



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Misc. Appli. 127 of 2004

REPUBLIC APPLICANT

VERSUS

THE DISTRICT COMMISSIONER (KITUI) RESPONDENT

MWIITU KISINI INTERESTED PARTY

MULEI MULILI EX PARTE APPLICANT

RULING

1. The Notice of Motion dated 5/10/2004 seeks the orders of certiorari and mandamus under Order LIII Rule 3 of the Civil Procedure Rules. Specifically, the ex-parte Applicant seeks orders in the following terms:-

- a. “An order of certiorari to remove into this Honourable court for the purposes of being quashed a judgment undated but delivered on 24th May 2004 by the Special District Commissioner under powers conferred by Section 29 (4) of the Land Adjudication Act and delegated powers as per Legal Notice NO. 73 dated 28/4/1978 in Appeal to Minister Land Case NO. 20 of 1989 Mulei Mulili vs Mwiitu Kisini.
- b. An Order of mandamus directing the Special District Commissioner, Kitui in Appeal to Minister Land Case No. 20 of 1989 Mulei Mulili vs Mwiitu Kisini to vacate his undated decision delivered on 24th May 2004 and further direct that the Special District Commissioner, Kitui in appeal to Minister Land Case NO. 20 of 1989 Mulei Mulili vs Mwiitu Kisini do retract and withdraw his decision against the Applicant and the intended execution be stayed pending the hearing and determination of the intended Notice of Motion.
- c. That costs be provided for.”

2. I have read the Verifying Affidavit and the Statement of Facts and the clear facts that emerge are as follows:-

The Interested Party first lodged an objection before the Nzalau Land Adjudication Committee in its Land Case No. 120 of 1977 and in it, he claimed the land subject of the present proceedings and the Committee agreed with him and awarded the land as he had sought. The ex-parte Applicant then proceeded to the Arbitration Board for Nzalau which dismissed his appeal in its case No. 487/1984. He proceeded to lodge an appeal to the Minister responsible for lands in Appeal No.20/1989. The Minister delegated his powers to the District Commissioner, Kitui, one P.N. Mwita who heard it, found no merit in it and dismissed it. It is that decision that is sought to be subjected to the twin orders of judicial review viz certiorari and mandamus. The grounds on which the orders are sought are:-

i. THAT the Special District Commissioner failed to note that the appeal arose out of the decision of the Land Adjudication Officer and failed to consider the said decision, in his decision but that of the Committee and Arbitration Board and further failed to give reasons for rejecting the Applicant's appeal.

ii. THAT the Special District Commissioner did not consider the grounds of Appeal raised by the Applicant and did not give any reasons for rejecting the Applicant's appeal.

iii. THAT the District Commissioner's decision is biased and not based on any facts or evidence before him and same is a miscarriage of justice.

iv. THAT the District Commissioner exceeded his powers and in delivering decision acted unjudiciously and contrary to the Provisions of law relating to conducting and deciding on Appeal and this was contrary to the Rules of Natural Justice and amounted to miscarriage of justice.

v. THAT the District Commissioner failed to arbitrate the dispute as required and was not impartial which amounted to miscarriage of justice.

vi. THAT the District Commissioner was biased and acted contrary to the pleadings before him by awarding the Respondent the portion of 4 acres granted to the Applicant in absence of an Appeal by the Respondent and which award is contrary to his upholding of the decisions of the Land Adjudication Officer."

3. The Respondent from the record filed no response to the Application but the Interested Party filed a detailed Replying Affidavit in which he gave out the history of the dispute and of significance and relevance to the Motion before me is the fact that the Respondent heard evidence from both parties, went through the history of the adjudication area, read the earlier decisions in the dispute and agreed with them and in favour of the Interested Party. He saw no bias in the decision and urged that the Application be dismissed with costs.

4. Advocates for the ex-parte Applicant and Interested Party wholly adopted their respective clients' affidavits and I retired to consider the matter with their list of authorities in my hands. One of the decisions that I should quickly advert to is the one of Wambua Mulili vs District Commissioner, Kitui & Ano., H.C.MISC. 760/1991 (Nairobi). That decision was handed down in 1998 by Owuor J and Shaikh Amini J. and it has relevance to the matter before me because the ex-parte Applicant is the same, the orders sought are the same and the arguments made are the same. The only difference is that in that case the dispute related to plot No.759, Nzalae, while the present one relates to plot No. 748 in the same area. In dismissing the claim, the learned judges stated as follows:-

"the record indicates that both parties and their witnesses were heard in the appeal. This is as it should be, unlike the normal appeals before the court. This Legislation puts at the disposal of the Minister a different procedure when adjudicating on these appeals.

Section 29 (1) provides:-

“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.”*

Once the appeal is before him, the Minister shall determine the appeal and make such orders therein as he thinks just and the orders shall be final.

As indicated, the Minister is not limited to the record of the objection before the adjudication officer. He is at liberty to accord the parties and their witnesses a hearing before him.

Land Adjudication Regulation 4 (4) empowers the Minister to:

“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 dully authorized agent and shall be entitled to call witnesses.”

It is on this basis that we are satisfied that the District Commissioner acted completely within his powers to hear both the parties and their witnesses. It was during the evidence of these parties that all issues in regard to how the land was acquired and how the appellant had used violence to acquire the land came out. On our own assessment of the proceedings before the District Commissioner and all the evidence he considered from the two Tribunals, we are satisfied that the appeal was heard in accordance with the rules of Natural justice. We see no merit whatsoever in....”

5. That is also the beginning of my bringing this matter to a closure because I have carefully read the proceedings before the District Commissioner. He carefully heard the parties including a witness for the ex-parte Applicant. He allowed each party to cross-examine the other and then concluded that the Land Adjudication Committee and the Arbitration Board were correct in their findings save that it was wrong for the Board to award the ex-parte Applicant 4 acres he ordered to be returned to the possession of the Interested Party. I see nothing wrong with that decision because Section 29 of the Act gives the Minister or his delegate power to make such orders as he thinks just and the same shall be final. In this case, the District Commissioner clearly considered the evidence before him together with past decisions on the subject and made his decision. The merits or demerits of it are not for this court to consider. This is why the court in Mahaja vs Khutwalo (1983) KLR 553 faulted a District Commissioner who only heard one party on appeal and failed to hear the other. That cannot be the case here and I have said why. Allegations of bias have been raised but where is the evidence? I submit none. It is said that he acted arbitrarily but how can that be when he heard both parties?

6. It is quite obvious that I completely see no merit in the present Motion and would adopt the words of the learned judges in Wambua Mulili (supra) and quickly dismiss the Motion with costs to the Interested Party.

7. Costs accordingly.

Dated and delivered at Machakos this 25th day of September 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Makau Mutua for Applicant

N/A for Respondent

ISAAC LENAOLA

JUDGE