



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 35 OF 2013

EUTON NJUKI MAKUNGO APPELLANT

AND

REPUBLIC 1ST RESPONDENT

J. K. CHELIMO, DISTRICT COMMISSIONER,

MBEERE NORTH 2ND RESPONDENT

AMBROSE NJIRU NTHIGA 3RD RESPONDENT

(Appeal against the Ruling of the High Court of Kenya at Embu

(H. Ong'undi , J.) dated 20th February, 2013

in

Judicial Review No. 57 of 2011)

JUDGMENT OF THE COURT

1. The suit property in this appeal is **Land Parcel No. Mbeere/Kirima/1448**, which at all material times was unregistered and subject to land adjudication process. A dispute over the parcel arose between the Mbandi clan on one part and Rweru and other clans on the other side. When the adjudication process commenced, Mwaniki Mwige (*represented by the appellant*) objected to the suit land being allocated to Alex Njuki then represented by the 3rd respondent. The adjudication officer heard the objection and ruled in favour of Mwaniki Mwige who proceeded to obtain a title deed over the suit property. The 3rd respondent appealed to the Minister in **Appeal No. 409 of 2003**. Upon hearing the parties, the 2nd respondent as the Minister's representative in a decision made on 24th May, 2011, cancelled the title issued to Mwaniki Mwige and allocated the land to Nthiga Mungori (*deceased*) represented by the 3rd respondent.
2. At all material times in the proceedings before the Minister and at the High Court and in this suit the appellant, Euton Njuki Makungo, describes himself as the representative of Mwaniki Mwige who is still alive. Being dissatisfied with the Minister's decision, by Notice of Motion dated 14th

- October, 2011, the appellant applied for orders of Certiorari to issue to remove into the High Court and quash the decision dated 24th May, 2011, made by the 2nd respondent the then District Commissioner Mbeere North District which decision awarded **Land Parcel No. Mbeere/Kirima/1448**, to Nthiga Mungori (*deceased*) represented by the 3rd respondent. The grounds upon which the application for certiorari was based were that the 2nd respondent as the District Commissioner was biased and there was an error on the face of the record.
3. The facts in support of the order for certiorari were that the suit property was allocated to a one Mwaniki Mwige represented by the appellant; that registration of the suit property in the name of Mwaniki Mwige was made on 23rd January, 2004, and title deed issued on 5th December, 2006; that when the land was allocated to Mwaniki Mwige and the title deed issued, there was no restriction entered in the register pursuant to **Section 28** of the **Land Adjudication Act** to indicate that an appeal had been lodged to the Minister. That the 3rd respondent appealed to the Minister vides **Appeal No. 409/2003** which appeal was presided over by the 2nd respondent. The decision made by the 2nd respondent on behalf of the Minister in the appeal reversed the allocation of land to Mwaniki Mwige and awarded the suit property to Nthiga Mungori represented by the 3rd respondent. The appellant sought orders for certiorari to quash the decision of the 2nd respondent on the ground that the District Commissioner was biased and the rules of natural justice were not followed because the 2nd respondent never recorded the appellant's evidence.
 4. Upon hearing the parties by way of written submissions, the learned Judge (*Ong'undi, J.*) in a ruling dated 20th February, 2013, declined to issue the order for certiorari prompting the appellant to appeal to this Court. In declining to grant the order for certiorari, the learned Judge identified three issues for determination in the suit as follows:
 - i. ***locus standi of the appellant;***
 - ii. ***jurisdiction of the Minister in the appeal and***
 - iii. ***allegation of bias by the 2nd respondent as the Minister's representative.***
 5. On the issue of the appellant's *locus standi* to institute judicial review proceedings before the High Court, the High Court held that the appellant did not have any power of attorney to represent the said Mwaniki Mwige who was the registered proprietor of the suit property. The Judge found that the appellant had actively participated in the appeal proceedings before the District Commissioner and he could not go ahead and have the suit property registered and title deed issued under the pretext that there were no restrictions in the land register showing that there was an appeal going on. On the issue that the 2nd respondent did not record his evidence, the learned Judge stated that the appellant never identified which evidence he claims was not recorded; that the record of proceedings before the District Commissioner revealed that the appellant participated in the proceedings, called witnesses and cross-examined witnesses called by the other party. The Judge found no bias on the part of the 2nd respondent and that the registrar of lands issued the title deed with the full knowledge that there was a pending appeal in relation to the suit property. The Judge held that the issuance of the title in favour of Mwaniki Mwige was bent to defeating the ends of justice and certiorari could not issue.
 6. Aggrieved by the decision of the High Court, the appellant lodged the present appeal citing the following grounds:
 - i. ***That the learned Judge erred in law in finding that the appellant lacked locus standi to file the application for judicial review yet she did not come to the same finding/conclusion in respect of the 3rd respondent.***
 - ii. ***That the learned Judge erred in finding that the issuance of the title deed in respect of the land parcel Mbeere/Kirimia/1448 to the appellant was bent on defeating the ends of justice.***
 - iii. ***That the learned Judge erred in law in find that the District Commissioner was not biased in***

ordering the cancellation of the appellant's title to the suit property.

- iv. *That the learned Judge erred in law and fact in finding that the end result in appeal cases no. 409 of 2003 and 245 of 2010 before the District Commissioner were the same.*
 - v. *That the learned Judge erred in law in failing to find that the proceedings of the appeal cases before the District Commissioner were irregular and conducted contrary to the rules of natural justice.*
7. At the hearing of this appeal, learned counsel Messrs Joe Kathungu appeared for the appellant while learned counsel Messrs F.M. Kinyanjui holding brief for Ken Githinji appeared for the 3rd respondent; they all filed written submissions in the appeal.
 8. Counsel for the appellant submitted that the learned Judge erred while addressing the issue of *locus standi*; that it is the appellant who all along represented Mwaniki Mwige, the registered proprietor of the disputed property at the Minister's land **Appeal Cases No. 403 of 2003 and 243 of 2010** and as such, he had *locus standi*. Counsel faulted the Judge for not finding that the 3rd respondent also had no *locus standi* to represent Nthiga Mungori who is deceased yet the said 3rd respondent had no letters of administration. On the issuance of title deed by the land registrar, it was submitted that under **Sections 27 and 28 of the Land Adjudication Act (Cap 284 of the Laws of Kenya)**, once an objection had been determined and a person duly registered, such registration became a first registration that cannot be defeated; that the title issued to Mwaniki Mwige was a first registration and was protected by **Section 143(1) of the Registered Land Act**; because Mwaniki Mwige's title was a first registration, the Minister through the 2nd respondent lacked jurisdiction to order cancellation of the title. It was submitted that the Minister in cancelling the title acted in excess of jurisdiction and certiorari should issue to quash the Minister's decision.
 9. Counsel for the appellant emphasized that **Section 28 of the Land Adjudication Act** required the Chief Land Registrar to restrict dealings with any parcel of land that was subject to an appeal and a party could only find out that the land is subject to an appeal by perusing the register and in the instant case, there was no restriction placed on the disputed parcel of land. Counsel cited the case of **Timotheo Mathenge – v- Manunga Ngochi, Civil Appeal No. 25 of 1978**, in support of the submission that certiorari will issue where there is excess of jurisdiction or a determination procured by fraud, collusion or perjury or error on the fact of the record.
 10. The 3rd respondent in opposing the appeal urged this Court to find that the decision of the learned Judge was well reasoned and sound in law. Counsel emphasized that this appeal relates to the High Court Ruling in the judicial review application and the instant appeal is not an appeal or review of the Minister's decision. It was submitted that the appellant sought an order for judicial review under **Order 53 of the Civil Procedure Rules** and the learned Judge did not err when she stated that under the **Civil Procedure Rules**, a party can only be represented by a person duly appointed as a legal representative. Counsel submitted that Mwaniki Mwige who was registered as proprietor of the suit property is alive and the appellant has no legal capacity or *locus standi* to represent the said Mwaniki Mwige. It was submitted that the appellant does not have a registered power of attorney to represent Mwaniki Mwige and has no *locus* to litigate on any aspect relating to the suit property. Pertaining to the appellant's submission that the learned Judge erred in not finding that even the 3rd respondent had no *locus standi*; counsel for the 3rd respondent stated that the 3rd respondent was dragged into the litigation by the appellant and as such the locus of the 3rd respondent is not an issue since it was the duty of the 3rd respondent to defend the suit instituted against him. For the 3rd respondent it was submitted that the title deed issued to Mwaniki Mwige was aimed at defeating the cause of justice; that at the time Mwaniki Mwige obtained the title deed, **Appeal No. 409 of 2003**, was pending before the Minister and both the proprietor of the suit land and the appellant were aware of the pending appeal. On the issue of jurisdiction, it was submitted that the learned Judge did not err in finding that the Minister had jurisdiction to cancel the title issued to Mwaniki Mwige; that at the time the title deed was issued, appeal to the Minister was pending and registration ought not to have been done before determination of the appeal. It was also submitted that no evidence of bias on the part of the 2nd respondent was proved and error on the face of the record was neither proved nor demonstrated. In relation to the ground that the

Minister heard **Appeal Nos. 409 of 2003** and **245 of 2010** separately, counsel submitted that the issue in this appeal relates to **Appeal No. 409 of 2003** and not **245 of 2010**; that the 2nd respondent did not err in hearing the appeals separately as they were filed by different persons and each man should be heard in his own case; that the 2nd respondent was under no obligation to consolidate the two appeals.

11. We have considered the rival submissions by counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle -vs- Associated Motor Boat Co., [1968] EA 123**, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)”.

12. This Court further stated in **Jabane – vs- Olenja, [1986] KLR 661, 664**:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870”.

13. The grounds of appeal cited in this case challenge the decision by the learned Judge on the three issues that she identified namely:

(i) Whether the appellant had locus standi to institute judicial review proceedings under the Civil Procedure Act;

(ii) whether the Minister had jurisdiction to hear appeal no. 409 of 2003 and cancel an alleged first registration title that had been issued in favour of a one Mwaniki Mwige and

(iii) whether there was proof of bias by the District Commissioner as the Minister’s representative.

14. We have considered the submissions by counsel in light of the grounds of appeal. On the issue of *locus standi*, the appellant moved the High Court under the provisions of the ***Civil Procedure Act (Cap 21 of the Laws of Kenya)***. It is also not disputed that the appellant is not the registered proprietor of the suit property; it is not in dispute that at all material times the registered proprietor Mwaniki Mwige was alive. No person can deal with the land of another unless that person is the duly authorized representative of the registered proprietor. The appellant admits that he does not have a power of attorney from the registered proprietor and neither was he a duly appointed legal representative. The appellant’s argument is that under the Land Adjudication Act, any person can represent another without a power of attorney and the appellant all along represented Mwaniki Mwige. It is our considered view that proceedings under the ***Civil Procedure Act*** and rules are distinct from proceedings under the ***Land Adjudication Act***. A power of attorney must be registered under ***Registration of Documents Act (Cap 285 Las of Kenya)***, in the Registry of Documents. The instrument of power of attorney must also be registered in the land registry relating to the property that is the subject matter of the transaction. We find that the appellant not being a

duly authorized representative of the registered proprietor had no *locus standi* to initiate judicial review proceedings in relation to the suit property. On this issue, we concur with the findings and conclusions arrived at by the learned Judge.

15. The appellant contend that because the Registrar of Lands had already issued a title deed in favour of Mwaniki Mwige; the 2nd respondent acted in excess of jurisdiction to cancel the title which had been issued as a first registration. The disputed parcel of land was within an adjudication area and at the time when the Registrar purportedly issued the title deed, appeal to the Minister was pending. The evidence on record reveals that the appellant and the registered proprietor had knowledge that appeal to the Minister was pending. A person who has knowledge of a pending appeal cannot come to court and submit that because there were no restrictions entered in the register, he could deal with the land as he pleases. He who comes to equity must come with clean hands. The appellant and the registered proprietor knew there was a pending appeal and the disputed parcel of land was still undergoing the adjudication process. We find that the 2nd respondent had jurisdiction to hear the appeal relating to the parcel of land. In the case of ***R – v- Lancashire County Council Ex p Gayer, (1980) 1 WLR 1024*** it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in ***R –v- Lachashire County Council Ex p Gayer, (supra)*** and observe that it is not the duty of the Registrar of Land to determine adjudication disputes; the evidence on record is clear that an appeal to the Minister was pending and the Registrar had no jurisdiction to issue the title deed in favour of Mwaniki Mwige while the appeal was pending. The disputed property was still subject to the adjudication process and the action by the Registrar was null and void. It is our view that the judicial remedy of certiorari was neither created nor established to settle ownership disputes, nor to create and confer title to land and the learned Judge did not err in declining to grant the order for certiorari.

16. Our re-evaluation of the evidence on record does not reveal any bias on the part of the 2nd respondent. We are satisfied that the learned Judge did not err in finding that bias on the part of the 2nd respondent was not proved. In ***National Bank of Kenya Limited v. Ndungu Njau, (Civil Appeal No. 211 of 1996, (unreported))*** this Court stated that an error on the face of the record must be self-evident and should not require an elaborate argument to be established. The appellant in his submissions before us has not illustrated the self-evident error on the face of the record. It is our view that there was no apparent error on the face of record as per the dictum in ***Muyodi v Industrial & Commercial Development Corporation & Anor., (2006) 1 EA 243***. The totality of our re-evaluation of the evidence on record and application of law to the facts of the case while taking into account submissions by all learned counsel leads us to the conclusion that this appeal has no merit and is hereby dismissed with costs to the 3rd respondent.

Dated and delivered at Nyeri this 22nd day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR