REPUBLIC OF KENYA

IN THE HIGH COURT MACHAKOS

CIVIL MISCELLANEOUS 124 OF 2004

REPUBLIC .....APPLICANT

VERSUS

SPECIAL DISTRICT COMMISSIONER - KITUI .....RESPONDENT

AND

SOO MWATHI .....INTERESTED PARTY

R U L I N G

The application before the court is dated 7/10/2004. It is by a Notice of Motion and seeks for an order of certiorari to remove to this court, the undated judgment of the Special District Commissioner, Kitui in the Appeals to the Minister No. 61 of 1988 and No. 185 of 1987, for quashing. The ex parte applicant had also sought the Order of Mandamus but he abandoned this prayer when he started to prosecute this application.

The facts placed before the court by the ex parte applicant are as follows:-

That in Land adjudication Committee case No. 108 of 1977, the committee awarded parcel No. Nzalai/Mtonguni/49 to the Respondent. Ex parte applicant appealed to the Arbitration Board in Arbitration Board Case No. 83 of 1979 over parcel No. Nzalai/Mtonguni/792 which had resulted from a subdivision of parcel No. 49 above mentioned. He did not attend the Board as he was in jail and the piece of land was awarded to the Interested Party. When he later came back home, he filed another appeal, in form of Objection, to the District Land Adjudication Officer, Kitui, being Case No. 298 of 1984. The Land Adjudication Officer in his judgment, split the parcel No. 792 aforementioned into two, giving the newly split portion No. 923, to the applicant and the remaining part, which retained its original No. 792, to the Interested Party, Soo Mwathi. This result displeased both parties who each appealed to the Minister, each one seeking the part he lost.

The applicant's appeal was No. 185 of 1987 while the Interested Party's was No. 61 of 1988. The Memorandum of Appeal by each was not given prominence by the counsel who argued the appeal for either party. The District Commissioner, however, appears to have consolidated the two appeals for a hearing. The District Commissioner in his ruling, dismissed the Ex parte applicant's appeal, thus awarding parcel No. 923 to the Interested Party. He, on the other hand, allowed the Interested Party's appeal, thus confirming the Adjudication Officer's award over plot No. 792, by giving it to the Interested Party. The effect of this was that the ex parte applicant lost both parcels No. 792 and 923 to the Interested Party, Soo Mwathi. It is for that reason that the ex parte applicant filed this Judicial Review application.

The ex parte applicant attacked the District Commissioner's judgment on the following grounds:

1. That the District Commissioner's ruling or judgment failed to show the reasons for reaching the conclusions he reached.

2. That the District Commissioner erred in law in failing to examine and consciously consider the grounds of appeal filed by the Ex parte applicant against the findings of the Land Adjudication Officer.

3. That the District Commissioner, had no legal jurisdiction to join or replace the appellant in Minister's Appeal No. 61 of 1988 or respondent in Minister's Appeal No. 61 of 1988.

4. That the District Commissioner erred on the face of the record in failing to make a full record of his visit to the disputed piece of land.

5. That the District Commissioner erred in arriving at a decision without showing the reasons for doing so.

6. That the District Commissioner erred in showing open bias against the ex parte applicant.

Replying to the above issues, the Interested Party represented by Mr Muinde, stated that he entirely accepted the historical narration of facts as recorded by Mr Makau who argued the ex parte applicant's case. Mr Muinde argued that the District Commissioner considered all the evidence on the record inclusive of the decisions of tribunals below and came to the right judgment. He answered further that the District Commissioner's decision, being the Minister's decision in law, was properly arrived at and cannot be questioned as it is final under Section 29 (1) of the Land Adjudication Act, Cap 284. That the District Commissioner heard the parties and their witnesses, gave them a chance to be cross-examined, visited the land and, noted that the Interested Party had settled and had buildings on the land. His decision, argued Mr Muinde, flowed from matters of evidence and it should rest there. That proceedings in such special tribunals should not be expected to be similar to those in ordinary courts of law who adhere to civil procedure.

Touching on the issue of the grounds of appeal, Mr Muinde said that the District Commissioner, must have considered those grounds of appeal from the parties, otherwise he could not have arrived at the decision he did.

