



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA JUDICIAL REVIEW CASE NO. 03 OF 2018

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY,

MINISTRY OF LANDS & SETTLEMENT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

NJERU MWATHI KAROMO.....EX-PARTE APPLICANT

ANDREW MUTHOMI.....INTERESTED PARTY

JUDGMENT

1. In his motion, brought to court under Sections 8 & 9 of the Law Reform Act and Order 53 Rule 3(1) of the Civil Procedure Rules, the ex-parte applicant seeks the following orders:

(i) 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 orally read.

(ii) That the Respondents and Interested Parties be ordered to pay the costs of this motion.

2. The motion is supported by the Statement of Facts and the Verifying Affidavit filed by the ex-parte applicant at the time of seeking leave.

3. The statement of facts dated **6th August, 2018** states as follows:

Statement of facts by ex-parte applicant

Pursuant to order 53 rule 1 (2) OF THE Civil Procedure Rules

STATEMENT OF FACTS BY EX-PARTE APPLICANT

Pursuant to Order 53 Rule 1 (2) of the Civil Procedure Rules

A. NAME AND DESCRIPTION OF APPLICANT

1. The name of the applicant is NJERU MWATHI KAROMO, a peasant farmer and a resident of Tharaka North Sub-County, Tharaka Nithi County.

2. The applicant's address of service for the purposes of this suit shall be care of:- M/S MURANGO MWENDA & COMPANY, ADVOCATES TEACHERS HOUSE, 2ND FLOOR, P.O. BOX 1163-60200, MERU, Email: murangomwenda@yahoo.com.

3. The Respondent's address of service for the purposes of this suit shall be care of THE HON ATTORNEY GENERAL, STATE LAW OFFICE, P.O. BOX 51-60200, MERU.

4. The Interested party's address of service for the purposes of this suit shall be care of GIKINGO LOCATION, THARAKA NORTH DISTRICT.

B. FACTS RELIED UPON:-

5. The applicant dissatisfied with the decision of the land Adjudication and Settlement Officer, filed an appeal to the Cabinet Secretary in charge of lands and Settlement under the provisions of Section 29 of the Land Adjudication Act Cap 284 laws of Kenya, claiming the whole of L.R. No Tharaka/ Irunduni/1148.

6. The Cabinet Secretary delegated the hearing and determination of the appeal to Deputy County Commissioner (formerly District Commissioner) Tharaka North Sub-County under Section 29 (4) of Cap 283 Laws of Kenya.

7. That the Ex-Parte Applicant received summons for the hearing of his appeal and duly attended the hearing with his witnesses ready to testify in support of his appeal.

8. That instead of the appeal being heard by the Deputy County Commissioner, to whom the matter was delegated by the Cabinet Secretary, the appeal was heard and determination given by a District officer (D.O.) now referred to as Assistant County Commissioner, one MR V.A. MATSALLA

9. That the said District Officer delivered his ruling on the 12/3/2018 and gave the interested party the whole of the land irrationally and without justification.

10. That the District Officer, Mr V.A. MATSALLA had no jurisdiction to hear and determine the appeal as the appeal was not delegated to him but to the Deputy Commissioner, Tharaka North Sub-County.

11. That the District Officer refused to give to the applicant a written copy of the award, even after it was formally requested for by my advocate.

12. The District Officer also acted unreasonably, unfairly and arrived at a hurried decision without visiting the locus in quo.

C. RELIEFS SOUGHT:-

13. The Applicant seeks an order of certiorari to remove into this Honourable Court and quash forthwith the Proceedings and the Decision made by the District Officer, Mr V.A. MATSALLA on the 12/3/2018 purportedly on behalf of the Cabinet Secretary in Appeal No 186 of 2017 in relation to L.R. NO Irunduni Adjudication Section Parcel NO 1148.

14. That the appeal be heard afresh by the Deputy County Commissioner, Tharaka North Sub-County who has the requisite jurisdiction to hear the same on behalf of the Cabinet Secretary.

15. The Respondent and the interested party pay the costs.

The facts herein are verified by the applicant in the affidavit filed herein together with the application.

DATED AT MERU THIS....6THDAY OF.....AUGUST.....2018

SIGNED BY:-.....

NJERU MWATHI KAROMO -EX-PARTE APPLICANT

4. The Verifying Affidavit sworn on **20th August, 2018** states as follows:

VERIFYING AFFIDAVIT

I, NJERU MWATHI KAROMO, adult male of sound mind, and a resident of Tharaka North sub-county, do hereby make oath and solemnly swear as follows:-

1. THAT I am the Ex-Parte Applicant herein and I am competent to swear this affidavit in support of the application.

2. THAT I am the lawful owner of all that parcel of land known as parcel No 1148/ Irunduni Adjudication Section, which was established under the Land Adjudication Act, Cap 284 Laws of Kenya.

3. THAT the land measures about 1.5 Acres and I have been in occupation for many years as it is ancestral land.

4. THAT the Interested Party was one of the Land committee, members within Irunduni Adjudication Section and was very close to both the Demarcation and Adjudication Officer.

5. THAT when the Adjudication process started, the Interested party, used his influence as a committee member to have land parcel NO 1148 recorded in his name.
6. THAT I filed my objections to the Adjudication officer, who heard the matter and awarded the land to the Interested Party.
7. THAT I was dissatisfied with the award and I filed an appeal to the Cabinet Secretary in-charge of land matters.
8. THAT I duly paid for the appeal as per receipt No 6515390 and I filed my grounds of the appeal. Copies of the Receipt is annexed and marked NMK I.
9. THAT I received summons for hearing of the appeal slated for the 23/2/2018.
10. THAT I went to the offices of Deputy County Commissioner, Tharaka North Sub-County for the hearing of the appeal together with my witnesses.
11. THAT to my surprise, on arrival, I was directed to the office of the D.O. (District Officer) Mr V.A. MATSALLA for the hearing and determination of my appeal.
12. THAT the District Officer directed that he would not be listening to any witnesses and would only hear me and the Interested Party.
13. THAT I told the district officer that I had brought my witnesses and that I wanted them to testify but he would hear none of it and flatly refused to hear any of my witnesses.
14. THAT I gave my evidence and the Interested Party did the same.
15. THAT I asked the District Officer to visit the land but he refused.
16. THAT after the two of us testified, the District Officer hurriedly gave his decision and awarded to the Interested Party one and half (1.5) Acres of my land.
17. THAT the decision by the District Officer was unreasonable and without basis.
18. THAT I am further advised by my advocate on record, that the District Officer had no jurisdiction to hear and determine the appeal as the powers had not been delegated to him by the Cabinet Secretary to hear and determine the appeal.
19. THAT after the district Officer read the award, I requested for a copy of the award but he refused.
20. THAT I later instructed my advocate on record to request for a copy of the proceedings and the award. My advocate formally asked for a copy through the letter dated 20/4/2018, copy annexed as NMK II.
21. THAT the district officer wrote back to my advocate refusing to give him a copy vide his letter of 25/4/2018, annexed as NMK III.
22. THAT because of the refusal by the District Officer to supply me with a copy of the proceedings and the award, I have not been able to attach a copy of the award sought to be quashed.
23. THAT the District Officer does admit in his letter annexure NMK III that he made the award and that he did not give me a copy thereof.
24. THAT I am further advised by my advocate on record, which I verily believe to be true that the District officer did not have the necessary legal jurisdiction to hear and determine the appeal.
25. THAT what I depone herein is true and within my personal knowledge.

5. The parties were directed to file and exchange their written submissions within a stipulated time frame. Only the ex-parte applicant filed and exchanged his submissions. Mr. Kiongo, for the Attorney General, while complaining that the Respondent had formed the habit of making mistakes similar to those alleged in this suit, intimated that he would leave the matter to the court to make its determination.

6. The ex-parte applicant's submissions read as follows:

EX PARTE APPLICANT'S SUBMISSIONS

BACKGROUND

The Judicial Review proceedings were brought vide a Notice of Motion dated 26th September 2018 after obtaining leave, seeking for

an order of certiorari to bring to this court the decision and award orally read by the acting Deputy County Commissioner on behalf of the Cabinet Secretary, Ministry of Lands and Settlement on the 12/03/2018 in relation to L.R. NO THARAKA/IRUNDUNI/1148.

The Ex-parte applicant is the owner of all that parcel of land known as parcel No 1148/IRUNDINI ADJUDICATION SECTION, measuring 1.5 Acres or thereabouts. The Ex-parte applicant states that when the adjudication process started, the Interested Party herein used his influence as a land committee member and caused the suit land to be recorded in his name. The applicant then filed an objection to the Adjudication officer who awarded the suit land to the Interested Party. He was dissatisfied with this decision and appealed to the Cabinet Secretary in charge of land matters.

The Cabinet Secretary delegated the hearing and determination of the appeal to the Deputy County Commander, Tharaka North Sub-County. On the date of the hearing, the applicant attended the hearing with his witness ready to testify in support of his appeal. However, instead of the appeal being heard by the Deputy County Commander to whom the matter was delegated, the appeal was heard and determined by the Assistant County Commander, formerly referred to as District Officer, one Mr. V.A Matsalla.

The applicant further states that his witness was not allowed to testify and the District Officer declined and/or refused to visit the suit land to fully understand the facts on the ground. The said District Officer delivered his ruling on 12/3/2018 and irrationally and without any justification awarded the whole land to the Interested Party. The applicant requested for the copy of the award but the District Officer declined to do so despite numerous requests to do so. Copies of the correspondences have been adduced before this court.

Having been dissatisfied by the decision-making process of his appeal, the applicant instituted Judicial Review proceedings seeking an order of certiorari to quash forth with the proceedings and decision made by the District Officer. Hence these submissions.

ON THE LAW.

Section 29(4) of the Land Adjudication Act, Cap 284 provides for the delegation of powers by the Minister in-charge of lands to hear and determine appeals. It stipulates;

“...the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office 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 purposes to be that of the Minister”.

My Lord, this provision of the law allows the Minister to delegate his powers to hear appeals to any public office. In this case, the Minister delegated this power to the Deputy County Commissioner to hear Appeal No 186 of 2017 in relation to L.R. NO THARAKA/IRUNDUNI/1148 but the same was heard and determined by the District Officer. Mr. V.A Matsalla is not gazetted as a public officer with delegated powers to entertain appeals to the Minister in-charge of lands. We submit that the District Officer lacked jurisdiction to hear and determine the appeal. The Deputy County Commander cannot delegate his delegated powers. This has not been provided for by the law.

Your Lordship, the applicant was never supplied with the copy of proceeding and decision thereof to show who signed the decision. However My Lord, the letter on record proves that the matter was heard and determined by V.A. Matsalia who signed off the letter for the Deputy County Commissioner. It is well within his knowledge that it is the Deputy County Commissioner who has the authority and powers to deal with appeals to the Minister and that is why he signed for the Deputy County Commissioner and went ahead to put the Deputy County Commissioner's stamp.

In **Republic v Cabinet Secretary, Ministry of Lands and Settlement & 2 others Ex-Parte Gerald Mbuuri Kabugu [2018] eKLR** the learned judge noted;

“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). 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.”

We implore this court to be persuaded by its decision that noted the paramount importance of jurisdiction. It is trite law that jurisdiction is everything. It goes to the very heart of the matter. The appeal was heard and determined by an office that lacked jurisdiction and it therefore renders the decision thereof null and void.

Order 53 of the Civil Procedure Rules provides for the applications of Judicial Review. The objective of Judicial Review was noted in **Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155** where Lord Brightman noted:

“Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.”

The court in **Commissioner Of Lands v Kunste Hotel Limited [1997]eKLR** with authority also reiterated Lord Brightman's views and stated;

“...it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”

Judicial Review is administrative in nature and seeks to ensure that those in authority do what is expected of them. It seeks to protect individuals and ensure that they get fair treatment from the authority. My Lordship, the question that this court should address itself to is whether the Ex- parte applicant received fair treatment from the District Officer by declining to hear the evidence of his witness who was already before him. We submit that failure to call the applicant's witness was unfair and unprocedural. Every litigant has a right to have his case heard fairly to ensure just determination of all matters. The applicant's case was never fully ventilated because his witness was not given an opportunity to give his evidence. This was unfair and a procedural impropriety.

Your Lordship, it our further submission that the hurried decision by the District Officer to award the suit land to the interested party without taking into consideration the fact that the applicant has been on that land for many years since it is ancestral land was unreasonable and irrational. Had he agreed to visit the suit land, then he would have a more informed decision. He would have noted that the applicant has been on the suit land for years and has developed the same. Failure to conduct a scene visit was also negligent on the part of the District Officer. This led to the applicant losing his parcel of land that he has lived on his entire life. We submit that the fact that the applicant has been living on that land for many years and the land is ancestral land, the same should have been taken into account.

It was unfair and unjust to the applicant to have his land given to the Interested Party when the District Officer who lacked jurisdiction in the first place, hurriedly determined the matter without according the applicant the fair treatment that he deserved. We submit that the application is merited and should be allowed.

We so pray.

We rely on the following authorities;

1. Chief Constable of the North Wales Police V Evans: HL 1982
2. Commissioner of Lands V Kunse Hotel Limited [1997] eKLR
3. Republic v Cabinet Secretary, Ministry of Lands and Settlement & 2 others Ex-Parte Gerald MbuuriKabugu [2018] eKLR

DATED AT MERU THIS 29th DAY OF OCTOBER, 2018

FOR: MURANGO MWENDA & CO. ADVOCATES

ADVOCATES FOR THE EX-PARTE APPLICANT.

7. I have carefully considered the ex-parte applicants submissions. I opine that all the three authorities (supra) proffered by the ex-parte applicant in support of his assertions are relevant and good authorities in the facts and circumstances of this case.

8. I find that the ex-parte applicant has proved his case on a balance of probabilities.

9. I do note that the interested party was not an active participant in these proceedings. In any case, the impugned decision for which judicial review orders are sought was solely made by the respondent. I am, therefore, inclined not to award costs against the Interested Party.

10. In the circumstances, I issue the following orders:

- a) The proceedings and the decision made by the District Officer, Mr. V. A. MATSALLA on behalf of the Cabinet Secretary in Appeal No. 186 of 2017 in relation to L. R. No. Irunduni Adjudication Section Parcel No. 1148 are hereby brought to this court and are forthwith quashed.
- b) The appeal should be heard afresh by the Deputy County Commissioner, Tharaka North Sub-County, who has the jurisdiction to hear the apposite appeal on behalf of the Cabinet Secretary and an order to that effect is hereby issued.
- c) Costs are awarded to the Ex-parte applicant against the Respondent.

Delivered in open Court at Chuka this 11th day of December, 2018 in the presence of:

CA: Ndegwa

Majau h/b Murango Mwenda for 1st Applicant

Other parties absent

P.M. NJORGE

JUDGE