



**Oyoko v Ogada & 3 others (Miscellaneous Civil Application 1 of 2022)
[2022] KEELC 12599 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
MISCELLANEOUS CIVIL APPLICATION 1 OF 2022
GMA ONGONDO, J
SEPTEMBER 27, 2022**

BETWEEN

DAMIAN WAGUMBA OYOKO APPLICANT

AND

PETER ODOYO OGADA 1ST RESPONDENT

**DEPUTY COUNTY COMMISSIONER, SUBA SUB-COUNTY 2ND
RESPONDENT**

LAND ADJUDICATION OFFICER, HOMA BAY COUNTY .. 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Formerly Migori Misc Civil Application No. 8 of 2019)

JUDGMENT

1. By a notice of motion application dated October 11, 2019 and filed on October 14, 2019 commenced under, *inter alia*, article 47 of the Constitution of Kenya, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act chapter 21 Laws of Kenya, order 53 rules (2) and (4) of the Civil Procedure Rules, 2010, section 7(1)(a), (2)(a)(iv and v), (f) and (h), 11(1)(e) of the Fair Administrative Action Act, No 4 of 2015 Laws of Kenya and section 29 of the Land Adjudication Act and section 68 (1) of the Land Registration Act, 2016 (2012) (the application herein), the applicant, Damian Wagumba Oyoko through M/S Apondi and Company Advocates is seeking the following orders;
 - a. Spent.
 - b. The honourable court be pleased to grant an order of judicial review in the nature of certiorari to issue against the respondents herein, quashing the decision of deputy county commissioner Suba sub county, 2nd respondent, in ministerial appeal case No 32 of 2007 whose judgment



was delivered on July 23, 2017 and which decision allowed the 1st respondent to be registered in land parcel no Kaksingri/Kagutu/Waregi/452.

- c. The honourable courts do make a declaration that the applicant's constitutional right to fair hearing was infringed by the 2nd respondent herein.
 - d. That this honourable court do make any further necessary orders to enable the ends of justice be met in this application.
 - e. That costs of and incidental to the application be provided for.
2. The application is founded upon grounds (a) to (u) stated on the face of the same. Furthermore, it is anchored on the applicant's supporting affidavit of twenty-eight paragraphs and a copy of proceedings in objection number 50 of 1987, copy of proceedings of appeal number 32 of 2007, copy of letter of the land registrar dated September 6, 2017, copy of the green card and search certificate of land parcel number Kaksingri/Kagutu/Waregi/452 as well as photographs showing applicant's residence being documents marked as DWO-1, DWO-2, DWO-3, DWO-4(a) and (b) to DWO-5 respectively annexed to the affidavit.
 3. The applicant's complaint is that the land parcel number Kaksingri/Kagutu/Waregi/452 (the suit land herein) was originally owned by his parents. That the 1st respondent, who was the area chief at the time, had the suit land adjudicated to himself even though the applicant's family was in occupation. That the applicant objected to the adjudication and the adjudication committee allocated the land to him. However, the 1st respondent appealed to the arbitration board *vide* objection number 50 of 1987, which appeal was allowed.
 4. The applicant contends that the 1st respondent was a member of the arbitration board that allowed the appeal by virtue of being the area chief. That the applicant then lodged a ministerial appeal number 32 of 2007 but the same was dismissed by a decision rendered on February 23, 2017.
 5. The applicant laments that he was not accorded the right to be heard during the ministerial appeal. That the minutes of the hearing of the appeal, which were only signed by the 1st respondent, do not reflect what actually transpired. That the ruling was delivered without notice to the applicant. Further, that the applicant and his family have been residing in the suit land from 1970 to date and his parents and some family members are buried thereon.
 6. The 1st respondent, Peter Odoyo Ogada, through the firm of H Obach and Partners Advocates, opposed the application by way of his replying affidavit sworn on November 26, 2019 duly filed in court on December 5, 2019. A copy of the objection to adjudication proceedings (POO-1), copy of proceedings dated May 20, 1986 (POO-2), copy of the appeal dated May 20, 1992 (POO-3) are annexed to the affidavit. He deposed, *inter alia*, that he is the registered proprietor and original owner of the suit land upon which he had established a home at the time of adjudication. That the applicant is the registered proprietor of land parcel number Kaksingri/Kagutu/Waregi/451 which borders the suit land at the boundary.
 7. The 1st respondent admitted that the applicant did appeal the adjudication process but only on the grounds that his land was extended into the 1st respondent's land and the same was allowed. That the applicant then shifted the boundary, thus forcing the 1st respondent to file a boundary dispute before the District Land Adjudication which was decided in his favour.
 8. Further, the 1st respondent stated that the applicant filed an appeal of the decision to the Minister for Lands and Housing but failed to move the motion of his appeal and attend the hearings thereof



hence the appeal was dismissed. That the applicant has been defiant to vacate the suit land and has constructed houses encroaching on the same.

9. The 2nd, 3rd and 4th respondents did not enter appearance and file any response to the application herein.
10. The application was heard by way of written submissions further to this court's directions of April 28, 2022; see order 51 rule 16 of the [Civil Procedure Rules, 2010](#) and Practice Direction number 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
11. Learned counsel for the applicant did not file any submissions in respect to the application.
12. By the submissions dated June 6, 2022 and filed herein on June 20, 2022, learned counsel for 1st respondent gave background facts of the matter. Counsel identified twin issues for determination thus: whether the plaintiff/ applicant should be given an audience by the honourable court in respect of the orders sought and whether the plaintiff/applicant is entitled to the orders sought in the application.
13. To fortify the submissions, counsel relied on various authorities including the case of [Republic vs Commissioner of Cooperative Development; Ex parte Paul Manwa & 3 others; Transline Savings and Credit Cooperative Society Limited \(Interested party\)](#) (2022) eKLR and [Republic vs Eldama Ravine Alcoholic Drinks Control Committee & another; Ex parte Solomon Chuchu Ruiru & 4 others](#) (2019) eKLR.
14. I have duly considered the application, the replying affidavit and the respondent's submissions in their entirety. So, is the application meritorious?
15. It must be noted that judicial review as a relief is provided for in among others; Article 23 (3) of the [Constitution](#) of Kenya 2010, Section 8 of the [Law Reform Act](#) chapter 26 Laws of Kenya, section 13(7) of the [Environment and Land Court Act](#) 2011, section 7 of the [Fair Administrative Action Act](#) 2015 and the common law.
16. Under order 53 rules 1 and 2 of the [Civil Procedure Rules](#), it is clear that leave to file an application for judicial review must be filed within 6 months from the date of the judgment or decision. This provision is similar to section 9(2) and (3) of the [Law Reform Act](#) cap 26 of the Laws of Kenya.
17. The applicant's appeal in Ministerial Appeal No 32 of 2007 was dismissed by way of a ruling delivered on February 23, 2017 yet the instant application was lodged on March 25, 2019. The applicant avers that the said ruling was delivered without informing him. That he only learnt that the appeal was dismissed on or about September 2018 thus, the delay in lodging the present application.
18. In [National Social Security Limited v Sokomanja Limited](#) (2021 eKLR) the court observed in part:

“...In my view, no leave is required to seek judicial review as a relief under article 23(3) of the [Constitution](#) where proceedings are instituted to enforce the bill of rights under article 22 of the [Constitution](#) or where proceedings have been brought under section 7 of the [Fair Administrative Action Act](#), 2015 for the review of an administrative action. Such leave is also not required under the [Environment and Land Court Act](#) 2011 before such relief is sought...”
19. Besides, the court stated in the [NSSF case](#) (supra), that if one opts to file an application for judicial review under the [Law Reform Act](#) and order 53 (supra), one must apply for leave within six months of the decision as the court has no discretion to enlarge time within which to file the application for



leave thereof. The same position was stated by the Court of Appeal decision in Wilson Osolo v John Ojiambo Ochola & Another 1995 eKLR where the Court held that:

“..It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules, that procedure cannot be availed for extension of time limited by statute, in this case, the Law Reform Act. There is no provision for extension of time to apply for such leave in the Limitation of Actions Act cap 22 of the Laws of Kenya which gives some limited right for extension of time to the suits after expiry of a limitation period...”

20. The instant application was lodged pursuant to various provisions of the Constitution and the law as stated in paragraph 1 hereinabove. I, however, note that the applicant did not expressly seek to enlarge the time to file the instant judicial review proceedings despite lodging the same almost two (2) years after delivery of judgment in Ministerial Appeal Case No 32 of 2007 whose judgment was delivered July 23, 2017.
21. Be that as it may, I subscribe to the decision of the Court of Appeal, as cited by learned counsel for the 1st respondent, in Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR, where the Court stated thus:

“Judicial review is concerned with the decision making process, not with the merit 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 the 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” (Emphasis added).
22. Sections 107 and 108 of the Evidence Act, chapter 80 Laws of Kenya are clear that he who asserts or pleads must support the same by way of evidence. So, has the applicant discharged this duty before this court for the grant of the orders sought in the application?
23. The applicant laments that he was not accorded the right to be heard during the ministerial appeal. That the minutes of the hearing of the appeal, which were only signed by the 1st respondent, do not reflect what actually transpired. That the ruling was delivered without informing the applicant.
24. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see James Kanyiita Nderitu and another vs Marios Philotas Ghikas and another (2016) eKLR.
25. Articles 48 and 50 (1) of the Constitution provide for access to justice and fair hearing respectively. However, the applicant did not present sufficient evidence to prove that his rights were infringed.
26. In the case of Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] eKLR it was noted that the grant of orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In the instant suit, I am persuaded that grant of the orders sought would not be justifiable.
27. From the foregoing and for the reasons stated, the application fails to meet the threshold for granting of the orders sought herein. The same is hereby dismissed with costs to the 1st respondent.



28. It is so ordered.

DELIVERED VIA E-MAIL THIS 27TH DAY OF SEPTEMBER, 2022.

G.M.A ONGONDO

JUDGE

