



**Singi v Deputy County Commissioner, Yatta Sub-County & 2 others;
Matheka (Interested Party) (Judicial Review Miscellaneous Application
1 of 2022) [2022] KEELC 3922 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3922 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT KITUI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 1 OF 2022**

LG KIMANI, J

JULY 28, 2022

**IN THE MATTER OF AN APPLICATION BY MBENGELE SINGI
FOR AN ORDER OF CERTIORARI AND PROHIBITION
IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284)**

AND

IN THE MATTER OF MADONG’OI ADJUDICATION SECTION P/NO.831

**IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES
2010 AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

BETWEEN

MBENGELE SINGI APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER, YATTA SUB-COUNTY 1ST
RESPONDENT**

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER LOWER
YATTA DISTRICT 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

MARY MATHEKA INTERESTED PARTY



JUDGMENT

1. The Notice of Motion dated March 3, 2021 is brought under Article 50 of the 2010 Constitution, Order 53 Rule 1 (2) of the Civil Procedure Rules, sections 7, 8 and 9 of the Fair Administrative Actions Act and all other enabling provisions of the law seeking for Orders:-
 1. That this Honorable Court be pleased to issue an order of Certiorari to quash the Judgment delivered by the 1st Respondent on 20/8/2020 and declare it unconstitutional, null and void.
 2. That this Honorable Court be pleased to issue an order of Prohibition directed to the Respondents and the Interested Party prohibiting them from enforcing, executing or in any manner whatsoever implementing the Judgment delivered by the 1st Respondent on 20/8/2020.
 3. That the costs and incidentals to this application be provided for.
2. The Grounds upon which the reliefs are sought are that originally, the suit parcel of land plot No. 831 belonged to one Mr. Muthami (Deceased) who had two wives being Mukusa Muthami, the 1st wife and Kalungu Muthami the 2nd wife.
3. The 2nd wife Kalungu Muthami was the mother of John Matheka Muthami (deceased) who was the husband of the interested party herein while the 1st wife Mukusa Muthami had two children Mwanthi Muthami (deceased) and who was the Respondent in the Appeal to the Minister and Singi Muthami (deceased) who was the husband to the ex parte applicant herein.
4. The Applicant contends that the suit land was given to the 1st wife and her children, (Mwanthi Muthami and Singi Muthami) by their father Mr. Muthami who was the original owner and they have all along been in occupation and cultivating the suit land until 20/8/2020 when the judgment to the Minister's Appeal was issued. It is claimed that the 2nd wife was also given her own land but she sold the same together with her son John Matheka Muthami.
5. That one Sammy Mwanthi purchased a portion of the suit land from Mwanthi Muthami and Mbengele Singi (The Appellant in the appeal to the Minister and the Ex parte Applicant herein respectively) for a consideration of Ksh.60, 000 and final instalment was paid on January 27, 2012.
6. That when the area where the suit land is situated was declared an adjudication area being Mandongoi Location, Kitui District John Matheka Muthami filed a complaint vide Committee Case No. 24 of 2003; John Matheka Muthami v Mwanthi Muthami. The same was heard on 29/7/2003 and judgement read on 6/8/2003 and the land was awarded to John Matheka Muthami. Being dissatisfied by the decision of the Committee Mwanthi Muthami filed a case in the Adjudication Board being case number 20/2003 against John Matheka Muthami. The Board found in favour of Mwanthi Muthami.
7. An Objection was then filed being case number 45 of 2005 John Matheka Muthami versus Mwanthi Muthami but the objection was dismissed on 26/9/2005 and the land was ordered to remain in the name of Mwanthi Muthami.
8. John Matheka Muthami then filed an Appeal to the Minister being Appeal 40/2012 but the parties died before the hearing and determination of the said appeal. Upon such deaths the Applicant contends that the Chief of Ikanga Location, Mutomo Sub-County vide his letter dated 17/8/2020 misled and/or misinformed the Minister by declaring that at the time of his death, Mwanthi Muthami



was neither married nor left an heir other than the Appellant-his blood brother-deceased who in turn left behind his wife Ng'a Muthengi as the natural heir of the disputed land.

9. The proceedings before the 1st Respondent on 20/8/2020 shows that a party by the name Ng'a Muthengi appeared for the Appellant John Matheka Muthami while on behalf of the Respondent Mwanthi Muthami no one appeared but the 1st Respondent relied on the letter from the chief aforementioned.
10. That on the strength of the said letter the 1st Respondent stated " Following the deaths of both parties and on the established fact that the Respondent died leaving no next of kin other than the wife of the appellant, the appeal dies naturally" He then went on to declare that " The disputed land is hereby awarded to the wife of the appellant"
11. It is the above mentioned proceedings, findings and judgment that the ex parte applicant challenges. The Applicant now contends that the suit land should have been awarded to her and her children since the deceased Mwanthi Muthami had a blood brother Singi Muthami (deceased), who though deceased was survived by a wife (herself) and six children forming the 1st house of Muthami while the Appellant was the deceased half brother and part of the 1st house.
12. It is the Ex parte Applicant's averment that she was denied the chance to tender evidence and was not afforded time to present her case and defend herself against the chief's letter which the Deputy County Commissioner relied on in his decision. She claims that the Deputy County Commissioner's decision was biased and procedurally unfair on this regard.
13. Following the decision of the Minister's Appeal, the Interested Party has encroached onto the Applicant's parcel of land, started cultivating and is in the process of evicting the Applicant from the suit land rendering her and her children homeless and landless.
14. The Applicant submitted that judicial review is not concerned with the merits of the decision, but in the decision-making process itself. Her counsel stated that what is being disputed is the procedure that the Minister took in arriving at the decision by relying solely on the Chief of Ikanga Location, Mutomo Sub-County's letter dated 17/8/2020 which misled him. The applicant claims that the decision in the appeal to the minister due process was not followed. Counsel for the ex parte applicant relied on the cases of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd*, Nairobi [2002] eKLR, *R v Kenya Revenue authority Ex parte Yaya Towers Ltd* [2008] eKLR, and *Suchan Investment ltd v Ministry of National Heritage & Culture & 3 others* [2016] eKLR
15. It is the Applicant's submission that the 1st Respondent and the chief did not carry out proper investigations into the family of the parties hereto and especially the family of Mwanthi Muthami where he would have discovered that the deceased Mwanthi had a brother from his mother's house who at the time of his death had a wife and six children. That relying on the Chief's letter led to a violation to her right to fair hearing and their right to fair administrative action.
16. The Applicant claims that the decision was irrational, unreasonable and biased and breached the rules of natural justice and went against the minimum standards of procedural fairness. The ex parte applicant also relied on Article 50 of *the Constitution* of Kenya 2010 and Section 7 of the *Fair Administrative Actions Act* and further stated that her rights to a fair hearing were violated.
17. According to the Applicant, the 1st Respondent failed to act fairly and consider relevant facts and also failed to understand the history of the proceedings and parties. This failure has caused the Interested Party to trespass and/or encroach onto the Applicant's parcel of land and is now in the process of evicting her and her children.



18. The Applicant concluded by submitting that she has been on the suit land for over 30 years earning her livelihood from it and has been subjected to much suffering with the threat of eviction while she is a widow with six children. She submitted that the present application meets the threshold for to warrant the judicial review orders sought and ought to be allowed as prayed.
19. The Respondents and the Interested Party were served with the Chamber summons for leave, the order granting leave and the Notice of motion and various hearing notices and affidavits of service were filed. The Respondent and the Interested Party did not file any documents opposing the suit and neither did they file submissions.

Analysis and Determination

20. The record of the impugned decision by the Deputy County Commissioner Lower Yatta Sub-County dated August 20, 2020 indicates that it was based on the letter by the Chief, Ikanga Location, Mutomo Sub-County stating that Mwanthi Muthami (Deceased) who was registered as the owner of the suit property, Mandongoi Adjudication Section Parcel Number 831 was neither married nor did he leave any heir other than the Appellant-his blood brother who is also deceased and awarded the parcel of land to the wife of the Appellant who is the Interested Party in this suit.
21. On record is an Agreement for the sale of a portion of the suit land where Mwanthi Muthami and the Applicant Mbengele Muthami are selling the land to Sammy Mwanthi Kyai as well as Mwanthi Muthami's burial permit that was issued to the Applicant herein that are the indicators that the Ex parte Applicant herein was a close relative of Mwanthi Muthami, the Respondent in the impugned Minister's Appeal herein.
22. The Respondent and the Interested Party have not filed any documents to challenge the ex parte Applicants explanation of her relationship with the deceased Mwanthi Muthami who was a blood brother of her husband Singi Muthami (deceased) and that the two brothers belonged to one house of Mukusa Muthami while the Appellant John Matheka Muthami belonged to another house of Kalungu Muthami. This being the case I do find that the proper party who ought to have replaced the deceased Mwanthi Muthami was the Ex parte Applicant and her children.
23. I do also find that the 1st Respondent relied on an unreliable letter instead of carrying out proper investigations to know of the existence of close relatives of the deceased who were entitled to continue with defence of the claim instead of declaring the appeal as having died a natural death and awarding the land to the Appellants wife. The court held in *Tobias Achola Osidi & 13 others v Cyprianus Otieno Ogallo & 6 others* [2013] eKLR

“A claim under section 13 of the Act can be made by successors of a deceased person and not necessarily the deceased's legal representatives. See, section 13 (5) of the Act. The purpose of a claim under the Act is to aid in the ascertainment of the rights and interest of persons in the land within an adjudication area.”
24. The failure of the Ex parte Applicant to be heard in the Minister's Appeal to adjudication as the substitute to Mwanthi Muthami, the Respondent therein, was a clear violation of her right to fair Administrative Action under Article 47 of *the Constitution* and her right to be heard under Article 50



of *the Constitution*. Section 7(2)(a) of the *Fair Administrative Action Act* Number 4 of 2015 provides that: -

“A court or tribunal under subsection (1) may review an administrative action or decision, if– (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case.”

25. The Court in *Kimwele Kithoka & 26 others v Deputy County Commissioner Kyuso Sub-County & 7 others* [2022] eKLR quoted the case *Judicial Service Commission vs Mbalu Mutava & another* [2015] eKLR, the Court of Appeal where it was stated that natural justice comprises the duty to act fairly:-

“Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to the right to fair administrative action.”

26. In addition to this, Sections 7(2)(c) and (f) of the *Fair Administrative Action Act* provide that: -

“A court or tribunal under subsection (1) may review an administrative action or decision, if– (c)the action or decision was procedurally unfair;

(f) the administrator failed to take into account relevant considerations.”

27. In my opinion, the Deputy County Commissioner Lower Yatta’s decision was procedurally unfair for failing to substitute the Deceased Respondent with his successors. While there is no laid down procedure for hearing of disputed for the adjudication of land, the Deputy County Commissioner still had the mandate of observing the rules of natural justice as was found in the above precedent, which includes affording a fair hearing both sides to the suit.

28. In the case of *Pastoli v Kabale District Local Government Council and others* [2008] EA 300 the court stated:-

“Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

29. The Deputy County Commissioner also failed to take into account relevant considerations and instead considered the erroneous letter stating that the deceased Respondent had no apparent heirs when the Applicant herein was the wife of his brother and he had children as well and they all formed one house of Mukusa Muthama while the Appellant belonged to a different house of Kalungu Muthama. In the



case of *Republic v Kenya Revenue Authority & another; Shapi & 3 others (Exparte)* (Judicial Review E038 of 2021) [2021] KEHC 401 (KLR) the Court found that:-

“It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.”

30. In conclusion, I find that the Ex Parte Applicant’s Notice of Motion dated March 3, 2021 has merit and the same is hereby allowed as follows;

1. An order of Certiorari be and is hereby issued to quash the Judgment delivered by the 1st Respondent on 20/8/2020 in Appeal to the Minister case No. 40 of 2012 Madongoi Adjudication Section P/No 831 and the same is hereby declared unconstitutional, null and void.
2. An order of Prohibition be and is hereby issued directed to the Respondents and the Interested Party prohibiting them from enforcing, executing or in any manner whatsoever implementing the Judgment delivered by the 1st Respondent on 20/8/2020.
3. Costs are hereby awarded to the exparte Applicant payable by the Respondents and the Interested Party jointly and severally.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF JULY 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read virtually in the presence of-

Musyoki Court Assistant

Kiluva Advocate holding brief for Makundi for the Ex parte Applicant

No attendance for the Respondents

No Attendance for the Interested Party

