



Republic v Deputy County Commissioner, Keiyo North & 8 others; Joseph Kipruto Kambai (Interested Party); Paul Kipkoech Rotich (Exparte) (Environment and Land Judicial Review Case E001 of 2022) [2022] KEELC 4794 (KLR) (19 July 2022) (Judgment)

Neutral citation: [2022] KEELC 4794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022**

L WAITHAKA, J

JULY 19, 2022

**IN THE MATTER OF AN APPLICATION OF PAUL
KIPKOECH ROTICH FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION**

AND

**IN THE MATTER OF THE LAND ADJUDICATION ACT
(CAP 284) LAWS OF KENYA**

AND

**IN THE MATTER OF LAND PARCEL UPPER CHEPTEBO
“B” SECTION PARCEL NO.1119 IN UPPER CHEPTEBO
“B” ADJUDICATION SECTION KEIYO SOUTH SUB-
COUNTY**

AND

**IN THE MATTER OF THE DECISION OF THE DEPUTY
COUNTY COMMISSIONER KEIYO NORTH SUB-
COUNTY ITEN ELC J/R NO. E001 OF 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER, KEIYO NORTH 1ST RESPONDENT
CABINET SECRETARY FOR LANDS, HOUSING AND URBAN
DEVELOPMENT 2ND RESPONDENT**



DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 3RD
RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

COUNTY LAND REGISTRAR ELGEYO MARAKWET 5TH RESPONDENT

COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER, ELGEYO
MARAKWET 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

CHIEF LAND REGISTRAR 8TH RESPONDENT

ATTORNEY GENERAL 9TH RESPONDENT

AND

JOSEPH KIPRUTO KAMBAI INTERESTED PARTY

AND

PAUL KIPKOECH ROTICH EXPARTE

JUDGMENT

Introduction

1. By a notice of motion dated April 14, 2022 and filed on an even date, the *ex parte* applicant Paul Kipkoech Rotich, seeks an order of *Certiorari* to remove to this court for purpose of being quashed the decision of the 1st respondent made in appeal to the Minister Case No 48 of 2018 on September 22, 2021; an order of *Prohibition* to prohibit the 3rd to the 6th respondents from implementing the impugned decision of the 1st respondent; an order setting aside the impugned decision and remitting the appeal for re-trial and costs of the application.
2. The application is premised on the grounds that the *ex parte* applicant lodged an appeal to the Minister in respect of the parcel of land known as parcel No 1119 Upper Cheptebo “B” Adjudication Section in Keiyo South-Sub County, Elgeyo Marakwet; that the Appeal was heard by the Deputy County Commissioner (DCC) Keiyo North Sub-County as opposed to the DCC-Keiyo South Sub-County who ought to have heard the appeal; that the appeal was heard and determined when the Interested Party was a member of the demarcation board and a friend of the DCC; that he (the *ex parte* applicant) was not given a reasonable opportunity to be heard and to cross examine the interested party; that his witnesses and he were threatened; that the 1st respondent exhibited outright bias and discrimination upon him (-did not allow him to complete stating his evidence and/or presentation). Further that the 1st respondent breached the rules of natural justice; failed to appreciate that he should be a neutral arbiter and descended in the arena of the dispute in support of one party.
3. The application is opposed through the replying affidavit of the interested party sworn on May 10, 2022, on the grounds that both parties were afforded an opportunity to be heard and to cross-examine witnesses; that it is not true that the applicant and his witnesses were harassed; that the adjudication process has several stages and that in all the stages, the issue of ownership of plot No 1119 was decided in his favour; that under the Land Adjudication Area (LAA) the Minister has power to appoint any officer to help him in his duties; that the 1st respondent having been duly appointed, was fully seized with the



jurisdiction to handle the applicant's appeal; that the appointment of the 1st respondent to hear and determine the appeal had nothing personal (this was not the only appeal heard and determined by the 1st respondent); that it was not necessary for the 1st respondent to visit the site as that had been done by elders who were familiar with the area; that the applicants' allegations of impropriety, irrationality and breach of rules of natural justice by the 1st respondent have not been substantiated. The suit is said to be vexatious, frivolous, abuse of the court process and meant to frustrate the enjoyment of the judgment made in his favour.

4. Pursuant to directions given on May 30, 2022, the application was disposed of by way of written submissions.

Submissions

The Applicant's submissions.

5. In his submissions, the applicant has reiterated that his appeal was heard by the DCC Keiyo North as opposed to the DCC Keiyo South where the suit property is situated and submitted that no explanation was offered why that happened. Asserting that it is the DCC Keiyo South who had jurisdiction to hear his appeal, the applicant contends that the DCC who heard his appeal divulged into extraneous factors beyond his scope. In this regard the DCC is said to have determined a boundary dispute at the appeal stage, which action is said to be unprocedural at the appeal stage. The DCC is also faulted for having failed to visit the locus in quo to discern if it was indeed a boundary dispute or not. The applicant's contention that the interested party was a member of the demarcation committee and a friend of the DCC is said to be unrefuted and submitted that fact coupled with the fact that the appeal was heard by a DCC who ordinarily ought not to have heard the appeal, there is ground to believe that the interested party influenced the outcome of the appeal.
6. The 1st respondent is said to have exhibited bias and discrimination against the applicant. The applicant claims that he was not allowed equal opportunity to complete stating his evidence. The 1st respondent is said to have failed to uphold the rules of natural justice, failed to appreciate that he ought to be a neutral arbiter and accused of descending into the arena in support of one party. The proceedings are also said to have been saddled with irrational and procedural impropriety thereby casting serious doubt on the veracity of the verdict. It is reiterated that the applicant and his witnesses were harassed, threatened and intimidated by the DCC during hearing and contended that the proceedings do not indicate the evidence of the other panelists yet, according to him, it ought to have been recorded. The applicant also casts aspersions on the proceedings on the ground that the members of the panel who heard the appeal are not indicated in the proceedings. Failure to indicate who the members of the panel were, is said to be a further ground for the applicant's belief that it was composed of the cronies of the interested party and the DCC. In view of the foregoing, it is submitted that the applicant has made up a case for being granted the orders sought.

The Respondent's submissions.

7. In their submissions, the respondents have pointed out that they opposed the application through the replying affidavit of the 1st respondent dated May 26, 2022 (that affidavit was not in the court file at the time of writing this judgment), through which they contend that the *ex parte* applicant has not demonstrated the alleged bias before, during and after appeal. It is contended that the proceedings do not bear the alleged bias against the appellant. It is the respondents' submissions that the proceedings indicate that the applicant was given an opportunity to present his case as well as to counter that of the interested party. It is pointed out that the applicant called two witnesses who testified in support of



his case. It is the respondents' case that there is nothing in the proceedings to show that the applicant was not afforded a fair hearing. The applicant is said to have failed to prove that rules of natural justice were not adhered to and that the 1st respondent was not a neutral arbiter. In view of the foregoing, the *ex parte* applicant is said to have failed to make up a case for being granted the orders sought.

8. On the contention that the 1st respondent lacked jurisdiction to hear and determine the appeal lodged by the *ex parte* applicant, reference is made to section 29(4) of the [Land Adjudication Act](#) which empowers the Minister to by notice in the Gazette, delegate his power to hear appeals to any public office by name or to the person for the time being holding any public office specified in such notice; and to gazette notice No 6854 of October 3, 2014 where the Cabinet Secretary for Lands, Housing and Urban Development delegated her powers to hear appeals to all the Deputy County Commissioners of all sub counties except those in Nairobi County and submitted that the 1st respondent had jurisdiction to hear and determine the appeal lodged by the *ex parte* applicant.
9. On the contention that the 1st respondent acted irrationally, it is submitted that the *ex parte* applicant did not prove that contention. The *ex parte* applicant is also said to have failed to prove that there was procedural impropriety. Consequently, the *ex parte* applicant is said to have failed to make up a case for being granted the orders sought.

The Interested party's submissions.

10. In his submissions the interested party has made reliance on Section 29(4) of the LAA and the case of [Gilbert Joseph Kabunjia v Land Adjudication and Settlement Officer Meru South & 3 others; County Government of Tharaka Nithi \(Interested Party\)](#) (2019) eKLR to counter the *ex parte* applicant's contention that the 1st respondent lacked jurisdiction to hear and determine the appeal.
11. On whether the *ex parte* applicant was accorded a fair hearing, the interested party has submitted that the proceedings of the appeal show that the parties to the appeal were accorded equal opportunity to present their case and to cross-examine witnesses.
12. Concerning the alleged bias on the part of the 1st respondent, it is submitted that the alleged bias cannot be deduced from the proceedings. The *ex parte* applicant is said to have failed to prove that fact.
13. Terming the decision of the 1st respondent free from bias, irrationality and procedural impropriety, the interested party urges the court to dismiss the *ex parte* applicant's suit with costs to him.

Analysis and Determination.

14. The sole issue arising from the pleadings, the evidence and the submissions, is whether the applicant has made up a case for being granted the orders sought.
15. With regard to this issue, I have carefully read and considered the cases urged by the parties to this suit.
16. The legal principles that undergird an application for judicial review were enunciated in the cases of [Pastoli v Kabale District Local Government Council & others](#) (2008) 2 EA 300 and the case of [Municipal Council of Mombasa v Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No 185 of 2007](#) (2002) eKLR, among other cases.
17. In the case of [Pastoli v Kabale District Local Government Council & others](#), supra, 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 a law or its principles are instances of illegality...

18. In applying those principles to the circumstances of this case, I begin by determining whether the 1st respondent had jurisdiction to determine the ex parte applicant's appeal to the Minister. Concerning that issue, it is not in dispute that under Section 29(4) of the LAA the Minister has power to delegate the powers vested in him to a public office or holder of a public office. It is also not controverted that *vide* Gazette Notice No 6854 dated September 13, 2014, the Minister delegated his authority to hear appeals to Deputy County Commissioners in all sub counties except the Deputy County Commissioners in the City County of Nairobi. The only issue in contention is whether that power must be exercised by the Deputy County Commissioner for the area in which the subject matter of the appeal is situated.

19. In addressing that issue, it is important to reproduce the gazette notice through which the Minister donated her powers to the DCCs. It 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.”

20. Whilst the notice does not expressly address the question as to whether the DCCs have universal jurisdiction to hear and determine the appeals, noting that the jurisdiction is tied to all the sub-counties and taking judicial notice of the fact that ordinarily a 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 appeal was heard by a DCC different from the DCC of the area where the subject matter is situated, an explanation needed 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 Deputy County Commissioners 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....”

21. In the circumstances of this case, no explanation was offered as to why the appeal was heard by the DCC Keiyo North Sub-County and not the DCC Keiyo South Sub-County. In the absence of any explanation as to why that happened, one may be forgiven for reading some mischief in the decision to have the appeal heard by a DCC, different from the one who ordinarily would have heard the appeal.



22. Concerning the contention that the proceedings do not indicate who the members of the panel were and what their evidence was, my view is that nothing turns on that. In that regard see the case of *Joseph Mudamba Ojwang v John Opondo Onyango & 4 Others* (2022) e KLR where it was stated: -

“As envisaged by section 29(1)(b) the minister did not need to follow the usual formal process of judgment writing and in my humble view the only way one can make a decision is that the then respondents including the petitioner’s father did not appear before the minister hence their case was dismissed in favour of the appellant.”

23. Similar sentiments were made by the Court of Appeal in the case of *Dominic Musei Ikombo v Kyule Makau* (2019) eKLR where it was stated: -

“The District Commissioner acting on behalf of the minister has wide latitude to conduct the proceedings in a manner that meets the ends of justice.”

24. Although the applicant did not substantiate or lead evidence capable of proving the serious allegations of biasness levelled against the 1st respondent, in view of the unexplained circumstances upon which, the appeal was heard by a DCC from another sub-county when the DCC of the area where the suit property is situated was in office, I am inclined to allow the application.

25. The upshot of the foregoing is that the application has merit and is allowed as prayed.

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

L. N. WAITHAKA

JUDGE

