



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 222 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DEPUTY COUNTY**

**COMMISSIONER KITUI WEST.....RESPONDENT**

**AND**

**ELIJAH NGOTHO.....INTERESTED PARTY**

**AND**

**MULEI MULILI.....EX-PARTE APPLICANT**

**JUDGMENT**

1. In the Notice of Motion dated 7<sup>th</sup> December, 2015, the Ex-parte Applicant is seeking for the following orders:

***a. An order of certiorari to remove into the High Court for the purpose of quashing a Judgment/Order made by the Respondent herein whereby it adjudged on the 7<sup>th</sup> day of October, 2015 that Land Appeal Case No. 67 of 1988 is hereby dismissed with costs and that the interested party herein do retain parcel of Land No. 809.***

***b. A declaration that the determination of the Respondent herein was and is unfounded and void and of no effect.***

2. The Application is supported by the averments of the Applicant in his statutory statement in which he has stated that he lodged an appeal in Case No. 67 of 1988 contesting the allocation of his land to the Interested Party; that the appeal was dismissed without him being given an opportunity to be heard and that the Respondent misinterpreted the facts of the appeal by assuming that he facts in that case were similar with appeal Case No. 66 of 1988.

3. According to the Applicant, the Interested Party was allocated his land and that the Respondent was biased in the way he conducted the proceedings.

4. In the Supporting Affidavit, the Applicant has deponed that he has been in occupation of land known as Nzalae/Mutungoni/51 since 1952; that when adjudication was done in 1976, his land was divided into

two, that is Plot Nos. 51 and 809 and that when he challenged the said decision in Appeal No. 67 of 1988, the appeal was dismissed without hearing him.

5. In response, the Interested Party deponed that an order of declaration cannot be granted in a Judicial Review Application.

6. According to the Interested Party, the Applicant is the owner of Plot No. 51; that he was awarded Plot No. 809; that his appeal which was No. 66 of 1988 was dismissed and so was the Applicant's Appeal No. 67 of 1988 and that the two of them were heard in Appeal No. 66 of 1988 which raised similar issues.

7. The Plaintiff's counsel submitted that the Ex-parte Applicant had the right to be heard in Appeal Case No. 67 of 1988; that the manner in which the Respondent handled the dispute did not serve justice and that the Respondent faulted the rules of natural justice.

8. The Interested Party's advocate submitted that a declaratory order cannot issue in a Judicial Review Application; that the only recognized orders are those of mandamus, prohibition and certiorari and that Judicial Review is only concerned with the decision making process and not the merits thereof.

9. Counsel submitted that in Appeal No. 66 of 1988, the Interested Party was claiming Parcel No. 51 while in Appeal No. 67 of 1988, the Applicant was claiming parcel number 809; that Appeal No. 66 of 1988 was heard and that the issues touching on both parcels of land were adjudicated and a decision reached.

10. What is before me is an Application for Judicial Review orders pursuant to the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules.

11. It is trite that before one commences proceedings seeking for the orders of certiorari, mandamus or prohibition under Order 53 of the Civil Procedure Rules, leave must be obtained first.

12. The Ex-parte Applicant filed the Chamber Summons dated 16<sup>th</sup> November, 2015 seeking the leave of the court "*to apply for Judicial Review.*" The said Application, although allowed by the court, did not specify the specific Judicial Review orders that the Applicant sought.

13. In the Substantive Motion before me, the Applicant has only prayed for one writ, that of certiorari. Indeed, as correctly submitted by the Interested Party's advocate, the court cannot consider the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> prayers in the said Motion because those are not Judicial Review orders.

14. The Applicant's complaint is that the Respondent made a decision in respect of Appeal Case No. 67 of 1988 without hearing him.

15. On the other hand, the Interested Party has argued that the Respondent dismissed Appeal Number 67 of 1988 because the issues raised in the said appeal were the same issues that had been ventilated in Appeal number 66 of 1988 where both parties were heard.

16. The only proceedings before this court are in respect to the Applicant's claim in Appeal No. 67 of 1988.

17. The proceedings show that the claim in Appeal No. 67 of 1988 before the Minister was for "*Recovery of land parcel number 809 Nzalae/Mutungoni Adjudication Section of Kitui West now in the name of Elija Ngotho Syengo.*"

18. The Applicant has deponed that during the adjudication, his land, being parcel number 51 was subdivided and a portion number 809 was created therefrom. That is the land that was allocated to the Interested Party.

19. Although the Interested Party has deponed that his claim in Appeal No. 66 of 1988 was heard; and

that both parties were heard in that matter, the records in Appeal No. 66 of 1988 were not placed before this court.

20. Consequently, this court is not in a position to ascertain if indeed Appeal No. 67 of 1988 was *res judicata* and if the Applicant was heard in that claim.

21. In any case, the decision of the Minister in Appeal No. 67 of 1988 which he dismissed does not say that the Applicant was heard in Appeal No. 66 of 1988, and that the two suits raise the same issues.

22. In the absence of the record in respect of Appeal Case No. 66 of 1988, I find that the Applicant's Appeal Case No. 67 of 1988 was dismissed without hearing the Applicant.

23. It is a cardinal rule of natural justice that party should not be condemned unheard, and where that happens, this court has the mandate to quash such a decision.

24. As was held by Nyarangi, JA in the case of *Onyango vs. Attorney General (1986-1989) E.A 456*, the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly.

25. The Applicant should have been given an opportunity to be heard in the Appeal that he had filed. Having not been given the opportunity to be heard, I find that the decision of the Minister in Appeal Case No. 67 of 1988 was unlawful.

26. For those reasons, I allow the Notice of Motion dated 7<sup>th</sup> December, 2015 in the following terms:

***a. An order of certiorari to remove to this court for the purpose of quashing the decision of the Respondent made on 7<sup>th</sup> October, 2015 in Land Appeal Case No. 67 of 1988 be and is hereby issued.***

***b. Each party to bear his own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018.**

**O.A. ANGOTE**

**JUDGE**