



Biwott & 2 others v Deputy County Commissioner Marakwet East Sub-County & 4 others; Kiptoo (Interested Party) (Environment and Land Judicial Review Case 3 of 2022) [2022] KEELC 4816 (KLR) (19 July 2022) (Ruling)

Neutral citation: [2022] KEELC 4816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 3 OF 2022**

L WAITHAKA, J

JULY 19, 2022

BETWEEN

**LUKA BIWOTT' 1ST APPLICANT
HILLARY ROTICH 2ND APPLICANT
RICHARD KIBIWOT 3RD APPLICANT**

AND

**DEPUTY COUNTY COMMISSIONER MARAKWET EAST SUB-COUNTY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
LAND ADJUDICATION AND SETTLEMENT OFFICER MARAKWET EAST SUB COUNTY 3RD RESPONDENT
DIRECTOR OF LAND ADJUDICATION 4TH RESPONDENT
CHIEF LAND REGISTRAR 5TH RESPONDENT**

AND

JOSEPH KIPROP KIPTOO INTERESTED PARTY

RULING

1. This ruling is in respect of the notice of preliminary objection (PO) dated November 2, 2021. Through that PO Joseph Kipro Kiptoo (hereinafter referred to as the interested party (IP)), seeks to strike out the notice of motion filed in this matter, dated September 10, 2021 on the grounds that this court lacks jurisdiction to hear and determine the matter; that the ex parte applicant's cause of action is



incompetent, defective in form and substance; that the case is bad in law for want of the consent of the land adjudication officer and that the action is pre-mature.

2. Pursuant to directions taken on March 23, 2021, the PO was disposed of by way of written submissions.
3. The interested party submits that the suit is an appeal disguised as a judicial review application; that this court has no jurisdiction to entertain an appeal from the decision of the minister under the [Land Adjudication Act](#), Cap 284 Laws of Kenya; that even if this court has jurisdiction to entertain the matter, the jurisdiction is curtailed by the ex parte applicants' failure to obtain the consent of the land adjudication officer required under section 30 of Cap 284; that the ex parte applicant should satisfy the court that the adjudication process is complete and that all the provisions of Cap 284 have been complied with, which they have not done.
4. It is pointed out that during the land adjudication process, the ex parte applicants objected to the decision made on February 25, 2019 awarding plot Nos 2924, 2926 and 2927 to the interested party and that the objection was heard and a decision made in favour of the interested party. On account of those facts, it is contended that the ex parte applicants are indirectly challenging the minister's decision, which decision is, under section 29 of Cap 284, final.
5. As can be discerned from the grounds of objections and the submissions in respect thereof, the interested party has premised his objection on the grounds that the application is an appeal disguised as a judicial review application; that the ex parte applicants have not obtained the consent of the land adjudication officer to bring this action as required by section 29 of Cap 284 and that the application is premature as the adjudication process is incomplete.
6. I have carefully considered the issues raised in the PO and find the sole issue for determination to be whether those issues fit the test of a PO.
7. With regard to that issue, for this court to determine whether the application is a PO disguised as an appeal, it is called upon to examine the merits of the ex parte applicants' application yet that is a function it ought not to perform in respect of a PO. In that regard, see the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969)EA 696* where it was held:-

' A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

8. In the case of [David Nyekorach Matsanga & Another v Philip Waki & 3 Others \(2017\) e KLR](#) it was stated:-

' We quickly turn to the question whether we have before us a preliminary objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969)EA 696* has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & Another (1995) e KLR* also captured the legal principle when it stated as follows:-

'A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.'



9. In *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others Supreme Court of Kenya Petition No 10 of 2013 (2014) e KLR* the Supreme Court stated that:-

' a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit.'

10. In the circumstances of this suit, the ex parte applicants have moved the court by way of a judicial review application. Although the interested party contends that the application is an appeal disguised as judicial review, I do find as a fact that the application before me is one for judicial review and not an appeal. The ex parte applicants have moved the court on the ground that the 1st respondent exercised his powers in a biased manner, acted in bad faith and that his actions were ultra vires, that the proceedings were conducted unprocedurally, against the rules of natural justice and that he was unfair to the ex applicants. Without going to the merits of the ex applicant's case, I do find those grounds to be fit and proper grounds for a judicial review application.

11. As to whether the ex parte applicant required the consent of the land adjudication officer, it is trite law that the consent of the land adjudication officer is not required to invoke the court's supervisory jurisdiction. In that regard see the case of *Moses BarKutwo & 3 others V The District Land Adjudication & Settlement Officer & Another-Eldoret ELC Petition No 11 of 2020* where it was observed:-

' Courts have rendered many decisions on the issue of consent from the land adjudication officer and such cases brought to court without such consents have been dismissed or struck out. It should be noted that such cases are distinguishable where such consent is required in matters that deal with the ascertainment of interest in land and those that challenge the legitimacy of the process. When a party is aggrieved and is challenging the legitimacy of the process, the court is the right forum for ventilating such matters. It would be moot to expect the land adjudication officer to grant consent to question a process which borders on unconstitutionality and/or criminality or impunity.'

12. Also see the case of *Republic v Magistrate Court, Mombasa; Absin Synergy Limited (Interested Party) (JR033 of 2021) (2022) KEHC 10 (KLR)* January 24, 2022 (judgment) where it was stated:-

' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. The role of the court in judicial review is supervisory. It is not an appeal and the court should not adopt the forbidden appellate approach'.

13. The upshot of the foregoing is that the objection is found without merit. Consequently, I dismiss it with costs to the ex parte applicants.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 19TH DAY OF JULY 2022.

LN WAITHAKA

JUDGE

