REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

JUDICIAL REVIEW CASE NO. 15 OF 2018

IN THE MATTER OF THE DECISION BY THE DEPUTY COUNTY COMMISSIONER MAKINDU SUB COUNTY WITHIN MAKUENI COUNTY

AND

IN THE MATTER OF APPEAL NO. 216 OF 1998 TO THE MINISTER OF LANDS

AND

IN THE MATTER OF THE LAND ADJUDICATION PLOTS MAKINDU/KISINGO 908 AND 1827

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

DANSON KIOKO KIVUVA ..... 1ST RESPONDENT

AND

DEPUTY COUNTY COMMISSIONER,

MAKINDU SUB-COUNTY..... 2ND RESPONDENT

EX-PARTE APPLICANTS:

BENJAMIN MAWEU NDIVO, SARAH MUTHIKE NDIVO, FLORENCE WAYUA MATUA, JONATHAN MAKAU NDIVO, BERNARD MUTUKU NDIVO, DANIEL MWATU NDIVO, DAMARIS KANINI NDIVO & JOSEPH KING'OO NDIVO

JUDGEMENT

1. The application for determination is dated 20th December, 2018 and is brought under Order 53 Rules 3 & 4 of the Civil Procedure Rules 9 (CPR), Sections 8 & 9 of the Law Reform Act, Cap 26 and all other enabling provisions of the Law. It seeks;

a) AN ORDER OF CERTIORARI removing to this Honorable Court for the purposes of being quashed, a judgment/decision made by Deputy County Commissioner, Makindu Sub County within Makueni County dated 19th January, 2017 in Appeal made to the Minister of Lands Case No. 216 of 1998 on suit premises No. Makindu/Kisingo 1827 and 908.

b) AN ORDER OF MANDAMUS directed to Deputy Land Registrar Makueni County to compel him/her to cancel the title deed of premise suit No. Makindu/Kisingo 1827 to extend/portion not part of it upon the decision being quashed and to do all those legal processes/acts over the suit properties titles herein.

c) A declaration that the boundary between the parties herein is that affixed by the Court in L.126 of 1974 between Joel Ndivo and Kivuva Nzikali.

d) An order for costs.

2. The application is supported by the statement, supporting affidavit and verifying affidavit of Benjamin Maweu Ndivo dated 6th December, 2018 as well as a supplementary affidavit sworn by him on 13th May, 2019. He has deposed that he has authority to swear the affidavits on behalf of his co-Applicants who are his family members and all who belong to the *Mbaa Mulea Itema clan*.

3. The dispute revolves around a parcel of land originally known as Makindu/Kisingo 908 and the Applicant has deposed that his father, Joel Ndivo, was the first to settle on the land and became the registered proprietor after which he *(Joel Ndivo)* invited Kivuva Nzikali *(deceased)* and gave him a portion *(No 1827)*. The 1st Respondent is the legal representative of Kivuva Nzikali.

4. He has deposed that in 1974, the Asii clan subdivided plot 908 forcefully and being aggrieved, his father filed case L.126 of 1974 at Kilungu Law Courts whereupon the magistrate visited the land, fixed the boundary between the parties and drew a well elaborate sketch map. The judgment and sketch map are exhibited as **BNM-3** & **4** respectively.

5. The case was also heard by the Land Adjudication Committee and Arbitration Board and the decisions are exhibited as **BMN-5**. It proceeded all the way to an appeal to the Minister filed by Jonathan Ndivo, a son of Joel Ndivo. The appeal was dismissed on 19 th January, 2017 and parcel 1827 awarded to Kivuva Nzikali.

6. The Applicant has deposed that the appeal to the Minister was dismissed without notice to him despite his effort to get information about it. That he only learnt about the dismissal during the hearing of Makindu PMCC No. 52 of 2013 (Makindu case). He deposed that prior to hearing of the Makindu case; the 1st Respondent disclosed a further list of documents but never attached the dismissal by the Minister. The further list of documents is exhibited as **BMN 1(a)** and **BMN 1(b)** is the decision by the Minister. **BMN 2** is a notice of the decision dated 15th June, 2017 and addressed to the Applicant's brother, Jonathan Ndivo.

7. He has deposed that while their appeal to the Minister was still pending, the Respondents jointly and severally caused a title deed to be issued to Kivuva Nzikali unprocedurally. The title deed is exhibited as **BMN-7.** It was also his deposition that some of the Applicants have no access to their lands and will forever trespass into parcel 1827, a situation which necessitated the Makindu case where orders of eviction and permanent injunction were sought.

8. He has deposed that upon discovery of the issuance of title deed to plot 1827, he wrote a letter to the Adjudication Officer at Kibwezi (**BMN 9)** who in turn wrote to the Land Registrar at Makueni asking for cancellation of the title deed. **BNM 10(a)** is the letter to the Registrar and **BMN 10(b)** is a list of parcels which had appeals.

9. He also deposed that allowing the decision of the Minister to stand will cause them to lose about 30 acres of land which they have occupied since 1953. Photographs of their homestead were marked **BMN-1** and the plaint from the Makindu case as **BMN-2**.

10. The application is opposed through two replying affidavits sworn by Danson Kioko Kivuva on 29th March, 2019 and 27th May, 2019. There is also a replying affidavit by James G. Kamau sworn on 4th January, 2020.

11. Danson Kioko Kivuva has deposed that the application is bad in law as it is based on an order of leave obtained fraudulently in light of an application filed in the Makindu case and exhibited as **DKK-1. DKK-2** is a grant of letters of administration showing that he is the legal representative of his father's estate.

12. He has deposed about the history of the dispute as follows;

a) His father, Kivuva Nzikali, Joel Ndivo and others acquired parcel 908 from which parcel 1827 and others were extracted. In 1974, Kivuva and Joel invited Asii clan to share the unsurveyed land that they and others had acquired in 1953. The clan shared the land and marked the boundary as per the committee findings **(DKK-3)**. Aggrieved by the clan decision, Joel sued Kivuva at Kilungu Law Courts and upon hearing the parties, the court proceeded to mark the boundary between the two men. Kivuva was given a small land and he appealed to the Resident Magistrate's Court at Machakos *vide* RMCC No. 125/1974. Joel cross appealed *vide* Appeal No. 126/1974.

b) The two appeals were consolidated and the Resident Magistrate referred the dispute for re trial at Kilungu Court but before it could be heard, an Act of parliament transferred the court's jurisdiction to handle land matters to the Tribunals under chairmanship of a District Officer. While the case was still awaiting hearing, Kisingo in Makindu location was declared a land adjudication section under the Land Adjudication Act chapter 284 of the Laws of Kenya. The case was discontinued and referred to Kisingo Adjudication Committee which heard the dispute and adopted the boundary marked by the clan **(DKK-4).**

c) Joel's representative was aggrieved and proceeded to file an objection against the Adjudication Register. The District Land Adjudication Officer heard the objection which comprised determinations of the Arbitration Board and adjusted the decision of the board in favour of the Applicants as per his findings and survey map marked as **DKK-6.**

d) Joel's representative appealed against the decision to the Minister and the 1st Respondent learnt about it when he was summoned for hearing in 2017.

e) After finalization of the objections, the District Land Adjudication Officer held a public meeting and declared that the Adjudication Register was finalized. After corrections and adjustments by the Surveyor, the file was forwarded to the Director of Land Adjudication to issue Title Deeds.

f) In 2006, Joel's family started trespassing into their land (Makindu/Kisongo/1827) and upon conducting a search at the Makueni

registry, he confirmed that his father was the registered proprietor and there were no restrictions against the title. The search is exhibited as **DKK-7**. The Registrar informed him that there was no appeal against the plot otherwise it would have been indicated in the finalized adjudication register forwarded to him by the Chief Registrar. The title deed is exhibited as **DKK-8**.

g) He filed a suit to evict the family members of Joel and obtained an injunction order which is exhibited as **DKK-9**. He was however surprised to be served with summons for hearing of the appeal and has deposed that he was never served with a copy of the memorandum of appeal either by the Appellant or by the Minister. A copy of the summons is exhibited as **DKK-10.**

13. Further, he deposed that the decision of the Minister was delivered in the presence of the Applicants and that he was present when the 1st Applicant was given a copy of the ruling by the Chief. It is also his deposition that the Surveyor implemented the decision in the presence of all the Applicants when he visited parcels 908, 2030 and 1827 to adjust the boundary and create access roads.

14. He has deposed that the entire land of Joel was shared by his beneficiaries and each is in possession of his/her share. He deposed that the attached pictures were taken from their plots and not 1827.

15. He also deposed that the Applicants have not manifested any breach of customary or written law committed by the clan, committee, arbitration board, land adjudication and finally, the Minister. He also deposed that the right procedure was followed in obtaining the title deed and that no evidence of fraud was availed or proved.

16. James G. Kamau deposed that he is the Deputy County Commissioner (the 2nd Respondent), Makindu Sub County and is well conversant with the issues raised. He went on to depose that Jonathan Ndivo, the Appellant and Danson Kioko Kivuva, the Respondent were present during the hearing of the appeal and they testified. A copy of the proceedings and decision are exhibited as **JGK-1.**

17. He deposed that the Applicants did not seek leave to commence judicial review proceedings within the stipulated six months. He has exhibited a notice marked **JGK-2** to show that the Applicants were notified of the Minister's verdict. It is also his deposition that the Applicants are challenging the merits of the decision instead of the decision making process.

18. In rejoinder, the Applicant deposed that their customary laws do not permit a different clan to invade another clan's land and sub-divide it forcefully. A certificate of registration of their clan is marked **BMN-1**. **BMN-2** is a chart flow of their generation.

19. He deposed that the decision of the Minister is irrational, unjust, unrealistic, oppressive and not within the statutory demands of land laws.

20. The Applicant responded to the supplementary affidavit and deposed that it did not raise any issue which had not been handled by the previous fora. He also deposed that the affidavit did not provide evidence of excess of jurisdiction by either of the fora.

21. He deposed that the only complaint raised by the Applicants is about a boundary put by Joel when he gave Kivuva a piece of land in 1952 yet they do not know where the boundary between parcel 908 and 1827 was put and the size of the land.

22. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

23. The ex-parte Applicants have reproduced the contents of the statement and affidavits which they filed in support of the substantive motion. They maintain that the Minister affirmed the boundaries fixed by the Asii clan but the factual boundary that is observed diligently by all the parties is the one fixed by the Kilungu Court. They submitted that Joel Ndivo did not participate in the decision of the Asii clan hence it is *ultra vires*. They submitted that the clan's boundary runs vertically and that of Kilungu Court runs horizontally. They submitted that in exercise of his statutory power, the Minister has a duty to observe the fundamental rules of natural justice and reasonableness.

24. They submitted that the Minister controverted their legitimate expectation that they would get a fair hearing and would not be subjected to an unfair decision which was arrived at without adherence to the due process of the law. They relied *inter alia* on **Republic –vs- Kenya Revenue Authority & Anor Ex-Parte Tradewise Agencies (2013) eKLR** where the Court expressed itself as follows;

> *"In order to succeed in an application for Judicial Review the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety…"*

25. They further submitted that the right to property is constitutionally protected and a registered proprietor's title to land cannot be revoked without the proprietor being afforded an opportunity to be heard.

26. The 1st Respondent submitted that judicial review remedies are discretionary and that even if the Applicants show that the Minister acted unlawfully, the Court may still deny him the order of certiorari on the ground that no serious injustice has been suffered.

27. He submitted that the Minister determined the case pursuant to jurisdiction conferred to him under Section 29(1) of the Land Adjudication Act. He also submitted that the Applicants were accorded the opportunity to present their case before the Committee, Arbitration Board and in the Appeal.

28. He submitted that after the death of Joel Ndivo, his share out of the original parcel 908 was shared by his beneficiaries but they still maintained that the boundary between parcels 908 an 1827 was not acceptable. He submitted that Joel's son, Benjamin Ndivo, objected to the register after succession proceedings of parcel 908. He contends that the dispute came to an end with the administration of the estate of Joel

Ndivo and the appeal heard by the Minister was defective and bad in law.

29. He went on to submit that the Applicants are not competent to apply for certiorari as the dispute of their father and Kivuva Nzikali and others abated after the death of their father and administration of their father's estate which contains no error on the face of the record. It was also his submission that the rules of natural justice were observed.

30. The 2nd Respondent submitted that the grounds advanced by the Applicants are not merited in an application for judicial review because they are asking the Court to go into the merits of the case and hold otherwise. He submitted that judicial review is concerned with the decision making process and not the merits of the decision. He contends that the Applicants have not demonstrated how the Minister's decision was arbitrary, selective, biased, unprocedural, secretive, ill motivated, aimed at defeating justice and not in their interest.

31. He submitted that the Applicant did not raise the issue of the title deed during the hearing of the appeal hence it is an afterthought.

32. He submitted that failure to notify a party about a decision does not render it null and void and is not a ground to quash it.

