REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 43 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY COUNTY COMMISSIONER,

KITUI WEST SUB-COUNTY….....RESPONDENT

AND

KILONZI MUKINYA MUVEVI.....1ST INTERESTED PARTY

JAMES NZYIMA NGOLO.....2ND INTERESTED PARTY

AND

JUSTUS MWENDWA LIKU.....EX PARTE APPLICANT

AND

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010 AND THE

LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

JUDGMENT

1. In the Notice of Motion dated 1st October,2019, the Ex parte Applicant has sought for the following orders:

> ***a. That the court be pleased to issue an order of certiorari to remove to this Honourable Court for the purpose of being quashed and quash the decision of the Respondent, the Deputy County Commissioner of Kitui West Sub-County, made in Appeal Case No. 310 of 1988 on 30th April, 2019.***
>
> ***b. That the costs of and incidental to this Application be provided for.***

2. The Application is supported by the Affidavit of the Ex parte Applicant who has deponed that he is the son of Likui Ngolo, who is captured as Malikui Ngolo in the proceedings before the Respondent; that his father died on 4th December, 2005, and that he was appointed as an administrator of his estate together with his mother.

3. The Ex parte Applicant deponed that his late father was involved in the adjudication process in respect of plot number 44 within Nzalae Mutonguni Adjudication Section *(the suit property);* that his late father was first sued by the late Mukinya Muvevi in District Case No.27 and 109/77 and that both cases were dismissed with costs.

4. According to the Ex parte Applicant, the matter further proceeded as Objection No. 95/84 which was also dismissed with costs in a decision that was made by the Land Adjudication Officer on 22.9.1986 and that although the objector was given 60 days to appeal, the appeal was filed in 1988 as Appeal Case No. 310 of 1988.

5. The Ex parte Applicant deponed that as at the time the Respondent heard the Appeal, both the Appellant and Respondent were deceased; that the proceedings show that the 1st Interested Party testified before the Respondent and his evidence was clearly recorded; that he also

testified on behalf of his late father and that he represented his mother and siblings in the proceedings.

6. According to the Ex parte Applicant, the evidence by his uncle, the 2nd Interested Party, claiming that suit property belonged to his *(Ex parte Applicant)* late grandfather was not true; that his late father was buried on the suit land; that his father was allocated plot number 44 by virtue of being in occupation of the land and that they have settled on the suit land to date.

7. The Ex parte Applicant deponed that his grandfather and the 2nd Interested Parties were adults and capable of claiming land parcel number 44 if it in deed belonged to them and that the 2nd Interested Party, his grandfather and his other uncles never participated in the proceedings for ascertaining the ownership of the subject land.

8. The Ex parte Applicant deponed that the Respondent was not vested with legal authority to hear an appeal which had been filed out of time; that the Respondent erred and violated his right to be heard when he failed to record the evidence he adduced before him and that it was not lawful for the Respondent to entertain new matters during the hearing and ordered that the suit land to be recorded in the name of a person who was not a party to the proceedings.

9. According to the Ex parte Applicant, the decision by the Respondent deprives the estate of his late father the suit land which the beneficiaries should benefit from; that the decision by the Respondent delivered on 30th April, 2019 was without authority and that the same ought to be quashed by this Honourable Court.

10. The Interested Parties filed Grounds of Opposition in which they averred that the Application is incompetent, bad in law and improperly before the court; that the Application is premised on a defective Chamber Summons dated 17th September, 2019 and that the Application and the Chamber Summons should be struck out.

11. In his submissions, the Ex parte Applicant's advocate submitted that Section 29(1) of the Land Adjudication Act provides that an appeal to the Minister should be filed within 60 days from the date of determination; that the decision which was Appeal led from was delivered on 22nd September, 1986 and that from the decision, it is clear that the Appeal before the Minister was filed in 1988 which was outside the 60 days allowed for Appeal. Therefore, it was submitted, the Appeal was filed out of time.

12. The Ex parte Applicant's counsel submitted that the Respondent lacked the jurisdiction to entertain the appeal out of time. Counsel relied on the case of ***Jasper Maluki Kitavi v Minister for Lands, Settlements Physical Planning & another (2017) eKLR*** where the Court of Appeal upheld the decision of the Special District Commissioner to dismiss an appeal which had been filed out of time.

13. It was submitted that the Appeal was between Mukenya Muvevi and Malikui Ngolo *(Likui Ngolo);* that in all the proceedings, there is nothing showing that Likui Ngolo was pursuing the claim on behalf of anyone and that by awarding the land to a person who was not a party to the proceedings the Respondent acted *ultra vires.*

14. According to the Ex parte Applicant's counsel, the Respondent ignored the proceedings that had taken place before the Land Adjudication officer and conducted a fresh hearing which was against the letter and spirit of Section 29(1) of the Land Adjudication Act; that the Respondent turned the appeal into a fresh hearing and that this led to the Respondent ignoring the evidence that had already been tendered before the Land Adjudication officer.

15. Counsel relied on the case of ***Mahaja v Khatwalo & another [1983] eKLR*** where the Court of Appeal held that although the Minister was not bound to follow the procedure followed in civil cases, he has a duty under Section 29 of Land Adjudication Act to determine the Appeal and make such order thereon as he thinks just. It was submitted that determining the appeal does not involve a fresh hearing and granting orders in favour of persons who are not party to the proceedings.

16. On his part, the Interested Parties advocate submitted that there is no evidence to show that the appeal before the Minister was filed out of time; that under Section 29(1) of the Land Adjudication Act, the Minister has the powers to review the evidence in order to make a determination; that the said determination is not restricted to the evidence that is adduced by the parties before the committees below him and that the decision of the Minister was backed by the findings of the Arbitration Board.

17. Counsel for the Interested Parties submitted that the role of the adjudication system is to establish ownership and proprietary rights to land; that the Minister had the power to declare the rightful owner of the suit property and that all the parties were heard by the Minister.

18. The Ex parte Applicant is seeking for an order to quash the decision of the Respondent dated 30th April, 2019. The Application is premised on the grounds that the appeal to the Minister was filed outside the requisite period of 60 days; that the Respondent considered matters which were not raised before the committees below and that suit land belonged to his late father.

19. Section 29(1) of the Land Adjudication Act provides as follows:

> *"(1) 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 to 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."*

20. The record shows that on 22nd September, 1986, the Land Adjudication Officer dismissed the objection that had been raised by Mukinya Muvevi, who was represented by his son, Kilonzi Mukinya Muvevi, the 1st Interested Party. In the proceedings before the Land Adjudication Officer, the Ex parte Applicant's father, the late Likui Ngolo, was the Defendant. After dismissing the objection, the Land Adjudication Officer reminded the objector the provisions of Section 29 (1) of the Land Adjudication Act as follows:

> *"Objection dismissed with all costs. Names (sic) of Likui Ngolo to remain as registered. R. A. – 60 days."*

21. The proceedings before this court shows that the Appeal before the Minister in respect of parcel number 44, Nzalae Land Adjudication Section was filed as *"Appeal No. 310 of 1988."* The proceedings do not indicate the date or even the year when the Appeal was filed. The assumption, as submitted by the Ex parte Applicant, is that because appeal number is 310 of 1988, the appeal must have been filed in the year 1988.

22. The Applicant's argument could be both right and wrong. I say so because the Appeal could have been filed earlier, and for one reason or another, the number could have changed. This is the position that Angima J took in the case of ***R vs. District Commissioner, Mbeere District and others, ex parte Njiru Kugariura (2015) eKLR***, where he held that the mere fact that a case number had a reference number bearing 1996 is not conclusive evidence that it was filed in that year.

23. The law provides that appeals are to be lodged in the Land Adjudication offices whereafter they are assigned a reference number. To succeed in a claim that the Appeal before the Minister was filed outside the requisite period of 60 days, the Applicant has to furnish the court with a copy of the receipt showing when the filing fees for the Appeal was paid or the filed Memorandum of Appeal which will ordinarily show when it was received by the adjudication office.

24. Having not provided such evidence, this court declines to find that the Appeal to the Minister was filed outside the requisite period of 60 days.

25. The Applicant's case is that the Respondent ignored the proceedings that had taken place before the Land Adjudication Officer and conducted a fresh hearing which was against the letter and spirit of section 29(1) of the Land Adjudication Act; that the Respondent turned the appeal into a fresh hearing and that this led the Respondent to ignore the evidence that had already been tendered before the Land Adjudication Officer.

26. The record shows that the Land Adjudication Committee, the Arbitration Board and the Land Adjudication Officer took evidence from the protagonists and their respective witnesses. During the hearing of the Appeal, the Respondent took the evidence of the representatives of the deceased parties together with their witnesses. In his findings, the Respondent acknowledged the fact that the dispute had been heard by the bodies established by the Act. Indeed, the Respondent evaluated the evidence that was given before those bodies and the testimony of the witnesses that appeared before him.

27. It is trite that the Land Adjudication Act does not provide the procedure that the Minister should adopt while presiding over an Appeal. 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:

> *"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." (Emphasis mine)

28. In the case of ***R vs. The District Commissioner, Kitui & Another, Ex parte Matwanga Kilonzo, Machakos ELC Miscellaneous No. 4 of 2020***, this court held as follows:

> *"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."*

29. Although the law does not mandate the Minister to take additional evidence while conducting an appeal, the Minister is not prohibited from doing so. However, he must consider the evidence that was tendered by the tribunals under him together with the grounds in the Memorandum of Appeal while making his decision.

30. Indeed, in his Affidavit and written submissions, the Ex parte Applicant did not inform the court the specific evidence that was tendered in the lower tribunals, and specifically before the Land Adjudication Officer, which was never considered, or the extraneous matters that the Minister considered in arriving at his decision.

31. The Ex parte Applicant did not exhibit the Memorandum of Appeal that was filed to enable this court understand the grounds that were raised by the Interested Parties in their Appeal to the Minister, and evaluate if indeed the Minister considered those grounds or not. However, from the findings of the Respondent, this court is satisfied that the Minister did not only consider the new evidence that was presented to him, but also the evidence that was adduced before the Land Adjudication Committee and the Land Adjudication Officer.

32. The Ex parte Applicant has faulted the Respondent for awarding land to someone who was not a party to the proceedings, and that Malikui Ngolo *(Likui Ngolo)* was not pursuing land on behalf of anyone. It was submitted that by awarding land to a person who was not a party to the proceedings, the Respondent acted *ultra vires.*

33. The Ex parte Applicant deponed that he is the son of Likui Ngolo *(Malikui Ngolo)* who died in 2005. The said Malikui Ngolo was sued by Mukinya Muvevi who also died before the appeal could be heard. Indeed, in the objection proceedings before the Land Adjudication Committee, the Arbitration Board and Land Adjudication Officer, it is only those two who claimed the disputed land.

34. However, in his decision, the Respondent found that the disputed land belonged to one Ngolo Wambua and Mukinya Muvevi. The said Ngolo Wambua, who is the brother to the late Likui Ngolo, never raised any objections during the adjudication process. If indeed the land was to be registered in the name of Likui Ngolo on behalf of the Ngolo family or his brother Ngolo Wambua, then the Minister should have said so instead of substituting the names of the Ngolos as he did in his findings.

35. To the extent that the Respondent found that Wambua Ngolo was entitled to the suit property, and the said Wambua Ngolo having not been a party to the proceedings before him, it is my finding that the Respondent acted *ultra vires.* Consequently, the Ex parte Applicant's Notice of Motion dated 1st October, 2019 is allowed as follows:

a) An order of certiorari be and is hereby issued quashing the decision of the Respondent, the Deputy County Commissioner for Kitui West Sub County, made in Appeal Case No. 310 of 1988 on 30th April, 2019.

b) The Appeal to be re-heard by any other Deputy County Commissioner within Kitui County other than Mr. Patrick M. Kimolo.

c) Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE