



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Miscellaneous Application 63 of 2004

REPUBLICAPPLICANT

VERSUS

THE SPECIAL DISTRICT COMMISSIONER, MACHAKOS.....1ST RESPONDENT

AND

JOSHUA M NTHENGE.....1ST INTERESTED PARTY

JACKSON NZEKI2ND INTERESTED PARTY

DAVID LITU.....1ST EX-PARTE APPLICANT

MUTUA NDIKU2ND EX-PARTE APPLICANT

KATHITU MUOKA MATU (DECEASED) 3^D EX-PARTE APPLICANT

RULING

1. The Notice of Motion dated 14/6/2004 is premised on Order LIII Rule 3 of the Civil Procedure Rules and the ex-parte Applicant seeks orders that the decision of the Special District Commissioner, Machakos dated 28/10/2003 and which decision was made on behalf of the Minister in-charge of land adjudication and settlement, should be brought to this court and quashed.

2. I have read the Statement of Facts and the Verifying Affidavit and the facts that are not contested in the Replying Affidavit sworn by Joshua Nthenge, one of the Interested parties are as follows:-

The land in dispute is land parcel No. 1369 within Mbee Adjudication Section. During the adjudication process, Ndumbi Nzeki instituted proceedings before the Mbee Adjudication Committee and the respondent in his claim were:

- i. David Mutiso Litu
- ii. Mutua Ndiki
- iii. Kathitu Muoka

3. The committee concluded that Ndumbi Nzeki was entitled to only that portion of land which he was cultivating and had built his houses but the remainder of the land would be registered in the names of the respondents aforesaid.
4. An appeal to the Machakos District Arbitration Board was filed by Ndumbi Nzeki, Nzomo Nzeki and Muasya Nthenge and on 25/2/1987, the Board determined that having visited the disputed portion of land, the land occupied by the Appellants was clearly demarcated with a sisal boundary and that portion of land should be registered in the joint names of the Appellants.
5. Land Appeal Case No. 84 of 2000 subject of the present proceedings was then filed by David Mutiso Litu, Mutua Ndiku and Kathitu Muoka Matu against the decision of the Arbitration Board and the Special District Commissioner, Machakos, on behalf of the Minister determined *inter-alia* as follows:-
 - i. The disputed parcel of land belongs to the Nzeki family which acquired it over a hundred years prior.
 - ii. Nzeki's neighbours lived far from the land and no one claimed it.
 - iii. The Committee and Arbitration Board confirmed that ownership.
 - iv. During demarcation parcels Nos.3145 and 2078 were registered in the names of Joshua Muasya Nthenge, Jackson Mbithi, Nzomo Nzeki, Ndumbi Nzeki and Muasya Nthenge respectively and in the end, that "the land in dispute belongs to the registered persons who are the respondents in this case. The appellants have no grounds of claiming any ownership."
6. The complaint against that finding is that the original claimant was Ndumbi Nzei who died before the Arbitration board proceedings were commenced and therefore the appellants before the Board were incompetent persons as they had no letters of administration to his estate. That in the end, the proceedings before the Minister were also rendered illegal as the wrong parties were before him.
7. Further that one Mutua Ndiku who was a party to the dispute was not accorded the right to be heard and the decision was therefore against the rules of natural justice and should be nullified.
8. In the Replying Affidavit sworn on 17/10/2008, Joshua Nthenge, the 1st Interested Party, states that although Ndumbi Nzeki died after the Committee proceedings, substitution was made before the arbitration board proceedings were undertaken and in any event, it is not those proceedings that are being challenged *per se* and in any event the proceedings before the Special District Commissioner were instituted by the ex-parte Applicants.
9. I have read the submissions by the advocates for the parties and only one issue seems to be in issue; whether the parties before the Special District commissioner were properly before him. I say so because in my view, the issue of one party not being heard is not borne out by the meticulous record of the District Commissioner. Each party had sufficient time to call evidence to support its case and all that he did was to uphold the decision of the Adjudication Committee and Arbitration Board.
10. On the issue that is before me, the decision of Mwera J referred to by the advocate for the ex-parte Applicants i.e. Peter Mua vs Leonard Mutunga, H.C.C.C 305/1995 is irrelevant. That matter related to proceedings in a court of law and where a Plaintiff dies during the pendency of a civil suit. Proceedings under the Land Adjudication Act, Cap 284 are not such proceedings because they are special proceedings within the context of that Act.
11. Similarly my decision in R vs Chairman, Machakos Land Disputes Tribunals, Civil Misc. 252/2000 related to registered land in which title had been issued to a Co-operative Society and therefore for purposes of succession there were clear titles whose ownership was in issue.
12. It must be remembered that under the Land Adjudication Cap 284 Laws of Kenya, the land is still

held under customary law and it is those rights that should be ascertained before registration is made and title issued under the Registered Land Act, Cap 300. I wholly agree with the Interested Parties that although Ndumbi Nzeki died after his success in the Committee Stage, it would defeat the purpose of proceedings under the relevant customary law if the parties that are affected by one decision to first go to a court of law and obtain letters of administration and expect to meet the time limits set by the Land Adjudication Act. In any event, the ex-parte Applicants fully participated in the proceedings from inception and the challenge raised now is in bad faith.

13. Lastly, it was the ex-parte Applicants who filed the appeal before the Minister and they never challenged the capacity of the Interested Parties and the challenge is made purely to obtain advantage but the same is in any event misguided. The decision of the Minister through the Special District Commissioner is final and the matter should now be put to rest.

14. The Motion before me is devoid of merit and is dismissed with the order that each party should bear its own costs.

15. Orders accordingly.

Dated and delivered at Machakos this 18th day of September 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Musyoka h/b Mr Makau for Applicant

Mr Mutuku for Interested Parties

ISAAC LENAOLA

JUDGE