



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

**Misc Appli 48 of 2005**

**IN THE MATTER OF: AN APPLICATION BY MAITHYA MUWIWA  
AND MALOMBE MUWIWA FOR JUDICIAL  
REVIEW IN THE NATURE OF  
CERTIORARI AND MANDAMUS  
AND**

**IN THE MATTER OF: AN APPEAL TO THE MINISTER KAUWI  
ADJUDICATION SECTION APPEAL  
CASE NO. 217 OF 1987 LAND PARCEL  
KNOWN AS MUTONGUNI/KAUWI 2150**

**BETWEEN**

**REPUBLIC.....  
.....APPLICANT**

**VERSUS**

**ATTORNEY-GENERAL.....  
.....1<sup>ST</sup> RESPONDENT**

**DISTRICT COMMISSIONER KITUI DISTRICT.  
.....2<sup>ND</sup> RESPONDENT**

**THE PERMANENT SECRETARY MINISTRY OF LANDS AND  
HOUSING.....3<sup>RD</sup> RESPONDENT**

**AND**

**KITHUVA KILIKU & BROTHERS.....  
...INTERESTED PARTIES**

**EX-PARTE**

**3. MAITHYA MUVIWA**

**4. MALOMBE MUVIWA**

**JUDGMENT**

On 18<sup>th</sup> January, 2005, the applicant was granted leave of the Court to bring an application for Judicial Review seeking orders of certiorari and mandamus to quash the proceedings and record relating to appeal to the Minister, Kauwi. Adjudication Section, Appeal Case No. 217 of 1987 in relation to Land Parcel Mutonguni/Kauwi/2150, Kithuva Kiliku Brothers v. Maithya Muviwa and Malombe Muviwa; and an order of mandamus directed at the 3<sup>rd</sup> Respondent to remove and withdraw the restriction registered on 17<sup>th</sup> November, 1989 as entry No.2 on the suit land. The applicant also asked for costs.

The substantive Notice of Motion was filed on 8<sup>th</sup> February, 2005 and was supported by the statutory statement dated 14<sup>th</sup> January, 2005 and an affidavit verifying the facts relied upon dated 12<sup>th</sup> January, 2005. The grounds relied upon are that the Applicants are the registered proprietors of the land parcel Mutonguni/Kauwi/2150. The appellants in the appeal 217/1987 had filed an objection No.367/1983 which was heard and dismissed on 30<sup>th</sup> December, 1983 and they had a right of appeal of 60 days. The appellants then filed appeal No.217/1987 out of the time allowed and the 2<sup>nd</sup> Respondent did not therefore have the jurisdiction or power to entertain the appeal whose proceedings the applicants now seek to be removed to the High Court to be quashed.

The applicant in the affidavit of Malombe Muviwa added that the appellants had misled the District Commissioner into believing that the suit land was part of family land and that they had not been allocated any land and yet each of them had inherited land. The applicant contends that the suit land was registered in their names after their father died in 1967. A copy of the search annexed to the applicant's affidavit shows the registration to have been on 17<sup>th</sup> November, 1989.

The Respondent opposed the application on one ground, that the proceedings are defective and incompetent in that leave was obtained irregularly by the applicant misleading of the court, because the order of certiorari was sought outside the statutory six (6) months period.

The objection No.367/83 which sought re-demarcation of Kiliku family land was finalized on 30<sup>th</sup> December, 1983. The objectors were given 60 days in which to appeal. The appeal should have been filed about 6<sup>th</sup> March, 1984.

The appeal proceedings do not indicate the date they were filed nor did the District Commissioner Kitui indicate the date he gave his judgment at the end of the proceedings. I do agree with Mr. Cherugony – counsel for Respondent's submission, that the date on the appeal proceedings is a stamp certifying that the proceedings were a true copy. The stamp is from Principal Land Adjudication Officer signed on 21<sup>st</sup> July, 2004 in Nairobi. This is not the date of the ruling.

The proceedings were before the District Commissioner in Kitui not the Adjudication officer in Nairobi. The stamp of 21<sup>st</sup> July, 2004 must have been affixed later in Nairobi at the Adjudication office. The Appeal must have been determined earlier than 21<sup>st</sup> July, 2004.

The application for leave was made on 18<sup>th</sup> January, 2005 about 2 days before six (6) months lapsed, if days are counted from 21<sup>st</sup> July, 2004, the date the applicant alleges the appeal was determined.

However, I believe the decision was made well before 21<sup>st</sup> July, 2004. The proceedings which the applicant placed before the court are incomplete and do not reflect the dates when the appeal was heard and determined.

I will agree with the Respondent that the date of 21<sup>st</sup> July, 2004 is misleading to the court, as this is not the date when the appeal was determined. Order 53 Rule 2 provides that leave for application for an order of Judicial Review has to be made within 6 months. This application is obviously made after six (6) months and is therefore incompetent.

Mr. Ongegu, counsel for the applicant further submitted that in any case, the decision of the District Commissioner was an illegality and the court has the jurisdiction and power to quash it. He relied on the recent case of **R.V. THE JUDICIAL COMMISSION OF INQUIRY IN THE GOLDENBERG AFFAIR & OTHERS HC CMISC. 1279/2004** in which the Constitutional Court held that after they had carefully considered Section 9 of the Law Reform Act and Order 53 rule 2 & 7 which deny the court jurisdiction to grant orders of certiorari outside six (6) months reveals that only formal judgments orders, decrees, convictions or other proceedings of inferior courts or tribunals fall within the 6 months period stipulated under Order 53 Civil Procedure Rules.

The order sought to be quashed is an order of the appeals Tribunal Kitui and falls squarely under the restriction of orders that should be brought for quashing within 6 months. The Constitutional Court was of the view that the limitation under Rule 2 & 7 was limited to the formal orders mentioned therein. This application should have been brought within 6 months. It was not. Since the decision cannot be quashed, an order of mandamus cannot issue. The whole application is therefore incompetent and is hereby struck off with costs to the Respondent.

Dated and delivered at Nairobi this 9<sup>th</sup> day of June, 2006

**R.P.V. WENDOH**

**JUDGE**