



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Miscellaneous Civil Application 2 of 2008

**IN THE MATTER OF: AN APPLICATION BY LETWAT KORTOM, FOR JUDICIAL REVIEW
(CERTIORARI AND MANDAMUS)**

AND

IN THE MATTER OF: LAND ADJUDICATION ACT, CHAPTER 284, LAWS OF KENYA

AND

IN THE MATTER OF: APPEAL TO THE MINISTER FOR LAND AND SETTLEMENT

AND

**IN THE MATTER OF THE DECISION BY THE DISTRICT COMMISSIONER, TRANS-MARA
DISTRICT**

AND

IN THE MATTER OF: SECTION 29 OF THE LAND ADJUDICATION ACT

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE DISTRICT COMMISSIONER, TRANSMARA DISTRICT..... RESPONDENT

AND

LEPORE OLE MAITOINTERESTED PARTY

EX-PARTE

LETWAT OLE KORTOM

RULING

The ex-parte applicant filed a notice of motion dated 25th February 2008 and sought an order of Certiorari

to remove into this court and quash the proceedings and decision of the District Commissioner, Transmara, in appeal case Numbers 146 of 1998 and 325 of 1997 concerning plots numbers 318 and 48, Mapash Adjudication Section. The said parcels of land, hereinafter referred to as “**the suit properties**” were awarded to the interested party. The ex-parte applicant also sought an order of Mandamus to compel the respondent to re-hear the aforesaid cases and determine the same in accordance with the Mandatory Provisions of **Section 29 (4)** of the **Land Adjudication Act, Cap 284** together with the regulations made thereunder.

In his affidavit in support of the said application, the ex-parte applicant deposed that the parcel of land currently known as Plot No. 48 Mapash Adjudication Section was originally owned and/or occupied by his father. The Adjudication and Demarcation process in Mapash Adjudication Section was declared in or about 1990. The said plot was erroneously and/or irregularly registered in the name of the interested party. As a result the ex-parte applicant filed an objection to wit, objection No. 2 of 1990 challenging the said registration. The objection proceedings were heard and determined on 14th August 1998 and it was ordered that Plot No. 48 be divided into two portions. The ex-parte applicant was not satisfied with that decision and preferred an appeal to the Minister through the District Commissioner, Transmara. The appeal was No. 325 of 1997. The interested party was also not satisfied and equally filed an appeal, No. 146 of 1998. The two appeals were heard by the respondent. The ex-parte applicant complains that the respondent unilaterally appointed three elders who participated in the adjudication of the appeals. In his view, that was a violation of the provisions of **Section 29 (4)** of the **Land Adjudication Act**. It was argued that the respondent exceeded his statutory jurisdiction by so doing. Consequently the decision that was delivered on 11th October 2007, though dated 28th April 2006, is *ultra vires*, the applicant’s counsel submitted.

The Interested Party filed a replying affidavit and averred that the suit properties belonged to him. He said that the ex-parte applicant went to the suit properties following a boundary clash between the Maasai and the Kisii communities wherein his brother was killed and out of kindness the Interested Party welcomed and offered to assist him until the tribal clashes subsided. When the clashes subsided the respondent refused to go back to his original place. A dispute arose over the suit lands which went all the way to the respondent.

The appeals were decided in his favour. The Interested party justified the nomination of the three elders who sat with the respondent by saying that the respondent, not being a Maasai by tribe, needed to be told about the practices, customs and history of the local community. He added that all the proceedings were held before the District Commissioner who ultimately decided the appeals. He further stated that the applicant did not raise any objection to the participation of the elders in the said proceedings. In his view, the applicant was now making the participation of the elders an issue simply because he had lost the appeals.

The advocates for the parties made brief submissions and filed list of authorities which I have taken into consideration.

I must start by pointing out that judicial review proceedings are not concerned with private rights or merits of a decision but the manner in which that decision was arrived at, See **THE COMMISSIONER OF LANDS –VS- HOTEL KUNSTE**, Civil Appeal No. 234 of 1995. It is therefore outside the province of this court’s jurisdiction in so far as these proceedings are concerned to determine who rightly owns the suit properties. The court will only consider whether the decision of the respondent was properly arrived at.

Section 29 (1) of the **Land Adjudication Act** states as follows:

“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 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.”

The aforesaid section does not state how the Minister shall proceed to hear and determine the appeal. In such appeals the Minister delegates his authority to the District Commissioner in the area where the land in dispute is situated to hear the appeals.

The question for determination is whether in appointing some elders to sit with him in determining the appeal the respondent acted *ultra vires*, as argued by the applicant. Mr. Oguttu for the applicant argued that the delegation was to the respondent only and he had no power to co-opt three elders to sit with him to hear and decide the appeals. It was not clear as to what criteria was used in choosing the elders and whether the parties were consulted. He submitted that the co-option of the elders affected the verdict but he did not state how. He also took issue with the fact that delivery of the decision was witnessed by the area Land Adjudication Officer. Counsel cited *inter alia*, **ANISMINIC –VS- FOREIGN COMPENSATION COMMISSION** [1969] 1 ALL ER 208 in an effort to show that the respondent, by appointing the elders, he acted without jurisdiction and therefore the decision was *ultra vires* the provisions of the Law under which he purported to act.

I carefully perused that authority and with respect to counsel, its relevance to these proceedings is minimal. I would, however, accept that delegated authority must be exercised by the person upon whom it is conferred and by no one else, see **ADMINISTRATIVE LAW**, sixth edition page 354. But that was not the case in the appeals that were before the respondent. He did not delegate his responsibility to the three elders. He only sat with them and for good reasons as stated by the interested party. The District Commissioner was a Kikuyu by tribe and he may have required elders who were familiar with customs and practices of the Maasai Community. Ultimately, the decision was prepared and delivered by the respondent. The elders did not sign the same.

There is no evidence that the applicant ever objected to the participation of the elders in the deliberations. The area Land Adjudication Officer did not participate in the appeals. He only witnessed delivery of the ruling.

In my view, this application is without merit and dismiss the same with costs to the interested party.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2009.

D. MUSINGA

JUDGE.

29/7/2009

Before D. Musinga, J

Mobisa – cc

Mr. Oguttu for the applicant

Mr. Nyangwencha for the interested party

Court: Ruling delivered in open court on 29th July, 2009.

D. MUSINGA

JUDGE.