Rono v Deputy County Commissioner, Keiyo North & 6 others; Kwambai (Interested Party) (Judicial Review E003 of 2022) [2022] KEELC 12688 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12688 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

JUDICIAL REVIEW E003 OF 2022

L WAITHAKA, J

SEPTEMBER 27, 2022

IN THE MATTER OF AN APPLICATION OF MOSES K. RONO 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.1269 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

BETWEEN

MOSES K. RONO .... APPLICANT

AND

DEPUTY COUNTY COMMISSIONER, KEIYO NORTH .... 1ST RESPONDENT

CABINET SECRETARY, LANDS HOUSING & 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 & SETTLEMENT OFFICER, ELGEYO MARAKWET .... 6TH RESPONDENT

ATTORNEY GENERAL .... 7TH RESPONDENT

AND

TITUS K. KWAMBAI .... INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted on March 23, 2022 to the *ex parte* applicant, Moses K Rono, to institute judicial review proceedings, the *ex parte* applicant, filed the notice of motion dated April 14, 2022 and filed on an even date seeking an order of certiorari to remove to this court for purpose of being quashed the decision of the 1st respondent contained in a judgment dated September 22, 2021 in Elgeyo Marakwet Lower Cheptebo Appeal to the Minister Case No 82 of 2018 giving ownership of plot No 1269 within Lower Cheptebo "B" adjudication section to the interested party. The *ex parte* applicant also seeks an order of prohibition to prohibit the 3rd to 6th respondents and the interested party from implementing the impugned decision of the 1st respondent. The *ex parte* applicant further seeks an order setting aside the impugned decision of the 1st respondent and remitting the appeal to the minister for re-trial.

2. The application is premised on the grounds that the interested party (respondent) was the appellant in Appeal to the Minister No 82 of 2018 over land parcel number No 1269 within Lower Cheptebo "B" adjudication section in Keiyo South Sub County while the *exparte* applicant was the respondent; that the appeal was heard by the 1st respondent who had no jurisdiction to hear and determine the appeal and that during hearing of the appeal, the *ex parte* applicant was not accorded reasonable opportunity to be heard; that the 1st respondent exhibited outright bias and discrimination against the *ex parte* applicant- the *ex parte* applicant was not accorded opportunity to complete stating or presenting his evidence; that the 1st respondent was not a neutral arbiter and that the appeal was heard when the interested party was still a member of land demarcation board and a friend of the 1st respondent. It is further contended that the 1st respondent had no power/jurisdiction to hear and determine the appeal as the suit land is suited in Keiyo South Sub County and that the proceedings of the appeal are saddled with irrational and procedural improprieties.

3. The application is accompanied by a statutory statement and an affidavit in verification of the facts relied on in support of the application. The *ex parte* applicant has annexed a copy of the proceedings of the appeal marked MKR-1 and aopy of the order issued by the court granting the applicant leave to commence judicial review proceedings.

4. In reply and opposition to the application, the 1st respondent filed the replying affidavit he swore on May 26, 2022. In that affidavit, the 1st respondent has deposed that the ex parte applicant has not proved the alleged biasness on his part; that the *ex parte* applicant has admitted that he was allowed to participate in the proceedings by himself and through his witnesses; that the proceedings indicate that the *ex parte* applicant was given opportunity to state his case and to call his witnesses; that the proceedings annexed to the *ex parte* applicant's affidavit and in his replying affidavit are a confirmation that the *ex parte* applicant was given an opportunity to be heard and to cross examine the interested party and his witnesses; that both parties to the appeal were given reasonable opportunity to be heard, present their evidence and that no one was discriminated against and that there is no evidence that the 1st respondent was not a neutral arbiter or that he violated the rules of natural justice or that he failed to observe rules of natural justice; that all the parties in the appeal were given reasonable opportunity to be heard and to present their evidence; that no party was discriminated against and that the *ex parte* applicant has not proved that the 1st respondent was not a neutral arbiter.

5. The 1st respondent has further deposed that appeal cases are done after several other avenues have been employed by the dissatisfied parties and that the *ex parte* applicant has not proved that he acted ultra vires and irrationally to warrant the issuance of the orders sought.

6. The interested party filed the replying affidavit he swore on May 30, 2022 through which he deposed that the *ex parte* applicant did not prove ownership of land parcel No 1269, Upper Cheptebo B Adjudication section and he (interested party) was found to be the rightful owner of the suite property after all parties were heard.

7. It is further deposed that during hearing of the appeal, the *ex parte* applicant and he were afforded equal treatment and opportunity to be heard and to present their case during the hearing of the appeal, that the *exparte* applicant has not demonstrated his allegations that the 1st respondent was biased is a family member to the interested party nor did he make a report to the police of harassment of his witnesses.

8. It is the interested party's case that the *ex parte* applicant has not made up a case for being granted the orders sought which if granted would be extremely prejudicial to the respondents.

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

10. I have carefully read and considered the pleadings filed in this case, the affidavit evidence and the submissions by the parties. The sole issue for the court's determination is whether the *ex parte* applicant has made up a case for being granted the orders sought.

11. This being an application for judicial review, for the *ex parte* applicant to be granted the orders sought, he has to demonstrate that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. In that regard see the case of *Pastoli vs Kabale District Local Government Council & others* (2008) 2 EA 300 where 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 the law...."

12. In the circumstances of this case, the 1st respondent is *inter alia* said to have acted without jurisdiction when he heard the appeal herein on the ground that the appeal ought to have been heard by the Deputy County Commissioner (DCC), Keiyo South where the suit property is situated.

13. It is noteworthy, that the 1st respondent in his replying affidavit neither denied the allegation that the subject matter of the appeal is situated in Keiyo South Sub County nor gave an account of the circumstances upon which he heard the appeal hereto. Given that the appeal would ordinarily have been heard by the DCC Keiyo South, the 1st respondent ought to have given an account of the circumstances upon which he heard the appeal.

14. Whilst it is not in dispute that the 1st respondent as a Deputy County Commissioner has delegated authority to hear appeals to the minister under section 29 of the *Land Adjudication Act*, cap 284 Laws of Kenya, a question of law arises to wit whether the 1st respondent has jurisdiction to hear appeals to the minister not falling within his area of jurisdiction, that is to say, the sub-county for which he is appointed and deployed to serve.

15. In addressing that issue, it is important to reproduce the gazette notice through which the minister donated her powers to DCCs. The gazette notice 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."

16. Whilst the notice does not expressly address the question as to whether Deputy County Commissioners have universal jurisdiction to hear and determine appeals to the Minister, noting that the jurisdiction is tied to all the sub-counties and taking judicial notice of the fact that ordinarily a Deputy County Commissioner (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 ought to have been 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 DCCs 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...."

17. In view of the foregoing, I agree with the *ex parte* applicant's contention and submission that the 1st respondent had no power/jurisdiction to determine the appeal preferred by the interested party.

18. It is trite law that anything done without jurisdiction is a nullity. In that regard see the case of *Lucy Bosire vs Nyankoni Manga Rovi* (2014) eKLR where it was held:-

> "A decision made without or in excess of jurisdiction is nullity *ab initio*..."

19. On that ground alone, I find and hold that the *ex parte* applicant has made a case for being granted the orders sought, which I hereby grant to him as prayed. For avoidance of doubt, the appeal to the minister hereto is resubmitted for hearing by the DCC Keiyo South Sub County.

Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 27TH DAY OF SEPTEMBER, 2022.

L. N. WAITHAKA

JUDGE