



Kitete v Cabinet Secretary Ministry of Lands & Physical Planning & 4 others (Judicial Review E002 of 2022) [2023] KEELC 18288 (KLR) (26 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18288 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
JUDICIAL REVIEW E002 OF 2022
EM WASHE, J
JUNE 26, 2023**

BETWEEN

KISHOE MASITOI KITETE APPLICANT

AND

**THE CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL
PLANNING 1ST RESPONDENT**

**THE LAND ADJUDICATION & SETTLEMENT OFFICER TRANSMARA
WEST, EAST & SOUTH 2ND RESPONDENT**

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HON.ATTORNEY GENERAL 4TH RESPONDENT

NAIDOYA SAIROUYWA 5TH RESPONDENT

JUDGMENT

1. The Applicant herein filed a Judicial Review Application dated 24th June 2022 (hereinafter referred to as the “the present JR Application”) seeking for the following Orders; -
 - a. That an Order of *Certiorari* to bring into the High Court and quash the decision made by and/or award by the 1st Respondent (The Cabinet Secretary Ministry Of Lands & Physical Planning) in respect of Land Parcel Number Transmara/Ololchani/29 Adjudication Section in Minister Appeal Case No. 224 of 1997 between Naidoya Sairouywa & Kishoe Masitoi Kitete contained in the Ruling dated 3rd November 2021 awarding to Naidoya Sairouywa, the Appellant in the disputed land.
 - b. That an order of prohibition be issued prohibiting the 2nd and 3rd Respondent from further implementing by altering the duplicate adjudication register to conform with the decision of the 1st Respondent, and or certify on the duplicate adjudication record that it has become



final in all respects, nor send details of the alterations and a copy of the certificate to the 3rd Respondent for alteration of the adjudication register and or in any manner whatsoever effect the decision contained in the ruling dated 3rd November 2021.

- c. That the costs of this Application be awarded to the Applicant.
2. The Applicant has outlined various grounds in support of the prayers sought hereinabove which can be summarised as follows; -
- i. The Applicant is and has been the beneficial as well as the registered owner of the property known as Plot.no. 29 Within Ololchani Adjudication Section (hereinafter referred to as “the suit property”) since the year 1978.
 - ii. On the other hand, the 5th Respondent is the beneficial and/or registered owner of the neighbouring property known as Plot.no. 28 Within Ololchani Adjudication Section thereof.
 - iii. In the early 1990s, during the demarcation and allocation of Ololchani Adjudication Section, the Applicant herein was registered as the rightful owner of the property known as Plot.no. 28 Within Olochani Adjudication Section and issued with an appropriate Adjudication Record.
 - iv. However, the 5th Respondent challenged the Applicant’s registration of the property known as Plot.no. 28 Within Ololchani Adjudication Section by filing a dispute to the Arbitration Board Members known as Case No.3/80/81 which was heard and determined through the determination pronounced on 6th November 1987.
 - v. The 5th Respondent being aggrieved with the determination pronounced on 6th November 1987, proceeded to file an Objection with the Land Adjudication & Settlement Officer which was assigned Case No. 136 of 1/12/1995 and determined on the 13/12/1995.
 - vi. The 5th Respondent again being aggrieved with the determination the objection proceedings by the Land Adjudication officer on the 13/12/1995 filed a Minister’s Appeal in the year 1997 and the same was assigned Minister’s Appeal No. 224 of 1997.
 - vii. The said Minister’s Appeal No. 224 of 1997 was heard on the 6th of November 2020 but the Applicant did not come to know about the judgement thereof until around October 2021.
 - viii. The Applicant submits that he does not agree with the reasons used by the Minister to cancel his Adjudication Record and the direction that the said Adjudication Records be amended to read the name of the 5th Respondent herein.
 - ix. Further to that, the Applicant states that the entire Minister’s Appeal process was suspect beginning with when the Appeal was filed, how the hearing was conducted and the manner in which the decision was subsequently pronounced.
 - x. The Applicant is of the considered position that every Kenyan under Article 47 of the Kenyan Constitution 2010 is entitled to an expeditious, efficient, lawful, reasonable and procedurally fair decision especially where such a decision would affect the rights of any person.
 - xi. In essence therefore, the Applicant’s considered view was that the judgement pronounced by the Minister in the Minister’s Appeal No. 224 of 1997 was arbitral, unfair and a clear abuse and/or improper exercise of delegated powers by the Deputy County Commissioner.
 - xii. Further to that, the Applicant indicated that the basis upon which the decision pronounced the Minister’s Appeal No. 224 of 1997 was arrived were vague and not properly proved.



- xiii. The Applicant's prayer was therefore that the judgement in the Minister's Appeal No. 224 of 1997 be quashed by this Honourable Court and further to that, an order of prohibition be issued to stop any alterations, and/or amendment of the Adjudication Records from the Applicant's name and particulars as the registered owner to the 5th Respondent's name and particulars.
3. The present JR Application was served the 1st to 3rd Respondents who filed their Memorandum of Appearance through the offices of the 4th Respondent.
4. The 5th Respondent also instructed a Counsel to represent him in this proceeding.
5. The 1st to 4th Respondents then filed their Grounds of Opposition dated 27th of September 2022 and challenged the present JR Application on the following grounds; -
- i. The present JR Application was fatally defective, incompetent and untenable in both substance and form contrary to the provisions of Order 53.
 - ii. The present JR Application was devoid of merit, time barred and should be struck out as it offended the mandatory provisions of Section 9(2) of the Law Reform Act, Cap 26 Laws of Kenya.
 - iii. The Applicant herein was duly accorded a fair hearing in the Minister's Appeal No. 224 of 1997 and a lawful decision arrived therein.
 - iv. Consequently therefore, the decision pronounced in the Minister's Appeal No. 224 of 1997 was sound in law and in consonance with the powers donated to him by Section 29 of the Land Adjudication Act.
 - v. Further to that, the present JR Application is founded on erroneous, misleading and misapprehension of the law in that it seeks to evaluate the merit of the decision pronounced in the Minister's Appeal No. 224 of 1997 and not the decision-making process itself.
 - vi. The 1st to 4th Respondent position was that present JR Application was a non-starter having been filled without due and/or valid leave as the alleged leave issued on the 9th of June 2022 was null and void in terms of the provisions of Order 53 thereof.
 - vii. Lastly, the 1st to 4th Respondents submitted that there was no decision capable of being quashed as the decision made by the Minister on the 3rd of November 2020 had been fully implemented to its logical conclusion thereof.
 - viii. In conclusion the 1st to 4th Respondents sought for the present JR Application to be dismissed.
6. The 5th Respondent also filed a Replying Affidavit sworn on the 18th of August 2022 opposing the present JR Application on the following grounds; -
- i. First and foremost, the 5th Respondent stated that the present JR application was incompetent, baseless, bad in law and contains deliberate misinformation.
 - ii. The judgement pronounced in the Minister's Appeal No. 224 of 1997 was concise and clear in terms of the contents therein.
 - iii. Further to that, the decision pronounced on 3rd November 2020 has been fully implemented and there is nothing legally to be quashed and/or prohibited thereof.



