



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 15 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF LANDS AND HOUSING.....1ST RESPONDENT

THE DIRECTOR, LAND ADJUDICATION, KITUI COUNTY.....2ND RESPONDENT

THE LAND REGISTRAR, KITUI COUNTY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

AND

SAMUEL MBITHUKA KAMWAKI.....INTERESTED PARTY

AND

MUEMA IKUTHU.....1ST EX PARTE APPLICANT

NDEMA IKUTHU.....2ND EX PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 26th April, 2018, the Ex-parte Applicants (*the Applicants*) are seeking for the following writs of Judicial Review:

a. An order of certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent conveyed by one Kimaru C. Kemboi, Deputy County Commissioner, Kisasi Sub-County, Kitui County on behalf of the 1st Respondent dated on 20th March, 2017 but delivered on 17th January, 2018 purporting to vest Mbitini/Kisasi Adjudication Section-Plot 51 to the Interested Party herein, Samuel Mbithuka Kamwaki in Minister's Appeal Case No. 256 of 1993.

b. An order of mandamus to compel the 1st Respondent to re-hear Minister's Appeal Case No. 256 of 1993 and allow the Applicants to avail their witnesses.

c. Costs be borne by the Respondents and Interested Party.

2. The Motion is supported by the Affidavit of the 1st Applicant who has deposed that his grandfather, Ikuthu Ing'athi, acquired land parcel number Mbitini/Kisasi Adjudication Section, Plot 51 in 1914; that he settled on the said land until 1926 when he died and that when the Interested Party attempted to acquire the land in 1971, he was stopped by the Chief.

3. It was the deposition of the 1st Applicant that being dissatisfied by the decision of the Chief, the Interested Party filed a suit at the Kitui Law Courts in Civil Case No. 145 of 1971; that the said suit was dismissed and that when he filed Civil Appeal No. 66 of 1972, the same was dismissed by the court.

4. It is the Applicant's case that during the adjudication process, the local committee granted the land to the Interested Party and when the matter was escalated to the Minister, he was not allowed to call his witnesses.

5. The 1st Applicant deponed that the 1st Respondent only considered the evidence of the Interested Party while arriving at his decision and that the decision of the 1st Respondent was unreasonable, against the rules of natural justice and was arrived at on the strength of irrelevant considerations.

6. The 1st-4th Respondents filed Grounds of Opposition through the Attorney General in which they averred that the Application contravenes the mandatory procedures of Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act and that the Application is incompetent and an abuse of the process of the court.

7. The 2nd Respondent deponed in his Affidavit that it is not true that the Applicants were denied an opportunity to call witnesses and that it is the Applicants who did not avail witnesses during the hearing.

8. In his Further affidavit, the 1st Applicant deponed that he was indeed not allowed to call any witnesses; that his opponent was given a notice of the Judgment date and that it was not until 17th January, 2018 that he became aware of the decision of the Minister.

9. The Interested Party did not respond to the Application. In his submissions, the Applicants' advocate submitted that the Applicants were not allowed to call their witnesses; that it is only the Interested Party who was allowed to call witnesses and that the Application should be allowed.

10. The evidence by the 2nd Respondent shows that the Mbitini/Kisasi area was declared an adjudication section on 8th March, 1984. The evidence before me shows that the Applicant's father, Ikuthu, filed an Appeal before the Adjudication Committee on 4th July, 1984, which Appeal was dismissed by the Committee. The subsequent Appeals to the Adjudication Arbitration Board and the Adjudication Land Officer were also dismissed.

11. When the Applicants lodged an Appeal with the Minister in Appeal Case No. 256 of 1993, the Minister's representative dismissed the Appeal. The Applicants are challenging the decision of the Minister on the ground that they were not allowed to call their witness.

12. It is trite that Judicial Review is not concerned with the merit of the decision, but with process that was followed before the said decision was arrived at. In the case of *Republic vs. Machakos Deputy County Commissioner, Ex-parte Maingwa Makoma & Another, Machakos ELC Misc. Application. No. 19 of 2018* this court held as follows:

“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.

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).”

13. The proceedings before the Minister shows that the 1st Applicant appeared on behalf of his late father Ikuthu Ing'athi. The 1st Applicant testified on how his late grandfather acquired the suit land which he bequeathed to his father, Ikuthu Ing'athi. When the Applicants finished testifying on 25th October, 2016 before the Minister's representative, and was cross-examined, there is no indication that he requested the Minister to allow him call witnesses.

14. On the other hand, the Interested Party requested, and was allowed to call a witness who testified.

15. Having being given an opportunity to testify, the Applicants cannot allege that the rules of fair hearing were not adhered to. Indeed, the mere fact that the Interested Party was allowed to call a witness cannot in itself vitiate the proceedings.

16. Considering that there is no evidence, either by way of a letter to the 1st Respondent or in the proceedings, showing that the Applicants were denied the right of calling witnesses, I find that the Notice of Motion dated 26th April, 2018 is unmeritorious. Indeed, the Minister complied with the rules of natural justice by hearing the 1st Applicant.

17. For those reasons, I dismiss the Notice of Motion dated 26th April, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF APRIL, 2019.

O.A. ANGOTE

JUDGE