



Republic v Deputy County Commissioner Igembe Subcounty & another; M'Mwireria (Interested Party); Kithure (Exparte Applicant) (Environment and Land Case Judicial Review Application E16 of 2022) [2023] KEELC 19226 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E16 OF 2022**

CK NZILI, J

JULY 26, 2023

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY MOSES
NTONJIRA KITHURE BY WAY OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE DECISION BY THE DEPUTY COUNTY COMMISSIONER
IGEMBE SOUTH SUBCOUNTY IN THE APPEAL TO THE MINISTER CASE NO. 68 OF 2019
IN RESPECT OF P/NO.2448 MERU NORTH/KIRINDINE 'B' ADJUDICATION SECTION**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER IGEMBE SUBCOUNTY 1ST
RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

HUMPHREY KUBAI M'MWIRERIA INTERESTED PARTY

AND

MOSES NTONJIRA KITHURE EXPARTE APPLICANT

JUDGMENT

1. By a notice of motion dated 11.1.2023, the exparte applicant seeks an order of -; a), *certiorari* to call for and bring into this court to quash the proceedings and the decision in Minister's Appeal No. 68 of 2019 and b), prohibition to prevent the 1st respondent from implementing the decision thereof.



The notice of motion was supported by a statutory statement of facts dated 8.12.2022 and an affidavit verifying the facts sworn by Moses Ntonjira Kithure on 9.12.2023.

2. The applicant averred that he was the recorded owner possessor and an occupant of L.R No. Meru North/Kirindine/"B"/2448 as per the copy of the official search marked MKK 01. He averred that he had filed Objection No's. 28 on Parcel No. 3416. He subsequently became the registered owner of Parcel No. Meru North/Kirindine/ "B" 2448 Adjudication Section before the land Adjudication Officer Kirindine B Adjudication Section which were heard and determined on 7.4.2018. That the interested party being aggrieved appealed to the Minister in Appeal No.68 of 2019, which was heard and decided on 9.11.2022 by the 1st respondent who awarded the interested party all his land. He attached copies of the official search certificate, proceedings by the Minister, Land Adjudication Officer and photographs showing developments on the land as annexures marked MNK 02, 03, and 04.
3. The applicant averred that before his objection was filed with the Land Adjudication Officer, the interested party had sued him in Maua Chief Magistrate ELC No. 30 of 2009, to which he had filed a defence and an objection based on non-exhaustion of the internal mechanism under Cap 284, which the suit was withdrawn before the Land Adjudication Officer's objection could be heard. The applicant further averred that despite this, he was shocked to be served with a letter from the 1st respondent to appear on 7.10.2021 for the Minister's appeal hearing. The applicant attached the proceedings in Maua Law Courts, defence and the preliminary objection, a letter from the 1st respondent, a request for the grounds of appeal and the proceedings as annexures marked MNK 05, 06, 07 and 08, respectively.
4. The applicant averred that the minister's appeal was heard on 30.11.2022, where the interested party was granted all his land. He termed the decision as biased based on an appeal filed outside the 60 days ultra vires. Further, the applicant averred that the 1st respondent allowed for new witnesses and relied on their evidence, which were not before unavailable at the Land Adjudication Officer.
5. Additionally, the applicant averred that the 1st respondent made the decision based on substantiated allegations that the interested party had bought the land, yet the maker of the alleged sale agreement was not called to testify or the sale agreement subjected to any forensic examination given the late Kobia M'Imathiu had not signed it as per objection marked as annexure MNK 08.
6. Moreover, the applicant averred that the 1st respondent disregarded, shrugged off his evidence and failed to consider that the interested party had never been in possession or occupation of the suit land, unlike him who had immense developments on the suit land, causing him and his family to be rendered destitute, homeless and suffer great prejudice, loss, and damage.
7. The notice of motion was served upon the respondents on 11.1.2023, and a return of service was filed on 16.1.2023. On 17.1.2023, this court granted leave to the respondents, 14 more days to file a response. The orders were again extended on 21.3.2023 to another 7 days.
8. As of 16.5.2023, the respondents had not complied with filing either a response or any written submissions. The court also expunged a further affidavit by the exparte applicant from the court record, which should have been filed by 28.3.2023.
9. The interested party opposed the notice of motion by a replying affidavit sworn on 17.3.2023 by Humphrey Kubai M'Mwireria. He termed the notice of motion as full of falsehoods, misinformation, misrepresentation, and short of disclosure of material facts. He averred that by a sale agreement dated 2.7.1996, he bought 70ft by 70ft from the late Kobia M'Imathiu, as a portion of Parcel No.3393 Kirindine Adjudication Section for Kshs.10,000/=, and was recorded as the owner and possessor of the land. He attached the sale agreement as annexure marked HKM "1".



10. The interested party averred that he eventually acquired another three acres out of the initial parcel of land vide sale agreements dated 19.10.1996 and 5.3.1997 for Kshs.39,000/=, which portions were later consolidated into and demarcated as Parcel No.6450. He averred that the deceased retained the original parcel number which, by another verbal agreement on 4.10.1999, he sold it to him at Kshs.12,000/=, as per a letter and an agreement dated 4.10.1999 and 6.10.1999, all produced as annexures marked HKM "2", "3", "4" & "5" respectively.
11. The interested party averred that every time he purchased a portion of the land from the deceased, he would immediately take vacant possession and occupation of the respective portion by putting up a fence and commencing cultivation. It was the interested party's averment that the adjudication section was later subdivided in Kirindine "D" & "B," and his land assumed a new Parcel No.3416, while Parcel No.3393, which had not yet been transferred to him became Parcel No.2447. His evidence was that he continued to exclusively, openly, and uninterruptedly possess or occupy the purchased parcels of land even after the seller passed on in 2014, without any complaints or objections at either the committee, arbitration board, or adjudication register objection stages.
12. The interested party averred that sometime in 2016, the exparte applicant, one Peter Tuta, and other persons allegedly trespassed into his suit parcels of land, forcibly occupied the same, and committed acts of destruction, alleging to be the rightful owners of the land. He averred that he sought the intervention by the area District Commissioner and the District Land Adjudicator and settlement officer as per summons annexed as HKM "6". The interested party averred that efforts to trace the land Parcels No.2448 and 1458, allegedly claimed by the exparte applicant and one Peter Tuta in both the adjudication map and or on the ground, were fruitless as per the map marked as an annexure HKM 14 "(b)".
13. The interested party averred that he wrote a letter dated 10.11.2016 to the District Land Adjudication and Settlement Officer (DLASO) regarding the interference of his land by the exparte applicant, which was replied to by a letter dated 5.3.2018 and a map attached as annexure HKM 8 (a) & (b), showing that he was the rightful recorded owner, only for an AR objection no. 28 and 28 (7) to resurface two years later as per annexures marked HKM 9 (a) & (b). He averred that the objections were determined on 7.11.2018 in favor of the applicant hiving off 2 acres of his land Parcel No. 3416 as parcel No. 2448. The interested party averred that he filed a Minister's appeal as per the letters dated 12.11.2018 and 12.11.2018, and the grounds of appeal attached as an annexure marked HKM 10 (a) (b) & (C).
14. The interested party averred that after the objections, the applicant once again started interfering with his land, including the one that the deceased had not yet transferred to him, in an attempt to take up possession, of which the DLASO wrote a letter dated 13.12.2018 marked as annexure HKM "11" informing the disputants of the pending Minister's appeal, which was ignored by the applicant prompting him to file Maua CM ELC No. 30 of 2019 as per annexure marked MNK 08 in the applicant's affidavit. The interested party averred that the trial court granted orders for the maintenance of status quo as per annexure marked HKM "13" and a DLASO letter to the OCS Maua dated 28.9.2021 annexed as HKM 14 (a) & (b).
15. The interested party averred that due to the preliminary objection raised by the exparte applicant at the trial court, he opted to proceed with the Minister's appeal. He averred that he had filed within the time and the same was served upon the applicant, who participated fully in the proceedings and never objected on account of non-service with the grounds of appeal or raised any objections as per the proceedings marked as annexure No. HKM "15". He termed the 1st respondent's right to call witnesses to make appropriate directives, and the decision, as within its powers and jurisdiction. Further, the interested party termed the decision as within the statutory powers of the 1st respondent, who took



into account, analyzed, and considered all the evidence adduced by the parties and reached a valid legal, lawful, and binding decision. Lastly, the interested party averred that the judicial review process was not concerned with private rights or the merits of the decision being challenged but with the decision-making process. In this case, the interested party averred that the exparte applicant had received fair treatment and was heard by an authorized officer who determined the appeal in line with the law. He urged the court to dismiss the notice of motion.

16. The court has carefully looked at the notice of motion, the interested party's response, and the annexures. The issues calling for the court's determination are:-
 - i. If the appeal to the Minister was filed within the statutory period of 60 days.
 - ii. If the Minister heard and determined the appeal within the law.
 - iii. If the notice of motion herein has merits.
 - iv. What is the order as to costs?
17. The exparte applicant, in paragraphs (b), (e) of the statement of facts, averred the appeal to the Minister was filed out of time. He averred that the A/R objection No. 28 was heard and determined on 7.4.2018. Annexure marked MNK – 03 & 05 were the proceedings before the Land Adjudication Officer. The interested party attached the same as annexure marked HKM (a) & (b). Therefore, an aggrieved party to the decision had to file a Minister's appeal 7.6.2018. Annexure marked HKM 10 (a) & (b), dated 12.11.2018 referred to an objection heard on 11.9.2018 and determined on 7.11.2018. Annexure marked HKM 10 (c) was the appeal to the Minister. It lacked the date when the appeal was made, received, and or paid for. The receipts for the payment of the appeal were lacking. There was no stamp from either the DLASO or the Minister. The particulars of the decision sought to be appealed against, were indicated as an A/R No. 18 heard on 11.9.2018 and determined on 7.11.2018 regarding Parcel No's. 2448 Kirinidne "B" Adjudication Section.
18. Annexure marked HKM 1 (c) has no official stamp on when the appeal was filed. The ground of appeal attached thereto were not dated or stamped by the receiving authority. The annexure marked HKM "15", the Minister's decision did not show when the appeal was filed and allocated the Minister's appeal No. 68 of 2019. If the appeal was filed in 2018, one wonders why it was assigned a Minister's number for the following year.
19. The oral witness statement made by the exparte applicant as per annexure No. HKM "15", during the appeal hearing, did not mention when the A/R decision he was appealing against was made in 2018 and the date that he had lodged and served both the appeal and the grounds of the appeal. Similarly, the 1st respondent in his findings and verdict did not establish, as a matter of fact, the exact decision that the interested party was appealing against. Annexure marked HKM "(12) (a)" was a consent to sue issued by the DLASO dated 19.1.2019. It was silent on whether there was a pending appeal to the Minister concerning Parcel No.2448.
20. The interested party averred that his appeal was filed within time. He has failed to substantiate such fact(s) through the payment receipts for the appeal fees and the received copies thereof. The respondents also failed to reply to the notice of motion and exhibit the appeal per any register of Ministers in line with Section 29 of the *Land Adjudication Act*.
21. In *Republic v Ministry of Lands & Settlement & 3 others exparte Kahareri Buri Karugu* (2019) eKLR, the court observed that Section 29 of the *Land Adjudication Act* specified how an appeal should be filed to the Minister. The certificate of payment of the appeal and the receipt for the fee are lacking in the instant case matter, unlike in the *Exparte Kahareri Karugu* case (*supra*).



22. In *Republic v Cabinet Secretary, Ministry of Land and Physical Planning and others exparte John Mbiri Njagi & Joseph Kaguura* (2021) eKLR, the court held that an appeal which had been filed nine years after the DLASO's decision was out of time. The court observed that Judicial Review proceedings also included ensuring that statutory or public bodies do not exceed the powers on procedure and substance as stipulated by the statute.
23. The 1st respondent was mandated to hear appeals properly before it under Section 29 of the *Land Adjudication Act* (Cap 284). The 1st respondent had no powers to hear, determine or admit an appeal lodged outside the statutory period of 60 days. In accepting, admitting and hearing a statute-barred appeal over an undefined decision that was not before it, the 1st respondent acted illegally, and unprocedurally. The interested party has not attached any decision which was made by the DLASO dated 23.8.2018, 11th & 12th.9.2018 or determined on 7.11.2018. The Minister's decision dated 9.6.2022 was silent on the A/R Objection made on 7.4.2018.
24. In the *Republic v Minister for Lands and Housing & another Exparte Kipkore Koilege* (2012) eKLR, at issue was whether a failure to object to the appeal as time-barred before the Minister was fatal. The court observed that the burden of proof was on the exparte applicant to establish when the land adjudication officer's decision had been made so that the burden would then shift to the interested party to show that the appeal was lodged on time.
25. In this matter, the exparte applicant and the interested party parties have attached the decision by the Land Adjudication Officer leading to the Minister's appeal as annexures marked MNK 05 and HKM 9 (a), respectively. The copy by the exparte applicant has a date of 7.4.2018 while the one by the interested party has no date. The former was certified while the latter was not. It was, therefore, incumbent upon the interested party and the respondents to show that the appeal against a different decision, other than this one dated 7.4.2018 and dated 7.11.2018. The burden is on those who stand to lose if a particular fact is not proved before a court of law. Without any contrary evidence, the Minister's appeal was filed out of time and without leave. My position is fortified by the case of *Jasper Maluki Kitavi v Minister of Lands and Settlement* (2017) eKLR. In this matter, the interested party and the respondents failed to disclose such facts yet they were within their knowledge was lodged regarding which decision was being appealed before the Minister and whether the appeal had been filed on time.
26. In *Pastoli v Kabale District Local Government Council & 8 others* (2008) 2E.A 300, the court held that an applicant to succeed in judicial review has to show that the decision or the act complained of was tainted with illegality, irrationality, and procedural impropriety. The court observed that illegality was when the decision-making authority committed an error of law and fact without jurisdiction or acted ultra vires. Further, the court observed irrationality was where there was such gross unreasonableness in the decision taken or act done that no reasonable authority would have made such a decision contrary to logic and to acceptable moral standards. Additionally, the court said procedural impropriety was when there was a failure to act fairly, and lastly, unfairness was when there was non-compliance with the rules of natural justice.
27. In this matter, the applicant faulted the Minister for hearing a time-barred appeal, allowing fresh evidence to be adduced and relying upon it to reach the impugned decision. In *Republic v Minister for Lands and Others* (1988) eKLR, the court observed that the decision appealed against must accompany the form filed by the appellant to the Minister, including all the maps as per Regulation 4 (1) of the *Land Adjudication Regulation*. As to the Minister's mandate, the court observed that since it was the legal authority to determine questions affecting the subjects' rights, it had a duty to act judicially and within its jurisdiction. The court said that the Minister's decision could not be faulted in the absence



of any evidence of acting ultra vires, on error of law, breach of rules of natural justice, fraud, collusion, or perjury.

28. In *Timotheo Makenge v Manunga Ngochi* (1979) eKLR, the court held that the Minister was bound to act according to the law and that the failure to ascertain the previous court's decision made the decision wrong in law. The court observed that under Section 29 *Land Adjudication Act*, the Minister was bound to determine the appeal and make such an order as he thought just, but must make a thorough inquiry since he was the final arbiter under the Act.
29. Article 50 (2) of *the Constitution* grants every person a right to a fair hearing. See *Robert Muli Matolo v Director of Land Adjudication & others* (2014) eKLR. In *Matwanga Kilonzo v DC Kitui & another* (2021) eKLR, the court observed that just like in an appellate court, a Minister may not take fresh evidence while dealing with the appeal unless for purposes of clarifying specific issues. See also *Maingi v Kyumbu and other* (2022) KEELC (KLR) 27th July (2022).
30. In *Republic v Special District Commissioner and another* (2006) eKLR, the court observed that the Minister had to determine the dispute in the appeal between the parties as constituted in the specific written grounds delivered under Section 21 (1) (a) of the *Land Adjudication Act*, whose substantive evidence would be in the proceedings, which would have taken place before the Land Adjudication Officer being in the form of an objection under Sections 26 of the Act. The court observed that the Minister had to examine the written grounds of appeal alongside the land adjudication officer's proceedings, judgment, ruling, or award and make a just order or judgment. The court said that Section 29 (1) of the Act did not authorize the Minister to take fresh evidence before he arrived at his decision. The court cited with approval *Mabaja v Kbutwalo* (1983) KJLR 553, that a Minister had to record the evidence systematically and exhaustively, including that of a site visit; otherwise, there would be an error in the face of the record requiring a correction through orders of *certiorari*. Additionally, the court said that the written grounds of appeal formed an integral part of the appeal process, which the Minister could not wish away.
31. In the proceedings before the Minister, it is apparent that the grounds of the appeal were not considered sequentially and systematically. The 1st respondent did not explain why he had differed with the land Adjudication officer's findings. He did not give credence to the entire record, from the demarcation map to the award by the Land Adjudication Officer. The Minister did not state why he believed or disbelieved the parties. The basis for calling for fresh evidence and whether it was subjected to any forensic examination was not clarified.
32. Consequently, I make a finding that the decision made on 9.6.2022 was based on an incompetent and unmerited appeal. The same is hereby brought before this court and quashed with costs to the applicant.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 26TH DAY OF JULY 2023**

In presence of

C.A John Paul

Nyaga for applicant

Mbaikyatta for respondent

Maranya for interested party

HON. CK NZILI



ELC JUDGE

