



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 107 OF 2017 (JR)

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

AND

GEDION MWATHE MUNYONGI.....INTERESTED PARTY

AND

ONESMUS MWANIKI NZAMBU...EX-PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 26th February, 2018, the Ex-parte Applicant is seeking for the following orders:

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 Numbers 231 and 232 of 1999 over Land Parcel No. Mutonguni/Nzala/3120 dated 11th July, 2017 awarding the said land to Daniel Munyongi Kimama (deceased) in place of the Applicant.

b. That the costs of this Applicant be provided for.

2. The Notice of Motion is premised on the Applicant's Statement of Facts in which he has averred that Daniel Munyongi Kimama died at the time of hearing the Appeal by the Deputy County Commissioner, Kitui West Sub-County; that the Interested Party was not a legal representative of the late Daniel Munyongi and that Gedion Mwathe Munyongi, the Interested Party herein, was a stranger in the proceedings.

3. The Applicant finally averred in his Statement of Facts that the Deputy County Commissioner heard the case and delivered his Judgment in favour of Daniel Munyongi who was already deceased and that the proceedings by the Deputy County Commissioner were a nullity.

4. In his response, the Respondent averred that the Applicant has not adduced evidence to show that Gedion Mwathe was not a son of the late Daniel Munyongi Kimama; that the issue of representation of the deceased' Estate was not raised during the proceedings of the Appeal and that the Deputy County Commissioner was right to proceed with the Appeal.

5. The Respondent finally averred that the Letters of Administration is not a requisite document in proceedings under the Land Adjudication Act and that the Ex-parte Applicant has not alleged that he was denied a fair hearing and that the Notice of Motion should be dismissed.

6. The Ex-parte Applicant and the Respondent filed brief submissions which I have considered. I have also considered the authorities filed by both parties.

7. The Ex-parte Applicant is seeking for an order of certiorari to quash the decision of the Deputy County Commissioner, Kitui, which was made on 11th July, 2017 in Appeal Case No. 231 and 232 of 1999. In the said decision, the Deputy County Commissioner directed that the names of Lazaro Nzambu Kimama and Ndeke Kimama should be removed from the register of parcel of land known as Mutonguni/Nzala/3120 and be replaced with the name of Daniel Munyongi Kimama (*deceased*).

8. In the Ruling of the Deputy County Commissioner, the Deputy County Commissioner acknowledged that Daniel Munyongi Kimama

(Appellant) and Lazaro Nzambu Kimama and Ndeke Kimama (Respondents) are all deceased “but were represented by their sons Gedion Mwathe Munyongi and Onesmus Mwaniki Nzambu respectively.” Indeed, the Interested Party never objected to Ex parte Applicant representing their deceased’s parents in the proceedings before the Deputy County commissioner.

9. 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.

10. 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”

11. 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.”

12. 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.”

13. 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.”

14. 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.

15. 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 26th February, 2018 to be unmeritorious. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDG