REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISC. APPLI. 92 OF 2007

REPUBLIC…….……..APPLICANT

Versus

MACHAKOS DISTRICT COMMISSIONER……..….RESPONDENT

EX PARTE: MWANGANGI MWANIA

JUDGMENT

The Notice of Motion dated 7th March 2007 was filed by the ex parte Applicant Mwangangi Mwania who seeks an order of certiorari to remove into the High Court for the purpose of being quashed the proceedings and decision of the Machakos District Ccommissioner in Minister's Appeal No. 147/1992 (**Ikaatini Adjudication Section Parcel No. 904, Chairman v Mwangangi Mwania)** made on 12th October 2006. The application is supported by the verifying affidavit of the Applicant sworn on 13th February 2007 and a statement of the same date. The Applicant also filed skeleton arguments on 28th May 2007. The Applicant was represented by Mr. Muli, Advocate.

The application was opposed and Ms Oyula of the Attorney General's Office filed grounds of opposition on behalf of the Respondent while the Interested Party Masaku County Council came on record and Mr. Timonthy Kamuli the Clerk to the Council, filed a replying affidavit dated 10th December 2008 and skeleton arguments on 4th February 2009, and Mr. Wambua Kilonzo Advocate appeared on behalf of the Interested Party.

In his affidavit, the Applicant deponed that the disputed land parcel 904 Ikaatini Adjudication section was recorded in the name of the County Council of Machakos. He filed a dispute with the Land Adjudication Officer, objection No. 79/1990 which was decided in his favour. He exhibited proceedings before the Adjudication Officer as 'RMM 1' An appeal was preferred from that decision i.e. Minister's Appeal No.147/1992. The same was heard by the Machakos District Commissioner (D.C.) and was decided against him. Proceedings and the decision are exhibited as 'RMM 2' .

It is the Applicant's contention that the said appeal was lodged out of time, the same having been filed in 1992; that whereas the appeal related to him and an adjacent church, he later learnt that it was between him and a school and he never got a chance to tender evidence relating to these facts. That the appeal

indicates that the dispute related to the Applicant and Ikaatini Primary School and Masaku County Council yet the proceedings show that the dispute was between him and Mathauta Primary School. That there is a fundamental error on the face of the record because Ikaatini is several kilometers away from his home so their plots could not border each other. That the DC did not visit the disputed land to ascertain its location nor did he inform the Applicant the nature of the dispute and that decision was tainted with bias and unfairness and was therefore ultra vires the Adjudication Officers jurisdiction and that is why he seeks the Judicial Review order of certiorari.

In opposing the application, the town clerk deponed that the application is bad in law, an abuse of court process and unmeritorious. That it transpired that the Applicant has encroached on school land and that there was evidence adduced at the appeal to prove that fact. That the disputed land was donated by the community to built a school in 1961 and after boundaries were established a school was built. That there is no possibility of application of Kamba Customary Law in the said appeal. That the mere fact that the chairman of the appeals Board did not visit the disputed land does not create any error on the face of the record. Mr. Kilonzo also argued that Masaku County Council does not exist but under S. 28(3) of the Local Government Act, what exists is the County Council of Masaku. He urged that the County Council of Masaku is registered as the owner of the land and holds that land in trust for the Local Community which has put up a public school for the last 40 years. Counsel also urged that there was no decision made on 12th October 2006 which the court can quash. That the stamp on the findings is dated 8th December 2006. He also argued that the appeal was filed within time. That S. 29(1) allows an aggrieved party to appeal within 60 days and that the judgment having been delivered on 12th November 2006, then the appeal was filed in good time because some days were not computed. Besides the issue of the appeal being filed out of time was never raised before the Adjudication Officer and raising it now is an after thought.

Ms Oyula submitted that the application is misconceived, bad in law and an abuse of the court process and that the application offends Order 53 Rules 3(2) in that not all affected persons were not served and that there is no decision made on 12th October 2006 that can be quashed. Counsel relied on the case of **REDCLIFF HOLDINGS LTD V THE MINISTER FOR LIVESTOCK & FISHERIES DEVELOPMENT HMISC 735/07** where this court heard that all parties that may be affected by the orders should be served.

I have now considered all the affidavits filed in this matter, the statement of facts, the submissions by all Counsel. The first issued to consider is whether there was any decision made on 12th October 2006 that can be subject of this challenge. The proceedings exhibited by the Applicant as RMM 2 are not dated. The only date, 8th December 2006, is on the certification stamp where the Director, Land Adjudication was certifying that the contents are the true copy of the Original. There is no evidence that the decision was made on that date. However, I do note the certificate by the DC, S.O. Warfa exhibited as part of RMM2 he does confirm presiding over Appeal case No. 147/92 and indicates at the bottom that both parties appeared before him for judgment on 12th October 2006. It is the Respondent who argues that there was no decision made on 12th October 2006 that can be quashed. However, RMM2, that is a statement of fact that needed to be controverted in an affidavit. The Applicant deponed that such decision was made and it was upto the Respondent to counter it by way of an affidavit not as a submission. There is no doubt that an appeal was filed against the Adjudication Officer‘s decision. The Interested Party admits that fact.

Notwithstanding the requirement of Order 53 Rule 7 Civil Procedure Rules that the decision to be quashed must be lodged with the court before the hearing of the motion or a satisfactory explanation be made as to why the decision or order could not be lodged, both parties have a duty to act candidly. So that if a decision was made by the Respondent, even if the Applicants have not exhibited one or have exhibited the wrong decision then the Respondent is under a duty to exhibit the correct decision. In the case of **R V LANCASHIRE COUNTY COUNCIL ex parte HUDDLESTON (1986) 2 ALL ER 945 1 at page 9459,** Sir John Donaldson observed;

“**Judicial Review is a process which falls to be conducted with all the cards face upwards on the**

table and where the vast majority of the cards will start in the public authority's hands ……the defendant should set out fully what they did and why so far as necessary, fully fairly to meet the challenge."

Again in the case of **R V SECRETARY OF STATE FOR TRANSPORT ex parte LONDON BOROUGH OF RICHMOND UPON THAMES (No.3) (1985) LR 409 at page 3**, Sadle J. heard, "**the want of an identifiable decision is not fatal to an application for Judicial Review."**

The above decisions are good law taking into account the fact that sometimes the aggrieved persons may have no means of identifying the decision or accessing it.

In this case, the certificate by the DC shows that judgment was read on 12th October 2006 and there being no evidence to the contrary by way of affidavit the court will take that to be date of the decision and I find that an identifiable decision by a tribunal, which if found wanting or flawed, can be subject to Judicial Review orders.

The next issue is whether the DC followed the procedure provided for in the statute in arriving at his decision. According to the Applicant, the DC was only required to review the evidence by the Adjudication Officer but instead went ahead to hear the case a fresh and heard the testimony of witnesses. This appeal is brought pursuant to Section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya. That Section reads as follows:

"**29(1) Any person who is aggrieved by the determination of an objection under S.26 of this Act, may within sixty days after the date of the determination, appeal to the Minister by :-**

(a) delivery to the Minister of an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final;

2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and the Chief Land Registrar;

3) When the appeals have been determined, the Director of Land Adjudication shall:-

(a) Alter the duplicate adjudication register to conform with the determination; and

(b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar who shall alter the adjudication Register accordingly.

4) Notwithstanding the provisions of S. 38 (2) of the Interpretation and General Provisions Act, or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public officer by name, or to the person for the time being holding any public office specified in such notice, the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister."

The Minister did delegate his powers to the District Commissioner under the above Section and he was properly seized of the matter.

Regulation 4(4) of the Land Adjudication Regulations, allows the calling of witnesses be with leave of the Minister being obtained. That rule reads

"**R 4 (1) Any person submitting an appeal to the Minister under S. 29 of the Act shall attach to his appeal a tracing from the demarcation map of the bonders of the holdings in dispute.**

(2)

(3)

(4) Subject to the leave of the Minister being first obtained the appellant or any other party to an appeal may attend before the Minister either in person or by duly authorized agent, and shall be entitled to call witnesses.

I have seen the proceedings before the District Commissioner to whom the Minister delegated his powers to hear the appeal. There is no evidence that the leave of the Minister was ever sought to call witnesses as per requirements of Rule 4(4) of the land Adjudication Regulations. The Respondent could not purport to call witnesses unless leave was sought to do so. Witnesses cannot be called as a matter of course. Even if the DC could exercise his discretion to call the witnesses, the necessity to call the witnesses should have been recorded. I would agree with the Applicant that the procedure of taking evidence was not in accordance with the Regulations and was uncalled for and the procedure was therefore flawed.

It is the Applicant's contention that the procedure was flawed because the Respondent did not visit the locus in quo. The Applicant has not pointed to this court the requirement under the Land Adjudication Act or Rules that there was a requirement that the DC visits the locus in quo. There is no basis for that contention. However R 4(1) requires that a copy of the map be avail filed along with the appeal. It seems none was availed as required.

The Applicant also contends that he was not informed of the nature of the dispute before the Respondent and hence a breach of the rules of natural justice. It is only in the statement of the witnesses that it is alleged that the Applicant had encroached on the school land. The Applicant's sworn statement is also clear that the issue before the Respondent was on the allegation that he had encroached on school land. In fact he alleged it is his land which was grabbed by the church. It was however the duty of the presiding officer of the Tribunal to tell the parties exactly what the allegations against the Applicant were. It is one of the requirements of rules of natural justice and a fair trial that a party who is accused of something should be informed of the charges against him in good time. See the case of **HYPOLITO DE SOUZA V CHAIRMAN TANGA APPEALS TRIBUNAL (1961) EA 377.** As will be considered later in this judgment the parties may have been talking about different parcels of land ie Mathauta school or Ikaatini school.

The other ground of challenge is that the appeal before the Respondent was filed out of time. The proceedings before the Adjudication Officer are dated 20th September 1991. Though it is not indicated when Appeal No. 147/92 was filed, the date speaks for itself. It was filed in the year 1992. S. 29 provides that a party aggrieved by the determination, of the objection under S. 26 may within 60 days of the determination appeal to the Minister. The period allowed for one to appeal is 60 days. The word 'may' does not apply to the period allowed for appeal. The word 'may' applies to the party intending to appeal, he can opt to appeal or not to do so. The period for appealing is not left open. It is specific, 60 days. Though the Respondent contends that there is a time when time was not running, that has not been demonstrated. It was not shown how many days time did not ran and which days these were. Time does not run about the Christmas season season. But there is no evidence that time did not run for the months of October and November 1991. 60 days must have lapsed sometime in November 1991 and that appeal was filed in 1992 out of the time allowed. The Respondent therefore had no jurisdiction to hear that appeal and all that was done was ultra vires the Respondent.

I do agree with the Applicants Counsel that there are apparent errors on the face of the record. It is clear that the objection raised before the land Adjudication Officer was that the Applicant amongst others were objecting that their plots were combined and surveyed in the name of Mathauta primary School. In the appeal before the Respondent however, the Respondent never bothered to record the nature of the dispute. The Dispute can only be deduced from the statements of the witnesses. However, in the proceedings before the Respondent, the parties to the dispute are recorded as: "APPELLANT.

1. Chairman Ikaatini Primary School

2. Masaku county Council

RESPONDENT

"Mwangangi Mwania""

In the appeal, Mathauta Primary School is not a party. Incidentally all the witnesses do not specifically refer to the school that is complaining. It is only Alexander Munyao who alludes to having been a parent at Mathauta in 1974 and that the Applicant was a neighbour of the school. It is therefore not clear who the parties to the appeal before the Respondent are: Is the appeal between the Applicant and Mathauta Primary School or the Applicant and Ikaatini Primary School? The Applicant contends that Ikaatini School is a far away from his land. The parties to the dispute not being clear, the Applicant was prejudiced as he may not have known the nature of the dispute and whom he was facing as the opponent in the appeal. That is why it was very key that the presiding officer of the tribunal informs the Applicant of the charges he was facing before the tribunal before embarking on taking of witness evidence. There is an obvious breach of rules of natural justice. The witnesses merely referred to the Applicant encroaching on the school land without mentioning which school it was. I find that there was indeed a grave error on the face of the record that can only be corrected by this court calling for that decision for purposes of its being quashed.

It is the Interested Party's contention that Masaku County Council does not exist and that under S. 28(3) of the Local Government Act, the body that should have been sued is County Council of Masaku. In response, Council for the Applicant submitted that Applicant however sued the Interested Parties but they brought themselves on record. It is true that it is Wambua Kilonzo who filed the notice of appointment and came on record for the Interested Party and described his client as Masaku County Council as per notice of appointment dated 5th August 2008 and filed in court on 7th August 2008. if there is a mis description it is by the same counsel blaming who is it on the Applicant. The misdescription cannot be attributed to the Applicant.

The Applicant has alleged that the Respondent was biased and acted in bad faith in the manner in which he handled the matter. I however do not find any evidence of those allegations. I do agree that the Respondent did not give any reasons for arriving at the decision that was made reversing the decision of the Adjudication Officer. For there to be fairness and so that the Respondent is not to be seen as acting arbitrarily, a decision maker such as the Respondent should have given reasons for his decision. It is a breach of rules of natural justice not to give reasons.

As to whether the application offends Order 53 R 3 (1) Civil Procedure Rules the Attorney General was never sued. The District Commissioner must have been served and passed over the matter to the Attorney General to represent him as the legal advisor of Government.

For all the reasons given in this judgment I find that the Respondent's decision is indeed flawed and is untenable and must be quashed by an order of certiorari. The Respondent will bear the costs. It is so ordered.

Dated and delivered this 13th day of May 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Muigai holding brief for Muli for the Applicant

Mr. Gitonga holding brief for Wambua Kilonzo for the Interested Party

Ms Onyula for the Respondent

Muturi: Court Clerk