



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. JUDICIAL REVIEW APPLN. NO. 86 OF 2017**

**REPUBLIC .....APPLICANT**

**VERSUS**

**DEPUTY COUNTY COMMISSIONER**

**KANGUNDO SUB-COUNTY.....1<sup>ST</sup> RESPONDENT**

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

**AND**

**PATRICK MUSYOKI MUTISO.....INTERESTED PARTY**

**EX-PARTE APPLICANT: KISOI KITONYI**

**JUDGMENT**

1. In the Notice of Motion dated 10<sup>th</sup> October, 2017, the Ex-parte Applicant is seeking for the following Judicial Review orders:

*a. That an order of certiorari do issue to remove to the High Court for the purpose of being quashed and to quash the proceedings and Judgment of the Deputy County Commissioner Kangundo Sub-County dated 18<sup>th</sup> July, 2017 in Minister's Land Appeal Case No. 99 of 1995.*

*b. That an order of prohibition do issue prohibiting the Deputy County Commissioner Kangundo Sub-County or any Lands Officer/Surveyor acting on the basis of the impugned Judgment from causing to be implemented or implementing the Judgment in Kangundo Minister's Land Appeal Case No. 99 of 1995.*

2. The Application is supported by the Applicant's Statement dated 26<sup>th</sup> September, 2017 and the Verifying Affidavit that was sworn on the same day.

3. According to the Applicant's deposition, his late father, John Kitonyi Ivai, was the brother of the Interested Party's grandfather, Luka Nzina Ivai; that his father, the Interested Party's grandfather (*his uncle*) and their descendants were from time immemorial in occupation and use of parcels of land known as 2026 and 3544 in Kawethei Adjudication Section, Kangundo Sub-County and that it was only after the death of his father that the Interested Party started claiming the suit land.

4. It is Applicant's case that the clan elders resolved the boundary dispute in respect of the family land; that after the clan elders fixed the boundary, Mutiso Luka Nzina destroyed the boundary which resulted in the filing of Civil Case No. L. 76 of 1969 in the District Magistrate's Court, Kangundo; that the court made its decision on 25<sup>th</sup> November, 1969 and that notwithstanding the decision of the court, the Land Adjudication Officer purported to re-open the dispute.

5. It is the Applicant's deposition that in the resultant Appeal which his father lodged, the Minister upheld the decision of the Land Adjudication Officer and that the decision of the Minister should be quashed.

6. In his Replying Affidavit, the Interested Party deponed that the suit land was acquired by his grandfather, the late Luka Nzina, in the year 1932; that in the year 1957, one Elija Mutambuki sued his late father, Mutiso Nzina, over the suit land in Kangundo Magistrate's Court Civil Suit No. L. 52 of 1957 and that the said suit was dismissed.

7. According to the Interested Party, John Kitonyi Ivai, who was his father's uncle, hived off a portion of the subject land; that the said Mr.

Ivai sued his father in 1969 in Kangundo Magistrate's Court Civil Case No. L. 76 of 1969 and that the court confirmed the boundary that had been fixed by the clan.

8. According to the Interested Party, his father filed an Application in Kangundo Civil Case No. L. 76 of 1969 in which he sought to set aside the Judgment of 25<sup>th</sup> November, 1969 and that before the application could be heard, the area was declared an Adjudication Section. It is the Interested Party's case that his father's land was demarcated and registered in favour of Ivai as parcel number 2625 -Kathiani Adjudication Section; that on Appeal, the Land Adjudication Officer ruled that his father was entitled to a portion of parcel no. 2625 and that the land that was given to his father was parceled out of parcel No. 2625 and registered as parcel number 3544.

9. The Interested Party deponed that John Ivai filed an Appeal with the Minister against the decision of the Land Adjudication Officer; that by the time the decision of the Minister was made, his father had died and that he is not the personal representative of his father's Estate. It is the Interested Party's deposition that the Applicant is not the personal representative of the Estate of John Ivai and that in any event, these proceedings were commenced after the requisite period of six (6) months.

10. The Interested Party finally deponed that in dismissing the Appeal, the Minister was guided by the law and that the suit land forms part of his late father's Estate and beyond the reach of this court.

11. The Applicant's advocate submitted that the Applicant did not get a fair treatment; that the conduct of the case by the 1<sup>st</sup> Respondent offended the rules of natural justice and that the evidence of the Applicant before the 1<sup>st</sup> Respondent was not recorded and his exhibit being the Judgment in Civil Case No. L.76 of 1969 was not taken into account.

12. Counsel submitted that being the son of John Kitonyi Ivai, the Applicant was likely to be affected by any decision relating to the land; that the decision in Civil Case Number L.76 of 1969 was a relevant matter which the 1<sup>st</sup> Respondent did not take into account while arriving at their decision and that the Application should be allowed. Counsel relied on several decisions of the High Court and the Court of Appeal which I have considered.

13. The Interested Party's advocate submitted that the Land Adjudication Act does not prevent either the Minister or the Land Adjudication Officer from hearing Objections or Appeals touching on land that was subject of court decisions before commencement of the adjudication process; that none of the parties appealed against the decision in Kangundo DMCC No. L.76 of 1969 and that the Land Adjudication Officer gave effect to the decision of the court.

14. The Interested Party's counsel submitted that the Applicant did not tell the court when the Minister's decision sought to be quashed was made; that Plot No. 3544-Kathiani Adjudication Section is recorded in the name of the Interested Party's father who died in 1997 and that by virtue of the Law of Succession, this court cannot be called upon to give orders regarding the Estates of the deceased.

15. The Applicant has sought for the quashing of *"the proceedings and Judgment of the Deputy County Commissioner Kangundo Sub-County dated 18<sup>th</sup> July, 2017 in Minister's Land Appeal Case No. 99 of 1995."*

16. It is not in dispute, at least from the pleadings, that the Applicant's father Kitonyi Ivai was a brother of the Interested Party's grandfather, Luka Nzina. When the Interested Party's grandfather died, his son, Mutiso Luka (*the Interested Party's father*) referred the dispute concerning the family land to the clan elders in 1967. It would appear that the Interested Party's father was not happy with the way the elders had sub-divided the family.

17. It is because of the said dispute over the land belonging to the family, and the decision of the clan elders, that made the Applicant's father, John Kitonyi Ivai to sue the Interested Party's father, Mutiso Luka Nzina in Kangundo District Magistrate's Court Civil Case No. L. 76 of 1969. In its Judgment dated 25<sup>th</sup> November, 1969, the Magistrate agreed with the way the clan members had divided the unadjudicated parcel of land between the two litigants. In those proceedings, the clan members informed the court that they had sub-divided the land in dispute equally between the Plaintiff and the Defendant, and had gone ahead to fix the boundaries. On the other hand, the Interested Party's father informed the court that the whole land belonged to his late father who had purchased it. While agreeing with the clan members, the court held as follows:

***"I have considered the whole evidence and I am satisfied that the land is a family one (sic) and that both parties have equal rights in it. In my opinion therefore, the clansmen arrived to a fair decision to have the land divided and I therefore confirm their decision."***

18. The above decision was never appealed against. From the evidence before me, the adjudication process in respect of Kawatheji Adjudication Section commenced sometimes in the year 1993. It is during the adjudication proceedings that another round of litigation commenced between the Interested Party's father, as the Objector, and the Applicant's father as the Respondent. In his decision, the Land Adjudication Officer awarded the entire land, except for a small portion, to the Interested Party's father in the following words:

***"Due to this failure (of taking an oath), I have ruled this case otherwise by awarding the land to objector for he took the oath. But due to right of tenancy I have reserved the home and an area to Respondent. The Respondent to retain the area where his home is."***

19. This is the decision that necessitated the Applicant's father to file an Appeal with the Minister. In the said Appeal, the Minister (1<sup>st</sup> Respondent) agreed with the decision of the Land Adjudication Officer.

20. The Interested Party has raised two preliminary points of law which I need to determine first. According to the Interested Party, these

proceedings were filed outside the mandatory period of six (6) months and that in any event, the litigants that were before the Minister have both died. It is the Interested Party's cases that because neither the Applicant nor himself have taken out the letters of administration in respect to their father's estates, the suit should be dismissed.

21. The two Objections raised by the Interested Party were dealt with extensively by Odunga J. in the case of **Republic vs. District Commissioner Machakos & Another Ex-parte Kakui Mutiso (2014) eKLR**. On the issue of filing an Application for orders of certiorari within six (6) months from the date that the impugned decision was made, the Judge held as follows:

***“36. However, in Republic vs. The Judicial Inquiry into the Goldberg Affair Ex parte Hon. Mwalulu & Others HCMA No. 1279 of 2014 (2004) eKLR as well as Republic vs. The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi HC Misc. Application No. 1235 of 1998, it was held that the six (6) months limitation period set out in order 53 Rules 2 and 7 only applies to the specific formal orders mentioned in order 53 Rules 2 and 7 and nothing else. A decision to alienate or to allocate land, is not formal because the Commissioner may in most cases issue titles without necessarily identifying the decision.”***

22. In the case of **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others, Dar-es-Salaam Civil Appeal No. 31 of 1999 (1995 – 1998) 1EA 199**, the Court of Appeal of Tanzania held that the phrase “or other proceedings has to be *construe ejusdem generis* with Judgment, order or decree, and conviction as having reference to a Judicial or quasi-Judicial proceedings as distinct from acts and commissions for which certiorari may be applied for.

23. In the case of **Stephen Kibowen vs. The Chief Magistrate's Court Nakuru & 2 others, Nyeri Civil Appeal No. 211 of 2013**, the Court of Appeal held as follows:

***“It is clear from the brief ruling that the learned judge took a strict approach to the six (6) months limitation period and concluded that the application before him was incompetent. Ordinarily, such a conclusion would be unimpeachable but in the matter before the learned judge, which was being challenged was not a decision properly made within jurisdiction against which time could run. Rather it was a nullity which amounted to nothingness. It was therefore incapable of commencing a reckoning of time and was deliberately incapable of triggering a statutory bar, being in every respect barren and of no effect. Had he given full consideration to the nature of the order being challenged before him he would likely have arrived at a different decision.”***

24. The matter before me is challenging the decision of the Minister for being ultra vires and a nullity. Consequently, and considering that the said decision has not been acted upon, the six (6) months limitation period captured in Order 53 Rule 7(1) does not come into play. However, in a situation where the decision of the Minister has been acted upon, and the rights of parties have crystallized, the court should in such instances refuse to exercise its discretion in favour of the Applicant under the doctrine of laches.

25. In any event, the impugned decision of the Minister in this matter is not dated. The only date on the said decision is the date that the decision was certified as a true copy of the original, which is 18<sup>th</sup> July, 2017.

26. The Law of Succession Act is not applicable to proceedings under the Land Adjudication Act. Indeed, this position was restated in the case of Kakui Mutiso (supra) as follows:

***“In my view, under the land consolidation and adjudication process, the issue before the relevant tribunals is the determination of interest in land rather than individual ownership since individual land tenure only comes into being on registration... Therefore, before registration the land in question is either ancestral or falls under any other form of communal ownership i.e. Trust land. In such instances, it is my view that the application of the strict succession legal regime does not apply since in my view the issue of estate may not be readily applicable to ancestral or communal property as such.”***

27. The suit land herein is still communal property wholly governed by the adjudicating process. Until the interests of those claiming the land are ascertained and title deeds are issued, it cannot form the estate of any individual. It was therefore not necessary that the Applicant and the Interested Party obtain letters of administration in these proceedings before they could prosecute and defend this matter respectively.

28. The next issue that I will deal with is whether the decision of the 1<sup>st</sup> Respondent should be quashed by this court. According to the Applicant, both the Land Adjudication Officer and the Minister did not consider the decision that was made by the clan elders in 1967 and the decision of the court that was made in Kangundo DMCC L. No. 76 of 1969 while arriving at their decision.

29. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited, Civil Appeal No. 185 of 2001**, the court of appeal held as follows:

***“Judicial Review 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 matter 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 making itself -such as whether there was or there was not sufficient evidence to support the decision.”***

30. The Applicant has alleged that 1<sup>st</sup> Respondent did not consider the decision of the court in Kangundo DMCC No. L.76 of 1969 which awarded his father half of the suit land. Indeed, the proceedings before the Land Adjudication Officer shows that the Judgment of the court formed a basis for the Award that the Land Adjudication Officer. According to the Land Adjudication Officer, the Magistrate in Kangundo DMCCC No. 76 of 1969 never visited the site, and therefore arrived at a decision that was not certain.

31. Considering that the court had arrived at a decision on how the suit land between the Applicant's and the Interested party's father should be shared, it was incumbent on the 1<sup>st</sup> Respondent to read the said decision and arrive at his interpretation of the decision of the court viz-a-viz the decision of the Land Adjudication Officer.

32. Although the decision of the court in Kangundo DMCC L. 76 of 1969 was not binding on the Minister, the said decision was a relevant factor that should have been considered by him before arriving at his decision. In the case of *Timotheo Makange vs. Manunga Ngochi, Civil Appeal No. 25 of 1978 [1979] KLR 5*, Law JA stated as follows:

***“It is arguable the principles of res judicata have no bearing on disputes under the Act, except to the extent of showing whether a claimant has a bona fide claim or not. Interests in land within adjudication areas previously recognized by the courts are not binding in land adjudication proceedings, and are only relevant as a factor to be taken into account...”***

33. Having failed to take into account the decision of the court in Kangundo DMCC No. L.76 of 1969, which decision had decreed that the two protagonists should share the land in equal shares, I find that the decision of the 1<sup>st</sup> Respondent was ultra vires, null and void.

34. For those reasons, I allow the Notice of Motion dated 10<sup>th</sup> October, 2017 as follows:

***a. That an order of certiorari do issue to move to this Court for the purpose of being quashed and to quash the proceedings and Judgment of the Deputy County Commissioner Kangundo Sub-County dated 18<sup>th</sup> July, 2017 in Minister's Land Appeal Case No. 99 of 1995.***

***b. That an order of prohibition do issue prohibiting the Deputy County Commissioner Kangundo Sub-County or any Lands Officer/Surveyor acting on the basis of the impugned Judgment from causing to be implemented or implementing the Judgment in Kangundo Minister's Land Appeal Case No. 99 of 1995.***

***c. That the cost of this Application be provided for.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25<sup>TH</sup> DAY OF JANUARY, 2019.**

**O. A. ANGOTE**

**JUDGE**