REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC JUDICIAL REVIEW CASE NO. 9 OF 2018

(Formerly Machakos Misc. Civil Appl. No. 314 of 2007)

BETWEEN

REPUBLIC.....APPLICANT

AND

THE DISTRICT COMMISSIONER

MAKUENI DISTRICT.....RESPONDENT

RONALD MUSAU NGAO

PHILIP MBATHA NGAO

ESTATE OF NZUNA NGAO (DECEASED).....INTERESTED PARTY

EXPARTE ALFONCE MULI KULEMBA

(Legal representative estate of JAMES KULEMBA KITHAMBI)

JUDGEMENT

1. By his Notice of Motion application expressed to be brought under Order LIII Rule 3(1) Order XXIII Rules 2, 3 & 4 of the Civil Procedure Rules, The Law Reform Act Chapter 26 of the Laws of Kenya, section 29 of the Land Adjudication Act and all other enabling provisions of the law pursuant to leave granted on 17th January, 2018, the Ex-parte Applicant prays for: -

> **(a) THAT an order of certiorari do issue to remove into the High Court and quash the Judgment and order made by the District Commissioner, Makueni District in Ministers appeal case No.212 of 1988 between Nzuna Ngao (deceased) –vs- James Kulemba Kithambi (deceased) on the 19th July, 2007.**
>
> **(b) THAT an order of prohibition directed at the District Commissioner, Makueni District do issue prohibiting the District Commissioner from acting on the said Judgement and the orders made to the chief Kavuthu Location, Mbitini Division and the District Surveyor Makueni District directing them to remove the Applicant from a portion of plot No.96 and sub-divide the said plot No.96 Mutyambua adjudication area.**
>
> **(c) THAT cost of this application be awarded to the Applicant in any event.**

2. The application is dated 23rd January, 2008 and was filed in court on 25th January, 2008. It is accompanied by a statutory statement and a verifying affidavit both dated 17th December, 2007 and filed in court on 18th December, 2007.

3. The Interested Parties have opposed the application through the replying affidavit of Ronald Musau Nzuna, the 1st Interested Party herein, sworn at Machakos on 15th July, 2008 and filed in court on 17th July, 2008.

4. The application is made on the grounds that: -

> **(i) THAT the judgement and orders made by the District Commissioner were made in excess of jurisdiction contrary to the**

provisions of the law.

(ii) THAT the proceedings, the judgement and the orders made by the District Commissioner were null and void ab initio as the parties to the said appeal to the Minister were already deceased by the time the proceedings were conducted and the judgement and the orders made.

(iii) THAT the proceedings were conducted by parties who were neither the legal representative of the deceased parties nor substituted to act on their behalf.

(iv) THAT there were no legal representatives of the estate of Nzuna Ngao (the appellant) and James Kulemba Kithambi (respondent) when the proceedings were conducted and judgement passed and the said proceedings were conducted by parties who had no locus standi for want of letters of administration as required by the law.

(v) THAT District Commissioner acted in excess of jurisdiction by taking fresh evidence from people who were not parties in the suit while the matter before him was an appeal.

(vi) THAT the deceased Respondent (James Kulemba Kithambi) was the registered owner of the suit premises plot No.96 Mutyambua Adjudication area and the District Commissioner erroneously and unlawfully exceeded his powers by ordering the removal of the Applicant and the sub-division of the said premises to other parties not party to the suit.

The same grounds have been repeated in the statutory notice.

5. The 1st Interested Party has deposed in paragraphs 12, 13, 14, 15, 18 and 19 of his replying affidavit that before the Minister heard the appeal, he asked each of the family members present if they were comfortable with the appeal being heard although the Appellant and the Respondent were already deceased and they answered in the affirmative and thus the Minister proceeded with the appeal, that indeed the current Applicant was present when the appeal was heard by the Minister and his brother, Edward Kisaulo Kulemba, gave his evidence on his own behalf as a family member and he never raised the issue of legal representation of his father's estate and he is estopped from raising it now that the decision was not favourable to their family, that the decision of the Minister in Appeal number 212 is factually sound as it confirmed the land boundaries as marked by the clan elders way back in 1974 and it cannot be faulted as it brings to an end this long and protracted land dispute, that the Applicant himself lacks the locus standi to challenge the decision of the Minister as he was not a party in the appeal, that the temporary grant of letters of administration marked as annexture AMK4 as issued was limited for the purposes of filing and prosecution of Makindu civil suit number 221 of 2007 and not this suit and the present Applicant is, therefore, a mere busybody in so far as those proceedings are concerned and that the Applicant is only aggrieved by the decision per se even though the decision making process which is the concern of the judicial review has not been faulted. That therefore the decision of the Minister in appeal number 212 of 1988 should not be interfered with in any manner.

6. The application was disposed off by way of written submissions.

7. The Ex-parte Applicant's Counsel submitted that when the Minister's appeal was filed, both parties were still alive but died before the hearing and determination of the said appeal. The Counsel pointed that this fact is confirmed in paragraph 12 of the replying affidavit.

8. The Counsel went on to submit that the main grounds against the Minister's proceedings are that the judgement and/or decision were conducted by parties who had no locus standi as both parties to the appeal were deceased. That none of the deceased parties had been substituted by their legal representatives. That those who conducted the proceedings did not have the requisite grant of letters of administration and were therefore not the legal representatives of the estates of the deceased parties and as such the proceedings before the Minister were a nullity ab initio. In support of his submissions, the Counsel cited the case of **James Akelo vs. Raphael Onyango in Kisumu Court of Appeal No.58 of 1984** where the Court of Appeal upheld a preliminary objection where substitution of a deceased party had not been done.

9. The Counsel further submitted that the Minister exceeded his power by taking fresh evidence from parties who were not the original parties themselves and proceeded to make a decision based on fresh evidence thus failing to recognize that the matter before him was an appeal and not a fresh case. The Counsel went on to submit that the Minister acted ultra vires by ordering the eviction of the Respondent and the sub division of the land while the deceased Respondent was the registered owner.

10. On the other hand, the Counsel for the Interested Parties submitted that the Ex-parte Applicant lacks locus standi to challenge the decision of the Minister as he never participated in the appeal and as such, the application is filed by a busybody and should be struck out. The Counsel pointed out that those who were present during the proceedings before the Minister were the deceased's Respondent two wives and his two sons. In support of his submissions, the Counsel cited the case of **Northern Construction Company Ltd vs. AG & 3 others [2008] KLR 328** where the Court of Appeal while dismissing an application for a party that had sought to be enjoined in a judicial review matter held that: -

> *"…judicial review is only concerned with decision making process and not with the merits of a decision."*

11. It was also submitted that there is great variance on the dates of the decision the Applicant is challenging in that whereas the Applicant was granted leave to apply for orders of certiorari to challenge the decision made on 19th October, 2007, a cursory glance of the Minister's proceedings clearly shows that the date in question is when the proceedings and the decision were certified as true copy of the original.

12. As for the letters of administration issued to the Applicant in Makindu SRMCC Succession Cause No.8 of 2007, the Counsel pointed out that they were limited to filing a civil suit for an injunction involving the deceased's plot No.98 Mutyambua Adjudication against Philip

Nzuna and Ronald Nzuna who were alleged to have trespassed on the same.

13. Regarding the ground that at the time when the appeal was heard the Appellant and the Respondent were deceased, the Counsel submitted that appeals under the Land Adjudication Act do not abate on the death of the principal litigants as the survivors continue with the dispute till the same is resolved, the reason being that customary claims to land rights are inter-generational. The Counsel cited **Section 13(5) of the Land Adjudication Act Chapter 284 of the Laws of Kenya** which provides that: -

> *"where several persons claim separately as successors of a deceased person and one or more of those persons attends, his attendance shall be taken to be the attendance of all the successors unless the Adjudication Officer otherwise directs."*

14. It was further submitted that Section 29(1) of the Act gives the Minister the jurisdiction to hear appeals and it does not define the manner in which the appeal is to be heard and determined. That it does not strictly forbid the Minister from hearing oral evidence.

15. The above section provides as follows: -

> *"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—*
>
> *(a) ……*
>
> *(b) ……*
>
> *and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."*

16. Arising from the above, the Counsel submitted that a look at the Minister's decision that has been challenged will reveal that the Minister did not discriminate any side. That he heard evidence from families of both Appellant and the Respondent.

17. The Counsel added that resolution of land disputes under the Land Adjudication Act does not strictly follow the Civil Procedure Act. That nowhere in the Act is it stated that a deceased litigant has to be formally substituted by a legal representative before hearing can proceed as this will defeat the very essence of the Act and cause unnecessary delay in resolving the disputes.

18. Regarding the issue Ex-parte Applicant faulting the Minister for taking fresh evidence on appeal, the Counsel pointed out that the same was taken from both sides and no party was shut out from calling evidence. That the Land Adjudication Act does not preclude the Minister from taking oral evidence from the parties and as such, he died not act ultra vires.

19. The Counsel was of the view that the Applicant who is aggrieved by the decision of the Minister has failed to pinpoint any fault with the decision making process which is the concern of judicial review. In support of his submissions, the Counsel cited the case of **Timotheo Makenge vs. Manunga Ngochi [1976 -80] KLR 1136** where the Court of Appeal stated thus;

> *"… the Minister heard the appeal. He went to Embu. He enlisted the aid of a number of assessors. He heard the evidence of the parties and witnesses. He went on to the land itself, and the parties pointed out on the ground the boundaries claimed by their respective clans. The Minister decided the appeal in favour of the Appellant and his clan."*

In the above mentioned matter the Court of Appeal held inter alia: -

> *"(ii) although the Minister's decision affected persons who had not been heard on the appeal, their interest on the land had been given to them by the Respondent and were dependent on his rights and interest.*
>
> *(iii) The Minister in deciding appeals under the Land Adjudication Act, was not bound to follow the procedure laid down for hearing of civil suits and was justified (whilst hearing the previous decisions in mind) in giving effect to them.*
>
> *(iv) That the Appeal before the Minister was properly viewed as a dispute between the representatives of the two clans and therefore, failure to afford a hearing to individual clan members in relation to the matter affecting their rights did not constitute a breach of the principles of natural justice.*
>
> *(v) The Minister's decision was final and there was no error on the face of the record, the court should not interfere with his decision."*

The Counsel urged the Court to be guided by the authority in question since the issues raised are similar.

20. In his further submissions the Counsel for the Ex-parte Applicant submitted that the Ex-parte Applicant as the legal representative of the deceased is the legal party with locus standi to bring these judicial review proceedings. The Counsel reiterated that the Ex-parte Applicant had exhibited a limited grant which he had obtained in respect of the estate of his deceased father.

21. As for the variance or discrepancies in the dates, the Counsel termed them as procedural technicalities that are not fatal to the substantive motion and I would agree with him on this issue.

22. The Counsel submitted that the Minister's decision was purely based on fresh evidence that was given by the parties before him and he failed to have cognizance of the deceased parties before the arbitration board.

23. Having read the Notice of Motion application, the replying affidavit and the submissions filed by the Counsel on record, I am of the view that there are only three issues for determination namely;

1) Whether or not the parties that appeared before the Minister were given a fair hearing.

2) Whether or not the Ex-parte Applicant has locus standi to file the instant proceedings before this court.

3) Whether or not the Minister acted in excess of jurisdiction.

24. In the case of **Ransa Company Ltd. vs. Manca Francesco & 2 others [2015] eKLR** 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 merit of the case. It is also restrictive in the nature of the remedies available to the parties."*

25. There is no doubt that in the Minister's appeal case number 212 of 1988, the deceased Appellant and the deceased Respondent were represented by their respective family members none of whom raised any objection to the hearing of the appeal by the Minister on the 14th June, 2007 and 11th July, 2007. All of them were given a chance to argue the appeal and to present their evidence before the Minister. The Ex-parte Applicant herein was represented by members of his family. He cannot be heard to say that he was not given a fair treatment by the Minister as his claim was dependent on the success of the family members who represented him. None of them have complained of having been denied a hearing by the Minister.

26. On the issue of whether or not the Ex-parte Applicant has locus standi to file these instant proceedings, it is clear that he bases his claim by virtue of the temporary grant of letters of administration annexed as AMK-4 to his verifying affidavit. As was correctly submitted by the Interested Parties' Counsel, the temporary grant of the letters of administration were limited to filing of a civil suit for an injunction. The Ex-parte Applicant cannot purport to use the same letters of administration to file these judicial review proceedings. Suffice it to say, he has no locus standi and I would agree with the Counsel for the Interested Parties that he is simply a busybody. As was observed elsewhere in my judgement, the Ex-parte Applicant's rights were dependent on the rights of those who represented the family in the Minister's appeal. In any case, I do agree with the Counsel for the Interested Party that customary claims under the Land Adjudication Act chapter 284 are inter-generational such that successors of a deceased once they attend proceedings under the Act, their attendance is deemed as the attendance of the successors unless the Adjudication Officer otherwise directs as provided under section 13(5) of the Act. Granted, the Minister while sitting in appeal is not an Adjudication Officer but as was correctly pointed out by the Counsel for the Interested Parties, section 29(1) of the Act does not define the manner in which the appeal is to be heard. It is clear that the Minister heard both sides that were before him on the two days that the Minister sat in appeal.

27. As to whether the Minister acted in excess of jurisdiction while hearing the appeal that was before him, the issues presented in these judicial review proceedings are similar to the ones in the case of **Timotheo Makenge vs. Manunga Ngochi [976-80] KLR 1136** referred to me by the Counsel for the Interested Parties. The Minister's decision in the appeal challenged before the Court of Appeal heard fresh evidence and the Court held that he (Minister) was not bound to follow the procedure laid down for hearing civil suits notwithstanding the fact that not all those who were affected by the Minister's Appeal were heard, that was found not to constitute a breach of the principles of natural justice.

28. I am bound by the authority cited and in my judgement, I hold that there is no evidence to show that the Minister acted in excess of jurisdiction or that those who appeared before him were not accorded fair treatment. Suffice it to say, there was no breach of natural justice.

29. The upshot of the foregoing is that it seems to me that the Ex-parte Applicants herein are challenging the merits of the appeal number 212 of 1988 before the Minister instead of challenging the process. The motion by the Ex-parte Applicants must therefore fail. In the circumstances, I hereby proceed to dismiss the notice of Motion Application dated 23rd January, 2005 with costs to the Interested Parties.

Signed, dated and delivered at Makueni via email this 29th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi