Republic v Minister for Lands and Settlement & another; Gakii (Exparte Applicant); M'lingera (Interested Party) (Environment and Land Judicial Review Miscellaneous Application E004 of 2022) [2023] KEELC 18353 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18353 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND JUDICIAL REVIEW MISCELLANEOUS APPLICATION E004 OF 2022

CK YANO, J

JUNE 21, 2023

IN THE MATTER OF AN APPLICATION BY, MWANAISHA GAKII FOR ORDERS OF CERTORARI AND PROHIBITION

AND

IN THE MATTER OF; JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA ARTICLES 23, 40 48 & 50 THEREOF

AND

IN THE MATTER: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

AND

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

AND

IN THE MATTER OF: IGEMBE SOUTH LAND ADJUDICATION SECTION

IN THE MATTER OF: MINISTERS CASE NO. 475 OF 2015 DELIVERED ON 27TH JANUARY, 2022 WITH RESPECT TO THAT PARCEL OF LAND KNOWN AS PARCEL 1725

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE MINISTER FOR LANDS AND SETTLEMENT ..... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION ..... 2ND RESPONDENT

AND

MWANAISHA GAKII ..... EXPARTE APPLICANT

AND

ERASTO M'LINGERA ..... INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted by court on 31st May 2022, the ex parte applicant filed a notice of motion application dated 14th June, 2022 seeking orders that:

    a. The orders of certiorari do hereby issue to remove and bring to High Court for purposes of being quashed the decision of the 1st respondent made on 27th January, 2022.

    b. That an order of prohibition do hereby issue directed to the 2nd respondent, their servants, agents, any other person or authority prohibiting them from altering the duplicate adjudication register or implementing the decision of the minister in accordance with the *Land adjudication Act* Cap 284 in Igembe South District within Meru County.

    c. That the respondent and the interested party be ordered to pay costs of this motion.

Applicant's Case.

2. The motion is supported by the affidavit of Mwanaisha Gakii the applicant, sworn on 14th June 2022 and is based on the following grounds;

    a. That the ex-parte applicant learnt or came to know about the appeal on 16th of April 2021 when she received summons from the minister.

    b. That the appeal to the minister was filed on 15th December 2014 and the ex parte applicant father who was alive then was never notified nor served with the appeal the whole years of 2015.

    c. That it is against the rule of natural justice that a suit was filed on 15 December, 2014 and the respondent was never served nor notified until the year 2021.

    d. That the ex-parte applicant was not served with the ground of appeal from the interested party in order to prepare herself for the appeal, she was only served with summons.

    e. That the 1st respondent exceeded its mandate by coming up with the decision to award interested party the ex parte applicant father's land.

    f. That the decision of the 1st respondent did not consider the grounds of appeal nor has he given analysis that sprint from each ground of the appeal.

    g. That the 1st respondent never gave any reasons for overturning the findings made by District Land Adjudication Officer Igembe South District.

h. That the 1st respondent did not examine the evidence already on record and the decision of the District Land Adjudication Officer at all but proceeded to conduct the appeal to the minister like a fresh matter.

i. That the 1st respondent exceeded his mandate by rehearing the case afresh and calling witness without leave of the minister as required by Rule 4 (4) of the Land Adjudication Regulation.

j. The procedure of taking evidence was not in accordance with the regulation and was flawed.

k. The statement of one of the crucial witness on the side of the respondent one David Michubu M'aciuki was never recorded.

l. The ex-parte applicant on behalf of the estate has suffered injustices including loss of crops cultivated on the disputed land and may completely be disinherited if the decision of the minister is not quashed.

m. The applicant has greatly been aggrieved by the 1st respondent unwillingness to follow appeal procedure in determining appeal to the minister.

3. In her supporting affidavit, the ex-parte applicant reiterated the above grounds and averred that she is the administrator of the estate of her late father who died in the year 2015 and annexed a copy of the death certificate. That her late father was farming the suit land way back before demarcation in 1989. That the Bwethaa clan gave the parcel of land to all people who were in occupation without discriminating in terms of clan or tribe.

4. The ex-parte applicant states that in or about 1989, her late father's land was demarcated as parcel number 2393 while the interested party's land was a subdivision of parcel No. 1999. Copies of the land adjudication records have been annexed which the applicant avers that it shows ownership before the adjudication section was subdivided into two Lower Athiru Gaiti A and B. That after subdivision, her late father's land number 2393 was given a new number in Lower Athiru Gaiti A as 1725.

5. The ex-parte applicant further states that on 11th November, 1998 when the interested party allegedly bought the suit property from the late Kamanja as per the copy of the agreement annexed, the land had already been demarcated and given number 2393 in the name of the ex-parte applicant's late father. It is the ex-parte applicant's contention that the interested party encroached on her late father's land leading to her father filing a case to claim the suit property. Copies of the proceedings and decision of the District Land Adjudication Officer are annexed. That the matter was heard by the chief, then the council of elders and the District Land Adjudication Officer, all of whom awarded the land to the applicant's late father.

6. The applicant avers that during the hearing by the District Land Adjudication Officer, a ground visit was made on 4th December 2014 wherein it was established that the interested party was sold parcel of land number 1999 by Kamanja. That this land was subjected to committee case No. 119/97/98 in which it was decided that the land be subdivided into two where one Boston Mutembei was issued parcel Number 5154 which he sold to Shadrack Kithinji M'Kirimania. The said decision has also been annexed.

7. The ex-parte applicant states that according to the demarcation block, her late father was demarcated to parcel number 2393 old parcel but recorded to one Hassan Abdalla. That according to the sketch map which is annexed, the land borders with parcel number 1996 on the lower side. That Parcel Number 1996 was demarcated to one Wanjiku Murungi and it is currently parcel number 548 and borders the

land in dispute. That according to the demarcation sketch map of 17th January, 1991, this land was demarcated as bordering parcel number 2393.

8. It is the ex-parte applicant's contention that the interested party is currently on what was surveyed and demarcated as parcel number 2393 (old parcel number) which he claims he was sold by Kamanja (new parcel Number 1725). The applicant states that Kamanja did not have any committee case against her late father to challenge demarcation of the land as was allocated by the clan, adding that it is clear that the size of the land was somehow relatively equal in size, about 5-8 acres.

9. The ex-parte applicant states that going by LCC number 119/97/98 decision which awarded Boston Mutembei 2.5 acres after the land parcel number 1999 (old parcel) being subdivided into two it is clear that David Kamanja was to be left with a half of the original land which is approximately 2.5 to 3 acres. That the balance of approximately 2.5 to 3 acres was sold to Mutegi. That going to the ground it appears unusual to find that there are two parcels of land parcel number 1999 which was subjected to LCC NO. 119/97/98 which is clearly subdivided into two and that this land still being claimed to belong to Kamanja and currently with the interested party which the applicant argues is not possible. That according to investigations of the District Land Adjudication Officer it was established that Kamanja moved to his late father's portion after selling all his land to Boston Mutembei and Mutegi.

10. The ex-parte applicant avers that the interested party was sold her late father's land fraudulently by Kamanja who is deceased and that her late father and the interested party had a dispute in relation to trees which were cut and the dispute was before the Njuri Ncheke elders on 13th July, 2004. That the elders made a ground visit and established that the trees cut were on her late father's land as per the report dated 3rd September 2004 CC to D.O Igembe East, Chief Kindani Location and Meru North District and which concurs with records in the Land Adjudication Office as indicated on District Adjudication Office finding.

11. The ex-parte applicant states that the miraa on the suit property was planted by her late mother but the interested party claims to have planted. That the interested party filed an appeal to the minster in the year 2015 and the appeal was heard in or about December, 2021. Copies of the summons and the appeal decision are annexed. That the interested party filed the appeal on 15th December 2014 but waited until the year 2021 to prosecute the appeal. Copies of the grounds of Appeal that the applicant alleges were never served to the ex-parte applicant have been annexed.

12. The ex-parte applicant further states that she came to learn about the appeal on 16th April 2021 when she was served with the minister's summons. That she was never served with the grounds of the appeal from the interested party in order to prepare herself for the appeal.

The Interested Party's Case.

13. The interested party opposed the application and filed a replying affidavit dated 10th September, 2022. He states that he indeed filed an appeal to the minister sometimes in 2014. That as far as he is concerned and as advised by his counsel on record there are no strict guidelines and or procedures set down for the manner to file an appeal to the minister nor the procedures to be followed per se. He avers that he had no intention of delaying to serve any papers and states that he still served the applicant with the appeal notwithstanding the fact that he had delayed in serving her.

14. The interested party avers that the appeal was lodged, heard and determined in his favour and accuses the Ministry of Lands for delaying the appeal unnecessarily, adding that he has suffered too due to the delay.

15. It is the interested party's contention that the application herein lacks merit and ought to be dismissed with costs. That since the appeal resulted in the issuance of the subject title deed, this court has no jurisdiction to hear the matter as a judicial review, but ought to be determined by the ELC court.

16. The interested party faults the ex-parte applicant for not responding to the appeal though served late, adding that her sister has been following up the matter before the applicant took over. That the applicant has no locus standi to file this case.

17. The respondents were duly served but never filed responses. The application was canvassed by way of written submissions. Only the ex-parte applicant filed submissions dated 8th September, 2022 thRough the firm of Kaibunga Kaberia & Co. Advocates.

The Ex-parte Applicant's Submissions

18. In their submissions, counsel for the exparte applicant gave brief facts of the case and identified the following issues for determination-;

    1. Whether the District Commissioner followed the procedure provided for in the statute in arriving at his decision.

    2. Whether the decision of the District Commissioner breached the rule of natural justice.

    3. Whether the ex-parte applicant has demonstrated sufficient ground to be granted the orders sought.

    4. Who shall bear the costs of the application

19. On the first issue the ex-parte applicant submitted that the 1st respondent re-heard the matter afresh allowing the interested party to call witnesses and give evidence a fresh. That the 1st respondent never referred to the tribunal judgment that was appealed against and that failure to consider the tribunal judgment in hearing the appeal to the minister renders the decision of 1st respondent an illegality. Counsel for the applicant submitted that the process of arriving at the minister decision was purely against the ex-parte applicant who was appearing before the minister on behalf of her late father who was conversant with suit land. The applicant argued that by not referring at all to the judgment of the tribunal by the 1st respondent is proof that the process of appeal hearing was biased on the face of the record. It is the applicant's submissions that she has provided sufficient evidence which proves that the land in Athiru Gaiti had already been demarcated and given a parcel number and therefore there was no block land available for sale. That if the 1st respondent considered the tribunal visa vis the ground of appeal by the interested party, he would not have arrived at the decision he made during the hearing of appeal to the minister.

20. The ex-parte applicant submitted that Section 29 (1) of the *Land Adjudication Act* does not expressly provide for the procedure to be followed by the person to whom the minister has delegated power to hear an appeal and that subsidiary legislation usually has, where parliament has provided for such, the effect of filling in gaps left by the principal legislation and in this case the appropriate subsidiary legislation is the Land Adjudication Regulation 4 thereof is applicable in the case.

21. The ex-parte applicant's advocate relied on the principle enunciated by Justice Mwangi Njoroge in Republic Vs Attorney General & 2 others exparte Emmanuel Poghisio (2018) eKLR where he ruled that the delegation of power is addressed by the principal Act and not by the Land Adjudication Regulation and that ordinarily, the duty to hear appeal involves consideration by the appellate court or

tribunal of the evidence and findings already on record as taken or arrived at respectively by the court or tribunal.

22. The ex-parte applicant submitted that there is no substantive provision for a rehearing of the case or calling witnesses and that in Section 29 (1) – (4) of the *Land Adjudication Act*, it is only proper in the circumstances to hold that even where the power of the minister has been delegated to the District Commissioner to hear an appeal under Section 29(1), leave of the minister must be sought in accordance with Rule 4(4) if the appellant or any other party to the appeal wishes to attend in person or by duly authorized agent and call witnesses. Counsel for the applicant further relied on the case of Republic Vs Machakos District Commissioner [2009] eKLR which held as follows-;

> "I have seen the proceedings before the District Commissioner to whom the minister delegated his powers to hear the appeal. There is no evidence that the leave of the minister was ever sought to call witnesses as per the requirements of the Rule 4(4) of the Land Adjudication Regulations. The respondent could not purport to call witnesses unless leave was sought to do so. Witnesses cannot be called as a matter of course. Even if the District Commissioner could exercise his discretion to call the witnesses, the necessity to call the witness should have been recorded would agree with the applicant that the procedure of taking evidence was not in accordance with the regulations and the procedure was therefore flawed".

23. It is the ex-parte applicant's submissions that the process of arriving at the decision of the minister was not proper.

24. Regarding the second issue, the ex-parte applicant submitted that the failure to serve her father with summons and grounds of appeal in time was intended to defeat justice and is tantamount to breach of the rule of natural justice.

25. It is the ex-parte applicant's submission that she has given sufficient grounds to be granted the orders sought and urged the court to allow the application as prayed.

Analysis And Determination

26. I have considered the application, the response and the submissions made. I find that the issues that arise for determination are;

    i. Whether the decision of the 1st respondent breached the rules of natural justice.

    ii. Whether the ex-parte applicant is entitled to the remedies she seeks.

    iii. Who should bear the costs of the application?

27. On the first issue, it is the ex-parte applicant's argument that rules of natural justice were breached by the District Commissioner who heard the appeal on behalf of the minister. I have perused the decision by the minister which is annexed to the ex-parte applicant's affidavit in support of the application. I note that both the proceedings indicate that the appeal was heard in the presence of the applicant who was acting on behalf of her father and in the presence of the interested party. The proceedings further indicate that both parties were given a chance to testify and even called witnesses. It is therefore clear that all the parties, including the ex-parte applicant were given a hearing before the decision was made.

28. In the case of Onyango Oloo Vs Attorney General (1989) EA 456 the Court of Appeal held that-;

> " The principles of natural justice applies where ordinary people would reasonably expect those making the decision which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... there is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decisions would have been arrived at ..."

29. Similarly in Pashito Holdings Ltd & another Vs Paul Nderitu Ndun'gu & others (1197) eKLR the Court of Appeal expressed itself as follows:-

> " An essential requirement for the performance of any judicial or quasi judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the view of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision... The rule of natural justice are minimum standards of fair decision – making imposed by the common law on persons or bodies who are under duty to act judicially."

30. In Republic Vs the Honourable the Chief Justice of Kenya & others Ex-parte Moijo Mataiya Ole Keiwua Nairobi Hcmca No. 1298 of 2004 the court held-;

> " The term natural justice, the duty to act fairly and legitimate expectation have no such difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would have a legitimate expectation that the decisions making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or her case. Whereas some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is now perhaps the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted. However, flexible that code of procedure may be and however, much the decision-maker is said to be master of his own procedure, the rules of procedure are generally formulated as the rule against bias (nemo judex in sua causa) and in respect of the right to a fair hearing (audi alternam partem)."

31. Article 50 of *the Constitution* provides that-;

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

32. Similarly, Article 47 (1) of *the Constitution* provide that-:

> " Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"

33. Where a party has not been heard, decision made in breach of the rules of nature justice is null and void ab initio. In the instant case the ex-parte applicant was actively involved in the proceedings and she actively contributed in the proceedings. If she felt her right of natural justice were violated she could have raised the same from the onset. It is therefore my view that the rules of natural justice were not flouted and the decision made thereto is not null and void.

34. I now turn to the second issue. Analyzing the statement above made by the ex-parte applicant, it is obvious that the ex-parte is challenging the merits of the decision of the minister. It is trite that judicial review is only concerned with the decisions making process and not the merits of the case.

35. In the case of Municipal council of Mombasa – vs – Republic & Another [2002] eKLR, the Court of Appeal held as follows-;

> " Judicial Review is only 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 merit of the decision itself such as whether there was or there was not sufficient evidence to support the decision."

36. In the same breath in the case of Republic Vs Kenya National Examination council Ex-parte Gathenji and Civil appeal No. 266 of 1996, the Court of Appeal stated inter alia that-;

> " It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision- making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally. That his decision was unreasonable and that the impugned decision was illegal."

37. The broad grounds on which the court exercises its Judicial Review Jurisdiction were also reiterated in Zachariah Wagunza & another – Vs Office of the Registrar, Academic Kenyatta University & 2 Others [2013] eKLR as stated in the Uganda case of Pastoli – Vs Kabale District Government Council and others (2008) 2EA 300 where it was observed among other things that-;

> " In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety; illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting

without jurisdiction or ultra vires or contrary to the provisions of law or its principles are instances of illegality…"

38. It is clear therefore that the purpose of judicial review is to check that public bodies or persons holding public authority and exercising their function, do not exceed their jurisdiction and carry out their duties within the limit defined by the law. Examples of these is where the lawful authority departed from procedures stipulated by statute and in this instant case it is not the case.

39. As was held in Republic Vs Kenya National Examinations Council ex-parte Geoffrey Gathenji and 9 others Civil Appeal No. 266 of 1996:-

> " The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment."

40. Having considered the application herein, I find that the minister acted procedurally and legally hence his decision stands. Consequently, the Notice of Motion application dated 14th June, 2022 is not merited and the same is dismissed with costs to the interested party.

41. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE 2023

In The Presence Of

Court assistant – V. Kiragu

Mberia for the ex-parte applicant

No appearance for A.G for respondent

No appearance for interested party

C.K YANO

JUDGE