



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU Miscellaneous**

Civil Application 270 of 2004

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284) LAWS OF

KENYA

THE REPUBLIC APPLICANT

-VERSUS-

**THE MINISTER FOR LANDS & SETTLEMENT
THE SPECIAL DISTRICT COMMISSIONER – BONDO RESPONDENT**

AND

**THE SCHOOL COMMITTEE
ORENGO PRIMARY SCHOOL – EXPARTE INTERESTED PARTY
LAWRENCE ATINGA OYUGI THE APPLICANT**

JUDGMENT

On the 22nd September, 2004 the ex parte applicant filed a notice of motion having obtained leave to institute judicial review proceedings on the 22nd of September, 2004. The motion seeks orders of certiorari and prohibition as follows:-

- a) **That the Honourable Court do issue an Order of certiorari to bring before this court for purposes of being quashed and to quash the proceedings and decision of the Minister and/or the District Commissioner – Bondo in the Appeal Case No. 154 of 2003 Nyaguda Adjudication Section P/No. 3711 dated 01.04.2004**
- b) **That the Honourable Court do issue an Order of prohibition to the Respondents and Interested Parties from using, executing, effecting and/or in any other manner enforcing the said decision in the Appeal Case No. 154 of 2003 Nyaguda Adjudication Section P/No. 3711.**
- c) **That costs be provided for.**

The application is based (more to be after statements of facts on the verifying affidavit dated 17th September, 2004) and the statement of facts dated 15th September, 2004. The reliefs sought are based on the grounds that the Minister (read District Commissioner) entertained an arbitration over a piece of land which had not been a subject of an objection and as such his decision was **ultra vires**. The appeal was filed out of time and the Minister's decision amounted to an abuse and improper exercise of power.

It was submitted on behalf of the ex parte applicant that the powers donated to the Minister are appellate in nature as against the determination of an objection made to the adjudication officer. That the Minister does not to have original jurisdiction as no objection was raised over parcel no. 3711 before an adjudication officer there was no appeal for the Minister to determine. That the parties had a dispute over parcel no. 3660 and the ex parte applicant lodged an objection before the adjudicating officer which objection was heard and determined and no appeal was preferred to the Minister within the prescribed period of 60 days.

The respondent and the interested party objected to the orders being sought by the ex parte applicant.

The respondent on his part objected to the orders sought and stated that the interested party lodged an appeal having been dissatisfied with the out-come of the objection lodged against parcel no. 3660. The respondent argued that the appeal was heard pursuant to S. 29 of the Land Adjudication Act and it is clear that the rules of natural justice were observed in the proceedings and as such the respondent's actions were

not **ultra vires**.

The interested party on its part argued that these proceedings are incompetent, misconceived and premature, as no consent in writing was obtained pursuant to S. 30 of the Land Adjudication Act and whether the appeal was filed on time or cannot be canvassed at this level, the ex parte applicant having failed to raise the same before the Minister – further that the objection either raised before the adjudicating officer related to both parcel nos. 3660 and 3711.

The Land Adjudication Act lays down the process of adjudication, it establishes arbitration mechanisms and how appeals emanating from objections raised by interested parties are to be handled and how and when a court may be involved.

From the not so legible annexures forming part of the verifying affidavit, the ex parte applicant raised an objection in relation to parcel no. 3660. The respondent cited was Siaya County Council who reserved the land for Orengo Primary School. The objection was heard by a land adjudication officer who made his findings and decision on 12th August, 1994, where he allowed the objection. In his finding he observed that Orengo Primary School owns parcel no. 3660 which is 11 acres and that the “extension” subject matter of the objection was part of 3711 as reflected in the demarcation map. He ordered the portion to be added to 3711 as originally demarcated in the land adjudicating officer’s decision he reminded the parties of the 60 days within which they would appeal.

From the facts placed before court the above objection was raised in connection with parcel no. 3660 having received more land than was originally demarcated and in this regard, I agree with the ex parte applicant’s contention that no objection was raised as regards parcel no. 3711. Before the court there is no record to support the assertion by the respondent that the appeal before the Minister was on the basis of the award by the adjudication officer made on 12th of August, 1999. Firstly because the appeal that was lodged and heard in 2003. The Act in S. 29 allows anyone aggrieved with the decision of the land adjudication officer to appeal to the Minister within 60 days. The lapse of time was more than the 60 days allowed in law and further, it is obvious that the District Commissioner on behalf of the Minister did not sit in his appellate jurisdiction but sat as if he had original jurisdiction, as he took evidence, investigated and made a fresh finding over looking the findings and the decision of the land adjudication officer. In the appeal proceedings other than the heading, there is no indication that the District Commissioner was sitting on appeal as such.

S. 26 of the Land Adjudication Act provides that anyone aggrieved with the adjudication exercise may within 60 days raise an objection and the adjudication officer will consider the objection and make a decision.

S. 29 provides and relates to those aggrieved with the adjudication officer’s decision and provides as follows:-

- “ S. 29 (1) 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 the determination, appeal against the determination to the Minister by:-**
- a) delivering to the Minister an appeal in writing and specifying the grounds of appeal; and**
 - b) sending a copy of the appeal to the Director of land adjudication and the Minister shall determined the appeal and make such order thereon as he thinks just and the order shall be final.**

No grounds of appeal were availed in court instead the proceedings indicate a hearing that was conducted by the District Commissioner supposedly on behalf of the Minister. This is clearly not the mandate given by S. 29 and it is obvious that the District Commissioner acted ultra vires.

As regards Section 30 of the said Act, the said Section clearly stipulates that no civil action may be instituted without the consent of the adjudicating officer until the adjudication register for the adjudication section has become final under S. 29 (3). This court has not been advised by any of the parties whether the register is final, none the less I do agree with the applicant’s counsel that judicial review proceedings are not civil proceedings but proceedings where the court exercises special jurisdiction and as such the Section is not applicable.

See **Welomondi VS Chairman Electoral Commission of Kenya (2002)** KLR at 486 where Ringera J. held in part:-

“In exercising powers under order 53, the court is exercising neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *suis generis*. It therefore follows that it is incompetent to invoke the provisions of Section 3A and Order L Rule 8 of the Civil Procedure Act and Rules and Sections 42, 79 and 80 of the Constitution of Kenya.”

In the circumstances therefore, I grant the orders sought in the notice of motion dated 22nd September, 2004.

DATED AND DELIVERED ON 30.04.2010.

**ALI-ARONI
JUDGE**

In the presence of:

..... for Appellant(s)

.....for Respondent(s)