



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JR. MISC. NO.8 OF 2018

Formerly

MISC. APPLICATION NO.369 OF 2009

IN THE MATTER OF LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF LAW REFORM ACT CAP 26 LAWS OF KENYA

IN THE MATTER OF APPLICATION BY ESTHER MUTHEI MUTISO AND RICHARD KIEMA MUTISO (Suing as personal representative of JULIUS MUTISO MULILI – Deceased)

FOR JUDICIAL REVIEW TO PROCEED AGAINST DISTRICT (THE MINISTER BY DELEGATED POWERS) BY WAY OF CERTIORARI AND PROHIBITION

REPUBLIC

-VERSUS-

DISTRICT COMMISSIONER MAKUENI

(The minister by delegated powers).....RESPONDENT

EX-PARTE

ESTHER MATHEI MUTISO

RICHARD KIEMA MUTISO.....APPLICANTS

AND

GREGORY WAMBUA NDIVO.....INTERESTED PARTY

JUDGEMENT

1) By their notice of motion application dated 01st December, 2009 and filed in court on 02nd December, 2009, Esther Muthei Mutiso and Richard Kiema Mutiso (hereinafter referred to as the Exparte Applicants) sought the following orders:-

1. THAT an order of certiorari do issue to quash the entire proceedings and consequent decision of the District Commissioner Makueni District (the Minister by Delegated Powers) passed on the 23rd March, 2004 setting aside and going against the Land Adjudication Officers decision dated 15th March 1991.

2. THAT an order of prohibition do issue to prohibit the Respondent and or his Agents, Servants and/or employees from in any way dealing with Land Parcel No.271.

3. THAT costs of this application be provided for.

The application is supported by the verifying and/or supporting affidavits of the two Exparte Applicants sworn at Nairobi on 02nd Day of December, 2009.

2) The application is opposed by the Respondent vide his grounds of opposition dated 05th February, 2010 and filed in court on 10th February, 2010.

3) In opposing the application, the respondent raised the following grounds:-

1. That the application offends mandatory provisions of the law and to that extent is misconceived, fatally incurable and an abuse of the court process.

2. That the applicant has alternative avenues to seek remedy other than judicial review.

3. That the application has no legal basis hence the Respondent's prayer for its dismissal with costs.

4) The Interested Party has also opposed the application vide his grounds of opposition dated 15th January, 2010 and filed in court on 18th January, 2010. The Interested Party has raised the following grounds:-

1. The application is incompetent and a nullity in law as is lodged through the wrong law and badly drafted.

2. That the Notice of Motion application was filed on 2nd December, 2009 to challenge a decision made on 27th April, 2004 contrary to Order 53 Rule 2 which provide that no leave shall be granted for orders of certiorari unless the leave is made "not later than six months" and the said Notice of Motion is in competent and ought to be struck out.

3. That in any event leave granted was not proper because the court lacked jurisdiction as the decision being attacked having been rendered on 27th April, 2004 at Wote when leave was granted on or about 12th November, 2009 i.e. more than 5 years after the challenged decision and the delay is inordinate.

4. The grounds as set out in the Notice of Motion dated 1st December, 2009 do not envisage the illegality and/or irrationality and/or outrageousness of the Respondents decision making process.

5. The Order of Prohibition to prohibit the Respondent and/or his agents, servants and/or employees from in anyway dealing with Land Parcel No.271 would only so to speak hand in the air without an Order of Certiorari against the decision.

6. The District Commissioner's Court as the Ministers Court considered the grounds of appeal and the proceedings before the Adjudication Officer in reaching the decision.

7. The District Commissioners Court has no procedural method set down for it to follow like ordinary courts and the court observed basic principles of natural justice.

8. The Minister's order and/or decision is final and this Honourable Court should only interfere with a finding of the District Commissioner who fails to consider such grounds of appeal and is not an issue in this matter.

9. The Applicants application is bad in law and incompetent as it offends the provisions of section 12 of the Government Proceedings Act (Cap. 40). The Respondent herein is not competent to conduct the proceedings in his own right.

10. The Applicants are not entitled to the orders sought.

In addition, the Interested Party filed a replying affidavit simultaneously with his grounds of opposition. The replying affidavit touch upon more or less the same grounds that the Interested Party has raised in his grounds of opposition.

5) It is only the Exparte Applicants and the Interested Party who filed their submissions pursuant to the directions made on the 08th May, 2013 to dispose off the application by way of written submissions.

6) The submissions by the Counsel for the Exparte Applicants were that the District Commissioner Makueni who sat in Land Case No.421 of 1996 acted ultra vires in that he admitted an appeal from the determination of the Land Adjudication officer whilst there were no grounds of appeal as is required under Section 29(1)(a) and (b) of the Land Adjudication Act chapter 284 of the Laws of Kenya.

Section 29(1) (a) and (b) provides as follows:-

"(1) Any person aggrieved by the determination of an objection under Section 26 of this Act of this Act may within sixty days after the date of determination appeal against the determination to the Minister by

1. Delivering to the Minister an appeal in writing specifying the ground of appeal and

2. 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 order shall be final”

The Counsel went on to submit failure to file grounds of appeal prevented the Exparte Applicants to adequately prepare for hearing of the appeal and their right to fair hearing was infringed.

7) It was further submitted that the Minister proceeded to hear the appeal despite information that the Respondent in the said appeal, one Julius Mutiso Mulili, was deceased. That the Minister did not allow the deceased legal representatives time to obtain authority to deal with the appeal.

8) It was also submitted that the Minister failed to avail one Kativanga Muvaa Kang'ela who is the Interested Party herein for cross-examination. The Counsel went on to submit that the judgment of the Minister failed to consider and evaluate the evidence, proceedings of the objection court, Arbitration Committee and the District Magistrate's III courts findings.

9) Regarding the Interested Party's claim that the application is barred by the mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules, 2010 and that it offends the provisions of Section 9(3) of the Law Reform Act, the Exparte Applicants' Counsel submitted that at the delivery of the judgement, the District Commissioner misadvised the family members of the deceased respondent in the matter to wait until the land was registered so that they could proceed to the High Court to challenge the appeal before the Minister.

10) The Counsel further submitted that the common law position is that once leave is granted by a judge of competent jurisdiction, challenges to a bar on the ground of time can only be made by a formal application to set aside the order for leave. The Counsel cited the case of *Njuguna vs. Minister for Agriculture (2000) EA 184*. The Counsel further cited the case of *Henry Njagi vs. A. O. Okello District Commissioner Mbeere District & Another [2014] eKLR* where the Court of Appeal outlined the proper procedure for challenging leave that has already been granted as follows:-

“...the proper procedure for challenging leave already granted is to apply under the inherent jurisdiction of the court, to the judge who granted leave to set aside the orders made. In our view the alternative avenue would be to raise a Preliminary Objection in the hearing of the substantive motion or lodge an appeal before this court to challenge the validity of leave already granted.....”

11) The Counsel concluded by urging the court to grant the prayers sought.

12) On the other hand, the Counsel for the Interested Party submitted that the application for leave to apply for orders of judicial review was filed in court on 11th November, 2009 which was almost five years. The Counsel added that the Land Adjudication Act has specified the period of six months from the date when the orders sought to be quashed were made.

13) The Counsel went on to submit that there is no complaint that the Respondent's decision has an error on the face of the record nor is there a complaint that the Respondent acted in excess of his jurisdiction. The Counsel pointed out that the Exparte Applicants complain that the District Commissioner failed to invoke and apply rules of natural justice in that although he was informed of the death of Julius Mutiso Mulili and the indisposition of his widow, he failed to use his discretion to adjourn or allow reasonable opportunity and time to hear the widow who may have been seized of the facts of the case. The Counsel termed the ground as one that lacks merit since one Richard Kiema Mutiso who is one of the Exparte Applicants was heard by the District Commissioner. The Counsel further submitted that the Respondent heard the parties herein.

