



Kiplagat v Kiptoros & 3 others; Kiptoros (Interested Party) (Judicial Review Cause E001 of 2023) [2023] KEELC 22609 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
JUDICIAL REVIEW CAUSE E001 OF 2023**

L WAITHAKA, J

NOVEMBER 29, 2023

**IN THE MATTER OF LAND APPEAL TO THE MINISTER CASE NO.
261 OF 2020 SAGASAK ADJUDICATION SECTION PARCEL NO.653**

AND

**IN THE MATTER OF THE MATTER OF ARTICLES 23(3) (F), 40, 48, 50,
162(6), 159(2)(D), 165(6) AND (7) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE LAW REFORM ACT
SECTION 8 AND 9, CAP 26 LAWS OF KENYA**

BETWEEN

LUKA KIPLAGAT APPLICANT

AND

SAMMY KIPTOROS 1ST RESPONDENT

**DEPUTY COUNTY COMMISSIONER BARINGO CENTRAL SUB
COUNTY 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

BARINGO COUNTY LAND REGISTRAR 4TH RESPONDENT

AND

SAMMY KIPTOROS INTERESTED PARTY



JUDGMENT

Introduction

1. Pursuant to leave granted on 14th March 2023 to Luka Kiplagat, hereinafter referred to as the ex parte applicant, to apply for judicial review orders of Certiorari and Prohibition against the decision of the Deputy County Commissioner (DCC) Baringo Central Sub County made on 21st February 2023 in Appeal to the Minister Case No.261 of 2020, the ex parte applicant filed the notice of motion dated 17th April, 2023 and filed on an even date seeking:-
 - i. An order of certiorari to remove to this court for purpose of being quashed the proceedings and the decision of the DCC, Baringo Central (2nd respondent) in Appeal to the Minister Case No. 261 of 2020 dated 21st February 2021 in relation to land parcel No. 563.
 - ii. An order of prohibition prohibiting the respondents by themselves, their servants, employees, officers and any person acting under their instructions and control from taking any step, action and measures implementing or enforcing the orders and ruling contained in proceedings of appeal to the Minister case No.261 of 2020 issued on 21st day of February 2023 in relation to land parcel number 653;
 - iii. Costs of the application.
2. The application is premised on the grounds on its face and is supported by the affidavit of the ex parte applicant sworn on 17th April, 2013.
3. As can be discerned from the grounds on the face of the application and the affidavit sworn in support thereof, the application is premised on the grounds that the decision is tainted with illegality and error of law in that the 2nd respondent failed to take into account that one of the persons who had an interest in the suit property was deceased when the Appeal was heard and determined and that he was not represented in the Appeal and that some persons who had interest in the Appeal participated in the Appeal without declaring their conflict of interest as by law required thereby acting as prosecutors and judges in their own course contrary to law.
4. The application is opposed by the 2nd to 4th respondent vide the replying affidavit of John Ongalo Laku, sworn on 17th May 2023 on the grounds that the issue of illegality and law of succession was not raised in the proceedings before the Land Adjudication Officer (LAO) and the Minister, 2nd respondent; that all parties and their witnesses were heard before the impugned decision was made; that the issue of capacity or failure to adhere to the law of succession was not applicable to the process under Land Adjudication Act (LAA) and that the issue of declaration of conflict of interest by the interested party's witnesses does not arise because there was no land dispute between the parties to the Appeal before the land committee. Further, that the ex parte applicant did not raise any objection to the interested parties' witnesses before or during hearing of the Appeal; that no evidence has been tendered capable of demonstrating that the respondents violated the rules of natural justice; that the application offends the provisions of Section 29 of LAA as it seeks to appeal or challenge the merits of the decision of the Minister through the back door and that the application is outside the purview of judicial review as the applicant's case revolves around ownership of land parcel number 653 and not the decision making process.
5. The interested party through the replying affidavit he swore on 28th April 2023, depones that the application is fatally defective as it was filed outside the time provided under Order 53(3)(1) Civil



Procedure Rules; that all parties and their witnesses were accorded chance and opportunity to present their cases; that the impugned decision is based on evidence presented before the Minister; that the allegations of bias and impropriety are a mere afterthought, without any basis and/or evidence in support; that the alleged biasness was not raised in the Appeal proceedings and that he represented the deceased who was his brother in the Appeal in accordance with the provisions of Section 13 of LAA. Further, that the applicant did not raise any objection before the Minister concerning the representation of his deceased brother, John Keitany, and that the issues of locus standi and adverse possession raised by the ex parte applicant fall outside the purview of judicial review proceedings.

6. Like the 2nd, 3rd and the 4th respondents, the interested party contends that the issues raised in the application revolve on merits of the decision of the 2nd respondent as opposed to the process leading to the impugned decision.
7. The application was disposed off by way of written submissions.

Submissions

The Applicant's Submissions

8. In the applicant's submissions filed on 22nd September 2023, an overview of the applicant's pleaded case is given and submitted/ reiterated that the Minister's decision was tainted with illegality because despite being aware that one of the registered proprietor's of the suit property, John Keitany, was deceased, the 2nd respondent proceeded with the case without participation of the estate of the deceased and awarded the whole of the suit property to the appellant thereby leaving the deceased with no share; that the conduct of the Minister of proceeding with the Appeal despite the appellant's objection of the same on the ground that it was filed outside the 60 days provided in law for appealing and the Minister's failure to adjourn the Appeal until the estate of John Keitany was administered and taking into account that the appellant was the Minister's junior staff, exhibits bias in the process and the resultant decision.
9. Maintaining that the Minister's decision was ultra-vires, the applicant submits that the Minister did not follow the rules of natural justice yet he was bound to thereby acting ultra vires; that the decision of the Minister was irrational in the sense that the Minister ruled that the suit reverts back to the appellant without taking into account the interest of John Keitany (deceased) who according to the adjudication register was a co-owner of the suit property.
10. Terming the decision of the Minister unfair, the appellant submits that the Minister erred by granting the land to the interested party yet he had been living in the suit property since he was born.
11. It is the applicant's case that the decision of the Minister to proceed with the Appeal without representation of the estate of John Keitany resulted in miscarriage of justice as the decision rendered the dependants of John Keitany landless without giving them opportunity to be heard contrary to rules of natural justice; that the Appeal to the Minister was filed outside the time provided by law for filing an appeal to the Minister and without leave, making its filing unprocedural.
12. According to the applicant, failure by the Minister to demand for representation of the estate of John Keitany rendered the entire decision an illegality.

The Respondents Submissions

13. In the respondents' submissions filed on 21st September 2023, an overview of the applicant's pleaded case and the response by the respondents is given and two issues identified as the issues for determination by the court. These are:-



- i. Under what circumstances are judicial review orders of certiorari and prohibition granted?
 - ii. Whether an order of certiorari is the most efficacious relief to grant in the circumstances of this case.
14. On the first issue, reference is made to the case of *Council of Civil Service Unions v Minister for Civil Service* (1985) AC 374, where Lord Diplock set grounds for judicial review and submitted that in the circumstances of this case, the applicant has not met the grounds for judicial review. According to the respondents, the applicant's affidavit fails to concisely disclose that the impugned decision is illegal, irrational or procedurally improper.
 15. The respondents further submit that the issue of illegality and law of succession was not raised as it does not feature in the proceedings and ruling of the Minister; that there is no evidence that the applicant raised any issue of illegality and law of succession in relation to John Keitany (deceased), hence estopped from alleging the same after he lost the Appeal.
 16. On the issue of conflict of interest, it is submitted that the issue does not arise because the applicant did not file a case before the land committee.
 17. The 2nd to 4th respondents assert their contention that the 2nd respondent conducted the proceedings in accordance with Section 29 of *LAA* that the applicant failed to provide any evidence in support of allegations against the 2nd to 4th respondents.
 18. Maintaining that that the applicant's case revolves around ownership of land parcel number 653 as opposed to the decision making process, which falls outside the purview of judicial review, the respondents assert that the applicant has not made up a case for being granted the orders sought.
 19. The respondents have further submitted that all parties to the Appeal were accorded an opportunity to represent their respective cases rendering the Appeal proceedings as well as the decision fair, objective and procedural; that no evidence of illegality or conflict of interest has been disclosed as contended by the applicant and that the applicant has not shown that the impugned decision was made contrary to the law or that rules of natural justice were violated.
 20. The respondents urge the court to adopt the position taken by the court in the case of *Republic v District Land Adjudication and Settlement Officer Maara Sub County & 3 others; ex parte applicant M'nyiri ragwa; Njeru Kirika (Interested Party)* (2021) eKLR.

