



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 1760 of 2004

REPUBLIC.....APPLCIANT

AND

MWINGI DISTRICT COMMISSIONER.....RESPONDENT

EX-PARTE: WILSON NGUNA KIMENGA

JUDGEMENT

1. The prayers the subject of this judgment are contained in the Notice of Motion dated 10th March 2005 in which the *ex parte* applicant **Wilson Nguna Kimenga** seeks the following orders:

a. **AN ORDER OF CERTIORARI to remove to the High Court for the purpose of being quashed, the proceedings and decision of the Mwingi istrict Commissioner in Minister’s Appeal No. 129 of 1998 (Nzeluni Adjudication Section Parcel No. 1004, Kimenza Nzomo (Represented by Nguna Kimenga –vs-Matiti Mwinzi (Represented by Julius Kaloi Matiti) made on 25th June 2004.**

b. **THE COSTS of this Application be provided for.**

2. The application is supported by a statutory statement filed on 21st December 2004 and a verifying affidavit sworn by the applicant, **Wilson Nguna Kimenga**, on 21st December 2004.

3. According to the applicant, the dispute herein is in respect of land parcel No. 1004 **Nzeluni Adjudication Section** which is now demarcated in favour of **Matiti Mwinzi** which during demarcation was part of Plot No. 495 and which was demarcated in favour of **Nguna Kimenga**. The Adjudication Committee later ordered sub-division of the land into two portions, plot numbers 495 and 1004 which were allocated to **Nguna Kimenga** and **Matiti Mwinzi** respectively. The applicant then filed an Arbitration Board Case challenging the subdivision and after the hearing **Matiti Mwinzi** won. Further objections to the Land Adjudication Officer and an appeal to the Minister were similarly determined against the *ex parte* applicant.

4. According to the *ex parte* applicant, during the hearing he was not given a fair opportunity to present his case and that his documents were not accepted by the District Commissioner who appeared to openly favour his opponent. Despite a visit by the said District Commissioner no record of the findings thereof were made and neither was a draft map or chart made. According to the *ex parte* applicant, the District Commissioner styled himself as a Court of Law. Further the impugned proceedings do not indicate that the matter was heard by a District Commissioner and the particular District Commissioner. Further the

decision does not bear the name of the District Commissioner.

5. On behalf of the *ex parte* applicant, it is submitted that by declining to accept the *ex parte* applicant's documents in defence of his case, the District Commissioner, acting as a delegate of the Minister's Appellate powers, failed to give the applicant a fair hearing as required under section 29 of the **Land adjudication Act**, Cap 284 and conducted an irregular visit to the locus in quo hence acted in excess of his lawful jurisdiction. In the applicant's view, the District Commissioner acted beyond the four corners of his lawful jurisdiction hence acted *ultra vires* his powers. Although the District Commissioner visited the disputed land, there is no or no proper record of the visit in the proceedings nor a record of the findings by the District Commissioner upon making the visit hence the District Commissioner acted maliciously and in bad faith.

6. It is further submitted that the District Commissioner failed to take into account the Kamba Customary Law which obligation is akin to that incumbent upon a court of law under Section 3(2) of the **Judicature Act** Cap 8 and reference is made to **Mumo vs. Makau [2002] 1 EA 170**.

7. The District Commissioner is similarly faulted for not making a draft map or chart of what he saw on the said visit. Citing **Republic vs. Northumberland Compensation Appeal Tribunal ex parte Shaw [1952] 1 KB 338**, it is submitted that the main remedy where there is an error on the face of the record is the order of certiorari for which the applicant prays.

8. It is further submitted that a fatal omission in the proceedings is that the proceedings or judgement do not indicate or at any rate, disclose that the matter was heard by a District Commissioner, which particular District Commissioner nor is the name of the District Commissioner indicated. In the *ex parte* applicant's view, the District Commissioner should have acted justly as demanded by section 29(1) of Cap 284.

9. It is therefore submitted that in the totality of these circumstances, the proceedings before the District Commissioner were tainted by a litany of procedural flaws in terms of error/excess of jurisdiction, *ultra vires*, failure to afford the Applicant a fair hearing and mala fides hence the certiorari sought herein.

10. On behalf of the Interested Party, it is submitted that the *ex parte* applicant has no *locus standi* to purport to represent the interests if any of his father and/or his seemingly intestate state. According to the Interested Party the applicant's siblings have neither been served with the present proceedings as required under Order 53 nor has service thereon been dispensed with. In the Interested Party's view, the applicant has neither shown that he is directly affected by the adjudication process nor that he has any sufficient interest in the parcel no. 1004. Without letters of administration, it is submitted that the applicant is non-suited hence these proceedings ought to be struck out.

11. In the Interested Party's view, these proceedings though purport to be challenging the decision-making process of the District Commissioner, are in actual fact a challenge on the merit of the decision. There is nothing, according to him, to infer that the District Commissioner acted *ultra vires* his jurisdiction under the **Land Adjudication Act** and that the allegations of bias, procedural impropriety, irrationality, unreasonableness and/or unfairness are mere allegations without proof. According to him there was no evidence adduced touching on Kamba Customary Law and the applicant was not denied a fair hearing since both parties testified and were cross-examined. By agreeing with the previous decisions, it is contended the District Commissioner must have reviewed the same which had been adopted by the applicant. It is further submitted that the failure to indicate the name of the District Commissioner did not occasion any miscarriage of justice since the applicant knew the District Commissioner before whom he appeared and who visited the site

12. It is therefore submitted that the District Commissioner's decision-making process was above board and hence unimpeachable and the grant of certiorari would serve no useful purpose since the quashing of the decision of the Minister would leave prior decisions intact and no case for re-hearing has been made out.

13. I have considered the foregoing matters and this is the view I form of the matter. Section 29 of the

Land Adjudication Act Cap 284 Laws of Kenya provides:

(1) Any person who is aggrieved by the determination of an objection under 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.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall -

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

(4) Notwithstanding the provision of section 38 (2) of [the Interpretation and General Provision Act](#) or of any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

14. The Interested Party has raised the issue of the *ex parte* applicant's locus more particularly in light of the absence of letters of administration. However one ought to establish the purpose of the *Land Adjudication Act* and what it is meant to achieve. According to the preamble to the Act 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." In my view the Act does not confer individual title to land. The Act is only a vehicle through which rights and interests in Trust land are ascertained and recorded. Those rights may either be individual or collective. Accordingly, at that stage it is my view and I so hold that there is no necessity to obtain letters of administration since some of the lands in question may well be clan and family lands rather than private ones.

15. The *ex parte* applicant's complaint is that he was not afforded a fair hearing as stipulated under section 29 of the said Act. That a party is entitled to fair hearing cannot be overemphasized. In fact that requirement is a constitutional requirement. Article 47 of the Constitution provides as follows:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

16. Article 50 of the same Constitution on the other hand provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

17. The *ex parte* applicant's complaint is that the District Commissioner declined to accept his documents. However, it must be remembered that what was before the District Commissioner was an "appeal". In **Karia and Another vs. Attorney-General and Others [2005] 1 EA 83**, Tsekoko, JSC

held:

“Appeal” is to address, invoke, entreat, implore, supplicate, sue or petition while to “sue” is to prosecute, accuse, take to court.... A general definition of a judicial appeal is said to be an application to a superior Court or tribunal to reverse, vary or set aside the judgement, order, determination, decision or award of an inferior court or tribunal in the hierarchy of Courts or tribunals on the ground that it was wrongly made or that as a matter of justice or law it requires to be corrected....Firstly, to appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. Secondly an appeal strictly so called is one in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it”.

18. In this case, there is nowhere in the proceedings of the District Commissioner where it is indicated that the *ex parte* applicant sought to produce any documents assuming that he could produce any documents at that stage. That the *ex parte* applicant was heard is not disputed. In fact the *ex parte* applicant’s case is not that he was not afforded an opportunity of being heard but whether given a fair opportunity of presenting his case. I have considered the record of the proceeding and I am not satisfied that the *ex parte* applicant was not treated fairly. Further there is no evidence on record that the District Commissioner exhibited bias in his treatment of either of the parties. I cannot help but agree with the Interested Party that the applicant’s purported challenge to the decision making process by the District Commissioner is in reality a challenge on the merits of the decision and a disguised appeal from the said decision. However, as the Court of Appeal reiterated 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 maker 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. 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.***

19. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

20. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.

21. The other complaint is that the District Commissioner did not indicate before whom the matter was heard. It is not in dispute that the *ex parte* applicant was aware of the person before whom the dispute was heard. He has not challenged the powers of the District Commissioner to hear the matter. Since the matter was at an appellate level, I am not satisfied that the mere fact that the District Commissioner did not record what had transpired during the visit to the site constitutes a procedural impropriety on his part. He was not under any legal obligation to visit the site in the first place and in my view nothing turns on that issue.

22. Apart from the foregoing the decision whether or not to grant the remedy of judicial review is discretionary is now well settled. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 Of 2000.**

23. The court does not therefore issue orders in vain even where it has jurisdiction to issue the prayed orders. To grant the orders of certiorari sought would have the effect of quashing the orders of the District Commissioner without quashing the earlier orders with the effect that the orders made prior to that of the Minister would remain in force and since there would be no pending appeal the Interested Party would thereby be registered. Accordingly no use will be served by allowing these proceedings.

24. In the premises the order that commends itself is that the Notice of Motion dated 10th March 2005 be and is hereby dismissed with costs to the Interested Party.

Dated at Nairobi this 30th April 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Mahinda for Munyasia for the Interested Party