- iv. The present JR Application was filed after the expiry of the statutory period within which a litigant is to file Judicial Review Application.
 - v. Consequently therefore, the present Judicial Review Application should be dismissed with costs thereof.
7. In response to the Grounds of Opposition filed by the 1st to 4th Respondents as well as Replying Affidavit filed by the 5th Respondent herein, the Applicant filed a Further Affidavit sworn on 8th of March 2023 which he stated as follows; -
- i. In response to the allegation that the present JR Application offended the provisions of Order 53 of the *Civil Procedure Rules*, 2010, the Applicant referred to the disclosure that the Minister's Appeal was heard on the 6th of November 2020 and the judgment pronounced on the 3rd of November 2021 and the present JR Application was therefore filed within the prescribed time.
 - ii. Further to that, the Applicant pleaded that the entire hearing of the Minister's Appeal was schemed towards giving a judgement in favour of the 5th Respondent and therefore the entire hearing was a sham.
 - iii. The Applicant further pleaded that the purported Minister's Appeal No. 224 of 1997 was filed out of the statutory time with the decision by the Land Adjudication & Settlement Officer being pronounced on the 13/12/1995 and the Minister's Appeal being filed in the year 1997.
 - iv. The Applicant stated that the Minister's directions that the Sub-County Surveyor be invited to implement its decision was thereof wrong as it meant to enforce and/or implement an illegal and unlawful decision contained in the Minister's Appeal pronounced on the 3rd of November 2021.
 - v. In conclusion therefore, the Applicant sought the Honourable Court to grant the prayers in the present JR Application.
8. On closing of the pleadings herein, the Court directed that the present JR Application be canvassed by way of written submissions.
9. The Applicant then filed his submission dated 6th February 2023 while the 5th Respondent filed his submission dated 17th April 2023.
10. The Applicant though without leave of this Honourable Court filed a further submission dated 16th March 2023.
11. This Honourable Court has duly perused the pleadings in the present JR Application and the submissions therefore and identified the issues for determination as follows; -
- Issue Which Is The Decision That Is A Subject Of The Present Jr Application?
- No.1
Issue Was The Present Jr Application Filed Within The Provisions Of Section 53 Of The *Civil*
No.2 *Procedure Rules*?
- Issue Is The Present Jr Application Merited?
- No. 3
Issue Is The Applicant Entitled To The Reliefs Sought In The Present Jr Application?
- No. 4
Issue Who Bears The Costs Of The Present Judicial Review Application?
- No. 5



12. Based on the above issues, this Honourable Court will now proceed to discuss the same and make its determination thereof as follows; -

Issue No.1- Which Is The Decision That Is A Subject Of The Present Jr Application?

13. In the present JR Application, the Applicant is seeking to review the decision-making process of the Deputy County Commissioner, Transmara West relating to the hearing undertaken on the 6th of November 2020 and the resultant Judgement pronounced thereafter relating to the Minister's Appeal No. 224 of 1997.
14. It is not in dispute that indeed a Judgement was pronounced by the Deputy County Commissioner exercising delegated duties by the 1st Respondent under the *Land Adjudication Act*, Cap 287 Laws of Kenya.
15. The said Judgement by the Deputy County Commissioner is duly annexed in the Applicant's supporting Affidavit as annexure KMK 3 but not dated in terms of when the same was pronounced.

Issue No.2- Was The Present Jr Application Filed Within The Provisions Of Section 53 Rules 2 & 3 Of The Civil Procedure Rules?

16. The Applicant in the present JR Application invoked the provisions of Order 53 Rule 3 of the *Civil Procedure Rules*, 2010 and Section 9 (4) of the *Fair Administrative Action Act*, No. 4 of 2015.
17. The Respondents herein have all raised the issue that the present JR Application was filed out of time and should not be entertained by this Honourable Court.
18. However, the 1st to 4th Respondent did not provide any facts and/or time lines within their Grounds of Opposition which this Honourable Court could apply and make the relevant determination on whether or not the present JR Application was time barred.
19. The 5th Respondent also in the Replying Affidavit failed to identify the dates upon which this Honourable Court ought to have relied upon to help it arrive at the determination that it was filed out of time.
20. Section 53 Rule 2 of the *Civil Procedure Rules*, 2010 requires that any litigant seeking Judicial Review remedies must apply to the Court not later than 6 months from the date of pronouncement of the said determination.
21. Section 53 Rule 3 of the *Civil Procedure Rules*, 2010 further provides that once leave to institute Judicial Review proceedings has been granted, then the substantive Application must be filed within 21 days from issuance of the said leave by the Court.
22. In the present JR Application, the Judgement pronounced by the Deputy County Commissioner on behalf of the 1st Respondent was not dated at all.
23. What appears on the face of the Applicant's annexure KMK3 which contains the proceedings of the Deputy County Commissioner on the behalf of the 1st Respondent is the date when the said Appeal was heard.
24. The date when the Minister's Appeal No. 224 of 1997 was heard is indicated to be 6th of November 2020.



25. According to the 1st to 4th Defendants Grounds of Opposition dated 27th of September 2022, Paragraph 9 reads as follows; -

“That there is no decision capable of being quashed as the decision by the Minister made on the 3rd of November 2020 ceased to exist once it was adopted and implemented by the 3rd Respondent among other stakeholders.”

26. This position by the 1st to 4th Respondent cannot be correct because according to the proceedings annexed as KMK 3 by the Applicant, the hearing of the Minister’s Appeal No. 224 of 1997 was done on the 6th of November 2020.

27. It is therefore not possible that the Judgement pronounced by the Deputy County Commissioner on behalf of the 1st Respondent could have been pronounced on the 3rd of November 2020.

28. The Applicant on the other hand submitted that the Judgement determining the Minister’s Appeal No. 224 of 1997 was pronounced on the 3rd of November 2021 and not 3rd November 2020.

29. This fact was pleaded by the Applicant in the present JR Application which was duly served on the Respondents.

30. However, none of the Respondents disputed this date of 6th November 2021 to the correct date upon which the Deputy County Commissioner on behalf of the 1st Respondent pronounced his decision relating the Minister’s Appeal No. 224 of 1997.

31. It is therefore this Honourable Court’s considered view that the Minister’s Appeal No. 224 of 1997 was heard on the 6th of November 2020 and the Judgement pronounced on the 3rd of November 2021.

32. Referring to the face of the present JR Application, it is pleaded that Leave under Order 53 Rule 2 of the *Civil Procedure Rules*, 2010 was granted on the 9th of June 2022.

33. In essence therefore, if the judgement being challenged was pronounced on the 6th of November 2021 and the Leave to challenge the said judgement granted on 9th June 2022, how many months had lapsed between these two dates?

34. The answer is that the Leave granted on the 9th of June 2022 was after the expiry of the 6 months statutory period provided under Order 53 Rule 2 of the *Civil Procedure Rules*, 2010.

35. Subsequently therefore, the Applicants Chamber Summons together with the leave granted on the 9th of June 2022 was time barred and resulted to the filing of the present JR application devoid of proper jurisdiction.

36. The jurisdiction of this Honourable Court under Order 53 Rule 3 of the *Civil Procedure Rules*, 2010 is activated by the compliance of Order 53 Rule 2 of the *Civil Procedure Rules*, 2010.

37. In conclusion therefore, this Honourable Court is of the Considered view that the present JR Application was filed without proper leave under Order 53 Rule 2 of the *Civil Procedure Rules*, 2010.

Issues No. 3 & 4

38. In the case of the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989), the Court observed as follows;-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending



other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

39. This Honourable Court having made the finding that the present JR Application was filed without proper leave in compliance of Order 53 Rule 2 of the Civil procedure Rules, 2010, it is therefore its considered view that it lacks the jurisdiction to entertain and/or make any lawful determinations as sought by the Applicant and in essence the prayers sought therein cannot be granted.

Issue No.5

40. The last issue for determination is who should bear the costs of the present JR Application.
41. Unfortunately, the Applicant has not been successful in the present JR Application.
42. It is trite law that costs follow the outcome of the proceedings.
43. In this present JR Application, the Applicant is hereby condemned to pay the incidental costs of this litigation to the Respondents herein.

Conclusion

44. This Honourable Court hereby makes the following Orders as relates to the Notice of Motion dated 24th June 2022; -
- A. The Notice of Motion Application Dated 24th of June 2022 Be and is Hereby Dismissed With Costs to the

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON DAY OF 26TH JUNE 2023.

EMMANUEL.M.WASHE

JUDGE

In the Presence of:

Advocates For The Applicant: Mr. Shira

Advocates For The Respondent: 1st – 4th Respondent

(N/A)

5th Respondent (N/A)

