



**Republic v District Commissioner (Acting as a Delegate of the Minister); Obonyo (Interested Party); Ombeng (Suing as the Legal Administrator and Representative of the Estate of the Late Walter Ombeng Okello) (Exparte Applicant) (Environment and Land Judicial Review Case 3 of 2021) [2023] KEELC 19952 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19952 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 3 OF 2021**

**AY KOROSS, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DISTRICT COMMISSIONER (ACTING AS A DELEGATE OF THE  
MINISTER) ..... RESPONDENT**

**AND**

**MARTIN OLOO OBONYO ..... INTERESTED PARTY**

**AND**

**JOSEPH OBONYO OMBENG (SUING AS THE LEGAL ADMINISTRATOR  
AND REPRESENTATIVE OF THE ESTATE OF THE LATE WALTER OMBENG  
OKELLO) ..... EXPARTE APPLICANT**

**JUDGMENT**

**Ex Parte Applicant's Case**

1. Vide a notice of motion dated 24/02/2023, the ex parte applicant sought from this court the following judicial review orders and other orders: -
  - a. That there be an order of certiorari to move this Hon. Court to set aside the decision of the respondent made on 12/11/2020 in respect of land parcel no. Nyangoma/Uyawi/2410 adjudication section in a dispute between the ex parte applicant and interested party.



- b. That there be an order of mandamus compelling the respondent to award the parcels of land to the estate of Walter Ombeng Okello (deceased).
  - c. That there be an order of prohibition directed at the respondent prohibiting him from implementing the decision made on 12/11/2020 in whatever manner through the Land Adjudication and the Chief Land Registrar or any other person acting in that behalf in respect of Nyangoma/Uyawi adjudication section 2410.
  - d. That costs of the application be borne by the respondent.
2. The motion was supported by the affidavit of Joseph Obonyo Ombeng sworn on 24/02/2023 who substituted Walter Ombeng Okello(‘deceased’) who died in the course of these proceedings. It was also supported by the statutory statement and verifying affidavit of the deceased in support of the chamber summons application for grant of leave dated 11/05/2021.
  3. The motion was founded on the following grounds which were a reiteration of grounds contained in the deceased’s statement of facts;
    - a. The minister exceeded jurisdiction conferred to him by Section 29(1) of the Act by entertaining fresh verbal evidence from the parties.
    - b. The minister failed to appreciate the interested party was only interested in beach plots.
    - c. The minister exceeded jurisdiction conferred by entertaining the appeal without records from the objection proceedings.
    - d. The respondent acted unprocedurally by overlooking the deceased’s grounds of appeal.
    - e. The minister ignored evidence and proceedings that emanated from the arbitration board.
    - f. The minister failed to consider the previous records since the original records could not be traced.
    - g. The minister considered extraneous evidence and failed to appropriately analyse the evidence.
    - h. There were procedural errors in the adjudication and appeal process.
    - i. The minister acted ultra vires of powers conferred to him by the Land Adjudication Act by conducting the appeal with procedural irregularities and considered extraneous factors.
  4. In brief, it was ex parte applicant’s case the deceased was allocated plot number 2405 Nyangoma/ Uyawi adjudication section on 26/02/1987; a beachfront piece of land. Gilbert Ongoro Midiwo (‘Gilbert’), interested party and Barnabas Omolo Ogoye (‘Barnabas’) lodged appeals to the district land adjudication committee (‘LAC’); they were successful.
  5. The deceased preferred an appeal to the arbitration board (‘AB’). However, by this time, the interested party had subdivided the land and portions were allocated as follows: Oranya Aroko was allocated land parcel no. 2410, the interested party was allocated land parcel nos. 2407, 2712 and 2713 and land parcel no. 2405 was allocated to Gilbert. Despite inquiries from the ministry of lands on how the subdivisions were conducted, none was forthcoming.
  6. The AB’s proceedings were not tendered before this court and the proceedings referred to by the ex parte applicant as AB’s appeal nos. 62, 63 and 64 were actually appeals he made to the Land Adjudication Officer (‘LAO’). In them, his appeal was dismissed which culminated to his appeal to the minister being appeal no. 237 of 2007.



7. After receiving summons on 10/11/2020, the appeal was eventually heard on 12/11/2020. The respondent rendered his decision on the instant date. The ex parte applicant contended the proceedings given to him by the respondent did not have previous records hence he strongly believed the respondent did not scrutinize previous proceedings when considering the appeal and arriving at his decision.
8. The ex-parte applicant remitted several documents to this court including the decisions of LAC and LAO, grounds of appeal to the respondent, summons, proceedings before the respondent and respondent's judgment.

#### **Respondent's case**

9. Despite service, the Office of the Attorney General did not participate in these proceedings.

#### **Interested party's case**

10. The interested party opposed the motion and filed a replying affidavit that he deposed on 16/05/2023. In summary, he reshaped the proceedings before various appellate bodies as provided for in the [Land Adjudication Act](#) which was similar to those alluded to by ex parte applicant.
11. However, he alluded AB's decision recommended land parcel no. 2405 be subdivided since the interested party's father had allocated a portion of it for purposes of tsetse fly control.
12. In the subdivisions, land parcel no. 2405 was left to the deceased, the tsetse fly control camp was given land parcel no. 2409 and the interested party retained land parcel nos. 2407 and 2712.
13. It was the interested party's position the proceedings before the respondent were above board and followed the laid-out process. Summons were issued to the parties, proceedings were conducted in accordance with the provisions of Section 29 of the [Land Adjudication Act](#), both parties adopted their respective statements and he reasonably believed the respondent considered all evidence.
14. The AB's proceedings that were tendered by the interested party appeared to be on entirely different appeal. They were irrelevant to the matter in dispute.

#### **Ex parte applicant's written submissions**

15. His counsel, Mr Nyanga, filed his submissions dated 14/03/2023. Relying on the case of Municipal Council of Mombasa v Republic & another [2002] eKLR and Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, counsel submitted in judicial review proceedings, the court is only concerned with the process leading to the decision and judicial review orders were remedies by superior courts against public bodies forbidding them from acting in excess of jurisdiction or acting against the law.
16. Counsel submitted courts were concerned with whether a decision was tainted with illegality, irrationality and procedural impropriety and to buttress his position, he cited the persuasive decision of Pastoli vs. Kabale District Local Government Canal & others [2008] 2EA 300 which stated: -

“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.”



17. On prohibition, counsel cited the case of Kuria & others vs. the Attorney General [2002] 2 KLR 69 where the court held that: -

“Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings.”

18. It was counsel’s submission that the rules of natural justice were not observed as the respondent entertained new evidence at the appellate stage. In addition, when hearing the appeal, the minister did not have all the evidence from previous proceedings. Counsel prayed that the order of prohibition be granted.

19. On mandamus, counsel submitted that an order of mandamus would issue compelling a person or body which had failed to perform their duty to perform it. Counsel placed reliance on Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji (Supra).

### **Interested party’s written submissions**

20. His counsel, Miss Machuka, filed submissions dated 16/05/2023. She identified 3 issues for determination; (a) whether the respondent exercised its statutory duties as envisaged in law (b) whether the ex parte applicant was entitled to judicial review reliefs sought and, (c) who should bear costs.

21. On the 1<sup>st</sup> issue, counsel submitted the Land Adjudication Act had a comprehensive grievance system including an appeal to the respondent in accordance with Section 29. According to counsel, the respondent followed all due process including issuing a hearing notice and hearing the parties.

22. Counsel submitted the ex parte applicant’s grounds were unsubstantiated inter alia; he failed to disclose which new evidence the respondent considered, had failed to substantiate his allegation the respondent did not have possession of previous records, did not demonstrate the respondent’s proceedings were tainted with procedural impropriety, or that the respondent abused his power or acted ultra vires.

23. She submitted that from the respondent’s proceedings, the respondent had in his possession previous records. Counsel submitted in accordance with Section 108 of the Evidence Act, the ex parte applicant had the burden of discharging his case. Counsel relied on M’Bita Ntiro vs. Mbae Mwirichia & another [2018] eKLR

24. On the 2<sup>nd</sup> issue, it was counsel’s submission the ex parte applicant had failed to prove that there was illegality, irrationality and procedural impropriety in the respondent’s decision as espoused in the case of Pastoli vs. Kabale District Local Government Council (Supra) which was cited with approval in Zachariah Wagunza & another vs. Office of the Registrar, Academic Kenyatta Univeristy & 2 others [2013] eKLR.

25. Counsel also relied on the case of Republic vs. Director of Immigration Services & 2 others ex parte Olamilekan Gbenga Fasuyi & 2 others [2018] eKLR which held: -

“Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a Court will not interfere.”

26. Counsel submitted that according to Halsbury Law of England 4<sup>th</sup> edition Vol 1 (1) para 12 page 270, judicial review orders were discretionary. On the 3<sup>rd</sup> issue, counsel sought for costs.



## Analysis and determination

27. I have considered parties' pleadings and submissions including the well cited authorities and I concur with them. I find the following 4 issues fall for determination: -
- a. Whether the prayers sought in the substantive motion were competent.
  - b. Whether the respondent acted ultra vires his powers under Section 29 of the [Land Adjudication Act](#).
  - c. Whether the respondent's proceedings were conducted with procedural impropriety.
  - d. What orders should this court issue.

## Whether the prayers sought in the substantive motion were competent

28. Having reviewed the prayers sought in the substantive motion vis a vis those sought in the chamber summons application for leave dated 11/05/2021, a pertinent issue emerged that may dispose of the motion. Order 53 Rule (1) of the Civil Procedure Rules provides that:

'(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.'

Whereas Rule 3(1) thereof stipulates;

'3. Application to be by notice of motion [Order 53, rule 3.]

(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.'

29. Earlier in this judgment, the court highlighted the judicial review prayers the ex parte applicant had sought in the notice of motion; they were in respect of Nyangoma/Uyawi/2410 which allegedly belonged to Oranya Aroko and not the interested party. Oranya Aroko has never been a party in these proceedings.
30. In his application for leave the ex parte applicant sought the following prayer which was granted by the court:

"That the court be pleased to grant leave to the applicant to apply for judicial review orders of certiorari, mandamus and prohibition in respect of the appeal decision of the minister that was issued in appeal no. 237 of 2007 in regards to land parcel Nyangoma/Uyawi 2407 and 2712 on 12.11.2020." Emphasis added.

31. The ex parte applicant has gone on a frolic of his own and introduced a new parcel of land to wit Nyangoma/Uyawi/2410 that belonged to a stranger and discarded the ones that were the subject for leave. This is a substantive issue and cannot be cured by Article 159(2) (d) of [the Constitution](#). Having brought himself within the purview of Order 53 of the Civil Procedure Rules, the ex parte applicant was bound to abide by the procedures set out therein.
32. The clear provisions of Order 53 Rules 1 and 3(1) of the Civil Procedure Rules limits the prayers sought in a substantive motion to those which leave was obtained. Any other prayer that was outside



this purview was incompetent and a nullity. Consequently, I hereby strike out prayers (a) (b) and (c) of the said motion. In this, I am guided by the persuasive decision of Aburili J in Republic v Chief Magistrate’s Court Nairobi Exparte Jeff Koinange & 11 others [2017] eKLR where the court stated;

‘In this case, prayers Nos. 2 and 4 of the amended notice of motion being for certiorari and mandamus are not grounded on any leave of court sought and therefore those prayers cannot stand in these proceedings. Accordingly, the two prayers are hereby struck out.’

33. Notwithstanding striking out the prayers has disposed of the motion save on the issue of costs. I will address my mind on the merits of the motion.

**Whether the respondent acted ultra vires his powers under Section 29 (1) of the Land Adjudication Act.**

34. The jurisdiction of the minister to hear an appeal is set in Section 29 of the Land Adjudication Act and subsection (1) thereof provides;

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

- (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
- (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

35. As rightfully submitted by both counsels, the purview and scope of judicial review proceedings is not to consider the merits of the case but to look at the process. This role of the court in such proceedings was well explained in the Court of Appeal decision of Municipal Council of Mombasa v Republic (Supra) as follows: -

“That is the effect of this Court’s decision in the Kenya National Examination Council case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. 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.”

36. By alleging the respondent’s decision was ultra vires, the ex parte applicant was invoking the judicial review ground of ‘illegality’. In other words, by considering fresh evidence and extraneous factors, the respondent had failed to give effect to Section 29 (1) of the Land Adjudication Act.



37. To substantiate his allegations, the ex parte applicant contended the interested party's son who was a stranger was allowed to testify before the respondent and when he sought for proceedings, the respondent issued him proceedings in respect of the appeal and not those in respect of LAC, AB and LAO.
38. Having scrutinized the proceedings and decision of the respondent, there is no evidence the interested party's son testified; the only witnesses were the deceased and the interested party. That is to say, no new evidence or extraneous factors were considered. This court has also not come across a letter by the deceased requesting for proceedings.
39. The respondent had jurisdiction to hear and determine the appeal in accordance with Section 29 of the *Land Adjudication Act*. The available evidence points to the fact that the respondent understood the law, issued notice to the parties, heard them and rendered its decision and did not run afoul with the law. Had I not struck out the motion, I would have found the allegation of illegality was not proved.

**Whether the minister's proceedings were conducted with procedural impropriety.**

40. The decision of Council of Civil Service Unions vs. Minister for the Civil Service (1985) A.C. 374,410 which was cited with approval in the case of Republic v Ministry for Agriculture, Livestock, Fisheries and Irrigation; Agriculture and Food Authority & another (Interested Parties) Ex parte Susan Wanjiku & 80 others [2021] eKLR defined the term 'procedural impropriety' as follows: -

“I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

41. The ex parte applicant was of the position the respondent did not consider all evidence since he did not have previous records while the interested party was of the contrary view. This calls upon this court to scrutinize the respondent's proceedings and judgment in order to ascertain the position.
42. In his decision, the respondent was categorical he only considered two records of appeal that of the AB and LAO. In his findings he stated;

‘Having reviewed the proceedings of the arbitration, (sic) board and objection, I find that their awards were fairly arrived.’

43. The complaint mechanism in the *Land Adjudication Act* is elaborate. It commences with LAC where an aggrieved party can challenge a recording. See Sections 20, 21 and 22. If one was dissatisfied with the decision of LAC, he would appeal to LAB. See Sections 21 and 22. The section would then be published as complete. The publication would be displayed for inspection by various land owners. Any objection to the register would be raised and determined by LAO. See Section 26. A final appeal would be made to the minister. See Section 29.
44. The proceedings and decision from LAC triggered the various appeals resting with the appeal before the respondent. It was a significant record and formed a relevant factor to be taken into account by the respondent in considering and arriving at his decision. See Municipal Council of Mombasa v Republic



45. It was not tenable for the respondent to consider the decision of the AB which was an appeal from LAC without first considering the evidence, proceedings and decision from the LAC.
46. The respondent was obliged not to proceed with the hearing and determination of the appeal until after his record was complete and he could do so by calling for the record and or reconstructing his file. The ex parte applicant has tendered LAC's proceedings before this court meaning a copy of it is available. Had I not struck out the substantive prayers sought in the motion, it would have been my finding the respondent acted with procedural impropriety.

**What orders should this court issue.**

47. For the foregoing reasons and findings, I hereby strike out the motion. It is trite law costs follow the event and I hereby award the interested party costs which shall be borne ex parte applicant. Ultimately, I hereby issue the following disposal orders: -
  - a. The notice of motion dated 24/02/2023 is hereby struck out.
  - b. Costs are awarded to the interested party which shall be borne by the ex parte applicant.
48. It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**21/9/2023**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Miss. Machuka for the interested party

Mr. Nyanga for the exparte applicant

Court assistant: Mr. Ishmael Orwa

