



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION NO. 35 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 ADJUDICATION1ST RESPONDENT

CHIEF LANDS 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

GEOFFREY MUTIE MBULE.....EXPARTE APPLICANT

JUDGMENT

1. **Geoffrey Mutie Mbule** the *ex parte* applicant filed a motion seeking orders as follows:-
 - i. Certiorari to remove to this court the 1st Respondent's decision (through District Commissioner Mbooni East by delegated powers) dated 21st July, 2010 dismissing the applicant's appeal No. 34 of 2009 and upholding the decision of the Land Adjudication Officer for Plot No. 423 within Mangani to remain **Ngovi's family** land on which formal notice of finalization of the Minister's decision was made to the applicant on 28th September, 2010 for purposes of being quashed.
 - ii. Prohibition directed to the 1st, 2nd and 3rd Respondents their servants, and/or agents or others whomsoever from in any way dealing with Plot No. 423 Mangani Adjudication Section and from implementing the awards of the Minister.
 - iii. The application is premised on grounds that on the 25th May, 1997 the applicant purchased from Daniel **Mukola Ngovi** one(1) acre of land being plot No. 423 Mangani Adjudication Section (suit premises) at Kshs. 88, 860/= without knowledge that he was disposing of ancestral land or that he held it in trust for anybody. As a result of the transaction, interested parties herein instituted objections to the Land Adjudication Board Mangani Adjudication Section which considered the objections raised and re-awarded the land to the 2nd & 3rd interested parties and the **Ngovi family**.
2. The applicant preferred an appeal to the Minister as provided by the law. The Minister's power was delegated to the District Commissioner Mbooni East District who heard the appeal and dismissed it without taking into consideration basic principles of natural justice. He had an interest in the matter, was biased having been bribed and he failed to consider the long duration the applicant had used the plot and carried on developments thereon.
3. 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.
4. **F.M. Mulwa** Counsel for the *ex parte* applicant submitted that the District Commissioner was obligated to follow rules of natural justice while acting in a quasi-judicial capacity but he failed to do so. He failed to give the applicant an opportunity to cross examine witnesses called by an interested party and to be heard.
5. Further, that the District Commissioner failed to follow proper procedure of determining an appeal and acted in excess of his jurisdiction by cancelling a contract of sale of the suit premises to the applicant by one **Daniel Mukola Ngovi** and directed that the **Ngovi** family refunds Kshs. 88,620 paid within 21 days, an issue that could only have been determined by the High Court. He faulted the District Commissioner for failure to disqualify himself following his personal interest in the matter.
6. **Mr. Mulwa**, counsel for the interested party submitted that the application was time barred having not been filed within six (6) months of the ruling complained about without leave of court hence leave should not have been granted by the court.
7. Referring to the alleged relationship between the District Commissioner and one of the interested parties, he submitted that **Jackson Kimanthi Ngovi** an interested party having denied the allegation on oath, the allegation was not true. He stated that the applicant was accorded an opportunity of participating in proceedings which made the decision made by the District Commissioner sound.
8. An issue was raised by the interested party in respect of the application being time barred. This must be considered first as it will inform the court whether the substantive motion should fail and hence not see the light of the day.
9. 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. 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 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;

10. 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 for the interested party provides as follows:-

“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.”

11. The District Officer representing the Minister heard the appeal on the 21st July, 2010. His verdict is not dated but forms part of the proceedings. In his verdict he stated thus:-

“...in view of this, it is my considered opinion based on the facts presented during the session of the appeal hearing on 21/7/2010 to uphold the decision of the Land Adjudication Officer made on 9th May, 2008 that the Land in question plot No. 423 within Mangani remain Ngovi family land.”

12. Looking at the wording of the extract of the verdict clearly show that the verdict was drafted on a different date from the date the case was heard. Failure to date the verdict therefore was an omission tantamount to an error on the face of the record. It is not known when exactly the verdict was made.

13. In his application for leave to apply for the orders of certiorari and prohibition, the applicant stated that the Minister's decision was made on the 28th September, 2010.

14. The application for leave to institute these proceedings was heard *ex parte* by **Kihara Kariuki, J** (as he then was). He considered facts presented before him and granted the order sought.

15. Interested parties appointed their advocates 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.

16. Counsel for the respondent submitted that the District Commissioner, Mbooni East District failed to uphold rules of natural justice in the course of presiding over the appeal. The process followed was also questionable.

17. 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 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...”

