



Republic v Deputy County Commissioner, Keiyo North & 2 others; Paul Sumukwo & 4 others (Interested Parties); Michael Kikiga & another (Exparte Applicants) (Environment and Land Judicial Review Case 15 of 2021) [2022] KEELC 4793 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 4793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 15 OF 2021**

**L WAITHAKA, J
JULY 27, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

DEPUTY COUNTY COMMISSIONER, KEIYO NORTH 1ST RESPONDENT

ELGEYO MARAKWET DISTRICT LAND REGISTRAR 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

AND

PAUL SUMUKWO INTERESTED PARTY

ELIJAH CHEMITEI INTERESTED PARTY

ANTHONY CHANGWONY INTERESTED PARTY

COLLINS CHOGE INTERESTED PARTY

DANIEL CHANGWONY INTERESTED PARTY

AND

MICHAEL KIKIGA EXPARTE APPLICANT

JOSEPH RONO EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on November 15, 2021 to the *ex parte* applicants to apply for orders of *certiorari* and Prohibition concerning the decision of the 1st respondent made in Elgeyo Marakwet Upper Cheptebo Appeal to Minister cases No 32 and 33 of 2018, the *ex parte* applicants, brought



the notice of motion dated November 29, 2021 and filed on December 9, 2021, seeking an order of *Certiorari* to remove to this court for purpose of being quashed the proceedings, ruling, judgment and decision of the 1st respondent given on September 22, 2021 in Elgeyo Marakwet Upper Cheptoo Appeal to the Minister's Cases No 32 and 33 of 2018 giving ownership and/or possession of plot No 265 within Cheptoo "B" Adjudication section to the Interested Party. The *ex parte* applicants also seek an order of prohibition to prohibit the respondents from implementing or executing the impugned decision of the 1st respondent.

2. The application is premised on the ground that the subject matter of this Judicial Review application to wit plot No 265 within Upper Chepteebo "B" Adjudication section was during land demarcation and adjudication, adjudicated in their favour; that the interested parties filed an objection to the Land Adjudication Officer which objection was dismissed; that the Interested parties vide the appeals referred to herein above, appealed to the Minister; that the appeals were heard by the 1st respondent who had no jurisdiction to hear and determine the appeal and that the 1st respondent failed to visit the locus in quo before making his decision.
3. It is contended that the 1st respondent intentionally and unreasonably denied the applicant's an opportunity to provide site evidence; that the decision of the 1st respondent awarding the suit property to the interested parties and others is unjustified and unreasonable as the appeal was between the interested parties and the *ex parte* applicants only and that the decision of the 1st respondent was unfair and tainted with procedural impropriety. The 1st respondent is said to have acted unreasonably, unjustifiably, *ultra vires* and in breach of the law.
4. The application is supported by the affidavit (supporting) of Joseph Rono (2nd *ex parte* applicant) in which the grounds on the face of the application are reiterated. The deponent has also annexed the following documents to the affidavit:-
 - i) Copy of letter from the Land Adjudication and Settlement Officer, Keiyo to a Mr Kiptanui dated February 23, 2021. Through the letter, the Land Adjudication and Settlement Officer, Keiyo is informing the addressee that land parcel No 265 at Upper Chepteebo "B" Adjudication Section was registered under Nicholas Kipyator Biwott and the *ex parte* applicant but there were appeals to the Minister by several individuals claiming ownership of the same.
 - ii) Ruling of the Land Adjudication Officer dismissing the interested party's objection to adjudication of the suit plot in favour of the *ex parte* applicants;
 - iii) Copies of the decisions of the impugned decision of the 1st respondent;
 - iv) Copy of order issued in this case granting the *ex parte* applicants leave to Commence Judicial Review Proceedings against the impugned decision of the 1st respondent.
5. The 1st respondent through the replying affidavit filed on April 26, 2022 *inter alia* admits that the suit property is situated in Keiyo South Sub-County and that ordinarily the appeal ought to have been heard by the Deputy County Commissioner (DCC), Keiyo South Sub- County. Explaining that the Deputy County Commissioner Keiyo South – Sub County delegated the authority vested in him of hearing appeals in his area of jurisdiction to him because the suit property was situated closer to his office and that hearing the appeals by him would reduce costs, the 1st respondent deposes that by virtue of being a Deputy County Commissioner, he had power/jurisdiction to hear and determine the appeals. The 1st respondent has further denied the allegations leveled against him and deposed that the *ex parte* applicants have not made up a case for being granted the orders sought.



6. The interested parties, through Paul Bowen Sumukwo (the 1st interested party) filed an affidavit denying the allegations contained in the ex parte applicant's supporting affidavit and contending that the respondent was right in determining the appeals preferred to the Minister in their favour.
7. Pursuant to directions given on June 15, 2022, the suit was disposed of by way of written submissions.
8. I have carefully read and considered the pleadings filed in this case, the affidavit evidence and the submissions by the parties. The sole issue for the court's determination is whether the *ex parte* applicants have made up a case for being granted the orders sought.
9. This being an application for Judicial Review, for the *ex parte* applicants to be granted the orders sought, they have to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. In that regard, see the case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 where it was held:-

“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...

Illegality is 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 the law....”

10. In the circumstances of this case, the 1st respondent is *inter alia* said to have acted without jurisdiction when he heard the appeals herein on the ground that the appeals ought to have been heard by the Deputy County Commissioner, Keiyo South where the suit property is situated.
11. As pointed out herein above, the 1st respondent admitted that the suit property is situated in Keiyo South Sub County and that ordinarily the appeal ought to have been heard by the DCC Keiyo South, Sub County. He gave the circumstances upon which he heard the appeals as that the DCC Keiyo South Sub-County, delegated his power to hear the appeals to him because the suit property is near his office and that hearing the appeal by him would save on costs.
12. Whilst it is not in dispute that the 1st respondent as a Deputy County Commissioner has delegated authority to hear appeals to the Minister under Section 29 of the *Land Adjudication Act*, Cap 284 Laws of Kenya, a question of law arises to wit whether the 1st respondent has jurisdiction to hear appeals to the Minister not falling within his area of jurisdiction that is to say the sub-county for which he is appointed and deployed to serve.
13. In addressing that issue, it is important to reproduce the gazette notice through which the Minister donated her powers to DCCs. The Gazette notice reads as follows: -

“In exercise of the powers conferred by section 29(4) of the *Land Adjudication Act*, the Cabinet Secretary for Land, Housing and Urban Development delegates the powers to hear and determine appeals and perform the related duties and functions under section 29 to the Deputy County Commissioners of all Sub-Counties except the Sub-Counties in Nairobi City County.”

14. Whilst the notice does not expressly address the question as to whether Deputy County Commissioners have universal jurisdiction to hear and determine appeals to the Minister, noting that the jurisdiction is tied to all the sub-counties and taking judicial notice of the fact that ordinarily a Deputy County Commissioner (DCC) may not exercise jurisdiction in the area of operation of



another DCC, while that other DCC is in office; I am of the considered view that, in the circumstances of this case, where the appeals were heard by a DCC different from the DCC of the area where the subject matter is situated, an explanation needs to be offered as to why the appeal was heard by a DCC other than the one who ought to have heard it. I say this because under Section 15 of the *Coordination of National Government Act, 2013* DCCs are appointed for specific sub-counties. In that regard see the said section which provides as follows: -

“15(1) In accordance with the national government functions under the *Constitution*, this Act or any other written law, the Public Service Commission shall, in consultation with the Cabinet Secretary, recruit and appoint national government administrative officers to coordinate national government functions and to perform such other functions as may be assigned to them under this Act or any other law.

(2) Pursuant to subsection (1), the Public Service Commission shall appoint-

(a) a county commissioner in respect of every county;

(b) a deputy county commissioner in respect of every sub-county....”

15. In the circumstances of this case, the 1st respondent explained that the DCC for Keiyo South Sub-County delegated the power to hear the appeals to him because the suit property was near his office and hearing the appeal by him would cut on costs. In support of that contention, the 1st respondent annexed a copy of a letter from the DCC Keiyo South to him (read DCC Keiyo, North), Ref LND/16/5 VOL I(61) dated April 28, 2021, marked JM-4. Through the letter, the DCC Keiyo South addressed the 1st respondent as follows: -

“Re: Hearing Of Land Appeal Cases To The Minister-the Upper Kabito, Upper Cheptebo And Upper Cheptebo “b” Adjudication

Reference is made to the County Commissioner’s Elgeyo Marakwet County Letter Ref LND CC 16/3 VOL III/122 dated March 9, 2021 on the above subject matter.

Enclosed herewith please find twenty-seven (27) files in respect of the above adjudication section for your further action.

.....”

16. Some of the appeals forwarded to the 1st respondent vide the aforementioned letter were the appeals herein. It is clear from that letter that the appeals were forwarded to the 1st respondent pursuant to a decision made by the County Commissioner, Keiyo Marakwet County. It is not known under what circumstances the County Commissioner made the decision he made concerning the hearing of the appeals the DCC Keiyo South forwarded to the 1st respondent. In view of the foregoing, it is not true that the decision to have the appeals heard by the 1st respondent was made by the DCC Keiyo South as alleged. The decision was made by the County Commissioner, Elgeyo Marakwet County. As pointed out, the circumstances surrounding the making of that decision have not been made known to the court as the letter of the County Commissioner referenced to wit Letter Ref LND CC 16/3 VOL III/122 dated March 9, 2021 was not produced in evidence or any explanation given concerning the circumstances upon which the County Commissioner wrote the letter. In the absence of such explanation, the account offered by the 1st respondent concerning the circumstances upon which he heard the appeals cannot be authenticated.



17. Bearing in mind that the appeals herein would ordinarily have been heard by the DCC Keiyo South, in the absence of any explanation of the circumstances surrounding the decision made by the County Commissioner, Elgeyo Marakwet that the appeals be heard by the 1st respondent and taking into account that the DCC Keiyo South Sub County had no power to delegate the power given to him of hearing the appeals to the Minister to the 1st respondent, I agree with the ex parte applicants that the 1st respondent had no power or jurisdiction to hear and determine the appeals herein.
18. It is trite law that anything done without jurisdiction is a nullity. In that regard see the case of *Lucy Bosire v Nyankoni Manga Rovi* [2014] eKLR where it was held:-
- “ A decision made without or in excess of jurisdiction is a nullity ab initio...”
19. On that ground alone, I find and hold that the *ex parte* applicants have made a case for being granted the orders sought, which I hereby grant to them as prayed.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 27TH DAY OF JULY 2022.

L N WAITHAKA

JUDGE

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