No.2976

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. APPLICATION NO.225 OF 2008

REPUBLIC.....APPLICANT

VERSUS

THE MINISTER, MINISTRY OF LANDS AND SETTLEMENT.....RESPONDENT
MBITHI NDOLO KIKUYU.....1ST INTERESTED PARTY
BERNARD MUTISYA WAMBUA.....2ND INTERESTED PARTY

EX-PARTE:

MULI MUTISO KIUYU

JUDGMENT

Before me is a Notice of Motion dated 24th October, 2008 filed pursuant to the leave granted by **Lenaola J.** on 16th October, 2008. The applicant seeks the following Judicial Review Orders:-

"1. ***THAT an order of Mandamus do issue compelling the Minister, Ministry of Lands and Settlement, to restore land parcel No.2020-Kaewa Adjudication Section back to the land parcel No.1087 Kaewa Adjudication Section; and to delete the No.2020 from the Adjudication Register for Kaewa Adjudication Section.***

2. THAT an order of Mandamus do issue compelling the Minister for Lands and Settlement to delete the names of Mbithi Ndolo Kikuyu and Bernard Mutisya Wambua, their agents, purchasers or nominees, from the Register for land parcel No.1087 or 2020 Kaewa Adjudication Section; or any sub-division thereof.

3. THAT an order of Mandamus do issue compelling the Minister for Lands and Settlement to register the restored land parcel No.1087 Kaewa Adjudication Section, solely in the name of MULI MUTISO KIKUYU.

4. THAT an order of Prohibition do issue prohibiting the Minister for Lands and Settlement from re-subdividing land parcel No.1087-Kaewa Adjudication Section.

5. THAT an order of Prohibition do issue prohibiting MBITHI NDOLO KIKUYU and BERNARD MUTISYA WAMBUA, their agents and/or servants, from putting up houses, cultivating, cutting trees and coffee plants, or uprooting crops on land parcel Nos.1087 and 2020 – Kaewa Adjudication Section or in any other way interfering with the said parcels of land.

6. THAT costs of these proceedings be paid to the ex-parte Applicant, MULI MUTISO KIKUYU."

The uncontested facts leading to this application are that the Applicants and interested parties are relatives. In the year 1976, the applicant, a grandson of **Ndolo** – deceased was sued by his uncles, the sons of **Ndolo** claiming a portion of land which until 1984 was unsurveyed and in the possession of the applicant. The suit was filed in the District Magistrate's court at Machakos being civil case number 20 of 1976. In a judgment delivered on 18th January, 1979, the learned Magistrate held:

"***in conclusion therefore I find that the land in dispute was purchased by Ndolo and therefore all sons of Ndolo are entitled to a share of the land in dispute. I then allow the Plaintiff's claim as prayed, and order that the land in dispute be divided to all sons of Ndolo by their clan officials following the Kamba Customary tenure..."***

It is instructive to note that the 1st interested party was the 2nd Plaintiff whereas the 2nd interested party is a son of the 1st Plaintiff.

Apparently, the Applicant was not happy with the decision and hence lodged an appeal in the Resident Magistrate's court at Machakos being Civil Appeal No.58 of 1979. The appeal was dismissed. In 1984 during the land adjudication process in the area, the suit land was given No.1087 and registered in the joint names of the applicant and the Plaintiffs in the aforesaid case. The applicant then lodged several objections with the Kaewa Land Adjudication Committee, board and to Machakos District Land Adjudication Officer. All these objections were lodged pursuant to Section 26 of the Land Adjudication Act, and each one of them was heard on the merits and dismissed thereby prompting the subdivision of the aforesaid land No.1087. Land No. 2020 was curved therefrom and registered in the names of the interested parties since the earlier claimant had died whereas No.1087 still remained in the name of the applicant.

Still dissatisfied with the decision of the Adjudication Board over his objections, the applicant appealed to the Minister of Lands and Settlement and by his decision dated 30th September, 2003, the appeal was dismissed. Unperturbed by the setback, the applicant's next stop was at the doors of the High Court of Kenya in Civil Appeal number **HCCA. No.120 of 2003** filed in this court. This appeal was however, withdrawn on 15th October, 2008. It was after the withdrawal of the appeal aforesaid that the applicant initiated this instant Judicial Review proceedings in the nature of mandamus and prohibition.

The case for the applicant is that the panels before which he presented his objection ruled against him in clear contradiction of the aforesaid court judgment which had been fully implemented before land adjudication. Therefore, the Minister of Lands and Settlement before whom the final appeal was lodged had a specific statutory duty to remove the interested parties' names from the register for land parcel 2020 and to restore the said parcel of land to the applicant's land parcel No.1087 – Kaewa Adjudication Section pursuant to the provisions of Land Adjudication Act

On the other hand, the case for the interested party is that the application was incompetent, *Res Judicata*, order 53 rule 1 (3) of the Civil Procedure rules did not apply, the decision of the Minister was final and cannot be challenged and finally, orders sought were unavailable to the applicant.

When the application came before **Waweru J.** for inter partes hearing, he directed that the same be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. However, before **Waweru J** could craft and deliver the ruling, he left the station on transfer. It was then that the application found its way to me. Parties agreed that I should act on the basis of the pleadings and the submissions on record, craft and deliver the ruling.

I have carefully read and considered the pleadings as well as the written submissions on record and the authorities cited.

I must agree, from the outset with the submissions of the interested parties. There is no doubt at all that the suit property was the subject of proceedings before Machakos District Magistrate's court in **DMCC No.L.20 of 1976.** The applicant was the defendant in the suit whereas the 1st interested party was the 2nd Plaintiff. The 2nd interested party is a son of the 1st plaintiff. The court duly rendered its decision. The applicant thereafter proceeded on appeal which he again lost. Litigation upto that stage, involved the same parcel of land as in these proceedings and same parties or those litigating under the same title. There is no evidence that the decision of the Resident Magistrate on appeal was overturned, varied or set aside. The matter having been decided upon by a court of competent jurisdiction involving the same parties and suit premises, it cannot be revived by these proceedings. It is therefore *Res Judicata*. It matters not that the prayers sought in the instant application are in the nature of Judicial Review. Judicial Review proceedings are not immune to the application of the doctrine of *Res judicata*. The adjudication board and the Minister were in reaching their decision simply implementing the decisions of the court. There is no evidence as claimed by the applicant that by the time of land adjudication in the area, the decision of the learned Magistrate had already been implemented.

According to Section 29 of the Land Adjudication Act, the Minister's decision on appeal by a person aggrieved by the determination of an objection is final. The applicant was the appellant before the Minister. The Minister having made a determination on the appeal, which determination is final, the applicant cannot again initiate these proceedings essentially challenging the decision of the two courts, arbitration boards and the Minister under the guise of Judicial Review.

Mandamus seeks to compel the performance of a public duty which is by law imposed on a person or body of persons and it lies if the person fails to perform the duty to the detriment of a party who has a legal right to expect such a duty to be performed. See **Republic –vs- Minister for Local Government and Another, Ex-parte Mwahima**. Essentially, this order is a command by the High Court to an Administrative Authority or inferior tribunal directing it to perform a peremptory duty imposed upon it by law. When such an authority fails in its legal duty to perform the duty, an order of mandamus may then issue compelling it to do so. In this case, the applicant is seeking to compel the Minister to restore land parcel No.2020 – Kaewa Adjudication Section back to land parcel No.1087 and to delete the number 2020 from the adjudication Register for Kaewa Adjudication section and also delete the names of the interested parties from the register No.1087 of 2020. Finally, he also seeks an order of mandamus to compel the Minister to register the restored land parcel No.1087 solely in the name of the applicant. However, the applicant has failed to demonstrate that there is an order in the above terms directed at the Minister and he has willfully refused to comply and or to enforce the same. It has not been shown that the Minister has statutory duty to act as above but has been indolent. It is only in those circumstances that an order of mandamus can issue to compel compliance. As it is therefore the applicant is seeking the performance by the Minister of non-existent orders or duty.

How about prohibition? In **Re. Kisima Farm Ltd. (1978) KLR 36**, it was stated that the order of prohibition is issued out of the High Court and directed to inferior tribunals, which forbids those tribunals from continuing proceedings in excess of its jurisdiction or in contravention of the laws of land. As constantly stated Prohibition looks to the future as opposed to the past. In this case the applicant is seeking to prohibit the Minister from re-subdividing land parcel No.1087.

That land parcel has already been subdivided into 1087 and 2020. Prohibition in that regard is not available. The applicant too wants prohibition to issue prohibiting the interested parties, their efforts and or servants, from putting up houses, cultivating, cutting trees and coffee. Plants, or uprooting crops on land parcel Nos.1087 and 2020. My response to the foregoing is that the interested parties are not tribunals capable of being prohibited.

Even if the two orders of Judicial Review were available to the applicant, of what use will they be to the applicant, unless the decision of the Minister and or the Adjudication Boards are quashed by an order of certiorari. As long as those decisions are not quashed, the orders of mandamus and prohibition will be meaningless and of no use to the applicant are not quashed. The court will have acted in vain in any event. Ordinarily, courts do not act in vain. To my mind, issuing the order of mandamus and prohibition when the decisions of the Minister and or the boards remain intact will turn the judiciary into a laughing stock. We must strive to avoid such scenario.

The application lacks merit and is accordingly dismissed with costs to the interested parties.

Dated and **delivered** at **Machakos** this 15th day of November, 2011.

ASIKE-MAKHANDIA
JUDGE