



**REPUBLIC OF KENYA**

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

**CHUKA JUDICIAL REVIEW CASE NO. 01 OF 2018**

**FORMERLY MISCELLANEOUS CIVIL CASE NO. 02 OF 2018**

**IN THE MATTER OF AN APPLICATION BY GERALD MBUURI KABUGU FOR ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 53 CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF GATUNGA ADJUDICATION SECTION AND IN THE MATTER OF APPEAL TO THE MINISTER IN CHARGE OF LANDS AND SETTLEMENT NO. 123 OF 2017**

**GERALD MBUURI KABUGU.....EX-PARTE APPLICANT**

**VERSUS**

**THE CABINET SECRETARY,**

**MINISTRY OF LANDS & SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JOSEPH IKURA WA ZAKAYO.....INTERESTED PARTY**

**JUDGMENT**

1. In his Notice of Motion dated **6<sup>th</sup> February, 2018**, the exparte applicant seeks the following orders:

**1.That** the honourable court be pleased to issue an order of certiorari to bring to this honourable court and quash the entire decision and award passed by V. A. MATSALLA, an Assistant County Commissioner on behalf of the Cabinet Secretary, Ministry of Lands and Settlement, dated **19.7.2017**.

**2.That** the Respondents and the Interested Parties be ordered to pay the costs of this motion.

2. The application was canvassed by way of written submissions. The exparte applicant filed his submissions on **29<sup>th</sup> March, 2018**. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents asked the court to treat their submissions

dated **6<sup>th</sup> April, 2018** as their submissions in the main motion, although they were intended for a Preliminary Objection. Mr. Kiongo opined that the submissions answered the main issue that spawned these Judicial Review proceedings.

3. Mr. Kiongo told the court that Mr. Murango Mwenda was aware of today's date for directions as he was in court when the mention date for directions was fixed by the court. He asked the court to give the parties a date for delivery of the apposite Ruling/Judgment. The court announced that it would deliver its Ruling/Judgment on **15<sup>th</sup> May, 2018 at 2.30 pm.**

4. I agree with Mr. Kiongo that Mr. Murango Mwenda was aware of the date fixed for directions by this court.

5. As the germane submissions are succinct, I reproduce them in full herebelow.

6. The exparte applicant's submissions state:

### **EXPARTE APPLICANT'S SUBMISSIONS TO THE MOTION DATED 6.2.2018**

The Ex-parte applicant seeks orders of certiorari to bring to this court for quashing the decision and award dated **19.7.2017** by MR. V.A. MATSALLA, D.O. (now called Assistant County Commissioner). The decision being challenged was issued in Minister's Appeal No. **123 of 2017** in respect of Gatunga Adjudication Section Parcel **No. 1807.**

The Ex-parte applicant appealed the decision of the Arbitration Board to the Minister in-charge of Land pursuant to **S. 29 (1)** of the Land Adjudication Act.

Section **29(1) (b)** provided that once an appeal is filed to the minister, the minister shall determine the appeal and make such orders thereon as he thinks just and the order shall be final.

The minister may hear and determine the appeal by himself or he may delegate in accordance with section **29(4)** of Land Adjudication Act, which provides:-

***“Notwithstanding the provisions of section 38 (2) of the Interpretations and General Provisions Act or any other written law, the minister may delegate, by notice in the Gazette, his powers to any public officer by name, or to the person for the time being holding any public office specified in such notice, and the determination order and acts of any such public officer shall be deemed for all purpose to be that of the minister.”***

From the provisions of the above section, it is clear that the person to whom the powers and functions are delegated must:-

**i. Be gazetted**

**ii. Named in the notice**

**iii. Or a holder of public office specified in the notice in the gazette.**

The practice has been that the Minister would delegate the powers and functions to the holders of the office of the District Commissioner, now referred to as Deputy County Commissioner (**D.C.C**). The District Commissioners are in-charge of districts.

In this particular case, the Appeal was heard by another person other than the District Commissioner one Mr. V. A. Matsalla, who is a D.O. (now Assistant County Commissioner). He purports to hear and determine the appeal for and on behalf of the District Commissioner. In deed he has signed the proceedings and the award for the Deputy County Commissioner. It is our submissions that the District Commissioner has no legal authority to further delegate the powers

and the functions of the minister donated by **Section 29** of the Land Adjudication Act to a District Officer working in his office. The District Officer is not gazetted by name, by the Minister nor is he a holder of the office of the District Commissioner. If he were, he would not be signing the Award for another officer, the Deputy County Commissioner. It appears that the District Officer was alive to the fact that he is not authorized to hear and determine the appeal and that is the reason he signed off the decision for Deputy County Commissioner.

