



Republic v Cabinet Secretary Ministry of Land and Physical Planning & 3 others; Catholic Church Mission & another (Interested Parties); Gitonga & another (Exparte) (Environment and Land Judicial Review Case E005 of 2022) [2022] KEELC 13410 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E005 OF 2022
CK YANO, J
OCTOBER 12, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**CABINET SECRETARY MINISTRY OF LAND AND PHYSICAL
PLANNING 1ST RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 2ND
RESPONDENT**

CHIEF LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

CATHOLIC CHURCH MISSION INTERESTED PARTY

DOMINIC MWANGANGI INTERESTED PARTY

AND

FREDRICK GITONGA EXPARTE

M'NGERENI MATHAIYA EXPARTE

JUDGMENT

The Application

1. Pursuant to leave granted by the court on March 24, 2022, the applicants filed the notice of motion dated April 14, 2022 and prayed for the following orders of judicial review:



- a) An order of *certiorari* be issued to remove into the honourable court for the purposes of it being quashed a decision made by and/or award by the 1st respondent in respect of land parcel No 795 and 796 Kamwimbi “A” adjudication section in the minister appeal case No 125 of 2018 dated February 24, 2022 between the interested parties (appellant) and *ex-parte* applicants/respondents.
 - b) An order of prohibition be issued prohibiting the 2nd and 3rd respondents from implementing the decision of the 1st respondent judgment, award on decision which is dated February 24, 2022 in regard to land parcel No 795 and 796 Kamwimbi ‘A’ adjudication section in the minister’s appeal case No 125 of 2018.
 - c) The cost of this application be provided for.
2. The application is supported by the affidavit of Fredrick Gitonga who has deponed *inter alia*, that the impugned appeal was heard by the assistant county commissioner, Igamba Ng’ombe instead of the deputy county commissioner of Meru South sub county who had issued the notices for hearing of the appeal, and who presumably had been delegated the powers to hear and determine the appeal by the 1st respondent. It was further deponed that the minister’s decision was malicious and biased and that the 1st respondent failed to appreciate that the issue was a boundary dispute.

The Applicants’ Submissions

3. In their submissions dated September 7, 2022, the applicants submitted that they appealed the decision of the arbitration board to the minister in charge of lands pursuant to section 29(1) of the [Land Adjudication Act](#). That practice has been that the minister would delegate the powers and functions to the holders of the office of the district commissioner (now referred to as deputy county commissioner (DCC)). The applicants submitted that in this case, the appeal was heard by an assistant county commissioner (ACC), one Mr Fred Masinjira and the decision was only endorsed by the DCC (Mr Nkaduda M Hiribae) who never took part in the hearing of the appeal. The applicants’ counsel submitted that the assistant county commissioner lacked jurisdiction to hear the matter, hence his decision should be held null and void.
4. Counsel submitted that the respondents have not proved that the assistant county commissioner had the mandate to hear and determine the matter on behalf of the minister, and that his actions amounted to an illegality. It was pointed out that going by gazette notice 6854, the minister delegated his mandate to all deputy county commissioners, except for Nairobi county, and that the powers were not delegated to assistant county commissioners. The applicants counsel relied on the case of [In the matter of Interim Independent Electoral and Boundaries Commission](#) [2011] eKLR; [Owners of motor vessel ‘Lillians’ v Caltex Oil \(Kenya\) Limited](#) [1998] eKLR; [M’bita Ntiro v Mbae Mwirichia & another](#) [2018] eKLR; [Keroche Industries Limited v Kenya Revenue Authority & 5 others](#) [2007] 2 KLR 240 and [Lepore Ole Maito v Letwat Kortom & 2 others](#) [2016] eKLR.
5. Counsel for the applicants further submitted that the applicants are challenging the procedure and process of how the decision was arrived at by the 1st respondent, and not the merits of the decision. It was submitted that the decision making process in the instant case constitutes an abuse of power and discretion, made in bad faith and violated the expectation of the applicants. The applicants counsel relied on the case of [Patole v Kabale District Local Government Council and others](#) [2008] 2 EA 300, and [Republic v Attorney General & another ex parte Munyokwang Kiyer & 3 others](#) [2014] eKLR.



The Responses

6. The respondents, through the Attorney General filed grounds of opposition dated May 11, 2022 and a replying affidavit sworn by C K Mbu on June 28, 2022. It is deponed that Kamwimbi 'A' is registered area in Igamba Ng'ombe sub-county in Tharaka Nithi county having been declared an adjudication section on November 5, 1992 in accordance with section 5(2) (c) of the *Land Adjudication Act*, and subsequently demarcation and survey work was carried out. That thereafter, hearing of objections to the committee and arbitration board was conducted and the adjudication register was published on November 15, 2010. That after the publication sixty days were granted to aggrieved parties to file objections and the same were heard and determined by the land adjudication officer, and parties who were aggrieved by the decision of the land adjudication officer were granted a further 60 days to appeal to the minister.
7. The deponent contended that the appeals were heard and determined by the deputy county commissioner, adding that the minister may delegate, by notice in the gazette, his powers to hear appeals and his duties and functions under the Act to any public office by name, or to the person for the time being holding any public office specified in such notice, and that the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the minister. It was deponed that the minister delegated his powers to the deputy county commissioner *vide* gazette notice number 6854, therefore the hearing of the proceedings by the deputy county commissioner was lawful. The respondents aver that the applicants have not established that there was any bias on the part of the deputy county commissioner neither have they established that he acted illegally or unprocedurally and therefore the respondents contend that the application lacks merit and is for dismissal.
8. The respondents did not file any submissions either within the time granted by the court or at all.
9. The interested parties filed replying affidavits sworn by Salesio Micheni and Dominic Mwangangi on September 15, 2022. It is stated *inter alia*, that the appeal was adjudicated upon by the deputy county commissioner in person and assisted by his deputy and that the *ex-parte* applicants were accorded ample and sufficient opportunity to present their case.
10. It is contended that the *ex-parte* applicants are vexatious litigants who have embarked on a mission to claim and annex large swathes of land. That owing to the multiplicity of suits pending before this court, it is not clear which particular appeal the *ex-arte* applicants seek to challenge in these proceedings. It is further stated that whereas the applicants seek to quash the decision in appeal No 125 of 2018 made on February 24, 2022, the 1st interested party was not a party in that appeal. Further, that if the *ex-parte* applicants intended to have the decision in appeal No 298 of 2017 quashed, it is debatable whether the 1st *ex-parte* applicant has the legal capacity to institute these proceedings since he does not appear as a party in the minister's appeal No 298 of 2017. It is also contended that the applicants are basically challenging the merits of the decision of the minister, hence the application is an abuse of the court process and should be dismissed with costs.

Interested Parties Submissions

11. In their submissions dated September 19, 2022, the interested parties submitted that the decision being challenged is not the correct one thus rendering the entire suit defective.
12. Counsel for the interested parties also challenged the capacity of Catholic Mission Church and Kabururu primary school to be sued. Besides pointing out that the school has been joined into these proceedings through submissions in contravention of the laid down procedure, counsel submitted that both the church and the school lack legal capacity to be sued. That it is trite law that non-corporate



body has no legal capacity to sue or be sued in its own name, hence the claim against them cannot stand. Counsel for the interested parties relied on the case of *Peter Ngugi Geoffrey & 3 others v Mithini SDA Church* [2019] eKLR.

13. Regarding the issue whether the appeal was heard by a person without jurisdiction, counsel submitted that the proceedings proceeded before both officers while at the tail end it is indicated that the ruling was delivered before the deputy county commissioner. That no indication has been shown that an objection was raised on the composition of those adjudicating on the appeal. It is further submitted that the introduction of evidence (being gazette notice) in submissions stage, is an irregular procedure.
14. Counsel submitted that the application does not satisfy the threshold necessary to trigger the exercise of this court's discretion in favour of the applicants since the claim is a challenge of the merits of the decision of the minister concealed as one against the procedure adopted. The interested parties prayed that the entire application be dismissed with costs to the interested parties.
15. Counsel relied on the case of *Matwangwa Kilonzo v District Commissioner Kitui & another* [2021] eKLR and *Republic v The Minister for Lands & another ex-parte Bonface Njeru Ngari & another* [2013]eKLR.

Analysis and Determination

16. I have considered the pleadings, the written submissions filed and the authorities cited. The issues for determination are whether the orders of judicial review sought are available to the applicants as well as costs.
17. It is clear that the ex parte applicants seek to quash the decision in minister's appeal case No 125 of 2018 dated February 24, 2022 as well as an order of prohibition of the implementation of the said decision. As rightly pointed out by the interested party, the proceedings annexed and marked 'FG1' in the affidavit in support of the application herein are in respect to case No 298 of 2017. I have perused the annexures herein and have not seen proceedings in respect to appeal case No 125 of 2018 which the applicants seek to quash.
18. It is a well settled principle of law that parties are bound by their pleadings and that unless amended, the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR as follows:

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. and it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on the either side with a view to expedite the litigation through diminution of delay and expense.”

19. The same position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited with



approval the decision of the Supreme Court of Nigeria in *Adetoun Oladji [NIG] v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...

...infact, that parties are not allowed to depart from the pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

20. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & another v IEBC & 2 others* [2017] eKLR found and held as follows in respect to the essence of pleadings:

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

21. Going back to the pleadings and the evidence in this matter, the evidence tendered by the applicants does not support the pleadings. The applicants pleaded and seek orders in respect of land parcel No 795 and 796 Kamwimbi ‘A’ adjudication section in the minister appeal case No 125 of 2018 dated February 24, 2022 between the interested parties and the *ex-parte* applicants. However, in the affidavit of Fredrick Gitonga in support of the application, the applicants have annexed proceedings in case No 298 of 2017. It is clear, therefore, that the applicants are urging the court to grant orders of certiorari and prohibition in respect of a decision which has not been shown to the court. It is thus clear that the evidence relied on by the applicants are inconsistent with the application itself.
22. My analysis of the record shows that even when the interested parties raised the anomaly, the applicants did not deem it necessary to rectify their pleadings by either amending the same or seek to file a further or supplementary affidavit to bring in the evidence that is in tandem with the application. The parties are bound by their pleadings and the duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce itself on any matter not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to determination made without hearing the parties and leads to denial of justice.
23. For those reasons, I find that the notice of motion dated April 19, 2022 to be defective, incompetent and unmeritorious. The same is struck out.
24. It is my honest opinion that the failure by the applicants to exhibit the correct decision is an honest mistake on their part. I am, therefore, not inclined to award costs to any of the parties. I order that parties bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 12TH DAY OF OCTOBER, 2022



In the presence of:

CA: Martha

Ms. Wahome h/b for Ms. Musyimi for Applicants

Ms. Kendi for Respondents

N/A for Interested Parties.

C. K. YANO,

JUDGE.

