



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. JUDICIAL REVIEW NO. 8 OF 2019

REPUBLIC.....APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER

MATUNGULU SUB-COUNTY.....1ST RESPONDENT

THE COUNTY SURVEYOR.....2ND RESPONDENT

THE LAND REGISTRAR MACHAKOS COUNTY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

VERSUS

ANTHONY MUNYAO KATA.....1ST INTERESTED PARTY

JOHN NDUVA KATA.....2ND INTERESTED PARTY

MALITI KIILU.....3RD INTERESTED PARTY

PHILIP KIILU.....4TH INTERESTED PARTY

AND

GREGORY MUTHOKA KAKONZI.....EX-PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 11th March, 2019, the Ex-parte Applicant has prayed for the following reliefs:

a. That an order of certiorari do issue to remove into this Honourable Court for purposes of quashing the Ruling of the 1st Respondent delivered on the 16th October, 2018.

b. That an order of prohibition do issue directed to the 2nd Respondent restraining him from visiting Machakos/Nguluni/1934 and identifying the boundary.

c. That an order of prohibition do issue directed to the 3rd Respondent restraining him releasing Title Deed for all that land registered as Machakos/Nguluni/1934 or sub-dividing and issuing a fresh Title Deed for all that land registered as Machakos/Nguluni/1934 in implementation of the Ruling of the 1st Respondent issued on the 16th October, 2018.

2. The Application is supported by the Affidavit of the Ex-parte Applicant who has deponed that he is the son of Syevuo Kata who died on 27th March, 2001; that Syevuo Kata is the third wife to Kata and that Syevuo Kata is the sole registered owner of land known as Machakos/

Nguluni/1934, 1935 and 1936 which she inherited from her late husband.

3. The Ex-parte Applicant deponed that after the demise of their father, they invited the Aombe clan to assist in dividing the suit property; that the clan divided the land between the three wives of the deceased and that Muthoki Kata and Ngii Kata alleged that Syevuo Kata had been awarded a bigger portion of land.

4. When the Adjudication Committee heard the dispute, it has been deponed that the Adjudication Committee directed that two portions be excised from Machakos/Nguluni/1936 and be given to Muthoka Kata and Wambua Kata; that his mother filed an Appeal against the decision of the Committee and that the Arbitration Board upheld the decision of Aombe clan.

5. On Appeal to the Adjudication Officer, the Ex-parte Applicant deponed that the Adjudication Officer upheld the decision of the Committee and that when he filed an Appeal to the Minister after the demise of his mother, no Letters of Administration had been taken up.

6. According to the Ex-parte Applicant, when the Deputy County Commissioner heard the Appeal on 8th March, 2017, he did not accord him a fair hearing; that he was not accorded enough time to table his evidence and that a Ruling was delivered without his knowledge.

7. In reply, the 3rd Interested Party deponed that Kata had three wives; that one of the wives was Mutile who married Syevuo (wife to wife) and that Syevuo had three children, including the Applicant.

8. According to the 3rd Interested Party, another wife of Kata known as Ngii had two sons, Namely Mutua Kata and Wambua Kata; that the 3rd and 4th Interested Parties are the sons of Mutua Kata and that the third wife of Kata, Muthoki, is the mother of the 1st and 2nd Interested Parties.

9. It is the deposition of the 3rd Interested Party that the Aombe clan sub-divided the suit property to the three wives unfairly, giving the first wife three portions which were surveyed and given numbers 1934, 1935 and 1936; that the second wife was given plot numbers 1027 and 2020 and that the third wife was given portion numbers 1931 and 1932.

10. The 3rd Interested Party finally deponed that Syevuo family filed an Appeal with the Minister, which Appeal was dismissed and plot numbers 2477 and 2478 were to be registered in the names of the 2nd and 3rd wives of Mr. Kata respectively and that the Minister acted within his mandate. The 3rd Interested Party finally averred that the Application has been overtaken by events since the Title Deeds have since been issued.

11. In his submissions, the Ex-parte Applicant's advocate submitted that under Article 47 of the Constitution and the Fair Administrative Action Act, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that a fair hearing entails listening to evidence and arguments in an impartial manner.

12. Counsel submitted that the Ex-parte Applicant was not accorded a fair hearing because he was not granted sufficient time to give his evidence nor was he given time to call his witnesses.

13. The Ex-parte Applicant's advocate submitted that the 1st Respondent, in arriving at his decision, acted *ultra vires*; that the 1st Respondent chose to ignore the evidence of the Ex-parte Applicant and relied on the evidence of the Respondents and that the 1st Respondent relied on irrelevant matters. According to counsel, the 1st Respondent chose to arbitrate on property belonging to deceased persons in their absence without ensuring that only authorized persons appeared before him.

14. The 1st, 3rd and 4th Respondents filed Grounds of Opposition in which they averred that the Application is an abuse of the court process and a waste of the court's judicious time.

15. In his submissions, the Respondents' advocate submitted that from the proceedings, both parties were given an opportunity to present their cases; that the testimony of the Ex-parte Applicant was recorded and that the Ex-parte Applicant was heard by the 1st Respondent before a decision was made.

16. Counsel submitted that Judicial Review orders are not concerned with the merits of the decision but by the decision making process and that the purpose of the remedy of Judicial Review is to ensure that the individual is given a fair treatment by the authority to which he has been subjected.

17. The Respondents' counsel submitted that the Ex-parte Applicant has failed to demonstrate that he was not given fair treatment by the 1st Respondent; that he has failed to demonstrate that the 1st Respondent acted *ultra vires* and that the Application should be dismissed with costs.

18. The Interested Parties' advocate submitted that the Applicant was granted a fair hearing in that he participated in the proceedings before the Minister and that the decision of the Minister has been implemented through letters dated 18th January, 2019 and 25th January, 2019.

19. In laying the scope of Judicial Review, the Court of Appeal in *Commissioner of Lands vs. Kunste Hotel Limited (1997) eKLR* held as follows:

“But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being

challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

20. The above position was taken up by the Court of Appeal in the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited, Civil Appeal No. 185 of 2001** in which the court held as follows:

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with issues such as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making 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 decider which would involve going into the merits of the decision itself-such as whether there was or there was no sufficient evidence to support the decision.”

21. The next issue I will deal with is whether in exercising its mandate, the 1st Respondent acted unlawfully, illegally, unreasonably and unproportionally. While dealing with this issue, I am guided by the decision of the Court of Appeal in the case of **Suchan Investment Limited vs. The Ministry of National Heritage & Culture & Others (2016) eKLR**, in which the court held as follows:

“55. An issue that was strenuously urged by the respondents is that the appellant’s appeal is bad in law to the extent that it seeks to review the merits of the Minister’s decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.”

22. The *ratio decidendi* of the above decision is that there is a shift towards merit consideration in Judicial Review Applications. According to the court, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review.

23. However, while reviewing the merit of the impugned decision, the Court of Appeal held that *“the reviewing court has no mandate to substitute its own decision for that of the administrator.”* The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

24. The Ex-parte Applicant is the son of Syevuo Kata who died on 27th March, 2001. Although the Applicant averred that Syevuo was married to the late Mr. Kata, the deposition of the 3rd Interested Party was that Syevuo was married to one of the wives of Mr. Kata (*wife to wife marriage*).

25. It is not in dispute that upon the demise of Mr. Kata, the Aombe clan sub-divided the land belonging to Mr. Kata amongst his three wives. The issue of the distribution of the suit property by the clan was litigated before the Land Adjudication Committee, the Land Arbitration Board, the Land Adjudication Officer before the final Appeal was filed in Ministerial Appeal Number 10 of 1996.

26. The Ex-parte Applicant is challenging the decision of the 1st Respondent on two grounds, firstly, that at the time of hearing of the Ministerial Appeal, the registered owners of the parcels of land that were in dispute were already deceased and succession had not been done to have their personal representatives represent them in the proceedings, and secondly, that he was not granted a fair hearing.

27. 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.

28. 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.

29. 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.

30. The proceedings before the 1st Respondent shows that the late Syevuo Kata was represented by Gregory Muthoka Kakonzi (*the Ex-parte Applicant*) and Golian Kakonzi while the late Muthoki Kata was represented by Anthony Munyao Kata and John Nduva Kata (*the 1st and 2nd Interested Parties*). The proceedings of the 1st Respondent shows that the other wife of the late Kata, Mutua Kata, was represented by the 3rd and 4th Interested Parties. All the three wives of the late Kata were therefore represented before the 1st Respondent.

31. The proceedings shows that the Ex-parte Applicant herein was heard by the 1st Respondent. Indeed, the Ex-parte Applicant informed the 1st Respondent that the dispute in respect to the suit property commenced in the year 1993; that his late father had given instructions on how his land should be distributed amongst his three (3) wives and that after the land was sub-divided, his late mother was not satisfied with the sub-division.

32. After the testimony of the Appellant, the proceedings shows that the 1st Respondent cross-examined the Ex-parte Applicant. In his testimony, the Applicant informed the 1st Respondent that although the suit land was sub-divided in accordance with his father's instructions, the same was not sub-divided equally.

33. On his part, 1st Interested Party informed the 1st Respondent that the suit property was sub-divided by the Aombe clan according to their father's wishes and that is the decision that was upheld by the Adjudication Committee.

34. In his findings, the 1st Respondent stated as follows:

“The deceased had two pieces of land, he gave some pieces to the Respondent's mother as a token and the rest he divided it among his three wives.”

35. The 1st Respondent made a finding that according to Kamba customary law, the late Kata had the right to sub-divide his land the way he wanted, which is what the Aombe clan did.

36. Indeed, the Ex-parte Applicant did not deny that his mother was not one of the wives of Mr. Kata, but rather, a wife to one of the wives of Mr. Kata (*wife to wife marriage*). That being the position, the 1st Respondent was entitled to arrive at the finding that the late Kata had the right to have his land sub-divided in the manner he wanted. The 1st Respondent arrived at this finding after hearing the Ex-parte Applicant.

37. Considering that the Ex-parte Applicant was heard by the 1st Respondent, and the 1st Respondent gave reasons for his findings, which findings were not unreasonable or unproportional, I find the Applicant's Application to be unmeritorious.

38. For those reasons, the Application dated 11th March, 2019 is dismissed but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE