor chief John Mwok signed a letter on 13th October, 1968 acknowledging that the land had been demarcated to the applicant. The interested parties urged this court to dismiss the application stating that it is scandalous, vexatious, frivolous and otherwise an abuse of the court process and colluding that the minister followed the right process in making his decision.

Having considered the application on the basis of the supporting grounds and those in opposition and also having taken careful consideration of the rival submissions by both the applicant and the interested parties it is apparent to this court that the issue for determination is whether the Minister through the second respondent went beyond his powers while considering an appeal against the decision of a Land Adjudication Board reversing the decisions of a Land Committee of elders made in 1988 and 1992.

The appeal was filed by the late Muselelion but he passed away prior to its determination by the Minister through the District Commissioner Pokot South (i.e. second respondent). The interested parties took over the matter as the administrators of the estate of the late Muselelion on the basis of a limited grant of letters of administration ad litem issued on 17th April, 2013 (Annexure marked "C" in the replying affidavit) on which date the land in dispute was allegedly visited by the second respondent and the disputed decision made. This meant that when the hearing of the appeal commenced on 3rd April, 2013, the interested parties did not have the necessary "locus-standi" to take over and prosecute the appeal on behalf of the late Muselelion. They secured the necessary "Locus-standi" at the time the disputed decision was made and that is why the second respondent ordered that the material portion of land be registered in their names as the administrators of the estate of the late Muselelion Ptiony.

Having had no "locus-standi" at the time the hearing of the appeal commenced and prior to its determination on the 17th April, 2013, the interested parties ought not have been given any audience by the second respondent. They had no right to prosecute or take over the appeal on behalf of the estate of the late Muselelion and could not be described as successors of the deceased or administrators of his estate prior to obtaining the formal grant of letters of administration whether limited or otherwise. Therefore, the credibility of the appeal process was compromised such that it could not be said that there was fairness in arriving at the disputed decision. More so, considering that no decision rising from a flawed process conducted by a public body or tribunal would fall under the ambit of Judicial Review whose concern is essentially the decision making process and not the merits of the decision itself.

Be that as it may, what came before the Minister through the second respondent was an appeal against the decision of the District Land Adjudication Officer West Pokot. This was to be conducted in accordance with the provisions of the Land Adjudication Act and in particular section 29 (1) of the Act which provides that:-

"Any person who is aggrieved by the determination of objection order section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by -

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal, and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

Under Regulation 4 (1) of the Land Adjudication Regulations any person submitting an appeal to the Minister under section 29 of the Act shall attach to his appeal a tracing from the demarcation map of the

boundaries of the holdings in dispute.

Herein, a perusal by this court of the appeal proceedings annexed to both the supporting and replying affidavits indicates that indeed the provisions of section 29 (1) of the Land Adjudication Act and Regulation 4 (1) of the Land Adjudication Regulations were not adhered to by the second respondent in that he proceeded to hear the appeal without grounds of appeal being placed before him by the aggrieved party and that he failed to send a copy of the appeal to the Director of Land Adjudication. He was also not provided with a tracing from the demarcation map of the boundaries of the holdings in dispute.

Instead, the record of the appeal proceedings indicate that the second respondent proceeded to hear a fresh case putting the interested parties and the applicant and that is why the second interested party testified on behalf of the other interested parties and was allowed to call a witness one Pkumun Achipa. The applicant was also called upon to testify and be cross-examined afresh yet this was an appeal.

At the end of the day, the appeal was allowed yet the findings by the second respondent were based on the evidence freshly adduced before him. The decision of the elders Land Committee was upheld without considering why the Land Adjudication office reversed the same and the reasons for doing so. It was doubtful whether the second respondent ever considered the decision of the Land Adjudication Officer before reversing it and resouthing to the decision of the elders led committee and rule in favour of the interested parties. His manner of handling the appeal smacked of bias against the applicant and explains why the interested parties were allowed to proceed with the appeal on behalf of the late Muselelion yet they had not become his legal representatives at the time. The record does not even show which particular officer presided over the appeal on behalf of the Minister, neither does it indicate the number of assessors and their names. The appeal was simply allowed without reasons for the decision being given. It therefore became difficult to fathom how the decision was arrived at.

In essence, the second respondent ought not have disregarded the grounds of appeal and the proceedings and decision of the Land Adjudication Officer prior to arriving at his decision. In doing so, he in effect disregarded and contravened the provisions of section 29 of the Land Adjudication Act which somehow sets the procedure for the hearing and determination of an appeal from decision of the Land Adjudication Officer made under section 26 of the Act. He therefore acted in excess of his jurisdiction as alleged by the applicant and the argument by the interested parties that he did not remain hollow.

Even if the decision of the second respondent was final as provided by section 29 of the Land Adjudication Act, it had to be arrived at in accordance with the law and the procedure laid down failure to which it would be amenable to judicial review and hence within the jurisdiction of this court.

The law and its procedure are in existence to be followed and obeyed. Any individual and/or public body is expected to adhere to what is provided under the law before arriving at a decision touching on any individual lest the decision be rendered null and void by way of judicial review.

Herein, the second respondent arrived at a decision touching on the applicant without following the laid down procedure under section 29 of the Land Adjudication Act. He went on to hear an appeal and converted it into a fresh hearing of the dispute between the applicant and the late Muselelion which dispute was heard and determined by the Land Adjudication Officer.

The failure by the second respondent to give consideration to the grounds of appeal and the proceedings before the Land Adjudication Officer as well as the decision reached was a clear manifestation of his disregard of the set procedure and his intention to convert the appeal into a fresh hearing of the material dispute shewed in favour of the interested parties at the expense of the applicant.

For all the foregoing reasons this court must find and hereby finds that this application is well merited and is allowed to the extent that an order of certiorari shall hereby issue to remove into this court and quash the decision made on the 17th April, 2013 on behalf of the Minister by the second respondent.

The applicant shall also be entitled to the costs of the application from the respondents and the interested

parties.

Ordered accordingly.

[Read and signed this 22nd day of May, 2014.]

J.R. KARANJA.

JUDGE.