REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLICATION NO. 35 OF 2019

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF: THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF LAND APPEAL CASE NO. 551 OF 2015 AND 562 OF 2015 TO THE DEPUTY COUNTY COMMISSIONER MWINGI EAST

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

JUDICIAL REVIEW

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY COUNTY COMMISSIONER MWINGI EAST.....RESPONDENT

AND

KATU KASINA MUSYOKI.....EX PARTE APPLICANT

AND

KINAA WAMBUA.....INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 2nd October, 2019, the Applicant is seeking for the following orders of Judicial Review:

a) That an order of Certiorari to remove into the High Court for the purposes of quashing the decision made by the Respondent herein where it awarded Mwambiu Adjudication Section parcel of land No.419 and Mwambiu Adjudication Section parcel of land No. 420 to the Interested Party.

b) That a declaration be made that the determination or decision of the Respondent herein was and is unfounded, unmerited, flawed and of no legal binding effect.

c) That a declaration be made for the objections for land parcels Nos. Mwambiu Adjudication Section parcels of land No.419 and Mwambiu Adjudication Section parcel of land No.420 to be heard afresh on merits by a different Deputy County Commissioner other than the one who heard them and gave determination on 15th January, 2019 in Appeal Case No. 551 of 2015 and 562 of 2015.

d) The Costs of this Application be borne by the Interested Party.

2. The Application is supported by the Affidavit of the Ex parte Applicant who has deponed that he is the legal owner of parcels of land namely Mwambiu Adjudication Section Plot Nos. 419 and 420 *(the suit properties);* that there was procedural impropriety during the trial that was conducted by the Respondent in Appeal No. 551 and 562 of 2015 and that the findings of the Respondent are not supported by any reliable evidence.

3. The Ex parte Applicant deponed that the Respondent exhibited open bias during the Appeals proceedings; that the Respondent failed to appreciate Kamba customs which provide that an individual can acquire land and reside elsewhere and that he was neither accorded a fair hearing nor fair administrative action.

4. The Respondent filed Grounds of Opposition dated 17th January, 2020 in which he stated that Section 29(1) of the Land Adjudication Act Cap 284 provides that the decision of the Minister in an Appeal is final hence this court lacks jurisdiction to entertain this Application which challenges the merits of the decision of the Minister; that the Applicant was not entitled to call any witness as of right and that calling of witnesses in an Appeal to the Minister is subject to Rule 4(4) of the Land Adjudication Regulations.

5. The Interested Party filed a Notice of Preliminary Objection in which he averred that premised on the fact that the decision being challenged and sought to be quashed was given and delivered on 1st March, 2017 and that by virtue of Order 53 Rule 2 of the Civil Procedure Rules and the provisions of the Law Reform Act, no leave for a party to apply for an order of Certiorari can be granted after the expiry of six (6) months after the impugned decision was made or delivered.

6. The Interested Party averred that in view of the provisions of the law, the entire Application is incompetent and improperly before the court and that the court has no jurisdiction to extend time for a party to apply for an order of certiorari and the leave granted herein was irregular.

7. The Interested Party swore a Replying Affidavit on 31st January, 2020 in opposition to the Ex parte Applicant's Application and deponed that the Application has been filed out of time since the decision sought to be challenged was delivered on 1st March, 2017.

8. The Interested Party deponed that he is the legally registered owner of parcel of land in Mwambiu Adjudication Section Plot No. 419 and 420 which was registered as Mwingi/Mwambiu/419 and 420; that all the parties to the proceedings before the Respondent and other Tribunals were given an opportunity to present their cases and that the outcome of the proceedings were in his favour.

9. According to the Interested Party, the issues raised in the Application do not fall within the ambit of Judicial Review jurisdiction as they are challenging the merit of the decision; that the court lacks jurisdiction to cancel the titles since they are first registrations and that granting the orders sought will be in vain since the Registrar of Lands is not a party to this suit, neither has any orders been sought against the Registrar.

10. According to the Interested Party, the Ex parte Applicant ought to have raised the issue of bias against him by the Respondent and Tribunals from the beginning or sought orders to stop the proceedings but he did not do so and that the findings of the Tribunal were supported with reliable evidence that had been produced during the proceedings.

11. The Ex parte Applicant's counsel submitted that the Respondent being a public officer had an obligation to exercise his statutory duties in a way that upholds the principles and values enshrined in Sections 47 to 50 of the Constitution, Section 4(3)(d) of the Fair Administrative Action Act and Section 7 of the Public Service (Values and Principles) Act.

12. According to counsel, there was procedural impropriety during the trial conducted by the Tribunal chaired by the Respondent in Appeals Nos. 551 and 562 of 2015; that the Respondent was represented by a third party without *locus standi*; that the Applicant was not accorded an opportunity to present any witnesses nor reply to the evidence tendered by the Interested Party and that the proceedings and questions asked were not all recorded.

13. According to the Applicant's counsel, the questions asked during the Tribunal proceedings were neither clear nor precise and were a sham; that the Respondent largely depended on hearsay evidence; that the findings of the Respondent are not supported by any reliable evidence whatsoever and that the findings and decisions of the Respondent exhibited open bias.

14. The Ex parte Applicant's counsel submitted that the Respondent failed to appreciate Kamba Customs in that an individual can acquire land and reside elsewhere as is common in many parts of Kenya; and that the findings and decisions of the Respondent in Appeals Nos. 551 and 562 of 2015 are invalid since they were partially and unfairly heard.

15. It was submitted that the Applicant is the legal owner of the suit properties which their family and relative, including Charles Ngemu Musyoki, have been in occupation and utilizing even before the demarcation commenced and that the Respondent's irrational and unmerited decision has deprived the Applicant inherent right to own property as well as his right to equitable protection and access to land.

16. In response, the Respondent's counsel submitted that Section 29(4) of the Land Adjudication Act gives the Minister powers to delegate his powers to hear Appeals to any public officer or to the person for the time being holding any public office specified in such notice.

17. Counsel submitted that no evidence has been adduced to show that the person who conducted the Appeal was not appointed by the Minister; that Section 29(1) of the Land Adjudication Act does not provide for the procedure of hearing appeals to the Minister and that the calling of witnesses is not a right and leave must be sought first. Reliance was placed on the cases of ***Republic vs. Attorney General & 2 Others Ex parte Emmanuel Poghisio [2018] eKLR*** and ***Republic vs. Machakos District Commissioner [2009] eKLR***.

18. The Respondent's counsel submitted that the Applicant was not even supposed to have cross-examined the Interested Party since the

proceedings in an Appeal only entails examining the evidence already on record without hearing the parties unless leave is sought and granted.

19. It was submitted that based on the allegations pleaded by the Applicant, the Applicant is asking the court to review the merits of the decisions made in the Appeal to the Minister which is improper. Counsel relied on the case of ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Nairobi [2002] eKLR.***

20. According to counsel, the Applicant's assertions that the Chairman introduced new facts, of which the Applicant did not have an opportunity to respond to was baseless since the Applicant has not disclosed the nature of the alleged new facts.

21. It was submitted by the Interested Party's advocate that the Applicant deliberately concealed the date of the decision which he was seeking to be quashed hence misleading the court so that the court would not ask the reason for non-compliance with Order 53 Rule 2 of the Civil Procedure Rules, 2010. According to counsel, the leave that was granted to the Applicant by this court was a nullity.

22. Counsel submitted that the date of 15th January, 2019 is the date of certification of the proceedings and not the date of the decision; that the date of the decision was 1st March, 2017; that the decision of the Minister which was forwarded to the Land Adjudication Officer was not availed in court hence a probable conclusion that the decision sought to be quashed was made on 1st March, 2017, two (2) years later.

23. The Interested Party's advocate submitted that the declaratory orders sought by the Applicant are not within the purview of Judicial Review whose rules are not concerned with the merits of the decision complained of, but the procedure and manner in which the decision was arrived at; that the Applicant was heard and that the Applicant has not shown any procedural flaws or impropriety in the proceedings. Counsel relied on the case of ***Republic vs. National Land Commission & Another: Ex parte Farmers Choice Ltd (2020) eKLR***.

24. It was submitted that the claim by the Applicant that the Interested Party has no *locus standi* should be dismissed for the reason that the Land Adjudication Act allows an authorized agent to represent a party in the proceedings who in this case was the daughter of the Interested Party and that the Applicant cross-examined the Interested Party's agent and did not raise any objection to her participation. According to counsel, no prejudice has been demonstrated by the Applicant that he would suffer. Reliance was placed on the case of ***Republic vs. Minister of Lands & Another Ex parte Peterson Thiga Mukora [2013] eKLR***.

25. I have read the pleadings, submissions and authorities filed by the parties. The Applicant is seeking for an order of certiorari to quash the decision of the Respondent in awarding the Interested Party parcel of land number 419 and 420 Mwambu Adjudication Section.

26. Indeed, as correctly submitted by counsel for the Interested Party, where a party files an Application seeking for an order of certiorari, Order 53 Rule 2 of the Civil Procedure Rules provides that the Application for leave for the order of certiorari must be made not later than six (6) months after the date of the proceeding.

27. The limitation period of six (6) months is however applicable only in certain instances. In the case of ***Republic vs. Kenya National Highways Authority & 2 others Ex-parte Amica Business Solutions Limited [2016] eKLR,*** the Court of Appeal held as follows:

> *"We are persuaded in this respect by the High Court decision in* ***The Goldenberg Affair Ex-parte Hon. Mwalulu and Others, HCMA No. 1279 of 2004 [2004] eKLR,*** *and* ***Republic vs. The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi, H.C. Misc. Application No. 1235 of 1998*** *where the courts held that the six (6) months limitation period set out in* ***order 53 Rules 2 and 7*** *only applied to specific formal orders mentioned in* ***Order 53 Rules 2 and 7*** *and to nothing else, certainly not to contents of one private letter in response to another.*
>
> *We are also persuaded by the Tanzania Court of Appeal decision in* ***Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals and Others, Dar-es-Salaam Civil Appeal No. 31 of 1999 [1995 – 1998] 1 EA 199*** *in which case the court held that the phrase "or other proceedings" has to be construed ejusdem generis with 'judgment, order or decree, and conviction'' as having reference to judicial or quasi-judicial proceedings as distinct from the acts and omissions for which certiorari may be applied for. We hold the view therefore that the six month's limitation would not apply to "decisions" made by administrative bodies which fall outside the purview of the definition "decision, judgment, order, decree or other proceedings" as contemplated under* ***Order 53 Rule 2*** *of the Civil Procedure Act."*

28. The six (6) months' limitation period set out in Order 53 Rules 2 and 7 of the Civil Procedure Rules is only applicable to specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else, and certainly not to contents of one private letter in response to another. The decisions of adjudicative bodies created under the Land Adjudication Act are quasi-judicial in nature and fall within the ambit of Order 53 Rule 2 and 7 of the Rules.

29. The impugned decision of the Respondent in this matter is not dated. Indeed, neither the Respondent nor the Interested Party produced any evidence to inform the court when the Respondent's Award was made. To the extent that the said decision is not dated, and in the absence of evidence to show that the Applicant's Chamber Summons seeking for leave to commence Judicial Review orders of certiorari was filed after the expiry of six (6) months after the impugned decision was made, I decline to hold that this suit was filed outside the requisite period of six (6) months.

30. The Applicant deponed that to the extent that the Interested Party was represented by his daughter when the dispute was heard by the Respondent, the proceedings should be nullified. I have perused the proceedings of the Respondent which shows that the Interested Party was represented by his daughter. However, there is no indication that the representation of the Interested Party by his daughter was objected to by the Applicant.

31. In any event, the proceedings before the Respondent being quasi-judicial in nature, the Respondent was not required to comply strictly with the rules of evidence as applied in the civil courts, or the Civil Procedure Rules. That was the position that was taken by Ong'undi J. in ***Republic vs. Minister for Lands & another Ex-parte Peterson Thiga Mukora [2013] eKLR*** as follows:

> *"The proceedings under the Land Adjudication Act do not strictly follow the procedures under the Civil Procedure Act. Section 13(3) & 4 of the Land Adjudication Act provides for one to send a duly authorized agent or any successor to appear on behalf of others. And if the applicant was dissatisfied with the presence of Murage Cirigu he ought to have done so at the time of the appeal, and I am sure the Minister's representative would have dealt with it."*

32. Consequently, the fact that the Interested Party was represented by his daughter during the hearing of the Appeal cannot be a basis of invalidating the decision of the Respondent.

33. The other complaint that the Applicant has raised is that the Respondent did not give him an opportunity to call witness while hearing the Appeal. However, the Applicant did not point out any provision in the Land Adjudication Act which allows a party to call witnesses during the hearing of an Appeal.

34. 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)*

35. The Minister's mandate under Section 29 of the Act is to consider the grounds of Appeal raised by any person appealing against the decision of the Land Adjudication Officer, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision.

36. Indeed, just like what happens in an appellate court, the Minister need not take fresh evidence while dealing with an 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.

37. The Applicant has not accused the Respondent for not considering the grounds of Appeal, or the evidence that was adduced before the Land Adjudication Officer. Indeed, in his findings, the Respondent considered all the relevant facts and eventually agreed with the decision of the Land Adjudication Officer. This court has no reason to fault that decision, more so considering that both the Applicant and the Interested Parties were afforded an opportunity of being heard, and were heard.

38. Although the Applicant has deponed that the Respondent was biased during the hearing of the Appeal, he has not adduced any evidence demonstrating the said bias. Indeed, considering that the Respondent agreed with the decision of the Land Adjudication Officer, the burden

was on the Applicant to show that the two officers either misinterpreted the facts and the law or that they were out rightly biased.

39. Having failed to prove biasness on the part of the Respondent and the Land Adjudication Officer, or that the decisions of two officers were irrational, un proportionate or illegal, I find the Notice of Motion dated 2nd October, 2019 to be unmeritorious.

40. For those reasons, I dismiss the Application dated 2nd October, 2019 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE