



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civil Appli 760 of 2006

IN THE MATTER OF AN APPLICATION BY MUNYOKI KING'OO KITAVI FOR LEAVE TO

APPLY FOR THE JUDICIAL REVIEW ORDER IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF APPEAL TO THE MINISTER KANZANZU ADJUDICATION SECTION

NO.2426 APPEAL NO. 128 OF 1998 MBALUKA MUSEMBI

EX PARTE MUNYOKI KING'OO KITAVI

JUDGMENT

The ex parte Applicant, Munyoki King'oo Kitavi, seeks an order of certiorari to quash the proceedings and decision of the Mwingi District Commissioner in Minister's Appeal No.128 of 1998 (Kanzanzu Adjudication Section, Parcel 2426, *Mbaluka Musembi V King'oo Kitavi*) made on 8/11/06. The Respondent is the Mwingi District Commissioner. He also asks for costs. The application is based on facts found in the statement and the verifying affidavit of the Applicant dated 19/2/06.

The Applicant is aggrieved by the Commissioner's decision for reasons that the appeal was a nullity because the District Commissioner had no jurisdiction to decide the merits of the case and that the appeal was also statute barred, the same having been filed outside the 60 days allowed from the date of the land adjudication officers.

That the Appeal No. 128/08 was from the decision of the J. Nzili, an adjudication officer and was dated 15/7/94. There are no records to show when the appeal was lodged but the Applicant contends that because of the case number, it must have been lodged in 1998 which was over 4 years since the decision was made.

Judicial review is concerned not with the merits of the decision but the fairness of the decision making process. It is not disputed that the District Commissioner had jurisdiction to entertain appeals from the decisions of the Land Adjudication Officer. That jurisdiction is donated by S 29 of the Land Adjudication Act which vests the power to hear appeals in the Minister and the Minister delegates those powers to the District Commissioner.

The decision of the Land Adjudication Officer was made on 15/7/1994 by J. Nzili. Under S 29 of the Land Adjudication Act, the aggrieved party had 60 days within which to appeal. The Applicant does not know when the objector filed the appeal to the Minister, but he supposes it must have been filed in 1998 because the Appeal Case Number is 128 of 1998. The proceedings before the District Commissioner are exhibited as 'MKKI'. It is apparent that the Applicant was party to those proceedings. How can he not know when the appeal was filed? It was upon him to find out when the appeal was filed because he alleges that the appeal was time barred. He can not base his case on suppositions and presumptions. This court can only base its decision on facts and the law. There are situations when a file may be given a different number even well after the date for filing and this court can not assume the date of filing the

appeal. Besides since the Applicant was party to the proceedings, why did he not raise the issue of the appeal being time barred before the District Commissioner. The Applicant subjected himself to the jurisdiction of the District Commissioner and cannot be heard to challenge it at this stage having let the chance to do so go by. That is a remedy that the Applicant should have pursued and there is no good reason why he failed to pursue it.

Order 53 Rule 3 (2) Civil Procedure Rules requires that the notice of motion be served on all persons directly affected and under order Rule 3 (3), the Applicant should file an affidavit of service as proof of service on all the parties.

In the instant case, the land dispute was between the Applicant and one Mbaluka Musembi. The said Mbaluka Musembi should have been served with this Judicial Review application. There is no evidence that he was served and if this court were to give any orders in this matter, Mbaluka would be directly affected. Rules 3 (2) and (3) are supposed to ensure that all parties are given a fair hearing and none is condemned unheard. Failure to serve Mbaluka Musembi goes against the tenets of the rules of natural justice that all parties to a dispute be accorded a fair hearing. The Applicant cannot therefore be entitled to the orders having failed to serve a party that will be effected by any orders that may be made by this court.

For all the above reasons, I find that the Applicant will not be entitled to any of the orders sought and the notice of motion is hereby dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 12th day of October 2009.

R.P.V. WENDOH

JUDGE

Presence:

Mr. Muli for the Applicant

No Appearance for the Respondent

Court clerk - Muturi