33. He submitted that a Judicial Review Court does not have jurisdiction to order the cancellation of a title deed and relies on **Republic –vs- Chief Registrar & 3 Others (2014) eKLR** where the Court held as follows;

> *"58. The efficacy and scope of an order of mandamus and prohibition was set out by the Court of Appeal in the case of National Examination Council –vs- Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal No. 266 of 1996. The Court quoted with approval Halsbury Laws of England, 4th Edn, Vol.1 at pg 111 from paragraph 89 as follows;*
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> *"The order of mandamus is of a most extensive remedial nature and is in form of a command issuing from the High Court of justice directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his office and is in the nature of a public duty…. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of a party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way…if the complaint is that the duty has been wrongly performed i.e. that the duty has not been performed according to law, then mandamus is a wrong remedy to apply because, like an order of prohibition, an order of mandamus cannot quash what has already been done…"*

34. He also submitted that declarations do not lie in judicial review and relies on the case of **Mombasa Maize Millers Ltd –vs- Commissioner of Lands (2007) eKLR** where the Court held that;

> *"I have given serious consideration to these rival submissions and the pleadings as a whole. To start with, I agree with Counsel for the first and second interested parties that declarations and general damages do not fall within the purview of our judicial review jurisdiction. Unlike in England where the relevant statutes have been amended to accommodate such claims, as is clear from section 8(2) of the Law Reform Act, our judicial review jurisdiction is still limited to the law that was obtaining in England under the Administration of Justice (Miscellaneous Provisions) Act of 1938. That section reads as follows;*
>
> *"In any case in which the High Court in England is by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act of 1938 of the United Kingdom, empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order"*
>
> *Section 7 of the English Administration of Justice (Miscellaneous Provisions) Act of 1938 had no provisions for the grant of declarations or awards of damages. The prayers for declarations and damages have therefore no legal basis and are hereby dismissed."*

35. He submitted that this Court should not have granted leave to file this judicial review application out of time and as such, it is null and void *ab initio*.

36. Having looked at the application, response and rival submissions, the only issue for determination is whether the substantive motion has merits.

37. As correctly submitted by the parties, a Court exercising judicial review jurisdiction should only concern itself with the decision making process and not the merits of the decision.

38. I have keenly scrutinized all the documents exhibited by the parties and indeed, the history of the dispute is as captured by the 1st Respondent. The grievances about how the disputed parcels were acquired and where the boundary should be were raised in all the fora, considered, and determinations made. The Applicants or their representatives participated throughout the process and were afforded adequate opportunity to present their case. Despite seemingly understanding the jurisdiction of a judicial review Court, the Applicants still want this Court to delve into the arena of merits.

39. With regard to the decision of the Minister, the major complaint by the Applicants is that they were not notified about it and only learnt that their appeal had been dismissed in November 2018 during the hearing of the Makindu case. Although they have vehemently denied being notified, there is a letter dated 15th June, 2017 addressed to Jonathan Ndivo informing him about the verdict. The 1st Respondent also deposed that he was present when the 1st ex-parte Applicant was given a copy of the ruling by the Chief. Be that as it may, I do agree with

the 1st Respondent that failure to notify a party about a decision does not render it null and void and is not a ground to quash it.

40. The case before the Minister proceeded on 19th January, 2017 and the fact that Jonathan Ndivo was in attendance shows that he received the hearing notice dated 23rd November, 2016. This is enough proof that he was accorded enough time to prepare his case and organize his witnesses. On the hearing date, the record shows that he presented his case and responded to questions. Jonathan Ndivo had three witnesses but agreed that only one would talk on behalf of the others. The record states as follows;

> *"After consultations by the appellant and his witnesses, they agreed that only one witness will talk on behalf of the other witnesses."*

41. Evidently, the hearing before the Minister qualifies as a fair trial and I am unable to see any irrationality or unreasonableness in the decision. Further, the Minister was empowered by **section 29(1)** of the Land Adjudication Act, Cap 284 Laws of Kenya, to preside over the appeal and it cannot therefore be said that he acted *ultra vires*. The said section 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:-*
>
> *a. Delivering to the Minister an Appeal in writing specifying the grounds of the appeal; and*
>
> *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."*

42. The appeal by the Applicants was filed in 1998 yet the decision of the Adjudication Officer was made in 1992. Evidently it was way out of time but was still entertained.

43. Further, the Applicants did not discharge their burden of proving that the title deed was acquired unproceduraly. On the contrary, the totality of the evidence shows that it was registered in the name of Kivuva Nzikali after finalization of a protracted dispute in various fora. It is also noteworthy that despite the title deed being issued in 2007, there was nothing to show that it was ever encumbered at the instance of the Applicants. There is absolutely no reason to interfere with it and the prayer for mandamus must fail.

44. The upshot of the foregoing is that the application has no merit and the same must fail. In the circumstances, I hereby proceed to dismiss it with costs to the 1st & 2nd Respondents.

Signed, dated and delivered at Makueni via email this 25th day of June, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka