



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 200 OF 2012

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND ADJUDICATION OFFICER, KITUI.....RESPONDENT

AND

MUSYOKA MALUKI.....INTERESTED PARTY

EX- PARTE APPLICANT:.....NYAMAI SYENGO

JUDGMENT

1. In the Amended Notice of Motion dated 13th November, 2018, the Ex-parte Applicant (*the Applicant*) is seeking for the following orders of Judicial Review:

a. That an order of mandamus to move into this Honourable Court compelling the District Land Adjudication Officer, Kitui to allow the Ex-parte Applicant to lodge an Appeal to the Minister against the decision in Objection Case No. 64 of 2010 delivered on 7th March, 2012 in respect to Land Parcel No. 82 Kawala Adjudication Section in Kitui County as provided for in law.

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

2. According to the Applicant's statutory statement, his witness, Kyule Mututa, was present during the hearing of objection number 64 of 2012 but was not allowed to testify by the Land Adjudication Officer; that when the Land Adjudication Officer visited the site, he was sick and hospitalized and that he was not aware that he was supposed to lodge an Appeal within sixty (60) days.

3. The Applicant finally averred that he bought the suit land in 1964 from one Kiteme Kitonga; that the first Interested Party encroached on the land just before the adjudication process commenced and that the Land Adjudication Officer who heard the objection is not the same person who pronounced the Award.

4. The Respondent filed Grounds of Opposition in which he averred that the Application is bad in law, frivolous and an abuse of the court process; that the Application is in contravention of the mandatory provisions of Section 29(1) of the Land Adjudication Act and that the Application is an afterthought because the Respondent had already filed submissions to the Application dated 20th May, 2018.

5. In his submissions, the Applicant's advocate submitted that on 7th March, 2012, the Judgment of the Land Adjudication Officer dismissing the Applicant's objection was delivered by one Mr. Kyalo; that the Applicant only came to know about his right of Appeal on 21st May, 2012 and that his attempt to lodge an Appeal out of time was not successful.

6. According to counsel, the Land Adjudication Officer, being an agent of the Minister, was mandated to accept the Appeal filed by the Ex-parte Applicant and that the orders sought in the Amended Notice of Motion should be allowed.

7. On his part, the Respondent's advocate submitted that the orders sought have no basis in law; that the law does not provide for a party to seek the leave of the Land Adjudication Officer to be able to file an Appeal to the Minister; that the Applicant had an opportunity to file the Appeal within sixty (60) days of the delivery of the decision of the Land Adjudication Officer and that the Application should be dismissed.

8. The record shows that on 5th September, 2012, the Ex-parte Applicant moved the court vide an Application dated 28th August, 2012 for

leave to “*apply for orders of certiorari and mandamus, to remove into the High Court and quash the Judgment/Order of the Land Adjudication Officer in Objection Case Number 64 of 2010 delivered on 7th March, 2012*”. The said Application was allowed by the court on 7th May, 2018.

9. Pursuant to the leave of the court, the Applicant filed the substantive Notice of Motion seeking for the orders of certiorari and mandamus to quash the decision of the Land Adjudication Officer on 29th May, 2013 vide an Application dated 20th May, 2018. However, the Applicant later on amended the said Application and sought for an order of mandamus “*compelling the District Land Adjudication Officer, Kitui, to allow the Ex-parte Applicant to lodge an Appeal to the Minister against the decision in Objection Case No. 64 of 2010 delivered on 7th March, 2012 in respect of Land Parcel No. 82 Kawala Adjudication Section in Kitui County as provided in law.*”

10. It is obvious that the prayers in respect of which leave was granted are completely different from the prayers that the Applicant is seeking in the Amended Notice of Motion dated 13th November, 2018.

11. It is trite that under the provisions of Order 53 Rule 1(1) of the Civil Procedure Rules, no order of mandamus, prohibition or certiorari can be made unless leave therefore is granted by the court. To the extent that the court did not grant to the Applicant leave for an order of mandamus compelling the District Land Adjudication Officer to allow the Applicant to lodge an Appeal to the Minister out of time, the Notice of Motion dated 13th November, 2018 is a non-starter.

12. In any event, an order of mandamus can only issue from this court, directing the Land Adjudication Officer, or an inferior body or tribunal, to perform a duty of a public nature which he/it has failed or neglected to perform (***See paragraphs 89 and 90 of Halsbury’s Laws of England, 4th Edition Vol. 1 and Kenya National Examinations Council vs. Republic; Ex-parte Geoffrey Githinji Njoroge & Others Nairobi Civil Appeal No. 266 of 1996***).

13. The Applicant has not shown that indeed there exists a provision of the law, requiring the Land Adjudication Officer, to give him leave to file an Appeal to the Minister out of time. As was held in the case of ***Kenya National Examinations Council’s case (supra)***, an order of mandamus must command no more than the party against whom the Application is made is legally bound to perform. Even where such a duty exists, where the duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.

14. Consequently, to the extent that the Land Adjudication Officer is not bound by the law to allow the Applicant to file an Appeal to the Minister against his decision out of time, or at all, the Applicant’s Notice of Motion dated 13th November, 2018 is unmeritorious.

15. For those reasons, I dismiss the Notice of Motion dated 13th November, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE