



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 246 OF 2013

REPUBLICAPPLICANT

VERSUS

DISTRICT COMMISSIONER-KATHIANI.....RESPONDENT

AND

DOMINIC MUSEI IKOMBO.....1ST INTERESTED PARTY

MATHEW KITUKU IKOMBO.....2ND INTERESTED PARTY

PETER MUSYIMI IKOMBO.....3RD INTERESTED PARTY

***Ex parte:* KYULE MAKAU**

JUDGEMENT

Introduction

1. The prayers the subject of this judgment are contained in the Notice of Motion dated 29th August, 2013 in which the *ex parte* applicant, **Kyule Makau**, seeks the following orders:
 - a. **THAT an order of Certiorari do issue removing to this Honourable Court for purposes of being quashed the proceedings and Ruling/Judgment of the District Commissioner-Kathiani, dated 27/4/2011 and given/read to the parties therein on 12/2/2013, in Machakos/Kathiani Minister's Land Appeal Case No. 109 of 1987, and the same be quashed.**
 - b. **THAT an order of prohibition do issue prohibiting the District Commissioner-Kathiani or any Land Officer/Surveyor acting on the basis of the aforesaid Ruling/Judgment from implementing or causing to be implemented the Ruling/Judgment made in Machakos/Kathiani Minister's Land Appeal Case No. 109 of 1997.**
 - c. **THAT costs of these proceedings be paid by the interested parties.**

Applicant's Case

2. The application was supported by a statutory statement filed on 28th July, 2012 and a verifying affidavit sworn by the applicant on 4th July, 2013.
3. According to the applicant, land parcel No. 2246 –Mitaboni Adjudication Section, is registered in

the names of:-

- (i) **Peter Musembi Makau**
 - (ii) **Kyule Makau, and**
 - (iii) **Kaswii Kileu**
4. After the aforesaid land was demarcated and registered as aforesaid, some three (3) persons, namely, **Dominic Musei Ikombo, Mathew Kituku Ikombo** and **Peter Musyimi** lodged an objection with the area Land Adjudication Committee which, with the assistance of the parties' clan, excised a huge tract of land from land parcel No. 2246, which was subsequently registered in the names of the aforesaid objectors as land parcel No. 2686.
 5. The aforesaid objectors appealed to the Land Adjudication Arbitration Board and to the Land Adjudication Officer against the aforesaid decision in or about the year 1986, but both appeals were dismissed. Thereafter, the objectors appealed to the Minister of Lands and Settlement, asking that land parcel No. 2246 be sub-divided further, and a further portion thereof be given to them. However, the aforesaid Appeal, which was registered as Appeal No. 109 of 1987, was not heard until the year 2012.
 6. Meanwhile, **Peter Musembi Makau** and **Kaswii Kileu**, who are jointly registered with the applicant as owners of land parcel No. 2246, died in 1993 and 1997 respectively. In or about March 2012, the District Commissioner (Kathiani) summoned the applicant and the objectors for hearing of the aforesaid appeal on 26th March, 2012 but the hearing was, however, stood over to 2nd April, 2012 at which hearing the said District commissioner purported to "substitute" the long deceased **Peter Musembi Makau** and **Kaswii Kileu** with persons who are/were not the legal representatives of the said two deceased persons, and continued to hear such "substituted" persons as if they were parties to the appeal. The District Commissioner further purported to illegally substitute the 3rd Appellant, **Peter Musyimi**, with a person who was not a legal representative and continued to hear such person as though he was a party to the appeal.
 7. Whereas the District Commissioner heard the appeal on 2nd April, 2012, he did not deliver his Judgment/Ruling on the said date but informed the parties that he would write his Judgment and deliver it at a later date, and would issue summons to the parties concerned in that regard.
 8. When the applicant failed to receive any summons within one (1) month after the hearing of the appeal, he started visiting the District Commissioner's Offices at Kathiani regularly, seeking to know when the Judgment would be delivered, but was every time told by the District Commissioner to go home and wait for summons. When in February, 2013 he visited the same office, he found a newly posted District Commissioner and was told that records held in that office showed that proceedings and judgment in the aforesaid appeal had been sent to the Lands Office/Minister's Office in Nairobi, and that I should go to that office and get copies of the same. He accordingly, went to the aforesaid offices and Nairobi on 12th February, 2013, and was given a copy of the appeal proceedings and Ruling "shown" to be dated 27th April, 2012, but which was never read to the parties thereto, and the date it was given/delivered to the applicant (12/2/2013) became the date of its reading, and time started running from the said date.
 9. The applicant therefore contended that the application for leave herein is brought within six (6) months from the date of delivery of the said Judgment/Ruling.
 10. To the applicant, land parcel No. 2246, which is registered in his name and those of **Peter Musembi Makau** and **Kaswii Kileu** (both deceased) was ordered to be subdivided and given to persons who are not parties to the appeal- **Kavuu** and **Wayua**, both of whom died long time ago hence the said District Commissioner acted both illegally, without jurisdiction, and *ultra-vires* his powers by illegally taking away the applicant's property and those of the said deceased persons, and purported to give it to long dead persons who are not, and were never parties to the proceedings before him.
 11. The applicant therefore deposed that the District Commissioner's aforesaid proceedings and judgment should be removed to this honourable court and quashed as by law provided.

Interested Party's Case

12. On their part the interested parties herein filed the following grounds of opposition:

1. **The Chamber Summons is Statutory barred and unmaintainable as it offends the express provision of orders 53 rule 2 of the Civil Procedure Rules; 2010 in that the application in relation to the proceedings for which leave is sought was filed long after expiry of six months from 27th April 2012 when the proceedings were concluded.**
2. **The law does not provide for extension of time in which an aggrieved party may apply for an order of certiorari and furthermore this Honourable Court is not seized of an application for extension of time.**
3. **The proceedings the subject of this application were in respect of appeal to the Minister under Section 29 of the Land Adjudication Act (Cap 284) and District Commissioner was merely acting under delegated powers exercised by the Minister under Section 35 of the Act. None of the grounds set in the statement disclose any lack of jurisdiction by the District Commissioner.**
4. **The District Commissioner did nothing outside the powers conferred by the Minister by the Land Adjudication Act and the decision which is sought to be quashed is regular and lawful.**
5. **The Ex-parte Applicant is not entitled to the leave sought.**

13. On behalf of the Applicant it was submitted that since the subject land parcel is registered in the names of **Peter Musembi Makau** and **Kaswii Kileu** who were both deceased and the applicant, the same formed part of the deceased's estates and as no personal representative was appointed in respect of their estates, no personal representative represented them at the hearing of the Minister's Appeal. Further at the said hearing the deceased were purportedly substituted by persons who were not their personal representatives an action which the applicant contended was illegal, without jurisdiction and ultra vires his mandate.

14. Since the interested parties opted not to file any affidavit, it was submitted that the factual averments were neither denied nor controverted.

15. Since the Minister's judgement was never read and/or pronounced, it was submitted that the judgement was not a judgement hence the date of the judgement ought to be the date when it was revealed/unveiled and this was on 12th February, 2013 hence time started running from that date and as the application was filed on 5th July, 2013, the same was filed within the period provided under the statute.

16. In support of the applicant's submissions the case of **Raichand Lakhamshi & Another vs. Assanand & Sons [1957] EA 85** was cited.

17. The applicant therefore urged the Court to allow the application.

Interested Party's Submissions

18. According to the interested parties, since the decision complained about was dated 27th April, 2012 and the application for leave was filed in August 2013, some 15 months after the date of the decision sought to be quashed, the same was filed way out of time stipulated under section 9(3) of the ***Law Reform Act***, Cap 26 Laws of Kenya as read with Order 53 rule 2 of the Civil Procedure Rules.

19. Based on **Ako vs. Special District Commissioner Kisumu & Another [1989] KLR 163**, it was submitted that the said period cannot be extended.

20. According to the interested parties, the District Commissioner was rightly guided by customary law principles on the tenure of ancestral land in the course of transiting to the land registration laws. So long as the District Commissioner observes the rules of natural justice and fair play, it was submitted that he was not strictly bound by the rules of evidence.

21. It was submitted that the applicant did not act immediately upon receipt of the proceedings as expected. On the authority of Republic vs. District Commissioner Kitui & 3 Others Civil Application No. 126 of 2004 and Makege vs. Ngochi Civil Application No. 25 of 1978, it was submitted that there is no duty to follow the procedures hence his mode of conducting the case before him cannot be faulted.

Determinations

22. Before going into the merits of this application, one needs to understand the purpose of the land adjudication and its processes. In doing so the decision of Law, JA in Timotheo Makege vs. Manunga Ngochi Civil Appeal No. 25 of 1978 [1979] KLR 53; [1976-80] 1 KLR 1136 immediately comes to mind. In the said decision the learned judge expressed himself 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.”

