



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JUDICIAL REVIEW 3 OF 2017

FORMERLY MACHAKIOS MISC CIVIL NO. 147 OF 2011

REPUBLIC -----APPLICANT

VERSUS

DISTRICT COMMISSIONER - MAKUENI ----- RESPONDENT

-AND-

1. JOSEPH MUTUSE NZUVE ----- 1ST INTERESTED PARTY

2. HARRISON NZUVE KYULE ----- 2ND INTERESTED PARTY

-AND-

CYRUS MULI KULA(*as legal representative of*

KOLA MATOLO alias KULA MATOLO) ----- EX-PARTE APPLICANT

JUDGMENT

1) There is before me a notice of motion application expressed to be brought under order 53 Rules 3 of the Civil Procedure Rules and Sections 8 And 9 of the Law Reform Act Cap 26 of the Laws of Kenya for orders that:-

1. THAT an order of certiorari do issue removing to this Honourable Court for purposes of being quashed the proceedings and findings of the District Commissioner- Makueni in Makueni Minister's Land Appeal Case No. 48 of 2009, and the same be quashed.

2. THAT an order of prohibition do issue prohibiting the District commissioner – Makueni from implementing and/or causing to be implemented his findings/decision – made in Makueni Minister's Land appeal Case No. 48 of 2009.

3. THAT costs of these proceedings be awarded to the applicant.

2) The application is supported by the statement dated 6th June, 2011, the verifying affidavit and further verifying affidavit of Cyrus Muli Kola sworn on 6th June, 2011 and 9th June, 2011 respectively.

3) The applicant's counsel in her submissions stated that the main grounds in support of the application are:-

a) The District Commissioner acted ultra-vires his mandate as given under the Land Adjudication Act by purporting to overturn judgments of courts of competent jurisdiction by ordering the taking of measurements and subdivision of land that had been adjudicated upon by the courts and boundaries duly fixed, and proceedings to give such land to other people.

b) The District Commissioner acted without jurisdiction when he purported to "substitute" the long dead appellant, Nzuve Muiya, with people who were not his legal representatives, and proceeding to hear such people as if they were parties to the appeal.

c) The District Commissioner acted in breach of the Rules of Natural Justice and acted without Jurisdiction when he denied

the deceased (Kola Matolo) an opportunity to be heard and to call witness, and proceeded to arbitrarily appoint a surveyor who purported to arbitrarily subdivide land awarded to the deceased by the courts, and to award such land to other people.

4) The counsel submitted that in purporting to substitute the long dead Nzuve Muithya (*who had filed the appeal*) with persons who had not been appointed his legal/personal representations under provisions of the Law of Succession Act, the said District Commissioner acted illegally, without jurisdiction and ultra vires his mandate under sections 3,47 and 48 of the said Act. The counsel correctly pointed out that jurisdiction to appoint personal/legal representatives of a deceased person's estate and to make orders regarding administration of those estates is vested in the High Court, and in some cases in the magistrate's courts.

5) The counsel referred the court to section 3 of the Law of Succession Act which defines who a personal representative is and as the duties of the personal/legal representative set out in section 82 (a) of the Act.

6) The counsel submitted that even though the appeal lodged by Nzuve Muithya before he died survived his death, the same could only be prosecuted/enforced by his personal/legal representative appointed by the courts in accordance with the law of Succession Act and as such, the District Commissioner had no power and jurisdiction to appoint people to purport to prosecute the appeal. The counsel termed both proceedings taken before the District Commissioner or any report written by any person appointed by him during the appeal proceedings, and the decision of the District Commissioner arising from such proceedings as nullity and should be removed to this court and quashed.

7) The counsel ended her submissions by correctly stating that decisions/judgments of courts of competent jurisdiction can only be overturned by higher courts on appeal, or by the courts giving such judgments upon successful application for review. The counsel submitted that a quasi judicial body cannot purport to overturn a court's judgement. She said that this is clearly stated in the relevant statutes, which include the Civil Procedure Act, the Judicature Act, the Constitution of Kenya and Appellate Jurisdiction Act, among others and opined that the notice of motion dated 21st June, 2011 is merited and, therefore, it should be allowed as prayed.

8) The counsel for the 1st and the 2nd interested parties, M/S J.A Makau & Co. Advocates submissions were on three grounds namely:-

a) That the applicant was present during the proceedings before the District Commissioner,

b) That the District Commissioner did not supersede the jurisdiction of the courts when determining the said appeal before him and

c) That the proceedings before the District Commissioner are special proceedings and the District Commissioner need not have substituted the deceased appellants Nzuve Maithya in accordance with the Law of Succession Act.

9) On the first ground, the counsel submitted that appeal number 48/2009 dated 10th June, 2010 shows that the Exparte applicant was present during the appeal before the District Commissioner. The counsel went on to submit that rules of fair trial and natural justice were followed since he was allowed to testify and call witnesses to defend their case.

10) On ground two, the counsel submitted that the District Commissioner did not supercede his powers in overruling a competent court of law but strictly exercised his powers as provided by the consent and direction of the High Court referred the matter to a parcel of elders.

11) On ground three, the counsel cited Machakos High Court **Misc Application number 63/2004 – Republic Vs the Special District Commissioner** where Lenaola, J as he then was, stated *inter alia*.

“... that proceedings under the Land adjudication Act, Cap 284 are special proceedings within the context of the Act ... I wholly agree with the interested parties that although Ndumbi Nzeki died after his success in the committee stage, it would defeat the purpose of proceedings under the relevant customary law if the parties that are affected by one decision to first go to a court of law and obtain letter of administration and expect to meet the time limits set by the Land Adjudication Act. In any event, the Exparte applicant fully participated in the proceedings from inception and the challenge raised now is in bad faith...”

12) The counsel submitted that the Exparte applicant did not raise any objections to the participation of the 1st and 2nd interested parties during the appeal before the District Commissioner. The counsel added that the ex parte applicant was present during the proceedings and has only cried wolf now because the District commissioner did not rule in his favour. The counsel went on to submit that from the proceedings the Exparte Applicant fully participated in them and never raised any issue as to legality of the participation of the 1st and 2nd interested parties. He never challenged the capacity of the interested parties and the challenge now is made purely to obtain advantage.

13) Justice Mutungi had a chance to address his mind on a similar that was before Justice Lenaola the same issue in the case of ***Roberts Muli Matolo V Director of Land Adjudication & 2 others in Nairobi ELC No. 599/13.*** The judge observed,

“ An appeal before the minister is quasi judicial process and it would be expected that the Civil Procedure Rules, would have application particularly in regard to parties of the actions/appeals before the minister”

The judge further observed

“... Where a party to an appeal before the minister dies their legal/personal representatives have a duty to seek substitution of the parties in the appeal to ensure that the appeal is prosecuted”

14) I fully associate myself with Justice Mutunga and I hold that a personal representatives of a deceased person as defined in section 3 of the Law of Succession Act can only be appointed by the High Court and in some cases by the magistrate's courts despite the fact that proceedings under the Land Adjudication Act Cap 284 are special proceedings within the context of the Act.

15) Mr. Antony M Mulekyo Advocate for the 3rd interested party submitted that the District Commissioner acted in breach of the constitutional right of access to justice and also the right to fair hearing as provided in Article 50 of the Constitution when he denied the respondents has an opportunity to be heard an appeal.

16) The counsel cited the case of Onyango Oloo vs Attorney General [1986 – 1989] EA 456 (successfully quoted in Registrar of Government Lands & 3 others Ex-parte John Njugi Gathumbi [2014] eKLR). In Onyango's case it was held ,

“ the principle of natural justice applies where ordinary people would reasonable expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice ... to “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as , to think, hold the opinion... “consider” implies looking at the whole matter before reaching a conclusion ...”

17) The counsel pointed out that the District Commissioner acted against the rules of natural justice by adopting as part of his findings a surveyor's report prepared arbitrarily and without hearing parties to the dispute on the existing boundaries fixed by the court.

18) The counsel went on to submit that the District Commissioner's decision was tainted with illegality in purporting to overturn decisions of courts of competent jurisdiction and acted beyond the authority conferred upon him and therefore arrived at a wrong decision. The counsel cited the case of Republic Vs Permanent secretary of Housing & Another (2014) eKLR which sets out the broad grounds on which the court exercises its Judicial Review jurisdiction were restated where the court cited with approval the Ugandan Case of Pastoli Vs Kabate District Local Government Council and others[2008]2 EA 300 where it was held;

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality”

19) The counsel further referred the court to the case of Republic Vs Kenya Revenue Authority Expertes Yaya Towers Limited [2008] eKLR where the court explained what substantive ultra vires is by using the case of Westminster Corporation Vs London and Northwestern Rail Co.(1905) Ac 426 at Page 430 where Lord Macnaughten stated follows;

“ It is well settled that a public body vested with statutory powers such as those conferred upon the corporation must take care not to exceed or to abuse its powers. It must keep the limits of authority committed to it. It must act in good faith and must act reasonably...”

20) The counsel further submitted that the Ex parte applicant has mischievously omitted to tell the court that the said parcels of land No.s 815 and 2062 are jointly owned by Kola Matolo and the husband of the 3rd interested party, Maweu Matolo, who are brothers. The counsel went on to submit that the Exparte applicant has also omitted to tell the court that the said land was divided between the two brothers by the Kamba Amutei Clan and that in doing so, the applicant has misled the court concerning the ownership of the said suit property. The counsel invited the court to take into account the fact that land plots Nos. 815 and 2062 are jointly owned by Kola Matolo and Maweu Matolo in making its determination in this suit.

21) For this court to act as the 3rd interested party requested, this would amount to exceeding the scope of Judicial Review. It is not for this court to substitute the decision that is sought to be impugned with its on decision for that is not what judicial Review is all about. I will, therefore, decline the prayer by the third interested party.

22) Having read the submissions filed, my finding is that the District commissioner acted illegally and without jurisdiction as he had no authority to purport to appoint personal legal representatives of the estate of Nzuve Muithya. The power to appoint such personal/legal representatives vests in the High Court and in some cases in the magistrates courts. As such the proceedings before the District Commissioner or any report written by any person appointed by him during the appeal proceedings and the decision arising from such proceeding are nullity. I also hold that the District Commissioner lacked authority to purport to overturn the decisions/judgments of court of competent jurisdiction.

23) Arising from the foregoing, I hereby proceed to grant prayers 1, 2 and 3 of the notice of motion application dated 21st June, 2011 and filed in court on 22nd June 2011.

Signed, Dated and Delivered on this 13th Day of December, 2017

MBOGO C.G

JUDGE

13/12/2017

Before Mbogo C.G

Mr Kwemboi Court Assistant

Ms Watta holding brief for Mrs Nzei for the Exparte applicant present

MBOGO C.G

JUDGE