



**Republic v Cabinet Secretary for Lands Housing and Physical Planning & 3 others;
Ngunyu (Exparte Applicant); Mutungi (Interested Party) (Environment and Land Judicial
Review Case E015 of 2022) [2023] KEELC 21733 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E015 OF 2022
TW MURIGI, J
NOVEMBER 15, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**CABINET SECRETARY FOR LANDS HOUSING AND PHYSICAL
PLANNING 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

**THE DEPUTY COUNTY COMMISSIONER, KILUNGU SUB-
COUNTY 3RD RESPONDENT**

**THE LAND ADJUDICATION OFFICER, NDUU ADJUDICATION
SECTION 4TH RESPONDENT**

AND

PRISCILLAR MINOO NGUNYU EXPARTE APPLICANT

AND

JAMES MAWEU MUTUNGI INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 28th October, 2022 brought under Order 53 Rules 3, 4, 5, 6 and 7 of the [Civil Procedure Rules](#) and Article 165(6) as read with (7) of the [Constitution](#) of Kenya, the *Ex-parte* Applicant seeks the following orders: -



1. That this Honourable Court be pleased to grant an order of *Certiorari* to remove into this Court and to quash the decision of the Deputy County Commissioner, Kilungu Sub-County, Makueni County dated 30/06/2022 for being *ultra vires*.
 2. That this Honourable Court be pleased to grant an order of Prohibition to prohibit the Respondents from implementing the decision of the Deputy County Commissioner, Kilungu Sub-County, Makueni County dated 30/06/2022.
 3. That this Honourable Court be pleased to grant an order of *Mandamus* compelling the Respondents to implement the Court's decision in the District Magistrates Court at Kilungu Civil Case No. L8 of 1980 delivered on 22nd September, 1980.
 4. That the costs of this application be borne by the Respondents.
2. The application is premised on the grounds appearing on the statutory statement together with the verifying affidavit of Priscillar Minoo Ngunyu sworn on even date.

The Ex Parte Applicant's Case

3. The Deponent averred that she is the administrator of the Estate of her late husband Joel Ngunyu Mutungi (Deceased). She averred that her late husband owned a ranch while his late father, Mutungi Yumbya had a similar ranch where they used to graze their animals.
4. She further averred that in the year 1980, her late husband was sued alongside with his father by Munyeke Kivondo Nthiwa and Ndambuki Mbeke Wachai over the same land. That vide the judgment delivered on 22/09/1980, the court found that the land belongs to her late husband and his father. That upon the demise of her husband, the Interested Party started claiming the land without acknowledging that her late husband owned part of it together with their late father.
5. She further averred that the 3rd and 4th Respondents acted *ultra-vires* by overturning a valid judgment issued by a court of competent jurisdiction. She contended that the judgment by the 3rd Respondent has no valid justification. She urged the Court to allow the application as prayed.

The Respondents Case

6. The Respondents opposed the application vide the replying affidavit of Philemon K. Mutai, the officer in charge of Land Adjudication and Settlement, Makueni County sworn on 9th February, 2023. He averred that the disputed land Parcel No. 1822 Nduu Adjudication Section was declared an Adjudication Section on 11/6/2015 and immediately thereafter, demarcation and survey work began and was completed and a publication of the same was made on 24/01/2018. He further averred that land Parcel Nos. 1675 and 1822 are recorded as having been registered in the names of Priscillar Minoo Ngunyu and James Maweu Mutungi respectively.
7. It was further averred that the *Ex-parte* Applicant's cases before the Committee, Arbitration Board, Objection and Appeal were dismissed. The deponent denied the *Ex-parte* Applicant's allegation that the decision dated 30/06/2022 was made *ultra-vires* or unprocedurally.

The Interested Party's Case

8. The Interested Party opposed the application vide his replying affidavit sworn on 8th March, 2023. He averred that the application is fatally defective as it amounts to an appeal against the appeals committee decision. He further averred that the appeals committee did not overturn any decision of the Court



and that the *Ex-parte* Applicant has not demonstrated by way of evidence how the Respondent was biased towards him.

