Republic v Cabinet Secretary for Lands, Housing & Urban Development & 2 others; Nadosoito (Exparte); Nchoe & 2 others (Interested Party) (Judicial Review Application E004 of 2021) [2022] KEELC 2453 (KLR) (20 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2453 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

JUDICIAL REVIEW APPLICATION E004 OF 2021

CG MBOGO, J

JULY 20, 2022

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

AND

IN THE MATTER IF THE ORDER OF THE CIVIL PROCEDURE RULES

AND

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

&

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

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IN THE MATTER OF LAND ADJUDICATION ACT

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IN THE MATTER OF LAND ADJUDICATION REGULATIONS 1970 REV.2012

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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

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

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY FOR LANDS, HOUSING & URBAN DEVELOPMENT ..... 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER, NAROK NORTH ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

KILUSU OLE NADOSOITO ..... EXPARTE

AND

KELENA OLE NCHOE ..... INTERESTED PARTY

SOKOIPEI KIPILA ..... INTERESTED PARTY

RAPHAEL NCHOKO ..... INTERESTED PARTY

JUDGMENT

1. What is before this court for determination is the notice of motion application dated May 24, 2021 brought pursuant to Section 8 and 9 of the *Law Reform Act* and Order 53 Rule 3 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 Physical Planning through the Deputy County Commissioner Narok North Sub County delivered on 31st March,2021 with regard to Naisoya Adjudication Section Appeal to the Minister Appeal No. 443 444 of 2020 Kilusu Nadosoito versus Kelena Nchoe, Sokoipei Kilipa and Raphael Nchoko.

    2. An order of Mandamus to compel the 1st respondent to rescind the ruling delivered on 31st March, 2021 with regards to Naisoya Adjudication Section Appeal to the Minister Appeal No. 443 444 of 2020 Kilusu Nadosoito versus Kelena Nchoe,Sokoipei Kilipa and Raphael Nchoko.

    3. An order of Prohibition to forbid and or restrain the respondents by themselves and/ or their agents, servants or personal assigns from implementing the ruling delivered on 31st March, 2021 with regard to Naisoya Adjudication Section Appeal to the Minister Appeal No. 443 444 of 2020 Kilusu Nadosoito v Kelena Nchoe, Sokoipei Kilipa and Raphael Nchoko.

    4. That costs of this application be borne by the respondents and the interested party herein.

2. The application is based on the grounds on the face of it and more particularly in the supporting affidavit of the applicant sworn on even date. In his supporting affidavit, the applicant deposed that he is the owner of parcel number 118 and 119 located within Naisoya Adjudication Section and was a member of the said adjudication section before the 1st and 3rd interested parties used their position of power to illegally remove his name from the register. The applicant further deposed that he reported the matter to the District Commissioner who directed that the matter be resolved at home where a unanimous decision was reached by the 1st and 3rd interested parties to allocate him 6 acres out of the

42 acres of land which amounts to unjust enrichment. The applicant deposed that he wrote several letters dated April 26, 2000, April 28, 2003 which elicited response vide letters dated May 19, 2000, June 2, 2000, December 9, 2002 and February 28, 2003.

3. The applicant deposed that the Land Adjudication Officer, Narok North demonstrated biasness during the conduct of the proceedings on 14th August, 2019 by denying his wife the chance as he had called her as one of his witnesses and that the evidence of the 2nd interested party and Mantas Kipila an officer from the Land Registry were taken despite being conflicted in the matter. The applicant deposed that being dissatisfied with the decision of the Land Adjudication Officer he filed an appeal before the minister who dismissed his appeal. The applicant has raised particulars of illegalities, irregularities and wrongfulness of the decision of the minister as follows: -

    a) The 1st respondent did not scrutinise the entire evidence presented by the applicant during the proceedings before the adjudication officer.

    b) The 1st respondent failed to note that there was no sale agreement for the sale of parcel number 118 and 119 between the interested parties and himself as required by the law.

    c) The 1st respondent failed to note that there was conflict of interest between the 2nd interested party and the adjudication officer.

    d) The 1st respondent failed to consider the evidence and testimony of his witness herein Kela Ole Nadosoito which amounts to grave omission and inaction.

    e) The ruling delivered by the 1st respondent entirely relied on the evidence of the testimonies of the interested parties witnesses, while his evidence and that of his witness was never considered.

    f) The 1st and 2nd respondents relied on the word of mouth and hearsay to make a determination on a weighty issue of land with no documents presented to them by any of the interested parties.

4. The 3rd respondent filed grounds of opposition dated November 8, 2021 challenging the application on the following grounds: -

    1. The purpose of judicial review is to check the decision-making process and the legality thereof; and not in making findings into legality and ownership of land.

    2. The dispute herein relates to ownership of the suit properties between the exparte applicant on one hand and the interested parties on the other hand which dispute cannot be determined in a judicial review application but in a substantive suit.

    3. The respondents have powers and discretion under section 12 of the *Land Adjudication Act* to admit evidence that would not be ordinarily admissible under a court of law.

    4. The 2nd respondent acted well within his powers when he made the decision. Section 29 (4) of the *Land Adjudication Act* gives the 1st respondent the powers to delegate his powers to hear appeals to any public office.

5. It is clear that there is no basis for the court to issue the orders sought in the notice of motion application and the same should be dismissed with costs.

6. The 2nd interested party filed a replying affidavit sworn on May 30, 2022 in opposition to the application. The 2nd interested party deposed that he is the registered owner of Cismara/Naisoya/118 having acquired the same from the 3rd interested party and has been in occupation since 1986. Further, that as per the documents on record the transactions took place in the year 1981 and whereas the

applicant claimed that the monies paid was advanced as a debt to secure his release, the applicant has not given reasons why the amounts remain unpaid to date. Further that it was necessary that his witness statement be taken as he has resided on the suit land which in turn directly affects him. The 2nd interested party is of the view that hearing of the objection before the adjudication officer and the appeal before the minister was fair as the applicant was afforded the chance to present his case.

7. The applicant filed a replying affidavit in response thereof sworn on June 10, 2022.The applicant buttressed the issued raised in his supporting affidavit dated May 24, 2021 and more particularly the details of the determination by the adjudication officer and the appeal to the minister.

8. The applicant filed written submissions dated 20th June, 2022.The applicant raised one issue for determination which is whether the applicant's appeal to the minister appeal no. 443 and 444 of 2020 delivered on April 13, 2021 by the 2nd respondent exercising the powers of the 1st respondent filed to adhere to the tenets stipulated in *the Constitution*, Fair Administrative Act and the *Land Adjudication Act*.

9. The applicant submitted that the 2nd respondent's ruling dated 13th April, 2020 was unfairly and unprocedurally arrived at hence infringing his right as stipulated in Article 50 (1) and 47 of *the Constitution* and Section 4 of the Fair Administrative Act. That Section 3 (3) of the *Law of Contract Act* was also not taken into consideration since he was not availed with information, material documents and evidence that were used by the administrator in arriving at the ruling dated April 13, 2021.The applicant relied on the case of *Republic v Attorney General & Another Ex-parte Munywokang Kiyer & 3 others* [2014] eKLR and submitted that it is evident that the proceedings in the appeal to the 2nd respondent showed open bias in the manner that he treated the evidence of the applicant and his witnesses. Further that the 2nd respondent did not hear the applicant or completely ignored his evidence condemning him unheard. The applicant further submitted his evidence was ignored despite having supplied them before and during the hearing. The applicant relied on the letters dated April 26, 2000, May 19, 2000 and April 28, 2003 and December 9, 2000.The applicant while submitting that the 2nd respondent was not impartial and was biased in his ruling and offended the rules of natural justice, relied on the case of *Republic v Tigania East District Land Adjudication and Settlement Officer* Judicial Review No. 11 of 2018 and *Msagha v Chief Justice & 7 others* Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006]2 KLR 553.

10. The applicant further submitted that the impugned decision is tainted with illegality contrary to Article 47 of *the Constitution* and Section 4 of the Fair Administrative Act as no copy of the sale agreement was availed to him before, during and after the hearing of the appeal. The applicant submitted that Section 12 of the *Land Adjudication Act* allows the 2nd respondent to admit evidence that would not be admissible in a court of law and that the issue of land being a very weighty and emotive issue that evidence not admissible in a court of law should not be admitted.

11. The 3rd respondent filed written submissions dated June 21, 2022. The 3rd respondent issues for determination are whether sufficient reasons have been placed before this court to warrant the grant of the orders sought. The 3rd respondent submitted that Section 13 (7) of the *Environment and Land Court Act* gives this court power to grant prerogative orders. The 3rd respondent relied on Section 4 and 7 of the *Fair Administrative Action Act* and *OJSC Power Machines Limited, Trans Century Limited and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* NRB CA 28 of 2016 [2017] eKLR.

12. On the issue of the sale agreement, the 3rd respondent submitted that copies attached to the proceedings show that there was a transaction that took place between the applicant and the interested parties to which the respondents were privy to and that Section 3 (7) of the *Law of Contract Act* excludes

the application of Section 3 (3) of the said Act to contracts made before the commencement of the subsection. Further that the applicant admitted to having received money from one of the interested parties which demonstrates that some elements of the contract were fulfilled as was stated in the Court of Appeal decision in *Peter Mbiri Michuki versus Samuel Mugo Michuki* [2014] eKLR. On irrationality and unreasonableness, the 3rd respondent relied on the case of *Environment & Combustion Consultants Limited v Kenya Pipeline Company Limited & 2 others* [2016] eKLR. While relying on the case of *Republic v Public Procurement Administrative Review Board & another Ex-parte Copy Cat Limited* [2017] eKLR, the 3rd respondent submitted that from the materials placed before this court, the applicant has failed to demonstrate any of the aforementioned conditions.

13. The interested parties did not file written submissions.

14. I have carefully analysed the application, grounds of opposition, replies thereof and the written submissions filed and the issue for determination is whether the applicant is entitled to the orders sought in the application dated May 24, 2021.

15. 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.

16. 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."

17. 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."

18. The permitted parameters of a court invited to undertake a judicial review process is well pronounced in the case of *Republic v 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."

19. The decision in *Municipal Council of Mombasa v 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."

20. From the foregoing, the mandate of this court is not to determine whether the amounts advanced by the 1st and 3rd interested parties were to bail out the applicant or was either forming part of the purchase price, but to examine whether the manner in which the objection and appeal to the minister was heard and determined followed due process.

21. The applicant herein submitted that he was not availed with information and documentary evidence during hearing and that upon being served with a hearing notice, he requested for a copy of the adjudication register which was denied. He further submitted that he complained to the 2nd respondent who also did not call for the adjudication records during the appeal. The applicant also submitted that he was also not supplied with a copy of the alleged sale agreement. The applicant has attached a copy of the objection proceedings before the adjudication officer where it was decided that the applicant herein be given 3 acres to be hived from each of the disputed parcels of land numbers 118 and 119.From the objection proceedings, the applicant had one witness by the name of Kinaru Ole Kimorgo. In the appeal to the minister, the applicant had one witness by the name of Kela Nadasoito who testified and was also cross examined. It is clear to this court that the applicant's witness was afforded the chance to give evidence before the minister. On the issue of the adjudication records, the applicant has not raised the same in his grounds of appeal to the minister. What is clear and is in dispute is the issue of alleged sale of land. The respondents in the appeal to the minister stated that they submitted the sale agreements. However, in the findings, the 2nd respondent makes a finding which in part reads "After examining all the evidence submitted to the court, it's clear and evident that Kilusu Nadosoito sold the land to the respondents knowingly and willingly and not under any influence of alcohol...".

22. Based on the summary of the applicant's claim the court is of the view that the issues raised involve mainly contested issues of fact. In hindsight, the applicant is inviting this court to determine whether there was a written sale agreement in existence. In my view, these are contested facts that are apparent from the dispute resolution proceedings during adjudication. It is basic law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof. For the facts presented by the applicant to be proved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This was the position in *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR where it was held: -

> "It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

23. It is trite law that a court hearing a judicial review case is concerned only with the lawfulness of the process by which the decision was arrived at. Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory and not appellate. This court cannot sit on appeal on the decision of the 2nd respondent and review the merits of the same as

one would do when dealing with an appeal. The case of *Minister for Immigration and Citizenship v SZJSS* {2010} HCA 48. reaffirmed the proper role of courts in reviewing administrative decisions. It held that "courts should not delve into the merits of administrative decisions on the ground that the decision-maker did not give 'proper, genuine and realistic consideration' to the evidence before it — the weighing of evidence, and the preference for some evidence over other, is a matter for decision-makers, not for courts exercising supervisory jurisdiction."

24. There are however exceptions to the rule that Judicial Review should not go into the merits of a decision. In *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (EA) Limited* [2013] eKLR Mumbi Ngugi J held as follows:

> " It is, I believe, settled law that a court exercising judicial review jurisdiction is concerned with the procedural propriety of a decision, rather than with its merits. A court will consider the merits of a decision only in the circumstances set out in the case of Associated Provincial Picture Houses Ltd –versus- Wednesbury Corporation, namely: where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it."

25. For the reasons stated above, I find that the applicant has not satisfied the court that the decision of the 2nd respondent was tainted with illegality and there existed denial of the rules of natural justice. As such, the applicant has failed to meet the threshold for grant of the orders of Certiorari, Mandamus and Prohibition.

26. Arising from the above, the notice of motion application dated May 24, 2021 is dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 20TH JULY, 2022.

MBOGO C.G

JUDGE

20/7/2022

In the presence of: -

CA: Timothy Chuma