



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, G.B.M KARIUKI & J. MOHAMMED, JJ.A.)**

**CIVIL APPEAL NO. 22 OF 2009**

**BETWEEN**

**DR. JASPER MALUKI KITAVI.....APPELLANT**

**AND**

**THE HON. MINISTER FOR LANDS,**

**SETTLEMENT & PHYSICAL PLANNING.....1<sup>ST</sup> RESPONDENT**

**MWANIKI MUETI .....2<sup>ND</sup> RESPONDENT**

**(An Appeal from the ruling & order of the High Court of Kenya at Machakos (Lenaola,J) dated 3<sup>rd</sup> December, 2008**

**in**

**HC MISC NO. 169 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Background**

1. This is a first appeal by **DR. JASPER MALUKI KITAVI**, the appellant herein against the ruling and order of the High Court, *Lenaola, J.*, of 3<sup>rd</sup> December, 2008. In that ruling, the appellant's application dated 8<sup>th</sup> November, 2004 was dismissed.

2. A brief summary of this matter shows that the appellant claimed to be the owner of **LAND PARCEL NO. 1771** Kyamboo Adjudication Section ("suit land"), which he claimed to have developed. A dispute arose as to ownership of the suit land and the matter was referred to the Land Adjudication Officer of the area who on 26<sup>th</sup> August, 1987 awarded the suit land to **MWANIKI MUETI** the 2<sup>nd</sup> respondent herein. Consequently, the appellant, on 21<sup>st</sup> September, 1987 filed Minister's Appeal Case No. 36 of 2000 against the said decision before the 1<sup>st</sup> respondent herein. When the said appeal was listed for hearing on 5<sup>th</sup> March, 2004, the District Commissioner, Kitui, as the Ministers delegate, declined to hear the appeal on the ground that the appeal was time barred. The appellant contended that on 5<sup>th</sup> May, 2004, his appeal

was heard in his absence, the fact that he was unwell notwithstanding.

3. It is for the foregoing reasons that the appellant filed a Notice of Motion dated 8<sup>th</sup> November, 2004, in the High Court seeking an order of *certiorari* to quash the decision of the 1<sup>st</sup> respondent through its delegate, the District Commissioner, Mwingi, dated 5<sup>th</sup> May 2004. The appellant raised a further issue before the High Court namely that his appeal was heard in his absence yet he was unwell, and therefore his right to be heard was denied and the rules of natural justice breached.

4. In response, the 2<sup>nd</sup> respondent through his son, one James Kwoko Mwaniki, swore a replying affidavit dated 31<sup>st</sup> March, 2005, and averred that the suit land was inherited by his father from his great grandfather and that the Land Adjudication Board confirmed this fact when it awarded the same to his father; that the appeal filed by the appellant was adjudged to be out of time and therefore the decision of the Minister responsible for lands was proper and justifiable.

5. The learned Judge took into consideration the competing arguments and found that the Minister's Delegate's decision was not unlawful as the appellant had the duty to prove conclusively that the appeal was filed before 26<sup>th</sup> October, 1987; that the Minister's Delegate was more than generous in spite of finding that the appellant's appeal had been filed out of time and before striking it out that he gave the appellant opportunities, on two occasions, to prove that his appeal was not filed out of time but he failed to do so and therefore the appeal was dismissed; that the rules of natural justice were not breached as the appellant was given an opportunity to be heard on the issue of the appeal being filed out of time and that he failed to produce the requisite documents. Accordingly, the learned Judge dismissed the application. Aggrieved by that decision, the appellant filed this appeal.

6. The appellant has filed several grounds of appeal contending that the learned Judge erred in law and fact and in summary, by:

- 1. Failing to find finding that the decision by the Minister's delegate (The District Commissioner) was not fair and just having in the first instance held that parties to any judicial or quasi judicial proceedings must all be heard for the decision to be fair and just.*
- 2. Ignoring and not taking into account the evidence on record and the Appellant's Advocate's submissions.*
- 3. Considering the dates on sequence of events in filing of the appeal and hence erred in making his decision.*
- 4. Failing to find that an appeal is lodged to the Minister by registering the same at the appropriate Land Adjudication Office and not in the Minister's office.*
- 5. Failing to find that the Minister's delegate ( DC) could have verified from the records that the subject appeal was lodged on 16/9/87 and paid for on the same date as clarified by the Land Adjudication Office and therefore the appeal was not lodged out of the prescribed time.*
- 6. Failing to find that the Minister's delegate (DC) ought to have adjourned the matter to enable the appellant who was sick at the date of hearing to later explain the circumstances in which he filed the appeal and demonstrate that the appeal was not time barred.*
- 7. Failing to find that the Minister's delegate (DC) acted on no evidence to arrive at the decision he made and heard no party and/or failed to record if he did hear any party contrary to the rules of natural justice and section 77(a) of the Constitution of Kenya [retired Constitution].*
- 8. The decision is unfair in all circumstances of the case.*

The appellant seeks that the appeal be allowed, the orders of the High Court be set aside and decision of

the Minister's Delegate (District Commissioner, Mwingi), be quashed by this Court with costs in the High Court and this Court.

## **Submissions**

7. The appeal was prosecuted by way of written submissions as well as oral highlights. Learned counsel, Miss Kiome appeared for the appellant. There was no appearance for the 1<sup>st</sup> respondent while Mr. Musyoka held brief for Mr. Munyasya, learned counsel for the 2<sup>nd</sup> respondent, Miss Kiome submitted that the Attorney-General had indicated that he would not oppose the appeal; that the appellant was not given an opportunity to be heard by the Minister's representative; that on the date of the hearing, the appellant was indisposed and sent a representative; that he was not given another date to argue his case and the DC proceeded to hear the matter in the appellant's absence; that the DC made an order to the effect that the appellant had filed his appeal out of time. Miss Kiome relied on the case of **MAHAJA V KHUTWALO, CA NO. 19 OF 1983**, where the court held that a tribunal must follow the procedures when hearing a matter; that it must call the evidence of both parties, record it and give a ruling; that the special circumstances of this case is that the foregoing was not done; that the appeal was dismissed because the appellant did not appear yet he had sent a representative; that the rules of natural justice were not adhered to and therefore the right to fair hearing was infringed.

8. On the issue of time, counsel for the appellant submitted that the letter from the 1st respondent dated 28<sup>th</sup> April, 2004, clarified that the appellant submitted his application letter and paid the requisite appeal fee indicating his intention to appeal against the Land Adjudication Officer's decision on 16<sup>th</sup> September, 1987; that the appellant was not issued with a receipt as the receipts were out of stock; that on 4<sup>th</sup> November, 1987 when the appellant collected the receipt, it was erroneously dated 4<sup>th</sup> November, 1987, rather than 16<sup>th</sup> September, 1987. Counsel urged us to allow the appeal with costs and order a re-hearing.

9. In response, the 2<sup>nd</sup> respondent's counsel submitted that he relied on the written submissions filed which states that the appellant filed his appeal out of time; that the decision to be appealed from was made on 26<sup>th</sup> August, 1987 and the appellant had 60 [sixty] days from the said decision to lodge his appeal yet the appeal was lodged on 4<sup>th</sup> November, 1987; that although the appeal document is dated 2<sup>nd</sup> October, 1987, the same was indicated to have been received by the Kitui Land Adjudication Office on 25<sup>th</sup> September, 1987; that the learned Judge noted the anomaly which indicated that the appeal was lodged two weeks before it was dated. Counsel urged us to dismiss the appeal with costs.

## **Determination**

10. We have considered the record, written submissions filed by both parties, authorities cited as well as the law. This being a first appeal, we are reminded of our primary role as a first appellate court, mainly, to re-evaluate, re-assess and re-analyse the evidence on the record and to determine whether the conclusions reached by the learned trial Judge are sound or not and give reasons either way. This duty was emphasized by this Court in the case of **KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED, (2009) 2EA 212** wherein this Court held *inter alia* that:

***“on a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”***

11. On the question whether the appellant's appeal before the 1<sup>st</sup> respondent was filed out of time, it is not in dispute that the decision appealed from was made on 26<sup>th</sup> August, 1987. The appellant, under **Section 29(1) of the Land Adjudication Act, Chapter 284, Laws of Kenya**, was required to lodge his appeal within sixty (60) days after the date of the determination by the 1<sup>st</sup> respondent. **Section 29(1) of the Act**, provides that:

**“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty 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.”**

12. The appellant claimed to have filed his appeal within the prescribed sixty (60) days. The learned Judge found that the same was dated 2<sup>nd</sup> October, 1987 and that it was received by the Kitui Land Adjudication office on 25<sup>th</sup> September 1987. The learned Judge queried how a document dated 2<sup>nd</sup> October, 1987 could have been lodged two weeks before it was dated. There is no evidence on record to prove that the appeal was filed on 21<sup>st</sup> September, 1987 as alleged and not on 4<sup>th</sup> November, 1987 when the appellant collected the receipt in respect of the appeal fee.

13. On the issue whether the appellant was accorded a fair hearing, this Court in the case of **JUDICIAL SERVICE COMMISSION V MBALU MUTAVA & ANOTHER, [2015] eKLR** stated on the principle of natural justice thus:

**“NATURAL JUSTICE**

*[19] In exercise of its powers under the Constitution or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the House of Lords in **Ridge v. Baldwin [1964] AC 40** clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:*

- 1. the right to be heard by an unbiased tribunal.*
- 2. the right to have notice of charges of misconduct*
- 3. the right to be heard in answer to those charges.*

...

*...Lord Denning MR in **Selvarajan v Race Relations Board***

*[1976] 1 All ER 12 when dealing with the procedure of bodies required to make investigation where he said at page 19:*

*'In all these cases, it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigations and the consequence which it may have on the person affected by it'.*

*'But it is now clearly settled, as is indeed self-evident, that there is no difference between natural justice and "acting fairly" but that they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power and the circumstances of the case'.*

14. The appellant's argument is that he was not granted a fair hearing; that on the day fixed for the hearing of his appeal, he was unwell but he sent a representative to inform the 1<sup>st</sup> respondent of the

same; that this notwithstanding, the 1<sup>st</sup> respondent went ahead to make a determination of the appeal without according him an opportunity to be heard; that accordingly, the rules of natural justice were breached. In opposition, the respondents have argued that on the day fixed for hearing, the 1<sup>st</sup> respondent made a determination that the appellant's appeal had been filed out of time. In the proceedings before the High Court, it is clear from the judgment of the 1<sup>st</sup> respondent dated 5<sup>th</sup> May, 2004, that the appellant's appeal had been fixed for hearing on 5<sup>th</sup> March, 2004, but the same was not heard for the reason that the 1<sup>st</sup> respondent determined that the appeal had been filed out of time; that upon this information being relayed to the appellant the appellant argued that his appeal had been filed within time. Consequently, he was accorded an opportunity to adduce evidence to prove his allegations; that the matter was therefore fixed for hearing after a period of two weeks on which date, in spite of appearance by both parties, the same did not proceed as the appellant requested for more time within which to adduce evidence that his appeal was not filed out of time. However, on 5<sup>th</sup> May, 2004, the appellant sent his representative with the information that he was indisposed. The 1<sup>st</sup> respondent argued that the appellant's representative did not adduce evidence to prove that the appellant's appeal had been filed within the prescribed time. Consequently, the appeal was dismissed.

15. From the foregoing, and confining ourselves to the principles of natural justice as stated in this court's decision of *Judicial Service Commission v Mbalu Mutava & another*, (*supra*) we find that the proceedings before the 1<sup>st</sup> respondent were fair and in accordance with the principles of natural justice. The 1<sup>st</sup> respondent determined the appellant's appeal on the information adduced. It is instructive to note that the letter of 28<sup>th</sup> April, 2004, by the Land Adjudication Officer was not brought to the 1<sup>st</sup> respondent's attention at the hearing of the appeal.

In the circumstances of this case, we find that the learned trial Judge in light of the facts and evidence placed before him was right in holding that the Minister's delegate was more than generous in according to the appellant several opportunities to prove that his appeal was not filed out of time. The appellant however failed to do so. From the record, it is clear that the appellant was accorded ample opportunity to prove that his appeal was not filed out of time. The learned Judge found no evidence to prove that the appellant's appeal was filed within the prescribed time. In the absence of evidence to the contrary, the learned Judge was correct in finding that the appellant's appeal was time barred. We, therefore, find that the proceedings before the 1<sup>st</sup> respondent were conducted according to the principles of natural justice.

16. We come to the conclusion that the learned Judge properly directed his mind to the pleadings and evidence and applied the law correctly and arrived at the correct decision. We find no merit in the appeal. Accordingly, the appeal fails and is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2017.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI, SC**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true  
copy of the original

**DEPUTY REGISTRAR**