



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 18 OF 2018 (JR)**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL ... RESPONDENT**

**AND**

**KATHINI NGALA VELE .....INTERESTED PARTY**

**AND**

**ERIC NDUNDU ITHUKU .....EX-PARTE APPLICANT**

**JUDGMENT**

1. In the Notice of Motion dated 3<sup>rd</sup> December, 2018, the Ex-parte Applicant is seeking for the following orders of Judicial Review:

*a. That an order of certiorari do issue to recall to this court and quash the decision of the Deputy County Commissioner, Kitui West Sub-County in Kitui County in Minister's Appeal Case Number 53 of 2000 over land parcel no. Mutonguni/Kaimu/3398 dated 12<sup>th</sup> February, 2018 ordering the name of Isaac Ithuku Kimama to be removed from the land register of Mutonguni/Kaimu/3398 and be replaced with that of Kathini Ngala Vele, the Interested Party.*

*b. That costs of this Application be provided for.*

2. According to the Applicant's Statement of Facts, the Respondent in the Appeal had passed on at the time of hearing of the Appeal by the Minister and when the decision was made; that no legal representative was appointed to conduct the Appeal on behalf of the deceased Respondent in the Appeal and that the proceedings before the Minister were conducted by strangers, and therefore irregular and illegal.

3. In response, the Respondent filed Grounds of Opposition in which he averred that the Estate of Isaac Ithuku Kimama was duly represented in the Appeal by the Ex-parte Applicant; that the Land Adjudication Act does not require a legal representative to be appointed vide succession proceedings and that the Application offends the mandatory provisions of Order 53 Rule (2) of the Civil Procedure Rules as read together with Section 9(3) of the Law Reform Act.

4. In her Replying Affidavit, the Interested Party deponed that the dispute before the Minister was initially commenced by her late husband, Ngala Vele against the late Isaac Ithuku Kimama; that on the demise of the initial parties, she took over the conduct of the matter from her late husband while the Ex-parte Applicant took over from his late father and that all the parties were heard by the Deputy County Commissioner (*Minister*).

5. The Interested Party finally deponed that having freely and actively participated in the proceedings in the Appeal to the Minister, the Ex-parte Applicant is estopped from claiming that the proceedings were defective.

6. In his submissions, the Applicant's advocate submitted that the parties admitted in their Affidavits the initial parties before the Deputy County Commissioner died while the proceedings were ongoing; that by purporting to substitute the deceased parties with the Applicant and the Respondent, the Deputy County Commissioner acted without jurisdiction and that the decision of the Deputy County Commissioner should be quashed by this court. Counsel relied on numerous authorities which I have considered.

7. The Respondent's counsel submitted that the requirement for the substitution of deceased parties by their legal representatives is not applicable in hearing of Appeals in land adjudication proceedings; that there is no requirement that successors of a deceased person should be his legal representative and that the Estate of Isaac Ithuku was duly represented in the proceedings before the Minister by his son, the

Applicant.

8. The Respondent's counsel submitted that in any event, this suit was filed out of time; that the Application should have been filed within six (6) months of the impugned decision and that the Notice of Motion should be dismissed. The Interested Party's submissions are similar to the submissions of the Respondent's counsel.

9. The Ex-parte Applicant is seeking for an order to quash the decision of the Deputy County Commissioner, Kitui West Sub-County in Appeal Case No. 53 of 2000. The said decision was made on 12<sup>th</sup> February, 2018 in which the Deputy County Commissioner ordered for the removal of the name of the late Isaac Ithuku Kimama from the land register of Mutonguni/Kaimu/3398.

10. The Application by the Applicant is premised on one ground; that there was no legal representative that was appointed to conduct the Appeal on behalf of the late Isaac Ithuku Kimama and Ngala Vele, who were the initial parties in the proceedings before the Deputy County Commissioner.

11. The Applicant has not denied that he is the son of the late Isaac Ithuku Kimama, the Respondent before the Deputy County Commissioner, while the Interested Party is the wife of the late Kathini Ngala Vele (*the Appellant*). However, it is the Applicant's contention that the Appeal before the Deputy County Commissioner should never have proceeded before legal representatives for both parties were appointed.

12. The law applicable in resolving disputes in respect to land under adjudication is the Land Adjudication Act, which provides for the ascertainment and recording of rights and interests in community land and for related purpose. The purpose of the Act is therefore solely for the ascertainment of the rights and interests of persons in the land within an adjudication area.

13. The rights and interests of persons in land within an adjudication area cannot be subject to the Law of Succession Act, which defines "free property" of a deceased person as follows:

***"The property of which the deceased person was legally competent to freely dispose during his lifetime, and in respect of which his interest has not been terminated by his death"***

14. Section 13(5) of the Land Adjudication Act provides as follows:

***"(5) Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs."***

15. Considering the preamble of the Land Adjudication Act and the provisions of Section 13(5) of the Act, it follows that the strict requirement of appointing legal representatives in respect of the Estate of a deceased person under the Law of Succession Act is not applicable to disputes under the Land Adjudication Act. In the case of ***Republic vs. District Commissioner Machakos ex parte Kakui Mutiso Nairobi High Court JR. Miscellaneous Application No. 304 of 2013*** Odunga J. held as follows:

***"In my view, under the Land consolidation and adjudication processes, the issue before the relevant tribunals is the determination of interest in land rather than individual ownership since individual land tenure only comes into being on registration... Therefore, before registration, the land in question is either ancestral or falls under any other form of communal ownership. In such instances, it is my view that the application of the strict succession legal regime does not apply since in my view the issue of estate may not be readily applicable to ancestral or communal property as such."***

16. I am agreeable with the above holding. Indeed, the property which vests in the legal representative of a deceased person is his personal property and not communal or ancestral land, whose rights and interests have not vested in an individual. This position is fortified by the definition of the words "estate" and "free property" by the Law of Succession Act. The Law of Succession Act has defined "estate" to mean the "free property of a deceased person" while the term "free property" has been defined to mean "the property of which the deceased person was legally competent to freely dispose during his lifetime, and in respect of which his interest has not been terminated by his death."

17. As I have stated above, land under the adjudication process cannot form part of the "estate" of a deceased person as contemplated under the Law of Succession Act. Consequently, any successor in title to land of a deceased person can commence or continue with proceedings before the various adjudicatory bodies established under the Land Adjudication Act. The Applicant and the Interested Party herein were successors of the deceased original parties before the Minister.

18. Being the successors in title of the original litigants before the Minister, the proceedings by the Deputy County Commissioner were legally conducted and completed. That being the case, I find the Applicant's Notice of Motion dated 3<sup>rd</sup> December, 2018 to be unmeritorious.

19. For those reasons, the Notice of Motion dated 3<sup>rd</sup> December, 2018 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**O.A. ANGOTE**

JUDGE