



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. JUDICIAL REVIEW APPLICATION NO. 112 OF 2017

REPUBLICAPPLICANT

VERSUS

THE CABINET SECRETARY,

MINISTRY OF LANDS AND HOUSING.....1ST RESPONDENT

THE REGISTRAR OF LANDS,

MINISTRY OF LANDS AND HOUSING.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

JOSPHAT MWANZIA1ST INTERESTED PARTY

ANDREW MUTHOKA2ND INTERESTED PARTY

NDOLO MWANGANGI.....3RD INTERESTED PARTY

MUSANGO MUTHOKA

ALSO KNOWN AS PETER MUSANGO MWANGANGI...4TH INTERESTED PARTY

AND

MUSYIMI KILONZOEX-PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 6th December, 2017, the Ex-parte Applicant (*the Applicant*) has prayed for the following orders:

- a. That an order of certiorari do issue to bring into this court and quash the decision of the 1st Respondent contained in a Judgment issued on 28th June, 2017 in Land Adjudication Appeal No. 228 of 2007 over land parcel no 2330, 2331, Kangonde/Masinga Adjudication Section as well as Land Adjudication Appeal No. 77 of 2007 also issued on 28th June, 2017 over land parcel No. 2441 Masinga/Kangonde Adjudication Section.
- b. That an order of prohibition, do issue to prohibit the 2nd Respondent from registering the Interested Parties or the Administrator of the Estate of the late Mwangi Muthoka or any other person as lawful proprietors for land parcel 2441, 2330, 2331 Masinga/Kangonde Adjudication Section.
- c. That an order of mandamus do issue to compel the 2nd Respondent to register land parcels 2441, 2330 and 2331

Masinga/Kangonde Adjudication Section in the name of the Ex-parte Applicant herein.

d. That the costs of this Application be provided for.

2. In the Statutory Statement, the Applicant averred that he resides at Katuta village, Masinga Sub-location, Machakos county; that he has been litigating over the suit properties since 1973 with the late Mwanga Muthoka, whose sons are the Interested Parties and that the decision of the 1st Respondent is fraught with factual inconsistencies, extraneous considerations and gross misunderstanding of the law and procedure.
3. According to the Applicant, the impugned decision of the 1st Respondent was made in violation of an existing court Judgment delivered on 28th November, 1973 by the District Magistrate's Court at Yatta in Civil Case No. L.48 of 1973 which granted the suit properties to the Applicant.
4. The Applicant further averred that the 1st Respondent's impugned decision is based on selective recording of proceedings, incomprehensible record, inconsistent record of events and contradictory findings that cannot lead to the Judgment reached by the 1st Respondent.
5. In his Verifying Affidavit, the Applicant deponed that he acquired land at Katuta area of the then Masinga Division in 1946; that in 1952, the late Mwanga Muthoka (*the Interested Parties' father*) visited him as he searched for land to acquire; that the deceased managed to acquire land next to his and that in 1973, he was shocked when he was informed that the deceased was sub-dividing his land.
6. When the clan forcefully sub-divided the land, the Applicant deponed that on 23rd August, 1973, he sued the deceased in court; that on 28th November, 1973, the court found the actions of the clan to have been illegal and set out the boundary between him and the deceased and that it was not until 1994 that the area was declared an adjudication section.
7. It is the Applicant's case that the Land Adjudication Officer illegally curved out a portion of his land being parcel number 1522 and allocated it to the deceased; that he also curved out land known as 1523 which he gave to one Mbatha Ndolo.
8. It is the Applicant's case that in the year 2007, he lodged an Appeal to the Minister challenging the decision of the Land Adjudication Officer who had allocated parcel number 2441 to the deceased; that the Minister dismissed his Appeal because the Kithimani District Magistrate's court allegedly curved the said land and awarded it to the deceased.
9. The Applicant has deponed that in the year 2007, the deceased's family also lodged an Appeal with the Minister of Lands in respect of parcels of land number 2330, 2331 and 1525; that the Appeal was lodged ten (10) years after the decision that they sought to challenge and that the Minister proceeded to allow the Appeal by the deceased and awarded the deceased parcels number 2330 and 2331 while parcel number 1523 remained in his name.
10. It is the Applicant's disposition that the proceedings before the Minister were conducted without regard to procedure, the applicable law and contrary to the evidence that was tendered.
11. In their Replying Affidavit, the 1st - 4th Interested Parties deponed that it is their late father who accommodated the Applicant in Katuta in 1947 and that their late father invited the clan to determine a boundary dispute.
12. According to the Interested Parties, parcels numbers 2330 and 2331, Kangonde/Masinga was curved from parcel number 1522 by the demarcation officer; that the District Magistrate's Court, Yatta, apportioned parcel of land number 1522 to the deceased; that the Minister's decision was valid and that the Application lacks merit.
13. In a Further Affidavit, the Applicant deponed that the Magistrate's Court awarded the suit land to him; that the Magistrate's findings is the same finding that the Adjudication Committee arrived at and that parcel of land number 1522 was not existing as at the time of the decision of the Magistrate.
14. According to the Applicant, although Appeal numbers 77 of 2007 and 228 of 2007 to the Minister were filed, the 1st Respondent allowed parties that did not hold Letters of Administration of the Estate of the deceased to take part in the proceedings.
15. In his submissions, the Applicant's advocate submitted that the Applicant has demonstrated that the suit land was subject of a judicial determination by a competent court; that the 1973 decision settled the boundary dispute between the Applicant and the late Mwanga Muthoka and that from the map, parcel numbers 2441, 2331 and 2330 were hived out by the Respondents contrary to the decision of the court.
16. Counsel submitted that during the hearing of case number 22 of 1994 between the Ex-parte Applicant and a neighbour known as Mbatha Ndolo, the Objector willingly surrendered parcel number 2331 to the Ex-parte Applicant and that the said surrender was in acknowledgement of the decision of the Magistrate's court.
17. Counsel submitted that the decision of the 1st Respondent was irrational and borne out of regard to extraneous matters like reference to the marital relationship between the parties before him. Counsel submitted that the decision of the 1st Respondent is replete with reference to irrelevant matters.
18. The Interested Parties' advocate submitted that the Applicant has not demonstrated how the 1st Respondent acted contrary to his powers

and that the 1st Respondent's decision is final. Counsel submitted that the Applicant has not demonstrated how the process was illegal, irrational or any way unprocedural and that the court cannot deal with the merits of the decision of the 1st Respondent. Both the Applicant and the Interested Parties' advocate relied on numerous authorities which I have considered.

19. The traditional perimeters of Judicial Review are now well known. According to those perimeters, in Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on merits. A Judicial Review Court was only concerned with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain limited respects (*See Republic vs. National Employment Authority & 3 Others Ex-parte Middle West Consultancy Services Limited (2018) eKLR*).

20. This traditional perimeters of a Judicial Review Court were further reinstated by the Court of Appeal in the case of *Commissioner of Lands vs. Kunste Hotel Limited (1997) eKLR* where the court held as follows:

“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.”

21. This limitation of what a Judicial Review Court was empowered to do was borrowed heavily from the common law jurisdictions, specially the United Kingdom. In the case of *Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155, Lord Brightman* stated as follows:

“Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power... Judicial Review, as the words imply, is not an Appeal from a decision, but a review of the manner in which the decision was made.”

22. Although the traditional perimeters of a Judicial Review Court are still valid, the same have since been expanded. In the case of *Suchan Investment vs. The Ministry of National Heritage and Culture*, the Court of Appeal 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) (1) 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.”

23. The provisions of Section 7(2) (1) of the Fair Administrative Action Act have given a Judicial Review Court the mandate of reviewing the decision of an inferior body by looking at not only the traditional, perimeters, but also at the proportionality of the impugned decision, which entails consideration of the merits of the challenged decision.

24. The Applicant has challenged the decision of the 1st Respondent issued on 28th June, 2017 in Appeal Case No. 228 of 2007 and 77 of 2007. The decision being challenged by the Applicant was in respect of parcels of land known as Kangonde/Masinga 2330, 2331 and 2441.

25. The main ground upon which the decision of the 1st Respondent is being challenged is that the decision was made in clear violation of an existing Judgment delivered on 28th November, 1973 by the District Magistrate's Court at Yatta in Civil Case Number L.48 of 1973 in which, it was argued, granted the suit land to the Applicant.

26. The Applicant annexed on his Affidavit copies of the proceedings in the District Magistrate's Court at Yatta, Civil Case No. L.48/1973. In that suit, the Applicant and his son sued the Interested Parties' father (*deceased*). In the proceedings, the Applicant informed the court that although he had invited the deceased to be his neighbour in 1952, the deceased had trespassed on his land. The Applicant sought for an order of eviction of the deceased from his portion of land.

27. The Judgment of the court shows that the learned Magistrate did visit the disputed suit land, whereafter he held as follows:

“I have called on that land and I was shown all the land now in dispute. I was also shown the land where the Defendant is living. I found that there is this river they call Kwa-Katuta stream, which divides the Plaintiffs and Defendant (sic)... I have considered this case carefully and I found that clan elders had no right to divide it. This is simply because the Plaintiff came there in 1943 while Defendant followed him in 1961. He never raised any claim across the stream.”

28. The court went further and drew a sketch map showing the position of the Applicant's land, the Katuta stream and the deceased's land.

29. After the said decision, it would appear that the two neighbours lived peacefully until when the area was declared an adjudication section in the 1990's. According to the Applicant, he lodged an objection as against one of his neighbours (*not the deceased*), Mbatha Ndolo, before the Land Adjudication Committee in Objection Case No. 22 of 1994. The proceedings show that the neighbour, Mbatha Ndolo, conceded to the Applicant's claim and had part of parcel number 1523 which he was claiming go to the Applicant. In its findings, the Committee stated as follows:

“The two parties have come together and the Defendant has said he would give the Plaintiff his portion. The portion is across Kwa Katuta Stream.”

30. The position of Plot No. 1523 was shown in the diagram drawn by the Committee. The Committee also showed the position of the stream; Kwa Katuta Primary school and the Applicant's land. The Committee further stated that the land that was to be merged with parcel number 1523 should be given a new number, which was accorded number 2331 on 3rd November, 1994.

31. In 1998, the Interested Parties' father (*deceased*) filed an Objection in respect of plot number 1525. According to the Applicant, this was a portion of the same land that the District Magistrate had dealt with in 1973. The issue was determined in favour of the Applicant.

32. The deceased filed another suit in 2007 before the Land Adjudication Committee at Masinga claiming ownership of several parcels of land to wit, 2682, 1525, 2330 and 2331. The dispute in respect of parcels number 2330, 2331 and 1525 was escalated to the Minister (*1st Respondent*) by the Interested Parties in Appeal Case No. 28 of 2007. On the other hand, the Applicant lodged an Appeal before the *1st Respondent* in respect to parcel No. 2441 in Appeal No. 77 of 2007.

33. I have perused the proceedings in the Appeal to the Minister Case No. 77 of 2007, parcel number 2441, Masinga/Kangonde Adjudication Section. In the said case, the Applicant herein referred to the 1973 decision of the Magistrate. The deceased sons on the other hand gave the same narration that was given to the District Magistrate in 1973, that it is their father who acquired the disputed land in 1943.

34. While dismissing the Applicant's Appeal, the *1st Respondent* stated as follows:

“The Kithimani District Magistrate's Court in Case No. L.48/73 visited the land and delivered a Ruling dated 23rd July, 1973. In the Ruling, the Magistrate observed that the Respondent (deceased) in this case did not ask anything on the other side of Katuta stream except his homestead and the garden which they curved. The homestead and the garden is where one of the Respondent's sons is living. This land is the subject of this case.”

35. The decision in Civil Case No. L.48/73 was a relevant factor in the determination of the dispute that was before the *1st Respondent*. Indeed, all the issues that were raised before the *1st Respondent* were raised by the parties during the hearing of Civil Case No. L.48 of 1973.

36. The District Magistrate in Civil Case No. L. 48/73 having visited the suit land, drew a sketch map and indicated the location of the Applicant's land viz-a-viz the deceased's land. Indeed, the learned Magistrate found that all the land on the right side of Katuta stream belonged to the Applicant.

37. That being so, the issue of the position of the deceased's house was not a relevant factor during the hearing of the two Appeals. While considering the interests in customary land between the Applicant and the Interested Parties' father, the decision and sketch map of the District Magistrate should have been the only guidance that was available to the *1st Respondent* while making his determination.

38. The error in Appeal Number 228 of 2007 filed by the deceased is even more obvious. After the decision of the District Magistrate in 1973, parcel number 1523 was merged with another land to become parcel number 2331. That is the land that was decreed to belong to the Applicant when he sued Mbatha Ndolo in Objection Case Number 22 of 1994.

39. That being so, the *1st Respondent* erred to hold that Mbatha Ndolo was coerced by the Committee to surrender parcel number 2331 to the Applicant, and that the said land belonged to the deceased.

40. The fact that the *1st Respondent* did not refer to the decision of the District Magistrate who clearly demarcated the land belonging to the Applicant and the deceased, makes his decision irrational, illegal and not proportional to the interests of the parties herein. The *1st Respondent* was under an obligation to align his decision with the decision of the learned Magistrate, which the deceased never appealed against.

41. In the case of *Suchan Investment Limited (supra)* 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.

42. Based on the above position of the law, this court will, which it hereby does, quash the decision of the *1st Respondent* and remit the two Appeals to the Cabinet Secretary in charge of Lands, to appoint another Deputy County Commissioner, other than the one who heard the two Appeals, to re-hear the Appeals Number 77 of 2007 and 228 of 2007.

43. For those reasons, this court makes the following orders:

a. That an order of certiorari do issue to bring into this court and quash the decision of the 1st Respondent contained in a Judgment issued on 28th June, 2017 in Land Adjudication Appeal No. 228 of 2007 over land parcel no 2330, 2331, Kangonde/Masinga Adjudication Section as well as Land Adjudication Appeal No. 77 of 2007 also issued on 28th June, 2017 over land parcel No. 2441 Masinga/Kangonde Adjudication Section.

b. That an order of prohibition, do issue to prohibit the 2nd Respondent from registering the Interested Parties or the Administrator of the Estate of the late Mwanga Muthoka or any other person as lawful proprietors for land parcel 2441, 2330, 2331 Masinga/Kangonde Adjudication Section.

c. The Cabinet Secretary in charge of Lands to appoint another Deputy County Commissioner to hear and determine Land Adjudication Appeal No. 228 of 2007 in respect of parcels of land number 2330, 2331 Kangonde/Masinga Adjudication Section and Land Adjudication Appeal No. 77 of 2007 in respect of parcel of land number 2441 Masinga/Kangonde Adjudication Section.

d. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE