



**Republic v Deputy County Commissioner, Kitui West Subcounty;
Malonza (Exparte) (Miscellaneous Civil Application 10 of 2021)
[2022] KEELC 2723 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
MISCELLANEOUS CIVIL APPLICATION 10 OF 2021**

LG KIMANI, J

JUNE 23, 2022

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER, KITUI WEST
SUBCOUNTY RESPONDENT**

AND

ELIZABETH NDUNE MALONZA EXPARTE

JUDGMENT

1. The Ex Parte/Applicant filed the Notice of Motion dated May 24, 2019 under the provisions of Article 47 of *the Constitution* of Kenya 2010, Section 3, 4, 5, 6, 7, 8 of the Fair Administrative Actions Act, 2015 and Order 53 Rule 1 and 2 of the Civil Procedure Rules 2010. The application seeks the following orders:-
 1. That this application be certified as urgent and be heard forthwith.
 2. That the Honourable Court be pleased to issue an order of Certiorari to remove into this Honourable Court and quash proceedings the decision made by the Deputy County Commissioner in respect of the decision to dismiss Appeal No. 17 of 2008 delivered on February 13, 2019 with respect to Land Parcel No. Mutonguni/Musengo/2784.
 3. That the Honourable Court be pleased to issue an Order of Mandamus directing the Registrar of Lands to remove the restriction and register the Land Parcel No. Mutonguni/Musengo/2784 in the name of the ex parte Applicant Elizabeth Ndune Malonza.
 4. That the costs of these proceedings be borne by the Respondent.



2. The application is accompanied by the chamber summons, statement and affidavit verifying the statement all dated April 29, 2019.
3. The ex parte applicant claims to be the legal representative of the estate of Malonza Maithya Kalwe (deceased) who was the appellant in Appeal to the Minister No. 17 of 2008 while the Respondent in the said appeal was Kitote Ngotho Kimonyo (deceased).
4. The Grounds upon which the reliefs are sought are that on February 13, 2019, the Deputy County Commissioner, Kitui West Sub County dismissed Appeal No. 17 of 2008 and ordered that the disputed parcel of land known as Mutonguni/Musengo/2784 remains to be the property of the Kitote Ngotho Kimonyo. The Applicant contended that the Deputy County Commissioner acted in excess of his mandate in dismissing the said appeal because both the Appellant and Respondent were deceased and yet he proceeded to hear the matter with people who were not the legal representative of either estates. The Applicant further relies on the ground that the Deputy County Commissioner acted in excess of his powers when he delved into the issue of ownership of the suit land in the absence of the legal representatives of the estate of the deceased herein.
5. Further to this, the Applicant has stated that the Deputy County Commissioner had no jurisdiction to hear the appeal since the suit land was already registered and that it is only the court that had jurisdiction to determine disputes over land ownership.
6. The impugned decision of the Deputy County Commissioner found that the Defendant's representative (for Kitote Ngotho Kimonyo) clearly narrated how the Defendant got the land and found no reason to reverse the verdict in the objection proceedings. The appeal was therefore dismissed and the land still remained to be the property of Kitote Ngotho Kimonyo (Deceased).
7. I also note that the Ex parte Applicant was present during the hearing of the appeal as the representative of Malonza Maithya (Deceased) and testified as his witness.
8. Parties agreed to canvass the application by way of written submissions. Counsel for the Applicant filed written submissions filed on April 27, 2022 while the Attorney General filed submissions dated January 19, 2022.

Ex-Parte Applicant's written submissions

9. The Ex-parte Applicant filed submissions and commenced by stating that they did file a Verifying Affidavit contrary to what the counsel for the 4th Respondent averred. He further contended that when the appeals were filed both parties were alive.
10. The Ex-parte Applicant reiterated that the Deputy County Commissioner acted in excess of his powers when he delved into the issue of land ownership of the suit land in the absence of the legal representatives of the estate of the deceased parties. Secondly, it was her submission that the 1st Respondent had no jurisdiction to hear and determine the Appeal since the suit land was already registered and that it is only the Environment and Land Court that has jurisdiction to determine disputes over land ownership.
11. It is also her counsel's submission that there is no affidavit evidence to support the Respondents case and that the Hon, Attorney General cannot purport to speak on behalf of the Interested Parties. She contends that the State counsel should secure a replying affidavit of the Respondents.



