



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 19 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MACHAKOS DEPUTY COUNTY COMMISSIONER.....RESPONDENT**

**AND**

**MAINGWA MAKOMA MUTI.....EX PARTE APPLICANT**

**KIVUVA MASILA.....INTERESTED PARTY**

**JUDGMENT**

1. In the Notice of Motion dated 6<sup>th</sup> June, 2018, the Ex-parte Applicant is seeking for the following orders of Judicial Review:

***a. That an order of certiorari do issue to remove to this Honourable Court for purposes of being quashed the proceedings and decision of the Machakos Deputy County Commissioner in Appeal to the Minister No. 207 of 1996 dated 13<sup>th</sup> November, 2007 and Appeal No. 208 of 1996 dated 7<sup>th</sup> June, 2017 and read to the parties on 13<sup>th</sup> December, 2017.***

***b. That an order of mandamus do issue directed to the Machakos Deputy County Commissioner to register the Ex parte Applicant as the owner of the Plot No. 2034 and 2035 Kyangala Adjudication Section as the rightful owner.***

2. The Application is premised on the ground that the Respondent acted in excess of his mandate; that the Respondent was not properly gazetted as per the law; that the Respondent failed to execute the orders of the High Court and that the Respondent acted in excess of his powers when he delved into the issue of ownership of the suit land and yet the issue was one of boundaries.

3. In his Affidavit, the Ex-parte Applicant deponed that the Interested Party commenced proceedings before the Land Adjudication Officer which escalated to the Minister in Appeal Case Number 207/1996 and 208 of 1996; that this matter had earlier on been decided by the High Court which had ordered that the map drawn by the Resident Magistrate should be used and that the Land Adjudication Officer should have complied with the order of the High Court.

4. It is the Applicant's case that there was therefore no valid dispute before the Adjudication Officer and the Minister and that both of them acted in excess of their powers. Neither the Respondent nor the Interested Party responded to the Application. In his short written submissions, the Applicant's advocate submitted that the Resident Magistrate's Court, the Chief Magistrate's Court and the High Court heard the dispute in respect of the suit property before the adjudication process began; that the Deputy County Commissioner heard the Appeal that arose from the Land Adjudication Officer before he was gazetted and that the parties had agreed to adopt the decision of the High Court.

5. Counsel submitted that the Respondent made a decision that was contrary to the decision of the High Court and ended up awarding the parcels of land to the Interested Party.

6. The first ground challenging the decision of the Respondent is that the Respondent was not gazetted. It is true that pursuant to the provision of Section 29(4) of the Land Adjudication Act, the Minister may delegate, by notice in the Gazette, his powers to hear Appeals to any public officer who shall be deemed for all purposes to be that of the Minister.

7. If indeed the Respondent in this case was not gazetted to hear Appeals on behalf of the Minister as alleged by the Applicant, it was for the Applicant to provide the Gazette Notices for the period to prove that the Respondent's name was not amongst those people who had been appointed by the Minister to hear Appeals. The Applicant cannot just allege that the Respondent was never gazetted without availing evidence to that effect. That ground is therefore rejected by the court.

8. The Applicant has alleged that although the parties appearing before the Minister had agreed to adopt the decision of the High Court, the Respondent went against that Agreement and allocated the suit land to the Interested Party; that the Respondent was bound by the decision of the High Court and that the Respondent acted in excess of his powers.

9. The decision of the High Court that the Applicant has referred to is not amongst the documents that were filed by the Applicant. In any event, the Applicant's claim seems to be that the Minister erred by not following the decision of the High Court.

10. It is trite that Judicial Review is concerned with the decision making process, not with the merits of the decision itself (*See Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited, Civil Appeal No. 185 of 2001*). The court is not supposed to act as an appellate court while determining a Judicial Review Application.

11. In Judicial Review Applications, the court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse of power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations (*See Republic vs. The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi HC Misc. Application No. 1235 of 1998*).

12. It is therefore true that if indeed the High Court had made a determination in respect of the suit land, then the said decision was a relevant consideration that the Minister should have considered while arriving at its decision. However, the said decision has not been exhibited. This court cannot therefore state with certainty that the Respondent never took in consideration the High Court decision while arriving at his decision.

13. In the absence of a copy of the decision of the High Court, I find that the Applicant's Application is unmeritorious. For those reasons, I dismiss the Application dated 6<sup>th</sup> June, 2018 with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**