



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. MISC. APPLN. NO. 313 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY FOR LAND, HOUSING**

**AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SURVEYOR, KITUI.....2<sup>ND</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**FRANCIS NZELI MAUNDU.....INTERESTED PARTY**

**AND**

**EX PARTE APPLICANTS:**

**1. ONESMUS KIMANZI MUSILI**

**2. BENEDICT MWANGANGI MUSILI**

**3. HARON MUSEMBI MUSILI**

**JUDGMENT**

1. In the Notice of Motion dated 3<sup>rd</sup> January, 2017, the Ex parte Applicants are seeking for the following orders:

*a. An order of certiorari to remove into this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent dated 10<sup>th</sup> February, 2016, whose effect was to overturn a decision of the Land Adjudication Officer, Mutonguni Adjudication Section delivered on 7<sup>th</sup> October, 1986 allowing the sub-division of Mutonguni/Nzalae/50.*

*b. An order of prohibition to bar the Respondents, their servants and agents from implementing or enforcing the decision of the 1<sup>st</sup> Respondent, the Cabinet Secretary for Land, Housing and Urban Development, delivered on 10<sup>th</sup> February, 2016, whether through a resurveying of the Original Mutonguni/Nzalae/50, revocation of the 1988 sub-division, cancellation of individual titles resulting from the 1988 sub- division, or alteration of the adjudication records [o] in any other way howsoever.*

*c. Costs of and incidental to the Application be provided for.*

*d. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.*

2. In his Statutory Statement, the Ex parte Applicants averred that they own several parcels of land which are a sub-division of land known as Mutonguni/Nzalae/50; that the Appeal proceedings before the 1<sup>st</sup> Respondent were a nullity having been taken without jurisdiction and that

by the time the Appeal was heard, parcel of land known as Mutonguni/Nzala/50 had already been sub-divided and titles issued to them.

3. According to the Applicants, the 1<sup>st</sup> Respondent's decision was illegal and a nullity because the Appeal was filed out of time; that the 1<sup>st</sup> Respondent did not have the requisite jurisdiction to hear the Appeal; that the decision of the 1<sup>st</sup> Respondent was unfair and unreasonable because no notice was issued to all the parties who would be affected and that the owner of parcel number Mutonguni/Nzala/50 died in 1999 and was never substituted by a legal representative.

4. The Ex parte Applicants finally averred that the 1<sup>st</sup> Respondent failed to communicate his decision to the Applicants and that the 1<sup>st</sup> Respondent took into account irrelevant matters while arriving at his decision.

5. In his Replying Affidavit, the Interested Party deponed that the 1<sup>st</sup> Respondent's decision was delivered on 10<sup>th</sup> February, 2016; that leave to file the Motion was granted on 8<sup>th</sup> December, 2010 and that the substantive Motion was filed on 4<sup>th</sup> January, 2017 which was against the orders of the court.

6. According to the Interested Party, the 1<sup>st</sup> Respondent had the requisite jurisdiction conferred by law to hear and determine the Appeal; that the Ex parte Applicants were granted an opportunity to canvass their respective cases before the 1<sup>st</sup> Respondent made his final determination and that the orders of Judicial Review can only be sought where the process was flawed.

7. The matter proceeded by way of written submissions. The Applicants' counsel submitted that the Applicants were not served with any notice before the Minister's decision was issued; that even after making his determination, the 1<sup>st</sup> Respondent never served on the Applicants with the said decision and that the decision was contrary to the provision of Article 47, 35 and 40 of the Constitution.

8. The Ex parte Applicants' counsel submitted that the Appeal to the Minister was filed in 1989, three (3) years after the objection was determined by the Land Adjudication Officer and that although the owner of parcel number 50 and that of his Estate were never involved in the dispute before the Minister. Counsel relied on numerous authorities which I have considered.

9. The Interested Party's advocate submitted that the Ex parte Applicants took the case after the demise of their father; that one Haron Musembi, one of the Ex parte Applicants, testified on behalf of the rest of the Applicants and stated that the current Application was filed one (1) year after the delivery of the decision of the 1<sup>st</sup> Respondent.

10. Counsel submitted that the Ex parte Applicants filed the Application over nine (9) months since the 1<sup>st</sup> Respondent made his determination; that the Application for Judicial Review should have been filed within six (6) months from the date of the decision and that once leave is granted, the Substantive Motion should be filed within twenty one (21) days.

11. By way of Chamber Summons dated 25<sup>th</sup> November, 2016, the Ex parte Applicants sought for leave to commence Judicial Review proceedings against the Respondents. The Record shows that pursuant to the provisions of Order 53 Rule 1 of the Civil Procedure Rules, the Applicants obtained the leave of the court to apply for orders of certiorari in respect of the decision of the 1<sup>st</sup> Respondent dated 10<sup>th</sup> February, 2016. The said leave was granted by the court on 8<sup>th</sup> December, 2016 with a rider that the Substantive Motion should be filed within twenty one (21) days.

12. The first issue I should deal with is whether firstly, the Application for leave to apply for an order of certiorari was filed within six (6) months of the decision that the Applicants are seeking to challenge, and if not, whether the said Application is incompetent.

13. Indeed, Order 53 Rule 2 provides that leave shall not be granted to apply for an order of certiorari to remove any Judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the Application for leave is made not later than six (6) months after the date of the proceedings.

14. Although the above legal position held sway absolutely for many years, the position has since changed. In the case of **Republic vs. The Judicial Commission of Inquiry into the Goldenberg Affair Ex parte Hon. Mwalulu and Others (2004) eKLR and Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited, Nairobi HC Miscellaneous Application No. 1235 of 1998**, it was held that the six (6) months limitation period set out in Order 53 Rules 2 and 7 only applies to the specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else. For example, a decision to alienate or allocate land, it was held, is not formal.

15. The Court of Appeal came up with different criteria on when the requirement for leave to apply for an order of certiorari need not be filed within six (6) months of the date of the impugned decision. In the case of **Republic vs. District Commissioner, Keiyo & 2 others, Ex parte Robert Kipsigirio Lotiang (2018) eKLR**, the court held as follows:

**“... This court finds that there is no time limit for applying for certiorari to quash null proceedings because nullities can be quashed at any time... this court finds that the 1<sup>st</sup> Respondent had no jurisdiction to entertain an Appeal filed out of time.”**

16. Considering that the Ex parte Applicants' contention is that the decision of the 1<sup>st</sup> Defendant is a nullity for want of jurisdiction, the issue of the Chamber Summons dated 25<sup>th</sup> November, 2016 having been filed outside six (6) months of the date of the impugned decision does not therefore arise.

17. The next preliminary issue that this court should determine is whether the Ex parte Applicants filed the Notice of Motion dated 3<sup>rd</sup> January, 2017 within twenty one (21) days as ordered by the court and as prescribed by Order 53 Rule 3(1) of the Civil Procedure Rules.

18. The period of twenty one (21) days within which the Ex parte Applicants ought to have filed the Substantive Notice of Motion commenced on 8<sup>th</sup> December, 2016, which is the date that the court granted to the Applicants leave to apply for orders of certiorari and prohibition. Ideally, twenty one (21) days lapsed on 29<sup>th</sup> December, 2016. However, it was not until 4<sup>th</sup> January, 2017 that the current Notice of Motion was filed.

19. However, considering the provision of Order 50 Rule 4 of the Civil Procedure Rules which excludes the period between 21<sup>st</sup> December in any year and the 13<sup>th</sup> day of January in the year next following from any computation of time under the Rules, the Applicants' Application was filed within the requisite twenty (21) days.

20. The record annexed on the Ex parte Applicants' Application shows that the decision that was appealed against before the Minister was made by the District Land Adjudication and Settlement Officer on 7<sup>th</sup> October, 1986. Being dissatisfied with the said decision, the Interested Party filed an Appeal before the Minister in Appeal Case No. 14 of 1989.

21. Although it is not clear the date that the Interested Party lodged the Appeal, the Judgment shows that the Appeal was filed in 1989. Indeed, the serial number of the Appeal is indicated as "Appeal Case No. 14 of 1989," meaning that the Appeal was filed in 1989.

22. Section 29(1) of the Land Adjudication Act provides that any person who is aggrieved by the determination of an objection may within sixty (60) days after the date of the determination, Appeal against the determination to the Minister.

23. It is clear from the record before me that the Interested Party herein filed an Appeal against the decision of Land Adjudication Officer after more than two (2) years from the date of the decision contrary to the provision of Section 29(1). The being the case, the 1<sup>st</sup> Respondent should not have entertained the Appeal, considering that the timelines stipulated in the Act are pertinent to the preparation of the register in an adjudication area.

24. Having not filed the Appeal before the Minister within the requisite sixty (60) days, the Minister acted without jurisdiction. Consequently, the decision that the 1<sup>st</sup> Respondent rendered on 10<sup>th</sup> February, 2016 was a nullity. In fact, by the time the said decision was rendered, and due to the delay in filing the Appeal, the Applicants had already acted on the decision of the Land Adjudication Officer and had the entire land sub-divided into several portions of land.

25. For the reasons I have given above, I allow the Notice of Motion dated 3<sup>rd</sup> January, 2017 as follows:

***a. An order of certiorari to remove into this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent dated 10<sup>th</sup> February, 2016, whose effect was to overturn a decision of the Land Adjudication Officer, Mutonguni Adjudication Section delivered on 7<sup>th</sup> October, 1986 allowing the sub-division of Mutonguni/Nzala/50 is hereby issued***

***b. An order of prohibition is hereby issued barring the Respondents, their servants and agents from implementing or enforcing the decision of the 1<sup>st</sup> Respondent, the Cabinet Secretary for Land, Housing and Urban Development, delivered on 10<sup>th</sup> February, 2016, whether through a resurveying of the original land known as Mutonguni/Nzala/50, revocation of the 1988 sub-division, cancellation of individual titles resulting from the 1988 sub- division, or alteration of the adjudication records in any other way howsoever.***

***c. Each party to pay for his own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF OCTOBER, 2019.**

**O.A. ANGOTE**

**JUDGE**