REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

MISCELLANEOUS APPLICATION 114 OF 1986

STEPHEN MUTISYA TITI …….....……1ST PLAINTIFF

PATRICK M.TITI…….....…….2ND PLAINTIFF

V E R S U S

THE MINISTER FOR LANDS& SETTLEMENT through

D.C. MACHAKOS….....…DEFENDANTS

J U D G M E N T

This Judgment concerns an application dated 6th March, 1987 brought by the Applicants against the Respondents for the following orders-

(1) that an Order of Certiorari do issue against the Minister for Lands and Settlement to remove into this court and quash his decision through the District Commissioner, Machakos dated 17-06-1986 on the grounds that-

(a) there is an error of law apparent on the record;

(b) the decision is against the rules of natural justice;

(c) that the decision did not follow Kamba Customary Law of inheritance;

(d) that the decision was based on evidence which was not proved in accordance with the rules of evidence and natural justice, and other grounds contained in the statement of facts verified by an Affidavit attached to the Application,

(2) that an Order of Mandamus directing the Minister through the District Commissioner Machakos to whom the Minister had delegated his powers to hear and determine the appeal and receive in evidence all the documents, particularly sale agreements of the disputed piece of land and allow applicants opportunity to present their case as required by law;

(3) that an order of prohibition prohibiting the Minister from executing his said decision until this case is heard and determined;

(4) that costs of this application be provided for.

The application was expressed to be based upon the statement of facts verified by the Affidavit of Stephen Mutisya Titi, and other grounds as may be adduced at the hearing.

At the hearing of this application before the late Justice Amin, and retired Justice of Appeal Effie Owuor (before her elevation to the Court of Appeal), the parties Counsel filed written submissions. The written submissions of the Applicant's Counsel Ndolo & Co. Advocates are dated 7-11-1996, and were served upon Mulwa & Mulwa Advocates on 8-11-1996. The submissions of the Respondent's Counsel, Mulwa & Mulwa & Co. Advocates are dated 19-11-1996 and were served on the Attorney-General, the 2nd Respondent on 16-12-1996. The second Respondent's submissions are dated 3-03-1997, and were probably filed at about the same time, as there is no indication as to when they were filed.

This matter was heard before me pursuant to the direction of the Hon. Chief Justice, that the case proceed pursuant to the provisions of Order XVII Rule 10 of the Civil Procedure Rules which says-

> "**10 (1) Where a judge is prevented by health, transfer or other cause from conducting a trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules and may proceed with the suit or application from the stage at which his predecessor left it.**
>
> **(2) The provisions of Sub-rule (1) shall, so far as they are applicable, be allowed to apply to evidence taken in a suit transferred under Section 18 of the Act;**

When counsel appeared before me, they expressed the wish, which I granted, that they be allowed to highlight verbally their respective submissions. Perhaps before indulging into the respective Counsel's position, it is necessary to lay down the origin of the challenge in this application.

The Land Adjudication Act **(Chapter 284)** Laws of Kenya), by Section 29 (1) thereof empowers any person aggrieved by a decision of an Adjudication Arbitration Officer under Section 26 of the Land Adjudication Act to appeal to the Minister for Lands and Settlement against any such decision. The Minister may either hear and determine the application himself, or he may delegate that function under the provisions of Section 29 (4) of the Land Adjudication Act and of Regulation 1of the Land Adjudication Rules 1985 (LN. No. 191 of 1985). In the matter at hand, the hearing of the appeal was delegated to one Mr. C.N. Chomba described in the proceedings as a Special District Commissioner who heard the appeal on 17-06-1986. The Special District Commissioner C.N. Chomba also rendered his decision on the same day 17-06-1986, and found that there was no merit in the appeal and that the appeal must therefore fail.

To recapitulate the facts, the Applicant and the Respondent originally bought a piece of land together with the intention of being shared equally. Upon adjudication, the parcel of land was divided and granted Nos. 237 and 238 respectively, but the parties later disagreed over the boundary of their respective portions. The dispute first went to the District Magistrates Court, in Machakos District Magistrate's Court Civil Case No. 33 of 1978. That Court referred the matter for adjudication of boundary to the Land Adjudication Officer.

The Land Adjudication Officer heard the evidence of the respective parties and ordered for the fixation of a boundary which would result in the equitable sharing of the land previously bought jointly by both parties. The Minister or Special District Commissioner acting in place of the Minister found the decision of the Land Adjudication Officer to be sound and did not result in the Applicant (or the Applicant then), getting less land than he was rightfully entitled to in terms of definite measurement, (hectares), or, alternatively, that the fixation of the boundary so ordered, unfairly or unreasonably disregarded the development the applicant had carried out on the land. The Minister, or the District Commissioner, as stated above, found no merit in the appeal, and dismissed it with costs. The Minister made the following Order.