The Respondent's Case and Submissions

12. State Counsel for the Respondent filed Grounds of Opposition dated January 19, 2022 opposing the Ex Parte Applicant's Judicial Review Application on Grounds:
 1. The motion dated May 24, 2019 is bad in law, incompetent and incurably defective.
 2. The Application herein is brought in bad faith and a waste of the court's judicious time.
 3. The application has been brought with the intention to circumvent the law.
13. The Respondent also filed written submissions and stated that the Notice of Motion is not accompanied by a Statement of facts or affidavit as required in a judicial review application and should therefore be dismissed.
14. It is the 4th Respondent's submission that even if the court were to quash the decision of the 1st Respondent, the suit property would still be registered in the name of Kitote Ngotho Kimonyo since the appeal to the 1st Respondent was against the objection proceedings before the Land Adjudication and Settlement Officer who had awarded the land to Kitote Ngotho Kimonyo and unless the said proceedings were also quashed the land would still remain in the same name.
15. They also submitted that both parties were alive at the time of lodging the appeal. Further, that the ex parte applicant was present during the hearing of the appeal and did not seek an adjournment to apply for letters of administration of the deceased Respondent whom he represented.
16. It is therefore the Respondent's submission that this application is an afterthought, brought in bad faith and calculated to defeat justice and should be dismissed with costs.

Analysis and Determination

17. From the outset it is noteworthy that the initial chamber summons for leave dated April 29, 2019 and the Notice of Motion dated May 24, 2019 are titled Republic versus The Deputy County Commissioner, Kitui West Sub County Ex parte Elizabeth Ndune Malonza. The Chief Land Registrar, the widow of Kitote Ngotho Kimonyo one Wamutwa Kitote and the Attorney General are said to have been served with the pleadings in this case as shown in the affidavits of service by one Boniface Mutua Mughu sworn on June 20, 2019 and November 4, 2020 and filed on the respective dates.
18. In my view the persons served can only be cited in this suit as interested parties and not as Respondents as indicated in the subsequent documents filed in court. It is further the courts observation that the submissions filed by the ex parte applicant introduce other alleged Respondents 2nd to 5th interested Parties without having shown that the said interested parties were served. In my view the said parties ought to be disregarded as parties to these proceedings.
19. The Attorney General filed a notice of appointment to act on behalf of the Respondent and further filed grounds of objection and written submissions dated January 19, 2022.
20. I have considered the Notice of Motion dated May 24, 2019 and the chamber summons filed seeking leave to institute the substantive notice of motion herein, statement and the affidavit verifying the statement all dated April 29, 2019 and the submissions filed. I am of the view that the following issues arise for determination by the Court.



A.

Whether the 1st Respondent had jurisdiction to hear and determine the appeal before him when the parties thereto were deceased and in absence of legal representatives and/or executors of their estates.

B.

Whether the 1st Respondent had jurisdiction to hear and determine the Appeal before him when the title deed to the suit land had been issued.

A. Whether the 1st Respondent had jurisdiction to hear and determine the appeal before him when the parties thereto were deceased and in absence of legal representatives and/or executors of their estates.

21. The legal right to fair administrative action is guaranteed as one of the rights and fundamental freedoms under the Bill of Rights. Article 47 of [the Constitution](#) of Kenya 2010 states that-

- “1. “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b) promote efficient administration.

22. In the case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA the court pronounced itself on the requirements for an order of judicial review which provides every one with a right to Fair Administrative Action thus:

“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.”

