



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 8 OF 2002

**IN THE MATTER OF AN ORDER AND DECISION OF THE DISTRICT COMMISSIONER –
HOMABAY DISTRICT HEARING THE APPEAL IN RESPECT OF EAST KANYADIER/5633
ARBITRARILY CONSOLIDATING IT WITH APPELLANT’S PARCEL NO.
KANYANDA/KANYADIER/1400**

AND

**IN THE MATTER OF AN APPLICATION BY BENARD OGOLA ORIENJE FOR ORDERS TO
ISSUE FOR A CERTIORARI**

BETWEEN

REPUBLIC APPLICANT

VERSUS

ZAKAYO ODOYO MAKOLWAL 1ST RESPONDENT

DISTRICT COMMISSIONER – HOMABAY 2ND RESPONDENT

DISTRICT LAND ADJUDICATION OFFICER 3RD RESPONDENT

JUDGMENT

1. The applicant was on 12th February 2002 granted leave by **Hon. Justice ICC Wambilyangah** to file an application for an order of certiorari and/or mandamus to quash the decision of the minister dated 18th September 2001 in Homa Bay Land Appeal Case No. 92 of 2001.

2. The applicant filed a Notice of Motion dated 18th February 2002 which was purportedly amended on 30th October 2002 though formal leave to amend was consequently given by the court on 8th October 2013. By the Notice of Motion the applicant seeks the following orders:-

- 1. An order of certiorari to remove into the High Court and quash an order of the District Commissioner Homa Bay and the District Land Adjudication Officer dated 18th September 2001 consolidating parcel number Kanyada/Kanyadier/5633 with 1400 thereby awarding parcel No. 5633 to Zakayo Odoyo Makolwal and deleting the applicant’s name Bernard Ogola Orienje (now deceased) from the said parcel.**

2. Costs of the application to be provided for.

3. The application was supported on the statement that accompanied the application for leave and inter alia the grounds upon which the applicant sought relief were that:-

(i) The decision of the minister was against the weight of the evidence on record inter alia the proceedings and judgment in Rongo District Magistrate Land Case No. 18 of 1972 was not challenged in any appeal.

(ii) The decision of the minister failed to consider the fact that the applicant has been in actual possession and occupation of the said land continuously without any interruption for over 20 years and had acquired prescriptive rights and would in any event be entitled to adverse possession.

(iii) The District Commissioner erred by delegating the hearing of the appeal to the District Officer I of the same station.

(iv) The District Commissioner's decision was arbitrary and without any proper supportive evidence and was apparently affected by undue influence.

The affidavit in support of the Notice of Motion reiterated contents contained in the statement and the applicant maintained that the Minister fell in error in ignoring the decision of the land adjudication committee who comprise local elders who know the parties and the history of the parcels of land the subject of the adjudication.

4. The respondent filed a statement of grounds of opposition to the applicant's application dated 3rd March 2003 and inter alia the respondent states that:

(a) The application for leave as well as the application for an order of certiorari and the annexed statement thereto do not disclose any act of commission or omission or any act done ultra vires that can justify the quashing of the decision of the District Commissioner and to contrary the respondent avers that:-

(i) That the ruling of the district commissioner is well reasoned and is based on the evidence availed willingly by witnesses of both parties.

(ii) That the District Commissioner properly directed himself on matter of Luo Customary Land Tenure Law.

(b) The application for leave and its subsequent Notice of Motion has been filed out of time contrary to Order LIII Rule 2 of Civil Procedure Rules or rule 3 (1) thereof. The District Commissioner's ruling having been made on 18th September 2001 and the application for leave and the application for an order of certiorari having been made on 30th October 2002.

5. The court on 25th September 2013 allowed **Anthony Otieno Ogolla, Daniel Otieno Ogolla and Tobias Ogolla** to be substituted as the legal representatives of **Bernard Ogolla Orienje** (deceased) to become the applicant's in place of the deceased. The court further granted leave for amendment of the Notice of Motion dated 18th February 2002 within 14 days to reflect the aforesaid substitution. The court further directed that the application be canvassed by way of written submissions. The applicant's filed their submissions dated 21st November 2013 but the respondents did not file any submissions and on 1st October 2015 when the matter was listed before me for mention, I reserved judgment/ ruling to be delivered on 6th November 2015.

6. I have carefully perused the Notice of Motion, the statement and the supporting affidavit and the statement of grounds in opposition and the filed submissions and the issue for determination is whether

the applicants have demonstrated and/or established any grounds upon which the decision of the District Commissioner acting under delegated authority of the Minister can be impugned to warrant the same to be quashed by way of judicial review as sought by the applicants.

7. The brief facts of this matter are that the applicant's father, Benard Ogola Orienje (now deceased) objected to the decision of the Land Adjudication Committee whereby he claimed his land had been wrongly consolidated with the land of Zakayo Odoyo Makowal, the defendant in the objection proceedings and awarded to the defendants as **Plot No. 1400**. The respondent in the instant application, as the defendant in the objection proceedings contended that he had purchased the land from one Nelson Oracha after satisfying himself that the parcel of land belonged to Oracha. After hearing both the objector and the defendant on the objection the Land Adjudication Officer allowed the objection and made a decision that the objector, the applicant herein should get a portion of **Plot No. 1400** that had been awarded to the defendant, respondent in the instant application and that the objector's portion be given a new **Plot No. 5633**.

8. The defendant in the objection being dissatisfied with the decision of the adjudication officer appealed the decision to the Minister as provided under Section 29 (1) of the Land Adjudication Act, Cap 284 Laws of Kenya. The applicant herein was the respondent in Land Appeal Case No. 92 of 2001 respecting **Land Parcel 5633**, Kanyadier adjudication section, Homa-Bay adjudication area. Section 29 (1) of the Land Adjudication Act provides:

29 (i) 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 appeal; and

(b) Sending a copy of the appeal to the director of Land Adjudication,

And the minister shall determine and make such order thereon as he thinks just and the order shall be final (emphasis mine)

9. From the above provision it is clear that the determination by the Minister is intended to be final and not subject to appeal. The applicant in the instant matter has not made an appeal to this court, he cannot do so as none is permitted. The applicant has filed a judicial review application which has to do with the examination and/or review of the process and/or conduct of the appeal to determine whether the process or conduct of the appeal was fairly undertaken. This court is not called upon to review the merits of the decision reached by the District Commissioner acting under delegated authority of the Minister but to determine whether the process of appeal was fairly conducted.

10. The court of appeal in the case of **Commissioner of Lands –vs- Kunste Hotel Ltd eKLR** expressed themselves in regard to what the scope of Judicial Review is when they stated thus:-

“But 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. Its purpose is to ensure the individual is given fair treatment by the authority to which it has been subjected (See Republic –vs- Secretary of State for Education and Science Ex parte Aron County Council [1991] LL ER 282 at p. 285). The point was more succinctly made in the English case of chief constable Evans [1982] 1WLR 1155, by Lord Hailsham of St. Marylebone thus:-

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”

11. The Court of Appeal recently in the case of **Shaban Mohammed Hassan & 703 Others –vs- Attorney General [2013] eKLR** reiterated that the procedure of judicial review only applies to the

decision making process and not the merit of the decision. The Court of Appeal in the **Shaban Hassan case** (Supra) referred to the case of **Republic –vs- Vice Chancellor JKUAT, Ex parte Cecilia Mwathi & Another (HC Misc. Application No. 30 of 2007)** where the judges quoted with approval the below noted excerpt from the Supreme Court Practice 1997 Vol. 53/1-14/6

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that, the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

12. In the case of **Basu Mining Ltd (Ex parte applicant) –vs- Commissioner of Lands & the Attorney General HC ELC Misc. Application No. 359 of 2014 (formerly Misc. Civil Application No. 331 of 2013 J/R) Milimani, Nairobi** where the applicant sought declaratory orders in regard to rights over land in a judicial review application and further sought a declaration that section 4 of the Mining Act, Cap 306 Laws of Kenya was unconstitutional in a judgment I delivered on 20th March 2015 I stated as follows:-

“Under judicial review the court’s jurisdiction is restricted to issue of mandamus, certiorari and prohibition which of necessity are confined to review of decisions whose propriety is in question..... judicial review is about reviewing the process through which the decision was made to determine whether the process was indeed fair and not about the merit or the demerits of the decision.”

13. Having regard to the judicial pronouncements highlighted above there is no doubt as to what the scope of judicial review proceedings entail. In the application before the court the issue is not whether the decision by the District Commissioner Homa Bay was meritorious but whether the process used to arrive at the decision was fair to the applicant. The grounds adduced by the applicant do not in my view impugn the process the District Commissioner used to arrive at the decision that he did. The grounds relate to challenge of the evidence the District Commissioner relied on and/or his evaluation of the said evidence. The written submissions filed on behalf of the applicant’s equally dwell on the evaluation of the evidence adduced both before the adjudication officer during the hearing of the objection by the applicant’s father and before that the evidence adduced before the District Magistrate at Rongo in 1972. The submissions further deal with a re-evaluation of the evidence adduced before the District Commissioner during the hearing of the appeal.

14. This court is not being called to sit on appeal against the decision of the District Commissioner as no appeal would lie pursuant to the provisions of section 29 (1) of the Land Adjudication Act. This court would only be concerned to evaluate and determine whether the appeal was fairly conducted. The record of the proceedings before the District Commissioner shows that the appellant and the respondent were each given opportunity to present their cases and cross-examine. The appeal court upon hearing the parties on their evidence on 5th September 2001 decided to visit the locus in quo on 12th September 2001 before making its findings and decision. On the date of the site visit both the appellant and the respondent were present at the site. The court at the site observed that **Plot No. 5633** was excised from land **parcel number 1400** and that at the time of the inspection neither the appellant nor respondent was residing on the land and the applicant’s claim that he has been in occupation of the property for over 30 years would appear not to be justified.

15. Since the District Commissioner was sitting as an appellate court from the decision of the adjudication officer he was lawfully entitled to re-evaluate the evidence adduced before the land adjudication officer during the hearing of the objection and come to his own decision based on the evidence. The District Commissioner in my view did not misdirect himself and he played his role appropriately. The applicant’s averment that the District Commissioner erred by delegating his responsibility to the District Officer I is not borne out by the record of the proceedings which clearly show the hearing was before the District Commissioner, Homa Bay one **Mr. K. Shivogo** who signed the proceedings on 5th September 2001 and

the judgment and order on 18th September 2001.

16. In the final result I find no basis upon which the decision by the District Commissioner as a delegate of the Minister under section 29 (4) of the Land Adjudication Act, Cap 284 Laws of Kenya can be impugned. I accordingly decline to quash the decision by the District Commissioner dated 18th September 2001 amalgamating parcel number **Kanyada/Kanyadier/5633** to land parcel number **1400** in the name of **Zakayo Odoyo Makolwal** and further ordering the name of **Bernard Ogolla Orienje** to be deleted.

17. The applicants amended Notice of Motion dated 8th October 2013 is hereby dismissed. Each party will bear their own costs of the application.

Judgment dated, signed and delivered at Kisii this 6th day of November, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

Mr. Ochwang'i for Mboya for the applicant

N/A for the respondents

J. M. MUTUNGI

JUDGE