



**REPUBLIC OF KENYA**

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

**ELC. JUDICIAL REVIEW NO. 58 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DEPUTY COUNTY COMMISSIONER**

**YATTA SUB-COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY SURVEYOR.....3<sup>RD</sup> RESPONDENT**

**AND**

**KISILU MULWA.....1<sup>ST</sup> INTERESTED PARTY**

**BONIFACE MUASYA KILONZO.....2<sup>ND</sup> INTERESTED PARTY**

**ANNASTACIA KILONZO.....3<sup>RD</sup> INTERESTED PARTY**

***Representing GREGORY KILONZO (deceased)***

**AND**

**JOHN NTHUKU MAINGI.....1<sup>ST</sup> EX-PARTE APPLICANT**

**ALEXANDER KILONZO MAINGI.....2<sup>ND</sup> EX-PARTE APPLICANT**

**DANIEL NZYOKA MAINGI.....3<sup>RD</sup> EX-PARTE APPLICANT**

**PETER MUTINDA MAINGI.....4<sup>TH</sup> EX-PARTE APPLICANT**

**WANZA MAINGI KIANGI.....5<sup>TH</sup> EX-PARTE APPLICANT**

**VICTORIA KITHIA MAINGI.....6<sup>TH</sup> EX-PARTE APPLICANT**

***Legal representatives of the Estate of MAINGI KIANGI (deceased)***

**JUDGMENT**

1. In the Notice of Motion dated 14<sup>th</sup> July, 2017 and filed on the same day, the Applicants are seeking for the following orders of Judicial Review:

***a. That an order of certiorari do issue to quash the decision made by the 1<sup>st</sup> Respondent on the 18<sup>th</sup> March, 2017 in Case No. 196 of 1995.***

***b. That an order of prohibition do issue against the 2<sup>nd</sup> Respondent, 3<sup>rd</sup> Respondent and the Interested Parties herein from applying, enforcing, executing and/or in any manner whatsoever from implementing the decision made on 18<sup>th</sup> March, 2017 by the 1<sup>st</sup> Respondent in Case No. 196 of 1995.***

***c. That an order of mandamus do issue against the 1<sup>st</sup> Respondent to re-hear Case No. 196 of 1995 in accordance with the law.***

***d. That costs of and incidental to these proceedings be provided for.***

2. The Application is supported by the Affidavit of the 5<sup>th</sup> Ex-parte Applicant who has deponed that the late Maingi Kiangi died on 8<sup>th</sup> March, 2004; that before he died, there was a pending Appeal before the Minister being Appeal No. 196 of 1995; that the Appeal before the Minister was eventually heard and that neither her nor her co-administrator were summoned.

3. According to the 5<sup>th</sup> Applicant, it is her children and the children of her co-wife that were summoned by the Minister; that their children were not the personal representatives of the deceased and that the hearing of the Appeal by the Minister was a breach of the rules of natural justice.

4. According to the 5<sup>th</sup> Applicant, there was no gazette notice appointing the 1<sup>st</sup> Respondent to hear the Appeal; that the decision of the 1<sup>st</sup> Respondent is not based on any reasoning; that the 1<sup>st</sup> Respondent did not date his Judgment and that the decision is null and void.

5. The 1<sup>st</sup> Respondent filed Grounds of Opposition through the Attorney General, in which he averred that the Application is frivolous, vexatious and misconceived.

6. In his Replying Affidavit, the 1<sup>st</sup> Respondent deponed that Appeals to the Minister are always referred to the Deputy County Commissioners to act on them on behalf of their Minister; that Mr. Kisilu Mulwa, the 1<sup>st</sup> Interested Party, was represented by his son during the hearing and that Mr. Maingi Kiangi, deceased, was represented by his sons, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties.

7. According to the 1<sup>st</sup> Respondent, during the hearing of the Appeal, the children of the deceased became uncooperative and rude and that after listening to all the parties, he decided that the disputed land should be sub-divided equally among the parties in dispute.

8. The 1<sup>st</sup> Respondent deponed that under Order 53 Rule 2 of the Civil Procedure Rules, a person seeking an order of certiorari must apply to court not later than six (6) months from the date of issuance of the decision and that the Application should be dismissed.

9. The 1<sup>st</sup> Interested Party deponed that the 1<sup>st</sup> Respondent had jurisdiction to hear the Appeal whose decision was rendered on 18<sup>th</sup> March, 2017; that all the parties were given equal chance by the 1<sup>st</sup> Respondent and that the 1<sup>st</sup> Respondent properly considered all the facts and evidence before upholding the decision of the Land Adjudication Officer.

10. In his submissions, the Applicants' advocate submitted that the 1<sup>st</sup> Respondent did not have jurisdiction to hear the dispute since he had not been gazetted as required by law; that the 1<sup>st</sup> Respondent had no power to choose representatives of the deceased Appellants and that it is only the Succession Court that can appoint the personal representatives of the Estate of the deceased's persons.

11. Counsel submitted that the 1<sup>st</sup> Respondent did not give the personal representatives of the Estate of the late Maingi Kiangi a chance to testify; that the decision of 1<sup>st</sup> Respondent was not accompanied by any reasons and that the 1<sup>st</sup> Respondent's decision is tainted with illegality, irrationality and procedural impropriety.

12. The Interested Parties' advocate submitted that the Application before the court dwells on the merits of the case rather than the decision process and that there was a proper determination which formed the basis of the Appeal under Section 29 of the Land Adjudication Act.

13. The Interested Parties' advocate, submitted that the Minister delegated his duties and functions to the office of the Deputy County Commissioner (*formally District Commissioner*) and that the Appeal was heard by a person who had the legal authority to hear and sign the Award.

14. The Interested Parties' advocate finally submitted that the Applicants did not apply to be substituted as parties before the 1<sup>st</sup> Respondent and that the rules of natural justice were complied with.

15. The Ex-parte Applicants are seeking to quash the decision made by the 1<sup>st</sup> Respondent on 18<sup>th</sup> March, 2017 in Appeal Case number 196 of 1995. Although the Applicants have gone into the merits of the dispute that was before the 1<sup>st</sup> Respondent, it is trite that Judicial Review is concerned with the decision making process, and not with the merits of the decision itself.

16. As was held in the case of ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited, Civil Appeal No. 185 of 2001***, the court would concern itself with such issues as to whether the decision makers had jurisdiction, whether persons affected by the decision were heard before it was made and whether the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the deciders which involve going into the merits of the decision itself such as whether there was or there was no sufficient evidence to support the decision.

17. Having the above decision of the Court of Appeal in mind, the main issues for determination in this Application are as follows:

- a. *Whether the 1<sup>st</sup> Respondent had jurisdiction to entertain the Appeal;*
- b. *Whether the said Appeal was heard and determined in violation of the rules of natural justice; and*
- c. *Whether the decision of the 1<sup>st</sup> Respondent was biased and unreasonable.*

18. Appeal Case Number 196 of 1995 was filed by Kisilu Mulwa and the late Gregory Kilonzo against the late Maingi Kiangi. The said Appeal emanated from the decision of the Land Adjudication Officer who awarded parcel number 200 to the late Maingi Kiangi.

19. The proceedings before the 1<sup>st</sup> Respondent shows that when the matter came up for hearing, the 2<sup>nd</sup> Appellant, Gregory Kilonzo and the only Interested Party, Maingi Kiangi, had died. The record shows that Gregory Kilonzo was represented by his son Boniface Muasya Kilonzo while Maingi Kiangi was represented by his four sons, who are the 1<sup>st</sup>-4<sup>th</sup> Ex-parte Applicants.

20. The proceedings shows that after hearing the 1<sup>st</sup> Appellant, who is the 1<sup>st</sup> Interested Party herein, the Deputy County Commissioner heard the 1<sup>st</sup> Ex-parte Applicant, who is the son of the late Maingi Kiangi.

21. During the hearing of the Appeal, the wives of the late Maingi Kiangi never applied to be joined in the Appeal. Indeed, the sons of the late Maingi Kiangi never protested to the fact that their mothers had not been joined in the proceedings before the 1<sup>st</sup> Respondent.

22. The 5<sup>th</sup> and 6<sup>th</sup> Applicants, who were not parties to the proceedings before the 1<sup>st</sup> Respondent have argued that being the legal representatives, they should have been joined in the proceedings. However, they have not said how they were supposed to be joined, and by who. Were they not the ones who should have asked to be allowed to join in the suit?

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

24. 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.*”**

25. 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.

26. The sons of the late Maingi Kiangi duly represented the entire family in the proceedings before the Minister. In the circumstances, the issue of the 5<sup>th</sup> and 6<sup>th</sup> Interested Parties having not been heard by the 1<sup>st</sup> Respondent does not arise.

27. Section 29(1) (b) and 29(4) 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—*”**

***(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.”***

***(4) Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.”***

28. The above provision shows that the Minister may delegate his powers to hear Appeals to “any public officer by name, or to the person for the time being holding any public office specified in the Gazette Notice.” I am aware that the Minister for Lands appointed all the District Commissioners (before the 2010 Constitution) to hear Appeals in the country. After the 2010 Constitution, District Commissioners became Deputy County Commissioners.

29. Considering that the law allows the Minister to delegate the hearing of Appeals to “any public officer”, and all the District Commissioners (now Deputy County Commissioners) having been gazetted to handle the Appeals, the 1<sup>st</sup> Respondent had the requisite jurisdiction to handle the Appeal. Indeed, any person holding the office of the Deputy County Commissioner, which is equivalent to the former District Commissioner’s office, has the jurisdiction to hear Appeals under the Act.

30. Having found that the Interested Parties, through the 1<sup>st</sup> Interested Party, were heard, and in view of the fact that the 1<sup>st</sup> Respondent had the jurisdiction to hear the Appeal in question, I find the Judicial Review Application before me to be unmeritorious. The Application is dismissed with costs.

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

**O.A. ANGOTE**

**JUDGE**