REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ENVIRONMENT AND LAND COURT

MISC CIVIL APPLICATION NO. 11 OF 2013 (JR)

IN THE MATTER OF AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE MINISTRY OF LANDS AND SETTLEMENT

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 OF THE LAWS OF KENYA

AND

IN THE MATTER OF PROCEEDINGS OF MINISTER'S LAND APPEAL CASE NO. 264 OF 2001

AND

REPUBLIC .....APPLICANT

VERSUS

MINISTER FOR LANDS & SETTLEMENT .....1ST RESPONDENT

DISTRICT COMMISSIONER MBEERE NORTH .....2ND RESPONDENT

JUNIUS NJUKI MACHOCHO .....3RD RESPONDENT (DECEASED) SUBSTITUTED BY JEDIDA MWENDIA NJUKI

AND

PAUL MUGO NGUKU ..... EX-PARTE APPLICANT

JUDGMENT

By his Notice of Motion filed herein on 13th April 2012, the applicant sought the following orders:-

1. ***An order of certiorari to remove to this Court for purposes of quashing, the proceedings and decision of the Minister and/or District Commissioner – Mbeere North in Appeal Case No. 264 of 2001, Kiambere Adjudication Section dated 28th October 2010.***
2. ***An order of prohibition prohibiting the respondents from using, executing, effecting or in any other manner enforcing the said decision in Kiambere Adjudication Section Appeal Case No. 264 of 2001.***
3. ***Costs of the application.***

The said application was supported by the applicant's verifying affidavit and statutory statement and bases on the grounds that:-

a. ***That the District Commissioner Mbeere North acting for the Minister of Lands and Settlement entertained, heard and made a decision on an appeal which had been brought by the respondent ten (10) years after the award of the Land Adjudication officer Kiambere.***
b. ***That the act of the District Commissioner acting for the Minister for Lands and Settlement of entertaining the appeal by the 2nd respondent herein and making the award was illegal, ultra vires and in contravention of Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya.***
c. ***That the District Commissioner acting for the Minister relied on inconsistent evidence in making this decision thus the decision was based on error of facts.***

The application was opposed and the 3rdrespondent who is now deceased, was substituted by his wife JEDIDA MWENDIA NJUKI who filed a replying affidavit.

Submissions have also been filed by counsels acting for the applicant and all the respondents herein. I have considered those submissions together with the application and other relevant documents.

It is the applicant's case that the District Commissioner Mbeere North Acting for the Minister of Lands and Settlement entertained an appeal that was filed by the respondents ten (10) years after the award of the adjudication officer Kiambere. It is the applicant's argument that the adjudication officer made his award on 5th September 1991 awarding the land subject to this case to his father and therefore there was a right of appeal of 60 days yet the appeal was lodged in 2001. However, in her replying affidavit JEDIDA MWENDIA NJUKI depones that the appeal was lodged on 8th October 1991 and not in 2001. She has annexed to her affidavit a copy of the appeal (annexture JMN 1) adding that the fact that the appeal was given a case number for 2001 does not mean it was filed in 2001. Looking at annexture JMN 1, it is clear that the appeal was lodged to the Minister on 8th October 1991 as it not only bears the Minister's stamp for that date but is also signed by the appellant on the same date. The Minister's appeal case is given as No. 264 of 2001 but under ***Section 291 of the Land Adjudication Act***, it is provided that a person aggrieved by the determination of any objection may, within 60 days of the determination appeal against the same by

"***Delivering to the Minister an appeal in writing specifying the grounds of appeal"***

The only evidence that has been placed before me as to when the appeal herein was delivered to the Minister is the annexture **JMN 1** which is the appeal to the Minister and which bears the date 8th October 1991 and the Minister's stamp of the same date. That is the primary document to show when the appeal was delivered to the Minister in accordance with ***Section 29 (1) of the Land Adjudication Act***. Therefore the fact that the appeal was given Case No. 264 of 2001 is not evidence that the appeal was filed in 2001. neither can that defeat the clear and cogent evidence on the documents of appeal which shows that it was lodged on 8th October 1991 and was duly received in the Minister's office and date stamped on that same day. Therefore, the ground that the appeal was filed ten years later is not supported by the evidence before me and therefore fails.

The other two grounds are that the District Commissioner acted ultra-vires and made an

illegal award contrary to the law and also relied on inconsistent evidence. It is further submitted by the applicant that the District Commissioner heard the case as if he had original jurisdiction and not as an appeal.

It is true that in hearing the appeal, the District Commissioner heard evidence from witnesses before arriving at a decision. The Land Adjudication Act does not provide a procedure of how an appeal shall be determined ***Section 29*** only states that:-

"------ the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final"

The applicant's counsel submits that since no grounds of appeal were in the proceedings and instead the District the District Commissioner conducted a hearing, this was ultra – vires ***Section 29 of the Land Adjudication Act***. Counsel relies on a decision by Justice Ali – Aroni in Kisumu High Court Civil Application No. 270 of 2004. That decision is of course only of persuasive value to this Court. In ***TIMOTHEO MAKENGE VS MANUNGA OGOCHI 1979 K.L.R 53,*** the Court of Appeal for Eastern Africa stated that the Minister's duty under ***Section 29 of the Land Adjudication Act*** is essentially to "***determine the appeal and make such orders thereon as he thinks just***" and that in doing so, the Minister "***is not bound***" to follow the procedure prescribed for hearing civil suits under the ***Civil Procedure Act***. That decision is binding on me and was not brought to the attention of Justice Aroni when she heard the Kisumu Civil Application No. 270 of 2004. In any case, even if the District Commissioner heard evidence afresh, the record shows that each of the parties was given an opportunity to adduce evidence and call witnesses and therefore none of the parties was prejudiced by that procedure. It would have been different if the District Commissioner proceeded to hear one party in the absence of the other. In my view, it is sufficient if the District Commissioner substantially applied the rules of natural justice which, in my view, he did even if the procedure was not what is known under the ***Civil Procedure Act.*** That alone would not render the decision illegal as alleged by the applicant. No material has been placed before me to indicate that the District Commissioner relied on inconsistent evidence or that the decision was based on error of facts.

Ultimately therefore, upon considering the applicant's Notice of Motion dated 10th April 2012, I find it lacking in merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

16TH SEPTEMBER, 2013

16/9/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Mwangi for Mungai for Applicant – present

No appearance for 1st & 2nd Respondent

Mr. Ithiga for Njeru for 3rd respondent – present

COURT: Judgment delivered this 16th day of September 2013 in open Court.

B.N. OLAO

JUDGE

16TH SEPTEMBER, 2013