The Response

9. In a supplementary affidavit sworn on 3rd May 2023, the *Ex-parte* Applicant pleaded with the Court to withdraw the annexure marked as “PMN-3” which was erroneously attached. Leave was granted for the said withdrawal and the *Ex-parte* Applicant annexed the correct decision of the Appeal to the Minister Case No. 446 of 2021 which was delivered on 10/05/2022.
10. The application was disposed of by way of written submissions.

The Ex Parte Applicant’s Submissions

11. The *Ex-parte* Applicant’s submissions were filed on 3rd May, 2023. On her behalf, Counsel submitted that the Respondents decision was tainted with illegality, irrationality and procedural impropriety. It was submitted that the Respondents acted ultra vires by going against the Court’s decision in Kilungu Case No. L8 of 1980 over the suit property.
12. As regards the issue of irrationality, it was submitted that the Respondent failed to visit the disputed land in order to establish the allegations made by the parties herein.
13. On the issue of procedural impropriety, Counsel submitted that the Respondents acted unfairly by believing one party and failing to observe the doctrine of adverse possession. Counsel further submitted that the Respondents failed to give an analysis of the evidence tendered by the *Ex-parte* Applicant in the proceedings and that this was against the principles of natural justice.

The Respondents Submissions

14. The Respondents submissions were filed on 19th May, 2023.
15. On their behalf, the learned State Counsel identified the following issues for the court’s determination:
 - i. Whether the Respondents exercised its statutory duties as envisaged in the law;
 - ii. Whether the orders of judicial review should be granted.
16. The learned State Counsel submitted that the Respondents followed due process when making the decision to award land Parcel No. 1822 to the Interested Party. It was submitted that the disputed land Parcel No. 1822 Nduu Adjudication Section was initially part of the bigger land Parcel No. 1675 and that Parcel No. 1822 was lawfully and procedurally issued to the Interested Party.
17. It was further submitted that the application herein seeks to challenge the merits of the decision rendered by the Minister and not the decision-making process. The Learned State Counsel submitted that the *Ex-parte* Applicant has failed to demonstrate the flaws in the decision-making process to avail the orders sought herein.
18. The Respondents submitted that the *Ex-parte* Applicant was accorded a fair hearing throughout the committee proceedings up to the appeal before the Minister. It was contended that the proceedings before the Minister were objective, procedural and fair.
19. On the second issue, it was submitted that the Respondents acted within the mandate granted under Section 29 of the [Land Adjudication Act](#) when making the decision to award land Parcel No. 1822



to the Interested Party. Counsel argued that the Respondents reviewed and analyzed the evidence presented by the parties herein before arriving at their decision.

20. On whether the Applicant is entitled to the orders sought, the Learned State Counsel argued that the *Ex-parte* Applicant has failed to demonstrate that the Respondents' decision is contrary to Section 7 of the *Fair Administrative Action Act* and therefore, the application herein must fail. It was further argued that the grounds relied on by the *Ex-parte* Applicant delve into the facts and merits of the case which is not the concern of judicial review. It was submitted that the *Ex-parte* Applicant had failed to demonstrate how the 3rd Respondent acted ultra vires or unprocedurally and is therefore, not entitled to the judicial review orders sought.
21. To buttress his submissions Counsel relied on the authorities annexed to the Respondents' written submissions.

The Interested Party Submissions

22. The Interested Party filed two sets of submissions, the first dated 4th April, 2023 and the other dated 16th May, 2023.
23. On his behalf, Counsel submitted that the 3rd Respondent took into consideration the decision of the Court in Kilungu Civil Case No. L8 of 1980 and therefore, the contention by the *Ex-parte* Applicant that the decision was ultra vires has no basis. Counsel further submitted that the *Ex-parte* Applicant did not seek leave to amend the application herein challenging the decision dated 30/06/2022 which had been erroneously annexed as averred in the *Ex-parte* Applicant's supplementary affidavit sworn on 3rd May, 2023. Counsel urged the Court to dismiss the application herein with costs to the Interested Party.

Analysis And Determination

24. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the 3rd Respondent acted *ultra vires* when making the decision dated 10/05/2022, in light of the judgment of the Court in Kilungu Civil Case No. L8 of 1980.
25. The Principles of Judicial Review were laid down by Lord Diplock in the case of *Council of Civil Service Union & Others v 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.”
26. The Court in *Okoiti & 3 Others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 Others* (Petition 42 & 27 of 2014 (Consolidated)) [2021] KEELRC 2306 (KLR) (30th July, 2021)



(Judgment) had the occasion to express itself on what amounts to an ultra vires act. The three-judge bench stated as follows: -

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“72. An act is ultra vires 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 a law or its principles renders the decision made laced with illegality. See *Republic v Secretary of the Firearms Licensing Board & 2 others ex -parte: Senator Johnson Muthama* [2018] eKLR. In the case of *Pastoli v Kabale District Local Government Council & others*, [2008] 2 EA 300 the court held that;

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.”

27. It is not in dispute that the 3rd Respondent had the power to hear and determine the Appeal Case No. 446 of 2021 in accordance with Section 29 of the *Land Adjudication Act*.
28. I have perused the appeal proceedings and findings in appeal Case No. 446 of 2021 conducted before the Deputy County Commissioner Kilungu Sub County. The Applicant was the Appellant, while the Interested Party herein was the Respondent. The parties and their witnesses were recorded as having been sworn and gave evidence. It is evident that both parties participated in the proceedings by giving evidence, cross examination and calling witnesses.
29. The *Ex-parte* Applicant was accorded the opportunity to be heard and indeed produced the judgment of the Court in Civil Case No. L8 of 1980.
30. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the 3rd Respondent was biased or unfair towards the Applicant.
31. Throughout the adjudication proceedings from the Committee stage up to the Appeal before the Minister, the *Ex-parte* Applicant was aware of the fact that the Interested Party was in occupation of land Parcel No. 1822 since the year 1980. Throughout the said proceedings which were produced as the Respondents' Exhibits PKM1, PKM2, PKM3 and PKM4, the *Ex-parte* Applicant made reference to the judgment delivered in Kilungu Court.
32. By the time the judgment in Kilungu Law Courts was being rendered, land adjudication had not been carried out and ownership of the Parcel No. 1822 had not been determined. The real issue in this case is that the *Ex-parte* Applicant wants ownership of the suit property determined in her favour as per Ground No. 5 of the statutory statement and paragraph 7 of the verifying affidavit. Those are issues of facts which the *Ex-parte* Applicant had the occasion to address the merits when appearing before the tribunal proceedings.
33. In *Municipal Council of Mombasa v Republic & Another* [2002] eKLR, the Court held as follows;

“Judicial review is concerned with the decision-making process, not with merits of the decision itself... 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.”

34. The Court of Appeal further held as follows in the case of *Kenya Revenue Authority & 2 Others v Darasa Investments Limited* [2018] eKLR;

“The need to take into account relevant considerations and ignore irrelevant facts in the decision making has close nexus with the need to act reasonably. This much was appreciated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 thus, "For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.'”

35. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court is satisfied that the Applicant actively participated in the said proceedings and even cross-examined witnesses. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicants have not demonstrated that such was case in the instant application.

36. If that had been the case, it would invite this Court’s intervention as was aptly held in the case of *Republic and Others v Attorney General and Another* [2006] 2 EA 265 (HCK);

“We again hold that the taking into account an irrelevant consideration invites this Court’s intervention in Judicial Review.”

37. The upshot of the foregoing is that the Court does not find merit in the Application for judicial review. Accordingly, the Notice of Motion dated 28th October, 2022 is hereby dismissed. Each party shall bear its own cost.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF NOVEMBER, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Mwendwa for the *Ex-parte* Applicant.

Ms Njuguna for the Respondents.

