



**REPUBLIC OF KENYA**

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

**ELC. MISCELLENOUS CIVIL APPLICATION NO. 317 OF 2007**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF PROHIBITION**

**AND**

**IN THE MATTER OF: APPEAL NO. 103 OF 1997 TO THE MINISTER FOR LANDS AND SETTLEMENT UNDER SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: MBONDONI ADJUDICATION SECTION PARCEL No.102**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

- 1. THE DISTRICT COMMISSIONER MWINGI DISTRICT**
  - 2. THE MINISTER OF LANDS AND SETTLEMENT**
  - 3. THE DIRECTOR OF LAND ADJUDICATION**
  - 4. THE CHIEF LAND REGISTRAR**
  - 5. THE LAND REGISTRAR KITUI DISTRICT**
  - 6. THE LAND ADJUDICATION OFFICER MWINGI DISTRICT**
  - 7. JOSEPH MUTIO KINYAMBU**
  - 8. THE HON. ATTORNEY GENERAL ..... RESPONDENTS**
- EX-PARTE:.....JUSTUS MUTHINI KWAKE**

**JUDGEMENT**

1. In the Notice of Motion dated 22<sup>nd</sup> November, 2015, the Ex-parte Applicant is seeking for the following orders:

*a. That the Respondents, their servants and/or agents be prohibited, restrained and stopped from acting upon, enforcing or in any manner altering the adjudication register in conformation with the determination order and/or judgement of the Mwingi District Commissioners Land Adjudication Appeal No.103 of 1997 relating to Mbondoni Adjudication Section Parcel No.1002 on behalf of the Minister for Lands and Settlement given on 25<sup>th</sup> October, 2004.*

*b. That the costs of this application be paid for by the Respondents.*

2. The Application is supported by the Statement of the Applicant who has averred that during the land adjudication process in 1983, and following the competing interests over parcel of land number 1002 in Mbondoni Adjudication Section with the 7<sup>th</sup> Respondents' father, one

Joshua Mulu Kinyambu, the Land Adjudication Committee awarded him the suit land.

3. According to the Applicant, the 7<sup>th</sup> Respondent appealed against the decision of the committee to the Land Arbitration Board; that the Board overturned the decision of the committee in 1989 and that he filed an appeal with the Minister against the decision of the Board.

4. It is the Applicant's case that on 13<sup>th</sup> October, 2005, he learnt that the appeal had been heard without his knowledge and that the proceedings before the District Commissioner (the Minister) went against the rules of natural justice when the appeal proceeded for hearing without giving him an opportunity to be heard.

5. In response, the Interested Party deponed that the Notice of Motion was filed out of the statutory period; that he has already been issued with a Title Deed; that the appeal before the Minister was properly and legally heard and that there is no prayer for setting aside the decision of the Minister.

6. The Applicant's advocate submitted that from the proceedings before the Minister, the Assistant Chief admitted that he never served the Applicant with the Summons personally; That the Minister determined the appeal without hearing him and that the Interested Party has not annexed the Title Deed for the suit land which he claims he has already been issued.

7. The Interested Party's advocate submitted that the impugned decision of the Minister has already been made and acted upon; that an order of prohibition deals with futuristic events and that the remedy that was available to the Applicant was that of certiorari.

8. It is not in dispute that on 25<sup>th</sup> October, 2004, the Minister in Appeal No.103 of 1997 between the Ex-parte Applicant and the 7<sup>th</sup> Respondent's father upheld the decision of the Land Arbitration Board. The Arbitration Board had set aside the decision of the Land Committee in respect to a dispute for parcel of land number 1002. According to the decision of the Arbitration Board, it was the 7<sup>th</sup> Respondent's father who was entitled to the suit land and not the Ex-parte Applicant.

9. The Ex-parte Applicant has challenged the decision of the Minister on the ground that he was not heard notwithstanding the fact that he was the Appellant. The Applicant is seeking for an order of prohibition prohibiting the Respondents from implementing the decision of the Minister. The Applicant does not however state what would happen to the decision of the Minister after an order of prohibition is granted.

10. It is common knowledge that prohibitory orders and quashing orders are complimentary remedies that can be granted in Judicial Review. A quashing order, which is often referred to as *certiorari*, issues to quash a decision which is *ultra vires*. A prohibitory order on the other hand issues to forbid some act or decision which would be *ultra vires*. The quashing order always looks to the past while a prohibitory order looks to the future. The two remedies are respectively comparable to a declaration and an injunction in the sphere of private law remedies. The purpose of a prohibitory order was stated in the decision of *Kenya National Examinations Council Versus R, Ex-parte Geoffrey Gathenji Njoroge & Others(1997)eKLR* as follows:-

***“Prohibition looks to the future.....However, where a decision has already been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....”***

11. In the instant case, the decision of the Minister has already been made. Even if the rules of natural justice were not complied with, an order of prohibition will not issue because the decision will still remain in place. Instead, the appropriate prayer should have been that of *certiorari* – to quash the said decision, or a declaratory order.

12. In the circumstances, and considering that courts do not issue orders in vain, I find that the Ex-parte Applicant's Application dated 22<sup>nd</sup> November, 2005 is incompetent. I therefore dismiss it with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25<sup>TH</sup> DAY OF MAY, 2018.**

**O.A. ANGOTE**

**JUDGE**