For these reasons, we urge the court to find that Mr. V. A. Mastsalla had no jurisdiction to hear and determine the appeal. His orders should be declared null and void and should be quashed.

For want of jurisdiction, the proceedings and the final award are illegal and amount to nothing in law.

The ex-parte applicant further submits that the District Officer acted unreasonably and unfairly in awarding the Interested Party **2.00 Acres** out of the disputed land. His refusal to hear witnesses from the ex-parte applicant when they were present was unreasonable as it denied the ex-parte applicant an opportunity to ventilate his case fully. His refusal of the request by the ex-parte applicant to visit locus in quo also denied the ex-parte applicant a chance to provide on site evidence. This was without justification and unreasonable.

We submit that the ex-parte applicant has sufficiently demonstrated that the appeal was heard by a person without authority, not gazetted and therefore the award amounts to nothing and should be quashed and remitted back for hearing by a legally authorized officer. We ask for costs.

**DATED AT MERU THIS 28<sup>TH</sup> DAY OF MARCH, 2018**

**FOR: MURANGO MWENDA & CO.**

**ADVOCATES FOR THE EX-PARTE APPLICANT**

**7. THE 3<sup>RD</sup>, 4<sup>TH</sup> RESPONDENT'S SUBMISSIONS STATE:**

May it please your Lordship

Before the honourable court is a Notice of Preliminary Objection dated **28<sup>th</sup> February, 2018**. The point of law raised in the Notice is that:

1. The Notice of motion dated 6<sup>th</sup> February offends the express provisions of section **29 (1) of Cap 284 Laws of Kenya**.

Your Lordship, this provision states as follows:

(1) Any person who is aggrieved by the determination of an objection under **Section 26** of this Act may **within 60 days** after the date of the determination, appeal against the determination to the Minister by:-

(a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) Sending a copy of the appeal to the Director of Land Adjudication,

and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

The Land Adjudication Act is a self-contained statute. A number of issues emerged from this particular provision. An appeal procedure is provided for to any party aggrieved by the decision of

the adjudication officer. This procedure has to be complied with before invoking the jurisdiction of the court. The reason being that the statute is a specialized one in which issues dealt with therein must be extensively ventilated. Thereafter a party may invoke the jurisdiction of the court. The reason being that the statute is a specialized one in which issues dealt with therein must be extensively ventilated. Thereafter a party may invoke the courts Judicial Review Jurisdiction properly grounded on rules of natural justice. This means that once in court a party must demonstrate with specificity which rules of natural justice were violated.

Another issue that emerges from section 29 (1), is that a party cannot again raise issues of ownership. The decision of the Minister is final in the sense that in the absence of proper grounds being raised and ventilated in the appeal, no other issue can be raised. A party can only approach the court strictly on the circumscribed grounds of appeal.

Further and connected to this issue is the sub-section which provides for the Ministers power to delegate. It states that such powers held may be delegated to any public officer. This provision does not limit persons who may hear appeals as long as they serve as public officers. Any argument such as the one relied by the Ex-parte applicant is not only self-serving but misplaced in law. Further there is no evidence to demonstrate the want of jurisdiction.

The applicant cannot approbate and reprobate at the same time. According to the proceedings attached, a certificate of no objection was signed by parties to the appeal. It meant that the jurisdiction was not challenged then but is being done now since the appeal was against the expectation of the applicant/appellant therein. By appearing before the respondent, the applicant acquiesced to the jurisdiction. He cannot be allowed to raise the same issue again. In any event the appeal was properly heard.

In view of the foregoing, we urge this honourable court to allow the preliminary objection and dismiss the Notice of Motion dated **6<sup>th</sup> February, 2018**.

Much obliged.

**DATED AT MERU THIS 6<sup>TH</sup> DAY OF APRIL, 2018**

**J. M. KIONGO**

**SENIOR LITIGATION COUNSEL**

**GOR: HON. ATTORNEY GENERAL &**

**DEPARTMENT OF JUSTICE.**

8. I frame the issues for determination in this suit as:

(a) Was the apposite appeal heard by a person who was not the legally and properly appointed person, by the Minister, to hear the matter?

(b) If that was the case should an order of certiorari quashing the entire award passed by V.A. Mastsalla, an Assistant County Commissioner on behalf of the Cabinet Secretary, Ministry of Lands and Settlement dated **19<sup>th</sup> July, 2017, BE ISSUED.**

(c) Who pays costs?

9. Both parties agree that the matter was not heard by a person holding the position previously held by a District Commissioner. The main issue in dispute is if or if not such a person can delegate his duties to a junior officer working under him, in this case the Assistant County Commissioner, whose position prior to the promulgation of the Constitution of Kenya 2010 and its consequent and attendant statutory

legislative and/or policy instruments, was that of a District Officer.

10. The proposition by the ex-parte applicant is that delegation to a person other than the one delegated by the Minister to hear an appeal is untenable. The respondents, in trying to debunk this proposition, assert that **Section 29(1)** of the Land Adjudication Act does not limit the persons who may hear appeals as long as such persons are public officers.

11. The respondents also submit that the ex-parte applicant and the Interested Party had signed a certificate of no objection to the hearing of the suit by the Assistant County Commissioner and for this reason, the ex-parte applicant cannot challenge the Assistant Commissioner's jurisdiction just because the apposite decision was not favourable to him.

12. This suit mainly canvasses the issue of jurisdiction concerning the person who heard the appeal on behalf of the Minister. Erudite guidance in this area has been offered by the Supreme Court in the Case of **Samuel Kamau & Another AND Kenya Commercial Bank and two others – Sopt. Ct. Civil Application No. 2 of 2011**. The court opined as follows:

*“A court’s jurisdiction follows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it, is not one of procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.”*

13. One can substitute a court with a tribunal or with a public officer undertaking quasi-judicial duties. I opine that the spirit of the judgment embraces all tribunals and all public officers vested with quasi-judicial functions.

14. A careful look at **section 29 (4)** of the **Land Adjudication Act** evinces two scenarios:

(i) The Minister may delegate his duties and functions to any public officer by name as per the apposite Gazette Notice.

(ii) The Minister may delegate his functions and duties to any person for the time being holding any public office in such notice.

15. The law is clear that the Minister has the power to name any public officer to perform his duties and functions under the Land Adjudication Act. And such name must be Gazetted. It is therefore conceivable that the Minister may name an Assistant County Commissioner (D.O) to perform his duties. It is clear that in the circumstances of this case, the Minister had not by Gazette Notice named V.A. Matsala as a person he had delegated his duties and functions to.

16. The law is also clear that the Minister can delegate his duties and functions to any public office specified in the germane Gazette Notice. The parties seem to be in agreement that the Minister had delegated his duties and functions to the office of the Deputy County Commissioner (formally District Commissioner) and not to the office of the Assistant County Commissioner (District Officer).

17. It is therefore pellucid to me that the Assistant County Commissioner (District Officer) did not have jurisdiction to hear the apposite appeal on behalf of the Minister.

18. If I accept the respondent's position that a public officer can delegate his duties to junior officers, where this is not specifically allowed by law, this will spawn phasmagoric and clearly undesirable consequences. The Deputy County Commissioner will delegate to the Assistant Deputy Commissioner who will delegate to the Chief who may delegate to the Chief's clerk or to the sub-chief. Unequivocally and as clearly elaborated by the Supreme Court in the case of **Samuel Kamau Macharia (op.cit)**,

jurisdiction must be predicated upon the Constitution or statutory law **AND, THEREFORE**, cannot be contrived or pretended.

19. In the circumstances, an order of certiorari is issued bringing to this court and quashing the entire decision and award dated **19<sup>th</sup> July, 2017** made by V. A. Mastsalla, an Assistant County Commissioner on behalf of the Cabinet Secretary, Ministry of Lands and Settlement.

20. Consequently, this appeal is remitted back for hearing and determination by a person properly and legally authorized to do so.

21. It is my honest opinion that hearing of this appeal by a person who lacked jurisdiction is an honest mistake. I am, therefore, not inclined to award costs to any of the parties.

22. No costs are awarded to any of the parties.

23. It is so ordered.

Delivered in open court at Chuka this **14<sup>th</sup> day of May, 2018** in the presence of:

CA: Ndegwa

Murango Mwenda for the Ex-parte Applicant

Kiongo for the Respondents

Joseph Ikuura Wa Zakayo – Interested Party

**P.M. NJOROGI**

**JUDGE.**