



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 113 OF 2017(JR)**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL**

**OF THE REPUBLIC OF KENYA.....RESPONDENT**

**FREDRICK MUKONZA NGOMO.....INTERESTED PARTY**

**EX-PARTE APPLICANT:.....JEZREEL MUNYITHYA KAVUWA**

**JUDGMENT**

1. In the Notice of Motion dated 28<sup>th</sup> March, 2018, the Ex-parte Applicant is praying for the following order of Judicial Review:

*a. That an order of certiorari do issue to recall to this court and quash the decision of the Deputy County Commissioner, Kitui West Sub-County, Kitui County in Minister's Appeal Case No. 345 of 1995 over land parcel number Mutonguni/Musengo/548 dated 11<sup>th</sup> July, 2017 ordering the suit property be shared equally between two deceased persons (Kavuwa Malombe Mailu and David Mutemi Mbusya).*

*b. That the costs of this Application be provided for.*

2. In his Statutory Statement of Facts, the Ex-parte Applicant has averred that David Mutemi Mbusya, the Respondent in the Appeal, died at the time of hearing the Appeal; that the Interested Party who conducted the proceedings on behalf of David Mutemi Mbusya, was not a legal representative of the deceased and that the proceedings were conducted by strangers contrary to the law.

3. The Interested Party did not file a Replying Affidavit. The Respondent filed Grounds of Opposition and submissions.

4. In his submissions, the Ex-parte Applicant's advocate submitted that the decision of the Deputy County Commissioner in Kitui Minister's Appeal No. 345 of 1995 over parcel of land number Mutonguni/Musengo/548 dated 11<sup>th</sup> July, 2017 should be quashed by this court.

5. According to the Ex-parte Applicant's counsel, the Deputy County Commissioner's decision was tainted with illegality because both the Appellant and the Respondent were dead as at the time the said decision was made; that the Appeal was prosecuted by strangers and that there is nothing on record to show in which capacity the two gentlemen prosecuted the Appeal before the Deputy County Commissioner.

6. Counsel submitted that for one to qualify to be a representative of a deceased person, he has to be armed with Grant of Letters of Administration issued by the court in accordance with the Law of Succession Act. Counsel relied on several authorities which I have considered.

7. The Respondent's advocate submitted that the Deputy County Commissioner acted in accordance with the law when he allowed the Interested Party to take part in the proceedings after the death of David Mutemi Mbusya; that the Interested Party was the son of the deceased and that the Interested Party had an interest in the suit property.

8. Counsel submitted that Section 13(1) of the Land Adjudication Act allowed the Interested Party to participate in the proceedings before the Deputy County Commissioner; that Letters of Administration are inconsequential in adjudication proceedings; that the Ex-parte Applicant participated in the proceedings and that all parties were heard. Counsel relied on several authorities which I have considered.

9. The Ex-parte Applicant is seeking to quash the decision of the Deputy County Commissioner of Kitui West Sub-County dated 11<sup>th</sup> July,

2017. The only ground that the Application is predicated on is that both the Appellant and the Respondent before the Deputy County Commissioner were deceased by the time the Appeal was heard by the Deputy County Commissioner. According to the Ex-parte Applicant, the people who conducted the Appeal before the Deputy County Commissioner were strangers because they did not have the Letters of Administration.

10. I have perused the entire record and I have not come across the proceedings before the Deputy County Commissioner. The only annexure in support of the Ex-parte Applicant's claim is the findings of the Deputy County Commissioner dated 11<sup>th</sup> July, 2017. The absence of the proceedings before the Deputy County Commissioner, which would show what transpired during the hearing of the Appeal renders the Notice of Motion dated 28<sup>th</sup> March, 2018 a nullity.

11. The perusal of the findings of the Deputy County Commissioner shows that both the Applicant and the Interested Party were heard, with the Applicant representing his deceased father in the Appeal.

12. In any event, there is no provision under the Land Adjudication Act which provides that the litigants in the proceedings under the Act should be substituted by their legal representatives upon their death.

13. The non-application of the Law of Succession Act in the proceedings under the Land Adjudication Act was addressed by Odunga J. in the case of **Republic vs. District Commissioner Machakos & Another, Ex-parte Kakui Mutiso (2014) eKLR**, as follows:

***“Therefore, before registration, the land in question is either ancestral or falls under any other form of communal ownership. 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... it would therefore follow that before the land is registered in the name of a person and thus bestowed with individual tenure thereof, the land in question cannot form part of the Estate of the deceased in order to require a person claiming the same to obtain letters of administration before making such a claim.*”**

14. The court in the above case observed that the person claiming an interest in land within an adjudication area need not have letters of administration in order to be entitled thereto. That being the case, one need not to be a legal representative to be substituted in the proceedings pending before the Minister.

15. The interests of the Applicant's father, and his entire family, having been catered for by the Applicant, the proceedings that the Deputy County Commissioner conducted were valid.

16. For those reasons, the Notice of Motion dated 28<sup>th</sup> March, 2018 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**