



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 124 of 1997**

1. Land and Environmental Law Division

2. Subject of main suit:- (i) Land adjudication act Cap 284 Laws of Kenya

Land – holding No.426 Waweru Sublocaiton South Nyanza assessors used to hear appeal.

Ministers Findings

- (a) Aware of Luo tradition that a visitor invited to stay on land must leave.
- (b) That portion given to Okelo Obanja too small.
- (c) That portion of money accrues be given to the appellant.
- (d) Decision final
- g) Ignored advice of his advocate matter Res judicata hearing been heard by the court

3. Judicial Review Application

- (i) Application No.124/77 filed on 2<sup>nd</sup> April 2007
- (ii) Notice of motion filed on 19<sup>th</sup> July 1978
- (iii) Orders sought of certiorian and Prohibition to quash decision of Minister.
- (iv) Reasons – a) The said decision did not deal with issues raised under Section 26 of the Land Adjudication Act Cap
- (b) Hearing of appeal made with assessors and called further evidence.
- (c) The minister went beyond powers. The issue of holding 426 was vested and completed before adjudication process.
- (d) The minister only empowered to determine matter

referred to him as per shaded map.

4. Arguments by applicant exparte

(a) The minister decision quashed and set aside

5. Argument by respondent 1 and 2

(b) The minister decision be upheld

6. Case law

(a) Land adjudicator Act Cap 284 Laws of Kenya

7. Advocates

A.K. Kuloba for Khamiwna & Khaminwa Co. Advocates for the plaintiff

O Eregi for Attorney-General the 1<sup>st</sup> defendant/applicant – present

Okelo Abanja for 2<sup>nd</sup> respondent in person

**SIMON OWUOR ADEDE .....PLAINTIFF**

**V E R S U S**

**MINISTER OF LANDS & SETTLEMENT .....DEFENDANT**

**J U D G M E N T**

**I JUDICIAL REVIEW**

1. The Judicial Review application before me concerns the Land Adjudication Act Cap 284 Laws of Kenya, touching on the land parcel holding 426 Waware Sub-location South Nyanza.

2. It seeks writs of certiorian and prohibition to quash “ the findings and judgments made by the Minister of Lands and Settlement Hon. J. Angaine in exercise of his appellate jurisdiction conferred by Section 29, Land adjudication act cap 284 delivered in appeal 153/1974 on the 27<sup>th</sup> April 1977.

3. Leave to bring these proceedings were granted by Platt J. (as he then was) on the 28<sup>th</sup> June 1978. The stay of the decision of the Minister was not obtained until 24<sup>th</sup> December 2003 issued by Ojwang J.

**II Delay of suit**

4. This suit has been pending before this court for exactly 30 years. Eight years after the matter was before this court, a preliminary objection was raised before S. Sach Deva J and S. Amin J. There appear to be no judgment or ruling on record. From 1985 to 2003 no action seems to be taken until an attempt to have dealings with the land was made. This made the exparte/applicant come to apply for stay of the Minister’s orders.

5. The Land and Environmental Law Division was recently established and parties came for hearing on the 4<sup>th</sup> July 2007. I did note that the pleadings were extremely old tattered hardly kept. The advocates in this matter provided fair copies duly endorsed with their signatures to which I thank them for.

## **II Background of Judicial Review**

6. The Minister of Lands and Settlement J. N. Angaine heard an appeal concerning the parties herein. The ex parte applicant not being satisfied with the Minister's decision, filed this Judicial Review application to quash the Minister's orders as he in effect exceeded his powers.

7. For ease of reference the parties concerned herein are:-

7.1 Samuel Odede (now deceased)

(a) The original owner of land holding No. 426 Waware Sub-location South Nyanza (herein referred to as the suit land).

7.2 Siemon Owuor Odede.

(a) Son to Samuel Odede and now the Owuor of the said suit land.

7.3 Abanya Nyamori.

(a) The stranger/visitor limited to stay on the suit land.

7.4 Okello Abanya

(a) The son to Abanya Nyamori.

8. Samuel Odede (herein referred to as Samuel) had limited Abanya Nyamori (herein referred to as Abanya) to stay .. him on his land as a stranger/visitor. From the pleadings and proceedings of other matters I understand that according to the Luo customary law a person who owns land can welcome a stranger or visitor to stay with him on the said land. There comes a time through that the stranger and or visitor must leave Abanya referred to leave. A dispute arose in 1950. Samuel filed court proceedings in the African Land Court. That court upheld Samuel's claim and allied that Abanya must leave the land and in effect move his house 100 yards from the boundary of Samuel's land. Abanya not being satisfied and pleasure went to the Kisii District officers in land case No.34/1950. The matter further went to appeal being Kisii appeal .....land case No.43 of 1950. The matter was finalized with the orders confined that the said Abanya must completely vacate Samuel's land.

9. This dispute occurred before the land adjudication exercise he gave. The effect of the said cases was that all the portion of land now belonged to Samuel. The land where Abanya finally settled with his family consisted of 2½ acres being boundary No.564. His house was constructed 100 yards from where he originally had built.

10. When the land adjudication act began Samuel registered his son Simon Owour Odede (herein referred to S. O. Odede) on the suit land.

11. Parties lived peacefully on their respective portions of land up to 1970. In 1970, it seems that Okello Abanya (herein referred to as Okello) moved back to where his father originally lived. Alarmed S. O. Odede a suit in the magistrate's court being District Magistrate case at Rongo of 1970 case No. 4/50. In the said trial he raised the issue of the said Okello's moving back. In the proceedings Okello admitted he was in the wrong and stated as the defendant:-

**"I was present (in the 1950 court case) I heard the court telling my father Abaga to removed his home for 100 yards from the boundary. The strip of 100 yards was left. I did not know that the [moving back to the original homestead] was prohibited. I agree that I did a mistake. I ask [the court to excuse me."**

12. He then asked for more time to move out. The court visited the suit land and noted that the matter

had already been determined and the elders of the land adjudication confirmed that S. O. Odede was the rightful one.

13. S. O. Odede then asked what happens to the 100 yards strip. Can it now belong to him? The magistrate referred him to the land adjudication officer. The land adjudication officer I believe awarded the 100 yards to the said S. O. Odede.

14. Not being satisfied with this Okello appealed to the Minister of Lands and Housing. The appeal was lodged on the 24<sup>th</sup> April 1972. Five years later the appeal was heard by the Minister. The act provided that the Minister hears the appeals and any decision is final at the appeal stage. The hearing began on 25<sup>th</sup> April, 1977 at 8.30 am. The assessors were called and further evidence was taken. The Minister then proceeded to visit the site of the suit land.

15. His conclusion of his decision was that the portion of land where Okello occupied of 2½ acres was very small. He awarded portion of plot panel holding No. 426 to Okello. This panel being the said land that in effect was awarded to S. O. Odede's father in 1950.

16. The assessors said since Okello's father had been welcomed there, then the said Okello should be given a portion of land from hold 426. The Minister was informed during the proceedings which he recorded in his ruling that the appellant Okello had been defeated in court case No. 14/1950 and his case was not able to succeed. That he was ordered to vacate. The Res Judicata principle therefore arose. The Minister though was of the opinion regardless that the matter was Res judicata, the said Okello is entitled to claim the portion of land in S. O. Odede land. The Minister did not therefore agree with the advice of his advocate. He stated:-

**“I had sent out a circular letter that all areas which were subject to previous court cases should not be arbitrated by any adjudication staff. If they had been previously in dispute in the regular courts of law and were later initiated by adjudication tribunals before coming to me or appeal, then I being the highest adjudicator could have full powers to give the fact. I am not bound by previous court judgments on the dispute”.**

17. The Minister overturned the decision of the court of 1950 and later of 1970 and award portion of the land to Okello from lot 426.

18. S. O. Okello filed this Judicial review claiming the Minister exceeded his powers.

### **III FINDINGS OF THE JUDICIAL REVIEW**

19. The land adjudicator officer would hear later parties in a land adjudication matters under Section 26. These are objections that may be raised if one is affected by the decision of the adjudication register.

20. The exparte applicant S. O. Odede stated that the matters adjudicated on appeal did not fall under Section 26. He wanted the determination of the 100 yards strip to go to him. Instead the Minister gave him portion of land to Okello the interested party.

21. The state counsel argued that the Minister's orders should stand. The advocate for S. O. Odede said the land should reveal to where it had been before the decision.

22. I have before me a map clearly showing that S. O. Odede occupies plot number 426. Okello occupies 5.64. The land under dispute 100 yard strip is with plot 426.

23 From the foregoing I would agree that the Minister exceeded his powers under Section 29 of the land adjudication act. He opened up proceedings that had already been determined by a court of law. This action by the Minister was res judicator and most certainly exceeded his powers.

24. I hereby hold that orders of certiorari prohibition do issue against the Ministers orders. That the said

Minister orders be and is hereby brought to this court and accordingly quash.

25. I hold that S. O. Okello is to retain his whole portion of plot 426 including the 100 yards strip that was being disputed.

26. That this be registered accordingly by the land adjudication officers and title deed be issued.

27. Okello the instituted party has no claim on the suit land that should be given to him. He is not entitled to any portion of holding Plot 426 nor the 100 yards strip.

28. I accordingly allow this judicial review with costs to the exparte appellant.

Dated this 12<sup>th</sup> day of July 2007 at Nairobi

**M. A. ANG'AWA**

**J U D G E**

**12.07.07**