



**REPUBLIC OF KENYA**

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

**CIVIL MISCELLANEOUS APPLICATION NO. 34 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. 423 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. 35 OF 2009**

**DIRECTOR OF LANDS ADJUDICATION .....1<sup>ST</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR-NAIROBI.....2<sup>ND</sup> RESPONDENT**

**THE HON THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**VERSUS**

**ELIZABETH MUUSI NGOVI.....1<sup>ST</sup> INTERESTED PARTY**

**JACKSON KIMATHI NGOVI.....2<sup>ND</sup> INTERESTED PARTY**

**BENSON MUTUNGA NGOVI .....3<sup>RD</sup> INTERESTED PARTIES**

**AND**

**GEOFFREY MUTIE MBULE.....EXPARTE APPLICANT**

## JUDGMENT

1. **Geoffrey Mutie Mbule** the *ex parte* applicant filed a Motion seeking orders of:-
  - i. *Certiorari* to remove to this court the decision of the 1<sup>st</sup> Respondent (*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 and Arbitration Board awarding plot No. 751 to **Jackson Ngovi** and **Benson Ngovi** as co-owners on which formal notice of finalization for the minister's decision was communicated to the Applicant on 28th September, 2010 for purposes of being quashed.
  - ii. Prohibition directed to the 1st, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their servant, and/or agents or others whomsoever from dealing with plot No. 751 Mangani Adjudication Section and from implementing the awards of the minister.
2. The application was premised on the ground that the applicant and **Samwel Ngovi Muthoka** (*now deceased*) entered into a sale agreement on the 4<sup>th</sup> July, 1992. It was for sale of plot No. 751 (suit premises). The consideration was 20,000. It was paid to the vendor in the presence of the 2nd interested party. The vendor having represented himself as the sole proprietor of plot No. 751. The purchaser therefore purchased the property without knowledge that the vendor held the suit property in trust for interested parties.
3. Thereafter the *ex parte* applicant filed a dispute with the Adjudication Committee and the suit property was awarded to him. Interested parties herein instituted objections before the land Adjudication Board Mangani adjudication Section which awarded the suit premises to the 2nd and 3rd interested parties. The applicant appealed to the Minister. The power was delegated to the District commissioner, Mbooni East who heard the appeal and dismissed it without taking into consideration basic principles of natural justice. He failed to consider grounds of appeal and had an interest in the matter. He also lacked jurisdiction to hear the matter since the gist of the matter was contract of sale which should have been referred to the High Court for determination.
4. The application for leave to apply for the judicial review was heard and granted by **Kihara Kariuki, J** (as he then was) on the 7th March 2011. Counsels for parties herein later agreed before **Dulu J.** to canvass the application by way of written submissions.
5. It was the submission of counsel for the *ex parte* applicant **F. Mulwa** that the District Commissioner though acting in a quasi-judicial capacity failed to discharge the obligation of upholding rules of natural justice; He failed to follow the right procedure of moving to the suit premises. He failed to accord the applicant an opportunity of cross-examining the witnesses; He acted in excess of his jurisdiction by cancelling a contract of sale of the suit premises instead of referring the matter to the High Court for determination; Having had an interest in the matter he should have disqualified himself.
6. **Mr. Mulwa** for the interested parties submitted that the application was filed out of the mandatory six (6) months without leave of the court; therefore, it offended the mandatory provisions of Order 53 Rule 3 of the Civil Procedure Rules and Section 9 of the Law Reform Act. He urged the court to find that no friendship existed between the District Commissioner and one of the parties hence there was no conflict of interest. Finally he argued that the applicant duly participated in the appeal by cross examining the interested parties.
7. The interested party raised the issue whether the application was time barred. The issue to be considered would be whether the substantive motion should fail on that ground.
8. The application for leave to institute judicial review in this matter was made pursuant to the provisions of Order 53 of the Civil Procedure Rules. In the instant application the applicant was seeking certiorari and Prohibition remedies. Time within which to apply for certiorari is provided for in Order 53 Rule 2 of the Civil Procedure Rules which provide 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;***

9. 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 purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*”**

10. The appeal to the Minister was heard on the 21<sup>st</sup> July, 2010. The verdict of the District Commissioner, Mbooni East District was not dated, but it forms part of the proceedings. In his verdict he states thus:

***“In view of this, it is my considered opinion based on the facts presented during the session of the appeal hearing on 21.07.2010 to uphold...”*”**

11. An interpretation of the verdict would suggest that it was written on a different date from the date when the case was heard. That would mean that failing to indicate the date when the decision was made and delivered could have been an error on the face of the record.
12. In his application for leave the applicant has stated that the minister's decision was made on the 28th September, 2010.
13. The application for leave was heard *ex parte* before **Kihara Kariuki J.** (*as he then was*). He considered the application in open court and granted orders sought. Interested parties appointed their advocate who did not raise any issue regarding granting of leave. It must therefore be taken that the decision of the minister that the applicant wants removed to this court for purposes of being quashed was delivered on the 28th September, 2010. Therefore, at the time of seeking leave to file the substantive motion on the 4th March, 2011 six (6) months had not lapsed.
14. Counsel for the respondent submitted that the District Commissioner, Mbooni East District failed to uphold Rules of natural justice while presiding over the appeal. It was argued further that he did not follow the right procedure while determining the appeal.
15. In the case of ***Republic versus Minister for Lands and Settlement and another, Civil Miscellaneous Appeal No.183/2004 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 parties 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...”*”**

16. According to Section 29 of the Land adjudication Act, any person who is aggrieved by the determination of the adjudication Registrar appeals for the Minister who determines the appeal. The procedure to be followed by the minister is not provided for.
17. Looking at the proceedings before the District Commissioner he opted to hear parties with their witnesses and have them cross examined. The interested party's witness one **Pauline Mbatha Maeke** testified but was not cross examined by the *ex parte* applicant. The finding of the District

Commissioner was partly based on what the witness stated. The evidence of that witness should have been subjected to cross examination. Failure on the part of the District Commissioner to notify the *ex parte* applicant of his right to cross examine or note circumstances under which the witness was not cross examined was an error.