23. Section 7 (2) of the [Fair Administrative Action Act](#) 2015 further gives the court power to review an administrative action or decision on the various grounds set out in that section. The section sets out the following grounds, if-

- A) the person who made the decision
 - i) was not authorized to do so by the empowering provision;
 - ii) acted in excess of jurisdiction or power conferred under any written law;
 - iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - iv) was biased or may reasonably be suspected of bias; or
 - v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;



- B) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- C) the action or decision was procedurally unfair;
- D) the action or decision was materially influenced by an error of law;
- E) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
- F) the administrator failed to take into account relevant considerations;
- G) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
- H) the administrative action or decision was made in bad faith;
- I) the administrative action or decision is not rationally connected to–
 - i) the purpose for which it was taken
 - ii) the purpose of the empowering provision
 - iii) the information before the administrator;
 - iv) the reasons given for it by the administrator;
- J) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- K) the administrative action or decision is unreasonable;
- L) the administrative action or decision is not proportionate to the interests or rights affected;
- M) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- N) the administrative action or decision is unfair;
- O) or the administrative action or decision is taken or made in abuse of power

24. In the present case, the Ex-parte Applicant relies on grounds that the Deputy County Commissioner had no jurisdiction to hear the appeals without the legal representatives of the deceased parties being present and that he acted in excess of his mandate by determining an appeal where the land had already been registered and a title deed issued. It would thus appear that the Ex parte Applicants challenge is based on Section 7(2) (a) for excess of jurisdiction 7 (2) (b) that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

25. In the proceedings before the Respondent it is not dispute that the Appellant and the Respondent were deceased at the time of hearing of the appeal. The Respondent states at the opening of the hearing that “When this case came up for hearing on December 6, 2018, both parties were present only that the two are deceased but were represented (Appellant) by his wife Elizabeth Ndune Malonza while the Defendant by his brother Utee Ngata Ngotho”. It is noted that the Appellants representatives Elizabeth Ndune Malonza is the ex parte Applicant herein while the Defendants representative Utee Ngata Ngotho was not made a party to this suit and he was not served with the documents.



26. From the documents on record the deceased appellant Kasuka Maithya was alive at the time when the appeal was filed since he signed the Form of Appeal dated June 29, 1987. The issue for determination is then whether it was unlawful for the 1st Respondent herein to hear and determine the appeal before him without first ensuring that the representatives had obtained grant of letters of administration to the estates of the deceased parties.

27. Section 12(1) of the *Land Adjudication Act* provides for the place of application of strict rules normally applied in hearing of civil hearings to adjudication proceedings. In my view the said section gives discretion to the adjudication officer in certain cases. The section provides that:

“In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.”

Further, Section 13(5) provides that: “Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.”

28. The Court of Appeal in the case of *Dominic Musei Ikombo v Kyule Makau* [2019] eKLR had this to say on having legal representatives during the adjudication process.

“Our view is that proceedings conducted under the *Land Adjudication Act* are not strictly speaking akin to proceedings under the *Civil Procedure Act*. The District commissioner acting on behalf of the Minister has wide latitude to conduct the proceedings in a manner that meets the substantive ends of justice. Section 13 of the *Land Adjudication Act* talks of “guardian” or “representative according to African Customary Law”. It does not refer to legal representatives. The strict rules of civil litigation as relates to capacity to sue and be sued do not apply to proceedings before the committee or the minister. It is not therefore necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant. The parties therefore had locus standi to appear before the adjudication committee, lack of letters of administration notwithstanding.

Further, the Act allows every person who considers that he has an interest in the land in question to lodge a claim to the recording officer. In this case, the parties did not need to obtain letters of administration to protect their interest in the land in question. Furthermore, the two qualified as representatives of the deceased under customary law to represent their respective families in the adjudication proceedings.”

29. Following the above court of appeal decision, I do find that the two representatives of the Appellant and the Respondents that appeared before the Deputy County Commissioner in the appeal to the Minister qualified as representatives of the deceased persons under customary law to represent their respective families in the adjudication proceedings. This ground of challenge must therefore fail.



B. Whether the 1st Respondent had jurisdiction to hear and determine the Appeal before him when the title deed to the suit land had been issued.

30. On the second issue I am guided by the provisions of Sections 24-28 of the *Land Adjudication Act* which prescribe the procedure for obtaining title deed under the act. Section 27 (3) provides for what happens during finalization of the adjudication register, subject to appeals and states as follows-

“When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall—

- (a) alter the duplicate adjudication register accordingly; and then
- (b) certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
- (c) forward the adjudication register to the Chief Land Registrar together with a list of the appeals.

