



No 140/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION NO. 36 OF 2011

IN THE MATTER OF AN APPLICATION OF **GEOFFREY MUTIE MBULE** FOR JUDICIAL
REVIEW ORDERS OF *CERTIORARI* AND *PROHIBITION*

IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP) 284

AND

IN THE MATTER OF PLOT NO. 745 MANGANI ADJUDICATION SECTION

AND

IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES AND ALL OTHER ENABLING
PROVISIONS OF THE LAW

BETWEEN

REPUBLIC

VERSUS

**THE MINISTER FOR LANDS & ADJUDICATION AND SETTLEMENT THROUGH THE
DISTRICT COMMISSIONER, MBOONI EAST APPEAL NO. 33 OF 2009**

DIRECTOR OF LANDS ADJUDICATION1ST RESPONDENT

CHIEF LAND REGISTRAR-NAIROBI.....2ND RESPONDENT

THE HON THE ATTORNEY GENERAL3RD RESPONDENT

VERSUS

ELIZABETH MUUSI NGOVI.....1ST INTERESTED PARTY

JACKSON KIMATHI NGOVI.....2ND INTERESTED PARTY

BENSON MUTUNGA NGOVI3RD INTERESTED PARTIES

AND

JUDGMENT

1. **Geoffrey Mutie Mbule** the *Exparte* Applicant filed a Motion seeking orders of Judicial Review orders as follows:-
 - i. *Certiorari* directed to the 1st Respondent to bring to this court to be quashed the 1st Respondent's decision (*through District Commissioner Mbooni East by delegated powers*) dated 31st March, 2010 dismissing the Applicant's Appeal No. 35 of 2009 and upholding the decision of the Land Adjudication Officer for plot No. 745 to remain in ownership of **Jackson Ngovi** and **Benson Ngovi** as co-owners on which formal communication of finalisation of the Minister's decision was made to the applicant on 28th September, 2010.
 - ii. *Prohibition* directed to the 1st Respondent, the Director of Lands Adjudication and Chief Lands Registrar Nairobi, their servants and/or agents or others whomsoever from in any way dealing with plot No. 745 Mangani Adjudication Section and from implementing the awards of the Minister.
2. The application is based on the grounds that **Daniel Mukola Ngovi** posing as the absolute sole proprietor of Plot No. 745 Mangani Adjudication Section, hereinafter "*the suit premises*" sold it to the *Exparte* Applicant on 2nd January, 1987. The plot measuring 1½ acres was disposed of at Kshs. 60,000/=. Following the transaction the interested parties herein instituted objections to the Land Adjudication Section which re-awarded the suit property to the interested parties and the **Ngovi family**.
3. The applicant appealed to the Minister. His appeal No. 33 of 2009 was heard by the District Commissioner, Mbooni East District to whom the Minister for Lands delegated powers. It was determined on the 31st March 2010. The decision was communicated to the applicant on the 28th September 2010. It was the contention of the applicant that the District Commissioner failed to uphold basic principles of natural justice. He failed to accord the applicant an opportunity of presenting his case and calling witnesses of his choice. He was biased as he was a friend of the interested party and also having been compromised.
4. Leave to apply for judicial review was granted by **Kihara Kariuki, J** (as he then was) on 7th March 2011. The application was canvassed by way of written submissions.
5. It was the submission of **Mr. F.M. Mulwa**, counsel for the *exparte* applicant that the District Commissioner for Mbooni East District, **Mr. F.M Shisia** in hearing and dismissing the appeal and upholding the decision arrived at by the Land Adjudication Officer and Arbitration Board and ordering their plot No. 746 to remain in ownership of **Jackson Ngovi** and **Benson Ngovi** as co-owners was action in a *quasi-judicial* capacity and he was obligated to follow the rules of natural justice. The District Commissioner failed to uphold rules of natural justice by hearing the appeal without notifying the applicant hence violating his right of being heard and hence condemned him unheard. The District Commissioner failed to follow the right procedure. The record of appeal did not disclose whether or not parties were heard and if they were given an opportunity to call witnesses or cross-examined in details by the District Commissioner. There was no indication if indeed grounds of appeal raised by the applicant were considered.
6. Counsel for the interested party, **Mr. Mulwa** submitted that the application for leave to file the substantive motion should not have been granted at the first instance as it was not sought within the prescribed time. With regard to the alleged bias by the District Commissioner following a purported relationship with one of the interested parties he submitted that it was denied by **Jackson Kimanthi Ngovi** hence it was not true. Further, he stated that the record of proceedings indicated the applicant failed to appear before the District Commissioner deliberately after he was notified. Therefore, he did not breach rules of natural justice.
7. With regard to the issue of leave having been irregularly granted to institute judicial review proceedings, the application was made pursuant to the provisions of Order 53 of the Civil Procedure Rules. The applicant was seeking *certiorari* and *prohibition* remedies. Time within which to apply for *certiorari* is provided for by Order 53 rule 2 of the Civil Procedure Rules

which provides as follows:-

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act”.

8. The Law Reform Act (Cap 26) Laws of Kenya an Act of Parliament provides for rules to be upheld by the court in respect of prerogative orders. Section 9(3) of the Act cited by counsel provides:

“In the case of an application for an order of certiorari to remove any judgment, Order, decree, conviction or other proceedings for the purposes of its being quashed, leave shall not be granted unless the application for leave is made not later than six (6) months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law”.

9. The District Officer representing the Minister of Lands heard the appeal on the 31st March, 2010. His findings and verdict are not dated. In his statement the applicant states that the decision was communicated to him on the 28th September 2010. The verdict is not dated but was certified on the 28th September, 2010. Failure to date the decision reached was an omission that is tantamount to an error on the face of the record. This court is not able to tell when exactly the verdict was made.
10. The application for leave to institute these judicial review proceedings was heard *ex parte* by **Kihara Kariuki, J** (as he then was). He considered facts presented and granted the order sought. This court cannot fault the order. No issue has been raised to challenge that fact. At the time of seeking leave to file the substantive motion on the 4th March, 2011, six (6) months had not lapsed.
11. It was submitted that the District Commissioner failed to uphold rules of natural justice denying the applicant the right to be heard. In the case of **Republic versus the Minister for Lands and Settlement & Others Civil Miscellaneous Appeal No. 183 of 2004, Onyancha, J** stated thus:-

“The court is a quasi judicial tribunal which cannot ignore basic principles of justice system in determining the appeal and in making such orders thereon as it is thought just as provided by section 29 (1) of the Land Adjudication Act... such a court is therefore bound to observe the basic principles of natural justice. It must make sure that all the partners for example are given an adequate reasonable time to put up their case including calling witnesses... the parties should be given an opportunity to cross examine the other side and its witnesses...”

12. According to Section 29 of the Land Adjudication Act, any person who is aggrieved by the determination of the Adjudication Registrar appeals to the Minister who determines the appeal. The procedure to be followed by the Minister is not provided.
13. A perusal of the record of proceedings of appeal made by the District Commissioner reveal that the applicant was absent. In his findings the District Commissioner remarked that the applicant declined to sign the summons forwarded to him and as such failed to attend the hearing of the appeal on 31/3/2010. His failure to attend in his opinion was contemptuous. This finding should have been supported by some evidence. This is the only way it could be established that justice had been done. It was therefore erroneous on the part of the District Commissioner to dismiss the applicant as having acted out of sheer contempt.
14. The District Commissioner's impartiality was questioned. He was accused of being a friend to one of the interested parties. The issue was indeed brought to the attention of the District Commissioner. In his findings the District Commissioner stated thus:-

“Instead the appellant chose to write to the same Minister, which is betrayal and contempt of the whole process, (copy of the letter written by the appellant is attached to these proceedings). In addition, the appellant in the same letter made comments which indicated that he was trying to draw the office to petty local social differences and this is not in the interest of public good”.

15. The letter written to the District Commissioner is dated 31/3/2010. The applicant outlined reasons why he believed it was important for the officer to recuse himself from hearing the case. In response to a letter written to the Minister the Permanent Secretary was of the opinion that the District Commissioner would decide on whether or not to hear the appeal. The District Commissioner based his decision on the issue. He formed an opinion that the applicant deliberately failed to appear before him following the communication he made to the Minister. He stated that as a result the appeal was a waste of time for the process and the defendants. This was evidence that he did not consider the grounds of appeal raised by the applicant. To reach a just conclusion it was incumbent upon the District Commissioner to consider grounds that were raised by the applicant and the proceedings before the adjudication Officer. (see **Mahaja versus Khutwalo [1983] KLR 553**).

16. This brings us to the issue whether judicial review can issue in this case. In the case of **Commissioner of Lands versus Kunste Hotel Ltd KLR (e & l) 249** the court stated thus-

“The purpose of judicial review is to ensure that the individuals receive fair treatment and not to ensure that the authority after according their treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”

17. The District Commissioner having been entrusted with the duty of hearing the appeal on behalf of the Minister of Land was expected to act within such powers. He was supposed to ensure the procedure adopted was fair and above all he ought to have upheld principles of natural justice. Failure to comply would call for an order of *certiorari* and *prohibition* being issued to control any kind of irregularity that may arise.

18. Section 29(1) (b) of the Land Adjudication Act however provides thus:-

“The Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

19. **Onyancha, J** grappled with the issue in the case of the Minister for Lands and Settlement and *ex parte, Robert Musilu Mwenzwa Civil Misc App. No. 183/2004*. Where he noted that the final part of the provision would suggest that the order of the minister cannot be reviewed. He referred to the case of **Re Marles Application [1958] E.A.153** where it was held that ***“the decision is stated to be final but does not preclude this court the issuing of certiorari...”***

20. In this case, it is obvious that the District Commissioner contravened principles of natural justice. He failed to consider grounds upon which the applicant appealed. He failed to recuse himself from hearing the appeal when serious allegations had been raised against him. He failed to ascertain if indeed the applicant had notice of the hearing date. The decision made was therefore initiated by an error on the face of the record which makes the decision *ultravires*.

21. In the premises, I do recall the orders of the District Commissioner Mbooni East (*by delegated power*) dismissing the applicant’s appeal No. 33 of 2009 and upholding the decisions of the Land Adjudication Officer for Plot No. 745 within Mangani to remain in ownership of **Jackson Ngovi** and **Benson Ngovi** the co-owners which I do hereby quash.

22. Secondly, I do issue an order of *prohibition* directed to the 1st and 2nd Respondents, their servants and/or agents or others whomsoever from in anyway dealing with plot No. 745 Mangani Adjudication Section from implementing the award of the minister.

23. Further, I do order that the appeal shall be re-submitted to the Minister for hearing in accordance with the law.

24. The error having been made by the Public Officer, each party shall bear its own costs.

25. Orders accordingly.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of JUNE, 2013

L.N.MUTENDE

JUDGE