



Republic v Homa Bay Land Registrar & 2 others; Odhiambo & another (Exparte); Odhiambo (Interested Party) (Judicial Review 3 of 2022) [2023] KEELC 20920 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20920 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
JUDICIAL REVIEW 3 OF 2022
GMA ONGONDO, J
OCTOBER 24, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

HOMA BAY LAND REGISTRAR 1ST RESPONDENT

MBITA RESIDENT MAGISTRATE COURT 2ND RESPONDENT

LAND ADJUDICATION OFFICER, HOMA BAY 3RD RESPONDENT

AND

DEBORA OKELO ODHIAMBO EXPARTE

JOPLEY C OYIENG' EXPARTE

AND

TOM KWALA ODHIAMBO INTERESTED PARTY

JUDGMENT

1. By a notice of motion application dated March 1, 2023 and filed on even date, the *ex parte* applicants who are acting in person, are seeking the orders infra;
 - a. An order of *certiorari* directed to the Mbita Resident Magistrate's. Civil Case No. 6 of 2016 to be moved into this court to quash the entire proceedings therein, including the ruling dated January 25, 2022 and subsequent processes thereafter.
 - b. (i) An order of *mandamus* directed to Homa Bay Land Registrar to expunge the name of Tom Kwala Odhiambo from land parcel number Lambwe West B878 (the suit land herein).



(ii) an order of *mandamus* directed to Homa Bay Land Adjudication Officer to expunge the name of Tom Kwala Odhiambo from the suit land.

- c. The cost be provided for.
2. The application is anchored on the statement accompanying the chamber summons application for leave dated April 19, 2022 and the verifying affidavit sworn on even date by Deborah Okello Odhiambo, the 1st *ex parte* applicant herein and the accompanying documents, *inter alia*, adjudication record relating to plot number Lambwe West B/878 and the proceedings together with the decision of the Land Adjudication Officer dated June 28, 1993 in respect of objection numbers 659 and 660 pertaining to plot numbers Lambwe West B/1629 and 878.
 3. The applicants lament that the 1st applicant jointly bought the suit land with her spouse, Jacob Gideon Odhiambo- deceased. That following his demise, the suit land was registered in the name of the 1st *ex parte* applicant and Tom Kwala Odhiambo. That the said Tom Kwala, who is a step son to the 1st *ex parte* applicant herein, had already been allocated a separate parcel of land. That therefore, the 1st *ex parte* applicant ought to have been registered as the sole owner of the suit land. That further, the Land Adjudication officer ought to explain why he included Tom Kwala as co-owner of the suit land, without giving the 1st *ex parte* applicant herein the reasons for that decision and without exercising the rules of natural justice.
 4. Despite service being effected as indicated in the affidavits of service dated March 24, 2023 and May 4, 2023, the respondents did not file any response to the application.
 5. On June 7, 2023, the court directed that the instant application be heard by way of written submissions.
 6. Consequently, the applicants filed submissions dated June 14, 2023 on even date. They submitted that since the adjudication officer had assigned title to the suit land to the 1st *ex parte* applicant, the same cannot be challenged. That the magistrate's court was *functus officio*. Reliance was placed on various authorities including the case of the *Queen v Gillyard* 9 [1948] 12 QB 527, to buttress the submissions.
 7. I have carefully studied the entire application and the *ex parte* applicants' submissions. In that regard, have the applicants established their case for the grant of the orders sought in the application?
 8. It is noteworthy that the *ex parte* applicants initiated the application with leave of the court pursuant to order 53 rule 1 of the [Civil Procedure Rules, 2010](#) which reads;

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”
 9. Notably, even if the application was originated outside the timelines set under order 53 (*supra*), the scope of judicial review is no longer confined to the said order or under the [Law Reform Act](#). It is now also entrenched in the [Constitution of Kenya](#), 2010 and the [Fair Administrative Action Act](#), 2015 which are envisioned in “all other enabling provisions of the law” as stated on the face of the present application.
 10. This court is aware of the property in dispute and proprietor's rights and interests as provided for in sections 24, 25, 26 and 28 of the [Land Registration Act](#), 2016 (2012). More fundamentally, I am conscious of the protection of right to property under article 40 (1) of the [Constitution of Kenya](#), 2010.



