



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, ODEK & KANTAL, JJ.A)

CIVIL APPEAL NO. 115 OF 2015

BETWEEN

DOMINIC MUSEI IKOMBO.....APPELLANT

VERSUS

KYULE MAKAU.....RESPONDENT

(Being an appeal from the Judgment/Order of the High Court of Kenya at Nairobi (G. V. Odunga, J.) dated 16th September, 2014

in

H.C. Misc. Application No. 246 of 2013)

JUDGMENT OF THE COURT

1. This appeal is the culmination of an old land dispute which started in the mid 1970s in respect of Land Parcel No. 2246 Mitamboni Adjudication section between the families of Kaloki Nzau and Kyule Makau Kaloki. The land was subjected to the adjudication process pursuant to the Land Adjudication Act, with the dissatisfied parties filing an appeal to the Minister in **Land Case No. 109 of 1987**. The appeal was heard by the District Commissioner pursuant to powers delegated to him by the Minister under **Section 35 of the Land Adjudication Act**.
2. From the record before the Court, the dispute was heard on the 2nd April, 2012. The findings/ruling of the District Commissioner was signed and dated on 27th April, 2012. In his ruling, the District Commissioner dismissed the ruling of the Adjudication Officer and directed the District Surveyor to subdivide the land into two equal parts to be transferred to Kavuu and Wayua respectively.
3. Although that Ruling is dated 27th April, 2012 the same bears signatures dated 12th February, 2013 and a certification stamp bearing the same date. That date is important because according to the respondent herein, the Ruling was never delivered to the parties, but he was availed the same on that date. These two dates form the fulcrum of this appeal. We shall revert to this issue later.
4. Being dissatisfied with the said decision, the respondent (Kyule Makau) through Nzei & Co. Advocates moved the High Court vide **Misc. Civil Application No. 246 of 2013** dated 4th July, 2013 seeking leave to institute Judicial Review proceedings for orders of certiorari to quash the said Ruling and also prohibition to prohibit the District Commissioner Kathiani, or any land officer/surveyor from implementing the impugned Ruling.
5. Leave was granted and the respondent herein filed the substantive Notice of Motion on 29th August, 2013. In support of the Notice of Motion, he faulted the District Commissioner, acting on behalf of the minister, for purporting to substitute the deceased, **Peter Musembi Makau** and **Kaswii Kileu** who were the registered owners of the land with persons who were not their legal representatives, and further for ordering that the land be transferred to persons who were deceased.
6. On behalf of the appellant/respondent in the Judicial review application), learned counsel Mr. Mulwa opposed the Notice of Motion by way of a Notice of Preliminary Objection dated 14th October, 2013 in which he raised the issue of limitation of time. According to counsel, the application for leave was null and void as it offended **section 9(3) of the Law Reform Act**, it having been filed outside the 6 months statutory period stipulated in the said section. He maintained that the proceedings before the District Commissioner were in compliance with

section 29 of the Land Adjudication Act and urged the court to dismiss the motion.

7. After hearing the parties, in a judgment rendered on 16th September, 2014, the High Court (Odunga, J.) concluded that in view of the two conflicting dates, “*the six months limitation period was inapplicable to the present proceedings more so as none of the parties was able to state with certainty when the impugned decision was delivered since the interested party did not file any affidavit to controvert the averment made by the ex-parte applicant.*”

The learned Judge also made a finding that the award of the disputed land to **Kavuu** and **Wayua** who were deceased was illegal as they were incapable of having any interest in the suit parcels of land. The orders of certiorari and prohibition were therefore granted. The impugned ruling was quashed and the District Commissioner Kathiani and any other officer were prohibited from acting on the impugned Award.

8. Aggrieved by the decision of the High Court, **Dominic Musei Ikombo** through F.M Mulwa Advocate, appealed to this Court vide the memorandum of appeal dated 13th May, 2015 citing five (5) grounds of appeal. In paraphrase, the said grounds fault the learned Judge for finding that the six (6) months limitation was inapplicable in the proceedings before him; failing to find that persons representing the deceased parties at the adjudication proceedings did not need to have letters of administration; and that the learned Judge had delved into the merits of the case instead of confining himself to the decision making process.

9. Mr. Mulwa learned counsel for the appellant, in his brief oral address during the plenary hearing expounded on the issue of limitation saying that **Sections 8 and 9 of the Law Reform Act** refer to the date when the impugned Ruling was made and not when it was delivered or become known to the parties. He contended that the relevant date for purposes of these proceedings was 27th April, 2012 and not 12th February, 2013 when it was certified. It was his view that the notice of motion was therefore statutorily time barred having been filed more than six (6) months after it was dated, and the court therefore lacked jurisdiction to entertain the same.

10. On the merit of the Notice of Motion, it was counsel’s contention that there was nothing wrong in ordering that the land be transferred to the two deceased ladies as the same belonged to their descendants, and the learned Judge fell into error when he allowed the Notice of Motion on that basis. He concluded by faulting the Judge for what he termed as delving into the merits of the award and in the process overstepping his jurisdiction. He urged the Court to allow the appeal with costs.

11. Opposing the appeal, Mrs. Nzei learned counsel for the respondent urged that the date to be considered for purposes of computing the six months for purposes of moving the court for orders of judicial review, is the date the impugned ruling became known to the parties and not necessarily when it was dated. She maintained that the respondent only became aware of the impugned Ruling on 12th February 2013 when the same was availed to him as manifested by the date and signatures on the Ruling and not 27th April, 2012 which appears to be the date it was made.

12. Counsel posited that the application for leave to file the Notice of Motion seeking prerogative orders dated 4th July, 2013 was filed on 5th July, 2013, which was within the 6 months stipulated in law. Her submission was therefore that the application was not statutorily time barred and the appellant’s Preliminary objection had been properly dismissed.

Learned counsel also reiterated that the District Commissioner had erred in finding that the parties in the dispute could represent a deceased person, lack of letters of administration notwithstanding, and maintained they had no *locus standi* as the Land Adjudication Act does not supersede the Law of Succession Act which requires persons representing the deceased’s estate to hold letters of administration in respect of the said estate. She also faulted the District commissioner for awarding the land to deceased persons and lauded the learned Judge for quashing the District Commissioner’s award. She urged for the dismissal of the appeal.

13. We have considered the record of appeal in its entirety, the grounds of appeal, submissions of both learned counsel, and the law. As expected, the appeal arising as it does from the Judicial Review proceedings, raises principally points of law, which we discern to be:-

- **Whether the date applicable in determining time limitation for purposes of judicial review is the date the Ruling is dated, or the date it is delivered;**
- **Whether for purposes of proceedings conducted under the Land Adjudication Act, letters of administration are mandatory for persons appearing for deceased parties;**
- **Whether it was a nullity for the minister to transfer the land in question to deceased persons.**

14. On the first issue, we observe that there is no concession by the respondent that the application for Judicial Review was filed outside the six months statutory limitation prescribed under **Section 8 and 9** of the Law Reform Act on which the application was premised. There was no application for extension of time before the court and the decision of **Ako Vs Special District Commissioner Kisumu and another [1989] KLR 163**, (cited to us) and a plethora of cases adopting the findings therein are not relevant for purposes of this judgment. The pertinent question which we need to address is whether the six months start running from the date of the impugned decision or from the date the parties became aware of the same.

15. Unfortunately, although Mrs. Nzei maintained that the relevant date was the date the respondent became aware of the decision, she did not furnish us with any decided cases to that effect. The trial Judge on the other hand based his determination on the fact that the limitation period was inapplicable as none of the parties was able to state with certainty when the impugned decision was delivered since the

respondent had failed to file a replying affidavit to controvert the averments made by the respondent.

16. This Court has however held the view that one can only challenge a decision that is within his/her knowledge. Holding otherwise would be irrational as it would be expecting a party to possess super human powers to know the contents of a decision long before it is delivered. It would also create fertile ground for corruption and other underhand maneuvers where a party would collude with the decision maker or their staff intending to frustrate the judicial review process, to hide or otherwise ensure that a decision is not availed to the parties until the statutory 6 months limitation period has expired.

17. This Court has addressed this point in several decisions and held that the six months should start running from the date the impugned decision is communicated to the affected parties or when they become aware of it. In **Republic VS. Kenya National Highways Authority & 2 others ex parte Amica Business Solutions Limited [2016] eKLR**, this Court pronounced itself as follows:-

“In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties.” (Emphasis supplied).

18. In this case Counsel for the respondent has made heavy weather of the fact **Section 9 (3) of the Law reform Act** and **Order 53 rule 2 Civil Procedure Rules** specifically provide for the date when the decision was dated and not when it was delivered. From the above decision however, it is evident that the applicable date is the date when the parties became aware of the decision. The appellant did not rebut the averment that the decision became known to the respondent on 12th February, 2013, in which case the application for leave, having been filed on 5th July, 2013 was filed within the 6 months timeline. We therefore hold that the application was not statutorily time barred and was properly before the High Court. Ground 1 in the memorandum of appeal fails.

19. On the second issue, our view is that proceedings conducted under the Land Adjudication Act are not strictly speaking akin to proceedings under the Civil Procedure Act. The District commissioner acting on behalf of the Minister has wide latitude to conduct the proceedings in a manner that meets the substantive ends of justice. **Section 13 of the Land Adjudication Act** talks of “guardian” or “representative according to African Customary Law”. It does not refer to legal representatives. The strict rules of civil litigation as relates to capacity to sue and be sued do not apply to proceedings before the committee or the minister. It is not therefore necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant. The parties therefore had *locus standi* to appear before the adjudication committee, lack of letters of administration notwithstanding.

20. Further, the Act allows every person who considers that he has an interest in the land in question to lodge a claim to the recording officer. In this case, the parties did not need to obtain letters of administration to protect their interest in the land in question. Furthermore, the two qualified as representatives of the deceased under customary law to represent their respective families in the adjudication proceedings. That ground meets the same fate as the first ground.

21. On the last issue as to whether the land could be awarded to a deceased person, it is common ground that both Kavuu and Wayua, to whom the disputed land was transferred were deceased as at the time the impugned award was made. It is trite that a deceased person cannot have any proprietary rights or any other interest in land. The land subject of this matter could only be transferred to the legal representatives of the deceased persons or specifically to their families. To that extent, we agree with the learned Judge that the minister made an order that amounted to a nullity in law, and the award is not capable of being executed. Where the decision is a nullity in law, then the same is amenable to judicial review.

22. On this ground alone, we agree with the learned Judge that the decision in question was for quashing. Accordingly, this appeal fails. The same is hereby dismissed but in view of the fact that the parties are close relatives, the order that commends itself to us is that each party bears its own costs of this appeal.

Dated and delivered at Nairobi this 19th day of July, 2019.

W. KARANJA

.....

JUDGE OF APPEAL

J. OTIENO ODEK

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR