



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL MISC. APPLICATION CASE NO. 239 OF 2011**

**IN THE MATTER OF AN APPLICATION BY NTHIMO KISWII AND MBULA KISWII FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, AND PROHIBITION**

**AND**

**IN THE MATTER OF APPEAL CASE NO. 129 OF 1999 TO THE MINISTER FOR LANDS & IN THE MATTER OF LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA**

**AND**

**REPUBLIC ..... APPLICANT**

**AGAINST**

- 1. THE DISTRICT COMMISSIONER, MBOONI EAST**
- 2. THE LAND ADJUDICATION OFFICER**

**MUTHWANI ADJUDICATION SECTION ..... RESPONDENTS**

**AND**

**DAVID NZIOKA MUNUVE ..... INTERESTED PARTY**

**AND**

- 1. NTHIMO KISWII**
- 2. MBULA KISWII ..... EX PARTE APPLICANTS**

**R U L I N G**

- 1. The *ex-parte* Applicants, **Nthimo Kiswii** and **Mbula Kiswii** (hereinafter Applicants) filed this application under **Order 53 rule 3** of the **Civil Procedure Rules** pursuant to the leave granted by this court on 4/11/11.

The application seeks the following orders:-

- i. (Spent).
- ii. **That leave to issue to the *Ex-parte* Applicants to apply for an order of *certiorari* to bring into the High Court for purposes of quashing the undated decision of the 1<sup>st</sup> Respondent and any other decision and orders giving ownership and/or possession of plots Nos.377 and 378**

- within** Muthwani Adjudication Section **to the Interested Party**, David Nzioka Munuve.
- iii. **That leave do issue to the *Ex-parte* Applicants to apply for an order of prohibition directed at the Respondents and the Interested Party prohibiting them from implementing the undated decision of the 1<sup>st</sup> Respondent and any other decision and orders giving ownership and/or possession of plots Nos.377 and 378 within Muthwani Adjudication Section to the Interested Party;** David Nzioka Munuve.
  - iv. **(Spent)**
  - v. **That costs be in the cause.**
  - ii. According to the Statement of Facts, the verifying affidavit and the affidavit in support sworn by the 1<sup>st</sup> Applicant, **Nthimo Kiswii**, their late father, **Samuel Kiswii Nthumba** purchased the suit land from the late **Munuve Nthiwa** who was the father of the Interested Party. The two families had no dispute during the lifetime of the aforesated family patriarchs.
  - iii. During the land adjudication process, the suit land was demarcated into two parcels. Land parcel **No. 378** was entered in the register in the name of 1<sup>st</sup> Applicant while **No. 377** went to the 2<sup>nd</sup> Applicant.
  - iv. However, on 29/04/1995, the 1<sup>st</sup> Interested Party filed case **No. MUT/2/95** before the **Land Adjudication Committee**. In its decision, the committee awarded the two land parcels to the Applicants.
  - v. Aggrieved by the said decision, the Interested Party filed an objection to the **Land Adjudication Officer** who in turn made orders that the suit land be transferred from the Applicants to the Interested Parties.
  - vi. The Applicants were dissatisfied with the decision of the **Land Adjudication Officer** and made an appeal to the Minister. Under powers delegated by the Minister, the appeal was heard by the **District Commissioner, Mbooni East District** on 24/2/10. However, the appeal was dismissed and the decision of the **Land Adjudication Officer** upheld.
  - vii. The Applicants were dissatisfied with the Minister's decision and filed these Judicial Review proceedings on the following grounds:-
    - v. **The District Commissioner Mbooni East District acted in an arbitrary and unreasonable manner in putting into account irrelevant considerations and failed to put into account relevant considerations.**
    - v. **The transfer of ownership of the land to David Nzioka Munuve (Interested Party) on 16/11/1998 contravenes Article 39 (3) and 40 (1) of the Constitution of Kenya and section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya.**
    - v. **The Committee acted in breach of the law and in total disregard of the principles of natural justice.**
  8. In opposition to the application, the Interested Party, **David Nzioka Munuve** swore a replying affidavit on 9/2/2012. It is contended that the Applicants exercised their right of appeal and cannot now purport to institute Judicial Review proceedings. That the application herein is time barred, the same having been brought after the lapse of the statutory period prescribed by the law. That the suit land forms part of the Interested Party's ancestral land and therefore it could not be sold without the consent of the family members. The Interested Party has further stated that the Applicants have never lived on the suit properties that litigation should come to an end as the Applicants were heard by the committee and the **Land Adjudication Officer** and no principles of natural justice were breached.
  9. The Respondents filed the grounds of opposition dated 18/10/12. It is stated that the prerogative orders are misplaced and not efficacious as the dispute before the court is in respect of ownership and/or title to land which dispute cannot be resolved by way of Judicial Review. That the Applicants lack the *locus standi* to bring these proceedings and have not made out a case for Judicial Review.
  10. I have considered the application, the reply to the same and the written submissions filed by the respective counsels for the parties.
  11. It must be remembered that "*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". (Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001).

12. One of the issues raised herein is whether the Interested Party had the *locus standi* particularly in the absence of letters of administration. It is noteworthy that this dispute fell under the **Land Adjudication Act** and not the **Land Disputes Tribunal Act** which has been variously cited in the written submissions filed. The preamble to the **Land Adjudication Act** states as follows:-

**“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.”**

The **Act** therefore, provides a mechanism through which the rights and interests in trust land can be ascertained and recorded. Such rights can either be individual or group rights e.g. tribe, clan or family land. My view is that for the ascertainment of such rights and interests, it would not be necessary to obtain letters of administration. Likewise, the Applicants having been parties in the proceedings before the committee, the **Land Adjudication Officer** and the Appeal before the Minister has the *locus standi* to bring these proceedings.

13. Did the dispute fall within the jurisdiction of the Minister? The answer to this question is found in **section 29 (1)** of the **Land Adjudication Act** which provides as follows:-

**“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.”**

14. **Section 29 (4)** of the **Land Adjudication Act** provides as follows:-

**“Notwithstanding the provisions of section 38 (2) of the Interpretation and General Provisions 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.”**

15. A perusal of the proceedings before the Committee (annexture “NK3”), the proceedings before the Arbitration Board (annexture “NK4”), the objection proceedings (annexture “NK5”) and the appeal to the Minister for Lands (annexture “NK6”) shows that both the Applicant and the Interested Party were heard before the decisions therein were reached. **Section 6 and 7** of the **Land Adjudication Act** provides for the appointment of the **Adjudication Committee** and the appointment of the **Arbitration Board** respectively. The objections to the **Land Adjudication Officer** are provided for under **section 26** of the **Land Adjudication Act**.

16. I have read the proceedings exhibited herein and I have not found the same to be unprocedural. The Applicant has not specifically pointed out which procedures were not followed or what irrelevant considerations the Minister took into consideration or what relevant considerations the Minister failed to take into account. Having found that the Applicants were heard in all the four stages enumerated above, I hold that there was no violation of the rules of natural justice.

17. The appeal before the Minister was heard on 24/02/2010. It is not clear from the said proceedings whether the determination of the appeal was read out to the parties. Be as it may, the said proceedings bear a stamp which reflects the copies were certified on 18/8/2011. These Judicial Review proceedings were filed on 28/10/2011. The argument by the Applicants that they received the proceedings on 18/8/2011 may as well be true. This court therefore accepts that the proceedings herein were filed within time.
18. The typographical errors pointed out concerning the land parcel numbers and some of the dates on the record do not go into the substance of the proceedings. The same can easily be corrected within those proceedings like in any other proceedings under the **Civil Procedure Code**.
19. On whether the Minister's decision contravened **Article 39 (3)** and **Article 40 (1)** of the **Constitution of Kenya**, the short answer to the question is that the said Constitutional provisions on the right to reside anywhere in **Kenya** and the right to acquire and own property protect both the Applicants and the Interested Parties and all citizens. It's not been demonstrated how the Minister's decision contravened the said Constitutional guarantees.
20. It was argued for the Applicant that the decision made on 16/11/1998 to transfer the ownership of the land contravened **Section 7** of the **Limitation of Actions Act Cap 22 Laws of Kenya** which provides as follows:-

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

21. As stated earlier on in this ruling, the **Land Adjudication** process was an exercise carried out to ascertain the rights and interests in trust land. The said exercise cannot be referred to as an action to recover land as provided for under **section 7** of the **Limitations of Actions Act**. The ascertainment of interests in land under the **Land Adjudication Act** is carried out within the period fixed under the **Land Adjudication Act**. There is no complaint that any of the said provisions of the **Land Adjudication Act** were violated.
22. With the foregoing, this court's conclusion is that the application herein does not meet the threshold for the grant of the orders sought. The application is dismissed with costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at **Machakos** this **4<sup>th</sup>** day of **September** 2013.

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**JUDGE**