REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Misc Civ Appeal 183 of 2004

REPUBLIC ..... APPLICANT

AND

THE MINISTER FOR LANDS AND SETTLEMENT ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

MALULI MWENZWA ..... INTERESTED PARTY

AND

ROBERT MUSILI MWENZWA ..... EX PARTE APPLICANT

R U L I N G

This application is dated 29.11.2004 but was filed either on 1.12.2004 or 15.6.2005. It carries both dates. It seeks an order of Certiorari to recall the decision of the Minister of Lands and Settlement made on behalf of the latter by the District Commissioner of Mwingi on 14.7.2004, to this court for a review and for quashing upon grounds to be examined here below, shortly. The application was apparently properly served upon the Attorney-General for himself and the Ministry of Lands and Settlement but the latter two failed to turn up in this court. The Interested Party however appeared unrepresented. The Ex Parte Applicant under these circumstances sought and obtained leave to proceed ex parte.

The background shows that the Ex Parte Applicant and the Interested Party have been fighting over a piece of land known as Parcel No. 2190 of Kanzanzu Adjudication Section in Mwingi District. The piece of land was subdivided from a larger piece known as parcel No. 1785 which was retained in the ownership of the Ex Parte applicant, who claimed that he had originally bought it from Muthengi Mbithe and Muthuvi Mwathengi in 1979. In 1990 during demarcation process the relevant piece of land, i.e. Parcel No. 2190, was demarcated in the Ex Parte applicant's name. The Interested party then filed a dispute with the Adjudication Committee which then awarded the piece of land to the Interested Party. This led the Ex Parte applicant to file an appeal to the Arbitration Board. The Arbitration Board in return re-awarded the piece of land to the Ex parte applicant once more. The Interested Party filed an objection to the Land Adjudication Officer who in return, re-awarded the land to the Interested Party. The only

appeal process available thereafter was to the Minister of Lands and Settlement and indeed the Ex parte applicant appealed to the Minister. Such appeals are under the Land Adjudication Act Cap 284 of the Laws of Kenya, conducted by the District Commissioner in whose District the piece of land is situated. That is how the appeal found its way to the District Commissioner of Mwingi District.

The District Commissioner appears to have sat to hear the appeal on 1.7.2004. Both parties were present and gave evidence each. They called no witnesses. There is no indication whether either party wished to call a witness or not as there is no record about it. Each party was properly cross-examined by the other and by the District Commissioner in detail. The record of proceedings does not indicate that any other action was taken either by the parties or by the District Commissioner's Court. Perusal of the judgement written by the District Commissioner however, reveals that the court later moved to the piece of land No. 2190 aforesaid and toured it in relation to the evidence that had been given by the parties in court. Unfortunately, the visit took place in the absence of the Ex Parte applicant. There is no record showing that he had been summoned or notified to be present on the land that day so that his absence on the material day which appears to have been 7.7.2004, would be taken as deliberate.

The record of the District Commissioner 's judgement also confirms that in his appeal to the Minister, the Ex Parte applicant had recorded specific grounds of appeal which included –

(a) That the Objection Court was heavily corrupted by the Respondent

(b) That there was long deliberate delay in visiting the disputed land after the court fixed and failed to visit it seven times, with a view to deny the appellant justice.

(c) That the Objection Court failed to consider the long period the appellant had used the land and the development he had made on it.

There is no indication on the record of evidence and judgement that the District Commissioner's Court as the Minister's Court, considered the above grounds of appeal which were clearly weighty grounds except the last ground above, which it considered despite the fact that the court visited the piece of land in absence of the appellant.

I am conscious of the fact that such a tribunal has no procedural method set down for it to follow like ordinary courts have. The court however in my view is a quasi – judicial tribunal which cannot ignore the basic principles of our justice system in determining the appeal and in making such orders thereon as it thought just, as provided under section 29(1) of the Land Adjudication Act aforementioned. Such a court is therefore bound to observe the basic principles of natural justice. It must make sure that all the parties for example are given adequate or reasonable time to put up their cases including calling the witnesses they wish to call. The parties should also be given opportunity to cross-examine the other side and its witnesses. They must as well be given adequate notice of the venue and time of the court proceedings.

In this case the court visited the disputed land on 7.7.2004 in the absence of the appellant/Ex Parte applicant. No explanation is given for his absence. The court examined the land and relied on the evidence it picked on the land as to who was occupying the land and whether the land had been developed as claimed by the Ex Parte applicant or not. It cannot be easily argued that this did not prejudice exparte applicant's case, especially where the judgement appears to have not considered other grounds of appeal before it. It is my view and finding that the Ex Parte applicant's basic rights were violated and the situation cries for help and rectification.

Section 29 (1) of the Land Adjudication Act, Cap 284, last part firmly, provides

*"……. **and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."***

The final part would suggest that the Minister's order shall be final. That would suggest that it cannot be re-examined or reviewed. How then can this court be asked to apply the order of Certiorari to a

Minister's final order? This issue arose in the case of **Mahaja vs. Khutwalo (1983) KLR, 553**. Hancox, J.A. stated at page 565 (para 35) in reference to the District Commissioner sitting as Minister's appeal tribunal –

"Even if he was not a court (as he expressed himself to be), he was still amenable to an order of Certiorari in his appellate capacity, as he was obliged to reach a decision after considering the grounds of appeal and the proceedings before the adjudication officer."

This above court of appeal confirmed that the District Commissioner, sitting as the Minister's appeal tribunal from the Land Adjudication Officer's Objection tribunal, needed to consider all the grounds of appeal filed by the appealing party in reaching his decision. That would mean, as I understand it, that this court will interfere with a finding of the District Commissioner who failed to consider such grounds of appeal by way of the order of Certiorari, despite the fact that such a finding is said to be final. Indeed In **Re Marles Application (1958) E.A. 153**, it was held that the fact that a decision is stated to be final does not preclude this court the issuing of Certiorari, for alleged excess or want of jurisdiction.

In this case before me, the District Commissioner of Mwingi, sitting as the Minister's Land Tribunal, not only failed to consider several grounds of appeal filed by the appellant (Ex Parte applicant), but also failed to give the said applicant a right to be heard when the tribunal visited the piece of land in dispute in his absence. The said appellant/Ex Parte applicant has approached this court seeking a remedy by asking this court to issue an order of Certiorari to rectify the situation. There is no doubt that the ex parte applicant has no other recourse as the decision of the Minister through the District Commissioner is said to be final. In my understanding, this court is the custodian of the rights of those under its jurisdiction. The court must therefore, in my view, ensure that justice is done to those who come before it regardless of whether or not that interferes with the management of the executive arm of the government. That would be the only remedy open to the applicant herein and others like him, especially on the face of a provision of law that express finality such as section 29(1) of the Land Adjudication Act and other similar provisions. That is the only way left by such a provision for justice to be done and be seen to be done.

For the above reasons this court is persuaded to allow this application. The decision of the Minister made by the District Commissioner Mwingi in Ministers Land Appeal No. 173 of 2001 between Robert Musili Mwenzwa and Maluli Mwenzwa, made and dated 14.7.2004, is hereby recalled to this court and is hereby quashed. Further orders are that the said Minister's Appeal shall be heard afresh by Mwingi District Commissioner, who nevertheless shall not be the same person who heard the appeal on 14.7.2004. The costs of this application shall go to the Ex parte applicant.

Dated and delivered at Machakos this 17th day of February 2006.

D. A. ONYANCHA

JUDGE