



**Republic v Mugambi & another; M'Maingi & another (Exparte) (Judicial Review 4 of 2019) [2022] KEELC 13598 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13598 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
JUDICIAL REVIEW 4 OF 2019  
CK NZILI, J  
OCTOBER 12, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SILAS MUGAMBI ..... 1<sup>ST</sup> INTERESTED PARTY**

**JOSEPH NTOMBURA ..... 2<sup>ND</sup> INTERESTED PARTY**

**AND**

**PETER MWIKA M'MAINGI ..... EXPARTE**

**ANCIETA NKUNU ..... EXPARTE**

**RULING**

**A. Pleadings**

1. Before the court is the notice of motion dated 2.10.2019 seeking for an order of *certiorari* to bring and quash the proceedings and decision made by the respondents in Tigania Objection No 2442 dated 22.11.2016 relating to Parcel No 5730 Karama Adjudication Section, Tigania East.
2. The application is supported by the statement of facts dated 5.3.2019, the verifying affidavit sworn by Peter Mwika M'Maingi on 5.3.2019 and supporting documents namely, the proceedings marked as PMM "1" dated November 22, 2016.
3. The facts as set out in the statement of facts are that the ex-parte applicant was the owner of Parcel Nos 1570, 1549 and 5730 originally belonging to the late Stanley M'Maingi, who had gathered the land in 1968 measuring approximately 4.12 Ha while the 1<sup>st</sup> interested party had gathered 3.35 acres, but was allegedly given the deceased's land in his account making a total of 7.47 acres.



4. The *ex-parte* applicant averred that the deceased objected to the inclusion of his land in the 1<sup>st</sup> interested party's land through Objection No 2442 where the tribunal made a decision without considering his views and took into account irrelevant considerations. It was stated that the *ex-parte* applicant did not have a lawyer to seek leave within time since he was acting in person, and was elderly.
5. The *ex-parte* applicant stated that the respondent's decision was to the effect that his land be measured and 5.12 acres be taken out in favour of the third parties and was aggrieved by the decision since the Njuri Ncheke elders had previously decided it in his favour.
6. Further, the *ex-parte* applicant averred that the decision was a nullity bad in law, made in bad faith, did not comply with the law, he was not accorded an opportunity to offer a defence, was full of illegalities and was made without jurisdiction.
7. In verifying the facts, the *ex-parte* applicant reiterated the same grounds as in the statement of facts.
8. The application was also supported by another affidavit sworn on 2.10.2019 by Peter Mwika M'Maingi stating that the 1<sup>st</sup> interested party got Parcel No 1570 without his knowledge following which he filed a Committee Case No 649/65/69 of 228, 1968 whose ruling on 10.9.68 was that the 1<sup>st</sup> interested party retains 1 acre of Parcel No 1549 and he retains 2.35 acre making a total of 6.47 acres as per a ruling marked as PMM 1 (a) & (b).
9. Further, he averred that in 2000, he established 4.12 acres gathered by his late father were not recorded in his account number but instead were recorded in favour of the 1<sup>st</sup> interested party. He attached a copy of the ruling as PMM "2". In effect therefore the *ex-parte* applicant averred that the 1<sup>st</sup> interested party acquired a total of 5.12 acres out of 4.12 acres from his Parcel No 1570 and 1 acre from Parcel No 1549.
10. The *ex-parte* applicants stated that on November 26, 2001, the District Land Adjudication & settlement officer Meru North directed the Land Adjudication Officer to stop any further dealing over his Parcel No 1570 which directive was ignored and instead allowed the Land Adjudication Officer, the 1<sup>st</sup> interested party to transfer the land to the 2<sup>nd</sup> interested party in 2004 as per the attached letter and marked as PMM "3" following which the *ex-parte* applicant lodged a complaint letter with the Director of Land Adjudication and Settlement, who noted the inconsistencies. He produced the letter dated 27.2.2003 as annexure marked PMM "4". It was averred that the DLASO noted the inconsistencies by a letter dated 3.5.2012 and stated that there was a wrong implementation. He attached the letter as annexure PMM "5".
11. The *ex-parte* applicant averred that a meeting was convened by the DCI Tigania East, the chief Muthara location with the 2<sup>nd</sup> interested party who was directed not to develop the subject property until the dispute was resolved. He attached the minutes as annexure marked PMM "6". Further, the *ex-parte* applicant wrote a complaint letter dated 8.11.2013 which he attached as annexure PMM "7" leading to an Objection No. 2442 against the 2<sup>nd</sup> interested party in 2016. He averred that the 1<sup>st</sup> respondent neglected and or intentionally failed to consider all the previous findings, reports and cases pertaining to the suit land. He attached a copy of the decision as annexure marked PMM "8".
12. Additionally, the *ex-parte* applicant averred that on 12.9.2017 he lodged a claim with the Njuri Ncheke elders who forwarded its findings to the District Land Adjudication & Settlement Officer. He attached a copy of the letter and case findings annexure marked PMM "9".
13. The *ex-parte* applicant therefore complains that the evidence and the attendant decision was irregular, ultra vires, was improperly handled, unfair and prejudicial hence urged the court to look at the gathering record and ascertain the legal owners of the land.



14. The 2<sup>nd</sup> respondent opposed the notice of motion through a replying affidavit sworn on 7.11.2019 on the basis that the suit land initially belonged to his father who gave it to the father of the 1<sup>st</sup> interested party who later on sold and transferred it to him. That the committee initially heard the dispute and awarded it to the interested party.
15. That at the time he was transferring the land, there was no pending objection or restriction stopping it. He attached a copy of the transfer and a sketch map as JN 1 (a) & (b) indicating that what the ex-parte applicant has been claiming was distinct and that all issues raised at the objection were resolved at the various stages preceding Objection No 2442 during which he was given all the opportunity to present statements, call witnesses, cross examine them and ultimately a decision was made with due consideration of all the matters dating back to 1957 till 1968 in line with the law.
16. Additionally, the 2<sup>nd</sup> interested party averred a scene visit was made on November 21, 2016 during which the Land Adjudication Officer made various observations before delivering the decision.
17. The respondents filed a notice of preliminary objection dated 28.1.2020 that the application offended sections 8 and 9 of the *Law Reform Act*. They relied on, *Republic v Public Procurement Administrative Review Board & another Exparte TSC* [2015] eKLR & *Republic v Mwangi Nguyai & 3 others exparte Harun Nguyai* [2013] eKLR.
18. Further, the respondents filed a replying affidavit sworn by Earnest K Langat on 18.2.2022. They denied that the ex-parte applicant was the recorded owner of Parcel No 1549 as per the record of existing rights which they attached as annexure marked EKL “1” & “2”. In the said annexures the land belongs to Stanley Maingi whose acreage is 2.68 acres contrary to the averments in the application.
19. In addition, the respondents averred the acreage from 17 fragments in different parts made a total of 5.03 acres and not 6.47 as alleged meaning the land committee case awarding the 1<sup>st</sup> interested party 1 acre was correctly implemented.
20. The respondents averred that the alleged 4.12 acres in favour of the 1<sup>st</sup> interested party was an imagination for it appears nowhere in Parcel Nos 1549 & 1570. That the *ex-parte* applicant did not appeal against LCC 649/68/69 to the arbitration board in line with the law.
21. The respondents averred that the ex-parte applicant’s adjudication register Objection No 2443 was heard by the land adjudication officer who was not bound by previous rulings and hence was properly done while observing sections 26 (1) of the *Land Consolidation Act*.
22. The respondents averred that the 1<sup>st</sup> exparte applicant was advancing the interests of the 2<sup>nd</sup> exparte applicant yet she did not file her own objection within the stipulated time lines nor had she given any written authority to the 1<sup>st</sup> ex-parte applicant to advance her interest if at all she was aggrieved by the outcome.

## **B. Written Submissions**

23. In written submissions filed on 19.4.2022 the *ex-parte* applicants submitted that they deserved the orders under article 47 (1) of the *Constitution* as read together with sections 3 of the *Fair Administrative Action Act* and guided by *Pastoli v Kabale District Local Government Council & others* [2008] EA 300 *Municipal Council of Mombasa v Umoja Consultants* Appeal No 185 of 2001, *KNEC v Republic exparte Gathenji Njoroge* [1997] eKLR and *Chief Constable of the North wales Police v Evans* [1982] 1 WLR 1155.



24. The respondents submitted that the 1<sup>st</sup> ex-parte applicant lacked authority to plead and act for the 2<sup>nd</sup> *ex-parte* applicant.
25. The respondents submitted that evidence before the court indicated the ex-parte applicants were granted fair hearing in line with Section 13 (4) of the [Land Consolidation Act](#) as deponed by Earnest Langat at paragraph 7 – 13 of the replying affidavit.
26. Reliance was placed on [Rose Kanini M'Atheru & another v District Land Adjudication and Settlement Karama Adjudication Section & 2 others](#) [2018] eKLR.
27. The respondents therefore submitted that the 2<sup>nd</sup> ex-parte applicant had the option of getting a representative of her choice which she failed to do and hence the court cannot guess what her claim would have been.
28. The respondents submitted that they had disproved the ownership of Parcel No 1549 as per the record of existing rights as well as the acreage as alleged by the applicants.
29. As regards what was implemented the respondents submitted that they have disproved the same and the fact that the 2<sup>nd</sup> ex-parte applicant failed to lodge an appeal until the publication of the final register, where he filed the Objection No 2442 which was heard and determined under sections 26 & 27 [Land Consolidation Act](#) in line with the rules of natural justice.
30. The respondents submitted that the decision made was being challenged 3 years down the line which by any stretch of imagination was inordinately long hence there could be no rehearing of the objections outside the timelines as per the [Act](#).
31. Further, the respondents submitted that leave to apply for Judicial Review was being sought 2 years and 4 months outside the six months provided under sections 8 & 9 of the [Law Reform Act](#), order 53 rule 2 [Civil Procedure Rules](#) and section 12 of the [Fair Administrative Action Act](#) hence rendering the application a non-starter.
32. The respondents submitted that the 1<sup>st</sup> ex-parte applicant participated in the A/R proceedings but was only complaining after losing in the pretext of the 2<sup>nd</sup> *ex-parte* applicant who has given no authority to plead and defend on her behalf.
33. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties submitted that the two issues for determination were whether the *ex-parte* applicants have locus standi and secondly whether the notice of motion had merits.
34. On the 1<sup>st</sup> issue the interested parties urged the court to find the 2<sup>nd</sup> ex-parte applicant was never a party to the objection proceedings and any attempts by the 1<sup>st</sup> ex-parte applicant to ventilate her issues without her authority to plead was misconceived, flawed and untenable since there was no appeal preferred by her against the decisions.
35. As to whether the application has merits it was submitted the applicants had failed to demonstrate that the proceedings and decision herein was tainted with illegality irrationality and procedural impropriety.
36. Reliance was placed on [Kimeo Stores Ltd v Minister for Lands & 2 others](#) [2011] eKLR citing with approval [KNEC v Republic ex parte Geoffrey Gathenji Njoroge & 9 others](#) Civil Application No 266 of 1996 [Patoli v Kabale District Local Government Council & others](#) [2008] 2 EA 300 [Republic v EACC ex parte Nairobi City County Assembly & 13 others](#) [2019] eKLR, [Republic v DPP \(ex parte\) Pius Kipkorir Chelimo & another](#) [2017] eKLR, [Joseph Mathita Ikirima v Tigania East District Land Adjudication 7 settlement officer & others](#).



#### D. Issues for Determination

37. The issues commending themselves for determination are:
- i. If the *ex-parte* applicants exhausted the internal dispute mechanisms before filing the proceedings.
  - ii. If the *ex-parte* applicants have proved non-compliance with the right to fair administration.
  - iii. If the applicants are entitled to the prayers sought.
38. The basis of the proceedings herein, is the statement of facts dated 5.5.2019, its verifying affidavit sworn on 7.5.2019 by Peter Mwika M'Maingi, the notice of motion dated 2.10.2019, its supporting affidavit sworn on 2.10.2019, its supporting affidavit sworn on 2.10.2019 and annexures marked PMM 1 (a) & (b) to PMM "9" respectively.
39. Whereas the name of the 2<sup>nd</sup> *ex-parte* applicant appears in the statement of facts there is no description of her relationship with the suit properties in the pleadings.
40. Similarly, the 1<sup>st</sup> *ex-parte* applicant did not mention the 2<sup>nd</sup> *ex-parte* applicant in the verifying affidavits, save at paragraph 1 of the affidavit in support of the notice of motion. Further, there is no authority to plead, swear and file the proceedings attached to the proceedings giving the 1<sup>st</sup> *ex-parte* applicant any mandate to represent the 2<sup>nd</sup> *ex-parte* applicant and her rights or interests in these proceedings.
41. A party filing a suit in court must be properly identified and state the capacity in which he or she brings the suit. The 2<sup>nd</sup> *ex-parte* applicant has not been described at all particularly on her relationship with the subject matter and the late Stanley M'Maingi said to have been the owner of Parcels No 1570, 1549 and 1530 Karama adjudication section.
42. The 1<sup>st</sup> *ex-parte* applicant has not filed any authority to represent the interests of the 2<sup>nd</sup> *ex-parte* applicant and or state the nature of those interest's vis a vis the alleged recorded owner of the suitland.
43. Orders 1 rule 13 (3) and 4 rule 1 (3) of the [Civil Procedure Rules](#) requires that a written authority be filed alongside the verifying authority sworn on behalf of the party giving it and must be filed together with the pleadings.
44. Order 53 Rule (2) (b) of the [Civil Procedure Rules](#) requires an application be accompanied by affidavits verifying the facts. Order 4 Rule 4 of the [Civil Procedure Rules](#) also requires a party to specify if he is suing in a representative capacity and where persons are not representing each other, they need to file separate documents or file affidavits individually and if they find it convenient to appoint one person, they need to do so in writing so that it is clear that one person has the authority of the other to file documents, which documents would then also represent their interests. See [Chalicha Farmers Cooperative Society Ltd v George Odhiambo & 9 others](#) [1987] eKLR.
45. In [Research International East Africa Ltd v Julius Arisi & 213 others](#) [2007] eKLR, the court was looking on the requirements of an authorization under the cited rules.
46. It was held without such an authority the court may not find what party is saying as binding on the other and in absence of it the court should find the rest of the applicants to have pleaded nothing and dismiss their case.



47. In absence of the authority to plead coupled with the fact that the 2<sup>nd</sup> ex-parte applicant has not seen it fit to file a supporting affidavit, my finding is that the 1<sup>st</sup> ex-parte applicant cannot advance the interests of the 2<sup>nd</sup> ex-parte applicant without authority to do so.
48. On the issue of representation of the interests of the estate of the deceased Stanley Maingi, there is no requirements in law for letters of administration so as to advance interests of the deceased during the adjudication process since at that stage, all what is before the land adjudication process are interests in land which have not yet crystallized into estates governable by the Law of Succession Act Cap 160 Laws of Kenya. See section 12, 13(4) of the Land Consolidation Act, and Tobias Achola Osindi & 13 others v Cyprian Otieno Ogalo & 6 others [2013] eKLR.
49. Turning to the 2<sup>nd</sup> issue the respondents and the interested party attack the application both on inordinate delay of 3 years and for lacking merits since the proceedings and the decision of the 1<sup>st</sup> respondent was made within the law and in compliance with rules of natural justice.
50. The 1<sup>st</sup> ex-parte applicant is of the contrary view and pleads that the 1<sup>st</sup> respondent took into account irrelevant considerations; did not fact or in the objector's views, failed to consider previous rulings on the dispute including a Njuri Ncheke decision, acted without jurisdiction, did not follow rules of natural justice and failed to call the 2<sup>nd</sup> ex-parte applicant to defend herself and made a decision bad in law and condemned the 2<sup>nd</sup> ex-parte applicant unheard.
51. There is no dispute that the 1<sup>st</sup> ex-parte applicant filed objection no. 2442 in 2016 under the Land Consolidation Act leading to the decision made on November 22, 2016 by the 1<sup>st</sup> respondent.
52. The respondents have pleaded and submitted that the proceedings and the decision were governed by sections 12, 13, 26 & 27 of the Land Consolidation Act. The 1<sup>st</sup> ex-parte applicant submitted that under sections 3 the Fair Administrative Actions Act and based on Pastoli vs Kabale (*supra*), there was illegality, irrationality and procedural impropriety hence the proceedings and decision made ought to be quashed.
53. On the other hand, the interested parties have submitted that the land adjudication office had the jurisdiction and mandate and followed the set principles to hear and determine the objection proceedings including giving all the parties fair hearing, considering the objection on metis and arriving at a just decision. They relied on Republic v DPP ex-parte Pius Chelimo (*supra*).
54. Article 47 of the Constitution of Kenya grants the exparte applicants the right to fair administrative action that should be expeditious, effective, lawful, reasonable, procedurally fair and which must have written reasons. If the administrative action shall adversely affect a party sections 4 & 6 of the Fair Administrative Action Act, the 1<sup>st</sup> respondent while hearing objection proceedings under sections 13 and 26 of the Land Consolidation Act, undertake its responsibilities while mindful of the statutory and constitutional rights and freedoms of the parties as set out under article 47 including informing the parties about their rights, the manner, place and period within which to appeal against such a decision, and by providing copies of the proceedings or decision on time.
55. Looking at the proceedings and the decision herein there is no doubt that the 1<sup>st</sup> ex-parte applicant attended the proceedings gave an elaborate witness statement and was cross examined by both the 2<sup>nd</sup> interested party and the 1<sup>st</sup> respondent.
56. The 1<sup>st</sup> ex-parte applicant's witness also gave testimony. The 1<sup>st</sup> ex-parte applicant was also cross examined the witness brought by the 2<sup>nd</sup> interested party.



57. The decision and its findings considered all the evidence tendered including their observations made during the scene visit on November 21, 2016.
58. The 1<sup>st</sup> ex-parte applicant submitted that there was an illegality in the proceedings and decision was ultra vires; irrational and had procedural impropriety.
59. The burden to prove these assertions rests with the 1<sup>st</sup> ex-parte applicant in line with sections 107 of the Evidence Act.
60. While expounding on what amounts to fair administrative action, the Court of Appeal in Law Society of Kenya v Centre for Human Rights and Democracy & 13 others [2013] eKLR stated that,
 

“if it is proved that the authority deviated from the established and set beacons or pathway or legal criteria as delineated for, it has run wild and amok and at worst has gone on a frolic of its own, become an unruly horse and engaged in cornice, malice, witch hunting and a wild goose chase, running helter-skelter, it is the duty of the High Court to pull the leash and firmly point the delineated legal path to trend and to follow”.
61. The onus was on the 1<sup>st</sup> ex-parte applicant to point out that the 1<sup>st</sup> respondent in hearing and determining the objections ignored certain legal requirements with impunity or exceeded the legal parameters and criteria set out under section 13 and 26 of the Land Consolidation Act.
62. The 1<sup>st</sup> ex-parte applicant was allowed to lodge the A/R objection. He was and issued with a date for the hearing. He was accorded an opportunity to ventilate his objection and adduce both oral and documentary evidence. He has not claimed that he was denied an opportunity to present past rulings, reports and call witnesses including the 2<sup>nd</sup> ex-parte applicant.
63. In Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR the court held that, it has no mandate to direct a party on the manner of the exercise of its discretionary obligation in the absence of demonstration of gross abuse of discretion, manifest, unjust or culpable excess of authority equivalent to a denial of a settled right to fair hearing.
64. It was not enough for the 1<sup>st</sup> ex-parte applicant to plead lack of a fair hearing and fair administrative action without specific details, instances and events in which the 1<sup>st</sup> respondent failed to adhere to article 47 of the Constitution or perhaps as to prior and adequate notice, opportunity to be heard, notice to right of appeal or review, reasons for the decision, denial of right to cross-examine; availability of information, materials and evidence and lastly an opportunity to attend, be heard, denial of request for adjournment and the presence of witnesses.
65. In JSC v Mbala Mutava & another [2014] eKLR the Court of Appeal held that, Article 47 entrenches the national values and principles of governance such as the rule of law, human dignity, social justices, good governance, transparency and accountability among public officers, state organs and other administrative bodies.
66. The respondents through a replying affidavit have pleaded the factual basis of the objection as regards the history of the adjudication process including who was the recorded owner and the specific details on acreage, the date of the processes and the manner in which they substantially heard and determined the objection in line with Sections 13 and 26 of the Land Consolidation Act.
67. The 1<sup>st</sup> ex-parte applicant did not seek to and or file a supplementary affidavit to pinpoint any loopholes or breaches of his right to Fair Administrative Action contrary to the replying affidavit by Mr. Langat.



68. In *Republic v KNEC ex-parte Gathenji* (*supra*) the court held that the orders of judicial review are only grantable where an unlawful conduct or breach of duty has been demonstrated on the part of a public body or official.
69. In *KRA v Universal Corporation Ltd* [2020] eKLR, the court held that the purpose of judicial review is to ensure that an individual is given fair treatment by the public authority to which he has been subjected and that post 2010 JR is available as a relief to a claim of violation of rights and freedoms.
70. In these proceedings, the 1<sup>st</sup> ex-parte applicant sought for a writ of certiorari. In the *KNEC* case (*supra*), the court held that an order of certiorari is available if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.
71. The 1<sup>st</sup> ex-parte applicant has pleaded there was excess of jurisdiction.
72. In *Owners of Motor vessel Lilian "S" v Caltex oil (K) Ltd* [1989] KLR 1 jurisdiction was defined as set by statute or the *Constitution*. See *Samuel Kamau Macharia & another v KCB & 2 others* [2012] eKLR.
73. The respondents have pleaded that the law governing the A/R objection proceedings was sections 13 & 26 of the *Land Consolidation Act*. The 1<sup>st</sup> ex-parte applicant has not brought anything to show that the 1<sup>st</sup> respondent did not have powers to hear and determine the AR Objection. My finding therefore is the 1<sup>st</sup> respondent was seized of the jurisdiction to hear and determine the 1<sup>st</sup> ex-parte applicants Objections No 2443.
74. Similarly, my finding is the 1<sup>st</sup> ex-parte applicant was duly heard and given an opportunity to present his objection, call witnesses and examine the respondent's witnesses. He was also accorded adequate time and resources to ventilate his case. He was also supplied with the proceedings and the outcome on time to seek the court's redress by way of appeal. By not appealing against the decision within 6 months, the ex-parte applicant gave the reasons as age factor, sickness and or lack of legal representation. He did not blame the respondents for the inordinate delay of over 3 years. In line with section 9 (1) of the *Fair Administrative Action Act*, my finding is the delay of over three years under the circumstances was unreasonable.
75. The 2<sup>nd</sup> respondent has raised the issue of prejudice if the court was to order for rehearing of the A/R Objection after a three years delay.
76. The ex-parte applicant has also attacked the decision as arrived at while considering irrelevant matters. The *Land Consolidation Act* grants the 1<sup>st</sup> respondent the power and mandate to hear and determine A/R objections alongside the land adjudication committee.
77. Looking at the proceedings and the decision, there is nothing demonstrated by the 1<sup>st</sup> ex-parte applicant that the 1<sup>st</sup> respondent considered irrelevant matters and or failed to consider matters which were relevant. The 1<sup>st</sup> respondent was not bound by the findings of Njuri Ncheke elders, since their role and mandate are not anchored under the *Land Consolidation Act*. See *Joseph Mathita Ikirima* (*supra*).
78. In the final analysis and given the foregoing, the court finds no merits in the notice of motion herein. The same is dismissed with costs.

Orders accordingly

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 12<sup>TH</sup> DAY OF OCTOBER, 2022**

**In presence of:**



C/A: Kananu

Applicant in person

Miss Mugambi h/b for Kieti for 1<sup>st</sup> & 2<sup>nd</sup> respondents

**HON CK NZILI**

**ELC JUDGE**

