



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 243 OF 2011**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PROVINCIAL LAND DISPUTES**

**APPEALS COMMITTEE FOR EASTERN**

**PROVINCE SITTING AT EMBU.....RESPONDENT**

**AND**

**BENEDICT MAITHYA KASEE.....INTERESTED PARTY**

**EX PARTE APPLICANT....JOSEPH MUNG'ELU MWANGANGI**

**JUDGMENT**

1. In the Notice of Motion dated 20<sup>th</sup> December, 2011, the Ex-parte Applicant (*the Applicant*) is seeking for the following writs:

***a. That an order of certiorari do issue to recall to this court and quash the decision of the Provincial Land Disputes Appeals Committee for Eastern Province in Land Appeal Case No. 70 of 2010, between Benedict Maithya Kasee and Joseph Mung'elu Mwangangi dated 11<sup>th</sup> July, 2011 ordering District Officer Mutomo accompanied by one Alice Nzasi to visit the disputed land and mark the common boundary between the Applicant and the Interested Party.***

***b. That costs of this Application be awarded to the Ex parte Applicant.***

2. The Application is supported by Verifying Affidavit of the Applicant who has deponed that the dispute between him and the 1<sup>st</sup> Respondent commenced at the Mutomo District Land Disputes Tribunal in which his claim was allowed; that the said decision was adopted by the court in Mutomo RMCC L. 23 of 2009 on 17<sup>th</sup> February, 2010 and that 1<sup>st</sup> Respondent filed an Appeal against the said decision with the Provincial Appeals Committee in Embu on 3<sup>rd</sup> September, 2010.

3. The Applicant's case is that the Appeal before the Appeals Committee was filed outside the requisite period; that the Appeal was heard in his absence and that he was only served with a notice for the purpose of reading the decision of the Appeals Committee by the Mutomo Court.

4. In his Replying Affidavit, the Interested Party deponed that the Applicant opted not to participate in the proceedings before the Appeals Committee; that the Appeals Committee acted within its mandate in arriving at the impugned decision and that any party aggrieved with the decision of the Appeals Committee ought to file an Appeal on points of law.

5. The Applicant's counsel submitted that the Appeal before the Appeals Committee was an incompetent one because: that the Appeal was not filed within the requisite period of thirty (30) days and that there was already a Decree in respect of the decision of the District Land Dispute Tribunal.

6. The Applicant's counsel submitted that the District Officer and Alice Nzasi were not duly gazetted members of the Appeals Committee; that the two could not fix boundaries as suggested in the decision of the Appeals Committee and that the Appeals Committee had no jurisdiction to direct strangers in fixing of the boundary.

7. The Interested Party's advocate submitted that the Provincial Appeals Committee acted within the law; that Alice Nzasi, being the Vendor,

was the best person to fix the boundaries and that the District Officer's involvement was purely administrative in nature to ensure that law and order was maintained.

8. The Interested Party's advocate submitted that the issue of whether the Appeal was admitted out of time should have been raised during the hearing and that the Applicant should have filed an Appeal and not a Judicial Review Application.

9. The proceedings before the Mutomo District Land Disputes Tribunal shows that the Applicant herein was the claimant while the Interested Party was the Objector. In the decision of the Tribunal, the Tribunal fixed the boundary between the two. The Interested Party did not agree with the said decision and filed an Appeal with the Provincial Appeals Committee.

10. Although the decision of the District Land Disputes Tribunal was made on 29<sup>th</sup> September, 2009, the same was adopted by the Mutomo Resident Magistrate in Land 23 of 2009 on 17<sup>th</sup> February, 2010. It was not until 3<sup>rd</sup> September, 2010 (*as per the receipt issued by the Provincial Commission, Eastern Province*) that the Interested Party filed an Appeal.

11. Indeed, due to the said late filing of the Appeal, the Applicant's advocate, vide a letter dated 1<sup>st</sup> July, 2011, informed the Appeals Committee that the Appeal had been filed out of time. It will appear that the Appeals Committee never considered the issue of the Appeal having been filed out of time.

12. Section 8(1) of the Land Disputes Tribunals Act (*repealed*) provides that any party to a dispute who is aggrieved by the decision of the Tribunal may, within thirty (30) days of the decision, Appeal to the Appeals Committee. That did not happen in this case.

13. The Applicant has alleged that he was never heard by the Appeals Committee. I have perused the proceedings of the Appeals Committee dated 11<sup>th</sup> July, 2011. The proceedings shows that it is only the Interested Party who was present, but was also not heard. According to the proceedings; the Committee went through the file and arrived at a conclusion, without hearing the parties.

14. The manner in which the Appeals Committee conducted the proceedings was contrary to the rules of natural justice- that all parties to a dispute must be heard, and also contrary to the provisions of Section 8(6) and (7) of the Act which states as follows:

***“8(6) At the hearing of the appeal, the party bringing the appeal shall begin.***

***(7) After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision:***

***Provided that the Committee may in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal.”***

15. It is therefore obvious that the Appeals Committee breached several provisions of the Act by firstly, allowing the Appeal out of time and secondly by not hearing the Applicant herein. The Committee therefore acted *ultra vires* the provisions of the law. Judicial Review has been bequeathed to this court with defined interventions namely: illegality, irrationality and impropriety of procedure. That being the case, the decision of the Appeals Committee can and should be quashed in the manner proposed by the Applicant.

16. For those reasons, I allow the Notice of Motion dated 20<sup>th</sup> December, 2011 in the following terms:

***a. That an order of certiorari do issue to recall to this court and quash the decision of the Provincial Land Disputes Appeals Committee for Eastern Province in Land Appeal Case No. 70 of 2010, between Benedict Maithya Kasee and Joseph Mung'elu Mwangangi dated 11<sup>th</sup> July, 2011 ordering District Officer Mutomo accompanied by one Alice Nzasi to visit the disputed land and mark the common boundary between the Applicant and the Interested Party.***

***b. That costs of this Application are awarded to the Ex parte Applicant.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**