Republic v Deputy County Commissioner Matungulu Sub-County & 4 others; Kiselu & 3 others (Interested Parties); Muinde (Suing as the legal representative of the Estate of Daniel Muinde Mutiso alias Muinde Mutiso) (Exparte Applicant) (Environment and Land Judicial Review Case E007 of 2022) [2023] KEELC 16862 (KLR) (19 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16862 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2022

CA OCHIENG, J

APRIL 19, 2023

IN THE MATTER OF: MINISTERIAL APPEAL CASE NO. 50 OF 2013

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, LAWS OF KENYA, SECTION 8 AND 9

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS FOR MANDAMUS, CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284

AND

IN THE MATTER OF: ARTICLES 25(C), 40, 47 AND 50 OF THE CONSTITUTION

BETWEEN

REPUBLIC .... APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER MATUNGULU SUB-COUNTY .... 1ST RESPONDENT

LAND REGISTRAR, MACHAKOS COUNTY .... 2ND RESPONDENT

COUNTY SURVEYOR, MACHAKOS COUNTY .... 3RD RESPONDENT

ATTORNEY GENERAL .... 4TH RESPONDENT

CABINET SECRETARY FOR LANDS .... 5TH RESPONDENT

AND

PAUL KILONZO KISELU .... INTERESTED PARTY

BONIFACE MUSEMBI WAMBUA .... INTERESTED PARTY

NZAVILA NZAU .... INTERESTED PARTY

MAKAU NZAU .... INTERESTED PARTY

AND

MICHEAL KITHUKA MUINDE .... EXPARTE APPLICANT

RULING

1 What is before court for determination is the *ex parte* applicant's chamber summons application dated the June 20, 2022 brought pursuant to section 9 of the *Law Reform Act* and order 53 rule 1 of the *Civil Procedure Rules*. The *ex parte* applicant seeks for the following orders:

1. Spent.
2. That leave do issue to the applicant to apply for an order of certiorari to remove into this honorable court for purposes of quashing the judgment of the 1st respondent, Deputy County Commissioner, Kitui West sub county delivered on the February 2, 2022.
3. That leave do issue to the applicant to apply for an order of prohibition directed to the 3rd respondent restraining him from implementing the judgment of the minister delivered on the February 2, 2022.
4. That the leave so granted do operate as stay of implementation of the judgment of the minister delivered on the February 2, 2022 pending the hearing and determination of this application.
5. That the leave so granted do operate as stay of implementation of the judgment of the minister delivered on the February 2, 2022 pending the hearing and determination of these judicial review proceedings.
6. That the costs of this application be in the cause.

2 The application is premised on the grounds as set out in the statement of facts and the verifying affidavit by Michael Kithuka Muinde. The *ex parte* applicant confirms that he is the administrator of the estate of Daniel Muinde Mutiso *alias* Muinde Mutiso while the 1st interested party is a son of Kaselu KyelI who is a step brother to his father. He deposes that his father and the father of the 1st interested party had cases at the tribunal Nguluni adjudication section over plot number 1422 which is owned by his father. Further, that the land in issue though not stated in the minister's judgment belongs to his late father because the family land was subdivided among his brothers and each had a separate title except his late father whom he represents. He avers that the land adjudication officer held the land to remain recorded in the name of his father. He explains that his father had filed this appeal being No 106 of 1994 but died before the same could be heard. He contends that the minister did indicate the appeal

was with regard to parcel of land number 422 which is a different parcel of land while the plot number in question was 1422. He explains that the minister heard the appeal and held that a different parcel of land number 422 instead of land number 1422 be subdivided between his father and the house of the interested parties *vide* a judgment delivered on February 2, 2022. He avers that the minister's judgment is an illegality and incapable of being enforced as it awarded land to people not parties to the appeal and it is over plot number 422 while the land subject of the appeal was plot number 1422 making the judgment ambiguous and unenforceable. Further, that the minister failed to record his testimony and that of his witnesses thus arriving at an unjust finding and determination. He insists proceedings are scanty and not a true reflection of his evidence which was lengthy and detailed and that the minister did not read his verbatim statements including those of his witnesses or allow them to sign them as required by law. Further, that the minister prevented him from producing documentary evidence in support of his case which shows the ownership by the various brothers or even visit the land. He explains that the 3rd respondent has moved to implement the decision and has given summons for June 23, 2022 despite the decision being over a different parcel. Further, that the ministerial appeal decision is an illegality and liable to be quashed by this honourable court. He reiterates that if the judgment of the minister is maintained he stands to lose his land illegally. He contends that the interested parties have now commenced to threaten him together with his family with eviction and to demolish their houses despite being aware that the judgment is incapable of enforcement. He reaffirms that unless leave and the orders of stay are granted, he stands to suffer forever because he has no avenue to challenge the same. Further, that the minister violated his right to a fair hearing as enshrined in article 50 of the *Constitution* and he was condemned unheard contrary to the rules of natural justice.

3 The respondents opposed the instant application by filing grounds of opposition where they contend that the said application is misconceived, untenable and bad in law and an abuse of the court process as the prayers sought are untenable to be granted by a court of law. Further, that it is incurably defective, incompetent, frivolous, vexatious and devoid of substance with unsupported conclusions and only tailored and stage managed to hoodwink this court. They insist that the reasons set forth in the application are a mere afterthought and this court is unable to grant the same and if granted it will be highly prejudicial to the respondents as the applicant will be seeking court's intervention to prove his case. They aver that the application lacks merit. Further, that from the proceedings and decision of the minister there is no indication that the *ex parte* applicant requested for an opportunity to call witnesses on his behalf or that his request was turned down nor is there an indication that the *ex parte* applicant had come with witnesses. They reiterate that there is no indication, from the proceedings, that the *ex parte* applicant was not afforded ample opportunity to ventilate his case. They insist that the *ex parte* applicant was afforded ample opportunity to ventilate his case and allegations of breach of article 47 and *Fair Administrative Action Act* cannot arise in the circumstances. They state that there is no evidence laid to demonstrate that the respondents violated the rules of natural justice or that the respondents were biased against the *ex parte* applicant or that there was a pre-determined decision on the part of the respondents.

