



Republic v The Cabinet Secretary for Lands & 3 others; Mbui & 3 others (Interested Parties); Muindi & 2 others (Exparte) (Environment and Land Judicial Review Case E014 of 2022) [2023] KEELC 17944 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E014 OF 2022**

TW MURIGI, J

JUNE 14, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE CABINET SECRETARY FOR LANDS 1ST RESPONDENT

THE DEPUTY COUNTY COMMISSIONER MAKUENI SUB-COUNTY 2ND RESPONDENT

THE LAND REGISTRAR, MAKUENI COUNTY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

MONICAH MUKENYE MBUI INTERESTED PARTY

ERASTUS WAMBUA MBUI INTERESTED PARTY

MICHAEL NZIOKA MBUI INTERESTED PARTY

FRANCIS NDAMBUKI INTERESTED PARTY

AND

ALEX NZUKI MUINDI EXPARTE

RAEL MBITHE MUINDI EXPARTE

JONES MAITHYA MUINDI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF JACOB MUINDI MULILI – DECEASED) EXPARTE



JUDGMENT

1. Before me for determination is the Notice of Motion dated December 2, 2022 brought under the provisions of Section 9 of the Law Reform Act and Order 53 Rule 1 of the Civil Procedure Rules in which the *Ex-parte* Applicants seek the following orders: -
 1. That an order of Certiorari do issue to remove into this Honourable Court for purposes of quashing the judgment dated September 5, 2022 and delivered by the 2nd Respondent in the Appeal to the Minister Case No 29/1996 over land Parcel No 264, Kivani Adjudication Section.
 2. That an order of Certiorari do issue to remove into this Honourable Court for purposes of quashing the decision of the 3rd Respondent to issue registration documents over land Parcel No 264, Kivani Adjudication Section during the pendency of Minister Appeal No 29 of 1996.
 3. That an order of Mandamus do issue directed to the 2nd Respondent compelling him to hear and determine the Minister Appeal No 29 of 1996 on merits.
 4. That the costs of this application be borne by the Respondents.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Alex Nzuki Muindi of even date.

The Applicant's Case

3. The deponent averred that his late father and his brother, Daniel Mbui Mulili (Deceased) owned half a share each of all that land known as Makueni/Kivani/264. That when land adjudication was done, the late Daniel Mbui Mulili fraudulently caused the entire land Parcel No Makueni/Kivani/264 to be registered in his name, a move which culminated in Appeal No 29 of 1996 to the Minister.
4. It was further averred that on August 15, 2007, the District Land Adjudication and Settlement Officer wrote to the Land Registrar in Nairobi requesting that a restriction be placed on Land Parcel Nos 264, 261 and 269 Kivani Adjudication Section. That the restriction was officially registered against land parcel No 264 on 27/05/2009 by the 3rd Respondent. That in utter disregard of the said restriction and during the pendency of the Appeal to the Minister, the 3rd Respondent issued registration documents for land Parcel No 264 to the late Daniel Mbui Mulili and to the Interested parties.
5. He further averred that he wrote several times to the District Commissioner requesting for a hearing of their Appeals Nos 29 of 1996 and 4 of 1999 to no avail. That when Appeal No 29 of 1996 was heard on June 16, 2022, the 1st Respondent held that the matter had been overtaken by events since a title deed had been issued to the Interested parties. It was further averred that the 2nd Respondent did not hear and determine the Appeal on merits.
6. The Applicant averred that they are the beneficial owners of half of land Parcel No Makueni/Kivani/264 and the Minister's decision infringes on their right to own property because the Appeal was dismissed on a technicality. That the Ex-parte Applicants' family has been on the suit property from birth and some of their relatives are buried there. He contended that if the Minister's decision is allowed to stand, they will suffer irreparably as they will lose their inheritance.
7. Though duly served, the Respondents as well as the 3rd and 4th Interested Parties did not respond to the application.



The 1st And 2nd Interested Party's Case

8. The application was opposed by the 1st and 2nd Interested Party vide the replying affidavit sworn by the 2nd Interested Party on his own behalf and on behalf of the 1st Interested Party. He averred that the application is frivolous and a waste of the Court's time. He further averred that land Parcel No Makueni/Kivani/264 is now registered in the name of the 1st Interested Party. He further averred that the subject land was awarded to Daniel Mbui Mulili (Deceased) by Jacob Muindi Mulili (Deceased) *vide* an agreement for ownership of the ancestral land. He contended that the Applicant's appeal was dismissed and the suit property declared to be the property of the 1st Interested party. He urged the Court to dismiss the application with costs.
9. The application was canvassed by way of written submissions.

The Ex Parte Applicants Submissions

10. The *Ex parte* Applicant's submissions were filed on 14th March, 2023.
11. On behalf of the *Ex-parte* Applicants, Counsel submitted that the main issue for determination is whether the ex parte Applicants are entitled to the judicial review orders. Counsel submitted that the cardinal elements which should be proved for orders of Certiorari are that the decision must be marred by illegality, irrationality and procedural improprieties. Counsel submitted that the 3rd Respondent's decision to issue a title deed while a restriction was in force was illegal and marred with procedural irregularities. Counsel further argued that the Land Registrar should have notified any party that wished to deal in any way with the suit property.
12. Counsel argued that despite the existence of the restriction which was registered on May 27, 2009 and despite the pendency of the Minister's Appeal, the 3rd Respondent proceeded to issue a title deed to the Interested Parties. Counsel submitted that the Land Registrar had no power to issue a title deed while a restriction was in force and during the pendency of Appeal No 29 of 1996.
13. Counsel contended that the *Ex-parte* Applicants were condemned unheard before the Minister due to the illegal actions of the 3rd Respondent. Counsel added that the Appeal was dismissed on a technicality that the title deed had already been issued thus rendering the Appeal to be overtaken by events. Counsel further contended that the 2nd Respondent ought to have interrogated circumstances under which the Title deed was issued by the 3rd Respondent during the pendency of the Appeal.
14. Counsel submitted that dismissing the Appeal on such a technicality had the effect of condemning the *Ex-parte* Applicants unheard and left them with no recourse. That the said dismissal infringed on the *Ex-parte* Applicants' proprietary rights. Counsel urged this Court to make a finding that the 3rd Respondent acted ultra vires in issuing the Title deeds and to proceed and quash the same.
15. Counsel relied on the following authorities to buttress his submissions: -
 1. [*Republic Vs Commissioner of Lands & Another Ex-parte George Kimani Njuki*](#) [2018] eKLR.
 2. [*Republic Vs Minister for Lands & another Ex Parte Joash Onyango Opiyo; Daniel Omondi Owira & Another \(Interested Parties\)*](#) [2020] eKLR.

The 1st And 2nd Interested Parties Submissions

16. The 1st and 2nd Interested Parties filed their submissions on February 16, 2023.



17. The 1st and 2nd Interested Parties submitted that the issues raised by the *Ex-parte* Applicants in their supporting affidavit would require the Court to go into the merits of the decision of the 2nd Respondent. The Interested Parties contended that the issues raised do not fall within the purview of judicial review. Elaborating further, the Interested Parties submitted that the major complaint relates to substantive issues among them subdivision of land Parcel No Makueni/Kivani/264 into equal shares for both Daniel Mulili and Jacob Mulili.
18. The Interested Parties submitted that the Ex-parte Applicants' remedy was to move the Court vide an appeal. Having not filed an appeal, it was their submission that the application ought to be dismissed with costs. To buttress their submissions, reliance was placed on the case of *Paul Mwicigi Mbugua & Another Vs Attorney General & 7 Others* [2020] eKLR.

Analysis And Determination

19. Having considered the application, the affidavits and the rival submissions, the issue for determination is whether the *ex parte* Applicants have made out a case for the grant of the judicial orders.
20. The Principles of Judicial Review were laid down by Lord Diplock in the case of *Council of Civil Service Union & Others Vs 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 main principles to be considered in an application for judicial review were propounded in the Ugandan case of *Pastoli Vs Kabale District Local Government Council & Others* [2008] EA 300 at 303-304 as follows;

“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 or procedural impropriety. See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC2 and also *Francis Babikirwe Muntu and Others Vs Kyambogo University*, High Court, Kampala, Miscellaneous application number 643 of 2005 (UR).

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 the law or its principles are instances of illegality.

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable



moral standards. *Re an application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph E.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercise jurisdiction to make a decision (*Al-Mehdawi V Secretary of State for the House Department* [1990] AC 876).”

22. The *Ex Parte* Applicants are seeking to quash the decision of the Minister on the basis that it was marred with illegality, irrationality and procedural improprieties. The court has considered the Applicants grievances in light of the above principles. The Applicants grounds for judicial review are hinged on the principle of illegality, irrationality and procedural impropriety.
23. The Applicants averred that the Minister’s decision is marred with illegality as the 3rd Respondent issued registration documents to the Interested Parties when a restriction on the suit property was in place and while the Appeal was still pending before the Minister. According to the letter dated July 15, 2007(ANM2) the Director Land Adjudication & Settlement requested the Chief Lands Registrar to register a restriction on parcels No 264 and 261 pending the hearing and determination of the appeals.
24. The Applicants produced a copy of the green card for land parcel No Makueni/Kivani/264(ANM3). According to the green card, the restriction was registered by the 3rd Respondent on May 27, 2009. According to entry No 7 of the green card, the suit property was transferred to Erastus Wambua Mbui and Nzioka Mbui Michael on October 17, 2016. The Minister’s Appeal was determined on September 5, 2021. The Applicant produced proceedings and the judgment before the Minister in Appeal No 29 of 1996 (ANM6). In his findings the Minister stated as follows in part;

“Therefore it is true that Muindi and Mbui had an agreement over the ownership of ancestral land according to perused records hence the view the whole matter to have been overtaken by events as title deed was issued to the Respondent.”
25. The Applicant in his evidence before the Minister stated as follows:-

“We accuse the Respondent because she has transferred the ownership of the parcel No 264 in her name (Monica Mukenye) without our knowledge and the same note the parcel is under restriction meaning no dealing should have proceeded before the Appeal is heard and determined. I request this court to confirm the legality of the title deed issued because I understand that their must have been something fishy done to the register and we want our land back for sub division amongst ourselves.”
26. The Applicants averred that he wrote several letters to the Minister requesting for the hearing of the appeal. In his letter dated May 26, 2009 (annexure ANM4), it is evident that the Applicant informed the District Commissioner Makueni that the Land Registrar had issued the title deed for Plot No 264 to Monica Mukenye.
27. It is clear from the above that even as the District Commissioner was hearing the appeal, it was made known to him that title had been issued. In making its decision the Minister has to take into



consideration the relevant matters. This was the holding in the case of Municipal Council of Mombasa Vs 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.....”

28. The proceedings before the Minister show that Plot No 264 was the property in dispute between the parties herein. The issue of whether the title for Plot No 269 was issued when a restriction was in force and during the pendency of the appeal was a relevant matter which the Minister ought to have taken into consideration before making his decision. It is clear that the District Commissioner did not take into consideration the relevant matters before he made his decision. The Minister’s decision is illegal in so far as it failed to acknowledge that the title for the disputed land was issued when a restriction was in force during the pendency of the appeal. The 3rd Respondent acted ultra vires by issuing the title when a restriction was in force.

29. 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 Vs Kenya Revenue Authority Ex Parte 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.....”

30. For those reasons, I find that the Applicants have demonstrated to the satisfaction of this court that they are entitled to the orders sought.

31. In the end the application dated December 2, 2022 is allowed in the following terms;

1. An Order of certiorari is hereby issued quashing the Judgment dated September 5, 2022 and delivered by the 1st Respondent in the Appeal to the Minister case No 29/1996 over land parcel No 264, Kivani Adjudication Section.
2. An order of certiorari is hereby issued quashing the decision of the 2nd Respondent to issue registration documents over land parcel No 264 Kivani Adjudication Section that was made during the pendency of Ministers Appeal No 29 of 1996.
3. An order of mandamus is hereby issued directed to the 1st Respondent compelling him to hear and determine the Minister’s Appeal No 29 of 1996 on the merits.
4. That each party shall bear its own costs.

.....
HON. T. MURIGI

JUDGE



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

In The Presence Of:-

Court assistant - Mr. Kwemboi.

