



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 187 OF 2010

REPUBLIC.....APPLICANT

VERSUS

MAKUENI DISTRICT COMMISSIONER.....RESPONDENT

Exparte: KISINGU MATHEW FRANCISCO KISILU AND KISINGU MULI WALIA

1. MULINGE KITUKU

2. KATHANZU KITUKU (DECEASED)

3. MAUNDU MBAI

4. NYAMU MBAI

5. MULWA MBAI.....INTERESTED PARTIES

J U D G M E N T

1. Pursuant to leave granted by this court, the Exparte Applicants, **Kisingu Mathew Francisco Kisilu** and **Kisingu Muli Walia** seeks an order of *certiorari* to remove to the High Court for the purpose of being quashed and to quash the proceedings of the **Makueni District Commissioner** in **Minister's Appeals Numbers 31 of 1997** and **32 of 1997 (Iuani Adjudication Section Plot No. 651, Muia Kituku, Kathanzu Kituku (Deceased) Maundu Mbai, Nyamu Mbai and Mulwa Mbai – Versus- Kisingu Mathew Francisco Kisilu, Kisingu Muli Walia and Kisangi Muli Walia)** made on the **24th March, 2010**.

2. The application is premised on the grounds set out in the statutory statement that: The **District Commissioner** acted in excess of jurisdiction; He did not visit the disputed parcel of land; He misguided himself and failed to evaluate and reach a finding on the decision of the land.

3. That the decision was tainted by bias, procedural impropriety and unfairness. The decision was not guided by or based on **Kamba Customary Law**.

4. The proceedings were in breach of the rules of Natural Justice due to bias and failure to receive and

record evidence or materials in favour of the Applicants.

5. The Applicants swore a verifying affidavit where they deposed that: **Kisangi Muli Walia** who would have been a party to these proceedings passed on in early **1990s**; a dispute over the suit land was lodged in **1978** adjudicated upon and a decision delivered by the **Land Adjudication Committee** on **22nd September, 1978**. Being dissatisfied with the decision they appealed to the **Arbitration Board**. Being aggrieved further by the decision of the **Arbitration Board** they appealed to the **Land Adjudication Officer** who awarded them the disputed land.

6. The Interested Parties filed the appeal to the **Minister Nos. 31 and 32 of 1997**. The decision of the **District Officer** delivered on **24th March, 2010** was not favourable to them. Now they contend that they were not given a fair hearing in that the **1st Applicant** was denied an adjournment despite having valid reasons. The **District Commissioner** was hostile to them. No visit was made to the disputed land by either the **District Commissioner** or **Land Adjudication Officer** and that the **District Commissioner** exceeded the powers conferred upon him by entertaining the appeals over seven years after the delivery of the **Land Adjudication Officer**.

7. In response to the application **Jesse Ochilo Oyugi, the District Commissioner, Makueni** deposed an affidavit where he deposed that **Nyamu Mbai** and **Maundu Mbai** filed a **Minister's Appeal** on the **21st March, 1990** and an appeal was recorded on **28th January, 1997**. **Muia Kituku, Muthoka Kazanzu** filed an appeal against the same decision on the **8th May, 1990**.

8. The Minister sent them the appeal for hearing on **21st March, 1997** and they assigned them **Nos. 31 and 32** of the year **1997** respectively. All parties in the appeal appeared as summoned. He declined to grant an adjournment sought by **Alphanus Kisingu** son of the **1st Applicant (Mathew Kisilu Kisingu)** because it was the third time the adjournment was being sought. **Alphanus Kisingu** declined to tender evidence as the hearing proceeded.

9. He concluded by stating that his decision was in accordance with the law and the appeals were lodged within time (**21st March, 1990**).

10. **Nyamu Mbai** having been authorized by other Interested Parties filed an affidavit in reply of the allegations where he deposed that during demarcation in the year **1980, Land Plot No. P651** was registered in the name of **Muia Kituku** an Interested Party. An appeal filed by the Applicants was found in their (Interested Parties') favour. The **Arbitration Board** upheld the decision of the **Adjudication Committee**. Following an appeal the Adjudication Officer awarded the Applicants the plot.

11. Following miscarriage of justice by the Adjudication Officer they lodged an appeal with the Minister and were reinstated to the plot.

12. They averred that the **District Commissioner** acted within the conferment of the law.

13. The application was canvassed by way of written submissions.

14. It was submitted by counsel for the Exparte Applicant that the **Land Adjudication Officer** rectified the **Adjudication Register** pursuant to **Section 26** of the **Land Adjudication Act (Act)** therefore registering the disputed land in favour of the Applicants. It was mandatory for the appeal to be lodged within **sixty days** therefore the Minister had no jurisdiction to entertain the appeal after **sixty days**. The Respondent therefore had no discretion to accept the appeal out of time.

15. Further, it was submitted that it was improper for the Minister (His nominee) to hear the objection afresh instead of relying on additional evidence. Having arrogated himself the duty to hear the objection afresh he should have accorded both parties a right to be heard as required by the rules of Natural Justice.

16. I have duly considered the application, affidavit, evidence adduced and submissions filed by the

Exparte Applicant. Issues for determination are:

- Whether the Respondent exceeded his jurisdiction.
- Whether there was procedural impropriety.
- Whether rules of Natural Justice were breached.

17. With the above stated issues in mind I must consider whether the prerogative order sought should issue. In the case of **Pastoli vs. Kabale District Local Government Council and others (2008) 2EA 300** the court enunciated circumstances in which judicial review would issue thus:

“.....the applicant must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.”

The court went on to interrogate what an illegality, irrationality and procedural impropriety amount to and had this to say:

“.....illegality is when the decision making authority commits an error of law in the process of taking or making an act, the subject of complaint..... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the fact and the law before it, would have made such a decision in defiance 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 procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute.....”

18. According to **Section 29** of the **Land Adjudication Act**, any person who is aggrieved by the determination of the objection made to the **Land Adjudication Officer** has the discretion to appeal to the Minister. The appeal should be lodged within **Sixty days**. In the instant case, the **Land Adjudication Officer** heard and determined the objection. His decision was delivered on the **21st March, 1990**. **Annexure “J002”** to the affidavit deponed by the Minister’s Nominee (Respondent) which is not disputed is a Certificate of Payment of the appeal indicating receipts Nos. **AN559866** and **AN559867** were issued, dated **21st May, 1990** in respect of an Appeal that was lodged by **Muia Kituku** and **Kathanzu Kituku** (Interested Parties). The appeal was against the decision of the **Land Adjudication Officer** dated **21st March, 1990**. This was approximately **fourty three days** after the decision, therefore the appeal was lodged within time. If there was lack of diligence on the part of the Minister in registering the appeal, the Appellants cannot be disadvantaged due to another person’s lack of diligence.

19. The appeal having been lodged within the prescribed time, the Respondent was seized of jurisdiction to hear it.

20. The Minister having been mandated by law to hear the appeal is required:

“To determine the appeal and make such order thereon as he thinks just” (See Section 29(1) of the Land Adjudication Act).

Pursuant to the provision of the Law the Minister’s Nominee is faulted to have deviated from the expected procedure of hearing an appeal. According to the Exparte Applicants he heard the Objection afresh. No rules of procedure to determine the appeal have been provided. What the Minister is expected to do at the hearing of the appeal is discretionary. In determination of the appeal he has the discretion to make orders as he thinks just. By implication, the procedure he adopted was just in his manner of thought. Therefore, this was acceptable and morally right. It cannot be assessed that he failed to observe procedural rules.

21. It is submitted that the Respondent was in breach of rules of Natural Justice, by condemning the

Exparte Applicants unheard. When the Respondent found it just to hear both parties prior to determining the issue on appeal, he summoned them. **Annexure “KKK5(a) and (b)”** to the replying affidavit sworn by the Interested Parties are Notices to the Respondents of hearing of the appeal. **(Also see Annexure “J003” to the affidavit deposed by the Respondent).**

22. In his affidavit, the Respondent deposed thus:

*“**That on the side of the respondent only Alphanus Kisingu a son to the 3rd respondent appeared.***

*“**That he however declined to be sworn in and instead produced a letter from his brother one Mathew Kisilu Kisingu the applicant herein the purpose of which was to seek that hearing of the appeal be postponed.***

*“**That this was the third time an adjournment of the hearing had been sought, I therefore declined to allow the same and ruled that the matter proceed.”***

23. It is submitted that:

*“**Assuming that it was the third time matters of sickness are very serious It would have been in the interest of justice that the Respondent grants a final adjournment.”***

24. The question to be answered is whether the decision made by the Respondent was just and fair for that matter?

25. **Annexure “KKK6”** to the replying affidavit is a letter authored by the 1st Exparte Applicant. In requesting for adjournment of the case on the ground that his father was unwell and being the first born in the family he could not leave him, he acknowledged the fact that the case had been adjourned on the **25th March** and **8th April, 2009** respectively. He went on to state thus:

*“**.....I would also like to inform you that we, the Walea family, have never had any dispute with the Mbai family concerning Plot No. 651. I therefore cannot understand how Maundu Mbai and his relatives could appeal against a case that was not theirs. I therefore request that the land office try to sort out the matter.”***

26. The Exparte Applicants were given notice of the appeal as required by rules of Natural Justice. They had the opportunity to appear and make their representation. The content of the letter written by the 1st Exparte Applicant clearly express their intention of not wanting to take part in the proceedings as they had no dispute with the **Mbai family**.

27. Under the **Land Adjudication Act**, the person who is ordered to attend may be represented by a duly authorized agent or any other person if he fails to attend the case may proceed in his absence. **(See Section 13(3) of the Act)**. Having acted diligently the Respondent was justified in proceeding with the appeal. In the premises, the rules of Natural Justice were not breached.

28. From the foregoing, it is apparent that the application is unmeritorious. Consequently, it is dismissed with costs to the Respondents and Interested Party.

29. It is so ordered.

Dated at Kitui this 16TH day of NOVEMBER, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 2nd day of December, 2015.

P. NYAMWEYA

JUDGE