



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 41 OF 2014

IN THE MATTER OF LAND ADJUDICATION ACT

AND

IN THE MATTER OF THE FORMER DISTRICT COMMISSIONER KATHIANI

BETWEEN

DISHON NGAO MUTIKUAPPLICANT

AND

THE COUNTY COMMISSIONER OF MACHAKOSRESPONDENT

AND

MUIA NZENGI1ST INTERESTED PARTY

MUTUNGA MBITHI2ND INTERESTED PARTY

TIMOTHY MALEI3RD INTERESTED PARTY

RULING OF THE COURT

The application

1. The Notice of Motion application before the court is dated **19th March, 2014** and filed herein on **20th March, 2014** under **Order LIII of the Civil Procedure Rules**. The Notice of Motion prays for an order of certiorari to quash the judgments in favour of the Respondent in Appeal case numbers 302, 303, and 304 of 2005. The Motion is supported by the Statutory Statement and verifying affidavit filed herein by the applicant **Dishon Ngao Mutuku**. The applicant is the son of Ngao Mutuku. Ngao Mutuku is the first son of Mutuku Malei. Mutuku Malei is husband of Mumbua Mutuku. Except the applicant all the aforesaid are deceased. Mumbua Mutuku had three (3) sons and two (2) daughters namely;-

- i. Ngao Mutuku (deceased)
- ii. Musyoki Mutuku (deceased)
- iii. Alfred Kiilu Mutuku (deceased)

iv Itumbi Mutuku (deceased)

v. Muoti Mutuku (alive)

2. Malei Nguli the father of Mutuku Malei had four (4) wives namely;

i. Ndete Malei (the applicant's great grandmother (deceased)

ii. Nyenyu Malei (deceased)

iii. Nzisa Malei (deceased)

iv. Mbevo Malei (deceased)

3. Ndeti Malei had only one (1) son called Mutuku Malei (applicant's grandfather) and two (2) daughters namely Ng'onde Malei and Ngali Malei. Nyenyu Malei had the following sons;-

i. Muimi Malei (deceased)

ii. Nzengi Mbovi Malei (deceased)

iii. Kethi Malei (deceased)

iv. Mutua Malei (deceased)

4. Nzisa Malei had three (3) sons namely:-

i. Mbengea Malei (deceased)

ii. Mbithi Malei (deceased)

iii. Ezekiel Nthiwa Malei (deceased)

5. Mbevo Malei had four (4) sons namely;

i. Zakayo Malei (deceased)

Timotheo Malei

iii. John Malei

iv. Julius Josia Malei (deceased)

6. The applicant provided the background of his application as follows. Malei Nguli left his land in Mitaboni and went to Ngelani where he had come from. This was because his children were dying and he thought there was bad omen in Mitaboni. He left behind the land between two valleys which is also known as Usini, which was all his. The land then did not have a number. He sold all this land to Mutiso Kini about the year 1928. His son Mutuku Malei (Mumbua's husband) went back to Mitaboni and discovered Malei his father had sold the land. He Mutuku Malei evicted the buyer occupants and as a result he was ordered by what was called Kakumi court to pay them a cow and one goat and take back the land and he did. Mutuku Malei upon arrival at Mitaboni first settled on the land known as Usini that he himself acquired. Thereafter he learned from his uncle Kitulo that his own father Malei Nguli had sold all his land in Mitaboni before leaving for Ngelani. Malei Nguli later on came back from Ngelani and took over the land that is on the two sides of the Usini land. He took the said land over from his two brothers. When his family later joined him from Ngelani they occupied the said land on the two sides of Usini land. (That is on the East and Western side). They later laid claim over the Usini land arguing that the same

was Malei Nguli's. Some of Malei Nguli's family members invaded the Usini land and sub-divided it with sisal plants. Mumbua Mutuku the wife of Mutuku Malei however uprooted the said sisal. The children of Malei Nguli's other three (3) wives sued Mumbua Mutuku at the local land committee for uprooting the said sisal which subdivided her land. The land committee however acquitted Mumbua Mutuku and found that the said land was wholly hers as her husband bought it by refunding the money his father had sold it for by paying a cow and a goat to the claimants. The whole land had already been given number 747 and registered to Mumbua Mutuku.

