



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. MISC. APPLN. NO. 187 OF 2011**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE MINISTER FOR LANDS.....1<sup>ST</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL OF THE**

**REPUBLIC OF KENYA.....2<sup>ND</sup> RESPONDENT**

**AND**

**MULATYA ISIKA.....1<sup>ST</sup> INTERESTED PARTY**

**MASOMBO MWANZIA.....2<sup>ND</sup> INTERESTED PARTY**

**EX PARTE APPLICANT.....KIEMA MUASYA**

**JUDGMENT**

1. In the Notice of Motion dated 31<sup>st</sup> October, 2012, the Applicant is praying for the following writ of Judicial Review:

***a. That an order of certiorari do issue to recall into this court and quash the decision of the Minister for Lands in Ministers Appeals Case No. 115 of 2001 over land parcel No. 825 Makusya Adjudication Section, Lower Yatta District dated 24<sup>th</sup> January, 2011 awarding Land Parcel No. 825 Makusya Adjudication Section to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in place of the Applicant.***

2. According to the Applicant's Statutory Statement of Facts, the 1<sup>st</sup> Respondent died at the time the Appeal before the Minister was being prosecuted; that one Muli Mulatya was allowed to participate in the proceedings without a Grant of Letters of Administration and that the Minister erred by contradicting the decision of the court in Kitui District Magistrate's Court Civil Case No. 2 of 1980.

3. According to the Applicant, the decision of the court was binding on the Minister; that a stranger by the name of Mutie Munyao was allowed to participate in the proceedings and that the Application should be allowed.

4. Neither the Respondents nor the Interested Parties filed their respective Replying Affidavits.

5. The Applicant's advocate submitted that Muli Mulatya could not urge a claim on behalf of the Estate of his late father, Mulatya Isika, who was the Respondent in the Appeal without a Grant of Letters of Administration and that the Minister allowed a stranger by the name of Mutie Munyao to cross-examine him.

6. Counsel submitted that the decision of the court in Kitui DMCC No. 2 of 1980 was binding on the Minister; that the court had made a decision to the effect that the suit land should be divided equally and that the decision of the Minister was flawed.

7. According to the proceedings annexed on the Applicant's Affidavit, the Applicant appealed to the Land Adjudication Officer against the decision of the Land Arbitration Board pursuant to the provisions of the Land Adjudication Act. After hearing the dispute, the Land Adjudication Officer allowed the Appellant's objection as follows:

***“The objection is allowed. New boundary established between Plot No.825 and Plot No. 875.”***

8. The Land Adjudication Officer further directed the Survey/Demarcation officer to visit the two plots and fix a common boundary between them.

9. The Applicant then filed an Appeal with the Minister in Appeal Case No. 115 of 2001. The Appeal proceeded for hearing on 24<sup>th</sup> January, 2011. Although the Applicant has stated that the 1<sup>st</sup> Respondent was already dead as at the time the Appeal proceeded for hearing, he did not avail to this court a copy of the Death Certificate to enable the court ascertain the authenticity of his claim.

10. In any event, the Applicant has stated that the said 1<sup>st</sup> Respondent's son testified on behalf of the 1<sup>st</sup> Respondent. Indeed, the record shows that it is one Masombo Mwanzia, the father of the 1<sup>st</sup> Respondent who testified before the Minister.

11. The fact that the said Masombo Mwanzia represented the 1<sup>st</sup> Respondent without Letters of Administration is not a valid reason to invalidate the proceedings before the Minister.

12. As was held by Odunga J. in the case of ***Republic vs. District Commissioner Machakos & Another Ex-parte Kakui Mutiso [2014] eKLR***, under the land consolidation and adjudication process, the issues before the relevant tribunals, including an Appeal before the Minister, is the determination of interest in land rather than individual ownership. That is what the preamble to the Act provides. It therefore follows that before the ascertainment of individual land rights, any land under an adjudication process is either ancestral or falls under any other form of communal ownership.

13. As was held in the case of ***Kakui Mutiso (supra)***, the Application of the strict succession legal regime does not apply since the issue of the Estate of a deceased person may not be applicable to ancestral or communal property. To the extent that the determination of individual rights in the suit land had not been completed, the suit property cannot be said to be part of the Estate of the 1<sup>st</sup> Respondent alone.

14. This legal possession is supported by the provision of Section 13 of the Land Adjudication Act which provides that every person who considers that he has an interest in land within an adjudication section may make a claim to the recording officer and point out his claim. Consequently, any person who has an interest in respect of ancestral or communal land need not have Letters of Administration to ventilate that claim. The Appellant's objection that Mr. Masombo Mwanzia should not have participated in the proceedings before the Minister before obtaining the Letters of Administration is therefore not valid.

15. The above argument also supports the need by the Minister to allow any person to participate in the proceedings before him. It is therefore not legally sound that the proceedings before the Minister are a nullity because the Minister allowed “*a stranger*” to cross-examine the Applicant.

16. The Appellant has argued that the Minister was bound by the decision of the court in Kitui DMCC No. 2 of 1980. That is not true. The Minister, while resolving a dispute pursuant to the provisions of the Land Adjudication Act is only required to look at the evidence on record and arrive at an independent decision. Indeed, a decision by the court of law is one of the relevant factors that the Minister should consider. The decision of the court being a relevant factor to be considered by the Minister is not the same thing as the Minister being bound by the said decision. In the case of ***Timotheo Makenge vs. Manunga Ngochi (1979) KLR 53, (1976-80) 1KLR 1136***, it was held as follows:

***“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...”***

17. The reason why the Minister need not be bound by a decision of the court is because the rights to be determined during adjudication are as varied as the parties who are likely to be affected by the decision. However, in a situation where the Minister departs from the decision of the court, reasons for such departure should be given by the Minister.

18. In any event, there is no evidence before this court to show that the Minister in this matter departed from the decision of the court in Kitui DMCC No. 2 of 1980. The court in the said matter made the following orders:

***“Justice of this case requires that an equitable boundary should be marked between the parties, awarding each party the area which has his existing works...boundary to be demarcated on 12<sup>th</sup> June, 1980. Plaintiff to meet transport charges.”***

19. The court never directed that the parties should share the suit properties equally. Indeed, equitable distribution of the suit land as ordered by the court is not synonymous with equal distribution of the land. Equity is giving everyone what they need to be successful, or what they are entitled to in law and fact, while equality is treating everyone the same, or giving them whatever they are claiming in equal portions. The court directed that the two parties to be apportioned their respective portions in accordance with their existing works.

20. Indeed, it is on the basis of the court order that in his decision, the Land Adjudication Officer directed the Demarcation officer to proceed and demarcate the land amongst the Applicant and the Respondents. Instead of waiting for the said demarcation, the Applicant proceeded to file an Appeal which was dismissed by the Minister.

21. Considering that the Land Adjudication Officer considered the decision of the court in Kitui DMCC No. 2 of 1980, the Minister cannot be faulted for having agreed with the said decision.

22. For those reasons, I find the Application dated 31<sup>st</sup> October, 2012 to be unmeritorious. The same is dismissed with no orders to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE