



4. An order of prohibition to issue as directed at the 3<sup>rd</sup> Respondent prohibiting him from registering Land Parcel No. 3345 in favour of the 4<sup>th</sup> Respondent as the first and absolute registered owner or at all.

5. An order of Mandamus to issue as directed to the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent compelling them to restore and maintain the status quo of the Adjudication register as it was before the death of the registered owner one Samuel Muli Kaleli (deceased).

6. That the leave granted to file this application do operate as a stay of execution of the whole proceedings in Land Appeal Case No. 171 of 2003 and all other proceedings giving rise to the said appeal.

7. That the costs of this application be for the Applicant.

2. The grounds in support are:-

a. The Appeal proceedings and the objection proceedings are a

nullity in law since the applicant herein lacked capacity to respect the registered owner of the land in dispute

b. The 1<sup>st</sup>, 2<sup>nd</sup> and the Land Adjudication Officer acted in breach

of the law when they proceeded with proceedings involving parties who lacked capacity and thereby interfered with an estate of a deceased person by exercising the large portion therefrom and allocated it to the 4<sup>th</sup> respondent.

c. The 1<sup>st</sup>, 2<sup>nd</sup> Respondents and the Land Adjudication Officer in

open bias through out the proceedings by favouring the 4<sup>th</sup> Respondent and even after requesting for typed proceedings, the applicant was not supplied with the same immediately.

d. The prayers sought if not granted the 2<sup>nd</sup> and 3<sup>rd</sup> respondent

will execute the judgment of the 1<sup>st</sup> Respondent which in effect will be effecting the illegal decision of the Land Adjudication Officer in the objection case.

e. The objection case out to have been stopped until the court

appoints administrator of the estate of the Applicant's husband who was the Respondent in the objection case and as such this honourable court should correct the abnormality in the appeal and the objection proceedings as to remove the Applicant from the proceedings into which she was summoned to substitute her husband without following the law.

f. Rules of natural justice were breached when the estate of the

Applicant's husband was condemned unheard

g. The judgment of the Minster under review is defective and incompetent as it is not dated.

3. During submissions, two issues were raised which I think I should deal with in limine. The first related to the form in which the Motion is brought. I have seen the Motion and without belabouring the point I see no failure to follow the procedure and form set out in Farmers Bus Service and others vs The Transport Licensing Appeal Tribunal [1959] E.A. 779. In any event, it is now settled law that failure to follow the form set out is not fatal to the Application and that is why an amendment to conform to the

form and procedure was allowed in the Farmers Case (*ibid*).

4. Secondly, it was said that the Application for leave was brought out of time in as far as the prayer for certiorari was concerned. I have perused the Application for leave dated 14.1.2005. It was filed on 17.1.2005 and my perusal of the award of the District Commissioner which is the subject of the present proceedings cannot help me determine the issue of time because the award is undated. All I see is that a copy of it was certified on 22.9.2004 while hearing was on 29.10.2003 and 17.12.2003. Without a clear date showing the date of the decision, clearly an error was commissioned by the District Commissioner but the error by itself cannot estop me from determining the merits of the Motion more so when a different judge heard the Application for leave and granted it.

5. Having so said, in the body of the Application, the ex-parte Applicant states that the decision was read to the parties on 15.7.2004 but I cannot from the record confirm that date as being the date of the decision and since no party has addressed me strongly on it, I will say no more than what I have said above.

6. Turning to the merits of the Application, it is argued that the ex-parte Applicant acted in ignorance when she participated in the objection proceedings because she was neither a legal representative of her deceased husband who was the rightful claimant of the land nor could the proceedings be held without such a person being lawfully appointed.

7. That therefore the estate of the deceased was condemned unheard and rules of natural justice were breached.

8. The response of the Respondent does not exist but the Interested Party in a Replying Affidavit sworn on 3.7.2008 maintains that the Application is frivolous and is brought in bad faith. That the land in dispute i.e No. 3345 at Kaewa land Adjudication Section belongs to him and that all the proceedings were properly conducted and there is no reason to grant the prayers now sought.

9. I have carefully considered the Application and to my mind, the same is frivolous and unmeritorious. I say so with respect because the decision being challenged is the one of the Minister for Land Adjudication and Settlement. I am nor sure that such a Minister has ever existed but in any event, the District Commissioner, Machakos under delegated authority of the Minister in-charge of land sat in Land Appeal Case No. 71/2003 where the Appellants were:-

- i. Philes Mwikali Muli
  - ii. Beatrice Mwikali Matheka
  - iii. Alice Nduku David
  - iv. Lydia Mbithe Mutua
  - v. Mutie Mwei

10. The respondent was Samuel Muli Kiseli, the present Interested Party. In the proceedings on 29.10.2003, the hearing could not take off because “*two of the Appellants were absent on medical grounds.*” On 17.12.2003, the record reads as follows:-

*“All the five appellants are present and all agree or requested that Sammy Muasa Muli, elder son of Philes Mwikali Muli speaks on behalf of them all.”*

11. In his evidence, Sammy Muasa Muli gave detailed evidence about how the land was acquired by his father, Samuel Muli Kaleli in 1948 and how the Interested Party later came to claim it. He produced proceedings of a dispute in Machakos Law Courts whose details are unclear but which the District Commissioner had in his possession as an exhibit. After hearing his evidence, Muasa was cross-examined

by the Respondent. Later evidence was given by the Respondent and his witnesses and were all cross-examined by the Appellants. The District Commissioner on considering the matter concluded as follows;

*“The land in dispute to remain the property of the registered owner Samuel Muli Kaleli P/No. 3345.”*

12. I have said above that the only issue raised by Philes Mwikali Muli is that she was the Appellant. She was in fact only one of the Appellants and participated in the filing of the Appeal and in the hearing thereof she did so not on behalf of the estate of the late Samuel Muli Kaleli but as a person amongst others entitled to the land in dispute. She, like the others was pursuing a personal interest and not that of the estate per se.

13. Secondly, and as a corollary to the above, the District Commissioner sitting as a delegate of the Minister-in-charge of lands is bound to hear the Appeal under section 29 of the land Adjudication Act which provides as follows:-

*“(i) 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*

*(2) The Minister shall cause copies of the order to be sent to the*

*Director of land Adjudication and to the Chief land Registrar.*

*(3) When all the appeals have been determined, the Director of*

*Land Adjudication shall-*

*a) alter the duplicate adjudication register to conform with the determinations; and*

*b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall after the adjudication register accordingly.*

*(4) Notwithstanding the provisions of section 38 (2) of the*

*Interpretation and General Provisions Act or of any other written law, the Minister may delegate by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.*

14. It is clear from the above section that the Minister or his nominee has wide discretion and is not bound by the particular provisions of the Civil Procedure Rules say as to locus standi. All he is enjoined to do is to hear the parties before him and finally determine the dispute. His powers are even wider than those given to Land Disputes Tribunals under Act No. 16 of 1990. The case in Mahaja vs Khutwalo [1983] KLR 553 exemplifies this fact because in that case, the only reason why the award was quashed was that the District Commissioner failed to hear one side and obviously the proceedings were against the principles of natural justice and the order he made was amenable to judicial review orders. This is not

the case in the matter before me.

15. I should say something about the Application in general; the same was sadly framed in a way that the locus standi was the main issue. No other serious question relating to the decision was raised and once I have disposed of that question, all other issues which may otherwise arise in an Application of this nature cannot be delved into. A court can only determine issues before it and that is all there is to say.

16. The Motion dated 31.1.2005 has no merit and is dismissed with costs.

17. Orders accordingly.

Dated and delivered at Machakos this **14<sup>th</sup>** day of **October 2008**.

**Isaac Lenaola**

**Judge**

In the presence of: Mr.O.N. Makau for Applicant

Mr.Makau Jnr h/b for Mr. Musyoka for Interested Party.

**Isaac Lenaola**