



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: AKIWUMI, TUNOI & LAKHA JJ A )**

**CIVIL APPEAL NO 85 OF 1992**

**BETWEEN**

**JAMES N. WA WAMBU.....APPELLANT**

**AND**

**REPUBLIC.....1ST RESPONDENT**

**MOSIRO LAND ADJUDICATION SECTION.....2ND RESPONDENT**

**LAND ADJUDICATION DIRECTOR.....3RD RESPONDENT**

**KAJIADO DISTRICT LAND REGISTRAR.....4TH RESPONDENT**

**SAPATI O. SAIGILU.....5TH RESPONDENT**

**POSE O. LAAN.....6TH RESPONDENT**

**PANIN O. MOIPEI .....7TH RESPONDENT**

**KISHANTO O. KURRINYO.....8TH RESPONDENT**

*(Being an appeal from the decision of the High Court of Kenya at Nairobi (Mr Justice Dugdale) dated the 14th day of May, 1991*

*in*

*High Court Misc Civil Case No 312 of 1991)*

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**JUDGMENT OF THE COURT**

On 11th July, 1986 Mosiro sub-location within Keekonyokie section in Kajiado district (“the section) was declared an adjudication section under section 5 of the Land Adjudication Act (the Act”) (Cap 284 of the Laws of Kenya) and on 16th July, 1986 the Land Adjudication Committee comprising of 20 local residents was appointed to ascertain the extent of existing rights to land within the section and to record them. On 20th December 1990, after a period of over 4 years the Director of Land Adjudication and Settlement issued a certificate of finality certifying that the adjudication register was final in all respects

as is required by section 27 of the Act. On the same day the Director caused the adjudication register for the section to be delivered to the Chief Land Registrar, Nairobi, to cause registrations to be effected in accordance with the adjudication register. It would appear that a total of 52,452 acres were adjudicated upon and about 60 parcels of land were demarcated and titles issued for them. One of the beneficiaries of the said title deeds is the appellant, John Ndungu wa Wambu.

On 10th May, 1991 the respondents Numbers 6 to 9 brought an *ex-parte* application in the superior court pursuant to order 53 rules 1(1) and (2) of the Civil Procedure Rules for leave of the court to apply for the orders of *mandamus*, *certiorari* and prohibition which leave was granted by Dugdale, J on the same day. He further ordered that the matter be mentioned on 14th May, 1991.

The facts relied upon in the application were that the District Land Adjudication Officer did not give any of the respondents and or any resident of Mosiro sub-location any opportunity to point out or to demarcate the boundaries of any land they claimed; the recording and the demarcation officers did not accord the respondents and or any of the residents of the said sub-location the opportunity to make claims to any particular portion of land in the said land adjudication section; that these officers allocated land to people on the map without such map allocation being preceded by demarcation of the respective pieces of land on the ground. The respondents further stated that the said officers allocated some 52,452 acres of land in the section to some named persons who were not ordinarily resident on the said section and who were not entitled to any land and who had no lawful claim or interest in the land. The survey officer is said not to have surveyed on the ground any of the parcels of land in the said section and that the staff of the department of land adjudication resorted to allocation of the land on the map only and created surplus plots which were sold to non-residents including listed Government officials and their relatives and friends who were not entitled to any land in the said section. The director of land adjudication is stated to have acted improperly in altering the adjudication register after the same had been purportedly completed.

On 14th May, 1991, Mr Mukunya for the respondents and Mr Ole Keiwua, for the Attorney-General acting for the Director of Land Adjudication appeared before Dugdale, J and all the prerogative orders sought by the respondents were granted by consent. These orders, in effect, quashed the certificate of finality made and given by the Director of Land Adjudication on 20th December, 1991 and the adjudication record prepared under sections 19 and 23 of the Act. They also quashed the appointment of the Land Adjudication Committee made on 16th July, 1986. Further, the Land Registrar, Kajiado district, was prohibited from compiling and maintaining a register under section 11 of the Registered Land Act (Cap 300) and the Land Adjudication Officer, Kajiado district, was commanded to take charge of, supervise and control over, the adjudication at Mosiro land adjudication section as required by the Act.

It is from these orders that this appeal is brought, the main grounds of complaint being, firstly, that the said prerogative orders should not have been granted *ex-parte*; secondly, that since no notice of the application for leave had been given to the Registrar the day preceding the hearing of the application the learned judge erred in granting leave to the respondents to apply for the prerogative orders; and; finally, that the learned judge erred in failing to allow eight clear days between the time he granted leave to apply for the prerogative orders and the hearing of the application.

The appeal raises a question in regard to order 53 rules 1 and 3 of the Civil Procedure Rules before the amendments brought in by LN 164/92. The material portions of these rules were as follows:

“1. (1) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.

(3) The applicant shall give notice of the application for leave not later than the preceding day to

the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits.

3. (1) When leave has been granted to apply for an order of *mandamus*, prohibition or *certiorari*, the application shall be made within 21 days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a Court, and the object is either to compel the Court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”

It is manifestly clear from the record of appeal that the learned judge also overlooked the mandatory provisions of o 53 rules 3(1) and (2). The substantive application was heard *ex-parte* within 7 days from the date of the leave and without service on all interested parties. The prerogative orders granted by the judge affected many people who had already been issued with title deeds, and if the parcels of land of which they claim to be registered owners, were to be subjected to fresh adjudication under the Act the titles held by them would be rendered null and void. The registered owners were, therefore, in our view persons directly affected and ought to have been given a hearing and natural justice demanded that they be informed of the allegations made against them or the reasons why it was proposed to cancel their title deeds. We allow grounds 6, 7 and 8 of the grounds of appeal.

We find it unnecessary to go into any of the other points raised in the appeal. We would allow the appeal. The prerogative orders granted on the 14th May, 1991 are also declared a nullity and are quashed. The appellants will have the costs of the appeal.

**Dated and delivered at Nairobi this 9th day of June 1995**

**A.M AKIWUMI**

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**JUDGE OF APPEAL**

**P.K TUNOI**

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**JUDGE OF APPEAL**

**A.A LAKHA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**