



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, G.B.M KARIUKI & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 1 OF 2009

BETWEEN

REPUBLIC 1ST APPELLANT

MUIA MAINGA (DECEASED) 2ND APPELLANT

NZEKI MAINGA..... 3RD APPELLANT

JAPHETH NGUNDU..... 4TH APPELLANT

GEOFREY MATHEKA 5TH APPELLANT

MWOLOLO SOMBO 6TH APPELLANT

AND

LAND ADJUDICATION OFFICER1ST RESPONDENT

IKALYONI ADJUDICATION SECTION2ND RESPONDENT

MAKUENI LANDS & SETTLEMENT OFFICERS3RD RESPONDENT

MBEVI MWANZAU MATOLO4TH RESPONDENT

(Being an Appeal from the ruling & decree of the High Court of Kenya at Machakos (Lenaola, J) dated 14th October, 2008 in HC MISC. APPLN NO. 253 OF 2006)

RULING OF THE COURT

Background

1. This is an appeal from the ruling of the High Court (Lenaola, J) dated 14th October, 2008 dismissing the appellant's application dated 30th November, 2006.

2. The genesis of the matter giving rise to the appeal is as follows; the appellants and the 4th respondent share a common ancestry in one Umba who originally occupied the suit property in dispute. In land case No. 21 of 1976 the elders determined that the suit property be divided equally between the parties. The decision was confirmed by the Resident Magistrate, Machakos (Hon N N Njagi) in a ruling dated 9th October, 1992 who ordered for enforcement thereof. Previously, the learned Magistrate had allowed an application by the appellants to have the disputed land surveyed and demarcated by the 1st respondent but the dispute was however not resolved. As a result, on 17th November, 2003 the 1st respondent commenced the hearing of the objections made by the 4th respondent with regard to parcels Nos 988, 1925, 1926, 1927, 1919 and 1923 Ikalyoni Adjudication Section. In a decision dated 19th September, 2006, the 1st respondent ordered all the above plots to be cancelled and combined with P/NO 988 and be recorded in the names of the 1st appellant (deceased) and the 4th respondent. He further ordered that the two should subdivide the said land after registration. Aggrieved by this decision, the appellants moved to the High Court.

3. In the High Court, the appellants sought an order of *certiorari* quashing the 1st respondent's decision dated 19th September, 2006. Three issues were argued by the appellants before the learned Judge as follows:

- a. *that the 1st appellant was deceased and there was no one properly and legally qualified to represent his estate;*
- b. *that the 5th appellant was absent during the proceedings and the 2nd 3rd and 4th appellants were not given a chance to cross-examine the 3rd respondent's witnesses therefore the rules of natural justice were breached; and*
- c. *that the 1st respondent acted in excess of his powers when he ignored the earlier orders of the court and proceeded to cancel the registration of one Mbevi Kamai over parcel No. 988.*

4. Upon hearing both parties, the learned Judge dismissed the appellants' application. The appellants have preferred the present appeal which is predicated on eight (8) grounds of appeal in which they contend that the learned judge erred in law and in fact in:

- i. *holding that the 1st respondent has the power, in the determination of a question before him in connection with any claim to land, to overlook the procedure and provisions under the Civil Procedure Act and the Law of Succession Act as regards dealing with estates of deceased persons as well as the issue of legal representation and that without a grant of letters of administration the 1st respondent can deal with an estate of a deceased person.*
- ii. *his finding that trust land claims are strictly based on customary law and that the 1st respondent in dealing with trust land claims is not bound by the provisions of the Law of Succession Act and the Civil Procedure Act and failed to note that under section 4 of the Law of Succession Act, succession to immovable property in Kenya of a deceased person is regulated by the Law of Succession and further under section 2 of the Law of Succession Act, the law of succession shall have universal application to all.*
- iii. *failing to note that the 1st respondent exceeded his jurisdiction by allowing one Mwainga Muia to appear on behalf of the estate of the 1st respondent and represent his estate without a grant of letters of administration and without having been appointed as the legal representative of the 1st respondent's estate in accordance with the provisions of the Law of Succession Act.*
- iv. *by failing to find and hold that the 1st respondent exceeded his jurisdiction by proceeding to hear the objection against the 5th appellant who had not been summoned to appear and in allowing a*

stranger to represent the 5th appellant who had no power of attorney and therefore erred in condemning the 5th appellant unheard.

- v. *failing to hold and find that the 1st respondent having opted to hear evidence from the parties erred and acted contrary to the rules of natural justice by denying the 2nd, 3rd and 4th appellants and opportunity to cross examine witnesses in support of their claim*
- vi. *in failing to note and hold that the 1st respondent acted contrary to the rules of natural justice by denying the appellants an opportunity to give evidence in support of their claim having allowed the respondents to do so.*
- vii. *failing to note and hold that the 1st respondent erred in failing to properly record evidence and exceeded his jurisdiction by proceeding to review a court judgment and failing to ascertain the lands in dispute.*
- viii. *failing to note and hold that the 1st respondent's decision was biased, unfair and meant to deprive the appellants of their property.*

Submissions

5. During the hearing of this appeal, both parties were represented by counsel. Mr Mutiso Makau, learned counsel for the appellants, compressed the grounds of appeal into three issues; that the learned Judge failed to consider that the matter was related to land and touched on the interest of a deceased person [the 1st appellant]; that there were no letters of administration taken out against the 1st appellant and that the 1st respondent should have ensured that **Sections 4 and 2 of the Law of Succession Act [Chapter 160, Laws of Kenya]** which provides that all intestate matters should be dealt with by the Law of Succession Act was complied with; secondly, that the 1st respondent did not follow the rules of natural justice in that the 5th appellant was not summoned for the hearing yet matters touching on him were dealt with; that the 2nd, 3rd and 4th appellants were denied the opportunity to cross-examine witnesses and that the appellant's contention relates to the manner in which proceedings were dealt with. Thirdly, that when the 1st respondent heard this matter, there were two court decisions touching on the suit property, that is, Case No. 69/1976 and Case No. 21/1976; that the 1st respondent acted as an appellate court yet he did not have the mandate to vary decisions and therefore exceeded his mandate. Counsel urged the court to set aside the ruling and orders of the High Court and allow the appeal with costs to the appellants.

6. Mr Kaumba Samwel, learned counsel for the 1st and 2nd respondents opposed the appeal. Regarding jurisdiction, counsel submitted that the 1st respondent had the authority to deal with objections in respect of land; that what is in dispute is whether the 1st respondent in his decision dated 19th September, 2006 had proceeded contrary to the ruling of the Senior Resident Magistrate in Case No. 21 of 1976 in excess of its jurisdiction; the decision of the 1st respondent took into consideration the decision in Case No. 21/1976 and therefore the 1st respondent did not act beyond its authority. Secondly, there are two kinds of applicable laws in the adjudication process - the substantive law and the procedural law; that in this case the substantive law is provided in the **Land Adjudication Act** and customary law by dint of **section 20 of the Land Adjudication Act**; that with regard to the appellants' argument on the application of the Law of Succession Act, that the Act governs the devolution of assets to beneficiaries that the adjudication process did not deal with the devolution of assets to beneficiaries, rather it dealt with the adjudication of the dispute with regard to the suit property. Accordingly, the **Law of Succession Act** is not applicable in this dispute. Thirdly, with regard to the appellants' submission on natural justice from the record, the said 5th appellant is shown as having been present during the hearing before the 1st respondent in the proceedings. No mention is made in the proceedings of his having been denied a chance to give evidence. Counsel urged us to dismiss the appeal.

8. Mr Francis Sila, learned counsel for the 3rd respondent adopted the submissions of the 1st and 2nd

respondents' counsel. He added that the 1st respondent had given due regard to the decisions previously made on the suit land. The 1st respondent's function is to determine interests in land and in so doing he has the discretion to admit any evidence he deems necessary in resolving a dispute before it. Counsel urged us to dismiss the appeal with costs to the respondents.

Determination

We have carefully considered the evidence, the submissions by counsel and the law.

10. On the question regarding the applicable law and procedure in the land adjudication process, this Court in the case of **REPUBLIC V KENYA NATIONAL EXAMINATIONS COUNCIL EX PARTE GATHENJI & OTHERS**, Civil Appeal No. 266 of 1996, stated:

“Only an order of certiorari can quash a decision already made and order of certiorari will issue if the decision is without jurisdiction or in excess of the jurisdiction, or where the rules of natural justice are not complied with.

11. The learned Judge considered the powers of the 1st respondent and the procedure to be followed in executing his powers. **Sections 9, 10 & 12 of the Land Adjudication Act** set out the 1st respondent's powers and duties.

Section 9 provides:

“(1) The adjudication officer shall be in charge of and shall exercise general supervision and control over the adjudication.

(2) The adjudication officer shall hear and determine-

- ***any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer; and***
- ***any objection to the adjudication register which is submitted in accordance with section 26 of the Act.”***

Section 10 sets out the general powers of an adjudication officer as follows:

“(1) The adjudicating officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connection with such claims. And for that purpose he shall be legally competent to administer oaths and to issue summonses, notice or orders requiring the attendance of such persons or the production of such documents as he may consider necessary for the carrying out of the adjudication.

(2) The adjudication officer may himself exercise all or any of the powers which are given by this Act to officers subordinate to him.”

The import of this section of the law is that it gives the adjudication officer a wide discretion in the carrying out of his duties. This view has been confirmed by this Court in **STANLEY THIANIE MBUI & ANOTHER V LAND ADJUDICATION OFFICER TIGANIA WEST DISTRICT & ANOTHER**, [2014] eKLR. As is the case with all judicial and administrative bodies it is to be expected that this discretion is exercised reasonably.

Section 11 of the Land Adjudication Act further grants the adjudication officer specific powers. **Section 11 (c)** specifically provides that in the course of an adjudication the adjudication officer shall have the power to make a claim or otherwise act on behalf of a person who is absent or under a disability if he considers it necessary to avoid injustice.

Section 12 provides:

“(1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of Civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.

(2) any proceeding conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of chapters XI and XVIII of the Penal Code.”

12. Based on the above provisions, did the 1st respondent act *ultra vires* when he heard and determined the objections raised by the 3rd respondent? From the record it is clear that there is a ruling dated 9th October, 1992 wherein the learned Magistrate ordered for enforcement of the elders’ decision to subdivide the disputed land equally between the parties.

13. The learned Judge found that the 1st respondent used and referred the decision in Land Case No. 21/1976 in the proceedings before him; that the 1st respondent has power under **Section 11(c) of the Act** to avoid injustice by allowing that claim to be entertained; that the 1st respondent was right in finding that the Demarcation Officer had subdivided Plot No. 988 and issued a new number 1839 to the plaintiff (deceased) which was against the court decision; that the demarcation officer had no authority to subdivide P/No. 988 and issued new numbers P/Nos. 1919, 1923, 1925, 1926, 1927 to the defendants which was contrary to the courts decision; that the 1st respondent was right in finding that the numbers created by the demarcation officer were illegal since the portion for the plaintiff deceased was small; and lastly, that the 1st respondent was bound by **section 10** to determine any question before him in connection with any claim to that land.

14. Based on the foregoing, we find that **Section 10 (1)** of the **Land Adjudication Act**, gave the 1st respondent jurisdiction in all claims under the Act relating to interests in land in the adjudication area with power to determine any question for determination in connection with such claims as the learned Judge correctly found. Further, **section 11(b) of the Act** gives the 1st respondent powers to correct any error made in the adjudication register following complaints raised with regard to the same. Accordingly, the appellants’ contention that the 1st respondent exceeded his powers has no basis as the 1st respondent had jurisdiction to hear and determine the objections filed by the 3rd respondent.

15. On the rules of natural justice, this Court in the recent decision in **JUDICIAL SERVICE COMMISSION V MBALU MUTAVA & ANOTHER, [2015] eKLR** stated in substantial detail what the common law as well as the constitutional formulation on the principle of natural justice is and stated as follows:

“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”.

16. The import of these authorities cited by the Court of Appeal in the case of **Judicial Service Commission [supra]**, is that the principle of natural justice requires the judicial or administrative body in question to act fairly. As to whether such a body has acted fairly or not recourse can be had to the three features stated by Lord Hodgson in **Ridge v Baldwin** i.e. (i) *the right to be heard by an unbiased tribunal.* (ii) *the right to have notice of charges of misconduct.* (iii) *the right to be heard in answer to those charges.*

17. The appellants’ argument is that the 5th appellant was not summoned to the hearing yet matters touching on him were dealt with. Further, that the 2nd, 3rd and 4th appellants were denied a chance to cross-examine witnesses. On their part the respondents’ aver that the said 5th appellant is shown as having been present during the hearing before the 1st Respondent in the written proceedings. No mention is made in the written proceedings of him having been denied a chance to give evidence.

18. From the proceedings it is clear that the 5th appellant, that is, Mwololo Sombo was present during the hearing of that objection. With regard to the cross-examination of witnesses the proceedings actually show that the 2nd appellant cross-examined the plaintiff therein (Page 79 of the Record of Appeal).

As to the 3rd and 4th appellants being denied an opportunity to cross-examine, we see no evidence of this allegation in the proceedings and therefore, this Court must reject this argument as it can only be confined to what appears in the typed proceedings. We therefore find that the proceedings before the 1st respondent were fair and in accordance with the principles of natural justice.

19. On the jurisdiction of the 1st respondent, the appellants argue that when the 1st respondent heard the objection there were two decisions touching on the suit property, that is, Case No. 69/1976 and Case No. 21/1976, that the 1st respondent erroneously acted as an appellate court and did not have the mandate to alter the decisions in the 2 aforementioned cases. The respondents on their part argue that the decision of the 1st respondent took into consideration the decision in Case No. 21/1976 and therefore the 1st respondent did not act beyond its authority.

20. Considering the finding by the respondent, we find that the 1st respondent did in fact consider the pending court cases. Accordingly, this ground of appeal fails.

21 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. None of the grounds challenging that decision can succeed and are dismissed. The appeal accordingly fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 27th day of May, 2016.

ALNASHIR VISRAM

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR