Mwololo v Deputy County Commissioner - Kilungu Sub County as a Delegate of the Cabinet Secretary, Land and Physical Planning & another; Isevi (Interested Party) (Environment and Land Judicial Review Miscellaneous Application E009 of 2022) [2023] KEELC 17942 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17942 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND JUDICIAL REVIEW MISCELLANEOUS APPLICATION E009 OF 2022

TW MURIGI, J

JUNE 14, 2023

BETWEEN

JOHN NDOLO MWOLOLO ..... APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER - KILUNGU SUB COUNTY AS A DELEGATE OF THE CABINET SECRETARY, LAND AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE DIRECTOR OF LANDS ADJUDICATION & SETTLEMENT KENYA ..... 2ND RESPONDENT

AND

RAPHAEL MAKAU ISEVI ..... INTERESTED PARTY

JUDGMENT

1. The Ex parte Applicant commenced this suit by way of a Chamber Summons dated 18th July, 2022 in which he sought for the following orders:-

    a. That leave be granted to the Applicant to apply for a Certiorari order to issue to remove into the Environment and Land Court and quash the decision of the Deputy County Commissioner Kilungu Sub County sitting as the Delegate of the Cabinet Secretary Lands and Physical Planning decision made on 22/02/2022 disallowing the Applicants Appeal No. 114 of 2015 in respect to land parcels No. 1707, 1709 and 1713 Wautu Land Adjudication Section Kilungu Sub County Makueni county.

b. That leave be granted to the Applicant to apply for a Prohibition order to issue to prohibit the implementation of the decision of the Deputy County Commissioner as a Delegate for the Cabinet Secretary Lands Physical Planning Kilungu Sub County Makueni in Minister's Appeal No. 114 of 2015 in respect of parcels of land No. 1707, 1709 and 1713 Wautu Land Adjudication Section Makueni by ensuring that the Director of Land Adjudication and Settlement does not submit the decision to the Land Registrar Makueni for implementation.

c. That the leave granted do operate a stay in this proceedings until determination of this application.

2. The application is premised on the statement of facts and the verifying affidavit of John Ndolo Mwolo sworn on even date.

The Applicant's Case

3. The Applicant averred that after the suit properties were registered in the names of the Interested Party, he lodged a complaint with the Committee where he lost and appealed all the way to the Minister.

4. He further averred that the hearing of the Appeal before the Minister was unprocedural since the hearing notice issued by the Minister on 17/01/2022 was served upon him by the Chief on 28/01/2022.

5. He further averred that the notice required him to appear before the Minister on 01/02/2022 for the hearing of his appeal. He stated that he complained to the Chief that the notice was too short since he wanted to summon his witnesses to attend the hearing of the Appeal.

6. He averred that on the hearing date, he notified the Minister that he had been ambushed for hearing since he was not given adequate time to prepare for his case.

7. The Applicant contended that his right to fair hearing was violated for the reason that he could not adduce evidence from his witnesses or challenge the Respondent effectively.

8. He further averred that he was compelled to proceed with his case without being given an opportunity to call his witnesses whom he tried to reach in vain. That he pleaded with the Minister to give him time to get his witnesses but instead the Minister recorded that he had no witness which was not true. That by denying him the opportunity to call his witnesses, the Minister violated his rights under Article 40 of the *Constitution* because his property was taken away from him and given to the Interested Party.

9. He further averred that the Minister was irrational and unreasonable in making his decision because he chose to ignore his evidence which demonstrates that they owned the land.

10. That despite adjourning the matter to visit the site, the Minister failed to do so and hence the decision was premature since she failed to gather the necessary evidence from the ground.

11. He contended that the Minister was not fair and acted *ultra vires*.

The Respondents Case

12. The Respondents opposed the application vide the replying affidavit sworn by Jane Katuse, the Deputy County Commissioner. She averred that contrary to the allegations by the Applicant, both parties were summoned to attend the proceedings and given adequate time to prepare for the case.

13. She further averred that before the hearing began, neither party indicated that they were not adequately prepared for the case nor requested for additional time to prepare for the case.

14. She further averred that upon listening to the submissions by both parties, she found it unnecessary to visit the site since the evidence on record was adequate for the purpose of determining the issue at hand.

15. She contended that the dispute was determined on merits from the Committee stage up to the Appeal. She maintains that the parties were given a fair hearing and the due process was followed during the hearing of the appeal. She argued that the application is an abuse of the court process and should be dismissed with costs.

The Interested Party's Case

16. In opposing the application, the Interested Party vide his replying affidavit averred that he occupies parcel No. 1707 while the other two parcels belong to his deceased uncle Stephen Kitivi Mbuki. He further averred that the beneficiaries of the Estate of Stephen Kitivi Mbuki were not involved in the proceedings before the Sub County Commissioner.

17. He denied the Applicant's allegations that he was denied a fair hearing since his witness one Cosmas Mutie Kitumu attended the hearing of the Appeal before the County Commissioner but the Applicant failed or refused to call him to testify on his behalf.

18. The Interested Party contended that in arriving at her decision, the Minister relied on the documents produced by the Applicant. According to him, there was no need to visit the site as the same had been done in other forums. He argued that the hearing notice was served upon the Applicant timeously hence he ought to have been ready to proceed with his case.

Analysis and Determination

19. Having considered the application, the affidavits and the rival submissions, the following issues arise for the Court's determination:-

    i. Whether the decision of the 1st Respondent was made in breach of the rules of natural justice.

    ii. Whether the Applicant is entitled to the orders sought.

    iii. Who is to bear the costs.

20. The Principles of Judicial Review were laid down by Lord Diplock in the case of *Council of Civil Service Union & Others v the Minister for Civil Service* [1985] AC 374 where the Judge held that;

> "Judicial review has, I think developed to a stage today when one can conveniently classify into 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 unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or 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 as "procedural impropriety", rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision."

21. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of *Republic v Kenya Revenue Authority Exparte Yaya Towers Limited* (2008) eKLR, where it was held that;

> " The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected...."

22. In the case of *Municipal Council of Mombasa v and Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 the Court held that;

> "Judicial review is 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 merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision..... "

Whether the decision of the 1st respondent violated the rules of natural justice

23. The Ex-parte Applicant seeks orders to quash the decision in Appeal Case No. 114 of 2015 on the grounds that the decision reached was against the rules of natural justice. He contended that the trial before the Minister violated the principles of fair hearing. The Applicant submitted that he was not accorded an opportunity to prepare for his case before the Minister. He averred that the Notice served upon him was too short to enable him to avail his witnesses for the hearing.

24. He further stated that the 1st Respondent did not consider his evidence while making its decision. The Interested Party on the other hand averred that both parties were accorded an opportunity to adduce evidence, to call witnesses and to cross examine the adverse party.

25. In O*nyango Oloo v Attorney General* [1986-1989] EA 456 the Court of Appeal expressed itself as follows;

> " The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions 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 principle of natural justice...To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...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 decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately

> results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio*."

26. I have perused the proceedings and findings in Appeal Case No. 114 of 2015 conducted before the Deputy County Commissioner Kilungu Sub County. The Applicant was the Appellant, while the Interested Party was the Respondent. The Interested Party averred that the Applicant's witness one Cosmas Kitumu was present during the hearing. From the proceedings before the Minister, Cosmas Mutie Kitumu of ID No. [particulars withheld] was recorded to have been present.

27. However, it is evident that the Applicant did not call him to testify on his behalf. It is therefore not true that he was not accorded adequate time to avail his witnesses. He cannot therefore fault the Minister for not giving him time to call his witnesses as it is clear that his witness was present during the hearing of the appeal.

28. The Applicant faulted the Tribunal for not visiting the site and before making its decision. From the proceedings before the Minister, it is clear that the Tribunal adjourned the case after both parties concluded testifying to await for the site visit and verdict to be scheduled on a later date.

29. In her replying affidavit the Deputy County Commissioner averred that she found it unnecessary to visit the site as the evidence on record was adequate to determine the issue at hand.The parties and their witnesses were recorded as having been sworn and gave evidence.

30. It is evident that both parties participated in the proceedings by giving evidence, cross examination and calling witnesses. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the Respondent was biased or unfair towards the Applicant.

31. The Applicant gave his testimony, he was allowed to cross-examine witnesses and fully participated in the proceedings. The Court finds absolutely no evidence of bias or unfair treatment.

32. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court is satisfied that the Applicant actively participated in the said proceedings and even cross-examined witnesses.

33. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicant has not demonstrated that such was case in the instant application.

34. Accordingly, the Court finds that the trial before the Minister adhered to the principles of fair hearing and as such there was no violation of the rules of natural justice.

Whether the applicant is entitled to the orders sought

35. The Applicant contends that 1st Respondent did not grant him a fair hearing as espoused under Article 50(1) of the *Constitution*.

36. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is in reality aggrieved by the merits of the decision of the 1st Respondent.

37. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a judicial review application. The Court is of the opinion that the Applicant is challenging the merits of the Minister's decision in the appeal. In the case of *Municipal Council of Mombasa v Republic & Umoja Consultant Limited* [2002] eKLR the court held that;

> " 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 take into account 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."

38. Similarly, in *Republic v Secretary of the Firearms Licensing Board & 2 Others Ex parte Senator Johnstone Muthama* [2018] eKLR it was held, inter alia, that;

> " The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited,* (2008) eKLR, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself."

39. In my opinion, a judicial review remedy would not be available in those circumstances.

40. The final issue relates to costs. Although the costs of an action are at the discretion of the court, the general and well established rule is that costs follow the event. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. So, a successful party should be awarded costs, unless, for good reason, the Court orders otherwise as provided for under section 27 (1) of the *Civil Procedure Act*(Cap 21).

41. The upshot of the foregoing is that the application dated 18th July, 2022 is hereby dismissed. Each party shall bear its own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF JUNE, 2023.

HON. T. MURIGI

JUDGE

In the presence of:-

Court assistant - Mr. Kwemboi

Mutinda for the Interested Party.