



Republic v Cabinet Secretary Ministry of Land and Physical Planning & 3 others; Wabeti & another (Interested Parties); Gitonga & another (Exparte Applicants) (Environment and Land Judicial Review Case E004 of 2022) [2022] KEELC 13458 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13458 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 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 & SETTLEMENT OFFICER 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

MARY WABETI INTERESTED PARTY

LUCY WARUGURU INTERESTED PARTY

AND

FREDRICK GITONGA EXPARTE APPLICANT

M'NGERENI MATHAIYA EXPARTE APPLICANT



JUDGMENT

The Application

1. Pursuant to leave granted by the court on March 24, 2022, the ex-parte applicants filed the Notice of Motion dated April 14, 2022 brought under order 53 rule 3(1) of the Civil Procedure Rules, section 8 and 9 of the Law Reform Act Cap 26 and all enabling provisions of law seeking for orders that:
 - 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 732 and 808 Kamwimbi/ 'A' Adjudication Section in the minister Appeal Case No 214 of 2019 dated January 13, 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 dated January 13, 2022 in regard to land parcel No 732 and 808 Kamwimbi 'A' Adjudication Section in the minister's Appeal Case No 214 of 2019.
 - c. The cost of this application be provided for.
2. The motion is supported by affidavit of Fredrick Gitonga, the 1st Ex-parte Applicant dated April 14, 2022 and further affidavit sworn on July 8, 2022 and is based on the following grounds:
 - i. That the Judgment/Ruling of the minister dated January 13, 2022 was tainted with issues of jurisdiction on account of the fact the Deputy Commissioner of Meru South issued notice for hearing of Appeal while the hearing proper was conducted by the Assistant County Commissioner of Igamba Ng'ombe Sub-County and all what the Deputy County Commissioner Meru South was to endorse the judgment by signing it.
 - ii. That the judgment of the minister was against the established policy and principles in adjudicating land under Cap 284 which requires that a person who have the land he or she was in occupation adjudicated and recorded under that person.
 - iii. That the Deputy County Commissioner on behalf of the 1st Respondent put into consideration extraneous matters (some completely irrelevant) thereby making him to arrive at wrong decision which was unjust and unfair to the ex-parte applicant.
 - iv. That the Respondent in contravention of the rules of natural justice regularized the illegal invasion of the applicant's parcel of land without proper analysis of the evidence produced.
 - v. That the decision by the 1st Respondent amount to an abuse of powers or authority conferred to him by any statutes.
 - vi. That the acts by the Respondents threaten safe proprietary rights of the ex-parte applicants as the interested parties have already started destructive activities cutting down trees and are in the process of forcefully taking over the applicants' ancestral land.
 - vii. That the hearing/ruling of the minister demonstrate bias on the part of the minister in favour of the interested party.



The Applicants' Case

3. The applicants aver that land parcel 799 Kamwimbi 'A' Adjudication section was ancestral land having originated from Bairugi who then left it to M'Njue to Kugereka who left it to Mathaiya then to M'Ngereeni Mathaiya that their family gathered and has been utilizing till parcels 732 and 808 were sub-divided therefrom during the adjudication process. That at the committee stage, parcel No 808 was not marked on the map and the only parcel on the map was parcel No 799.
4. The applicants further aver that parcel No 732 had no proceedings during the committee stage because back then it did not appear on the map, and was located on the map after Arbitration Board proceedings when they noted that it was located in parcel 799. The applicants contend that the 2nd interested party was also not aware of the location of parcel 732 since it did not appear anywhere on the map initially and was not even present during the ground visitation by the DCC since she did not know where the parcel of land was located.
5. The applicants aver that the proceedings in regard to parcel 808 commenced at the objection stage when it was placed on the map, a copy of which has been annexed and marked 'FG3'. That being dissatisfied with the decision of the board, the applicants made an appeal to the minister which they lost.
6. The applicants further aver that the appeal was heard by another person and not the County Commissioner who was mandated by the law. That at the committee stage, it was decided that one Ambrose Muchemi be allotted a portion of land from parcel 799 and instead of the implementation of the committee's decision, the interested party was allocated parcel 808 and the same indicated on the map. The applicants aver that at the objection stage, they raised the issue in regard to parcel 808 and the 1st Interested party. That Ambrose Muchemi filed a civil case against one Mutegei in regard to parcel 799 alleging it was parcel 797 but lost the case.
7. The applicants aver that the minister decided that parcel 808 was an original demarcation number without noting that parcel 808 only appeared on the map at the objection stage and that the location of parcel 808 kept being interchanged with parcel 797 which led to confusion as to the location of parcel 808.
8. It is the applicants' contention that the minister decision to award the parcel to the 1st interested party was unfair and illegal since the 1st Interested party contradicted her statement which stated that she resides in parcel 797, but later changed her statement to state that she lives and undertakes farming on parcel 808 where she said she had buried her husband. The 1st applicant avers that he was among the people who dug the grave of the Interested party's husband and disclosed during the hearing that it was in parcel 797 and not 808. It is the applicants' contention that the minister's decision was biased because he was taken to the ground and shown and discovered that the said grave was located in parcel 797 and not 808 as alleged by the 1st Interested party.
9. The applicants further aver that the matter was heard by one Florence Obunga the Deputy County Commissioner Igambang'ombe Sub-County who is not mandated by law to hear adjudication matters which amounted to an illegality. That the ground visitation was later done by one Nkaduda M Hiribae, the Deputy County Commissioner Meru South who was not present during the hearing. Further, that the minister later visited the ground but did not possess the knowledge of the matter since he had not heard the matter. It is the applicants' contention that the appeal was heard by a different person from the County Commissioner who was mandated by law.
10. The applicants state that during the objection stage, the location of parcel 808 and 797 on the ground was different from that after the objection where the 1st interested party claimed to have buried husband



at parcel 808 yet it is parcel 797. That the applicants wrote to the DLASO to complain about the interchanging of the locations of parcels 808 and 797 and the situation was rectified. A copy of the letter marked 'FG8' has been annexed.

11. The applicants argue that the decision of the DCC was based on an illegality for awarding the parcel of land to the interested parties even after his visit to the ground confirmed that their averments were false. The applicants further argue that the minister was biased since he did not consider all the evidence tendered before him. That if the decision made by the minister is implemented in relation to parcels 808 and 732, the applicants stand to suffer irreparable harm and injustice.

The Applicants' Submissions

12. Pursuant to the directions of court, the applicants filed written submissions dated September 1, 2022 through the firm of Ojwang Sombe & Company Advocates. It is submitted that the minister failed to consider the evidence that was tendered by the ex-parte applicants during the hearing of the appeal. It is further submitted that the appeal was heard by someone who had no jurisdiction and in violation of section 29(4) of the *Land Adjudication Act*. That from that provision, the person to whom the power and functions are delegation by the minister must be gazetted, named in the notice, or a holder of public office specified in the notice in the gazette. The applicants' counsel relied on the case of *Samuel Kamau & Another and Kenya Commercial Bank and two others – Sot Ct Civil Application No 2 of 2011* and *M'Bita Ntiro v Mbae Muirichia & Another [2018] eKLR*.
13. In their submissions the applicants also faulted the minister for going ahead and awarding the suit parcel of land to the interested party who had lost the appeal case no 125 of 2018 and argued that the minister's decision was illegal and biased and the court should interfere with the same by this judicial review application. The applicants relied on the case of *Lepore Ole Maito v Letwat Kortom & 2 Others [2016] eKLR*. The applicants submitted that they are challenging the process of how the decision was arrived at, adding that the same constitutes an abuse of power and discretion made in bad faith and violated the legitimate expectations of the applicants. The applicants' counsel relied on the case of *Patoli v Kabale District Local Government Council and others [2008] 2 EA 300*, and urged the court to grant the orders sought herein.