18. The procedure to be followed by the Minister in determining an appeal filed by an aggrieved person following a determination of the Adjudication Registrar is provided for by section 29 (1) of

Land Adjudicating Act which provides thus:-

“Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within 60 days after the date of determination, appeal against the determination of 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 and Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final”.***
19. A perusal of the proceedings presided over by the District Commissioner Mbooni, shows that he opted to hear parties with their witnesses. He allowed them to be cross-examined. The respondent's witness one **Pauline Mbatha Maeke** testified but was not cross-examined by the appellant (ex parte applicant herein). There is no indication if he was given the opportunity to cross examine him. The duty was upon the District Commissioner to notify the *ex parte* applicant of his right to cross-examine the witness. Failure to do was an error that cannot be overlooked.
20. The District Commissioner has been faulted for not recording grounds of appeal relied upon by the ex parte applicant.
21. It is a requirement for any person appealing to specify his grounds of appeal. Grounds of appeal presented before the District Commissioner do not form part of the record of the substantive motion. A perusal of the proceedings taken by the District Commissioner does not allude to any grounds of appeal. As correctly submitted by counsel for the ex parte applicant, in the case of ***Mahaja versus Khutwalo [1983] KLR 553 Hancox, J*** referring to the District Commissioner sitting at Minister's Appeal Tribunal stated 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 therefore important for the District Commissioner to consider grounds of appeal if any that prompted the *ex parte* applicant to lodge the appeal.

22. The District Commissioners incompatibility between his public office and his private interest especially when handling the appeal was questioned. The record of the tribunal does not show if the *ex parte* applicant raised the issue with the commissioner. However there is a letter dated 31/3/2010 addressed to the District Commissioner written by the *ex parte* applicant whereby he objected to the District Commissioner presiding over the appeal. The letter was copied to the Minister for Lands. Reasons are given why the District Officer should have been precluded from hearing the appeal. His conduct was questioned. The letter has no stamp impression that would confirm it was received. It cannot be assumed that it was indeed received.
23. However, there is a letter dated 28th January, 2010 addressed to the Minister. It was received at the the Ministry of Lands on the 3rd February, 2010. In the letter the *ex parte* applicant raised an objection to the District Commissioner presiding over the appeal following what he referred to as conflict of interest. It was alleged that the District Commissioner had been hosted by the defendants in the case. His impartiality was questioned.
24. 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 was sent to the Minister reiterating the objection to have the case heard by the District Commissioner. This letter was received on 3rd March, 2010.
25. Having not heard parties herein and put them to test through cross examination it cannot be ruled that indeed the District Commissioner was biased. However, considering the fact that the officer acted on evidence that was not tested, such allegations cannot just be dismissed out rightly. The District Commissionier should have recused himself from hearing the appeal.
26. On the issue of contract of sale of plot No. 423 that the District Commissioner cancelled; it was argued that the matter should have been referred to the High Court for determination. The

ex parte applicant herein entered onto a sale agreement with **Daniel Mukola Ngovi and his mother (1st wife Muuki Ngovi)**. The two (2) sold to him the plot which falls under adjudicated land. As such the registration governing it is the Land Adjudication Act which does not disqualify a Minister of Land Adjudication and Settlement from presiding over the dispute on the mere claim that the matter involves sale of land. It is not clear under which land regime the suit premises was registered as it was before amendment of the Land Laws. There is no title that was annexed/produced by either of the parties to indicate which law to rely on as far as the sale of land is concerned. In any case, the issue raised as far as the suit premises is concerned by the interested party is not only that of ownership of the plot but also that of boundary dispute.

27. We therefore have to determine whether judicial review can issue in the instant 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 authorised by law to decide for itself a conclusion which is correct in the eyes of the court.”

28. The District Commissioner, Mbooni East having been entrusted with duties of hearing the appeal on behalf of the Minister of Lands wielded power. It was expected of him to keep within the jurisdiction he had. He was supposed to ensure the procedure adopted was fair and above all he ought to have upheld principles of natural justice. Failure to do so would call for an order of certiorari and prohibition to control any kind of irregularity that may have arisen.

29. Section 29(1) (b) of the Land Adjudication Act however, provides ;-

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

30. **Onyancha, J** grappled with the issue in the case of the **Minister for Land and Settlement and ex parte, Robert Musilu Mwanzia Civil Misc app. 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 Applications (1985) 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...”

31. In this case, from the foregoing it is apparent that the District Commissioner, Mbooni East contravened principles of natural justice; failed to determine grounds upon which the *ex parte* applicant appealed; failed to disqualify himself from hearing the appeal when it was expedient and failed to accord the *ex parte* applicant an opportunity to cross-examine the interested parties witness'. The decision he made was therefore vitiated by an error on the face of the record which makes it ultravires.

32. Consequently, I do recall the order of the District Commissioner, Mboni East (by delegated powers) dismissing the appeal No. 34 of 2009 and upholding the decision of the Land Adjudication officer for plot No. 234 within Mangani to remain the property of **Ngovi Family** which I do hereby quash .

33. Secondly, I do issue an order of prohibition directed to the 1st, 2nd and 3rd respondents from executing the decision of the Minister (*delegated to the District Commissioner, Mbooni East*).

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

35. The error having been made by the Public Officer, Each party shall bear their costs.

36. It is so ordered.

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

L.N. MUTENDE

JUDGE