



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 21 OF 2018**

**MUNYITHYA MASYUKO NZAVI .....APPLICANT**

**VERSUS**

**THE DEPUTY COUNTY COMMISSIONER**

**KYUSO SUB-COUNTY .....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVT.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, MWINGI COUNTY.....5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**AND**

**MANZI KAVOI NGUILU .....INTERESTED PARTY**

**EX PARTE APPLICANT: MUNYITHA MASYUKO NZAVI**

**JUDGMENT**

1. In the Notice of Motion dated 20<sup>th</sup> July, 2018, the Ex-parte Applicant is praying for the following orders of Judicial Review:

*a. That an order of prohibition do issue prohibiting and stopping the Respondents, their servants and/or agents from acting upon, enforcing or in any manner altering the adjudication register to conform with the determination, order/or Judgment of the Deputy County Commissioner, Kyuso Sub-County in Land Adjudication Appeal No. 63 Development given on 27<sup>th</sup> November, 2017 (but dated 22<sup>nd</sup> March, 2018) in respect of Land Parcel Number Ngaai Adjudication Section No. 3112.*

*b. That an order of certiorari do and is hereby issued to remove into this court and quash the Judgment decision and determination of the Deputy County Commissioner Kyuso Sub-County on behalf of the Cabinet Secretary, Ministry of Lands, Housing and Urban Development made on 27<sup>th</sup> November, 2017 (but dated 22<sup>nd</sup> March, 2018) in respect of land parcel number Ngaai Adjudication Section No. 3112.*

*c. That other consequential directions and orders be given as may be deemed necessary.*

*d. That the costs of these proceedings be provided for.*

2. According to the Applicant's Verifying Affidavit, he had a dispute with the Interested Party in respect of parcel of land known as Ngaai

Adjudication Section 3112 (*the suit land*) which was heard by the Adjudication Board; that he filed the Appeal with the Minister and that the Appeal was heard by the 1<sup>st</sup> Respondent who delivered a Judgment on the same day.

3. The Applicant deponed that after following up on the proceedings and the Judgment, he discovered that the Judgment that was read to them on 27<sup>th</sup> November, 2017 was not the same Judgment that he was given; that the Judgment was given on 27<sup>th</sup> November, 2017 and not 22<sup>nd</sup> March, 2018 and that the Judgment that was read to them on 27<sup>th</sup> November, 2017 took less than one to read which was to this effect: “*This case has engaged my mind too much. Go and live the way you have been living.*”

4. Although the Respondents were served with the Application, they never filed their responses. The Notice of Motion proceeded by way of written submissions.

5. The Applicant’s advocate submitted that the only complaint against the 1<sup>st</sup> Respondent is that he altered his Judgment to the detriment of the Applicant; that the 1<sup>st</sup> Respondent misconducted himself and abused the powers bestowed on him and that apart from a breach of the rules of natural justice and excess of jurisdiction, bad faith and dishonesty have been held to be grounds for attracting the remedies of prohibition and certiorari.

6. The Ex-parte Applicant has challenged the decision of the 1<sup>st</sup> Respondent on the ground that he acted dishonestly and in bad faith when he granted him a written Judgment that was different from the Judgment that he pronounced on 27<sup>th</sup> November, 2017. According to the Ex parte Applicant, after hearing both parties in respect of the Appeal that the (*the Applicant*) had filed, the 1<sup>st</sup> Respondent pronounced himself as follows:

***“Hii kesi imenikula akili sana na imenisumbua sana. Enda mkae vile mnakaa” [This case has engaged my mind too much and also disturbed me. Go and live the way you have been living].***

7. I have perused the proceedings that were taken by the Minister. It is true as deponed by the Applicant that the 1<sup>st</sup> Respondent heard both the Applicant and the Interested Party on 27<sup>th</sup> November, 2017. However, the proceedings do not show that the 1<sup>st</sup> Respondent delivered any decision after hearing the matter on 27<sup>th</sup> November, 2017. The only decision that was delivered by the 1<sup>st</sup> Respondent is the one dated 22<sup>nd</sup> March, 2018 in which the 1<sup>st</sup> Respondent dismissed the Applicant’s Appeal.

8. It is trite that Judicial Review is concerned with the decision making process, not with the merits of the decision itself. As was held in the case of ***Municipal Council of Mombasa vs. Republic Ex-parte Umoja Consultants Limited, Civil Appeal No. 185 of 2001***, the Judicial Review court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the person affected by the decision was heard and whether in making the decision, the decision maker took into account relevant matters or took into account irrelevant matters.

9. Indeed, as correctly submitted by the Applicant’s counsel, the other ground for granting the order of certiorari is if the decision maker acts dishonestly, unreasonably and in bad faith. However, there is no evidence before this court to show that the 1<sup>st</sup> Respondent acted unreasonably, dishonestly and in bad faith when he heard the Appeal and delivered his decision on 22<sup>nd</sup> March, 2018.

10. Although the Applicant has deponed that the 1<sup>st</sup> Respondent delivered two conflicting Judgments, there is no evidence to show that the 1<sup>st</sup> Respondent delivered any decision on 27<sup>th</sup> November, 2017. The only decision that was delivered by the 1<sup>st</sup> Respondent is the one dated 22<sup>nd</sup> March, 2018. That being the case, I find that the 1<sup>st</sup> Respondent neither acted *ultra vires* nor in bad faith.

11. For those reasons, I dismiss the Notice of Motion dated 20<sup>th</sup> July, 2018 but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21<sup>ST</sup> DAY OF JUNE, 2019.**

**O.A. ANGOTE**

**JUDGE**