The Responses

14. The application was opposed by both the Respondents and the interested parties. The respondents through the Honourable Attorney General filed ground of opposition dated May 11, 2022 on the following grounds:
 - i. That the application is fatally defective misconceived and mischievous or otherwise an abuse of the court process and therefore are unsustainable in the obtaining circumstances.
 - ii. That the application has failed to meet the threshold for grant of the orders sought for the following reasons:
 - a. Section 29(4) of the *Land Adjudication Act* Provides Notwithstanding the provisions of section 38(2) of the *Interpretation and General Provisions Act* (Cap 2) or any other written law, the minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the minister. Thus the hearing of the proceedings by the Deputy



County Commissioner was lawful since the minister is authorized by law to delegate his duties to hear the appeal to any person holding a public office.

- b. That section 29 of the *Land Adjudication Act* the decision of the minister is final and not subject to challenge.
 - c. That judicial review proceedings purely deal with the procedure and process of decision and not the merits and/or substance of the case. However, the Applicant is seeking that this honourable court de (sic).
- iii. That the plaintiff's (sic) Application is bad in law only meant to defeat the cause of justice hence it ought to be dismissed with costs to the Respondent.
 - iv. That the application is otherwise frivolous, vexatious and an abuse of the court process.
15. The respondents also filed a Replying affidavit sworn by CK Mbui, the Land Adjudication and Settlement Officer Meru South on June 28, 2022. It was his case that Kamwimbi 'A' is registered area in Igambang'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*. That subsequently demarcation and survey work was carried out and therefore hearing of objections to the committee and arbitration Board was conducted and the Adjudication register for Kamwimbi 'A' 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.
 16. The Deponent contended that the parties aggrieved by the decision of the Land Adjudication officer were granted a further 60 days to appeal to the minister. That the appeals were heard and determined by the Deputy County Commissioner. Copies of the proceedings were annexed and marked 'CKM1'.
 17. The deponent contended that the minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under that section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public office shall be deemed for all purposes to be that of the minister.
 18. The deponent further averred that the minister delegated his powers to the Deputy County Commissioner vide gazette notice number 6854, thus the hearing of the proceedings by the Deputy County Commissioner was lawful since the minister is authorized by law to delegate his duties to hear the appeal to any person holding a public office. It is contended that the application delves into the substance and merits of the proceedings and review of the evidence rather than the procedure and process of decision making and 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. The Respondents therefore contended that the application lacks merit and is for dismissal.
 19. The 1st interested party through a replying affidavit sworn on June 20, 2022, stated that the decision was made by the minister and not by any of the respondents herein therefore the application is grossly incompetent as it is directed against the wrong persons. That the applicants have not cited any known grounds for judicial review proceedings to warrant the grant of the orders sought, adding that the applicants are challenging the merits of the decision of the minister which is beyond the scope and purview of judicial review proceedings.
 20. According to the 1st interested party, land parcel Kamwimbi 'A' Adjudication section No 797, 798 and 808 were the original ancestral parcels of land belonging to Mwaganu M'Ntumiriri who was her father-



in-law and who then bequeathed the parcels of land to his two sons; Simon Rauni and Nanua Mate (deceased) who was the interested party's late husband.

21. The 1st interested party stated that her late husband was awarded parcel No 808 where she lived, occupied and permanently developed since time immemorial. That the applicants are requesting for orders in respect to parcel 796 which the 1st interested party has never been part of the proceedings at any adjudication stage. That the applicants had an interest in parcel 985 which was awarded to them, a copy of the proceedings and finding is annexed and marked 'MWI'.
22. The 1st interested party contended that the 2nd respondent's findings on parcels 797, 798 and 808 were fair since all parties were given a chance to be heard. That parcel 732 does not exist and it had been illegally demarcated to the applicants having been hived from the original land parcel 808. The deponent has attached a map and finding marked 'MW2'. The 1st interested party argued that Ambrose was rightly allocated parcel 798 by the committee because it was his ancestral land, having been bequeathed by his father Simon Rauni. It is her contention that the site visit guided the 2nd Respondent in making a fair finding since all parties participated in the scene visit. It is further contended that the 2nd Respondent had the locus standi to delegate even to an Assistant County Commissioner to hear and determine any appeal. That the correct procedure was used by the respondents since it was also established that the applicants do not live nor occupy and/or utilize parcels 797, 798 and 808.

Submissions

23. The respondents did not file submissions either within the period allocated by the court or at all.
24. In her submissions dated September 15, 2022, the 1st interested party, through the firm of M/s Kijaru & Co advocates, submitted that the principles for judicial review were set out in the case of *Republic v Kenya National Examination Council Ex-parte Gathenji and others Civil Appeal No 266 of 1996* where the court of Appeal stated inter alia that:

' An order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is no concerned with the merits of the case but the decision making process. In order for an applicant to succeed in any application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.'
25. The 1st interested party submitted that gazettelement and jurisdiction of the Deputy and the Assistant Commissioner is settled under the [Land Adjudication Act](#) in which the powers can be delegated to a person holding a public office of the Deputy County Commissioner (DCC). That all the stated persons found on the face of the proceedings at the appeal hold a public office in the office of the DCC.
26. The 1st interested party submitted that the applicants (sic) state that the powers were delegated, and have only mentioned a gazette notice but have not produced a copy to ascertain the same. She submitted that it is trite law that he who alleges must prove, and relied on the case of [Gilbert Joseph Kabunjia v Land Adjudication](#) and [Settlement Officer Meru South & 3 Others; County Government of Tharaka Nithi \(Interested Party\)](#) in which it was held that 'the applicant didn't make any effort to prove the issue of gazettelement of the Deputy County Commissioner.'
27. The 1st Interested Party submitted that the applicant is in abuse of the court process and that his application is not based on any legitimate grounds. That the applicants have not demonstrated how the



decision making process was illegal, unreasonable and to be found with illegalities. The 1st interested party therefore urged the court to dismiss the application with costs.

Analysis and Determination

28. I have considered the pleadings, the legal and statutory authorities and the written submissions filed by the parties in support of their respective assertions.

29. It is trite law that Judicial Review concerns itself with the integrity of the process rather than the merits of the decision made in the impugned proceedings. In the case of *Chief Constable of the North Wales Police v Evans [1982]1 WLR 1155*, Lord Brightman noted thus;

' Judicial Review is concerned, not with the decision, but with the decision –making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.'

30. The principles for Judicial Review were also set out in the landmark case of *Republic –vs Kenya National Examination Council Ex-parte Gathenji and 9 others [1997] eKLR* where the Court of Appeal stated inter alia :

' That an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case, but the decision – making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was reasonable and that the impugned decision was illegal.'

31. In the case of *Municipal Council of Mombasa v Umoja Consultants Ltd [2002] eKLR*, the Court of Appeal 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.'

32. In this case, and being guided by the above decisions, the applicants' complaint is that the matter was heard by a person who did not have jurisdiction, hence the action is ultra vires. The court therefore will not dwell with matters that go to the merits of the decision. The applicants averred that the appeal was heard by the Assistant County Commissioner of Igamba Ng'ombe Sub-County (Florence Obunga) instead of the Deputy County Commissioner of MeruSouth (Nkaduda M Hiribae) who had been gazetted.



33. In the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank and 2 others* [2012] eKLR the Supreme Court stated:

' A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.'

34. The issues that call for determination are whether the impugned appeal was heard by a person who was not the legally and properly appointed person by the minister to hear the matter, and if so, whether the orders of Judicial Review sought herein should issue.

35. Section 29 of the Land Adjudication Act (Cap 284) provides as follows:

1. Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the minister by:-
 - a. Delivering to the minister an appeal in writing specifying the grounds of appeal; and
 - b. Sending a copy of the appeal to the Director of Land Adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
2. The minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.
3. When the appeals have been determined, the Director of Land Adjudication shall:-
 - a. Alter the duplicate adjudication register to conform with the determination; and
 - b. Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.
4. Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap 2) or any other written law, the minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public office shall be deemed for all purposes to be that of the minister.'

36. A Careful look at section 29(4) of the Land Adjudication Act evinces two scenarios:

First, the minister may delegate his duties and functions to any public office by name by notice in the Gazette, and secondly, the minister may delegate his functions and duties to any person for the time being holding any public office in such notice. The law is therefore clear that the minister has the power to name any public officer to perform his duties and functions under the Land Adjudication Act, and



such name must be gazetted. It is also clear that the minister can delegate his duties and functions to any public office specified in the germane Gazette Notice.

37. In this case, the parties seem to be in agreement that the minister had delegated his duties and functions to the office of the Deputy County Commissioner. The question is to which Deputy County Commissioner were the duties and functions delegated to?
38. Whereas it appears from the applicants' arguments that the functions and duties were delegated to the Deputy County Commissioner Meru South Sub-County, and not Deputy County Commissioner Igamba Ng'ombe Sub-County, the Respondents on their part have merely stated that the minister delegated his powers to the Deputy County Commissioner vide Gazette Notice Number 6854. The Respondents have however not exhibited the said Gazette Notice and neither have they specified the relevant Sub-County. In her submissions, the 1st Interested party even pointed out that it has been stated that the powers were delegated, but no copy of the Gazette Notice was produced.
39. It is trite law that he who alleges must prove. The Respondents have not made any effort to prove that both the Deputy County Commissioners of Meru South and Igamba Ng'ombe were gazetted, since it is apparent from the proceedings that both heard the appeal, although the decision was only signed by one. In my view, the issue of jurisdiction and gazettement of the Deputy County Commissioner who heard the appeal has not been specifically rebutted and sufficiently settled, yet it goes to the root of the application herein. By making reference to the germane Gazette Notice but failing to exhibit a copy, it is my conclusion that the Deputy County Commissioner Igamba Ng'ombe did not have jurisdiction to hear the apposite appeal on behalf of the minister. That to me also explains why the said Deputy County Commissioner failed to append her signature on the decision, even after hearing the appeal. The Respondents did not explain whether the minister had delegated his powers to the two Deputy County Commissioners, and if so, why only one appended his signature on the decision, yet it is indicated that the appeal was heard by both of them.
40. In view of the foregoing, this court finds that the application herein is merited and the same should be allowed in the following terms:
 - a. An order of certiorari is hereby issued bringing to this court and quashing the entire decision and award dated January 13, 2022 by the 1st Respondent in respect of Land Parcel No 732 and 808 Kamwimbi 'A' Adjudication Section in the Minister's Appeal Case No 214 of 2019.
 - b. An order of prohibition be and is hereby issued prohibiting the 2nd and 3rd Respondents from implementing the decision of the 1st Respondent dated January 13, 2022 in regard to Land Parcel No 732 and 808 Kamwimbi 'A' Adjudication Section in Minister's Appeal Case No 214 of 2019.
 - c. The appeal is remitted back for hearing and determination by a person properly and legally authorized to do so.
 - d. Considering that the presence of the two Deputy County Commissioners during the proceedings may have been an honest mistake, I order that parties bear their own costs.
41. Orders accordingly.

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

C. K. YANO,

JUDGE.

In the presence of:



CA: Martha

Ms. Wahome h/b Ms. Musyimi for Ex-parte Applicants

Ms. Kendi for Respondents

Ms. Kijaru h/b for Murithi for Interested parties

