



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 336 OF 2013

REPUBLICAPPLICANT

VERSUS

DISTRICT COMMISSIONER-KATHIANI.....RESPONDENT

AND

GRACE NTHENYA NZIOKI.....INTERESTED PARTY

***Ex parte:* MUSYOKA NGOTYA**

JUDGEMENT

1. The prayers the subject of this judgment are contained in the Notice of Motion dated 10th October, 2013 in which the *ex parte* applicant **Musyoka Ngotya** seeks the following orders:
 - a. **THAT an order of Certiorari do issue removing to this Honourable Court for purposes of being quashed the proceedings and Ruling/Judgment of the District Commissioner-Kathiani, dated 29/12/2011 and given/read on 24/7/2013, in Machakos/Kathiani Minister's Land Appeal Case No. 235 of 2008 (1989), and the same be quashed.**
 - b. **THAT an order of prohibition do issue prohibiting the District Commissioner-Kathiani or any Land Officer/Surveyor acting on the Ruling/Judgment made in Machakos/Kathiani Minister's Land Appeal Case No. 235 of 2008 (1989) from implementing and/or executing the said Ruling/Judgment.**
 - c. **THAT costs of these proceedings be paid by the interested party.**
2. The application is supported by a statutory statement filed on 20th September, 2013 and a verifying affidavit sworn by the applicant, on 15th September, 2013.
3. According to the applicant, land parcel No. 3164–Mitaboni Adjudication section, is registered in the name of **Ngotia Ndolo**, the same having been hived off/excised from land parcel No. 15-Mitaboni Adjudication section pursuant to a judgment of the area Land Adjudication Committee made on 19th June, 1975 in the said Committee's Case No. MBN/2/75 in which the parties were **Ngotia Ndolo** and **Sila Mina**.
4. The said Adjudication Committee's judgment was upheld by the area Land Adjudication Officer on 28th August 1989 vide objection Case NO. 213. Being dissatisfied with the Adjudication Officer's said judgment, **Sila Mina** filed Minister's Appeal Case No. 235 of 1989, which was subsequently renumbered and heard as Appeal Case No. 235 of 2008. However, the aforesaid Minister's Appeal Case was not heard during the life time of the parties thereto since **Ngotia Ndolo** died on 29/1/202, and the applicant was issued with letters of administration of his estate

- on 5th July, 2010 while **Sila Mina** also died on a date that he could not remember.
5. In or about September 2011, summons were send out by the District Commissioner for Kathiani District requiring **Ngotia Ndolo** (deceased) and **Nzioki Sila** (a son of the late **Sila Mina**) to appear before the said District Commissioner on 11th October, 2011 for the hearing of the aforesaid appeal. As **Nzioka Sila** was long dead, he could not and did not attend the hearing thereof. However, his wife, **Grace Nthenya Nzioki**, though not the appellant or the legal representative of either **Nzioki Sila** or **Sila Mina** was called upon by the said District Commissioner to proceed with the appeal before him as if he was the Appellant, which she did. Although the applicant attended the hearing of the said appeal as the legal representative of his late father **Ngotia Ndolo** who was the Respondent in the said Minister's appeal, the District Commissioner-Kathiani denied him an opportunity to participate in the appeal proceedings and to oppose the appeal proceedings and to oppose the appeal, and instead called upon his uncle, **Julius Muthoka Ndolo** who is not a legal representative of the late **Ngotia Ndolo**, to represent the said deceased person in the appeal proceedings.
 6. After hearing the appeal on 11th October, 2011, the said District Commissioner visited the disputed land and said that he would issue summons on the date that he would read his judgment. However, the said District Commissioner did not issue any summons on when to read his judgment, and he never read the same. According to the applicant, he has since October 2011, made numerous visits to Kathiani District Commissioner's Office seeking to know when Judgment on the appeal will be read the last such visit being on or about 17th July, 2013 when he was told by officers thereat that all land appeal records and judgments for Kathiani district had long been send by the District Commissioner to the Lands Minister's Officer in Nairobi, and that he should go to the Minister's office in Nairobi, and ask to have the judgment read to him and copies thereof given to him.
 7. On 24th July, 2013, he went to the Minister's Office in Ardhi House Nairobi, and was referred to the office of the Director of Land Adjudication and settlement on the 9th floor of the said House, whereat the said District Commissioner's Judgment was read to him and copies of both the appeal proceedings and the judgment were given to him. Although the aforesaid judgment is shown to be dated 29th December, 2011, the same was not read to the parties thereto until 24th July, 2013, which date became the date of the said Judgment and which is also endorsed thereon. (According to the Applicant, a judgment does not become a judgment unless and until it is read/delivered, and that the date a judgment is read/delivered becomes the date of such judgment.
 8. In the said Judgement, the District Commissioner – Kathiani wrongfully and unlawfully gave the late **Ngotia Ndolo's** said land to a person who is long dead, **Nzioki Sila**, and did so after hearing one **Grace Nthenya Nzioki** who is/was not a legal representative of **Nzioki Sila** (deceased). To the applicant, the said District Commissioner also wrongfully and unlawfully purported to substitute the late **Ngotia Ndolo** (the Respondent in the appeal) with **Julius Muthoka Ndolo** who is not the legal representative of **Ngotia Ndolo**. Further, the said District Commissioner condemned the late **Ngotia Ndolo** (deceased) unheard by refusing to give audience to his legal representative (the Applicant), and therefore acted against the Rules of Natural Justice.
 9. To him, the said District Commissioner has, in effect illegally taken away land Parcel No. 3164-Mitaboni Adjudication Section belonging to **Ngotia Ndolo** (deceased) and purported to illegally give it to a dead person, **Nzioki Sila** hence the said District Commissioner acted both illegally, without Jurisdiction, and *ultra-vires* his powers. According to him, matters of estates of deceased persons can only be handled by the courts or as ordered by the courts, and in accordance with the **Law of Succession Act**.
 10. In the submissions filed on behalf of the Applicant the following issues were reiterated.

Determination

11. Judicial review, it has been held:

“...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-such as whether there was or there was not sufficient evidence to support the decision.”

See **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

12. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. It 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 that the individual is given fair treatment by the authority to which he has been subjected. See **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60*.
13. In order to succeed in it:

“...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 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 or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.**

14. As the application was not opposed by either the Respondent or the interested party, the Applicant's averments were not controverted.
15. In **James Gilo vs. The Republic & Another Civil Appeal No. 133 of 2009** the Court of Appeal while dismissing an appeal arising from a decision in which the High Court quashed a decision arising from land adjudication proceedings held:

“It is common ground that the Land Adjudication Officer had admitted in writing that the affected parcels and the persons claiming them were mixed up and consequently hearing notices had been issued to the wrong persons. We consider this admission to be the heart of the appeal before the court. There is a clear admission by the decision makers that they followed or invoked the wrong process...The four consequences of the common ground as described above are first, that the rightful claimants were not accorded the right of hearing which in turn constituted a breach of the rules of natural justice, second, that the decision maker did rely on irrelevant considerations, namely the proper parcels and the matching claimants, third, that the decision arrived at was consequently arrived at without reasons and four, the decision maker acted without jurisdiction, in that the procedure set out in section 12 of the Land Adjudication Act was never followed and proper notices issued...It is

clear to the court certiorari would issue on the basis of any one of the four consequences or violations specified namely breach of the rules of natural justice; reaching a decision on the basis of irrelevant considerations; or not taking into account relevant considerations, and arriving at a decision as a result of a serious procedural impropriety for failure to give proper hearing notices; acting contrary to section 12 of the Land Adjudication Act and therefore acting without jurisdiction. We also think that in view of the mix up of parcels and claimants outlined, the decision was irrational in that it was not based on any valid reasons in the circumstances. In our opinion a decision maker must adopt a fair procedure giving those affected a fair and informed say. We think that the facts giving rise to the grounds reflect considerable overlap. To sum up, it is our view that the court was in the circumstances entitled to invoke any or all the above grounds for intervention in judicial review under the following broad categories, illegality, irrationality and impropriety of procedure namely the three “Is” as described by Lord Diplock in the celebrated case of *Council of Civil Service Union & Others vs. Minister for Civil Service [1984] 3 All ER 935*. We must however, observe that in this country as well, the grounds for intervention were not intended to be exhaustive and are likely to expand in future a fact that is exemplified by Article 23(3)(f) of the new Constitution where an order for judicial review may issue to enforce bill of rights violations. In our view the three “heads” as described herein are neither exhaustive nor mutually exclusive...The court was also of the view on the same facts and in the circumstances, the decision maker did act without jurisdiction in the narrow sense. Thus in *Judicial Review Handbook 3rd Edition Michael Fordam* at page 728 sets out the law that a body must not make errors of precedent fact, conclusions unsupported by evidence or fundamental factual errors. If a body considers the factual trigger to exist when in truth it does not exist, the body is proceeding to exercise a function which in truth is beyond its powers and this justifies the Court in investigating for itself the key question of fact on all available material. Accordingly, errors of precedent fact are not just reviewable, but correctable... Over the years the word “*jurisdiction*” has been given what appears to the court to be an unclear meaning. It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word “*jurisdiction*” has been used in a very wide sense, and it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of inquiry which is of such nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have found in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question which was not remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some other matter which, under the provisions setting it up it had no right to take into account. Though this list is not exhaustive, if it decided a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. If it is entitled to enter on the inquiry and does not do any of those things mentioned in the course of the proceedings then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law...In the circumstances of this case although the Adjudication officer was entitled to enter into the issue of adjudication and was therefore within jurisdiction in the original sense, all the same he went on to commit the following error, which in turn denied him jurisdiction in the narrow sense as defined in the *Anisminic Case*:- a). Failure to give correct hearing notices and addressing the notice to wrong claimants and failure to hear the correct claimants resulting in his having acted contrary to the rules of natural justice. b). Basing his decision on no evidence because the rightful claimants did not have an opportunity to adduce evidence as regards their respective rights to the parcels of land. c). Basing his decision on irrelevant matters or not taking into account relevant matters. d). Failing to conduct hearing as per requirements set out in the Land Adjudication Act as pertains to the procedure to be followed...The

important point in all these is that a necessary “trigger” to the decision making function must objectively have been met for the decision maker’s decision or action to have been lawful. In all these instances the court is of the view that he stepped out of jurisdiction in the narrow sense and this in turn justified the superior court’s intervention on any one of the instances listed above. In the circumstances of the case before the court, the court specifically pegged its intervention on the ground that the decision maker did violate the rules of natural justice, and, in the court’s view, the court cannot be faulted. However, because of the overlap of the grounds for intervention as analysed above the court has on its part demonstrated that there were other grounds of intervention arising from the same facts.”

16. The allegation made herein that the applicant who was the personal representative of one of the parties to the dispute was not afforded a hearing was not disputed. Similarly, the allegation that the Respondent determined the dispute in favour of a person who was long dead is similarly not disputed.

17. In my view these two grounds are sufficient to nullify the Respondent’s decision.

18. In the premises, the orders which commend themselves to me and which I hereby grant are as follows:

1. An order of Certiorari is hereby issued removing to this Court for purposes of being quashed the proceedings and Ruling/Judgment of the District Commissioner-Kathiani, dated 29/12/2011 and given/read on 24/7/2013, in Machakos/Kathiani Minister’s Land Appeal Case No. 235 of 2008 (1989), and the same is hereby quashed.
2. An order of prohibition is hereby issued prohibiting the District Commissioner-Kathiani or any Land Officer/Surveyor acting on the Ruling/Judgment made in Machakos/Kathiani Minister’s Land Appeal Case No. 235 of 2008 (1989) from implementing and/or executing the said Ruling/Judgment.
3. As the application was not opposed there will be no order as to costs.

Dated at Nairobi this 14th July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mungai for Mrs Nzei for the Applicant

Cc Kevin