



Republic v Deputy County Commissioner Masinga Sub County & 2 others; Mwonga & another (Interested Parties); Mulwa (Exparte Applicant) (Environment and Land Miscellaneous Application 18 of 2020) [2022] KEELC 12612 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12612 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 18 OF 2020
CA OCHIENG, J
SEPTEMBER 29, 2022
IN THE MATTER OF ARTICLES 10, 40 AND 47 OF THE
CONSTITUTION
AND
IN THE MATTER OF SECTIONS 3, 4, 5, 7 FAIR ADMINISTRATIVE
ACTIONS ACT, 2015
AND
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION ORDER 53 RULE
3(1) OF THE CIVIL PROCEDURE RULES
AND
IN THE MATTER OF SECTIONS 12, 13, 30 OF THE LAND
ADJUDICATION ACT CAP 284
AND
IN THE MATTER OF THE DECISION OF THE DEPUTY COUNTY
COMMISSIONER MASINGA APPEAL FROM THE MINISTER IN
CASE NO. 182/2006 IN LAND PARCEL NUMBER
MASINGA/KANGONDE/682

BETWEEN

REPUBLIC APPLICANT

AND



**DEPUTY COUNTY COMMISSIONER MASINGA SUB COUNTY 1ST
RESPONDENT**

CABINET SECRETARY MINISTRY OF LANDS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

PAUL MWAU MWONGA INTERESTED PARTY

LANDS REGISTRAR MACHAKOS COUNTY INTERESTED PARTY

AND

SAMUEL MWANGANGI MULWA EXPARTE APPLICANT

JUDGMENT

1. By a notice of motion dated the June 22, 2020, the ex parte applicant seeks the following orders:
 1. That an order of certiorari to remove to the High Court for purposes of quashing the decision of the deputy county commissioner, Masinga sub county (1st respondent) in judgment delivered on December 11, 2019 in re-hearing of appeal to minister no 182/2006 over land parcel number no 682 Masinga/Kangonde which decision awarded land to Paul Mwau Mwonga (1st interested party).
 2. That an order of prohibition to remove to the High Court for purposes of barring the land registrar, Machakos county and Paul Mwau Mwonga from implementing the decision of the deputy county commissioner Masinga sub county in the judgment delivered on December 11, 2019 in the re-hearing of appeal to minister no 182/2006 over land parcel no 682 Masinga/Kangonde section.
 3. That costs of this application be paid by the 1st interested party.
2. The application is based on the grounds set out in the statement as well as the affidavit of the ex parte applicant Samuel Mwangangi Mulwa. He contends that he has a legitimate interest over the land parcel no 682 Masinga/Kangonde hereinafter referred to as the '*suit land*', claiming ownership of the same. He explains that together with the 1st interested party they are claiming ownership of the suit land, which was subject to re-hearing before the deputy county commissioner (DCC) Masinga sub county. He contends that the DCC Masinga sub county was not impartial throughout the proceedings because he did not take into account the evidence he adduced and prevented him from giving relevant information at the re-hearing. He disputes the decision presented by the DCC Masinga sub county on December 11, 2019 and insists it is not what transpired during the hearing. He claims even by the decision delivered on December 11, 2019 the 1st respondent clearly focused on the evidence of the 1st interested party as the basis of which the said decision was founded. He reiterates that he was not accorded a fair trial contrary to his legitimate expectation.
3. The application was opposed by the 1st interested party Paul Mwau Mwonga who filed a replying affidavit where he deposes that the allegation that the DCC Masinga sub county prevented the ex parte applicant from giving the relevant information and calling witnesses is a total lie to justify the orders sought. He contends that the ex parte applicant had called five (5) witnesses. He explains that in the



entire hearing, only three witnesses attended in support of the ex parte applicant and they testified while the rest did not after which he was allowed to proceed with his case. He avers that after the hearing was concluded, the proceedings were typed and read over to all the parties who confirmed that they reflected the correct position after which they both signed without any issues being raised. He states that the *ex parte* applicant was afforded enough time to testify together with his witnesses and both parties were accorded a fair hearing. He insists that during the hearing, the ex parte applicant rejected requests to have the DCC Masinga sub county visit the suit land to ascertain the status on the ground because he knew he had no developments thereon. He argues that the ex parte applicant has not even stated which documents he was barred from producing because there is none. He reiterates that he has been in occupation of the suit land since 1969 up to date. He sought for the application be dismissed with costs.

4. The ex parte applicant filed further affidavits sworn by Simeon Munywoki Kiminza, Nicholas Kiswii Mawia and Kativa Musyoki who all explained what transpired during the re hearing of the appeal to the minister and the actions of the DCC Masinga sub county and insist they were not accorded a proper hearing.
5. The interested party filed a rejoinder to the further affidavits of Simeon Munywoki Kiminza, Nicholas Kiswii Mawia including Kativa Musyoki denying the allegations made therein and insisting that the process of re-hearing was properly done.
6. The matter was canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the notice of motion application dated the June 22, 2020 including the statement of facts, respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the ex parte applicant is entitled to the orders as sought.
8. The ex parte applicant in his submissions insists the respondents were not procedurally fair during the re-hearing of the appeal. He proceeded to highlight what transpired during the re-hearing and insisted the entire process was marred by procedural impropriety, unfairness, biasness including bad faith. He proceeded to highlight a summary of the particulars of procedural impropriety and biasness on the part of the 1st respondent. He insisted that he was entitled to the rights as enshrined in the Constitution under the bill of rights. Further, he was entitled to the orders as sought. To buttress his averments, he relied on the following decisions: *Republic v Machakos Deputy County Commissioner ex parte Maingwa Makoma Mutie, Machakos* ELC Misc App no 19 of 2018; *Judicial Service Commission v Mbalu Mutava & Another* (2015) eKLR; *Associated Provincial Picture Houses Ltd V Wednesbury Corporation* (1947) 2 All ER 680 and *Baker V Canada (Minister of Citizenship & Immigration)* 2 SCR 817 6; *National Bank of Kenya v Wilson Ndolo Ayah* (2009) eKLR.
9. The interested party in his submissions insists this application does not fit the scope of judicial review. He disputes the affidavits sworn by Simeon Munywoki Kiminza, Nicholas Kiswii Mawia including Kativa Musyoki and challenges what they were responding to. He insists there were no confrontations nor anyone forced to sign proceedings. He contends that the ex parte applicant is making wild allegations. He avers that the ex parte applicant seeks the court to determine a dispute which is not in the purview of judicial review. To buttress his averments, he relied on the following decisions: *Republic v National Employment Authority & 3 others ex parte Middle West Consultancy Services Limited* (2018) eKLR; *Commissioner of Lands v Kunste Hotel Limited* (1997) eKLR; *Chief Constable of the North Wales Police v Evans* (1982) 1WLR 1155; *Republic V Law Society of Kenya Disciplinary Tribunal & Another ex parte Muema Kitulu* (2018) eKLR; *Republic v Waitaluk Land Disputes Tribunal*



Comprising of Mboto Kidai Ezekiel Kession Paul Karop & 2 others ex parte Cheseret Arap Maina (2018) eKLR and *Republic V Zacharia Kabuthu & Another (Sued as Trustees and on behalf of and as officials of Kenya Evangelical Lutheran Church) and Jobaness Kutuk Ole Meliyio & 2 others (Interested Parties) ex parte Benjamin Kamala & Another* (2020) eKLR.

10. In this instance, the *ex parte* applicant claims the DCC Masinga sub county was not impartial throughout the re-hearing of the appeal to the minister as he failed to take into account the evidence he adduced and relied more on the 1st interested party's evidence. Further, he was prevented from giving relevant information and/or documents/witnesses before the DCC Masinga sub county at the re-hearing thereof. He argues that he was not accorded a right to fair hearing and the decision given by the DCC Masinga sub county on December 11, 2019 is not what transpired during the re-hearing as it had a lot of amendments to favour the 1st interested party. Further, the proceedings were marred with unfairness, injustice and against the rules of fair hearing and trial. The respondent did not controvert the *ex parte* applicant's averments while the interested party vehemently opposed the instant application. He averred that the DCC Masinga sub county did not prevent the *ex parte* applicant from giving the relevant information and calling witnesses as claimed. He contends that the *ex parte* applicant had called five (5) witnesses during the hearing. He explains that in the entire hearing only three witnesses attended in support of the *ex parte* applicant's claim and they testified while the rest did not; after that, he was allowed to proceed with his case. He states that after the hearing was concluded, the proceedings were typed and read over to all the parties who confirmed that they reflected the correct position after which they both signed without any issues being raised. He reaffirms that the *ex parte* applicant was afforded enough time to testify together with his witnesses and both parties were accorded a fair hearing. He insists that during the re-hearing, the *ex parte* applicant rejected requests to have the DCC Masinga sub county visit the suit land to ascertain the status on the ground because he knew he had no developments thereon. He argues that the *ex parte* applicant has not even stated which documents he was barred from producing because there is none. He reiterates that he has been in occupation of the suit land since 1969 up to date.
11. Lord Diplock in the case of *Council for Civil Service Unions v Minister for Civil Service* [1985] AC 374, at 401D clearly set the standards of judicial review when he stated that:-

"Judicial Review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

12. While in the Supreme Court in *Baker v Canada (Minister of Citizenship & Immigration)* 2 SCR 8176 it was held that:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair,



impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

13. Further, in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil appeal no 185 of 2001, it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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...The court should not act as a Court of appeal over the decider which 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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

14. Article 47 of the *Constitution* provides that:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.”

15. While section 7 of the *Fair Administrative Actions Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to - (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said section.

16. The applicant has sought for orders of certiorari and prohibition to quash the decision of the DCC Masinga sub county that emanated from the re-hearing of the aforementioned appeal to the Minister, claiming the DCC Masinga sub county did not exercise procedural fairness while re-hearing the said appeal. From perusal of the proceedings including findings of the appeal, I note the ex parte applicant actually participated in the re-hearing and extensively presented his claim. I wish to reproduce an excerpt from the proceedings marked as annexure ‘ANN 7’ where the ex parte applicant stated as follows:

“Your honour having lawfully presented to you my statements, factual adduced documentary evidences and availed witnesses for their testimonies, I rest my case in your lawful court for Judgment, plead and pray that, you find enough evidence in issues and facts presented in tell-it-all submission to the court for consideration, determination and find justice in re-allowing the appeal, re-instating my name in the land register, re- issuance of the title deed and the case cost.”



17. From the said annexure, I note the *ex parte* applicant was cross-examined by the 1st Interested Party whom he also later cross-examined. This court further notes that the *ex parte* applicant's witnesses also testified in support of his case. From the said proceedings, it is evident the *ex parte* applicant even signed the proceedings and findings therefrom which he is vehemently challenging through this case.
18. However, based on the facts as presented while associating myself with the decisions cited as well as relying on the legal provisions I have quoted, I find that the *ex parte* applicant was indeed accorded an audience, cross-examined the 1st interested party during the re-hearing of the appeal and had witnesses who were allowed to testify. I note that he produced documentary evidence in support of his claim. I hence find that no rules of natural justice were violated by the respondent. Further, from the proceedings, except for the affidavits sworn by the *ex parte* applicant's witnesses, I do not see any elements of procedural impropriety, unfairness or bias as claimed. It seems to me that the *ex parte* applicant had a challenge with the decision of the DCC Masinga sub county and wanted the court to go to the merits of the said decision by analyzing the evidence presented but this is not within the purview of Judicial Review. To my mind, I find that the DCC Masinga sub county acted within his duty by granting the parties audience and communicating the final decision to them. I opine that it is not enough for the *ex parte* applicant to claim that the said DCC Masinga sub county has acted illegally, unreasonably or in breach of rules of natural justice without placing tangible evidence before this court. In absence of evidence to the contrary, I find that there was procedural fairness in the re-hearing since the DCC Masinga sub county acted within his legal mandate.
19. In the circumstances, I find that the prayers for prohibition and certiorari cannot issue at this juncture. I hence find the instant application unmerited and will proceed to dismiss it with costs to the 1st interested party.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