Touching the allegation that the District Commissioner was biased, Mr Muinde argued that the record demonstrated otherwise since the record shows that either party was treated fairly.

I have carefully considered the arguments advanced by both counsel touching the issues raised in this application. The District Commissioner's record of proceedings, and findings and ruling show that the appellant before him was Soo Mwathi. This indeed is the party who was involved with the claim of the piece of land from the beginning when the dispute was being considered before the Land Adjudication Committee. He remained the party when an appeal went to the Arbitration Board and thereafter to the Adjudication Officer, before the claim went to the Minister, who was represented by the District Commissioner. As the record further shows, Soo Mwathi was the appellant to the Minister in Appeal No. 61 of 1988 beside being the Respondent in Appeal No. 185 of 1987. The District Commissioner was cognizant of these facts for which reason he indeed consolidated the two appeals before embarking to hear them. Having shown at the top of his record that Soo Mwathi is an appellant, in appeal No. 61 of 1988, the District Commissioner should have, in my view, gone ahead to also show that Wambua Mulili was the Appellant in Appeal No. 185 of 1987. This would have later helped the District Commissioner, not only to consider the latter appeal as well, but also to consider it on merit. However, that issue will come up much later in this ruling. The ex parte applicant's complaint presently is that the District Commissioner, without any legal explanation, proceeded to replace Soo Mwathi as the appellant in Appeal No. 61 of 1988 by one Kivungo Soo who was sworn and testified not as a mere witness, but on behalf of Soo Mwathi. The record is silent as to who Kivungo Soo was or why he should act on behalf of Soo Mwathi. If Kivungo Soo was acting for Soo Mwathi with legal authority, such as a power of attorney, the District Commissioner said nothing about it. Had Soo Mwathi died and was now being represented by Kivungo Soo? If so, this should have been recorded and the Grant of Probate made part of

the record of proceedings. As the record stands presently, Kivungo Soo was not asked to record his legal capacity in the record. The District Commissioner, merely joined Kivungo Soo without explaining his legal authority to do so. In joining or replacing Kavungo Soo he exceeded his mandate to merely hear the appeal and determine it under Section 29 (1) of the Act.

The District Commissioner, it is not disputed in this application, sits for and on behalf of the Minister under Section 29 (1) of the Land Adjudication Act, Cap 284 of the Laws of Kenya. Section 29 (1) of the said Act provides:-

"***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 of 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."

The stress put on some parts of quoted section, by underlining them, is mine. In my understanding of this section, the District Commissioner's duty sitting as the Minister, is to determine the dispute in the appeal as between the parties. The said appeal to be determined is constituted in the specified written grounds of appeal delivered by the appellant under Section 29 (1) (a) of the Act. The substantive evidence from which the appellant is likely to raise his grounds of appeal is in the proceeding which will have taken place before the Land Adjudication Officer being in form of an objection under Section 26 of the said Act. A glance at Section 26 will confirm that the objection proceedings and the determination under the Section are conducted out by the District Land Adjudication Officer who also sits as one of appellate tribunals in the adjudication process. From him an aggrieved party appeals to the Minister, by means of written grounds of appeal as provided under Section 29 (1) (a) aforementioned.

I do not wish to speculate as to what would happen if an appeal to the Minister is not in a written form tabulating grounds of appeal. What is clear to me however is that the Act has specified the form and procedure that an aggrieved party must follow in filing his appeal from the Land Adjudication Officer to the Minister. At the appropriate time the Minister must forward the Adjudication Officer's records with the written grounds of appeal to the appointed District Commissioner, to conduct the appeal. It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower court record that will assist him to,

> "*….determine the appeal and make such order thereon as he thinks just …."*

It is fashionable in this kind of applications, for Interested Parties to argue that the District Commissioner has a free hand to conduct the appeal in any manner he wishes. That the Act has not specified a procedure for him to follow in determining the appeal so long as he finally makes such orders thereon as he thinks just. That might be so but only to a point, in my view. With great respect, it might be time to reexamine Section 29 (1) aforesaid more closely.

If the provision requires that the aggrieved party who wishes to appeal to the minister, will file a statement of written grounds of appeal, then the method of appeal is in that way, defined. It is also provided that the Minister shall determine the appeal and make such order on the appeal as he thinks just. My understanding of the method of determining the appeal then, is receiving the written grounds of appeal and perusing them before determining it by making such an order on it as he thinks just. This means to me that the District Commissioner (Minister) has to examine the written grounds of appeal along with the Land Adjudication Officer's proceedings, judgment, ruling or award, and from it, he will,

make a just order or judgment. Can the District Commissioner refuse to read the substance of the evidence and the decision of the Land Adjudication Officer from whom the appeal came? Should he on the other hand have totally disregarded the grounds of appeal of the aggrieved party?

In my view, he should not have ignored the Land Adjudication Officer's lower tribunal's record of evidence and decision. He could however have considered the Land Adjudication Officer's decision and have accepted it or rejected it. But it was improper to have ignored the written grounds of appeal since without them there was seriously no appeal before him as envisaged by Section 29 (1) (a) of the Land Adjudication Act. Nor can it be seriously argued that the appellant's appeal was effectively put before that tribunal or argued before it, contrary to the cardinal rule of fairness that an appellant like any party before the court, has a right to put his case before the court, squarely. In conclusion on this issue, this court sees a clear procedure laid down by Section 29 (1) aforesaid to be followed when a District Commissioner is conducting and determining an appeal under the Section. That is to say, that the District Commissioner will receive a written appeal containing grounds of appeal together with the Land Adjudication Officer's record and will then determine the appeal upon those grounds of appeal. It would be unreasonable to think that the Legislature intended that the aggrieved party would file the grounds of appeal to the Minister without those grounds being intended to serve any purpose in helping the District Commissioner arrive at a fair and just decision. In that regard I am aware of the prevailing popular procedure under which the District Commissioner, before he makes his decision, records fresh evidence from the parties and their witnesses. Such procedure has all along been tolerated on the basis that Section 29 (1) aforementioned gives the District Commissioner freedom to use any lawful method to arrive at his decision. While I am not presently prepared to state that the recording of fresh evidence is not authorized by the Act, I am on the other hand clear in my mind that the District Commissioner will not choose to rely on such freshly recorded evidence alone without regard to the grounds of appeal filed by the appellant. That is to say, that the evidence he records should be considered along with the evidence in the District Land Adjudication Officer's records of proceedings and ruling that is appealed from, and on which the grounds of appeal arise. On the other hand, my understanding of Section 29 (1) aforesaid, is that there is no part of that section that authorizes the taking of fresh evidence by the District Commissioner before he arrives at the decision. This means that he has open room to do so and is in fact expected to rely on those records to come to his decision except where he needs particular additional evidence for clarification. I am not for a moment suggesting that the District Commissioner, deciding an appeal under Section 29 of the Land adjudication Act, is bound to follow Civil Procedure Rules or strict rules of evidence as found in ordinary courts of law. Indeed such was clearly ruled out in the case of Makenge versus Ngochi (Civil Appeal No. 25 of 1978, unreported) where Law, J.A stated thus:

"***But no such duty (as under Section 12 of the Act) to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, by Section 29 of the Act, is to 'determine the appeal and make such order thereon as he thinks just"***

In this case before me, the District Commissioner sat to hear an appeal from the District Land Adjudication Officer's Objection proceedings and ruling or judgment, which appeal was in form of a written document containing grounds of appeal. His record shows that he recorded fresh evidence from the parties and their witnesses. The record fails to show that he visited the land in dispute or when he did so except for his terse mention in his finding. The record further is silent as whether both parties were present at the land visited or not. Although the District Commissioner claims that he had found that the Interested Party had built houses on the land, the record is silent as to the date of visit and his findings. Since he had recorded the evidence of both parties in detail, there was no good reason for him not to record the details of the visit to the land as well. As stated by Hancox J.A. in the case of Mahaja versus Khutwalo, (1983) KLR 553, at 566:-

"……***the District Commissioner did in fact proceed to hear evidence and he recorded that all three parties were present. If he began to hear evidence in pursuance of the procedure whether prescribed or not, then he must surely finish the case in the same manner….."***

That court then, proceeded to conclude that there was an error on the face of the District Commissioner's

record. The error in my understanding is failure to record evidence as systematically and exhaustively as the District Commissioner had started recording it. Similarly in this case before me, the District Commissioner erred in failing to show on the record that he had visited the land and to show exactly what he found there which was later to influence him in his determination of the appeal. In failing to include such a record, the District Commissioner created by omission, an error on the face of his record requiring correction by certiorari. This court is not oblivious of the fact that the District Commissioner is an administrative non-judicial officer, who in addition, is not trained in this judicial function in which he is involved. But that should not detract from the fact that he is nevertheless in this exercise, discharging quasi-judicial functions. Principles of justice require that he must not only discharge those functions fairly and justly but must appear to do so. It is the function of this court to ensure that that is done, as stated by Cheson J, as he then was, in the case of Republic versus Director General of East African Railways Corporation, ex parte Kaggwa, (1977) KLR p. 194:-

"It must be remembered that the court as a custodian of the rights of those under its jurisdiction must 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 is why there is no other remedy open to the applicant, the court has no choice but to grant the order of mandamus (fiat justitia) so that justice can be done and be seen to be done (see Republic versus Bishop of Sarum (1916) I.K.B.466."

In addition, and in the same trend of thinking, the written grounds of appeal formed an integral part of this appeal process. They could not be wished away by the District Commissioner who was hearing the appeal. He, in my view had to examine the grounds and either accept them partly or wholly or reject them. And in my further view the record should show that he consciously examined those grounds of appeal whether jointly or severally before he accepted or rejected them. Otherwise, as earlier posited, there would have been no purpose by the Legislature to specify that an appeal to the Minister must be a written appeal giving grounds of appeal if such appeal would attract not even a glance from the official hearing the appeal. While the District Commissioner may not be a court in the ordinary sense, he was nevertheless sitting to discharge judicial functions. As stated by Hancox, J.A. in the case of Mahaja versus Khutwalo at page 565, (supra):-

"Even if he is was not a court (as 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."

In this case before me, the record before the District Commissioner does not as much mention the grounds of appeal which were filed in the two consolidated appeals. There is therefore nothing to show that he considered the grounds of appeal in the two appeals before he made his decision. This alone also makes his proceedings and findings or ruling amenable to the order of certiorari.

The ex parte applicant argued as well that the District Commissioner arrived at a finding or ruling or judgment without showing the reasons for doing so. Careful perusal of the findings however, show that the District Commissioner gave some reason for his ruling. He at least said in his findings, that the Interested Party entered the land first and used it for grazing. He also said that the Interested Party had constructed permanent building on the land. These at least backed the District Commissioner's judgment.

The ex parte applicant further alleged bias on the part of the District Commissioner. In my view, no evidence to support this ground was advanced and the same indeed, has no merit.

A separate ground argued by the Interested Party /Applicant is that the Minister's decision was as provided under Section 29 (1), final. However, as stated earlier, and in particular in the case of Re Marles' Application, (1958) 153 at 155 –

"It is well settled law that the jurisdiction of this court to exercise its power of supervision over inferior courts and tribunals will not be taken away unless there are express words clearly defining the intention of the legislature to do so. The expressions that decisions of

tribunals shall be final and without appeal or final and conclusive, have effect …..only so far as an appeal on the facts are concerned, but do not preclude the issue of certiorari for excess of jurisdiction or for error of law (ReGilmore'a Application (1) (1957) All E.R, 796).

I adopt the above statement and rule that this court's jurisdiction in the exercise of its power of supervision over inferior courts and tribunals cannot and was not taken away by the words used in Section 29 of the Land Adjudication Act, Cap 284 of the Laws of Kenya. This court will therefore where necessary, issue the orders of certiorari.

The relevant order in this suit will be as follows:-

ORDERS:

(a) An order of certiorari to remove into this court for the purpose of being quashed, a Judgement or Ruling undated but delivered on 24th May, 2004 by the Special District Commissioner in the Appeal to the Minister in Land Appeal No. 61 of 1988 and Appeal No. 185 of 1987 between Wambua Mulili and Soo Mwathi, is hereby to be issued forthwith.

(b) The said appeals be placed before the current Kitui District Commissioner for fresh hearing as soon as possible.

(c) Costs of this application be met by the Interested Party, to be agreed upon or be taxed.

Dated and delivered at Machakos this 24th day of March, 2006.

D.A. ONYANCHA

JUDGE