31. Section 28 of the *Land Adjudication Act* provides that:

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register: Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.”

32. From the foregoing it is clear that the Chief Land Registrar has authority to cause registrations to be effected in accordance with the adjudication register subject to the pending appeal before the Minister. The restriction placed in the register is expressed to endure until determination of the appeal and the same is supposed to protect the interests of the parties to the appeal. After determination of the appeal to the Minister, the register is to be altered in accordance with the said determination.

33. Section 76 of the *Land Registration Act* No. 3 of 2011 provides for Restrictions and states as follows;

- (1) For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
 - (a) for a particular period;
 - (b) until the occurrence of a particular event or
 - (c) Until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.



(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.

34. In the present case, I find that the ex parte Applicant has in the first place not shown that a title deed was issued to Kitote Ngotho Kimonyo since no title deed has been exhibited. What has been shown to the Court is the certificate of official search showing registration of the name of the proprietor and the date of registration. It also shows that a restriction was registered and the reason and conditions for its registration being “except by the order of the Chief Land Registrar, no dealings should be registered against the titles until the appeal to the Minister are finalized.”

35. The Court of Appeal in *Euton Njuki Makungo v Republic & 2 others* [2014] eKLR held as follows when dealing with a case where a title deed was issued by the Land Registrar when an appeal to the Minister was pending:

“The appellant contend that because the Registrar of Lands had already issued a title deed in favour of Mwaniki Mwige; the 2nd respondent acted in excess of jurisdiction to cancel the title which had been issued as a first registration. The disputed parcel of land was within an adjudication area and at the time when the Registrar purportedly issued the title deed, appeal to the Minister was pending. The evidence on record reveals that the appellant and the registered proprietor had knowledge that appeal to the Minister was pending. A person who has knowledge of a pending appeal cannot come to court and submit that because there were no restrictions entered in the register, he could deal with the land as he pleases. He who comes to equity must come with clean hands. The appellant and the registered proprietor knew there was a pending appeal and the disputed parcel of land was still undergoing the adjudication process. We find that the 2nd respondent had jurisdiction to hear the appeal relating to the parcel of land. In the case of *R – v- Lancashire County Council Ex p Gayer*, (1980) 1 WLR 1024 it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in *R –v- Lachashire County Council Ex p Gayer*, (supra) and observe that it is not the duty of the Registrar of Land to determine adjudication disputes; the evidence on record is clear that an appeal to the Minister was pending and the Registrar had no jurisdiction to issue the title deed in favour of Mwaniki Mwige while the appeal was pending. The disputed property was still subject to the adjudication process and the action by the Registrar was null and void. It is our view that the judicial remedy of certiorari was neither created nor established to settle ownership disputes, nor to create and confer title to land and the learned Judge did not err in declining to grant the order for certiorari.”

36. I agree with the above decision of the Court of Appeal which is binding on me and find no merit in the ex parte Applicants contention that the 1st Respondent lacked jurisdiction to hear and determine the appeal before him when the title deed to the suit land had already been issued. I find that the 1st Respondent herein had jurisdiction to hear the appeal relating to the parcel of land Mutonguni/Musengo/2781. The court of appeal determined that the learned Judge did not err in declining to grant the order for certiorari.



Final Orders

- 37. For the foregoing reasons, I find that the 1st Respondent had jurisdiction to hear and determine the appeal before him even though the initial parties to the appeal were deceased and in absence of legal representatives and/or executors of their estates but in the presence of their representatives.
- 38. I find on the second issue that the Exparte Applicant has not shown that a title deed to the land in dispute had been issued to the deceased Kitote Ngotho Kimonyo. I further find that the 1st Respondent had jurisdiction to hear and determine the Appeal before him when registration of the land had been carried out and a restriction placed against the said registration.
- 39. Based on the foregoing reasons, I find that the Ex-parte Applicant’s Notice of Motion application dated May 24, 2019 lacks merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 23RD DAY OF JUNE 2022.

HON. L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Judgment read in open court in the presence of-

C. Nzioka Court Assistant

.....Advocate for the Ex parte Applicant

.....Advocate for the Respondents

.....Advocate for the Interested Party

