



Chondo & another (Administrators of the Estate of Safari Chondo) v Jawa & 5 others (Judicial Review Application E004 of 2022) [2023] KEELC 16816 (KLR) (17 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
JUDICIAL REVIEW APPLICATION E004 OF 2022**

AE DENA, J

APRIL 17, 2023

BETWEEN

ALI SAFARI CHONDO 1ST APPLICANT

SWALEHE ALI MWAJUMA 2ND APPLICANT

ADMINISTRATORS OF THE ESTATE OF SAFARI CHONDO

AND

MKALA MWERO JAWA 1ST RESPONDENT

LUPJANDE NGANYAWA MWIJO 2ND RESPONDENT

JAWA KOMBO JAWA 3RD RESPONDENT

DIRECTOR LAND ADJUDICATION & SETTLEMENT 4TH RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER

KINANGO 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. This ruling is pursuant to the applicants application brought by way of notice of motion dated October 26, 2022 under the provisions of order 53 rule [1] of the *Civil Procedure Rules* and sections 3A of the *Civil Procedure Act* and sections 8 & 7 of the *Law Reforms Act*. The applicants seek for an order of *mandamus* directed to the 5th respondent compelling him to quash the decision of the District Settlement & Adjudication Committee made on April 17, 2014 in regards to plot No 358-Kinango and to expunge the same from the registry of titles and for a certificate of title to be issued to the applicants. The applicants further seek for costs of the application.



2. The application is supported by a statement of facts on record and the verifying affidavits of both the applicants herein. Essentially the core grounds are that the applicants have all along been in occupation and possession of the suit property measuring 10 acres. That the suit property belonged to the late Safari Chondo who died in 1981 who was the 1st applicant's father and had been gifted the property by the late Mzee Bora Bendadze after marrying his daughter Karua Bora. The applicants aver that they have been residing on the property from that time and several graves are thereon including that of Safari Chondo. The applicants aver that they have been subjected to land dispute proceedings in Kinango 3 times and in all instances the same were decided in favour of the respondents. The applicants state that Kwale case No 264 of 2006 awarded them the suit property but the decision of the court in the said case has been disregarded by the tribunal and which stated that the suit property in Kwale case No 264 of 2006 was over an entirely different parcel.

Response

3. The 1st, 2nd and 3rd respondents filed a replying affidavit on November 21, 2022 sworn by the 2nd respondent Luphande Nganyawa Mwijo in response to the notice of motion. It is averred that the applicants have not demonstrated their source and proper authority/*locus standi* to initiate the judicial review proceedings on behalf of the estate of Safari Chondo in respect of the suit property plot No 358 Kinango and which is the subject matter herein.
4. It is deponed that even if the applicants had acquired letters of administration in respect of the estate of the deceased, the applicants have failed to procedurally file the competent appeal as per the mandatory provisions of the *Land Adjudication Act*, to challenge the said decision delivered on April 17, 2014. It is stated that the applicants have further failed to exploit the mandatory internal alternative dispute resolution mechanisms as envisaged under the *Fair Administrative Action Act* 2015.
5. The respondents aver that the suit land has been subject of various disputes relating to its ownership and the outcome of the same has always been in their favour. Paragraph 7 of the affidavit gives a brief history of several disputes allegedly resolved over the suit property between the applicants and Respondent's families from time immemorial. These include the Kinango Land Disputes Tribunal and the District Settlement & Adjudication Committee. That it is the decision of the committee that forms the basis of the instant judicial review proceedings. It is also stated that despite the applicants being granted a right of appeal within 14 days of the decision by the committee, they did not appeal the same and have waited for 8 years before filing the judicial review application herein. The 1st, 2nd and 3rd respondents pray the application dated October 26, 2022 be dismissed.
6. The 1st to 3rd respondents further filed a notice of preliminary objection in opposition in the following terms;
 1. This court lacks proper jurisdiction to hear and determine the applicants chamber summons application for it offends the provisions of section 9[1] & [2] of the *Fair Administrative Action Act*.
 2. That the applicants herein lack proper locus standi as the administrators to the estate of Safari Chondo for there is no evidence of letters of administration issued in their favour.
 3. That the proceedings herein offend the provisions of section 29 and 30 of the *Land Adjudication Act* cap 284 laws of Kenya as it amounts to an abuse of the process of the court.
7. The rest of the respondents did not respond to the application.



Submissions

8. I directed that the application and the preliminary objection be disposed of concurrently by way of written submissions which parties filed and exchanged.

Applicants Submissions

9. The applicant's submissions are dated December 2, 2022. It is submitted that the chamber summons was filed pursuant to order 53[1] of the Civil Procedure Rules which requires leave of the court is first obtained. That all these pleadings were served upon the respondents who failed to appear on October 13, 2022 when the chamber summons application was allowed paving way for the filing of the substantive notice of motion herein. It is also submitted that the applicants have locus to institute this suit pursuant to grant of letters of administration ad litem issued by the Chief Magistrates Court at Mombasa in succession cause No E195 of 2021 in the matter of the estate of Safari Chondo-deceased.
10. The applicants further submitted that the adjudication office is prejudiced against them. That their several complaints to the Ministry of Lands and Physical Planning have yielded no positive results including the outcome of the tribunals. That an order for status quo issued continues to be breached by the respondents and hence necessitating the orders of *mandamus* sought. Reliance is placed in the holding in Zachariah Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 others [2013] eKLR on the grounds upon which the court exercises judicial review jurisdiction which include illegality, irrationality and procedural impropriety in the decision-making process. It is additionally submitted that the preliminary objection is not well grounded in law. That the respondents have failed to appreciate the Fair Administrative Actions Act was to operationalize article 23 of the Constitution to deal with judicial review matters and does not in way interfere with rights under article 40. The court is asked to dismiss the preliminary objection.

The 1st, 2nd and 3rd Respondents Submissions

11. The 1st, 2nd and 3rd respondents submissions were filed on January 24, 2023. It is submitted that the application dated October 26, 2022 offends the provisions of section 9[1], (2)(3)(4) and (5) of the Fair Administrative Action Act 2015. That despite being granted 14 days within which the applicants ought to have appealed the decision of the committee they filed the instant judicial review proceedings 8 years later. It is further urged that the applicants had not sought the leave of the court to be exempted from the exhaustion of internal dispute mechanism as provided for by the law. That no exceptional circumstances have been proved or pleaded. The court was referred to the case of Speaker of National Assembly v Karume [1992] KLR 21 where the court stated that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Further reference was made to Municipal Council of Mombasa v Republic & Umoja Consultants Ltd civil appeal No 185 of 2001 where the court emphasized *inter alia* judicial review proceedings are concerned with decision making process not with merits of the decision itself.
12. On locus standi to sue as administrators of the estate of Safari Chondo it is submitted that since the applicants have not presented a copy of letters of administration of the estate of the late Safari Chondo they do not have the *locus standi* to institute suit on behalf of the estate of the deceased. Reliance is placed in the case of Law Society of Kenya v Commissioner of Lands & others Nakuru HCCC 464 of 2000
13. Referring to section 29 of the Land Adjudication Act it is submitted that the applicants had failed to exhaust the mechanism for appealing the decision of the Land Adjudication Committee which lay to the Minister. That further section 30 of the Act required prior consent of the Adjudicating Officer



before institution of civil proceedings concerning an interest in land in an adjudication area and which the applicants did not comply with. The respondents state that the applicants have not exhausted the provisions of sections 29 & 30 of the Act and urge the application dated October 26, 2022 be dismissed with costs to the 1st-2nd and 3rd respondents.

Analysis and Determination

14. I will first deal with the chamber summons which was basically for leave to commence judicial review proceedings and I will not spend much time on it. It is now settled that leave is no longer a prerequisite for filing judicial review proceedings since it is anchored under the Constitution and Fair Administration Act. The choice is with the party to file directly or to first seek leave.
15. The jurisdiction of the Land Adjudication Officer is set out under section 10 of the Land Adjudication Act which provides;

The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in adjudication area, with power to determine any question that needs to be determined in connection with such claims....”
16. Under section 9 (1), the Adjudication Officer is in charge of and also exercises general supervision and control over the adjudication. The said officer hears and determines petitions respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer. Under section 9 (2) (b) The Adjudication Officer hears and determines any objection to the adjudication register which is submitted in accordance with section 26 of the Act.
17. Section 26 referred to above provides as follows;

Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.
18. It is clear that the applicants had a right of appeal to the Minister under section 29 of Land Adjudication Act. They failed to file the appeal and instead filed the judicial review proceedings herein. They were obligated to file the appeal to the minister or any other person the minister may have delegated this power. There is no evidence that this was done. I therefore find that the notice of motion herein was prematurely filed before this court. I am persuaded by the case of Mohamed Ahmed Khalid (Chairman) and 10 others v Director of Land Adjudication & 2 others [2013] eKLR where Angote J. held:

“Considering that the Land Adjudication Act, cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of trust land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the Land Adjudication Act, cap 284, I find that the petition was prematurely filed.”



19. I think enough has been said to demonstrate that the applicants ought to have exhausted the dispute resolution mechanisms provided for under the [Land Adjudication Act](#) before filing the judicial review application herein.
20. It is now settled that judicial review is not concerned with the merits of the decision being challenged but rather with the decision-making process. In the case of [Municipal Council of Mombasa v Republic & Umoja Consultants Ltd \(Interested Party\)](#) civil appeal 185 of 2001 [2002] eKLR the Court of Appeal emphasized as follows; -
- “The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker consider relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review”
21. My review of the grounds upon which the notice of motion application is premised as well as the supporting affidavit does not demonstrate that the applicant seeks to impugn the decision making process. It is stated inter alia by the applicants that the District Land Adjudication & Settlement Committee failed to consider that the suit property is ancestral land belonging to the applicants and that the applicants do not have anywhere to go. That they have been on the land since time immemorial and have burial site for their relatives thereon. To me clearly the issue of land ownership and the merits of the committee decision is what is under litigation in the present notice of motion application judicial review proceedings is not the forum to decide such ownership issues which requires full hearing where witnesses are heard and review of evidence availed. Even assuming the notice of motion was properly before me I would not have rendered myself on the same. I would have struck it out for this reason.
22. The issue of *locus standi* has been raised by the respondents. It is alleged that despite the suit being filed by the representatives of the estate of Safari Chondo, no grant ad litem has been annexed in evidence of the power to institute suit on behalf of the said estate. It is trite that the estate of the deceased vests in the personal representatives who then have capacity to file or defend suit. Such persons must be appointed by the court either through probate or grant in the case of intestate succession. The court has perused the contents of the pleadings by the applicants, there is no evidence of a grant ad litem for purposes of filing this suit. Counsel for the applicants purports to attach a copy of a grant obtained in Mombasa Chief Magistrates Court in succession cause No E195 of 2021 but it is not attached. The bottom line is therefore that I have not seen a grant of letters of administration in these proceedings and in its absence the suit herein cannot be sustained. I am guided by the provisions of sections 45 and 46 of the [Law of Succession Act](#) cap 160 of the Laws of Kenya. There are also numerous authorities where the courts have stated that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. See [Isaya Masira Momanyi v Daniel Omwoyo & another](#) [2017] eKLR.
23. In view of the foregoing I have been unable to find any justification to sustain the proceedings herein. The upshot is that I find that the preliminary objection is merited and the notice of motion application dated October 26, 2022 stands dismissed for the reasons cited with costs to the 1st – 3rd respondents.
- It is so ordered.

DELIVERED AND DATED AT KWALE THIS 17TH DAY OF APRIL, 2023



A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Omollo for the Applicants

Mr. Ondeng for the Respondents

No appearance for the Attorney General for 4th 5th & 6th Respondents,

Mr. Daniel Disii Court Assistant