14) It was further submitted that the Exparte Applicants have not brought evidence to support the contention that the principles of natural justice were violated save for their statements in that regard.

15) Regarding the order of prohibition, the Counsel for the Interested Party submitted that the Exparte Applicants had not shown any reason why the said order should issue.

16) It was also submitted that the District Commissioner though sitting as a quasi-judicial officer on behalf of the Minister, he was not expected to follow the strict procedure that the courts follow in civil suits so long as he heard both parties and allowed each a chance to question the other. That the District Commissioner visited the land and having seen previous decisions on the subject matter determined the appeal. That he cannot be faulted for doing what the statute obligated him to do under Section 29 of the Land Adjudication Act.

17) The Counsel cited the case of *Republic vs. D.C Kitui & 3 others in Machakos High Court Civil Misc. Application No.126 of 2004* where the Court while rejecting the order of certiorari adopted the words of Law J.A in *Makege vs. Ngochi in C.A 25/1978(U.R)*.

“There is no such duty (under Section 12 of the Act) to follow the procedure laid down for hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure, his duty by Section 29 of the Act is to determine the Appeal and make such orders thereon as he thinks just.”

18) The Counsel concluded by urging the court to dismiss the application with costs to the Interested Party for being wholly misguided, incompetent and without merit.

19) From the foregoing my finding is as follows:-

20) Firstly, it is clear that the notice of motion application is solely brought under Section 9(2) and (3) of the Law Reform Act Chapter 26 of the Laws of Kenya as well as Order 53 Rule 3 of the Civil Procedure Rules. It seeks to quash the decision of the Minister that was delivered

on 23rd March, 2004. The application itself was filed on 02nd December, 2009 which is slightly over five years since the decision sought to be impugned was made. In so far as the application is not a constitution petition, it would offend the provisions of Section 9(2) of the Law Reform Act Cap 26 which requires that applications for an order of mandamus, prohibition or certiorari be made within six months or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

Section 9(2) provides as follows:-

“(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.”

21) The wording in Section 9(2) of the Law Reform Act is couched in mandatory terms. There is nothing on record to show that the Minister acted without jurisdiction in which case time would cease running as nullities are not covered by the six months' rules as was held in the case of **Republic vs. Judicial Commission of inquiry into the Goldenberg Affair and 3 others Exparte Mwalulu & 3 others [2004] eKLR** where it was held that;

“nullities are not covered by the six months' limitation both on the wording of the rules and as a matter of principle of the nature of nullities.”

22) Secondly, it should be noted that judicial review restricts itself to the process rather than the merits of a case. This was so held in the case of **Ransa Company Ltd vs. Manca Fancesco & 2 others [2015] eKLR** where the Court of Appeal expressed itself thus: -

“As we all appreciate a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than merits of the case. It is also very restrictive in the nature of remedies or relief available to the parties.”

23) In the application before me, the ex-parte applicants have sought to impugn the judgment of the Minister delivered on 23rd March, 2004 on the grounds that the Minister failed, omitted and/or neglected to consider issues that he ought to have considered or considered issues that he shouldn't have considered. In effect the Exparte Applicants are questioning the merits of the decision made by the Minister. That is not for this court to determine since the Minister in arriving at his decision was entitled to make mistakes or make a wrong or correct decision so long as he did not act with illegality, irrationality and impropriety of procedure. There is nothing to suggest that the Minister exceeded his jurisdiction. As was submitted by the Interested Party's Counsel, Richard Kiema Mutiso who is one of the Exparte Applicants herein was afforded a chance to present his case before the Minister. In a nutshell, my finding is that there is no reason that has been proffered as to why the prayers sought in the application by the Exparte Applicants should be allowed. The application lacks merit and I proceed to dismiss it with costs to the Interested Party. It is so orders.

Signed, Dated and Delivered at Makueni on this 11th Day of September, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

4th Exparte Applicant

No appearance for the 2nd Respondent

C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

11/09/2019.