



Republic v County Government of Kajiado & another; Kapaai (Interested Party); Ogoka & 2 others (Exparte Applicants) (Miscellaneous Judicial Review 61 of 2019) [2023] KEELC 17496 (KLR) (23 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17496 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISCELLANEOUS JUDICIAL REVIEW 61 OF 2019

MN GICHERU, J

MAY 23, 2023

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION BY PETER ORINA OGWOKA, DOUGLAS MOMANYI ORIECHI, ISACC BOSIRE AND DAVID THOMAS OKIOMA

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT (NO. 6 OF 2012)

AND

IN THE MATTER OF LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION NO. 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF KAJIADO 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

RAPHAEL LERIONKA KAPAAI INTERESTED PARTY



AND

PETER ORINA OGOKA EXPARTE APPLICANT
DOUGLAS MOMANYI ORIECHI EXPARTE APPLICANT
DAVID THOMAS OKIOMA EXPARTE APPLICANT

JUDGMENT

1. The applicants seek the following reliefs against the Respondents and the interested parties.
 - i. An order of *certiorari* do issue to the High Court and quash the decision and verdict or finding and recommendation of the joint committee of the National Land Commission County Coordinator dated June 12, 2019.
 - ii. An order of prohibition do issue to restrain and prohibit the Respondents from implementing the findings of the joint committee dated June 12, 2019.
 - iii. Costs of and incidental to the application be provided for.
 - iv. Such further or other relief as the court may deem just and expedient to grant.

This is as per the notice of motion dated September 30, 2019.

2. The motion by the Applicants is supported by a verifying affidavit sworn by the first Applicant in which he states as follows. He is the registered owner of Plot No B1197 Residential –Noonkopir Trading Centre. The plot got the current registration number after validation. Before then, it was Plot No 1558.
3. The plot belonged to one Daniel Solitei Namadi who sold it to the first Applicant in the year 2001. Since then, the Applicant has been in occupation of the land. He fenced it, planted crops trees which are now mature, installed water and electricity and built a family house where he resides. The building of the family home came after the Respondent approved the first Applicant’s building plan. The first Applicant occupied the land peacefully until the year 2010 when the first interested party complained that the first Applicant had encroached on his plot no 192/Industrial at Noonkopir Trading Centre. The Applicant was summoned by the Respondent and after a hearing, he was allowed to continue occupying his plot and developing it.
4. Surprisingly, again after eight years, the same interested party presented the same complaint before a joint committee created by the Governor of Kajiado known as Joint Committee on National Land Commission County Coordinator Kajiado which after a summary hearing resolved vide a letter dated June 12, 2019 that the suit plot and those of the other Applicants belong to the first Interested Party.
5. It is because of the decision of the said committee that the Applicants filed this suit. They fault the committee for the hearings which they condemn as being shambolic, a mockery of any established law for lack of procedure on production of documents, hearing of witnesses, absence of cross-examination, lack of recording of evidence, professionalism among others.

Other failures of the committee are as follows:-

- i. Shifting from dealing on encroachment to deciding on ownership of the land.
- ii. Not giving reasons for its decisions.



- iii. Ordering loss of investment without compensation.
 - iv. Not entertaining an appeal against its decision.
 - v. Arriving at an unlawful and arbitrary finding.
 - vi. Condemning the Applicants unheard.
 - vii. Denying the Applicants their right to fair administrative action which right is guaranteed by the Constitution and statute.
6. In support of the Notice of Motion, all the four Applicants filed affidavits similar in content. They also filed documents which included the following:-
- i. Transfer of plot forms for Plot Numbers 1558, 1478, 1774 and 1376 Business –Noonkopir Trading Centre.
 - ii. Copies of certificates of official search for the plots.
 - iii. Copies of approved plans for construction of buildings or the suit plots.
 - iv. Other relevant documents.
7. The motion is opposed by the first Respondent whose Land Registrar has sworn a replying affidavit dated July 7, 2021 in which he says that the Applicants were unable to prove where their plots mutated from. It is also stated in reply that the Applicants were accorded a fair hearing where they appeared three times before the committee and the first Interested Party was able to provide all ownership records. Annexed to the affidavit are documents which include the following.
- i. Copies of letters of allotment to the first Interested Party.
 - ii. Copies of client attendance register for January 14, 2019 and June 12, 2019 showing that the Applicants attended before the County Coordinator Kajiado, national Land Commissioner on the two dates.
8. The second Respondent filed grounds of opposition to the motion which are dated September 30, 2019. They read as follows:-
- i. Article 159 (c) of the Constitution encourages promotion of alternative forms of dispute resolution such as reconciliation, mediation, arbitration and traditional dispute resolution mechanism.
 - ii. The decision of June 12, 2019 by the joint committee was done within statutory and administrative functions of the first and second Respondents.
 - iii. The issues raised in the motion touch on ownership of the suit property and this cannot be determined through the institution of judicial review proceedings.
9. Counsel for the first Respondent and the Plaintiff filed written submissions on June 21, 2022 and June 27, 2022 respectively. The issues identified by the parties are as follows.
- i. Whether this court has jurisdiction to make a determination in this case?
 - ii. Whether the Respondents' joint committee accorded the Applicants a fair hearing?
 - iii. Whether the Respondents are entitled to the costs of this suit?



10. I have carefully considered the Notice of Motion in its entirety including the verifying affidavits, grounds, replying affidavits, annexures, the submissions by the learned counsel for the parties and the law cited therein. I find that the three issues as identified by the counsel for the first Respondent will resolve the dispute.

11. On the first issue, I find that this court has jurisdiction to issue orders of certiorari and prohibition. This power is to be found in Articles 23(3) (f), 162 (2) (b) and 165 (3) (b) of the Constitution of Kenya. They provide as follows.

Article 23(3) (f)

“In any proceedings brought under Article 22, a court may grant appropriate relief including (f) an order of judicial review”.

Article 162 (2) (b).

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(b) The Environment and the use and occupation of, and title to land”.

Article 165 (3) (b)

“Subject to clause 5, the High Court shall have –

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened”.

12. From the above provisions of the Constitution it is beyond argument that this court can grant an order for judicial review and that it has equal status with the High Court when it comes to the enforcement of a right or fundamental freedom. The orders sought by the Applicants are squarely within the purview of this court.

Furthermore, this court has power under Section 9(4) of the Fair Administrative Act to exempt a party from a merry go round in seeking justice in a case where breach of the Act is alleged and to hear the party without much ado.

13. On the second issue, I find that the joint committee did not afford a fair hearing for the following reasons.

Firstly, there are no proceedings exhibited by the first Respondent or any of the other parties to show how the case was conducted. We do not know as of now who testified, what they said and the exhibits that were produced.

Secondly, there is no record of what the committee said about the Applicants’ occupation of the suit land for long, the approved plans for buildings and why they would invalidate documents approved by the first Respondent.

Finally, the general law on estoppel would not allow the first Respondent to allow the Applicants occupy land, accept payment of rates and approve plans then suddenly turn around and revoke all that without giving reasons and paying compensation to the Applicants.



Section 120 of the *Evidence Act* provides as follows.

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing”

In this case, the first Respondent, having approved the building plans by the Applicants cannot be allowed to deny that they approved them in proceedings conducted without evidence of participation of the Applicants.

14. For the above stated reasons, I find merit in the Notice of Motion dated September 30, 2019 and I allow it with costs to the Applicants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 23RD DAY OF MAY, 2023.

M N GICHERU

JUDGE

