



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 189 of 2006

DAVID KENYE ADIEAPPELLANT

AND

DISTRICT COMMISSIONER, KISUMU DISTRICT..... 1ST RESPONDENT

JOSEPH OMOYI ABUTO.....2ND RESPONDENT

*(Being an appeal from the judgment and decree of the High Court of Kenya at Kisumu (Warsame, J)
delivered on 16th May 2006*

In

MISC. CIVIL APPL. NO. 304 OF 2004)

JUDGMENT OF THE COURT

David Kenye Adie (hereinafter referred to as the “appellant”) was the appellant in two appeals (Ministers Appeal No. 138 of 2000 & 139 of 2000) which were heard by the District Commissioner, Kisumu District pursuant to **Section 29(4)** of the **Land Adjudication Act**. (Cap 284 of the Laws of Kenya)

He lost both appeals. He moved to the High Court in its Judicial Review Jurisdiction and filed High Court Kisumu Miscellaneous Application No. 304 of 2004 under **Order 53 Rule 3(1)** of the **Civil Procedure Rules** and **Section 8(2)** of the **Law Reform Act** seeking an order:-

“That this Honourable Court be pleased to issue an order of certiorari removing into this Court the proceedings and rulings of the District Commissioner, Kisumu District delivered on 15th October 2004, in Ministerial Appeal No. 138 of 2000 & 139 of 2000 for the purposes of their being quashed.”

The learned Judge (Warsame, J.) heard the notice of motion and in a considered ruling dated 16th May 2006 dismissed the same for lack of merit.

Aggrieved by that dismissal, the appellant moved to this Court by way of this appeal. He has proffered eight (8) grounds of appeal as hereunder:-

1. *The learned Judge erred by failing to find that the District Commissioner Kisumu had breached the rules of natural justice in hearing of appeal without giving the appellant adequate time to prepare for his case or avail his witnesses.*
2. *The learned Judge erred by failing to find that the proceedings by the District Commissioner, Kisumu were unconstitutional hence amenable to Judicial Review.*
3. *The learned Judge erred by failing to find and hold that there was error apparent on the face of the record in respect to the findings of the District Commissioner, Kisumu.*
4. *The learned Judge erred by failing to find and hold that the District Commissioner, Kisumu acted in collusion with the interested party.*
5. *The learned Judge erred by failing to find and hold that the District Commissioner, Kisumu failed to consider relevant matters.*
6. *The learned Judge erred by failing to find and hold that the District Commissioner did not consider relevant matters.*
7. *The learned Judge erred by failing to find and hold that the District Commissioner Kisumu did not have jurisdiction to hear the appeals.*
8. *The judgment of the learned Judge and the decree were illegal.*

He asks the court to allow his appeal, set aside the decision in question and substitute the same with an order granting the application dated 29th November 2004.

Mr. Nyaanga learned counsel for the appellant relied on these grounds and expounded them before us in his oral submission. It is pertinent to note that the said grounds were actually the same ones that were cited on the body of the motion for Judicial Review before the High Court and similar arguments were heard for and against the motion.

This is nonetheless, a first appeal and it is incumbent upon us to re-evaluate the said grounds and the rival arguments by counsel and arrive at our own independent conclusion.

On ground one (1), learned counsel strongly urged that there was denial of natural justice to the appellant by the District Commissioner in that the appellant was only given four (4) days to prepare for his appeal and that was not adequate time to prepare. He nonetheless conceded that the appellant herein never requested for more time nor did he apply for an adjournment to enable him bring his intended witnesses if any.

On ground two (2), he urged us to find that the District Commissioner's ruling was unconstitutional for the reason that the same parcels had been arbitrated upon before and that other parcels which were not subject of the proceedings before the District Commissioner had been introduced and dealt with unprocedurally.

This challenge was in our view however, on the merit of the award or decision of the tribunal and not on the process. We shall come to that later on.

He also submitted that there was fraud and/or collusion between the Respondent and the District Commissioner. That assertion was based solely on the fact that the respondent had been given a lift in the District Commissioner's Land rover to the venue of the hearings. He also urged that the District Commissioner had considered some irrelevant matters which he did not nonetheless amplify. He entreated the court to allow the appeal.

In his response to these issues, *Mr. Maroro* learned counsel for the 1st respondent submitted that

both parties were given adequate time to prepare and present their cases before the tribunal. They had not complained then and nor did they ask for time to call witnesses. There was therefore no denial of natural justice.

On ground two (2), he submitted that the alleged unconstitutionality of the process was not indicated, and that the parties had willingly submitted themselves to the process and had not complained. He submitted that there was no proof of collusion and that the District Commissioner had just given a lift to the respondent - at the back of his Land rover because transport was not readily available in that area and it could have been inhuman to leave the respondent behind in such circumstances. Learned counsel further submitted that the issue of the wrong parcels of land was not raised before the High Court. He stated that the appellant had failed to demonstrate impropriety on the part of the District Commissioner and lastly that the District Commissioner indeed had jurisdiction to hear and determine the appeals before him on behalf of the Minister.

Learned counsel for the 2nd respondent **Mr. Orenge** echoed the submissions of counsel for the 1st respondent. He reiterated that the issues of other parcels of land being considered by the tribunal was not raised before the tribunal itself or before the High Court. He also maintained that the fact that the 2nd respondent was given a lift in the District Commissioner's Official motor vehicle did not amount to collusion and that the High Court had rightly so found.

He urged us to find that the learned Judge of the High Court had not concerned himself with the merits of the case but with the process which is what he was required to do on Judicial Review Application and his judgment could not be faulted. He urged us to dismiss this appeal.

Having done the above recapitulation of the facts, grounds of appeal and learned counsel's submissions, we will now consider the law applicable in Judicial Review matters, apply the same to this appeal and determine whether the learned Judge of the High Court properly applied the same and draw our own conclusion.

A good starting point is revisiting the scope of Judicial Review briefly and so far as it is relevant to our present case. Principally, Judicial review is not concerned with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that parties are given fair treatment by the authority to which they have been subjected (see **Republic Vs. Secretary of State for Education and Science** ex-parte, **Avon County Council (1991) 1 ALL ER 282 at 285**).

See also the English Case of **Chief Constable of North Wales Police Vs. Evans (1982) 1 WLR 1155** where Lord Hailsham pronounced himself thus:-

“The purpose of Judicial Review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.”

This Court differently constituted quoted the above cases with approval in **Commissioner of Lands Vs. Kunste Hotel Limited (1995 – 1998) 1 E.A 1(CAK)**. In other words, where the court is satisfied that the proper procedures were followed; where no impropriety of whatever nature is present; where there is no illegality or irregularity; where Rules of natural justice are observed to the letter; where the court or tribunal has considered the relevant law; and where the said court or tribunal has acted within its jurisdiction, then the Superior Court cannot interfere with the decision of that court or tribunal by way of quashing it. This is of course on the assumption that the court or tribunal has jurisdiction to deal with the subject matter before it in the first place because jurisdiction is the fountain from which all courts and tribunals draw their judicial authority.

All these requirements were broadly captured in the judgment of the High Court. We shall now apply them to the material before us and see whether indeed there is cause for us to interfere with the judgment of the High Court.

On the issue of denial of natural justice, we find that the record of the District Commissioner is explicit. The appellant never complained that he was not prepared to proceed with the case on account of short notice nor did he raise the issue of his intention to call any witnesses. Instead he participated fully, cross examined the respondent, and was also cross-examined by the respondent and the members of the committee. We are satisfied that he was given a fair hearing and no rules of natural justice were flouted. Ground one of the appellant's memorandum of appeal must therefore fail.

On ground two and three, as submitted by learned counsel for the respondents', the unconstitutionality of the proceedings was not brought to bear or even pointed out. We find that there was nothing unconstitutional in the process before the District Commissioner. The issue of other parcels of land being considered by the District Commissioner was not raised before the High Court and it cannot be introduced at this point. Moreover, the issue of those parcels of land and who they were awarded to, goes into the substance of the case and has nothing to do with the process itself.

On the issue of collusion between the 1st and 2nd respondents, the allegation was in our considered view farfetched. The 2nd respondent was only given a lift at the back of the District Commissioner's Official Land rover and the circumstances under which he was given the lift were clearly explained. There was no allegation whatsoever that the two (2) respondents were ever left alone in that motor vehicle or that they ever discussed the case. We find no evidence of impropriety on the part of the 1st respondent.

We do not also find any extraneous and or irrelevant matters which the 1st respondent may have considered which led to the determination in question. Grounds five (5) and six (6) must therefore fail.

On the issue of jurisdiction, we are satisfied that the 1st respondent acted strictly within the mandate delegated to him pursuant to **Section 29(4) of the Land Adjudication Act** (Cap 284 of the Laws of Kenya).

On ground eight (8), we have not been shown the illegality of the decree of the learned Judge.

All in all, after considering all the material placed before us including the oral submissions of all counsel, we find no basis for us to interfere with the judgment of the learned Judge of the High Court. He considered all the facts placed before the District Commissioner and the law applicable and arrived at a proper finding that indeed, the appellant's motion for Judicial Review was for dismissal. He cannot be faulted. On our part, flowing from the analysis we have given above, it is evident that we agree with the learned Judge.

We find this appeal devoid of merit and dismiss the same with costs to the respondents herein.

Dated and delivered at Kisumu this 11TH day of OCTOBER, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR