



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW MISC. APPLICATION NO.117 of 2013

IN THE MATTER OF THE REGISTERED LAND ACT CAP.300 LAWS OF KENYA

AND

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

AND

MINISTER'S CASE NO.268 of 1987

AND

IN THE MATTER OF THE MINISTER FOR LANDS AND SETTLEMENT

AND

THE LAND ADJUDICATION OFFICER KITUI DISTRICT (NOW COUNTY)

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AGAINST THE
MINISTER FOR LANDS**

AND

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA ARTICLES 23,
40, 48 & 50 THEREOF**

REPUBLIC..... APPLICANT

VERSUS

- 1. THE LAND ADJUDICATION OFFICER KITUI**
- 2. THE MINISTER FOR LANDS AND SETTLEMENT**
- 3. THE KITUI COUNTY LAND REGISTRAR**
- 4. THE DIRECTOR LAND ADJUDICATION..... RESPONDENTS**

AND

1. MULULU NDIMA

2. JONES KIMANTHI NDIMA..... INTERESTED PARTIES

AND

SYLVESTER NDIMA WAMBUA.....EX-PARTE APPLICANT

JUDGEMENT

INTRODUCTION

1. These proceedings were commenced by way of a Notice of Motion dated 10th May 2013 in which the *ex parte* applicant, **Sylvester Ndima Wambua**, seeks the following orders:
 - a. **That an order of mandamus do issue to compel the Minister for Land and Settlement herein named the second Respondent to hear the Appeal to the Minister that was lodged by the Applicant under Section 29 of the Land Adjudication Act 284 Laws of Kenya against the decision of the Kitui Land Adjudication Officer which Appeal was lodged to the Minister being Ministers Appeal Case No.268/1987 and has not been heard todate.**
 - b. **The costs of this Application be provided for.**

Applicant's Case

2. The application is based on the statement of facts filed on 5th April 2013 and supported by an affidavit verifying facts relied upon sworn by **Sylvester Ndima Wambua**, the applicant herein as well as a supporting affidavit sworn by the same person on 6th March, 2013.
3. According to the applicant, he is the son of the late **Wambua Ndima** (hereinafter referred to as the deceased) and the Administrator to the estate of the deceased who was embroiled in a Land dispute in Kitui. The said dispute arose from the fact that the deceased was allocated his ancestral land by his father in the year 1960 and he settled there and he is buried in that land. In the year 1981, during the time of demarcation, the deceased was working with the Ministry of Public Works and his brothers namely **Kimanthi Ndima, Daniel Mululu Ndima, Ndumbanthi Ndima**, were given his land. The deceased then filed a case at the Committee Stage against **Daniel Mululu Ndima** and **Ndumbanth Ndima** in Kitui District Land Case No.52 of 1985 for Parcel No.621 whose decision was in favour of the deceased. However, **Daniel Mululu Ndima** appealed the said decision to the Land Adjudication Committee. Although the summons dated 19th February, 1986 indicated that the hearing thereof was scheduled for 20th February, 1986 the summons were served on the deceased on the 21st February, 1986. Consequently, the Arbitration Award was made *ex parte* to the detriment of the deceased.
4. Aggrieved by the decision, the deceased appealed to the Objection Committee vide Objection No. 264 by the letter dated 23rd April, 1987 according to the applicant, all this period, **Daniel Mululu Ndima** was an Officer in the Adjudication process. When the deceased was served with summons which were unrelated to his case, complained to the Director of Land Adjudication who promptly responded urging the Kitui Land Adjudication Officer to correct the error and on the 8th September, 1987, though the same were corrected, he was nevertheless served with incorrect summons. According to him the judgement that emanated therefrom related to a different matter and the deceased passed away on 16th December, 2002 before his appeal was determined.
5. It is therefore the applicant's case that as a result of the failure to determine the appeal, he has been left exposed and to his surprise, on /or about 4th February, 2013 he received an eviction letter from the suit land from an advocate acting on the instructions of the 2nd Interested Party herein.
6. It is his case that the Minister has a duty to the Applicant that the Appeal be speeded to enable

delivery of justice and the effect of the judgment appealed against be forestalled. His attempt to stop the decision being effected was however, declined by the court for want of jurisdiction. He therefore is of the view that the titles namely Mulango/Kangunga/1723, 1724, 1553, 621 issued pursuant to the said judgment should be revoked and/or restricted as a result of the non action by the Minister.

Interested Parties' Case

7. On behalf of the interested parties, a replying affidavit was sworn by **Jones Kimanthi Ndim** on 18th April, 2013.
8. According to the deponent, the history of the parcels of land involved in this matter is as given by the applicant save for the fact that it is not true that his co-interested party caused the deceased father of the applicant not to get justice just because he was working with the Adjudication office. In his view, the said issue can only be addressed by the Minister for Lands and Settlement and not this court. In his view, it is within the discretion of the Minister for Lands and Settlement to hear Appeals under the *Land Adjudication Act* at his pace and in the manner he deems fit and appropriate. According to him, since the decision of the Adjudication Tribunals subordinate to him has already been implemented, there is nothing capable of being stayed.
9. According to him, the applicant filed Kitui S.P.M.C.C. NO.215 OF 2011 challenging the Title Deeds issued to the owners of the respective parcels but his suit was, after due process, struck out with costs to us the interested parties and in accordance with the Tribunals' decisions each of the interested parties have his Title Deed and resides on his respective parcel(s) of land with his family. With respect to the letter seeking the vacation of the land, he deposed that the same was addressed to the applicant's son who admitted having committed the act complained of and requested for an amicable settlement.
10. The interested parties' case is therefore that the applicant has come to this court with unclean hands, half –truth and above all, is using the courts to frustrate registered owners of the land parcels in dispute exercising their rights over the same, contrary to the law and equity. Apart from that, the applicant has not demonstrated that he or his family has no land to reside on hence the stay sought is not warranted. To him the stay orders is speculative in the sense that the applicant already holds the view that he would eventually win the appeal to the Minister, which is not the case.
11. To him, the orders sought ought not to be granted in the interest of justice.
12. There was another affidavit sworn by the same deponent on 28th November, 2013 in which he confirmed that they had a case over the land the subject of these proceedings with their late brother the deceased at the Land Adjudication Tribunals which they won at the objection stage, resulting in the deceased's appeal to the Minister. However, the deceased passed on before the appeal was determined.
13. He reiterated that they have been issued with title deed of the parcels of land that were the subject of the disputes in the Tribunals. However, they are not aware of the reasons behind the long delay in having the appeal the subject of these proceedings heard and determined, since that is beyond their powers. Further the applicant has not demonstrated that before the application the subject of these proceedings he had acted prudently by writing to the Minister or otherwise made effort to have his appeal heard.
14. According to him, they have been wrongly sued and the applicant's problem is as a result of his indolence and the deceased.
15. He deposed that they have been advised that at the appropriate time, they will be summoned for the hearing of the appeal which hearing they are waiting for since the hearing of Appeal to the Minister under the *Land Adjudication Act* (chapter 284, Laws of Kenya) is a matter entirely within the purview of the Minister and not subject to control by the parties thereto. The interested parties' position is therefore that this application is, premature, an abuse of the due process of the court and above all devoid of any merits and that the applicant is also on a "fishing expedition", because he has vowed that he would get the land through thin and thick. They accordingly sought that the application should be refused, with costs to them in any event, as they have been wrongfully dragged into court.

Determination

16. I have considered the application as well as the various positions taken by the parties herein.

17. Section 29 of the ***Land Adjudication Act*** Cap 284 Laws of Kenya provides:

(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 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.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall -

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

(4) Notwithstanding the provision of section 38 (2) of [the Interpretation and General Provision Act](#) or of any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

18. It is clear from the foregoing provision that there is no express time limit within which the Minister is to hear and determine appeals made under the said provision.

19. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, 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 or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application 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 the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the

detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done”.

20. Article 47 of the Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

21. The interested parties' contention that there is no timelines provided for the hearing of the appeals by the Minister cannot hold in the current constitutional dispensation. Article 48 of the Constitution enjoins the State to ensure access to justice for all persons while Article 50(1) thereof decrees that every person has the right to have any dispute that can be resolved by the application of law decided in a fair hearing. One cannot be said to have been given a fair hearing where the dispute takes unnecessarily too long to be determined. Similarly, access to justice cannot be said to have been assured unless proper facilities are put in place by the State to ensure disputes especially land disputes are heard and determined expeditiously.

22. For the respondents to sit on an appeal for an unnecessarily and unjustified long period of time not only falls foul of Article 47 of the Constitution but also amounts to an abuse of power. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully exercised..... Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations.....The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of

natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

23.It is therefore my view that the Respondent has violated the applicant’s rights to fair administration of justice and have in so doing abuse the powers bestowed upon them. In such circumstances an order of mandamus is warranted.

24.In the result, I hereby grant an order of mandamus directed to the Minister in charge of land to hear the Appeal lodged by the Applicant under Section 29 of the ***Land Adjudication Act***, Cap 284 Laws of Kenya against the decision of the Kitui Land Adjudication Officer which Appeal was lodged to the Minister being Ministers Appeal Case No.268/1987.

25.The Applicant and the interested parties will have the costs of this application to be borne by the said Minister.

Dated at Nairobi this 3rd June, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ngaluka for B M Mungatta for the Applicant

Cc Kevin