4 The application was canvassed by way of written submissions.

Analysis and Determination

5 Upon consideration of the instant chamber summons application including the statement of facts, verifying affidavit, annexures, grounds of opposition and rivalling submissions, the only issue for determination is whether the *ex parte* applicant is entitled to leave to commence proceedings of certiorari as well as prohibition and if such leave can operate as stay of the minister's decision dated the February 2, 2022.

6 The *ex parte* applicant in his submissions contends that leave should be granted as he has shown serious grounds why the Deputy County Commissioner arrived at an unjust decision and liable to be re-looked by the court. Further, that leave granted should operate as stay of implementation of the decision sought to be challenged so as to preserve the substratum of the suit and of the substantive application for judicial review. Otherwise if the decision is implemented, then it may affect the outcome of the judicial review application. He confirms that the decision challenged is yet to be implemented. To support his arguments, he has relied on the following decisions: *IRC v National Federation of Self-Employed and Small Businesses Ltd*; *Republic v County Government of Embu ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others* [2022] eKLR; *R (H) v Ashworth Special Hospital Authority* (2003) 1 WLR 127 and *Taib A. Taib v The Minister for Local Government & others* Mombasa HCMISCA No 158 of 2006.

7 The respondents in their submissions contend that the *ex parte* applicant has not met the threshold for leave to be granted. They submit that the assertion made by the *ex parte* applicant that the minister's appeal was in respect of another parcel namely plot number 422 and not the intended parcel number 1422 is totally unfounded and can be easily explained as a typographical error as all parties have confirmed that the 1st respondent held a hearing in respect of minister's appeal No 106 of 1994 that was in respect of plot No 1422. Further, the *ex parte* applicant has failed to demonstrate that the 1st respondent made a decision that was in respect to parcel of land unknown to the parties and to the fact that reference was made to the alleged plot No 422. They insist that the issues raised in the instant application do not revolve around the decision making process. Further, that the instant application falls outside the purview of judicial review proceedings as the dispute revolves around contested issues of ownership or occupation of land and judicial review would not be the appropriate forum to address them. To buttress their averments, they relied on the following decisions: *Republic v County Council of Kwale & another Ex-parte Kondo & 57 others*, Mombasa HCMA No 384 of 1996; *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (EA) Limited* [2013] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* civil appeal No 185 of 2001; *Seventh Day Adventist Church Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* judicial review case No 112 of 2011.

8 The legal provision governing leave to institute judicial review proceedings is contained in order 53 rule 1 of the *Civil Procedure Rules* which stipulates thus:

> (1) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days."

9 It is trite that judicial review is not concerned about the merits of the decision but on the process adhered to, by a person in position of authority. It also challenges the administrative action of a person

in position of authority. In the current scenario, the *ex parte* applicant seek to challenge the decision of the respondents in respect to the suit land and contends that he was not accorded a fair hearing during the minister's appeal as his evidence was not properly taken, his witnesses were not allowed to testify and his verbatim evidence not considered. Further, that the respondents contravened the rules of natural justice and he stands to loose his land. He dwelt on the error in respect to the parcel number being quoted. The respondents however opposed the instant application for leave and insisted that it falls outside the purview of judicial review.

10 Lord Diplock in the case of *Council for Civil Service Unions v Minister for Civil Service* [1985] AC 374, at 401D clearly set the standards of judicial review when he stated that:-

Judicial review has I think developed to a stage today when…one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'…By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it…By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'…it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

11 While in the case of the *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR, it was held that:

It follows therefore that where the resolution of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

13 In applying the principles established in the above cited decisions to the circumstances at hand, I note as per the proceedings during the hearing of the appeal to the minister, the *ex parte* who was the appellant presented his case first and even explained that the family of muinde was not satisfied with the issue of subdivision hence they appealed to stop it. Further, that they wanted the land to remain in their father's name. I note the respondent who was represented by Paul Kilonzo insisted that they wanted the suit land subdivided into the names of Kaselu's sons. I further note that in the objection proceedings, which findings were appealed from, the suit land was No 1422. Further, Nzau Mulwa was actually a respondent therein, but since he is deceased, I opine that the minister was not wrong in dealing with representatives of his estate Nzavila Nzau and Makau Nzau and it is clear to this court how they came into the proceedings. To my mind I find that the *ex parte* applicant was actually accorded a fair hearing as he did not demonstrate if he had any witnesses or not, when he presented his appeal to the Deputy County Commissioner, Matungulu sub county. Further, on the issue of the parcel number, noting that all parties were participating in the proceedings of appeal from an objection which deals with parcel No 1422, it is my considered view that this is an error and it cannot be used to quash a properly determined decision. I opine that the issues raised by the *ex parte* applicant does not fall within the purview of judicial review. In the foregoing, I find that the *ex parte* applicant is hence not entitled to leave as sought.

14 In the circumstances, I find the instant chamber summons application unmerited and will dismiss it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF APRIL, 2023

CHRISTINE OCHIENG

JUDGE