> "**1. Parcel No. Kiandani/238 to remain the property of DOMINIC MAITHI as represented**

by the Respondent.

(2) The Appellant to pay the Respondent the costs of the Appeal"

It is this decision which the Applicant seeks to review on the grounds already stated above.

In opposition to the application, the 2nd Respondent filed grounds of apposition, that the application (***Notice of motion dated 6-03-1987***) is misconceived and does not lie because, it offends the mandatory provisions of Order LIII of the Civil Procedure Rules and is therefore incurably defective, and that the Chamber Summons application dated 13-08-2004 does not lie, and for those reasons, the same ought to be dismissed with costs.

The Chamber Summons dated 13-08-2003, and filed on 11-01-2005 was dismissed by me in a Ruling delivered on 6-06-2005, and no more need be said about it.

Reverting therefore to the substantive application herein, Mr. Masila, learned Counsel for the Applicant relied upon the written submissions dated and filed on 7-11-1996. Counsel submitted that the decision of the Minister ***(or the Special District Commissioner***) was void, not because he either had no power to hear and determined the appeal, or that he exceeded his powers under the enabling provisions, but because "***he did not relate to early decisions in respect of Kiandani Arbitration Board Case No. 63 of 1976, dated 10-08-1976, and further objection No. 70 of 1979 before the Land Adjudication Officer dated 3-04-1979 which prompted the appeal, and the decision of the Minister made on 17-06-1986"*** that is the subject of the proceedings and this judgment.

Counsel submitted that the decision of the Special District Commissioner in exercise of the powers delegated to him under the Land Adjudication Rule 1987 (L.N. 212 of 20-09-1987, was a nullity because the Minister had no power to nullify title and in any case the findings were made without regard to the rules of evidence. Counsel submitted that the application was essentially against the 2nd Respondent, and it was immaterial that the 1st Respondent was deceased, and orders could still be maintained against the 2nd Respondent that is to say, the Minister. As Counsel for the 1st Respondent's estate was more to the points in issue, I shall consider his submissions in my consideration of the rival arguments.

The Applicant's first contention is that the Minister's decision should be quashed because there is an error of law on the face of the record. Having examined the submission of counsel for the applicant and indeed the application itself, I could find no error of law on the face of the record. The nearest such allegation was at Page 2 of the written submissions (dated 7-11-1996) which says …….***even though the case was heard in 1976 or thereabouts the judgment is dated 26/1/79 a clear error apparent on the record***." This submission however, has absolutely no relationship with the application herein which concerns the decision of the Minister through the Special District Commissioner made on 19-06-1987 and submission does not therefore lie.

The other submission that the Minister failed to take into account Kamba Customary Law, is equally misplaced. It may have been a useful submission on merits, in an appeal, but the application herein is not an appeal. It is an application to the Court invoking its supervisory jurisdiction. There is no confusion in the Minister's Order, only Plot No. 238 is affected, not the other Plot, No. 237. There is equally no merit on this ground as well.

I will consider grounds Nos 2 and 4 together, namely, that the decision of the Minister was against the rules of natural justice and that the decision was based on evidence which was not proved in accordance with the rules of evidence and natural justice.

The rules of natural justice demand, firstly that no man or woman shall be condemned unheard, or secondly, or more positively that hear the other party or as the Latins were won't to say, ***audi alteram partem*****.**

The concept of natural justice is comprised in the rules and procedure to be followed by tribunals or persons charged with quasi-judicial responsibilities of adjudicating upon disputes between, or the rights of others. These rules require that persons or tribunals act fairly, in good faith, without bias, and in a judicial temper to give each party an opportunity of adequately stating his/her case, and correcting or contradicting any relevant statement prejudicial to his/her case and not to hear one side at the back of the other. A man/woman must not be a judge in his own cause, say for instance a judicial officer such as a judge or magistrate must declare any interest he has in the subject matter of the dispute before him/her. A person must have notice of what he is accused of. Relevant documents which are looked at by the tribunal should be disclosed to the parties interested. In short, not only should justice be done, but should be seen to be done.

Looking at the record of proceedings before the Special District Commissioner, it is clear that he gave a hearing firstly to the Applicant and secondly to the Respondent, who cross-examined the Applicant, but did not himself adduce any evidence, the Special District Commissioner raised questions in clarification of the Applicant's evidence, and thereafter summed up the evidence before him, made his findings and final orders. I am unable, and indeed cannot discern anything from that record which is either against the rules of natural justice, or that the decision of the Minister through the Special District Commissioner) was procured through fraud, collusion or perjury. I can find no merit in this ground as well.

The final word concerns the nature of judicial review and the rules applicable thereto. It has been said that judicial review is a special jurisdiction. It is neither civil nor criminal in nature. It is entirely based upon two sections (8 & 9) of the Law Reform Act ***(Cap 26 Laws of Kenya),*** and the rules made thereunder and contained in order LIII of the Civil Procedure Rules. This is a misnomer that those rules are contained in the Civil Procedure Rules as indeed other rules of civil procedure do not apply to judicial review proceedings.

In exercising its judicial review function, the Court's jurisdiction in applications for orders of Certiorari, mandamus or prohibition, are supervisory in respect of orders or decisions made by courts or other quasi-judicial tribunals or authorities subordinate to it. The court does not sit as an appellate court. To succeed in an application for such orders the applicant, must demonstrate that the inferior tribunal or the Minister ***(in this case***) had no legal authority to take the decision it made, **or** that it exceeded such authority and therefore the orders be nullified or quashed, by an order of ***Certiorari*** or that it failed to take a decision which it was bound to take and that it ought to be ordered to take such a decision according to law, then an order of mandamus would issue, or that the action it is contemplating to take is illegal and an order of prohibition would therefore issue, or that the inferior tribunal declined to serve notice of a hearing to the other party or arbitrarily and capriciously refused to hear the other party and in which event it would be guilty of breach of the rules of natural justice by condemning the other party unheard. There is no suggestion of procuring the Minister's or the Special District Commissioner's decision by fraud, collusion or perjury.

In the instant case, the applicable law is the Land Adjudication Act (***Cap 284) Laws of Kenya***). The applicable Section 29 (4) which provides-

29 (4) Notwithstanding the provisions of section 38 (2) of the Interpretation and General Provisions Act or of any other written law, the minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination order and acts of any public officer shall be deemed for all purposes to be that of the Minister."

By Legal Notice Number 191 of 30th August, 1985, the Minister in exercise of the powers conferred by the said Section 29 (4) delegated his powers to hear appeals and his duties and functions under Section 29 of the Act to one of the public officers named in the first column of the schedule in respect of the Districts specified in the second column of that schedule and the District Commissioner of that particular District, and the District Commissioner in respect of the Districts which are not specified in the Schedule.

This long-winded notice in short, delegated the Minister's powers to hear appeals, and the Minister's

duties and functions under Section 29 of the Act to public officers who happened to be District Commissioners of the respective Districts where appeals from Land Adjudication Officers were made. The public officer concerned who was also the District Commissioner of the District within which the appeal arose was one Charles Ngoroi Chomba, who was to hear appeals from decisions of the Land Adjudication Officers in respect of Machakos, Kitui and Embu Districts.

The Minister's power to hear appeals under the Act and his duties and functions under Section 29 of the Act was to make such orders on appeal as he thinks fit and that his order would be final, and the Minister was to cause copies of the order to be sent to the Director of Land Adjudication and the Chief Land Registrar.

There was no allegation that the District commissioner breached any of the said provisions. As stated earlier the District Commissioner's order was brief and concise, and was made after considering the evidence of the appellant which showed the dispute to be about the boundary between plots Nos. 237 and 238, and found that the Land Arbitration Officer had properly determined and made an order for the fixation of a boundary which would result in the equitable sharing of the land previously bought jointly by both parties. The District Commissioner therefore found that the decision made by the Land Arbitration Officer was not only quite proper and just but that the appellant had failed to establish in the appeal that he had as a result of the Land Adjudication's Officer's determination failed to get more land than he was rightfully entitled to, or that the boundary had been fixed arbitrarily by the ``Land Adjudication Officer who had with the parties, visited the disputed land.

These are however issues of merit, as I have already dealt adequately on the orders sought, and even on these issues if the Applicant had appealed, and not sought judicial review orders, I am doubtful that the result would have been different.

For all the above reasons, I find the applicant's application dated 6th March, 1987 without merit, and the same is hereby dismissed. In view of the antecedents to this application, and the sole issue here being whether the applicant was entitled to judicial review orders which I found he is not entitled to, and also taking into account, the length of time this matter has taken to be determined, I order that each party shall bear its own costs.

Dated and delivered at Nairobi this 7th day of March, 2006.

ANYARA EMUKULE

JUDGE.