



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Misc. Appli. 253 of 2006

REPUBLIC APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER1ST RESPONDENT

IKALYONI ADJUDICATION SECTION

MAKUENI LANDS & SETTLEMENT OFFICERS 2ND RESPONDENT

MBEVI MWANZAU MATOLO INTERESTED PARTY

EX PARTE

MUIA MAINGA (DECEASED)

NZEKI MAINGA

JAPHETH NGUNGU

GEOFREY MATHEKA

MWOLOLO SOMBO APPLICANTS

RULING

1. The Notice of Motion dated 20/11/2006 seeks orders as follows:-

i. “An order of Certiorari to remove into this Honourable court for the purposes of being quashed a decision dated 19/09/2006 by the Land Adjudication Officer under powers conferred by section 26 of the Land Officer Adjudication Act objection to Adjudication Register in Ikalyoni Adjudication Section P/No.988, 1925, 1926, 1927, 1919, 1923.

ii.

iii. That costs be provided for.”

2. In the Supporting Affidavit sworn on 30/11/2006 and in the Statement of Facts on record, the grounds and facts relied upon are:-

a. “THAT the Land Adjudication Officer failed and erred in proceeding with the case against the Respondents when the 1st defendant Muia Mwainga was deceased having died in 2002 and without any legal representative having been properly substituted and without letters of administration of the deceased estate.

b. The Land Adjudication officer exceeded his jurisdiction by allowing one Mwainga Muia to appear on behalf of estate of 1st Respondent’s estate without letters of administration and purporting to represent deceased estate.

c. The Land Adjudication Officer exceeded his jurisdiction by proceeding to hear Appellants appeal against 5th Applicant who was not summoned, was absent and who was purportedly represented by Johnson Mathuva Mwololo who had not a registered power of Attorney so to do.

d. THAT the Land Adjudication Officer acted against the rules of natural justice by denying 3rd and 4th Applicants an opportunity to cross-examine the appellant.

e. THAT the Land Adjudication Officer acted against the rules of natural justice by denying 2nd, 3rd and 4th Applicants an opportunity to cross-examine the Appellant’s witness.

f. The Land Adjudication officer acted against the rules of natural justice by denying the respondents an opportunity to give evidence.

g. The Land Adjudication officer acted against the rules of natural justice and against procedure in hearing disputes by failing to record the names of parties and witness who gave evidence by their names or identifying them.

h. The Land Adjudication officer exceeded his jurisdiction and his powers by purporting to Review Courts decree and upsetting the same.

i. THAT the Land Adjudication Officer exceeded his powers by giving and/or acted contrary to his power by failing to consider all lands in dispute and provisionally registered.

j. THAT the Land Adjudication officer exceeded his powers by canceling registration of plot No.988 and ordering the same to be registered in the name of Muia Mainga (deceased) and Mbevi Kamai contrary to court the judgment which had ordered subdivision and further contrary to law by registering a deceased person.

k. THAT the Land Adjudication officer in his decision was biased, unfair and acted contrary to the rules of natural justice by ignoring to note following implementation of court’s judgment the interested party was registered as proprietor of plot 1839 to which the Land Adjudication did not consider in canceling applicants plot and ordering the plot 988 be shared equally between the deceased and the interested party and which decision was deprived the applicants of their property and has given the interested party more than he is entitled.”

3. From the annexures to the Supporting Affidavit and the submissions by Mr Makau for the ex-parte Applicant I note that the Applicant and the Interested Parties share a common ancestry in one Uмба who originally occupied the land in dispute. In Land Case No.21/1976 the elders decided that the land be divided equally between the parties. The decision was confirmed by the Resident Magistrate, Machakos Hon. N.N. Njagi in his Ruling dated 9/10/1992 and he ordered enforcement thereof. Earlier, the learned magistrate had allowed an application by the ex-parte Applicants to have the land “surveyed and demarcated by the Land Adjudication office in Machakos.” The dispute was however not resolved and on 17/11/2003, the Land Adjudication officer commenced the hearing of objections placed by Mbevi Mwanzau Matolo, the Interested Party with regard to parcels Nos. 988, 1925, 1926, 1927, 1919 and 1923 Ikalyoni Adjudication Section. In a decision dated 19/9/2006, the Land Adjudication Officer stated as follows:-

“DECISION:

All the plot numbers 1919, 1923, 1925, 1926 and 1927 to be cancelled and combined with P/NO 988 which should be recorded in the names of Muia Mainga and Mbevi Kamai. Parties sub-divide after registration.

