



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. JR NO. 27 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE MINISTER FOR LANDS.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**NTHINWA NYAGA.....INTERESTED PARTY**

**CHELESTINO NYAGA KITHUMBU & 6 OTHERS.....EX PARTE APPLICANT**

**JUDGEMENT**

**A. INTRODUCTION**

1. By an *ex Parte* chamber summons dated 21<sup>st</sup> January 2013 brought under the provisions of **Order 53 Rules 1 & 2** of the **Civil Procedure Rules 2010** (*the Rules*), **Section 9** of the **Law Reform Act (Cap. 26)** and **Section 29** of the **Land Adjudication Act (Cap. 284)** the *ex Parte* Applicants (*the Applicants*) sought leave of court to apply for an order of *certiorari* to quash the proceedings and the award of the Minister for Lands dated 19<sup>th</sup> July 2012 in *Minister's Land Appeal Case No. 266 of 2001* with respect to *Parcel Nos. 150 and 3490-3495*. The Applicants also sought leave to apply for an order of *prohibition* to stop the Minister, the Director of Land Adjudication & Settlement, Chief Land Registrar and District Land Registrar Mbeere from implementing the said award.

2. The said Application was heard on 15<sup>th</sup> July 2013 whereby the court granted the leave sought and granted the Applicants 21 days within which to file the substantive application for judicial review. The court further directed that the said leave shall operate as stay of implementation of the impugned award.

**B. THE APPLICANTS' CASE**

3. The Applicants filed a notice of motion dated 29<sup>th</sup> July 2013 based upon **Section 9** of the **Law Reform Act (Cap. 26)**, **Section 29** of the **Land Adjudication Act** and **Order 53 Rules 1, 2, 3 & 4** of the **Rules** seeking the following substantive orders:

a. That this honourable court do issue orders of *certiorari* to remove to the High Court and to quash the proceedings and judgement/award of the Minister for Lands dated 19<sup>th</sup> July 2012 in Land Appeal Case No. 266 of 2001 in respect of land Parcel Nos. 150, 3490, 3491, 3492, 3493, 3494 and 3495 within Kiambere Adjudication Section.

b. That this honourable court do issue orders of *prohibition* to prohibit the Minister for Land and specifically the Director of Land Adjudication and Settlement, the Chief Land Registrar and the District Land Registrar, Mbeere District from implementing the Judgement/Award of the Minister for Lands dated 19<sup>th</sup> July 2012 in land appeal Case No. 266 of 2001 in respect of land parcel No. 150, 3490, 3491, 3492, 3493, 3494 and 3495 within Kiambere Adjudication Section.

4. The said motion was based upon the statutory statement and verifying affidavit filed with the chamber summons for leave to apply for judicial review. It was contended that *Appeal Case No. 266 of 2001* was filed several years out of time; that there was a violation of the rules

of natural justice; that a person who was not a legal representative of the deceased was allowed to represent him in the appeal; the District Commissioner (DC) took into account irrelevant considerations; and that the District Commissioner who heard that appeal purported to select witnesses for the Applicants. The Applicants further complained that the District Commissioner had formed an opinion contrary to the evidence tendered in the appeal and as such had acted irrationally and arbitrarily.

### **C. THE RESPONDENTS' RESPONSE**

5. The Attorney General who appeared for both Respondents filed a replying affidavit sworn on 6<sup>th</sup> August 2020 by Nancy Wachira who was the Deputy Director of Land Adjudication & Settlement in the Ministry of Lands and Physical Planning in opposition to the application. It was contended that the Interested Party paid for his appeal on 11<sup>th</sup> March 1992 and filed his grounds of appeal on 1<sup>st</sup> April 1992 which was well within the statutory period of 60 days for filing an appeal. The deponent explained that it took so long to process the said appeal hence the reason it was assigned *Appeal Case No. 266 of 2001* and not a reference of 1992.

### **D. THE INTERESTED PARTY'S RESPONSE**

6. There is no indication on record of the Interested Party having filed a response to the application despite service.

### **E. DIRECTIONS ON THE HEARING OF THE APPLICATION**

7. When the matter was listed for directions on 7<sup>th</sup> July 2020 it was directed that the application for judicial review shall be canvassed through written submissions and on the basis of the documents and affidavits on record. The parties were consequently given timelines within which to file and exchange their written submissions.

8. The Applicants were granted 14 days to file and serve theirs where the Respondents were granted 14 days upon the lapse of the Applicants' period to file and serve theirs. The record indicates that whereas the Respondents filed their submissions on or about 6<sup>th</sup> October 2020, the submissions of the Applicants and the Interested Party were not on record by the time of preparation of the judgement.

### **F. THE ISSUES FOR DETERMINATION**

9. The court has considered the Applicants' notice of motion, the statutory statement, verifying affidavit and annexures thereto as well as the Respondents' replying affidavit in opposition thereto. The court is of the opinion that the following issues arise for determination:

- a. Whether Minister's Land Appeal Case No. 266 of 2001 was filed out of time.
- b. Whether there was a violation of the rules of natural justice in determination of the appeal.
- c. Whether the 1<sup>st</sup> Respondent erred in law in allowing a deceased person to be represented by someone who was not a legal representative.
- d. Whether the 1<sup>st</sup> Respondent took into account irrelevant considerations and whether he acted irrationally and arbitrarily.
- e. Whether the Applicants are entitled to the judicial review orders sought.
- f. Who shall bear costs of the application.

### **G. ANALYSIS AND DETERMINATIONS**

#### **a. Whether the appeal was filed out of time**

10. The Applicants contended that the appeal was filed out of the statutory period of 60 days stipulated in **Section 29** of the **Land Adjudication Act** because the objection proceedings which precipitated the appeal were concluded on 5<sup>th</sup> March 1992 whereas *Appeal No. 266 of 2001* bore a reference of 2001. There was absolutely no evidence annexed to their application to demonstrate the alleged lateness in filing the appeal. They did not exhibit copies of the appeals' register, payment receipts or the grounds of appeal in issue. Their objection was simply based upon the reference number assigned to the appeal.

11. The court has considered the Respondents' replying affidavit on the issue of timeliness in filing the appeal. It was contended that the Interested Party paid for the appeal vide receipt No. As 045504 dated 11<sup>th</sup> March 1992 which was well within the statutory period of 60 days from the date of the determination of the Land Adjudication Officer.

12. The Applicants did not dispute the explanation rendered by the Deputy Director of Land Adjudication & Settlement in her replying affidavit that it took a several years to process the appeals and allocate them reference numbers hence the reason the appeal bore a 2001 instead of a 1992 reference. The Applicants did not file any further affidavit to dispute or discount the explanation rendered by the Respondents. They did not also dispute the genuineness of the grounds of appeal exhibited in the replying affidavit and the date appended thereon.

13. In the premises, the court is satisfied that the impugned appeal was filed within the statutory period of 60 days. In any event, the

Applicants have not demonstrated that they objected to the hearing of the appeal before the District Commissioner on the basis that it was time-barred. In **Watuku Mutsiemi & Another v Republic & 5 Others [2018] eKLR**, the Court of Appeal held that an objection as to jurisdiction of the Minister to entertain a late appeal should be raised at the earliest opportunity and that a party who fails to do so may be precluded from raising the same issue after conclusion of such proceedings.

**b. Whether there was a violation of the rules of natural justice in the adjudication of the appeal**

14. Although the Applicants did not give detailed particulars of alleged violation of the rules of natural justice they accused the District Commissioner who adjudicated over the appeal of bias. They contended that the District Commissioner purported to choose witnesses on their behalf; that he had already formed an opinion contrary to the evidence tendered on appeal; and that he acted on evidence which was not produced before him.

15. The court has examined the proceedings and the judgement or award of the District Commissioner. It indicates that the Appellant and the Respondents in the appeal were accorded a chance to testify and to call their own witnesses. There is absolutely no indication on record to demonstrate that the District Commissioner imposed some witnesses upon the Applicants against their will or that he prevented them from calling witnesses of their choice. There is no evidence on record to demonstrate that the District Commissioner was biased against the Applicants and that he had formed any adverse opinion against the Appellant at the commencement of the appeal. There is nothing on record to demonstrate that he acted on evidence which was not tendered in the appeal. The Applicants did not point out any such evidence in their application at all.

16. The Appellants appear to be aggrieved by the following passage in the proceedings which they considered as evidence of bias:

**“The court confirmed that out of the seven Respondents, Kavavi Mwarwene of Ngai resides on the disputed land. Kavavi Mwarwene is in-law of first witness for Appellant, Joseph Kiura Murira. He is living in the disputed land at the mercy of his in-laws.**

**Kavavi Mwarwene could be the best placed person to have cased on the land in dispute because he is alleged to have been living on the land since 1952 and not Chelestino Kithumbu Nyaga which the court confirms is from Mururi clan. Kavavi confirmed that he is from Ngai and not Mururi clan.”**

17. The court is unable to agree with the Applicants that the above passage is evidence of bias. It is simply an analysis or evaluation of the evidence tendered before the District Commissioner. The adjudicator was entitled to wonder why a more suitable witness from Ngai clan who was said to have been resident on the suit properties for several decades was not called to testify but the Applicants called someone else from Mururi clan who was not even resident on the disputed land.

18. The court finds that the allegations of bias and violation of the rules of natural justice have not been established by the Applicants. Accordingly, the 2<sup>nd</sup> issue is answered in the negative.

**c. Whether the 1<sup>st</sup> Respondent erred in law in allowing a deceased person to be represented by someone who was not a legal representative**

19. It would appear from the material on record that by the time the appeal was being heard the Appellant and some of the Respondents in the appeal were already deceased hence they were represented by their family or clan members. In particular, the Appellant Nthinwa Nyaga (deceased) was represented by Patrick Nyaga Kiura. The Applicants contended that the persons who purported to represent the deceased parties did so irregularly and unlawfully since they were not legal representatives duly appointed under the **Law of Succession Act (Cap. 160)**.

20. The issue of representation of deceased parties in proceedings under the **Land Adjudication Act** was considered by the Court of Appeal in **Dominic Musei Ikombo v Kyule Makau [2019] eKLR** as follows:

**“On the second issue, our view is that proceedings under the Land Adjudication Act are not strictly speaking akin to proceedings under the Civil Procedure Act. The District Commissioner acting on behalf of the Minister has wide latitude of conducting the proceedings in a manner that meets the substantive ends of justice. Section 13 of the Land Adjudication Act talks of “guardian” or “representative according to African Law.” It does not refer to legal representatives. The strict rules of civil litigation as relates to capacity to sue or be sued do not apply to proceedings before the committee or the Minister. It is therefore not necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant. The parties therefore had *locus standi* to appear before the adjudication committee lack of letters of administration notwithstanding”**

21. On the basis of the said authority the court finds no merit in the Applicants’ objection to the representation of the deceased parties in the appeal. In any event, the Applicants did not object to such representation before the District Commissioner during the hearing of the appeal. They are accordingly estopped from doing so after conclusion of the appeal. The 3<sup>rd</sup> issue is consequently answered in the negative.

**d. Whether the 1<sup>st</sup> Respondent took into account irrelevant considerations in determining the appeal**

22. The Applicants contended in their statutory statement dated 21<sup>st</sup> January 2013 that the 1<sup>st</sup> Respondent’s decision was based on irrelevant considerations on the basis that he relied on evidence which was not tendered during the appeal. Although such conduct may constitute a ground for judicial review, the Applicants did not demonstrate in their verifying affidavit what evidence, if any, was imported from outside

the proceedings. No particulars of the impugned evidence were provided in the entire application for judicial review. Accordingly, the court finds and holds that the ground has not been substantiated. There was also no evidence on record to demonstrate that the 1<sup>st</sup> Respondent acted arbitrarily or irrationally.

**e. Whether the Applicants are entitled to the judicial review orders sought**

23. The purpose of judicial review was considered by **Odunga J in Republic v Country Government of Machakos [2019] eKLR** as follows:

**“In Republic v Kenya Revenue Authority Ex parte Yaya Towers Ltd [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision 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 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. See *Halsbury’s Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.*”**

24. The court has already found that the Applicants have failed to demonstrate that the appeal was time barred. They have failed to demonstrate bias and violation of the rules of natural justice. They have failed to demonstrate any illegality in the representation of the deceased appellant or any other impropriety on the part of the Respondents which would invite the supervisory jurisdiction of the court. Accordingly, the court is of the opinion that the Applicants are not entitled to the reliefs sought in the application or any one of them.

**f. Who shall bear costs of the application**

25. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the suit. Accordingly, the Respondents shall be awarded costs of the action. The Interested Party shall not be awarded costs since he did not participate in the proceedings.

**H. CONCLUSION AND DISPOSAL ORDER**

26. The upshot of the foregoing is that the court finds no merit in the application for judicial review. Accordingly, the Applicants’ notice of motion dated 29<sup>th</sup> July 2013 is hereby dismissed in its entirety with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. For the avoidance of doubt, the order of stay granted on 15<sup>th</sup> July 2013 is hereby vacated. It is so decided.

**JUDGEMENT DATED** and **SIGNED** in Chambers at **EMBU** this **22<sup>ND</sup> DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Ms. Nzekele holding brief for Mr. Okwaro for the Applicant and in the absence of the rest of the parties.

**Y.M. ANGIMA**

**JUDGE**

**22.10.2020**