



**Republic v Deputy County Commissioner, Narok West & 2 others;
Karani (Exparte); Mosiro (Interested Party) (Judicial Review Application
E002 of 2021) [2022] KEELC 3909 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3909 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

JUDICIAL REVIEW APPLICATION E002 OF 2021

CG MBOGO, J

JULY 21, 2022

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORMS ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE

RULES

AND

IN THE MATTER OF SECTIONS 4,5,7 & 8 OF THE FAIR

ADMINISTRATIVE ACTION ACT

&

IN THE MATTER OF ARTICLES 40,67 AND 162 OF THE

CONSTITUTION

&

IN THE MATTER OF LAND ADJUDICATION ACT

&

IN THE MATTER OF LAND ADJUDICATION REGULATIONS

1970 REV.2012

&

IN THE EXERCISE OF POWERS CONFERRED TO THE DEPUTY

COUNTY COMMISSIONER BY THE CABINET SECRETARY

PURSUANT TO KENYA GAZZETTE NOTICE NO. 6854 OF

3/10/2014

&



1 | PAGE JUDGMENT ELC JR NO. E002 OF 2021 DELIVERED VIA
EMAIL ON 21ST JULY, 2022.

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF PROHIBITION, MANDAMUS & CERTIORARI

BETWEEN

REPUBLIC APPLICANT

AND

DEPUTY COUNTY COMMISSIONER, NAROK WEST 1ST RESPONDENT

CABINET SECRETARY FOR LANDS, HOUSING & URBAN

DEVELOPMENT 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

TUMPUYA OLE KARANI EXPARTE

AND

LEISI OLE MOSIRO INTERESTED PARTY

JUDGMENT

1. What is before this court for determination is the notice of motion application dated April 7, 2021 brought pursuant to Section 3A of the *Civil Procedure Act*, Sections 8 and 9 the *Law Reform Act* and Order 51, Order 53 Rules 3 and 4 of the *Civil Procedure Rules* seeking the following orders: -
 1. An order of Certiorari to remove into this honourable court and quash the entire decision and award passed by the Cabinet Secretary, Ministry of Lands and Settlement through the Deputy County Commissioner Narok West Sub County delivered on February 3, 2021 with regards to Leshuta Adjudication Section Appeal to the Minister Appeal No 590 of 2020 Leisi Ole Mosiro acting for Dickson Mosiro versus Tumpuya Ole Karani.
 2. An order of Mandamus to compel the 1st Respondent to rescind the ruling delivered on February 3, 2021 with regards to Leshuta Adjudication Section Appeal to the Minister Appeal No 590 of 2020 Leisi Ole Mosiro acting for Dickson Mosiro versus Tumpuya Ole Karani.
 3. An order of Prohibition to forbid the respondents by themselves and/or agents, servants or personal assigns from implementing the ruling delivered on February 3, 2021 with regards to Leshuta Adjudication Section Appeal to the Minister No 590 of 2020 Leisi Ole Mosiro acting for Dickson Mosiro versus Tumpuya Ole Karani.
 4. That costs of this application be borne by the respondents and the interested parties herein.
2. The application is premised on the grounds inter alia that the interested party herein lodged an objection with the Land Adjudication and Settlement Officer-Narok South challenging the allotment of the parcel number 526 to the ex-parte applicant during which the hearing of the proceedings did so



in his own interest and not on behalf of DM the minor herein. A ruling was delivered and the same was dismissed. Further, that the interested party herein lodged an appeal to the minister on March 4, 2019 through appeal number 590 of 2020 where he was not appearing to be acting for the minor who was not a party to the objection proceedings before the Land Adjudication Officer and a ruling by the minister was delivered on February 3, 2021. The ex-parte applicant contends that the 1st respondent was wrong in allowing a new party to the appeal and proceeding to determine the appeal in favour of the new party who is a minor.

3. The application is supported by the statutory statement sworn on April 7, 2021 and a supporting affidavit sworn on even date. In his statutory statement, the ex-parte applicant deposed that the Deputy County Commissioner Narok West Sub County heard the appeal on January 26, 2021 and delivered a ruling on February 3, 2021 and that the hearing and determination of the appeal was marred with irregularities and breach of procedure governing the hearing and determination of appeals. The ex-parte applicant outlined the particulars of the illegality, irregularities and wrongfulness of the decision to the appeal to the minister as follows: -
 - a. The 1st respondent through his representative the DCC Narok West in his ruling to the appeal by the 1st respondent allowed the introduction of a new party to the appeal by allowing the appellant to represent himself as acting for his son identified with the initials DM by virtue of being a minor.
 - b. The 1st interested party had all along during the hearing of the objection lodged before the adjudication officer been representing his own interests and has never indicated that he is acting for anyone else apart from himself.
 - c. The 1st interested party's son DM was a stranger in the said appeal but still the DCC Narok West allowed the appellant to prosecute the appeal on his own behalf.
 - d. The 1st respondent through his representative the DCC Narok West in his ruling to the Appeal by the 1st respondent rendered a ruling to the effect that he ordered that the suit property be divided equally between the ex-parte applicant herein and the stranger in the appeal allegedly represented by the appellant (the 1st interested party herein).
 - e. The minister failed and/or ignored to take into account the fact that the matter proceeded before the adjudication officer Narok South without the 1st respondent's son DM being part of the proceedings and went ahead to allow for his introduction in the appeal.
4. The grounds upon which the orders are sought are: -
 - i. Ultra vires-that the 1st respondent acted ultra vires by allowing introduction of a new party to the appeal.
 - ii. Abuse of power-that the 1st respondent abused his powers by determining the appeal before him without following the principles governing the hearing of appeals.
 - iii. Irrelevant consideration and illegality-that the 1st respondent permitted himself to consider the appeal in a manner that contradicts the law.
 - iv. Unreasonableness-that the minister failed to take into account that allowing a new party to the appeal would cause an injustice to him.
 - v. Procedural impropriety-that the 2nd respondent represented by the 1st respondent did not follow the due procedure and therefore violated Section 4, 6 and 7 of the *Fair Administrative Action Act* and Articles 20, 47 and 50 of the *Constitution*.



5. The ex-parte applicant is apprehensive that the adjudication officer shall place reliance on the ruling and divide his land and allocate the same without due procedure having been followed during the determination of the appeal.
6. In his supporting affidavit, the ex-parte applicant rehashed the grounds raised in his application.
7. The 3rd respondent filed a preliminary objection dated March 22, 2022 challenging the application on the following grounds: -
 1. That this application offends the mandatory provisions of Order 53 Rule 1 of the Civil Procedure Rules which provides that no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted. The ex-parte applicant has not obtained leave to file this application.
 2. That this application offends the mandatory provisions of Order 53 Rule 2 of the civil procedure rules which requires an application for leave to quash a decision to be filed not later than six months from the date of the decision.
 3. That this offends the mandatory provisions of section 9 (3) of the Law Reform Act, Cap 26 which requires an application for leave to quash a decision to be filed not later than six months from the date of the decision.
8. The interested party filed a replying affidavit sworn on November 3, 2021 in opposition to the application. The interested party deposed that he is a member of Leshuta Adjudication Section by birth and that on January 25, 2012, a new committee was formed which took over the functions of the previous committee. Further, in the second committee, his son was allocated the suit property during demarcation which is plot number 526 Leshuta Adjudication Section and that essentially all men his age were allowed to register 3 sons into the membership list to cater for sons who were not of age during the demarcation and it is on this basis that he presented the name of Dickson Mosiro to the adjudication committee where he was registered as a member.
9. The interested party further deposed that on February 8, 2019, he objected to the ex-parte applicant being allocated his son's parcel number in objection 84 of 2019 who being an official of the adjudication section sought to benefit himself unfairly by laying claim to the land in dispute through abuse of office despite being allocated parcel number 1463. The objection was heard and determined by the adjudication committee and during the hearing before the tribunal, the ex-parte applicant led the tribunal to believe that he was claiming the parcel in his own name yet he was acting on behalf of his son and that the decision was erroneously arrived at due to the false pretence that he was seeking to have the suit land to himself in addition to his own plot.
10. The interested party being dissatisfied with the decision, appealed to the minister through case number 590 of 2020 where the minister made a finding that the land should be divided equally and that taking into account that both parties are residents on the disputed land and have both developed the same, it would not be prudent to contravene by ordering a settled member to vacate his home. Further, that land allocation was closed in the adjudication section and there is no vacant land available for allocation to the minor should the parcel be taken from him who unlike the applicant does not have alternative parcels to land.
11. The interested party further deposed that the ex-parte applicant is not honest as he has been allocated several parcels of land and used his office to obtain four other parcels of land in his name. Also, that the ex-parte applicant has not exhausted all available remedies for failure to annex a copy of consent



- to institute proceedings. As such the application is frivolous and should not be allowed since it will amount to an eviction order against him and his son.
12. The ex-parte applicant filed written submissions dated April 25, 2022. The ex-parte applicant raised two issues for determination which are whether the motion for judicial review orders of certiorari, mandamus and prohibition sought is merited and who bears the costs of these proceedings. The ex-parte applicant submitted that judicial review not only concerns itself with the legality of the decisions arrived at by public officers, but it also looks into the rationality in strict interpretations of the rules of natural justice and that pursuant to Section 29 (1) and (4) of the [Land Adjudication Act](#), Articles 47 and 2 of the [Constitution](#), the respondents are required to act with high standards of professional ethics, be accountable for their administrative actions and be transparent in their provision to the public of timely and accurate information as well as effective, impartial and equitable provision of services in the public service.
 13. The ex-parte applicant submitted that a look at the annexed certified copy of the proceedings paints a clear portrait of a public officer acting in excess of jurisdiction which is an affront on the rules of natural justice and that it is trite law that only parties to judicial review proceedings are accorded a remedy, hence the proceedings of the appeal to the minister like any other judicial process ought to be handled as such. The ex-parte applicant relied on the case of [Nyabira Oguta Diran Onkangi versus Council of Legal Education \[2016\] eKLR](#) and submitted that the addition of the minor to the proceedings must have influenced and or set a fragile ground for bias from the 1st respondent.
 14. The ex-parte applicant further submitted that without the danger of looking into the merits of the impugned decision, it is trite law that judicial review proceedings are restricted to the process rather than the merits of the case. The ex-parte applicant relied on the cases of [Kenya National Examination Council versus Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others \[1997\] eKLR](#), [Republic versus The Commission of Lands and Another Ex-parte Kithinji Mungu Miagere Nairobi HC Misc Application No 395 of 2012](#), and [Ransa Company Limited versus Manca Fansco & 2 Others \[2015\] eKLR](#).
 15. On the issue of costs, the ex-parte applicant submitted that the same follows events and it is at the discretion of the court and that based on a balance of probability, the application under review is merited and ought to be awarded costs.
 16. The interested party filed written submissions dated June 8, 2022. The interested party raised 4 issues for determination as follows: -
 - a. Whether the minister has jurisdiction to consider grounds of appeal raised under Section 29 of the [Land Adjudication Act](#).
 - b. Whether the consent of the Land Adjudication and Settlement Officer is required to commence these proceedings.
 - c. Whether the ex-parte applicant has made a case for grant of orders sought.
 - d. Should the court issue orders as to costs.
 17. On the first issue, the interested party submitted that the minister has jurisdiction to hear a case where any aggrieved person has appealed against the objection decision and has delivered written grounds of appeal which the minister has mandate to consider the grounds of appeal. The interested party relied on the case of [Republic versus Special District Commissioner & Another \[2006\] eKLR](#) and submitted that the mandate of the minister under Section 29 of the Act is to consider the grounds of the appeal raised by any person appealing alongside the objection proceedings.



18. On the second issue, the interested party submitted that it has long been established through case law that proceedings before the minister are quasi-judicial in nature and must comply strictly with rules of evidence as applied by court civil procedure rules. The interested party relied on the case of *Republic versus Deputy County Commissioner, Mwingi East ex-parte Kato Kasina (2021)eKLR* and submitted that at no point in the proceedings did the ex-parte applicant object to the representation of the minor by his father.
19. On the third issue, the interested party submitted that the ex-parte applicant has not brought before this court any evidence that the consideration of the grounds of appeal by the minister was tainted with illegality, irrationality or procedural impropriety and that all indications point to an applicant who is unhappy with the decision of the minister and not the decision making process. On the issue of requirement of consent to institute these proceedings, the interested parties submitted that the adjudication process has not become final as orders sought include those prohibiting registration of numbers and subdivision and that in the absence of the consent as stipulated under Section 30 (1) of the *Land Adjudication Act*, the instant application ought to be struck out for failure to exhaust all the dispute resolution remedies provided in the Act.
20. Finally, the interested party submitted that the records confirms that the ex-parte applicant served the 3rd respondent with the application seeking leave on March 8, 2022 a year after the notice of motion had been filed and the orders issued were never served in contradiction to Order 53 Rule 3 of the Civil Procedure Rules.
21. I have analysed the substantive motion, the preliminary objection, replying affidavit and the written submissions filed by the parties and the issues for determination is as follows: -
 - i. Whether the applicant complied with the provisions of Order 53 of the Civil Procedure Rules.
 - ii. Whether the applicant is entitled to the orders sought.
22. For the avoidance of doubt, it is necessary that I point out the decision herein below relates to ELC file number JR No E003 of 2021 as well. In the instant matter, the applicant filed a Chamber Summons application dated March 18, 2021 where he was granted leave to commence judicial review proceedings following the court's directions issued on March 19, 2021. Thereafter, he filed the substantive motion, through JR No E003 of 2021. It came to the attention of this court on April 26, 2022 that both matters are related and by consent this court consolidated both files with JR E002 of 2021 as the lead file.
23. I will first proceed to deal with the preliminary objection dated March 22, 2022. The 3rd respondent opposed the application on the grounds that the ex-parte applicant did not obtain leave to file this application and that such an application cannot be filed later than six months from the date of the decision. I have looked at the proceedings and the ex-parte applicant through chamber summons application dated March 18, 2021 sought leave to commence judicial review proceedings and this court granted him leave on March 19, 2021. As such, the ex-parte applicant has not offended the provisions of Order 53 Rule 1 of the Civil Procedure Rules.
24. The ex-parte applicant filed this application after he was aggrieved with the decision of the minister through a ruling that was delivered on February 3, 2021. The ex-parte applicant sought leave through chamber summons application dated March 18, 2021 which is slightly over a month since date of delivery. The ex-parte applicant was well within the timelines provided under Order 53 Rule 2 of the Civil Procedure Rules and Section 9 (3) of the *Law Reform Act*.
25. As such, the respondents' preliminary objection dated March 22, 2022 is dismissed.



26. It is important to note that Judicial Review as a relief is provided for in among others; Article 23 (3) of the Constitution, Section 8 of the Law Reform Act, Section 13(7) of the Environment and Land Court, Section 7 of the Fair Administrative Action Act and the Common law.

27. Article 47 of the Constitution provides for the substantive right and provides that;

' Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.'

28. Further the Fair Administrative Action Act sets out and elaborates the grounds for Judicial Review orders at Section 7 as follows:

' A court or tribunal under subsection (1) may review an administrative action or decision, 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; or
- (iv) The reasons given for it by the administrator; or 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
- (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; or
- (o) The administrative action or decision is taken or made in abuse of power.'

29. The permitted parameters of a court invited to undertake a judicial review process are well pronounced in the case of *Republic Vs Attorney General & 4 others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR* where the court calibrated the scope of judicial review as follows:

' Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.'

30. The decision in *Municipal Council of Mombasa Vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No 185 of 2001, [2002] eKLR*, provided in the Ex Parte applicant's submissions is also instructive on the contours of a judicial review exercise where the court observed as below:

' 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.'

31. In this case, the ex-parte applicant is aggrieved that the inclusion of the minor in the appeal before the minister greatly influenced the decision of the minister who was a stranger in the objection proceedings before the Land Adjudication Officer. Being mindful of the task before me, I will not go into the substance of the ruling delivered by the minister and the adjudication officer. I have perused the ruling delivered by the minister dated February 3, 2021. In the proceedings, the appellant stated that he will not move out because one of his children by the name Dickson, does not have a parcel of land. The same was stated by the interested party two witnesses.

32. The statement by the ex-parte applicant indicates that the interested party children were allocated different parcels of land. In his replying affidavit, the interested party annexed a copy of a more legible objection proceedings before the Land Adjudication Officer. A look at the proceedings does not indicate a direct claim on behalf of the interested party's children. The ex-parte applicant witnesses



stated that the interested party has three sons who were also given land. There is no indication that the interested party filed an objection on behalf of the minor. Again, the claim before the Land Adjudication Officer was that the ex-parte applicant has been disturbing him a lot and for a long time over ownership of the land.

33. While considering the appeal before him, the minister took into consideration the grounds of appeal dated March 4, 2019 as it would form part of the proceedings before him on the date of the hearing. It appears, the ex-parte applicant did not object to the introduction of new grounds in the appeal. I would therefore not say, that the minister acted ultra vires, was unreasonable or he abused his powers. I would also not say that the minister violated Section 4,6 and 7 of the *Fair Administrative Action Act* and the *Constitution* because, he was granted a chance to defend his case, was heard and his witnesses who were present with him were also heard. Perhaps this court would have made a different finding if he opposed the grounds of appeal but it appears he did not do so.
34. Arising from the above, I find that the notice of motion dated April 7, 2021 lacks merit. The same is dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 21ST JULY, 2022.

MBOGO C.G

JUDGE

21/7/2022

In the presence of: -

CA: Timothy Chuma

