



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & SICHALE, J.J.A)**

**CIVIL APPEAL NO. 282 OF 2009**

**BETWEEN**

**REPUBLIC**

**DAVID MUTISO LITU**

**MUTUA NDIKU MICHAEL MUSYA NZIOKA (Substituted for**

**KATHITU MUOKA MATU (Deceased)).....APPELLANTS**

**AND**

**THE SPECIAL DISTRICT COMMISSIONER, MACHAKOS JOSHUA M. NTHENGE**

**JACKSON NZEKI..... RESPONDENTS**

*(An appeal from the Ruling of the High Court of Kenya at Machakos*

*(I. Lenaola, J.) dated 18<sup>th</sup> September, 2009*

in

**HC Misc. Application No. 63 of 2004)**

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling and orders of the High Court of Kenya at Machakos (**Lenaola, J. as he then was**), delivered on 18<sup>th</sup> September, 2009 in which the appellants' application seeking orders that the decision of the Special District Commissioner, Machakos dated 28<sup>th</sup> October, 2003 and which was made on behalf of the Minister in-charge of land adjudication and settlement be brought to the court and quashed by way of Certiorari.

The brief background leading to the proceedings before the learned Judge were that land parcel No. 1369 hereinafter, "*the suit land*" was situate within Mbee Adjudication Section. During the adjudication process one, Ndumbi Nzeki instituted proceedings against the appellants before the Mbee Adjudication Committee claiming the suit land. The committee heard the claim and concluded that Ndumbi Nzeki was entitled to only that portion of suit land which he was cultivating and had built his houses but the remainder of the suit land would be registered in the names of the appellants. He was dissatisfied with the committee's finding and together with Nzomo Nzeki and Muasya Nthenge lodged an appeal before the Machakos District Arbitration Board. The board visited the suit land and determined that the portion occupied by the Ndumbi Nzeki and Muasya Nthenge was clearly demarcated with a sisal boundary and that portion of the suit land should be registered in their joint names.

The appellants were aggrieved with the decision of the board and appealed to the Special District Commissioner, Machakos in Land Appeal Case No. 84 of 2000. The Special District Commissioner made a determination to the effect that:

the disputed parcel of land belonged to the Nzeki family which had acquired it over a hundred years prior. He concluded the suit land belonged to the respondents and the appellants had no grounds to claim ownership of the same.

The appellants then initiated before the High Court, Judicial Review proceedings seeking an order of certiorari to quash the decision of the special District Commission aforesaid. The appellants' contention was that the original claimant, Ndumbi Nzeki died before the arbitration board proceedings were commenced and therefore, the appellants before the board were incompetent persons as they did not have letters of administration to his estate. Further, that the proceedings before the Special District Commissioner were also rendered illegal on the same account. They further contended that Mutua Ndiku the 2nd appellant was not accorded the right to be heard hence the decision was against the rules of natural justice.

In response Joshua Nthenge, the 2nd respondent deposed in a replying affidavit that although Ndumbi Nzeki died after the committee proceedings, substitution was made before the arbitration board proceedings were undertaken and in any event, it is not those proceedings that are being challenged. That in any event, the proceedings before the Special District Commissioner were instituted by the appellants.

The learned Judge in rendering his decision framed only one issue for determination which was, whether the parties before the Special District commissioner were properly before him. In his view the issue of one party not being heard was not borne out by the meticulous record kept by Special District Commissioner. It was discernable from the record that each party was given sufficient time to call evidence and were heard.

On the one issue he had framed for determination, the court noted that proceedings under the Land Adjudication Act, were special proceedings within the context of that Act and that during adjudication process the land is still held under customary law and if a party dies during the pendency of the claim, the provisions of the Civil Procedure Rules with regard to substitution did not apply since it is those rights that should be ascertained before registration is made and title issued under the Registered Land Act (repealed). Consequently, the court held 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 the decision were to first go to a court of law and obtain letters of administration and expect to meet the strict time limits set by the Land Adjudication Act. That in any event, the appellants fully participated in the proceedings from inception and the challenge raised before the court was therefore in bad faith. The court also noted that in any event, it was the appellants who filed the appeal before the Special District Commissioner, hence the challenge that was now being made was purely to obtain advantage. It was the court's finding that the decision of the Special District Commissioner was final and the matter should be put to rest. Subsequently the motion was dismissed with no order as to costs.

Dissatisfied with the impugned ruling, the appellants filed the present appeal in which they raised six grounds to wit that; the learned Judge erred in law and in fact in: misapprehending the nature of the application before him and fail to deal with all grounds raised in the statement filed and erroneously picked only one issue amongst eleven other issues; failing to note and hold that the decision of the Special District Commissioner was against rules of Natural Justice and provisions of the Civil Procedure Act and the rules made thereunder as regards proceeding in the absence of the 1st appellant or his duly authorized representative; failing to note and hold that the Special District Commissioner erred in failing to accord the 2nd appellant an opportunity to be heard though present and also failed to record what he stated; failing to note and hold that the initial claimant was not properly substituted and so was the 4th appellant before the Special District Commissioner's appeal and those purported to have been substituted for the 4th appellant were without a grant of letters of administration hence the finding that letters of administration were not necessary was contrary to the law; holding that the appellants participated in the

proceedings and cannot challenge the jurisdiction of the Special District Commissioner; and that the learned Judge erred in law and in fact in failing to note and hold that the Special District Commissioner exceeded his powers by allowing a stranger to conduct the appeal on behalf of the appellants thereby rendering the proceedings null and void.

During the hearing of the appeal, parties consented to have the appeal disposed of on the basis of their respective written submissions on record.

In their submissions, the appellants took issue with the court's holding that only one issue called for its determination and that was whether the parties were properly before the Special District Commissioner. They contended that the grounds did not border on representation alone but raised issues on breach of the rules of natural justice and exercise of jurisdiction and by reducing the eleven grounds to one issue only the judge failed to pick the other pertinent issues that had led to the application before him. In that view, in a judicial review application, the relief that is sought flows from the grounds that are set out in the statement as was then provided for under Order LIII Rule 1(2) which is similar to Rule 1(2) in Order 53 of the Civil Procedure Rules. They relied on the case of **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR**, for this proposition, and therefore the failure to consider all the grounds in the statement, as it happened in this case, led to injustice.

As regards participation by the 1st-3rd appellants, they pointed out that the proceedings which led to the appeal before the Special District Commissioner were quasi-judicial proceedings with clear indication who the parties were. They argued that the person who presented the case on their behalf did not have the consent and or authority of the appellants to do so. They reiterated that although the 2nd appellant was present he was not afforded the opportunity to prosecute his appeal and the effect was that the appellants were not heard before the Special District Commissioner leading to breach of the rules of natural justice.

With regard to substitution of the parties who had passed on before the proceedings were concluded, they maintained that substitution ought to have been undertaken. That in order to ensure that right parties with sufficient interest in the proceedings were the ones participating, it was prudent for proper substitution to be effected and failure to do so opened the proceedings to imposters to step in and participate in the proceedings.

They disputed the finding that the appellants' participation in the proceedings amounted to admitting the jurisdiction of the Special District Commissioner as their participation did not mean that they conferred jurisdiction on the Special District Commissioner to commit acts that amounted to breach of procedure. The jurisdiction of the Special District Commissioner flowed from Section 29 of the Land Adjudication Act under which he was exercising powers assigned to him by the minister. (See: **Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR**). Lastly, they submitted that the Special District Commissioner did not have the power to allow a person who was not a party to the proceedings to prosecute the appeal before him and therefore acted in excess of his authority. There were no written submissions by the other appellants and 1st respondent.

For the 2nd and 3rd respondents, it was submitted that the 2nd appellant cannot be heard to say that he was not heard on his case as the record showed that though he was allegedly sick, he sent his sons to represent him in the proceedings. The said sons agreed that one of them, Silas Christopher Nzioka would proceed with the appeal on their behalf. It was submitted that as this was going on, the 1st appellant was present. Accordingly, the 2nd appellant was fully represented in the proceedings by Silas Christopher Nzioka. They further submitted that the proceedings in tribunals operates under Land Adjudication Act and are not subject to Civil Procedure Act and the rules made thereunder. It is enough that parties are represented by persons of their choice hence no special Power of Attorney or a grant of letters of administration is necessary. That such disputes are handled as customary claims and heirs apparent or other appointees as agreed by the parties can represent the parties in conflict. It was the respondent's view that under the Land Adjudication Act, proceedings have time limits and if the disputes were to be tied to other Acts of Parliament, the disputes would never end. The respondent therefore urged us to dismiss the appeal with costs.

We have carefully considered the record, submissions by counsel and the law. The issues for determination is whether the court was right in dismissing the judicial review application filed by the appellant on the basis of the one issue it framed for determination. Closely linked with this, is whether substitution was necessary, and finally, whether the appellants were denied the right to be heard.

As already stated this appeal arises from a Judicial Review application in which the appellants sought an order to quash the decision of the Special District Commissioner dated 28th October, 2003. Judicial review orders are discretionary in nature hence, whenever this Court is called upon to interfere with the exercise of such judicial discretion, as in this case, it should be guided by the principles enunciated in **Mbogo v Shah [1968] EA 93** as follows:

***“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

It is common ground that the suit land was in an adjudication section. The adjudication was being undertaken under the Land Adjudication Act. It was thus special proceedings within the context of the said Act. Before the application was filed, the appellants and respondents went through the whole process of land adjudication and exhausted the appellate mechanism provided therein. To recap, the Adjudication Committee held that Ndumbi Nzeki (deceased), was entitled to a portion in the suit land that he had built houses on and was cultivating. The deceased appealed to Machakos District Arbitration Board which visited the suit land and arrived at the conclusion that the suit land was demarcated with sisal boundary and should be registered in the joint names of the deceased and 2nd respondent. The appellants then appealed to the Special District Commissioner, Machakos who upon hearing the parties concluded that the suit land belonged to the deceased as the Committee and the Board had confirmed, and that the appellants had no claim of ownership over the same. This conclusion is what triggered the judicial review application.

The appellants contend that the court erred in framing only one issue for determination yet in their statement in support of the application, they had raised several grounds. It is a requirement that a trial court frames issues for determination. In doing so, the court may opt to frame only one issue for determination, if it is of the view that from the pleadings, evidence led and the law, that issue alone is sufficient to determine the suit. In this case the trial court settled on one issue which it thought was at the core of the dispute. The trial court cannot be faulted for doing so, more so, when the parties themselves did not frame issues for the court’s determination. Accordingly, this complaint has no merit at all.

The appellants also contend that the deceased (1st appellant) was not substituted nor did the respondents obtain a grant of letters of administration in the proceedings before the board and the Special District Commissioner. According to them, the said proceedings were illegal. They faulted court’s determination that the parties were properly before the Special District Commissioner as these were special proceedings and thus the requirements of civil procedure regarding substitution did not apply. Even though the deceased died, it would defeat the purpose of the proceedings under relevant customary law if affected parties were to first obtain a grant of letters of administration before proceeding with their claims and expect to meet the time limits set by the Act.

In this case we note that it is the appellants who initiated the proceedings against the respondents. They are the ones who brought the respondents on board. They cannot blame the respondents for failing to substitute the deceased appellant. The appellants fully participated in the proceedings even with the knowledge that there was no substitution of the deceased appellant and at no given time did they challenge the respondents’ *locus standi*. In the result, we agree with the decision by the court below that the appellants only made the claim for substitution to gain advantage over the respondents.

The appellants also complain that they were not accorded the opportunity to be heard, and that the Special District Commissioner did not have power to allow Silas Christopher Nzioka, who was not a party to the proceedings to prosecute the appeal on behalf of the appellants. The respondents on the other hand argue that the 2nd appellant was allegedly sick and sent his sons including, Silas Christopher Nzioka to

represent him and the parties agreed that the said son proceeds with the appeal. It is noteworthy that the 1st appellant was present but never objected to the proposal. We note that disputes handled as customary claims, heirs apparent or other appointees as agreed can represent the parties.

It is clear from the record that the appellants were present during the appeal before the Special District Commissioner. They did not raise any objection to Silas prosecuting the appeal, on their behalf. It would seem that the appellants only cried wolf because the decision did not go their way. Be that as it may, the appeal before the Special District Commissioner was not a normal appeal under Order 41 of the Civil Procedure Rules, there is therefore no requirement under the Land Adjudication Act that the usual court rules of procedure and normal court protocols in dealing with civil appeals do apply to an appeal to the Special District Commissioner under Section 29 of the Act. The appellants having elected Silas to represent them, they cannot be heard to claim that he was a stranger to the proceedings and or that they were never heard. It thus goes without saying that the appellants were given an opportunity to be heard, which they utilised.

In the end, we find no reason to interfere with the ruling of the trial court. The appeal lacks merit and is accordingly dismissed with costs to the 2nd and 3rd respondents.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**