The Interested Party's Submissions

21. In his submissions, filed on 21st September 2023, the interested party has given an overview of the case urged by the applicant and his response and identified the following as the issues for the court's determination:-
 1. Whether the substantive motion was filed within the time limits prescribed?
 2. Whether the ex parte applicant deserves the orders sought?
 3. What is the order as to costs?
22. On issue No. 1, reference is made to Order 53 Rule 3(1) of the *Civil Procedure Rules* which provides that when leave has been granted to apply for an order of Mandamus, Prohibition or Certiorari, the application shall be made within twenty one days and submitted that the provision is clear on timelines within which to file the substantive motion.



23. It is pointed out that the instant application was filed 34 days after leave was granted and submitted that it was filed outside the time provided by law for filing it without leave of the court. Based on the decision in the case of *Republic versus Medical Laboratory Technologists Board ex parte Anastacia Ngithi Wahu & 177 other* (2017) eKLR among other cases, where the need to strictly comply with timelines given by law and the court is underscored, the court is urged to dismiss the application for having been filed outside the time provided by law.
24. On whether the applicant deserves the orders sought, it is submitted that the grounds taken up by the applicant do not demonstrate biasness or exceeding of jurisdiction on the part of the 2nd respondent and that the grounds do not give reasons for one to apply for judicial review.
25. Based on the decisions in the cases of *Municipal Council of Mombasa v Republic & another* (2002) eKLR, *Republic vs. Milimani, Commercial Court Chief Magistrate & another, ex parte AIG Insurance Co. Ltd* (2010) eKLR and *Republic v Land adjudication and Settlement Officer Tigania East & Another; David Thirinja (Interested Party) ex parte Silas Kaiyongi Mugambi* (2021) eKLR, it is submitted that the two grounds on which the ex parte applicant's application is premised are without basis because the 2nd respondent accorded all parties an opportunity to be heard and to call their witnesses, a fact attested by the proceedings; that the applicant did not bring to the attention of the 2nd respondent or raise any query pertaining the two issues he has taken up in the instant application; terming the issues raised by the applicant mere afterthought, the interested party maintains that the 2nd respondent followed due procedure/process in handling the Appeal and did not exceed his jurisdiction.
26. Regarding the contention that the 2nd respondent did not follow due process as stipulated under the law of succession when adjudicating the deceased's property, John Keitany, it pointed that the applicant filed an objection against the interested party only and submitted that he cannot turn around at this stage and purport to allege the legal representatives of John Keitany were excluded from the proceedings.
27. It is the case of the interested party that he represented the deceased, who is his brother, in accordance with the provisions of Section 13(1) (4) of *LAA*. Based on the decision in the case of *Republic V Minister for Lands & Another ex Parte, Perterson Thiga Mukora* 2013 eKLR; and *Mutwiri Vs. Land Adjudication Officer Ruiru/Rwarera Adjudication Section & Another; Stephen Makathimo M'mugambi & Another (interested party)* 2021 eKLR, it is submitted that in matters pertaining land adjudication, it is not necessary for a person appearing on behalf of the deceased to possess letters of administration in respect of deceased.
28. Regarding the contention that it was illegal for the chair and member of the land committee to act as witnesses, it is submitted that the contention is without basis as the ex parte applicant did not raise any concern before the Minister pertaining the said witnesses at all.
29. Reference is made to Section 14 of *LAA* that deals with issue of declaration of interest by committee members and submitted that the section is inapplicable to the circumstances of this case as the persons whose participation in the process is being challenged participated in the proceedings as witnesses and not as members of the committee.
30. On the contention that the Minister acted *ultra vires*, it is submitted that he acted within the powers he was seized of and followed the procedure laid down and upheld the principles of natural justice.
31. Arising from the foregoing submissions, it is submitted that the ex parte applicant has failed to demonstrate that the decision of the 2nd respondent is tainted with illegality, unreasonableness, impropriety or procedural unfairness and the court is urged to dismiss the application with costs.



Analysis and Determination

32. From the pleadings filed in this application, the documentary evidence adduced in support thereof, the submissions and the law applicable, I find the issues for the court's determination to be as follows:-
- i. whether the application is fatally defective for having been filed outside the time provided for under order 53 of the civil procedures rules;
 - ii. The legal propriety or otherwise of the proceedings before the Minister and the LAO?
 - iii. Whether an order of certiorari is the most efficacious remedy in the circumstances of this case;
 - iv. What order or orders should the court make?
33. On whether the application is fatally defective for being filed outside the time provided by Order 53 Rule (3)(1) of the Civil Procedure Rules, it is clear from the court record that the application was filed outside the time stipulated in Order 53 Rule 3(1) of the Civil Procedure Rules and without leave of the Court.
34. Although no explanation has been offered for the delay in filing the application for the purpose of according substantive justice to the parties, I will treat failure to file the main motion as a procedural defect that is curable under Article 159 of the Constitution and Order 51 Rule 6 of the Civil Procedure Rules. Accordingly, I find and hold that the defect does not render the application fatally defective or bad in law.
35. On legal propriety or otherwise of the proceedings before the LAO and the Minister, from the proceedings, affidavit evidence attached to the affidavits sworn in support and reply to the application, it is clear that neither the applicant nor the interested party strictly complied with the procedure provided under the LAA in pursuing their interests in the suit property. For Instance, whereas the suit property was demarcated in the name of the interested party sometime in 1985 or thereabout, the applicant did not challenge that action until sometime in 2016 or thereabout, many years after the land had been demarcated in favour of the interested party and his brother. I find the explanation offered by the applicant for failure to participate in the processes contemplated in the LAA like filing a Land Committee case to be not properly accounted for. I also find the procedure used by the LAO in hearing the objection filed by the applicant to have been flawed in that there is no proof of service of any summons on the interested party and how, if at all, the interested party was served with the summons to attend the case before the LAO. In the absence of any proof of service of Summons on the interested party, it is safe to conclude that the interested party was contemned unheard by the LAO.
36. It's trite law that any decision made against the rules of natural justice is a nullity in law.
37. It is not in dispute that the Appeal to the Minister was filed outside the time provided for in law for filing an appeal to the Minister. Whereas, the reason offered for none compliance with the timelines provided under LAA is plausible, it can nevertheless be a remedy to the fact that the Appeal was filed outside the time provided for in law, hence time barred. The question of time bar, renders the proceedings before the Minister tainted with procedural impropriety namely failure to adhere to the timelines provided in LAA for lodging an appeal to the Minister. Procedural impropriety being one of the grounds for judicial review, would in appropriate circumstances entitle an ex parte applicant the remedy of judicial review.
38. As to whether in the circumstances of this case the ex parte applicant has made up a case of being granted the orders sought, having determined that the decision by the LAO that formed the basis of the Appeal to the Minister was a nullity in law, I find it incapable of forming the basis of the orders sought.



The proceedings before the Minister, even though tainted with procedural impropriety in that the Appeal to the Minister was filed outside the time provided in law was the only opportunity the parties had to present their cases. I note from the proceedings that both parties were accorded by the 2nd respondent opportunity to present their case. The issue of biasness raised by the applicant was neither proved nor substantiated as the ex parte applicant had not filed any case before the land committee. The issue of conflict of interest by the interested parties witnesses would only have arisen if and if only the applicant had filed a case before the land committee.

39. On the issue of failure to take into account that the estate of John Keitany was not administered, the applicable law in particular Section 13 of the [LAA](#), did not require proof of administration of the estate of John Keitany before the Minister could proceed with the case before him. It is the view of this court that the estate was properly represented by the interested party. I hasten to point out, that if the ground of representation of the estate of John Keitany is a ground for vitiating the proceedings before the Minister, it would similarly form a ground for vitiating the proceedings before the LAO, which proceedings the applicant seems to be okay with yet he equally proceeded against the estate of John Keitany without representation.
40. In view of the foregoing and despite having determined that the Appeal to the Minister was tainted with procedural impropriety in that the Appeal was filed outside the time stipulated in the [LAA](#) for filing an appeal to the Minister, I decline to exercise the discretion vested in me in favour of the ex parte applicant and dismiss the application with costs to the respondents and the interested party.
41. Orders accordingly.

JUDGMENT READ, DELIVERED, DATED AND SIGNED AT KABARNET THIS 29TH DAY OF NOVEMBER, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

No appearance for the exparte applicant

Ms Odeyo for the respondent

Mr Kibii for the interested party

Court Assistant - Daisy