18. It has been stated that the *ex parte* applicant recorded grounds of appeal that the District Commissioner never considered.
19. Any person appealing against a decision must specify his grounds of appeal. The applicant did not annex the said grounds of appeal to his application. However looking at the proceedings that were recorded by the District

Commissioner he does not refer to any grounds of appeal. As correctly submitted by counsel or the *Ex parte* applicant in the case of *Mahaja versus Khutwalo (1983)KLR 553 Hancox J.* referring to the District Commissioner sitting as minister's appeal Tribunal states thus;

***“even if he was not a court (as he expressed himself to be) he was still amenable to an order of certiorari in his appellate capacity as he was obliged to reach a decision after considering the grounds of appeal and the proceedings before the adjudication officer.*”**

It was imperative to consider grounds of appeal if any raised.

20. An issue was raised which questioned the District Commissioner's incompatibility between his public office and his private interest especially so while handling the appeal.

The proceedings recorded do not show if the *ex parte* applicant raised the issue with the District Commissioner. However, there is a letter dated 31.3.2010 addressed to the District Commissioner, authored by the *ex parte* applicant where he objected to him hearing the dispute. The letter was copied to the minister for lands. The letter gives reasons why the District Commissioner's conduct was being questioned. The letter has no stamp impression indicating it was received. It cannot be assumed that it was indeed received.

21. However, there is a letter dated 28th January, 2010 addressed to the Minister. It was received at the ministry of lands on the 3rd February, 2010.

The *ex parte* applicant raised an objection to the District Commissioner presiding over the appeal following his conflict of interest. It was alleged the District Commissioner had been hosted by the defendants in the case. His impartiality was questioned. It was further stated that on the 18th January, 2010 he had made orders closing down public roads within the disputed parcel of land. A reminder to the minister reiterating that objection to have the case heard by the District Commissioner was received on 3rd March, 2010.

22. Whether or not he was biased cannot be said with certainty but considering the fact that he believed a witness who was not subjected to cross examination her evidence forming the basis of the decision, such allegations could not be dismissed. He should have disqualified himself from hearing the appeal.
23. On the issue of lack of jurisdiction on the part of the District Commissioner to hear the matter as the gist of it was a contract of sale which should have been left to the jurisdiction of the High Court; it is apparent that the *ex parte* applicant herein entered into a sale agreement with **Samuel Ngovi** where he paid Ksh.20,000/= as a consideration of a parcel of land. That portion per evidence falls under adjudicated land. The legislation governing the said land is therefore the Land Adjudication Act. This means that the Minister of Land Adjudication and Settlement had power to preside over the dispute. It is not clear under which land regime the suit premises was registered as it was before amendment of Land Laws. No title has been exhibited by either party to indicate which law to rely on as far as the sale of land is concerned. In any case, the issue raised so far as the suit premises is concerned by the interested party is not only that of ownership of the land but also that of a boundary dispute.

24. The issue to be determined is therefore whether Judicial Review can issue in the circumstances. In the case of **Commissioner of Lands versus Kunste Hotel Ltd.** KLR (E&I) 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.”***

25. It was expected of the District Commissioner to act within the powers he was seized of. He ought to have followed the procedure laid down. It was his duty to ensure the procedure adopted was fair and above all he ought to have upheld principles of natural justice. Having deviated from the process and laid down principles, this court is called upon to issue an order of certiorari and prohibition to control any kind of irregularity that arose.

26. Section 29(1) (b) of the Land Adjudication Act provides:

***“... the minister shall determine the appeal and make such order thereof as he thinks just and the order shall be final’.***

27. **Onyancha J.** had to deal with the issue in the case of the **Minister for Lands and Settlement and ex parte Robert Musili Mwenzwa Civil Miscellaneous application No. 183 of 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) EA 153** where it was held that the decision stated to be final but does not preclude this court from issuing of certiorari ....

28. Guided by the two (2) authorities, looking at the instant case, it is evident that the District Commissioner, Mbooni East contravened principles of natural justice; he failed to determine grounds that prompted the *ex parte* applicant to file the appeal; failed to recuse himself where his impartiality was questioned. Finally he also failed to accord the *ex parte* applicant the opportunity to test the evidence of the witness called by the Respondent.

29. In the premises the decision reached was vitiated by an error on the face of the record that makes it ultravires.

30. Therefore, I do recall the order of the District Commissioner, Mbooni East (*by delegated power*) dated 31.03.2010 dismissing the Applicant's Appeal No. 35 of 2009 and upholding the decision of the Land Adjudication Officer and Arbitration Board awarding plot No. 751 to **Jackson Ngovi, Benson Ngovi** as co-owners on which formal notice of finalization of the minister's decision was communicated to the *ex parte* Applicant on 28th September, 2010 which I hereby quash.

31. Secondly, I do issue an order of prohibition directed to the 1st, 2nd and 3rd Respondents, their servants and/or agents or other whomsoever in anyway dealing with plot No. 751 Mangani Adjudication Section and from implementing the awards of the Minister.

32. Further, the appeal shall be re-submitted to the Minister for hearing in accordance with the law.

33. The error having been made by the public officer, each party shall bear their costs.

34. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 21ST day of NOVEMBER, 2013.**

**L.N. MUTENDE**

**JUDGE**