23. On the same point, the Court of Appeal in Mukangu vs. Mbuyi Civil Appeal No. 281 of 2000 [2004] 2 KLR 256, pronounced itself as hereunder:

“The very purpose of subjecting land, hitherto held under customary tenure, to the process of land consolidation under the Land Consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act is *ipso facto* to change the land tenure system which would have been ascertained and recorded before registration....The registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act... In this case the land was ancestral land that devolved from the father. It was registered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of the

succeeding generations.”

24. The High Court, on the other hand, in Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa High Court Miscellaneous Application No. 40 of 2000 pronounced itself as follows:

“Individual ownership of land is guaranteed in the constitution. The policy of Government is evidenced in the passing of Land Consolidation and Land Adjudication and Registration programme resulting in individual tenure, which is the opposite of communal tenure. There is no tenure based on ancestral claim and or ethnicity where land has been registered as the registration of land ownership individualizes tenure and results in eradication of communal or any other tenure.”

25. As this Court held in Nairobi High Court JR Miscellaneous Application N. 304 of 2013 – Republic vs. District Commissioner Machakos ex parte Kakui Mutiso:

“...under the land consolidation and adjudication processes, the issue before the relevant tribunals is the determination of interest in land rather than individual ownership since individual land tenure only comes into being on registration. The preamble to the *Land Adjudication Act*, Cap 284, Laws of Kenya states that it is “An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto.” Therefore, before registration the land in question is either ancestral or falls under any other form of communal ownership i.e. Trust land. In such instances, it is my view that the application of the strict succession legal regime does not apply since in my view the issue of estate may not be readily applicable to ancestral or communal property as such. My view is supported by the provisions of the *Law of Succession Act*, Cap 160 Laws of Kenya... therefore the property which vests in the personal representative of the deceased is the property of the deceased. Under section 3 thereof “estate” is defined to mean “the free property of a deceased person” while “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death”...In my view communal property cannot therefore be said to form part of the estate of the deceased. It would therefore follow that before the land is registered in the name of a person and thus bestowed with individual tenure thereof, the land in question cannot form part of the estate of the deceased in order to require a person claiming the same to obtain letters of administration before making such a claim...To apply strict succession legal regime to such property would render the process of land adjudication and consolidation lose its purpose and meaning. It ought to be noted that by section 13 of the *Land Adjudication Act*, every person who considers that he has an interest in land within an adjudication section may make a claim to the recording officer and point out his boundaries to the demarcation officer. It follows that the person claiming an interest in land within an adjudication area need not to have letters of administration in order to be entitled thereto...It is therefore my view that it was not necessary that the interested party obtain letters of administration and be substituted in place of the deceased appellant before the appeal could proceed.”

26. It was contended that the instant application was time barred. However, in R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR as well as Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998 it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else. A decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7.

- Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.
27. As I held in **Republic vs. District Commissioner Machakos ex parte Kakui Mutiso** (supra) a Court of law ought not to drive a litigant from the seat of justice unless the law is clear that the cause of action is time barred under the relevant limitation statute. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199**, in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.
28. Just as I held in the aforesaid case, the six months limitation period was inapplicable to the present proceedings more so as none of the parties was able to state with certainty when the impugned decision was delivered since the interested party did not file any affidavit to controvert the averments made by the ex parte applicant.
29. It was further contended that the Respondent by his decision in effect awarded the disputed land to a deceased person. As I have already stated hereinabove the purpose of the adjudication process is to determine rights and interest in a Trust land. It would therefore be erroneous to confer rights and interests in such land on a deceased person. Therefore the award of the disputed land to **Kavuu** and **Wayua** who it is not disputed were deceased was an illegal order as the said persons were incapable of having any interest in the suit parcels of land.

Order

30. In the premises the orders that commend themselves to me and which I hereby issue are as follows:
- 1. An order of Certiorari is hereby issued removing to this Court for purposes of being quashed the proceedings and Ruling/Judgment of the District Commissioner-Kathiani, dated 27/4/2011 and given/read to the parties therein on 12/2/2013, in Machakos/Kathiani Minister’s Land Appeal Case No. 109 of 1987, which decision is hereby quashed.**
 - 2. Prohibition prohibiting the District Commissioner-Kathiani or any Land Officer/Surveyor acting on the basis of the aforesaid Ruling/Judgment from implementing or causing to be implemented the Ruling/Judgment made in Machakos/Kathiani Minister’s Land Appeal Case No. 109 of 1987.**
 - 3. The costs of this Application are awarded to the Applicant to be borne by the Respondent.**

Dated at Nairobi this 16th September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

The Applicants

Cc Patricia