



REPUBLIC OF KENYA

High Court at Embu

Judicial Review 57 of 2011

NTHIGA MUNGORI(DECEAED Represented by

NJERU AMBROSE NTHIGA.....APPELLANT

VERSUS

MWANIKI MWIGE Represented by

EUTON NJIRU MAKUNGO.....RESPONDENT

AND

IN THE MATTER OF JUDICIAL REVIEW

REPUBLICAPPLICANT

VERSUS

J.K. CHELIMO, DISTRICT COMMISSIONER,

MBEERE NORTH DISTRICT.....RESPONDENT

AMBROSE NJIRU NTHIGA.....INTERESTED PARTY

EUTON NJUKI MAKUNGO.....EX-PARTE APPLICANT

R U L I N G

This is the Notice of Motion dated 14/10/2011 filed pursuant to leave granted on 26/9/2011. The application is brought under Order 53 Rule 3 of the Civil Procedure Rules and Section 8 & 9 of the Law Reform Act, for an order of certiorari to remove into the High court for the purpose of being quashed the decision of the DC Mbeere North District dated 24/5/2011 allowing appeal to the Minister in Minister's Land Appeal case No. 409/2003 and awarding land parcel No. Mbeere/Kirima/1448 to the appellant Nthiga Mungai.

The grounds raised ar

The DC was biased.

There was an error of law on the face of the record.

In his supporting affidavit the applicant states that on following a successful appeal, land No.

Mbeere/Kirima/1448 was awarded to Mwaniki Mwigie whom he represented. Subsequently on 23/1/2004 registration was done and a title deed issued on 5/12 2006 (ENM2).

There had been no restrictions in the register concerning an appeal to the Minister. A decision in appeal No. 409/2003 later reversed the decision and awarded this land to Nthiga Mungori represented by Ambrose Njiru Nthiga. He complains that the DC never recorded his evidence, and arrived at a biased decision.

I have not seen on record any replying affidavit by the interested party. Counsels for the *ex-parte* applicant and the interested party filed written submissions. Ms. Njeru for the *ex-parte* applicant submitted that after being registered there was never any restriction placed on the land as required by Section 28 of the repealed Land Act. And that since the applicant was registered he was protected by Section 143(1) of the registered Land Act (now repealed).

He denied knowledge for any pending appeal as he was never served as there was no provision of such service. Ms. Njeru submitted that the DC could not in the circumstances cancel the earlier title. To her the error on the face of the record was cancellation of an existing title. And on that ground the decision ought to be quashed. He referred to the case of ***TIMOTHEO MAKENGE VS MANUNGA NGOCHI Court of Appeal NO. 25/78.***

Secondly the evidence of the Mbeere District Land Registrar was not included in the proceedings. And that the DC was biased in that he refused to consolidate the two appeals i.e. No. 409 & 243/10. She therefore prayed that the decision of the DC be quashed.

Mr Githinji for the interested party opposed the application. In his submissions he states that :-

1. ***The issuance of title to the applicant on 5/12/2006 when the appeal was on-going is very suspect. He fully participated in the appeal.***
2. ***When the appeal started there was no title to the land. He withheld the information that he had title.***
3. ***The case of TIMOTHEO MAKENGE (SUPRA) supported the claim by the interested party. He referred to the Judgment of Judge Law (as he then was).***
4. ***The applicant was given ample time for hearing and even examined witnesses.***
5. ***He dismissed the applicants averment that the Minister denied him the right to consolidate appeals. And it was not a must for the Minister to consolidate the appeals.***

Counsel has also raised the issue of non service on the Respondent. I have however confirmed from the record that indeed the Attorney General was served upon the Court's direction. The decision the applicant wishes to have quashed was made by the DC Mbeere North District dated 24/5/2011. The said decision allowed the appeal to the Minister in Minister's Land Appeal case No. 409/03 awarding parcel No. Mbeere/Kirima/1448 to the appellant Nthiga Mungori.

The said appeal was raised after an order was made in objection proceedings awarding the suit land Mbeere/Kirima/1448 to Mwaniki Mwigie whom the Applicant represented. The same was registered and a title deed issued on 5/12/2006. This appeal was finalized 24/5/2011.

Three issues emerge for determination viz:-

1. ***Locus standi of the applicant.***
2. ***Jurisdiction of the Minister in the Appeal.***
3. ***Bias by the minister's representative.***

I will first of all deal with the issue of *locus standi* of the applicant herein. It is true that under the Adjudication Act anyone would appear on behalf of another even if the claimant had died. But that is not so under the Civil Procedure Act. The applicant herein does not have any power of attorney to enable him represent the said Mwaniki Mwigie who is registered as the proprietor of the suit land.

Secondly its clear that the Applicant actively participated in the appeal proceedings. As a Respondent he was served otherwise how was he able to take part in the proceedings? And having been made aware of the on going appeal he could not go ahead and have the land registered and a title deed issued under the pretext that there were no entries/restrictions in the land register showing there was an on going appeal.

Its not disputed that the area in question was under adjudication. The process of adjudication as provided for under Section 29 of the then Act had to be finalized before registration and issuance of title deeds. The appeal was lodged in the year 2003 and finalized in 2011. There was no title deed between 2003-2006.

The applicant does not say he was not aware of the appeal. He who comes to equity must come with clean hands. The applicant is not doing so. The DC was not duty bound to consolidate the appeals. The fact that he elected to hear appeal No. 409/03 & 243/10 separately does not mean he was biased. Infact the end result is the same in both appeals.

The applicant complains of part of his evidence not having been recorded by the DC. Which is this evidence that was left out? He has not identified which evidence this is. In the case of **TIMOTHEO MAKENGE VS MANUNGA NGOCHI Civil Appeal No. 25/78** the Court held that CERTIORARI will issue to quash a determination for excess or lack of jurisdiction, error of the law on the face of the record, or breach of rules of natural justice or where the determination has been procured by fraud, collusion or perjury.

A perusal of the proceedings shows that the applicant fully participated in the proceedings, called witnesses and even cross examined the witnesses who were called by the other party. The fact that the decision arrived at did not favour him does not in itself mean the DC was biased.

An issue has been raised to the effect that the evidence of the Land Registrar was not included in the proceedings. At what point did the Land Registrar give evidence? She gave evidence on whose behalf? Was she a witness of the applicant or of the interested party? This has not been established.

The Land Registrar could have said anything but the truth of the matter is that a title deed was issued by the Land Registrar to Mwaniki Mwige with the full knowledge that there was a pending appeal in relation to this land. Had the registration been done before the filing of the appeal, the position would have been different and we would be talking of a properly acquired on first registration. I therefore find that the Minister had the jurisdiction to hear the appeal as it was filed before any registration was done.

I have found absolutely no elements of breach of the rules of natural justice in the manner the appeal was handled. On the issue of 1st registration and a title deed being issued, I find that with the impending appeal which was well known to the applicant and the Land Registrar, the title deed ought not to have been issued. It was issued before the process under the Land Adjudication Act was complete.

I find that the issuance was bent on defeating the ends of justice to favour Mwaniki Mwige. And finally the Applicant lacked the *locus standi* to file the application before this Court.

I therefore decline to grant the order of Certiorari sought. The application dated 14/10/2011 is therefore dismissed. No orders as to costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF FEBRUARY 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Githinji for interested party
Interested Party
Njue CC