



Minister's delegate, the same was time-

barred. That on 5.5.2004, the Appeal was heard in the absence of the ex-parte Applicant who was unwell. The same was then dismissed and the point made is that the right to be heard was denied and the rules of natural justice were breached.

4. In his Replying Affidavit sworn on 31.3.2005, one James Kwoko Mwaniki stated as follows.

*"That I am the son of the Interested Party hence competent to make and swear this Affidavit."*

5. He further deponed that the disputed parcel of land was inherited by his father, Mwaniki Mueti from his great grandfather. The Land Adjudication Board confirmed that fact when it awarded the land to him in objection proceedings filed by the ex-parte Applicant. That the Appeal filed thereafter was adjudged to be out of time and therefore the decision of

the Minister responsible for lands was proper and the Motion should be dismissed with costs.

6. It is patently clear from the above narration of facts that the only issue before me is whether the ex-parte Applicant was accorded a fair hearing before his Appeal was dismissed. The Advocate for the ex-parte Applicant has pointed me to the decision of *Potter, Kneller and Hancox J.J.A* in Mahaja vs Khutwalo [1983] KLR 559 where the learned Judges in the Judgment stated inter- alia as follows:-

*"It is essential in an application for certiorari for the tribunal or person whose decision is impugned, whether that tribunal or person constitutes a court, to be, if not named in the title of the proceedings, at least be served and have an opportunity to be heard."*

*The Judge was right in the circumstances of the case having quashed the proceedings before the District Commissioner to make the order for hearing as failing to do so would have left the parties without a remedy."*

7. The Law as I understand it therefore is that parties to any judicial or quasi- judicial proceedings must all be heard for the decision to be said to be fair and just. In this case however, there is the more serious issue whether in fact the Appeal was filed within time. I have taken note of the fact that the decision appealed from was made on 26.8.1987 and the ex parte Applicant had 60 days to file his Appeal i.e by 26.10.1987. I have seen the Appeal document. It is dated 2.10.1987 and it was received by the Kitui Land Adjudication Office on 25.9.1987. I should pause here and express surprise that a document dated 2.10.1987 could have been lodged two weeks before it was dated. Nonetheless, the Appeal document was addressed to the Minister for Lands, Settlement and Physical Planning as well as the Director of Land Adjudication and the Land Adjudication Officer, Kitui. I have said above that there is clear evidence, with the problem highlighted, that it was received by the Land Adjudication Office. Where then is the evidence that it was filed within time before the Minister, the correct and statutory lawful authority, within time? I see none.

8. In his judgment dated 5.5.2004, the Minister delegate stated as follows:-

*"The Appeal was fixed for hearing on 5.3.2004. It was not heard when the court informed the Appellant he was time barred. He insisted that he filed the appeal within time. The court gave him a chance to bring documents to prove his allegations. The case was fixed for hearing within two weeks."*

*The second time both parties were again present, the Appellant pleaded for more time. The Court allowed him and then case fixed on 5.5.2004. On the day the Appellant sent his representative to report that he was sick but he had no document to support that his case was filed within time."*

*The court therefore ruled that the case was time barred."*

*Objection court delivered judgment on 26.8.1987."*

*The last date to file the Appeal was 26.10.1987. The actual Appeal was filed on 4.11.1987. The Appeal was therefore late with 10 days. The Appellant has been informed accordingly of the court Ruling through his representative during the Ruling.”*

9. Is that decision unlawful? I think not. The ex-parte Applicant had the duty then and now to prove, conclusively, that the Appeal was filed before 26.10.1987. In his Motion, the ex-parte Applicant states that “*the Appeal documents clearly showed that the Applicant’s Appeal was received in the Honourable Minister’s registry on 21.9.1987 and not 4.11.1987*”. That is not true. The Land Adjudication Office is not the Minister’s registry and if it was, where is the evidence and the law to support that proposition? I have seen none.

10. Lastly, the Minister’s delegate was more than generous. In spite of finding that the ex-parte Applicant’s Appeal was out of time and before striking it out, he gave him another opportunity, on two occasions, to explain himself but he failed to do so and the Appeal was dismissed. He was therefore properly given a chance to be heard on that crucial

issue and he failed to do so. He has equally failed to do so before me and I have said why.

11. The Khutwalo decision is easily distinguishable as in that case the ex-parte Applicant was given no opportunity to be heard. In this case, there was more than the question of

being heard because the Appeal was time-barred and if it was not, I have no facts to hold otherwise.

12. The Motion dated 8.11.2004 is without merit and is dismissed with costs to the Interested Party.

13. Orders accordingly.

Dated at Machakos this 3<sup>rd</sup> day of December 2008

**Isaac Lenola**

**Judge**

**In the presence of: Mr. Macharia h/b for Mr. Nzilli for Interested  
Party.**

**Isaac Lenaola**

**Judge**