



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 106 OF 2017 (J.R)

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY FOR LANDS.....2ND RESPONDENT

THE DEPUTY COUNTY COMMISSIONER

MASINGA SUB-COUNTY.....3RD RESPONDENT

AND

SAMUEL MULWA.....1ST INTERESTED PARTY

THE REGISTRAR OF LANDS

MACHAKOS COUNTY.....2ND INTERESTED PARTY

AND

PAUL MWAU MWONGA.....EX-PARTE APPLICANT

JUDGMENT

1. The Ex-parte Applicant (*the Applicant*) has filed a Notice of Motion dated 22nd November, 2017 in which he is seeking for the following orders:

a. That an order of certiorari do issue to quash the decision of the County Commissioner Masinga Sub-County in the Judgment dated 28th June, 2017 and delivered in the Appeal to the Minister Case No. 182 of 2006 over land Parcel No. 682, Masinga/Kangonde Adjudication Section.

b. That an order of prohibition do issue to prohibit the Land Registrar, Machakos County and Samuel Mulwa from implementing the decision of the County Commissioner Masinga Sub-County in the Judgment dated 28th June, 2017 and delivered in the Appeal to the Minister Case No. 182 of 2006 over land Parcel No. 682 Masinga/Kangonde Adjudication Section.

c. That costs of this Application be paid by the Respondents.

2. According to the Applicant's Affidavit, parcel of land known as Masinga/Kangonde/682 which was the subject of Appeal to the Minister is registered in his name; that vide Gazette Notice No. 6854 dated 13th September, 2014, the Cabinet Secretary of Lands delegated the power to hear and determine Appeals to all Deputy County Commissioners and that the Appeal the subject of this Application was heard by one John Kisang who was not the Deputy County Commissioner Masinga Sub-County.

3. According to the Applicant, the Judgment of the Minister was signed by Deputy County Commissioner who had not heard the matter and

that the proceedings in Appeal Case No 182 of 2006 are a nullity because the Masinga Deputy County Commissioner had no power to re-delegate the power that had been delegated to him by the Cabinet Secretary to hear and determine Appeals.

4. The Applicant deponed that in any event, the Deputy County Commissioner had no jurisdiction to hear the Appeal; that the suit land was already registered and that it is only the court that had jurisdiction to determine disputes over land ownership.

5. In his reply, the 1st Interested Party deponed that parcel of land known as Masinga/Kangonde/682 originally belonged to Katumbi Ndolo who sold the land to his deceased father, Mulwa Mbula in 1982; that his late father paid Mr. Kalumbi Kshs. 50,000 and that the late Kalumbi died before the entire purchase price was paid and was buried on the suit land.

6. The 1st Interested Party deponed that the Applicant fully participated in the Appeal to the Minister in Case No. 182 of 2006 and did not raise any issue of the officer not being qualified to hear the Appeal and that the Registrar of Lands has already registered the suit land in his name. According to the 1st Interested Party, a prohibition order cannot issue to prohibit that which has already taken place.

7. The 3rd Respondent swore an Affidavit in which he deponed that he is the Assistant County Commissioner 1, Dagoretti Sub-County in Nairobi; that he was previously stationed at Masinga Sub-County, Machakos County in the same capacity and that the Minister's Appeal Case No. 182 of 2006 was delegated to the Deputy County Commissioner through Kenya Gazette Notice No. 6854 dated 13th September, 2014.

8. The 3rd Respondent averred that it is the Deputy County Commissioner who handles most of the Appeal cases; that the Deputy County Commissioner proceeded on leave when more than half of the cases out of the 91 cases referred to him had not been heard and determined and that being his Principal Deputy, he undertook his duties in accordance with Section 29(4) of the National Administration and Field Services Functions delegated powers and administrative procedures.

9. According to the Assistant County Commissioner, both parties to the Appeal were notified of the hearing of the Appeal that took place on 27th February, 2017; that after hearing the parties, he found in favour of the 1st Interested Party and that when the Deputy County Commissioner reported back on duty, he signed the Judgment and delivered it on 28th June, 2017.

10. The Applicant's counsel submitted that as at the time the Minister heard and determined the Appeal, the Applicant had already been registered as the absolute owner of the suit land; that the Appeal was heard by another person other than the Deputy County Commissioner and that the person who heard the Appeal did not sign the Award. Counsel relied on numerous authorities which I have considered.

11. The 1st Interested Party submitted that the Gazette Notice appointing public officers who could hear Appeals on behalf of the Minister did not bear a name of a person but the public office by name and that the office mentioned in the Gazette Notice could be held by the Assistant County Commissioner in the absence of the Deputy County Commissioner.

12. According to the 1st Interested Party, the Assistant County Commissioner only assisted the Deputy County Commissioner in preparing and processing the determination of the Appeal and that the Assistant County Commissioner did not deliver the Judgment. The 1st Interested Party relied on several authorities which I have considered.

13. The Notice of Motion before me is seeking for the Judicial Review orders of certiorari and prohibition. The quashing orders (*certiorari*) and the prohibiting order are complimentary remedies, based upon common principles. A quashing order issues to quash a decision which is *ultra vires*. On the other hand, a prohibiting order issues to forbid some act or decision which would be *ultra vires*. Consequently, a quashing order looks into the past while a prohibiting order looks into the future.

14. Quashing and prohibiting orders are employed to primarily control inferior courts, tribunals and administrative authorities. In the case of **Republic vs. Machakos Deputy County Commissioner, Ex-parte Maingwa Makoma Mutie, Machakos ELC. Miscellaneous Application No. 19 of 2018**, this court gave the perimeters of Judicial Review Applications as follows:

“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).”

15. In addition to the above perimeters of orders of Judicial Review, a Judicial Review Court is also entitled to quash a decision of an inferior court, tribunal or administrative body if the decision is made in excess of jurisdiction. The first issue that I will deal with is whether the 3rd Respondent had the requisite jurisdiction to deliver the undated Award in Appeal Case No. 182 of 2006.

16. It is not in dispute that the 1st Interested Party appealed against the decision of the Arbitration Board to the Minister in respect of a parcel of land known as 682. The Appeal by the 1st Interested Party against the Award of the Arbitration Board was pursuant to the provisions of Section 29(1) of the Land Adjudication Act.

17. Section 29(4) of the Land Adjudication Act provides as follows:

“Notwithstanding the provisions of Section 38(2) of the Interpretation and General Provisions Act or of any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear Appeals and his duties and functions under this Section to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.”

18. From the above provision, it is clear that the person or office to whom the powers and functions of hearing an Appeal may be delegated must be gazetted. The Applicant has deponed that the Minister’s Appeal Case No. 182 of 2006 was delegated to the Deputy County Commissioner vide Gazette Notice No. 6854 dated 13th September, 2014. This position was admitted by then Machakos Assistant County Commissioner 1.

19. Despite the Minister having delegated to the Machakos Deputy County Commissioner by way of a Gazette Notice to hear all the appeals, the Assistant County Commissioner 1 admitted that he is the one who heard the Appeal, prepared the Award and gave the Award to the Deputy County Commissioner to sign it.

20. It was the deposition of the Assistant County Commissioner that being the Principal Deputy of the Deputy County Commissioner, he undertook the duties of his senior who was away on leave, and then had him sign the Award.

21. It is inconceivable and absurd that a person exercising quasi-judicial authority can admit that he heard the Appeal, wrote a Judgment and gave it to a different person to sign it. Considering that the law allows the Minister to delegate his functions of hearing Appeals to any person or public officer, and having delegated that function to the Deputy County Commissioner, how can the Assistant County Commissioner hear the Appeal on behalf of the Deputy County Commissioner? That, in my view, is an exercise by an officer who does not have jurisdiction.

22. It is trite in administrative law that unless Parliament expresses or implies a dispensation, legislative power must be exercised by those to whom it is given, and not by further delegates. *“Delagata potestas non potest delegari”* is a principle in constitutional and administrative law that means that no delegated powers can be further delegated.

23. Considering that the law only allows the hearing of Appeals by the Minister, or by public officers or people gazetted by the Minister, the only person who was authorized to hear Appeal Case No. 182 of 2006 was the 3rd Respondent, and not his Assistant. The proceedings and Judgment of the Assistant County Commissioner 1 were done by someone who did not have the jurisdiction to do so. The said proceedings were therefore *ultra vires*, null and void.

24. Although the 1st Interested Party has deponed that he has already been registered as the proprietor of parcel of land known as Masinga/Kangonde/682, I find that the said registration, having being based on the decision that has been nullified, was also null and void. Indeed, the Machakos Land Registrar, Machakos should cancel the said registration forthwith and await a valid decision of the Minister.

25. For the reasons I have given above, I find that the Notice of Motion dated 22nd November, 2017 is meritorious. The Application dated 22nd November, 2017 is therefore allowed as follows:

a. That an order of certiorari do issue to quash the purported decision of the Deputy County Commissioner Masinga Sub-County in the Judgment dated 28th June, 2017 and delivered in the Appeal to the Minister Case No. 182 of 2006 over land Parcel No. 682, Masinga/Kangonde Adjudication Section.

b. The Land Registrar, Machakos is hereby directed to cancel the title and the entries made on the register in respect of the Title Deed that was issued to the Interested Party on 6th September, 2017.

c. Appeal No. 182 of 2006 to be re-heard by Deputy County Commissioner.

d. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE