



**Republic v Land Adjudication and Settlement Officer & another; M'Mutea (Exparte);
M'Imagana & 2 others (Interested Parties) (Environment and Land Judicial
Review Case 03 of 2020) [2022] KEELC 3441 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3441 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 03 OF 2020

CK NZILI, J

JULY 27, 2022

IN THE MATTER OF AN APPLICATION BY M'THURANIRA M'MUTEA

FOR SETTLEMENT OFFICER MERU CENTRAL DISTRICT IN

OBJECTION NOS 226, 5203, 5204 & 5205 IN RESPECT FOR

P/NOS 630, 4178, 4180 & 4182 RUIRI/RWARERA ADJUDICATION

SECTION

BETWEEN

REPUBLIC APPLICANT

AND

LAND ADJUDICATION AND SETTLEMENT OFFICER 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

M'THURANIRA M'MUTEA EXPARTE

AND

BENARD M'IMAGANA INTERESTED PARTY

CHARLES THURANIRA INTERESTED PARTY

LYDIAH NKATHA M'RUKUNGA INTERESTED PARTY



JUDGMENT

A. Pleadings

1. By a notice of motion dated December 9, 2021 the *ex parte* applicant seeks two orders namely; *certiorari* to call for and bring before this court the 1st respondents' proceedings and decision made on September 17, 2019 in objection no's 2226, 5203, 5204 and 5205 over Parcels No 630, 4178, 4180 and 4182 Ruiru/Rwarera Adjudication and secondly an order for prohibition stopping the 1st respondents from implementing the aforesaid decision.
2. The application is based on the statutory statement of facts dated March 17, 2020, the affidavit sworn by M^rThuranira M^rMutea on the even date and annexures marked MM-01, MM02 (a) & (b) and MM-03 respectively.
3. The *ex parte* applicant stated the 1st respondent made a decision on September 17, 2019 awarding the 1st and 2nd interested parties part of his Parcel No 630 Ruiru/Rwarea adjudication section. The grounds upon which he challenges the decision are set out under paragraphs 4 (a) – 6 in the statement of facts that the 1st respondent acted *ultra vires*; he usurped the power of the land adjudication committee members by purporting to hear and decide the objection proceedings, he acted against the law by hearing and determining or awarding the land to the 2nd interested party in his absence (2nd interested party), he contravened the [Land Adjudication Act](#) & [Land Consolidation Act](#) Cap 283 and 284 in hearing and determining the objection proceedings; acted without basis and lastly he made a decision which is void ab initio for all intents and purposes.
4. In the affidavit verifying the facts, the *ex parte* applicant states the 1st respondent was the incharge of the adjudication section where the suit land is situated. That the 3rd interested party was a purchaser from him of two acres and vide his letter he requested the 1st respondent to excise the said two acres before the impugned decision was made which process was confirmed through a letter dated September 30, 2019. That despite the confirmation letter, the said two acres were not provided for in the impugned decision.
5. The *ex parte* applicant averred the objection proceedings were conducted in english language and despite his protests the 1st respondent refused to avail an interpreter for him but instead refused to record his protest, or allow him to cross examine the 1st interested party and proceeded to award the 2nd interested party part of his land when he was not even present before respondent. Further, the *ex parte* applicants averred the 1st respondent usurped the powers of the land adjudication committee members by purporting to hear the objection proceedings.
6. Additionally, the *ex parte* applicant averred the 1st respondent was in the process of implementing the suit decision whilst the 1st and 2nd interested parties were vigorously advertising by word of mouth to the area residents their intentions of selling suit land to third parties hence there was a risk of the suit parcel being transferred to third parties which will be outside his control.
7. The respondents through a replying affidavit sworn by Justus M Levu on February 18, 2022 have opposed the replying affidavit. He stated the suit parcels of land fell under Ruiru/Rwarera Adjudication; that Objection No's 2226, 5203, 5204 & 5205 were filed again. Parcel No. 630, 4178, 4189 and 4180 by Bernard M^rImagana against Thuranira Mutea, Charles Thuranira, Josephat Marangu and Japhet Kiogora of which parcel initially were recorded in favour of Thuranira Mutea,



Charles Thurairaja, Josephat Marangu and Japhet Kiogora respectively who are sons of the 1st recorded owner.

8. That Parcel No's 4178, 4180 and 4182 were as a result of subdivision of Parcel No 630. That the objectors claim was that he was the first person to settle on Parcel No 630, 4180 and 4182 in 1970 which occupation the respondents and the objectors did not challenge. That during the ground visit, the respondents were unable to pin point out the boundaries of the land they claimed unlike the objector who identified the boundaries and established he was in occupation on the ground. That the objections were eventually determined and allowed in the form of subdivisions which the demarcation officer to implement through fresh subdivisions as per the changed acreage namely Parcel No. 630- (1.5 acres), 4180-(1.5 acres), 4182 – (1.5 acres) and 4092 – (6.31 acres) respectively.
9. That due to the foregoing, no error in fact and in law was made by the land adjudication officer, the decision was sound, based on evidence tendered and the scene visit findings, the land adjudication committee was a lower level tribunal and that the land adjudication officer was at liberty to uphold or prevail upon its decision; the land adjudication officer acted within the powers under Section 10 of the Land Adjudication Act which governed the suit parcels and not the Land Adjudication Act Cap 284.
10. As regards objections no's 1415 & 3223, the respondents averred the two acres had been subdivided to Lydia Nkatha and a new number 8229 issued. The respondents attached a certified copy of the proceedings as annexure marked "JML".
11. The 1st interested party opposed the notice of motion by a replying affidavit sworn on February 18, 2022 on the basis that the 1st respondent followed the law and reached a proper decision. That the *exparte* applicant never complained that he was not conversant with the language during the objection proceedings; the language used was not even English and that the purported letter to the 1st respondent was a tailor made, undated and lacked the date of service by way of a stamp by the recipient. That the *exparte* applicant was indolent, had failed to exhaust the internal mechanisms under the law, the allegations had not been proved, it was an after thought since it is brought after one year after the aforesaid decision and therefore lacked merits.

B. Written Submissions

12. With leave of court parties opted to put in written submissions by April 29, 2022. It is the submissions of the *exparte* applicant submitted that judicial review is concerned with the decision-making process and not the merits of the decision as held in Republic vs KRA exparte Yaya Towers Ltd (2008) eKLR.
13. In his own view, the *exparte* applicant submitted the issues for determination are whether or not the 1st respondent acted within or outside the law and secondly if the manner it handled the objection was *ultra vires*.
14. On the 1st issue it is submitted the 1st respondent failed to involve the mandatory 25 members of the land committee which fact has not been controverted or explained at all. Further, it was submitted the 2nd interested party was not present at the hearing, gave no evidence but was miraculously awarded a portion of the suit property.
15. On the issue of the language, it was submitted the respondents have not denied that fact including the right to an interpreter and cross examination which was not only unlawful but also unconstitutional.
16. Regarding the 2nd issue, the *exparte* applicant submitted the decision was *ultra vires* since it was made without the aid of the mandatory land committee members.



17. In response to the replying affidavit, the *ex parte* applicant submitted the acreage stated at paragraph 13 of the replying affidavits by the 1st respondent differs with what is contained in the letters attached to his own affidavit in verification of facts.
18. The *ex parte* applicant submitted no scene visit report is attached to the replying affidavit or evidence of the participation of the parties during the alleged scene visit in absence of which the court should not be persuaded without evidence.
19. As to the alleged two acres at paragraph 15 of the replying affidavit, it was submitted no back up report has been exhibited by way of a ruling or decision.
20. In view of the glaring contradictions pointed out above, the *ex parte* applicant submitted the application has merits and should be allowed.
21. The 1st interested party submitted the onus is on the *ex parte* applicant as held in *Municipal Council of Mombasa vs Republic* (2001) eKLR to prove that the 1st respondent failed to follow Section 9 (1), 11 (1), 14, 26 (1) & 29 (4) of the *Land Consolidation Act*.
22. The interested party it is submits the proceedings indicate there was a properly constituted land committee members who heard the objection and though not tabulated in the proceedings, were present during the hearing although it is good practice to include them.
23. Further, it was submitted the members of the land committee were drawn from the area hence the issue of language does not arise and that the record shows the *ex parte* applicant responded to all the questions asked of him during the proceedings and if at all he did not understand the language then he could have given irrelevant responses.
24. It was submitted that Section 9 of the *Fair Administrative Action Act* required the *ex parte* applicant to exhaust the alternative dispute resolution mechanisms under sections 30 (3) of *Land Adjudication* before resorting to Judicial Review. Reliance was placed on *Republic vs Land Adjudication Officer Tigania sub county & another* (2021) eKLR, *Republic vs District Land Adjudication 7 Settlement Officer Tigania East/West Ex parte Zaverio Mithika* (2018) eKLR Municipal Council of Meru *supra*.

C. Issues for Determination

25. The issues calling for determination are:
 - i. What was the applicable law to the land adjudication process of the suit premises.
 - ii. If the *ex parte* applicant exhausted the internal dispute resolution mechanism under the law before invoking the court's jurisdiction.
 - iii. If the proceedings and the decision of the 1st respondent offended both the statute(s) and the *Constitution* as on the right to fair administrative action and fair hearing.
 - iv. If the *ex parte* applicant is entitled to the prayers of certiorari and prohibition
 - v. What is the order as to costs.
26. It is not in dispute that a consent was issued on September 30, 2019 by the 1st respondent is made under the *Land Adjudication Act* Cap 284 Laws of Kenya. At paragraph 5 of the replying affidavit the 1st respondent states that the suit parcels are situated within Ruiru Rwarera Adjudication Section established under the Land Adjudication.



27. From the pleadings it is quite clear therefore the law applicable was the [Land Adjudication Act](#). Under Section 26 (1) a party aggrieved by the adjudication register who considers it incomplete or incorrect may within 60 days upon notice of completion of the adjudication register being published object to the adjudication officer. Under Section 29 thereof, a party aggrieved by the determination of an objection under Section 26 is required within 60 days after the determination appeal to the Minister. The decisions from the objection herein were made by the 1st respondent on September 17, 2019.
28. The *ex parte* applicant attacks the acts of the 1st respondent for being *ultra vires* and void in law in failing to accord him his rights as to fair hearing and fair administrative action.
29. The powers of a Land Adjudication Officer are set out under Section 9 and 10 of the Act. They include being in charge, general supervision and control over adjudication in the area designated to him, hearing and determination of petitions respecting any act done or omissions made or decision given by a survey officer, demarcation officer or recording officer under Section (9) 2 (b), hearing and determination of objections to the adjudication register under Section 26 (1) thereof.
30. The proceedings under Section 12 (2) of the Act are presumed as judicial proceedings for the purpose of chapter Xi and Xviii of the Penal Code.
31. Similarly, the Land Adjudication Officer is bound by the preamble of the Act which is to ascertain and record rights and interests in trust land.
32. There exist disputes resolution mechanisms in every step of the adjudication process so as to protect the just ascertainment of the said rights and interests on land.
33. The decision was made on September 17, 2019. On September 30, 2019 the 1st respondent gave the *ex parte* applicant a consent to seek for injunction over Parcel No 1677, 4092, 4178, 4272 and 5081 against Stephen Mbwiri M³Mutea, Charles Thurania, Douglas Kaumbuthu and Hellen Nkirote Mwiraria.
34. For reasons not stated the *ex parte* applicant did not file any suit in line with the consent but opted to file a judicial review on March 17, 2020.
35. The *ex parte* applicant has not explained why the appeal to the Minister was not filed before the expiry of six months
36. The judicial review proceedings were however lodged within the six months period of the decisions being made.
37. The respondents and the interested parties take the view the *ex parte* applicant should have appealed to the minister instead of rushing to court.
38. In [Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others](#) (2015) eKLR the Court of Appeal held that the exhaustion doctrine was a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for dispute resolution, outside the court.
39. A similar position was taken in [Mutanga Tea & Coffee Co. Ltd vs Shikara Ltd & another](#) (2015) eKLR where the court held Article 159 (2) (c) of the [Constitution](#) has expressly recognized alternative dispute resolution forms which must be promoted and by usurping such jurisdiction the court would be acting against it and undermining a clear constitutional objective. See also the matter of [MuiCoal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 others](#) (2015) eKLR.



40. Under Section 9 (3) of the *Fair Administrative Action Act* the court is required to defer a proceeding till exhaustion of any internal dispute mechanisms unless there are exceptional circumstances to entertain the suit as set out under subsection (4) thereof.
41. In *Republic vs Kenya School of law & 2 others exparte Kgaborone Tsholofelo Wekesa* (2019) eKLR it was held the Section 9 (2) & (3) is in mandatory terms and that under Section 9 (4) the court may only excuse a party if such exemption is in the interest of justice.
42. Further the court held that what constitutes exceptional circumstances depends on facts, context, circumstances out of ordinary, unreasonable delay decision which is patently illegal, doctrine of estoppel, a matter purely for courts determination, nature of the decision, impracticability of the internal dispute mechanisms and ineffectiveness of the mechanism.
43. The court further held that a party must formally apply to the court and demonstrate the exceptional circumstances as contemplated by Section 9 (4) and not through an oral application.
44. The court took the view that an internal remedy is effective if it offers a prospect of success and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the *constitution* and the law.
45. Under the *Land Adjudication Act* the minister has powers to deal with the appeal as he thinks fit. The *exparte* applicant explained why he did not invoke the said internal mechanisms and or perhaps said it lacks effectiveness or impracticability under the circumstances.
46. To the contrary, even after the issue was raised in these proceedings, the *exparte* applicant has not seen it fit to explain the reasons for non-compliance with Section 26(1) of the *Land Adjudication Act* and why he did not move the court under Section 9 (4) of the *Fair Administrative Action Act* for the leave to treat this application as exceptional under the circumstances obtaining.
47. My finding is that the *exparte* applicant's application fails on the non-exhaustion doctrine.
48. Going to the merits of the application, the onus was on the *exparte* applicant to demonstrate through evidence that the 1st respondent acted *ultra vires* the Acts governing the hearing and determination of objections.
49. The court has already made a finding that the objections were governed by the *Land Adjudication Act*. This law does not require the presence of the land adjudication committee members in the hearing and determination of objections unlike the *Land Consolidation Act* see *Peter Kimandiu vs Land Adjudication Officer & 5 others* (2016) eKLR.
50. The *exparte* applicant attacks the proceedings and decision by the 1st respondent for failing to accord him an interpreter, using a language he did not understand, for failing to put down his protest over language and lastly for allowing a claim in favour of the 2nd interested party when he did not attend or present his evidence before the Land Adjudication Officer.
51. The replying affidavits by both the interested party and the 1st respondent were categorical that the *exparte* applicants' rights as to fair hearing and fair administrative action were followed. There has been no counter-response by the *exparte* applicant did not file a supplementary affidavit to deny that he indeed fully participated in the proceedings and even cross-examined the witnesses and the interested parties.
52. It is trite law that he who avers must prove on a balance of probability. In this matter, the proceedings and the decision indicate that the *exparte* applicant fully participated in the proceedings. There is no



indication that he raised any objections as to the language and or lack of fairness during proceedings. There is no evidence that the 1st respondent failed to consider relevant issues and or considered irrelevant issues.

53. Nothing was brought up by the *ex parte* applicant on the specific details of the 1st respondent acting outside the Act. The *ex parte* applicant seems to be unclear on the application of both the [Land Adjudication Act](#) and [Land Consolidation Act](#) in the proceedings and the decision made by the 1st respondent.
54. It is also not clear whether the *ex parte* applicant made any complaint to the Commission on Administrative Justice if at all he was aggrieved by the manner in which the 1st respondent handled the objections.
55. Similarly, there is no indication if the *ex parte* applicant invoked the [Access to Information Act](#) and was denied a copy of the records and decision regarding his request for an excision.
56. As indicated above a land adjudication officer derives its statutory powers from the preamble and Sections 9, 10 & 11 of the [Land Adjudication Act](#) looking at the handling of the objections, there is nothing abnormal which was done by the 1st respondent to show that it did not accord, the parties herein their statutory rights and or hear the objections on merits. Therefore I find no reason to grant the orders sought for certiorari and prohibition.
57. In the premises I find the application lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 27TH DAY OF JULY, 2022

In presence of:

Mr Kaume for 3rd interested party

Kieti for 1st & 2nd respondents

HON C K NZILI

ELC JUDGE