7. Being dissatisfied with the decisions of the land committee the claimants took the said dispute to the land board only for their representative Muimi Malei to withdraw their claim asserting that the said land was the property of Mumbua Mutuku and that they were not going to lay any further claim over it. In September, 2005 ten (10) people including Muimi Malei's representative Mbaluto Muimi filed an objection before the District Land Adjudication officer. Their objection was that the finding of the committee and the land board was wrong as the land found to have been repurchased by Mumbua's husband belonged to the objectors. The Land Adjudication Officer ruled in favour of the Objectors. The respondents in this objection were the exparte applicant herein and one Alfred Kiilu Kituku a son of Mumbua Mutuku then deceased. This judgment in essence created several number of parcels of land out of Mumbua's land number 747.

8. The respondents being dissatisfied with the ruling of the Land Adjudication Officer they appealed to the Minister and the said appeal was heard by the Minister's appointee the District Commissioner Kathiani District. The District Commissioner made his judgment on appeal in the absence of the appellants and respondents and the appellant who included the exparte applicant herein were not informed of the decision of the District Commissioner until they were told by one John Malei that they would be evicted from the disputed land. The respondents were fearful of the eviction and sought advice from the District Commissioned office and it was then they were informed that the District Commissioner had released judgment. They applied for a certified copy and the same was issued on dated 20th November, 2013. From the judgment they noted that the District Commissioner had upheld the Land Adjudication Officers decision to sub divide into more parts Mumbua's Land Number 747.

9. It is the District Commissioner's judgment certified on 20th November, 2013 that the exparte applicant seeks to quash. The judgment in content is in cases Numbers 302, 303, and 304 all of 2005. It is the exparte applicant's contention that the date of the judgment of the District Commissioner is the date of pronouncement of judgment to him which is the date certified copies of judgment were released to him and therefore he is within time to seek an order of certiorari.

10. The application is premised on the following grounds:

- a. The judgment of the District commissioner Machakos in cases 302, 303 and 304 is against the exparte applicant's legitimate expectation that the law would be observed during the hearing and when making the judgment.
- b. The judgment of the District Commissioner took to consideration irrelevant issues.
- c. The judgment of the District Commissioner is unprocedural and lawful.
- d. The judgment of the District Commissioner contravenes the provisions of the Law of Succession Act regarding representation in the event of death of a claimant or respondent.
- e. The judgment of the District Commissioner is against public good and interest.

The Response

11. The application is opposed vide Replying Affidavit sworn by **Muia Nzengi** (1st Interested Party) on **16th December, 2015** on his own behalf and on the behalf of the 2nd and 3rd Interested Parties. The

Interested Parties' case is that the application is an abuse of the court process, is unmeritorious, bad in law, incompetent and is statutory time barred, and in the interest of justice the said Notice of Motion be dismissed with costs. The respondents state that the appeal were properly decided and the exparte applicant lost in all of them and every party was given an opportunity to be heard as required under the rules of natural justice. Further, the respondents state that time starts to count when judgment is read to parties and not when a photocopy of the judgment is certified. The judgment were read to all parties and each party was given a copy thereof. However the exparte applicant did not challenge it in time as required by the law, and that equity aids the vigilant but not the indolent. That the applicant's allegations are unfounded and false.

12. The respondent did not enter appearance or respond to the motion. However, the Interested Parties stated that the fact that the respondent has not filed a response would not entitle the exparte applicant to automatic orders as prayed. The subject matter martially affects the Interested Parties who have objected to the application and are entitled to be heard.

Submissions

13. With the leave of court parties filed submissions which I have considered. The exparte applicant's submissions are modled upon the Supporting Statement filed herein and I will not rehearse the same. The Interested Parties have objected to the application on the grounds that the same is an abuse of the process of court, bad in law, incompetent and is statutorily time barred.

14. However, before this court goes into the merit of the application, the court must re-state emphatically that judicial review proceedings are special proceedings to quash a decision of tribunal or public organ. They are not appeal to the decision and therefore the court will not discuss the ingredients of the decision complained of. Because of its nature, adherence to timelines is essential, as the review merely sets to find out if the public officer or organ had exceeded its jurisdiction. In this regard, and in considerations of the parties submissions, this court raises the following issues for consideration.

- i. Whether the application is bad in all
- ii. Whether the application is statutory time barred.
- iii. Whether the application is an abuse of the court process
- iv. Whether the application for judicial review is available in this matter.

15. Whether the application is bad in law and therefore incompetent

The Notice of Motion is brought under **Order LIII of the Civil Procedure Rules**. The said cited (**Order LIII**) does not exist in the **Civil Procedure Rules 2010**. The Notice of Motion was filed in court on 20th March, 2014 during the subsistence of the **Civil Procedure Act and Rules 2010**. Therefore the Notice of Motion is based on non existence law. However, under **Order 53 of the Civil Procedure Rules**, once leave has been granted the exparte applicant ought to file a substantive Notice of Motion as provided for under **Order 53 rule 3** within twenty one (21) days. Notice of Motion as envisaged under **Order 53 Rules 3** of the **Civil Procedure Rule** is found under **Order 51 of the Civil Procedure Rules, Rule 4** which provides *“Every Notice of Motion shall state in general terms the ground of the applicant and where any motion is grounded on evidence by affidavit a copy of any affidavit intended to be used shall be served”*.

16. Therefore any Notice of Motion which is intended to be grounded on evidence the affidavit shall accompany the Notice of Motion. The applicant did not file an affidavit in support of the motion to annex the statutory statement and verifying affidavit. (his intended evidence). The Notice of Motion filed herein does not comply with the law it is not supported by any evidence. The chamber summons filed seeking leave to file an application for Judicial Review becomes spent once leave has been granted and it is the spirit of the Rules that now a substantive application (Notice of Motion) be filed within twenty one (21)

days after leave is granted. Under **Order 53 Rule 4**, copies of the statement accompanying the application for leave shall be served with the Notice of Motion. Therefore it is not proper for an applicant to indicate that the Notice of Motion shall be supported by the statement or the application for leave since those are to be served separately. The application before me the court is not supported by any evidence and should therefore be dismissed with costs.

17. Whether the application is time barred

The application is filed out of statutory time and therefore time barred. **Order 53 rule 2** is a clear and provides ***“Leave shall not be granted to apply for an order of certiorari to remove any judgment order, decree, conviction or other proceedings for the purposes of its being quashed, unless the application for leave is made not later than six (6) months after the date of proceeding or such shorter period as may be prescribed by any Act...”***

18. The judgment complained about was made on 18th January, 2012 in case number 302 of 2005, case number 303 of 2005 on 21st November, 2011 and case number 304 of 2005 on 29th December, 2011. The ex parte applicant filed or commenced these proceedings on 27th February, 2014 four (4) years after the delivery of the judgment. **Order 53 rule 2** is mandatory. No application for judicial review can be filed upon expiry of six (6) months after delivery of the judgment.

19. Whether the application is an abuse of the court process

The applicant has sought to quash the decision/judgment of the county commissioner of Machakos in appeal case numbers 302, 303 and 304 of 2005. This appeals stems from earlier decided objections under then Land Adjudication Act. Those judgments are not under any challenge. What the District Commissioner did was to dismiss the appeals filed by the ex parte applicant. Therefore it follows that, even if this court were to quash the said judgments in the appeal the original judgment would still stand and therefore this application is an abuse of the court process and lacks in merit.

20. Judicial Review, is a special proceedings made to quash a decision of Government officials arm or bodies, if the said decisions are *ultra vires* or made without jurisdiction.

21. The ex parte applicant has not demonstrated that the county commissioner acted without jurisdiction in hearing the appeals or that he exceeded his mandate or even violated the rules of natural justice, therefore an application for judicial review is not available to the applicant in this case.

22. Under paragraph 24 of the verifying affidavit, the applicant cite three (3) grounds only why the decision should be quashed viz;

- i. Is that the judgment fell the legitimate expectation as the law would be observed. No law has been cited herein even in the submission and the alleged expectation was not substantiated.
- ii. He also alleges the decision took to consideration irrelevant issues. Those issues were not substantiated and even if the decision considered irrelevant issues this not qualify to be in excess of jurisdiction or without jurisdiction what amounts to irrelevant issues has not been defined or cited.
- iii. The other ground is that, the decision is unprocedural and unlawful, this again has not been substantiated for instance what is unlawfully or unprocedural? Has not been demonstrated.

23. The interested parties in their replying affidavit paragraph 6 avers that judgment were read to all parties and each party given a copy thereof. The ex parte applicant did not controvert. He was aware of the judgment but did not challenge the same. Every party therefore had notice of the delivery of the judgment.

24. In the finding of this court, judicial review proceedings as special proceedings to quash a decision of a tribunal or public organ. They are not appeal against the decision, and therefore it is not proper to discuss

the ingredients of the decision complained about concerning the family tree at this point in time.

25. The upshot of the foregoing is that the Motion herein lacks merit and is herewith dismissed with costs to the Interested Parties.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF MARCH, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Njuguna for Applicant

Mukula for Interested Parties

Court Assistant - Munyao