11. It is common ground that at the heart of the instant application is the decision by the Land Adjudication Officer to include Tom Kwala Odhiambo as co-owner of the suit land. That no reasons were proffered for the said decision.
12. The applicants further contend that the suit in Mbita Resident Magistrate's Court Civil Case No. 6 of 2016 was not heard to conclusion but was dismissed for non-attendance. As regards the said suit, the applicants did not avail any records to buttress their assertion. Thus, an order of certiorari is not available in the circumstances.
13. Article 47 of the Constitution provides for the right to fair administrative action. That every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, among others. This provision is operationalized by, *inter alia*, sections 3(b) and 4 (1) of the Fair Administrative Action Act, 2015.
14. In the Adjudication record presented by the applicants in court and dated June 28, 1993, objection number 660 was allowed and the name of Tom Kwala Odhiambo was added as a co-owner of the suit land. The said objection was lodged by the 1st *ex parte* applicant herein.
15. In the proceedings attached to the adjudication record and which bear the 1st *ex parte* applicant's thumbprint, it is indicated that it is in fact the 1st *ex parte* applicant herein who was emphatic that the suit land be transferred to Tom Kwala Odhiambo. She stated thus:

“... the other plot no. 878 (the suit land herein) should be transferred to Tom Kwala Odhiambo who is the son of the deceased's first wife...”
16. It is therefore, quite baffling for the 1st applicant to assert that no reasons were given for the said decision, yet she is in fact the one who requested for inclusion of Tom Kwala Odhiambo as a co-owner of the suit land. Notably, the 1st applicant has not denied lodging objection no. 660 with the Land Adjudication officer nor has she disputed the contents of the proceedings therein.
17. In Peter Kaluma's book, Judicial Review, Law Procedure and Practice at page 46, it is stated that:

“The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision making process and the legality of the decision making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely in Judicial review the court's exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for that of another body, as happens in appeals, the court in an application for judicial review is concerned with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed.” (Emphasis added).
18. As I held in Johnson Otieno Adera v Lucas Angonga & another [2020] eKLR, the courts and tribunals as provided for under article 159 (1) of the Constitution, have a duty to hear the parties on matters before them. This ensures that the *audi alteram partem* rule (right to be heard) is not violated as noted in Re-Hebtulla Properties Ltd [1976-80] 1 KLR 1195 at 1209 and James Kanyita Nderitu and another v Marios Philotas Ghikas and another [2016] eKLR.
19. So, did the Land Adjudication Officer properly discharge his duties and follow due process to arrive at the decision of June 28, 1993 in the manner required by law and guided by the principles enshrined in articles 48 and 50 of the Constitution?



20. Article 47 of the Constitution as read with section 4 of the Fair Administrative Action Act, 2015, prescribe the right to be given written reasons for administrative actions and decisions. In the instant application, the Land Adjudication Officer accorded the 1st ex parte applicant an opportunity to be heard before granting her request, which decision was reduced in writing.
21. It is therefore, this court's considered view that the Land Adjudication Officer followed due process in arriving at the said decision. Thus, the 1st applicant's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as enshrined under article 47(1) of the Constitution (*supra*), was not contravened.
22. This court is cognizant of the provisions of section 7 of the Limitation of Actions Act, chapter 22 Laws of Kenya which provides thus:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
23. The cause of action arose in the 1993 yet the instant application was filed in 2022. Clearly, the period of twelve years had lapsed. Therefore, the instant claim is time-barred.
24. In the foregone, it is the finding of this court that the application is incompetent and unmeritorious.
25. Wherefore, the application dated March 1, 2023 and lodged herein on even date, be and is hereby dismissed with no orders as to costs.
26. Orders accordingly.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF OCTOBER, 2023.

G M A ONGONDO

JUDGE

Present

- 1. 1st ex parte applicant**
- 2. 2nd ex parte applicant**
- 3. Terrence, Court Assistant**