Sign: L.A.O

R.O.A granted within 60 days. 19/09/2006.”

4. Only three serious issues are raised against the decision;

i. that Muia Mainga was dead and there was no one properly and legally qualified to represent his estate;

ii. the 5th ex-parte Applicant was absent during the proceedings and the 2nd, 3rd and 4th Applicants were also not given a chance to cross-examine the Interested Parties’ witnesses and the rules of natural justice were breached;

iii. that the Land Adjudication Officer acted in excess of his powers when he ignored the earlier orders of court and proceeded to cancel the registration of Mbevi Kamai over parcel No.988;

5. I have read the Replying Affidavit sworn on 5/2/2007 by one Mbevi Matolo, the Interested Party. The history of the dispute as outlined above is repeated and all that Matolo states is that the Land Adjudication Officer acted within the law and any party unhappy with the decision should have filed an appeal under the Act i.e. Land Adjudication Act, Cap 284. That the 5th ex-parte Applicant was present during the proceedings and the proceedings were conducted according to law.

6. I have taken into account all that the advocate for the Interested Party said in submissions and I also note that the Respondents have filed no response to the Application.

7. The powers of a Land Adjudication Officer in a dispute such as the one before the 1st Respondent are set out in Section 10 of the Land Adjudication Act which provides as follows:

“10. (1) The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connexion with such claims, and for that purpose he shall be legally competent to administer oaths and to issue summonses, notices or orders requiring the attendance of such persons or the production of such documents as he may consider necessary for the carrying out of the adjudication.

(2) The adjudication officer may himself exercise all or any of the powers which are given by this Act to officers subordinate to him.”

8. As to the procedure to be followed by the Land Adjudication Officer, Section 12 of the Act provides as follows:-

12.“(1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.

(2) Any proceeding conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of Chapters XI and XVIII of the Penal Code.”

9. Of importance is the statutory power to admit evidence which in a court would not be admissible and to use evidence adduced elsewhere. In this case, the decisions in Land Case No.21/1976 were used and referred to in the proceedings before the Land Adjudication officer but my humble view is that in fact the orders made in that case were not effected properly and in his decision, the officer stated as follows:-

“During its ruling the court never came out clearly on the land that was supposed to have been sub-divided equally. This is because the court mentions on the pieces within the occupied land by members of either family members to be surveyed and the aggregate totals of one family be equal to the other.

During field visit it was evident that the plaintiff was only confined to a small area and the vast area occupied by the defendants. The demarcation officer went ahead and sub-divided P/No 988 and issued a new number 1839 to the plaintiff. This was against the court decision. The demarcation officer also with no authority went ahead and sub-divided P/No. 988 and issued new P/Nos.1919, 1923, 1925, 1926, 1927 to the defendants family members. This was contrary to the court decision since there was a court decision this is what should have been implemented. Clarification should have been sought from the court for proper implementation.”

Therefore the number created were illegal since the portion for the plaintiff was small.

Sign; L.A.O”

10.I agree with the Land Adjudication Officer because he is bound by section 10 above “to determine any question before him” in connection with any claim to that land.

11.As for the argument that he determined the interests of Muia Mainga who was deceased, I note from the record that in fact the ex-parte Applicants presented his claim and clearly explained why they so appeared. The Adjudication Officer has power under Section 11 (c) of the Act to avoid injustice by allowing that claim to be entertained and I am not of the view that there ought to be a person appointed by a Succession Court to handle the claim. This is also because the whole import of the Land Adjudication Act is “the ascertainment and recording of rights and interests in Trust Land.” To do so the procedures under the Civil Procedure Act and the Law of Succession need not be strictly followed because Trust Land claims are strictly based on customary law. It would be impractical to do so in any event.

12.One other thing I should say in this matter; what the Adjudication Officer was hearing was an objection lodged by the Interested Party. The objection was as to the register and section 26 of the Act provides as follows:-

“ 26. (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.”

13.The Adjudication Officer is again not limited by civil procedure rules and the Law of Succession in determining the issue. His discretion is wide and in this particular case, he went out of his way to hear all the parties before him and I see no justification for the assertion that rules of natural justice were breached. If they were, then as in Mahaja vs Khutwalo (1983) KLR 553, I would have readily allowed the motion but not so in this case.

14.The Application before me is certainly without merit and is best dismissed with costs to the Interested Party.

15.Orders accordingly.

Dated and delivered at Machakos this **14th** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Makau Jnr for Applicant

Mr Sila for Interested Party

ISAAC LENAOLA

JUDGE