



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 295 of 2005

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

AND

**IN THE MATTER OF LAND PARCEL NO. 1422 SANGURUR ADJUDICATION SECTION
MARAkwET DISTRICT**

BETWEEN

**REPUBLIC.....APPLICANT
VERSUS**

**MINISTER FOR LANDS AND HOUSING.....1ST RESPONDENT
DISTRICT LAND ADJUDICATION AND SETTLEMENT**

OFFICER MARAKWET DISTRICT.....2ND RESPONDENT

AND

DANIEL K. KIBOR.....INTERESTED APRTY

AND

EX PARTE APPLICANT:

KIPKORE KOILEGE

JUDGEMENT

Pursuant to leave granted on 28th November 2005 the ex parte applicant applied to this court through Notice of Motion dated 5th December 2005 and filed on 8th December 2005 for the following reliefs:

- a) An Order of Certiorari do issue to remove into court and quash forthwith the decision of the 1st respondent under Sangurur Registration Section Koibatek Location Marakwet District awarding land parcel number 1422 to the Interested Party.
- b) An Order of Prohibition to issue so as to prohibit the 2nd respondent from registering the Interested

Party as the absolute owner of land parcel number No. 1422 Sangurur Registration Section.

c) Costs be provided for.

The reliefs sought were based on the grounds that:

- 1. The Applicant and one Kandie Chesang' have battled over the ownership of the suit land since 1977.**
- 2. The Adjudication Board gave the land to the applicant on 27/9/1991 and the Interested Party given leave to appeal within 60 days.**
- 3. The Interested Party did not appeal but strange enough a meeting was held purportedly by the 1st Respondent which gave the suit land to the Interested Party.**
- 4. The said meeting was improperly conducted as the decision was arrived at by even numbers of members (4) instead of uneven or odd.**
- 5. One Daniel Kibor had no legal authority to act on behalf of the late Kandie Chesang who had since passed away without first having obtained Letters of Administration.**
- 6. The presiding officers except the D.O. were composed of the Interested Party's relatives and thus unable to reach a verdict without bias being exhibited.**

The facts in so far as they appear from the verifying affidavit accompanying the application for leave were that the applicant has had several matters regarding parcel of land known as No. 1422 Sangurur Registration Section dating back to 1977. That the decision of the committee on 26/4/1977 awarded the land to him. The Arbitration Board on 22/3/1979 to which one Kandie Chesang' and not the Interested Party appealed to awarded the parcel to the said Kandie Chesang who later passed on. That on 27/9/1991 after his objection the land reverted to him. Thereafter the Interested Party was given 60 days to Appeal to the 1st respondent. That no such appeal was preferred but on 6/8/2005 he was summoned for a meeting headed by the District Officer. That the findings of the 1st respondent were that he had lost the appeal to Kandie Chesang. This was communicated through letter dated 23rd August 2005 annexed as exhibit KK3. The applicant was informed that he had exhausted his remedies under the Land Adjudication Act and therefore his only avenue was to seek redress in a court of law. This prompted this application for judicial review.

The Interested Party filed a Relying Affidavit in opposition to the motion. He deposed that on 8th March 2002 the ex parte applicant sued him in Eldoret CMCC No. 344 of 2002. The suit was still pending. There was another suit Iten RMCC No. 39 of 2005 filed by the *ex parte* applicant against the Interested Party that was also still pending. The Interested Party is the son to Kandie Chesang deceased. He deposes that his father died on 9/1/2004. He had lodged an appeal to the Minister against the decision of the land adjudication officer. The appeal was heard on 6/8/2004 on which date the ex parte applicant never objected to the hearing of the appeal on the ground that Kandie Chesang was deceased. That he went to Kapsowar on 12/7/2005 as per summons letter dated 29/6/2005 and heard the ruling/findings of the minister who allowed the appeal by his late father Kandie Chesang'. That his late father Kandie Chesang won the cases at the Committee and Arbitration Board Committee contrary to the letter Ref. LAS/1/41/23 dated 23/8/2005. That the land Adjudication Act was complied with and the final award made in their favour to date. That there was no bias. He denies that parcel no. 1422 reverted to the ex parte applicant on 27/9/1991 on the objection of the ex parte applicant. He also denies that he was given 60 days right of appeal.

The Respondents did not file any papers in reply. The application was canvassed before me and counsel for the ex parte applicant submitted that the Interested Party did not lodge an appeal within 60 days to the Minister. That Kandie Chesang died on 9th June 2004. That no letters of administration were

taken by the Interested Party and therefore the Interested Party could not represent the deceased Kandie Chesang' before the Minister during hearing of the appeal.

Counsel for the respondents opposed the application. He submitted that principles for grant of Certiorari had not been satisfied. That the Minister observed the law. That the decision cannot be set aside because the D.C. was exercising delegated powers from the Minister. That the spirit of the Land Adjudication Act is to ascertain the rights as existing on the ground. That section 30 bars the filing of any suit without consent of the authorities. That the Interested Party was acting for himself and he had *locus standi*. He could be given the land directly. That the question of letters of administration does not arise. That no objection was raised before the D.C. Appeal was properly before the Minister. There was no breach of procedure and that Certiorari is concerned with procedure and not merits of the decision.

Counsel for the Interested Party also opposed the application and relied on the affidavit of the Interested Party. He submitted that the Notice of Motion was challenging decision made on 12/7/2005 in Appeal No. 639/96 parcel no. 1422. Appeal was lodged by Kandie Chesang before he died. The appeal was argued by Daniel. The appeal was filed within time. Within 60 days. He urged that the Motion be dismissed.

I have carefully considered the issues raised in the motion and I of the view that the application gravitates around tow issues. Firstly, whether the appeal to the Minister was lodged within time. Secondly, whether the Interested Party was competent to represent his father at the appeal without obtaining Letters of Administration. I have considered the evidence adduced by the *ex parte* applicant as well as the Interested Party through their respective affidavits and I am unable to ascertain when the decision of the Land Adjudication Officer was made on the objection raised by the *ex parte* applicant. The Interested Party annexed a receipt dated 21/1/94 being a receipt for fees for lodging an appeal to the Minister. It can be taken that this is the date when the appeal was lodged. The proceedings of the Land Adjudication Officer annexed as KK1 do not show when the decision was made. It is not dated. Because of this it is difficult to discern from what date the 60 day period would begin to run. The *ex parte* applicant did not mention in the verifying affidavit when the 60 day period begins to run. I have also perused exhibit KK11 and the issue of filing out of time was not raised by the *ex parte* applicant before the District Commissioner. Am persuaded by the submission of counsel for the Interested Party that the argument could be an afterthought.

In any event the burden of proof lies on the party who would fail if no evidence were given on either side. The incidence of the burden of proof was on the *ex parte* applicant to establish the date when the Land Adjudication Officer made the decision on Objection Proceedings so that the incidence would then shift to the Interested Party to show that the appeal to the Minister was lodged within 60 days from that date. As pointed out the *ex parte* applicant did not provide the date either through affidavits or during submissions. The *ex parte* applicant therefore fails on the first question for lack of evidence on the date when the Land Adjudication Officer made his decision.

The second issue is a question of law. It can be cast from the following perspective, Whether it was mandatory for a legal representative of Kandie Chesang' to prosecute the appeal. It is common ground that there was no legal representative of the Estate of Kandie Chesang' who died on 9th January 2004 when the appeal was pending. Counsel for Interested Party has asked the court to consider the spirit of the Land Adjudication Act as well as he provisions of section 30 of the Land Adjudication Act Cap 284 and to make a finding that the Interested Party as a person on the ground was competent to prosecute the appeal. On the other hand counsel for the *ex parte* applicant submitted that we must respect to the provisions of the Law of Succession Act. The Law of Succession act is an Act of Parliament that provides for succession to the estate of deceased persons. It also provides for appointment of persons as personal representatives. If the appeal was in relation to a matter before court the answer would have been provided by the provisions of Order XXIII of the Civil Procedure Rules. This Order clearly envisages the take -over of suits by legal representatives. The problematic issue that this court will have to address is whether the requirement of legal representative would extend to such quasi-judicial proceedings as appeals before the Minister under the Land Adjudication Act.

I have considered the purpose and spirit of the Act. It was an Act of Parliament that was enacted to ascertain the interests of persons occupying land so that those interests could be registered. The Act contained elaborate provisions for recording of interests, demarcations of boundaries, adjudicating disputes, registration of persons occupying land in an adjudication register, objections to the adjudication register, appeals to the minister and forwarding of final adjudication register to the Chief Lands Registrar for title issuing. A father who was registered as occupying land held the land in trust for his family or clan. The land was thus ancestral land. Members of the family had a direct interest in the land by virtue of customary trust that arose. The proceedings before the dispute settlement bodies under the Act were not suits as understood in the Civil Procedure Act. The bodies had the power to control their own procedure subject of course to the rules of natural justice. I Am persuaded by the argument of counsel for the Interested Party that the Interested Party was competent to prosecute the appeal and that since no objection was raised by the ex parte applicant the objection now raised is an after thought.

I have carefully considered whether the Law of Succession Act would forbid the argument of counsel and I do not find any inconsistency if it is taken that the trustee had died and the beneficiary was asserting his right. To import the provisions of Order XXIII of the Civil Procedure Rules into circumstances where the same was not intended may not achieve the ends of justice. The customary right to the land parcel no. 1422 could be espoused by the Interested Party as son to the deceased. The father was in the position of trustee. The trust was determined by his death. The beneficiary acquired full capacity to vindicate his own rights.

For these reasons I am persuaded that the Notice of Motion lacks merit and is hereby dismissed with costs to the Interested Party and Respondents. It is so ordered.

Dated AND signed at Nairobi on this 24th day of august 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 31st Day of october .2012.

F. Azangalala
.....
Judge

In the presence of : Mr. Kiboi for Applicant

Mr. Ngumba for Respondent