



REPUBLIC .....  
APPLICANT

VERSUS

MINISTER OF LANDS AND HOUSING.....RESPONDENT

NZYOKA KALEVE.....INTERESTED PARTY

MALI LAYU..... EX-PARTE  
APPLICANT

### RULINGS

1. The Notice of Motion dated 3.11.2004 is premised on the provisions of Order LIII Rule 3 of the Civil Procedure Rules. The ex-parte Applicant seek orders that the decision of the Minister in Land Appeal Case Number 235 of 1988 in respect of land parcel number 721 situated in Motunguni Nzalae Adjudication Section.

2. From the Statement of Facts, and Verifying Affidavit of the Applicant and the Replying Affidavit of the interested Party, Nzyoki Kaleve the uncontested facts are that;

i. The dispute between the ex-parte Applicant and the Interested Party commenced as Land Adjudication Committee Case Number 40 of 1977 and the plot number was then No. 87 in Nzalae/Mutonguni Adjudication Section. The issue was ownership thereof and on 20.5.1977 the Committee awarded the land to the ex-parte Applicant.

ii. The Interested Party then preferred an appeal to the Arbitration Board which upheld the decision of the Committee.

iii. The Interested Party then filed a further appeal to the Minister and P.N. Muita, District Commissioner, Kitui, determined that the appeal should be allowed and parcel No. 721 should be registered in the name of the Interested Party.

3. The complaints by the ex-parte Applicant are well set out in the grounds in support of his Motion and in the submissions by counsel. These are that;

***“(a) The proceedings before the Minister concerned Land Parcel Number 721 in Mutonguni/Nzalae Adjudication Section and which land is adjudicated in the applicant’s name.***

***(b) The Minister considered irrelevant issues***

***which led to his reaching on erroneous decision.***

***(c) There is an error apparent on the face of the record before the Minister.***

***(d) The Minister did not follow the right procedure which fact***

**led to his reaching the wrong decision.**

**(e) The Minister acted ultra vires his jurisdiction.**

**(f) The Rules of natural justice were violated by the minister who acted arbitrarily and was openly biased against the applicant.**

**(g) The whole of the process followed by the Minister was flawed hence the decision made by the minister is null and void.**

**(h) The decision by the minister is null and void ab initio and incapable of being implemented.”**

4. The Interested Party in his Replying Affidavit and Further Affidavit sworn on 18.5.2006 denied all these matters and said no more but in submissions his advocate stated that the ex-parte Applicant participated fully in the appeal and never sought an adjournment to enable the grounds of appeal to be supplied to him. That he then went on to argue his case and upon visiting the land the Minister made his decision and he cannot be faulted for making the correct decision.

5. I have taken note of the decision of *Onyancha, J.* in HC Misc Application No. 129 of 2004 Republic vs Special District Commissioner, Kitui & Another and the reasoning of the learned judge in a matter similar to this one. To my mind however, the beginning to resolving this issue is to revisit the decision of the District Commissioner, Kitui on behalf of the Minister in Land Appeal No. 235 of 1988. The Appellant was Nzyoki Kaleve, the present Interested Party and the Respondent was Mali Layu, the ex-parte Applicant. Having heard the two, the District Commissioner then gave his opinion as follows:-

**“The Appellant states that the land was acquired by his father Kaleve and a brother. The respondent states that he is the one who acquired the land.**

**After land viewing it was noted that the home of appellant is just next to the disputed land. It was also observed that the size of the land in dispute is small for someone to acquire in 1955. The sisals and euphorbia which the respondent claimed to have planted when he acquired the land could not march the years he acquired the land. The respondent never disputed that his brother was a committee member.**

### **Ruling**

**Appeal allowed the land parcel no. 721 to be registered in the name of Nyzoki Kaleve.”**

6. With that background in mind, can it be said that the arbiter failed to follow the proper procedure of an Appeal; and did he act against the rules of natural justice; and was he biased; and was there an error on the face of his record; and can his decision be said to be null and void and incapable of being implemented?

7. An Appeal in the nature of Appeal No. 235 of 1988 is made pursuant to section 29(1) of the Land Adjudication Act which provides as follows:-

**“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty 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.”**

8. In the present case, the parties appeared before the arbiter on appeal and there is no evidence that;

- i. no grounds of appeal were filed or
- ii. that no appeal in writing was delivered.

9. I say this with respect because the Commissioner became seized of the appeal and the ex-parte Applicant did not anywhere protest that either of the two actions were not taken. I have taken into account the reasoning of *Onyancha, J.* in Republic vs Special District Commissioner, Kitui (supra) and I agree with the learned judge that it is on the basis of the written grounds of appeal that an appeal of this nature is determined and in the instant case, there is no evidence that the contrary was done. The ex-parte Applicant did not expect the Minister or his delegate to act like a court and strictly follow the rules of procedure prescribed for courts. That is why *Law J.A.* in Makenge vs Ngochi C.A. 25 [1978] (unreported.) stated as follows;-

***“But no such duty (as under section 12 of the Act) to follow the procedure laid down for the hearing of civil suit is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, by section 29 of the Act is to determine the appeal and make such order thereon as he thinks just.”***

10. I wholly agree with that reasoning and I do not see merit in the complaint that there was an error on the face of the record and that the District Commissioner failed to follow the procedure set out for him in the Act. Neither is there merit in the contention that he acted without jurisdiction as the same is conferred by the Act to the Minister who then properly delegated it to the District Commissioner, Kitui.

11. The only other matter left to address is whether the District Commissioner acted arbitrarily and with bias. In this case, both parties were heard and the land in issue visited and I have not been told that the ex-parte applicant was shut out or that only the Interested Party was given a chance to argue his case. The ex-parte Applicant in fact enthusiastically participated in the proceedings and the fact that he lost the appeal cannot be the basis for a claim based on alleged on alleged bias. This is why in Mahaja vs Khutwalo [1983] KLR 553 Hancox J.A. stated that once the District Commissioner chose a particular procedure, then he must apply it in respect of the case for all parties and this is what happened in this case.

12. Of course one of the non-negotiated issues in any judicial or quasi-judicial proceedings is that the rules of natural justice must be up-held. In this case, what was expected is that each party would have the right to be heard, and each was indeed heard. The other was that a decision would be rendered and reasons for it given. I have elsewhere above reproduced the findings and decision of the District Commissioner and I see nothing in them that would amount to breach of natural justice.

13. In conclusion, the ex-parte Applicant has failed to dislodge the fact that this court sitting in its judicial review capacity cannot interrogate the merits or demerits of a challenged decision. It should only look to the process leading to that decision and I have said that I cannot fault it. It is final in any event.

14. In the end, the Notice of Motion dated 3.11.2004 has no merit and is dismissed with costs to the Interested Party only.

15. Orders accordingly.

Dated and delivered at **Machakos** this **29th** day of **October 2009**.

**Isaac Lenaola**

**Judge**

In the presence of; Mr.Mutia h/b for Mr. Musyoki for Applicant

Mr Musila h/b for Mr. Mutuku for Respondent

**Isaac Lenaola**

**Judge**