REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. JUDICIAL REVIEW NO. 38 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY COUNTY COMMISSIONER,

KITUI WEST.....RESPONDENT

AND

SIMON MUENDO MUSIKA.....INTERESTED PARTY

AND

JUSTUS KAMEYA MWETU.....EX PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 2nd July, 2018, the Ex-parte Applicant has prayed for the following orders:

> ***a. An order of certiorari to remove into the High Court for the purpose of quashing a Judgment/Order made by the Respondent herein wherein it awarded parcel of land no. Nzalae/Mutonguni/793 to the Interested Party's father, the late Stephen Muendo Masika.***
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> ***b. A declaration that the determination of the Respondent herein was and is unfounded and void and of no effect.***

2. The Notice of Motion is supported by the Ex-parte Applicant's Statutory Statement and the Verifying Affidavit. According to the Ex-parte Applicant, he is the son of the late Mwetu Kaithya who is the legal owner of land parcel number Nzalae/Mutonguni/793 measuring approximately 40 acres.

3. The Ex-parte Applicant deponed that his late father and the entire family have been in occupation and utilization of parcel of land known as Nzalae/Mutonguni/793 *(the suit property)* and that he has invested immensely on the land having undertaken permanent developments and that the entire family resides on the land.

4. According to the Ex-Parte Applicant, the survey in respect of the suit property was undertaken in 1976 in favour of his late father; that thereafter, the Interested Party's father, the late Stephen Muendo Masika, started claiming ownership of the land and that in the year 1986, the Land Adjudication Officer visited the land and found that indeed his father was residing on the suit property with his family.

5. The Ex-parte Applicant deponed that the Interested Party's late father lodged Appeal number 250 of 1998 before the Deputy County Commissioner; that since the Interested Party's father and his father had died, they were summoned by the Kitui West Sub-County Deputy County Commissioner to appear for hearing of the Appeal case and that it is the Kitui West Sub-County Commissioner who presided over the Appeal.

6. According to the Applicant, he was not given an opportunity to call witnesses during the hearing of the Appeal; that the answers he gave at the hearing were not recorded; that the Minister only appended his signature to the proceedings but did not conduct the hearing and that the Minister did not visit the suit property before rendering his decision.

7. The Applicant finally deponed that the Respondent did not furnish any reasons for his decision but only stated that the land belonged to the Interested Party; that the Interested party has never resided on the suit property and that the Respondent did not appraise himself with the

applicable Kamba Customary laws.

8. In reply, the Interested Party deponed that the Ex-parte Applicant does not have the *locus standi* because he is purporting to bring this suit on behalf of his late father and yet he does not have the Letters of Administration; that the suit land belongs to his late father, Stephen Muendo and that his late father cultivated tobacco on the suit property for many years.

9. According to the Interested Party, the Application has been made to deny him from enjoying the fruits of his Judgments; that the Appeal was conducted in a fair and competent manner and that no basis has been laid for the grant of the said orders.

10. In the Grounds of Objection, the Attorney General, on behalf of the Respondent, averred that the Applicant participated in the Appeal; that the decision of the Respondent was not *ultra vires* as it did not violate the rules of natural justice and that no objection was raised in the manner the Appeal was conducted.

11. In his submissions, the Ex-parte Applicant's advocate deponed that the Ward Representative who made the finding did not comprehend the decision of the Land Adjudication Officer; that the Land Adjudication Officer visited suit property and that the mere fact that such property remains undeveloped is not the only proof of acquisition of land.

12. Counsel submitted that the allegation that the Interested Party's father dwelt on the land, cultivated tobacco and had a cattle boma defies the findings from the visit that the Land Adjudication Officer made and that the Respondent's findings were not born out of the proceedings or the facts of the case.

13. According to counsel, the proceedings before the Minister were marred with procedural impropriety; that the Respondent failed to act fairly in its non-observance of the rules of natural justice and that it is not clear what questions were asked and if any questions were asked at all.

14. The Applicant's counsel submitted that the proceedings were presided over by the Ward Representative, Kitui West Sub-County, an officer who is neither qualified nor gazetted to hear and determine such disputes and that the Respondent should have ensured that all parties were present during hearing. Counsel relied on numerous authorities which I have considered.

15. On his part, the Interested Party's advocate submitted that the Ex-parte Applicant has not taken out the Letters of Administration for the Estate of the deceased; that the Applicant should have sought for leave to continue with the proceedings on behalf of his late father and that on the same ground, the Interested Party has been wrongly enjoined in these proceedings.

16. Counsel submitted that the impugned decision was rendered by one Patrick Kimolo, the Deputy County Commissioner, Kitui West County and that the Applicant has not provided the name of the alleged Ward Representative who heard the Appeal.

17. It was submitted that the Applicant actively participated in the proceedings before the Deputy County Commissioner; that the Applicant never sought leave to call witnesses to testify and that the rules of natural justice were complied with. Counsel relied on several authorities which I have considered.

18. The Attorney General submitted that the Applicant was present and actively participated in the Appeal; that the Applicant was given an opportunity to cross-examine the Interested Party and that there is no evidence to show that the presiding officer of the Appeal was not the Deputy County Commissioner.

19. The first issue I will deal with is whether the Ex parte Applicant has the *locus standi* to prosecute the current Application. The Applicant has deponed that the proceedings before the Land Adjudication Officer were commenced by his late father who sued the Interested Party's father. The two protagonists died before the Appeal could be heard and determined by the Minister.

20. By the time the Appeal came up for hearing on 7th December, 2017, both the Respondent and the Appellant had died. Both parties were represented by their sons at the hearing, the current Applicant and the Interested Party. The issue of whether the Applicant or the Interested Party had the *locus standi* to continue with the Appeal before the Minister was never raised by any of the parties. That being the case, the issue of whether the two parties had the requisite *locus standi* cannot be raised at this stage.

21. In any case, the Law of Succession Act is not applicable in proceedings under the Land Adjudication Act. In the case of ***Republic vs. Minister for Lands and Settlement Ex-parte Joseph Simon Kituli (2019) eKLR*** this court held as follows:

> *"10. To deal with the issue of the locus standi of parties in proceedings under the Land Adjudication Act, the purpose of the Act has to be contextualized. In the case of* ***Mukungu vs. Mbui Civil Appeal No. 281 of 2000 (2004) 2 KLR 256****, the Court of Appeal held as follows:*
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> > *"The very purpose of subjecting land, hitherto held under customary tenure, to the process of land consolidation under the Land Consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act is ipso facto to change the land tenure system which would have been ascertained and recorded before registration… In this case, the land was ancestral land that devolved from the father… It is a concept of intergenerational equity where the land is held by one generation for the benefit of the succeeding generations."*
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> *11. In the case of Republic vs. District Commissioner Machakos & Another Ex parte Kakui Mutiso (2014) eKLR, Odunga J. held as follows:*

> *"In my view, under the land consolidation and adjudication processes, the issue before the relevant tribunals is the determination of interest in land rather than individual ownership since individual land tenure only comes into being on registration. Therefore, before registration the land in question is either ancestral or falls under any other form of communal ownership i.e. Trust land. In such instances, it is my view that the application of the strict succession legal regime does not apply since in my view the issue of Estate may not be readily applicable to ancestral or communal property as such…"*
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> *12. I am in agreement with the above decision. To the extent that the land under adjudication is communally owned until the rights of individuals have been ascertained, any member of the family or community can commence proceedings before the Land Adjudication Officer or the Minister without obtaining the Letters of Administration. The land in question cannot form part of the Estate of the deceased unless and until the register is complete in an adjudication area.*
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> *13. Consequently, it does not matter that by the time the matter escalated to the Minister on Appeal, the Interested Party's father was dead. The Interested Party did not require the Letters of Administration to pursue the interest in the suit land notwithstanding the fact that it was his father who participated in the initial proceedings."*

22. Neither the Applicant nor the Interested Party required the Letters of Administration to testify in the Appeal before the Minister or to file the current proceedings. This is because disputes under the Land Adjudication Act are concerned with the ascertainment of rights of land which is communally owned, and until such rights have been ascertained, the Law of Succession Act is inapplicable.

23. The Appellant has stated that the Respondent did not give him and his witnesses a fair hearing and that he was not allowed to call witnesses to testify. The proceedings of the Minister shows that the Appellant and the Interested Party were given an opportunity to testify, and cross-examined each other. There is no indication that the Applicant sought for leave to call witness, which leave was denied.

24. Having been given an opportunity to testify in the matter and to cross-examine the Interested Party, the issue of the Respondent having been biased, or having breached the rules of natural justice does not arise.

25. Although the Applicant has argued that the Minister should have visited the site before pronouncing his findings, there is no requirement in the law stipulating that indeed the Minister must visit the *locus quo.* The procedure that must be adopted by the Minister while conducting an Appeal was stated in the case of ***R vs. Special District Commissioner & Another (2006) eKLR*** as follows:

> *"36. The manner in which proceedings should be conducted by the Minister was captured in the case of* ***Republic vs. Special District Commissioner & another [2006] eKLR*** *as follows:*
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> > *"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. <u>He could however have considered the Land Adjudication Officer's decision and have accepted it or rejected it</u>. 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. <u>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</u>." (Emphasis mine)*

38.Indeed, just like what happens in an appellate court, the Minister need not take fresh evidence while dealing with the appeal, although he may do so to seek clarification on certain issues. However, he must consider the grounds of appeal and the evidence that was adduced before the Land Adjudication Officer before making his decision. The said decision must give reasons as to why he agrees or disagrees with the decision of the Land Adjudication Officer."

26. All the Minister is required to do during the hearing of an Appeal is to consider the grounds of Appeal and the proceedings before the Land Adjudication Officer, and then make his findings. Any evidence that the Minister records should be considered alongside the evidence that was tendered before the Land Adjudication Officer. The issue of taking up any fresh evidence as happens all too often is at the discretion of the Minister.

27. The findings of the Minister shows that he considered the decision of the Land Adjudication Officer and the grounds of Appeal. Having done so, he was entitled to arrive at an independent decision on matters of fact and law, which finding, on matters of fact, was final.

28. Although the Applicant deponed that the person who heard the Appeal was not Patrick Kimolo, the Deputy County Commissioner, there is no evidence to that effect that was placed before me. That allegation therefore just remains that, an unproved allegation.

29. Having considered the decision of the Minister, which is accompanied by the handwritten proceedings of the Land Adjudication Officer, it is my finding that the Respondent did not act illegally or unprocedurally.

30. For those reasons, I dismiss the Applicant's Notice of Motion dated 2nd July, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF MARCH, 2021.

O.A. ANGOTE

JUDGE