



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JUDICIAL REVIEW APPLICATION NO. 7 OF 2014

IN THE MATTER OF JUDICIAL REVIEW BY EUTON NJUKI MAKUNGO FOR AN ORDER OF CERTIORARI

AND

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

AND

IN THE MATTER OF THE DECISION OF THE CHELIMO DISTRICT COMMISSIONER MBEERE NORTH DISTRICT IN ADJUDICATION APPEAL NO. 299 OF 2011

REPUBLICAPPLICANT

VERSUS

MINISTER FOR LANDS AND SETTLEMENT1ST RESPONDENT

J.K. CHELIMO DISTRICT COMMISSIONER, MBEERE NORTH DISTRICT..2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AMBROSE NJIRU NTHIGA.....INTERESTED PARTY

AND

EUTON NJUKI MAKUNGO.....EX-PARTE APPLICANT

JUDGMENT

By his Notice of Motion filed herein on 18th March 2014 the Applicant **EUTON NJUKI MAKUNGO** seeks the following orders:-

- 1. That the Honourable Court be pleased to issue an order of certiorari to remove into the High Court for the purpose of its being quashed the decision of the District Commissioner Mbeere North District dated 7th December 2012 allowing Appeal to the Minister in Minister's Land Appeal Case No. 299 of 2011.***
- 2. That costs of this application be provided for.***

The application is based on the matters set out in the statement of facts and the affidavit verifying the same together with the annexures thereto. The grounds upon which the relief of certiorari is sought are:-

- a. ***The Appeal to the Minister was filed outside the period of sixty (60) days contrary to Section 29 of the Land Adjudication Act.***
- b. ***The Title Deed for parcel of land No. MBEERE/KIRIMA/2604 had already been issued at the time of filing the appeal.***
- c. ***Restriction by the Chief Land Registrar was placed against the parcel long after the Title Deed had been issued.***

It is the applicant's case that following the objection proceedings (which were conducted by the applicant on behalf of **MWANIKI MWIGE** who was un-well) the land parcel No. MBEERE/KIRIMA/2604 (the suit land) was awarded to **MWANIKI MWIGE** and a title deed issued in his names on 30th June 2004. The said **MWANIKI MWIGE** therefore became the absolute proprietor of the suit land and there was no entry in the register restricting any dealing with the suit land or an indication that any appeal was pending to the Minister as provided under **Section 28 of the Land Adjudication Act**. That only later was a restriction allegedly by the Chief Land Registrar placed on the suit land pending determination of the appeal before the Minister which was filed outside the sixty (60) days contrary to **Section 29 of the Land Adjudication Act** as it was filed in 2011 which was over seven (7) years since the title to the suit land had been issued and further, the 2nd respondent did not have the power to cancel the said title deed. There was therefore a miscarriage of justice hence this application.

The respondents did not file any response to the application but the interested party **AMBROSE NJIRU NTHIGA** filed a replying affidavit in which he deponed, inter alia, that the applicant having been granted leave on 24th February 2014 to file this application within twenty one (21) days, the same was filed on 18th March 2014 one day out of time and is therefore fatally defective. Further, that after the Adjudication Committee Case No. 12 of 1972 and Arbitration Board Case No. 9 of 1972 were heard and determined, Objection Cases numbers 114 of 1983 113 of 1986, 281 of 1983 and 56 of 1983 were lodged and decisions were made by the Land Adjudication Officer on 14th December 1989 and being aggrieved by that decision of the Land Adjudication Officer, Minister's Appeal Case No. 299 of 2011 was instituted on 16th January 1990 by the applicant on behalf of **GODFREY JOSEPH NYAGA NJUKI**. That the said Minister's Land Appeal Case No. 299 of 2011 was paid for vide receipt No. AM 144643 and subsequent payment made on 16th January 1990 which was well within the sixty (60) day period. Following the lodging of the said appeal, it was upto to the staff of the Land Adjudication and Settlement office to deal with the administrative issues of allocating an appeal number and the applicant had no control over the allocation of appeal numbers. The registration of the suit land in the names of **MWANIKI MWIGE** was thus provisional and was subject to the determination of the Minister's Appeal Case Number 299 of 2011. The adjudication register therefore became final once the Minister's Appeal Case No. 299 of 2011 was determined and the adjudication register ought to be altered to conform with the Minister's determination and findings. The interested party therefore urged the Court to dismiss the Notice of Motion with costs. Annexed to the affidavit was a copy of the Appeal – annexure **ANN 1**.

Submissions have been filed both by the firm of Rose Njeru advocate for the applicant and Duncan Muyodi advocate for the interested party.

I have considered the application, the replying affidavit and the respective annexures as well as the submissions by counsel.

This is a Judicial Review application for an order of certiorari to quash the decision of the District Commissioner Mbeere North District dated 7th December 2012 allowing the appeal in Minister's Appeal Case No. 299 of 2011. The scope of the jurisdiction of a Court exercising Judicial Review powers was discussed in the case of **PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300** 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...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality..... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defence of logic and acceptable moral standards..... Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with un-procedural fairness towards one to be affected by the decision”.

The essence of Judicial Review therefore is to address the decision making process as opposed to the merits of the decision arrived at. Therefore, a decision arrived at in flagrant disregard of the law, laid down procedure or improper assumption of jurisdiction or in breach of the rules of Natural Justice is amenable to quashing by a writ of certiorari. In the case of MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS LTD C.A CIVIL APPEAL NO. 185 OF 2001, the Court of Appeal addressed this issue as follows:-

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision makers had the jurisdiction. Whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself”

An applicant who moves the Court by Judicial Review proceedings seeking to have the Court determine contested matters of facts which would result in determining the merits of a dispute must be told that a Court exercising Judicial Review powers would not have the jurisdiction to determine such a dispute which should be placed before another forum where the parties can ventilate such grievances.

The applicant’s complaint herein is two-fold:-

- 1. That the Minister’s Appeal Case No. 299 of 2011 was filed in 2011 well after the sixty (60) days period allowed under Section 29 of the Land Adjudication Act within which appeals can be filed following objection proceedings which ended on 14th December 1989.*
- 2. The Title Deed for the suit land had already been issued at the time the appeal was being filed and the restriction by the Chief Land Registrar was placed against the suit land after the Title Deed has been issued.*

However, before I consider the above, I need to decide whether infact this application was filed within the 21 days as ordered on 24th February 2014 and if not, what consequences will follow.

It is not in dispute that leave to file this Notice of Motion was granted on 24th February 2014 and this application was filed on 18th March 2014. Counsel for the interested party Mr. Muyodi, has submitted, on the authority of REPUBLIC VS FUNYULA LAND DISPUTES TRIBUNAL & OTHERS 2004 1 K.L.R., that this application ought to be dismissed since it should have been filed on 17th March 2014. Ms Njeru counsel for the applicant concedes that this application was filed one day late which she says is not in-ordinate and which she attributes to an error in her office.

On 24th February 2014 when this Court granted leave to the applicant to file this application, it directed as follows:-

“That the applicant do file the Notice of Motion within 21 days and the same to be served upon the respondents and all other such persons affected by it within 14 days”

The order was made pursuant to the provisions of **Order 53 Rule 3 (1) of the Civil Procedure Rules** which provide as follows:-

“Where leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for hearing” emphasis added

The delay of one day, it is conceded, is not in-ordinate. But it is a delay nonetheless explained on the basis of an error on the part of the advocate for the applicant. However, the applicant was not entirely without a remedy. Since the 21 day period is provided for under the **Civil Procedure Rules**, an application should have been filed to extend that period and there is now ample authority that whereas the six month period within which an application for certiorari can be filed cannot be extended the 21 day period can be extended. In this case where the period is conceded to be only one day, this Court would no doubt have considered such an application favourably. However, there being no leave sought to extend that period, this Court, is obliged to reject this application. In doing so, I am bound by the decision of the Court of Appeal in the case of **WILSON OSOLO VS JOHN OJIAMBO AND THE ATTORNEY GENERAL C.A CIVIL APPEAL NO. 6 of 1995 (NAIROBI)** where it said:-

“It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the Notice of Motion must be filed within 21 days of grant of grant of such leave. No such Notice of Motion having been apparently filed within 21 days of 15th February 1982 there was no proper application before the Superior Court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules”

I had occasion to deal with a similar situation in the case of **PETER MURIUKI NJIRU AND TWO OTHERS VS GACHOKA DISTRICT LAND TRIBUNAL AND ANOTHER EX-PARTE EMILIO NYAGA NJIRU KERUGOYA HIGH COURT JUDICIAL REVIEW APPLICATION NO. 11 of 2012**, a case that incidentally also involved Mr. Muyodi advocate, where I held that a Notice of Motion filed outside the 21 days cannot be a proper application. I must take the same route in this matter and indeed that in the same route that **Sergon J.** took in the **FUNYULA** case (supra). No doubt rejecting an application for being late by a day may sound harsh but rules were made for a purpose and must be adhered to. In the **PETER MURIUKI NJIRU** case (supra), I was not persuaded that the provisions of **Article 159 (2) (d) of the Constitution** would come to the aid of the applicant bearing in mind that Judicial Review jurisdiction is a special jurisdiction. Besides, if the Court allows the application to sneak through because the delay is only one day, then how will the Court treat similar applications where the delay is two or three days? Clearly, I have no discretion in the matter once the application is filed outside the 21 day period but I can consider an extension of time. That is what the Court of Appeal stated in the **WILSON OSOLO** case (supra) which is binding on this Court.

Ultimately therefore, the Notice of Motion dated 18th March 2014 is ordered struck out with costs to the interested party.

B.N. OLAO

JUDGE

13TH MAY, 2016

Judgment dated, signed and delivered in open Court this 13th day of May 2016.

Mr. Muyodi for the Interested party present

Ms Muthike for Ms Njeru for the Applicant present.

B.N. OLAO

JUDGE

13TH MAY, 2016