



Muli & another v Cabinet Secretary for Lands and Physical Planning (through the Deputy County Commissioner Kathiani Sub County in Appeal 25 of 1997) & another; Munguti (Interested Party) (Environment and Land Constitutional Petition 16 of 2017) [2023] KEELC 16875 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 16 OF 2017**

CA OCHIENG, J

APRIL 20, 2023

**IN THE MATTER OF: ARTICLES 19, 20, 22, 23, 40, 47, 64 & 159
OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE
EXPECTATION**

AND

**IN THE MATTER OF: CONTRAVENTION OF RIGHT TO PROPERTY
IN RESPECT OF PARCEL OF LAND NO. 2385**

BETWEEN

BETWEEN

WAMBUA MULI 1ST PETITIONER

SAMUEL NZIOKA 2ND PETITIONER

AND

**CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING
(THROUGH THE DEPUTY COUNTY COMMISSIONER KATHIANI SUB
COUNTY IN APPEAL 25 OF 1997) 1ST RESPONDENT**



THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

JONATHAN MUNGUTI INTERESTED PARTY

JUDGMENT

1. By a Petition dated the 25th August, 2017 and filed on 20th September, 2017, the Petitioners seek for the following orders from the Respondents:
 - a. A declaration that the Minister's decisions (through the Deputy County Commissioner, Kathiani Sub County in Appeal No. 25 of 1997 decision in his verdicts he held inter alia that the suit land be divided into two portions without properly rendering a concrete decision as to his reasons why thus rendering said decision offensive to the provisions of Article 47 of the Constitution of Kenya.
 - b. A declaration that the Petitioners are the bona fide and rightful owner of Plot No. 2385 in Ngiini Adjudication Section.
 - c. A permanent injunction order do issue restraining the Interested Party herein, their agents or assigns or any other person from trespassing and/or with interfering with the Petitioners' quiet possession in respect of Plot No. 2385 in Ngiini Adjudication Section or in any manner howsoever from interfering with the Petitioners possession or from laying claims over the said land.
 - d. An order of Certiorari to issue to bring to this Honourable Court for the purposes of being quashed and to forthwith quash, the Minister's (Through the Deputy County Commissioner Kathiani Sub County) decisions in Appeal No. 25 of 1997 dismissing the Petitioners' Appeals and in his verdicts he held inter alia that the suit land be divided into two portions without properly rendering a concrete decision as to his reasons why.
 - e. An order of Prohibition to issue to prohibit the Respondents whether by themselves, or through their agents or assigns or any other Government Department or agency from in any way dealing with Plot No. 2385 in Ngiini Adjudication Section and from implementing the aforesaid Minister's Awards.
 - f. An order of Mandamus to issue to compel the Respondents to cause the issuance to the Petitioner of the title documents in respect to Plot No. 2385 in Ngiini Adjudication Section.
 - g. An award of compensation and/or exemplary damage as against the Respondents or any of them as will be found to have violated the Petitioners fundamental rights.
 - h. Any other or further order that this Honourable Court may deem fit in the circumstances to grant.
 - i. Costs of this Petition.
2. The 1st and 2nd Respondents opposed the instant Petition by filing Grounds of Opposition dated the 19th December, 2017 where they stated thus:
 1. That the Petitioner has not demonstrated any proprietary rights over the property capable of protection by this court.



2. That the Order sought at paragraph D of the Petition contravenes the mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules, 2010 and Sections 8 and 9 of the [Law Reform Act](#), Cap 26.
3. That this Petition contravenes the mandatory provision of Section 29(1) of the [Land Adjudication Act](#) which provides inter alia and the Minister shall determine the Appeal and make such order thereon as he thinks just and the order shall be final.
4. That the Petitioners prayer No. B, F and G are not capable of being granted in a Petition without first determining issues of ownership of the suit property and such determination can only be done through viva voce evidence.
5. That the Petition is vexatious, frivolous and an abuse of the court process.
3. The Petition was canvassed by way of written submissions.

Submissions

Petitioners' Submissions

4. The Petitioners stated that during the adjudication process in the year 1987, the Interested Parties herein lodged objection proceedings with the Land Adjudication Board Mitaboni Adjudication Section and there were Appeal processes which culminated to their filing of Judicial Review proceedings being Machakos Misc. Civil Application No. 131 of 2015 which was struck off for having been filed out of time. They contend that the Judicial Review was not determined on merit. They explain that they did not receive fair treatment during the objection proceedings and the Appeal processes. Further, that they have demonstrated how they are entitled to Plot No. 2385 Ngiini Adjudication Section hereinafter referred to as the 'suit land', which was subject to objection proceedings as they have been living on parcel No. 2485 in the Ngiini Adjudication Settlement Section since 1977 and 1971 respectively. They confirm that the verdict of the Appeal from the Minister held that the suit land was to be divided into two portions. They claim they were apprehensive that if the hearing was conducted by the office of the Deputy County Commissioner, Kathiani Sub County (formerly District Commissioner, Kathiani District), they would be treated unfairly since the Interested Parties enjoyed close ties with the said office. They reiterate that with regard to legitimate expectation, they had not received any adverse claims on the suit land until the Interested Party emerged. Further, they have resided on the suit land for a long time and that is why they were not evicted therefrom. They reaffirm that the decision of the Minister not only violated their constitutional rights but was also contrary to legitimate expectation.

Respondents' Submissions

5. The Respondents in their submissions contend that the Judicial Review remedies sought herein should not issue as the Petitioners admitted that they was heard during the proceedings in Appeal Case No. 25 of 1997. They made reference to the proceedings in the said Appeal case and argued that the Petitioners testified and were also cross-examined by the Respondents. Further, that a site visit was conducted on 5th November, 2011 and the Petitioners gave their statement, culminating in a Ruling being delivered on 24th April, 2012. They further made reference to the Notice of Motion dated the 3rd November, 2016 wherein the Petitioners sought to quash the Minister's decision in Appeal No. 25 of 1997, which Application was dismissed. They urged the Court to uphold the previous decision. They reiterate that the Minister did not act ultra vires as alleged since it was within his jurisdiction including mandate to hear appeals emanating from objection proceedings by the Land Adjudication Officer. Further,



that the Petitioners exhausted all avenues as set out in the *Land Adjudication Act*. They aver that the Petitioners do not have proprietary rights over the whole suit land. To support their averments, they relied on the following decisions: Municipal Council of Mombasa v Republic & Umoja Consultants Limited Nairobi Civil Appeal No. 185 of 2001 (2002) eKLR and Johnson Mithika M'ikiao v Rose Mukiri Thaitumu & 2 others (2018) eKLR.

Analysis and Determination

6. Upon consideration of the Petition, Grounds of Opposition including rivalling submissions, the only issue for determination is whether the Petitioners are entitled to orders as sought in the Petition.
7. The Petitioners have sought for orders as enumerated above which were opposed by the Respondents. This Petition emanated from an Appeal from the Minister being Appeal Case No. 25 of 1997 where it was directed that Plot No. 2385 in Ngiini Adjudication Section (suit land) was to be divided into two, and shared between the Petitioners and the Interested Party. The Petitioners being aggrieved with the outcome of the Appeal filed for Judicial Review proceedings seeking orders of certiorari but the same was struck out for having been filed late. The Petitioners insist since that since the Judicial Review was not heard on merit, they have filed the instant Petition seeking for similar orders as well as a declaration that they are the owners of the suit land.
8. On perusal of the proceedings in respect to the Appeal to the Minister which was filed herein, I note Wambua Muli and Samuel Nzioka Muli, the Petitioners herein including their witnesses presented their case and were even cross-examined by various persons. Further, a site visit was conducted on 5th November, 2011 to confirm the position of the disputed land after which the Deputy County Commissioner (District Commissioner), Kathiani District made the following Ruling:

Both parties' provide strong evidence over the claims. However, due to long standing dispute and passing away of key witnesses. I believe it is only fair to both parties if the disputed area is divided into two equal parts for both Appellants and Respondent. Thus, I set aside decision of Land Adjudication Officer and direct that the dispute land be shared equally between the two parties in this dispute."
9. I note this Petition revolves around administrative action of the Deputy County Commissioner (District Commissioner) Kathiani, who handled the Appeal emanating from the Land Adjudication Officer in respect to the suit land, which is claimed by the Petitioners and the Interested Party.
10. On administrative action, Article 47 of *the Constitution* provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration."
11. While Section 7 of the Fair Administrative Actions Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to — (a) a court in accordance with Section 8 or (b) a Tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said Section.



12. On Judicial Review, the Supreme Court in *Baker v. Canada (Minister of Citizenship & Immigration)* 2 S.C.R. 817 6 held that:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

13. Further, in the case of *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*, it was held that:

Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

14. The Petitioners have sought for orders of Certiorari, Mandamus and Prohibition to quash the Proceedings and Findings in the Appeal from the Minister being Appeal Case No. 25 of 1997, claiming they were not accorded procedural fairness in the said Appeal. From perusal of the proceedings including findings of the Appeal, I note the Petitioners fully participated in the hearing of the said Appeal by extensively presenting their claim including providing a witness who testified on their behalf. They further cross-examined the Interested Party including his witnesses. I note there was even a site visit in which both parties participated and indicated their respective boundaries over the suit land. The Deputy County Commissioner (District Commissioner), Kathiani after undertaking the hearing as well as the site visit proceeded to direct that the suit land was to be divided into two and shared between the Petitioners and Interested Party.

15. From my analysis above while applying the principles on Judicial Review as well as administrative action, I find that the the Petitioners were indeed accorded an audience, and even cross-examined the Interested Party during the hearing of the Appeal to the Minister. Further, their witness was even allowed to testify. I note the Petitioners even participated in the site visit to confirm the features of the respective boundaries. It also emerged during the hearing of the Appeal that no party was utilizing the disputed land. In the circumstance, I find that no rules of Natural Justice were violated by the Respondents as claimed. Further, from the proceedings, including the Findings and Ruling I do not see any elements of procedural impropriety, unfairness or bias as claimed. It seems to me the Petitioners despite the determination of the dispute herein by the Deputy County Commissioner (District Commissioner), Kathiani District, did not want a conclusion of the matter. To my mind, I find that the Deputy County Commissioner (District Commissioner), Kathiani District, acted within his duty by granting the parties audience and communicating the final decision to them. I opine that it is not enough for the Petitioners to claim that the Deputy County Commissioner (District Commissioner), Kathiani District, has acted illegally, unreasonably or in breach of rules of natural



justice without placing tangible evidence before this court. In my view, the said Deputy County Commissioner (District Commissioner), Kathiani District acted in accordance with his legal mandate to determine the Appeal.

16. In the circumstances, I find that the prayers for Prohibition, Mandamus and Certiorari cannot issue at this juncture. Further, I am unable to declare the Petitioners as sole owners of the suit land nor grant them orders of injunction as well as damages in respect to the said land.

17. In the foregoing, I find the instant Petition unmerited and will dismiss it.

I make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF APRIL,
2023**

CHRISTINE OCHIENG

JUDGE

