



**Republic v The Cabinet Secretary Ministry Of Land And Physical Planning & 3 others; Gitonga & another (Exparte Applicants); Mwangangi (Interested Party) (Environment and Land Judicial Review Case E007 of 2022) [2022] KEELC 13455 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13455 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2022  
CK YANO, J  
OCTOBER 12, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CABINET SECRETARY MINISTRY OF LAND AND PHYSICAL  
PLANNING ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 2<sup>ND</sup>  
RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**FREDRICK GITONGA ..... EXPARTE APPLICANT**

**M'NGERENI MATHAIYA ..... EXPARTE APPLICANT**

**AND**

**DOMINIC MWANGANGI ..... INTERESTED PARTY**

**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 1<sup>st</sup> respondent in respect of land parcel No 804 Kamwimbi/ 'A' Adjudication Section in the minister appeal case No 125 of 2018 dated January 13, 2022 between the interested parties (appellant) and ex-parte applicants/respondents.
  - b. An order of prohibition be issued prohibiting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from implementing the decision of the 1<sup>st</sup> respondent from implementing the decision of the 1<sup>st</sup> respondent's judgment, award on decision which is dated January 13, 2022 in regard to land parcel No 804 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 motion is supported by facts and grounds contained in the application and the affidavit of Fredrick Gitonga, the 1<sup>st</sup> Ex-parte applicant dated April 14, 2022.
  3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed grounds of opposition dated May 11, 2022 and a replying affidavit sworn by C K Mbui, the Land Adjudication and Settlement Officer Meru South dated June 28, 2022.
  4. The interested party filed a replying affidavit dated September 15, 2022.

### **The Applicants' Case**

5. The applicant contended that the ruling of the minister was tainted with issues of jurisdiction on account of the fact that the Deputy County Commissioner of Meru South issued notice for hearing of the appeal while the hearing proper was conducted by the Assistant County Commissioner of Igambang'ombe Sub-County, and that all what the Deputy County Commissioner Meru South did was to endorse the judgment/ruling by signing it. It was further contended 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 was in occupation had the land adjudicated and recorded under his/her name. The applicant further stated that the Deputy County Commissioner, on behalf of the 1<sup>st</sup> respondent, put into consideration extraneous matters, some completely irrelevant, thereby arriving at a wrong decision which was unjust and unfair to the applicants. It is also contended that the Respondents contravened the rules of natural justice and abused their powers and authority conferred by statutes. The applicants' case is also to the effect that the hearing/ruling of the minister was biased in favour of the interested party.
6. In the supporting affidavit, the 1<sup>st</sup> Ex-parte applicant deponed *inter alia*, that these judicial review proceedings are in relation to the 1<sup>st</sup> respondent's ruling dated February 24, 2022 in respect of Land Parcel No 804 Kamwimbi 'A' Adjudication Section in the minister's Appeal Case No 125 of 2018 and has annexed a copy of the proceedings marked 'fg1'. The adjudication proceedings began way back in 1999 and has annexed copies of the proceedings of the committee, the Arbitration Board and of the objection stage, and argued that the interested party lost the case twice but the 1<sup>st</sup> respondent still went ahead to illegally award him the land.

### **The Respondents' Case**

7. It was the respondents case that the minister delegated his powers to the Deputy County Commissioner vide gazette notice number 6854 as provided in Cap 284 and thus the proceedings by the Deputy County Commissioner was lawful. The respondents contended that the application herein is frivolous, vexatious and an abuse of the court process since the applicants are seeking that the court delves into the substance of the proceedings and review of the evidence which goes to the merits



of the decision instead of the process and procedure of the decision. The respondents averred that the applicants have not established that there was bias on the part of the Deputy County Commissioner. The respondents contended that the application lacks merit and is for dismissal.

### **The Interested Party's Case**

8. The interested party deponed *inter alia*, that he is the one who instituted the impugned appeal to the minister and upon considering the evidence the minister dismissed the appeal. He pointed out that it is comical that it is the ex-parte applicants who now want the said decision reversed. The Interested Party also supported the respondents' contention that the appeal was presided over by the Deputy County Commissioner, Meru South, and that all the parties were accorded ample opportunity to participate. That the ex-parte applicants' application is basically challenging the registration of the suit land in the name of the interested party which action was not a product of the decision of the minister.

### **Submissions**

9. Pursuant to directions given by the court, the parties consented to disposing off the application by way of written submissions. The applicants' counsel filed their submissions on September 5, 2022 while counsel for the interested party filed theirs on September 19, 2022. The respondents did not file any submissions either within the time granted by the court or at all.
10. The applicants submitted that they have approached the court for judicial review orders against the decision of the minister dated February 24, 2022. That there was an appeal of the Arbitration Board to the minister in-charge of lands pursuant to section 29(1) of the [Land Adjudication Act](#).
11. It is the applicants' submission that the person who heard the appeal on behalf of the minister had no jurisdiction. The applicants counsel relied on the Supreme Court decision in the case of [Samuel Kamau & Another and Kenya Commercial Bank & 2 Others](#) supt. CT Civil Application No 2 of 2011 in which the court opined as follows:

“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. We agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it, is not one of procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.”
12. The applicants submitted that the minister may hear and determine the appeal by himself or he may delegate in accordance with section 29(4) of the [Land Adjudication Act](#). That from the said provision, it is clear that the person to whom the powers and functions are delegated must be gazetted, named in the notice or a holder of public office specified in the notice in the gazette.
13. The applicants' counsel submitted that the 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), who are in charge of districts.
14. It is submitted that in this particular case, the applicant was heard by another person one Fred Masinjila, who is a District Officer (now Assistant County Commissioner) instead of the Deputy County Commissioner. That the Assistant County Commissioner purported to hear and determine the appeal for and on behalf of the District Commissioner.



15. The applicants submitted that the minister delegated his duties and functions to the office of the Deputy County Commissioner vide Gazette Notice 6854 as admitted by the Respondents, and not to the office of the Assistant County Commissioner (District Officer). That the law is very clear that the minister has the power to name any public officer to perform his duties and functions under *Land Adjudication Act*, and such name must be gazetted. That it is clear that in this case, the minister had not by gazette notice named Fred Masinjila as the person he had delegated his duties and functions to. The applicants counsel cited the provisions of section 108 of the *Evidence Act* which provides that the burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all were given on either side. They relied on the case of *M'bita Ntiro v Mbae Mwirichia & Another* (2018) eKLR in which it was held that:

“The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”
16. It is submitted by the applicants that the respondents have not proved that the Assistant County Commissioner had the mandate to hear and determine the adjudication matter on behalf of the minister and that this amounted to an illegality to the whole appeal case. That going by the Gazette notice 6854, the minister delegated the mandate to all Deputy County Commissioners, except Nairobi County, and not to Assistant County Commissioners.
17. Counsel for the applicants submitted that the District Commissioner (Deputy County Commissioner) has no legal authority to further delegate the powers and functions of the minister donated by section 29 of the *Land Adjudication Act* to a District Officer working in his office. That the District Officer is not gazetted by the minister, nor or is he a holder of the office of the District Commissioner (Deputy County Commissioner). For those reasons, the applicants urged the court to find that Mr Fred Masinjila had no jurisdiction to hear and determine the appeal, and that his order should be declared null and void and therefore should be quashed since delegation to a person other than the one delegated by the minister to hear an appeal is untenable.
18. The applicants argued that while challenging the legality of the process that was used to arrive at the final decision by the minister and not the merit of the case, they pointed out that from the proceedings, the interested party herein made an appeal to the minister and the same was dismissed. That despite the dismissal of the appeal, the minister went ahead and awarded the said parcel of land to the interested party who had lost. That such a decision was illegal and biased. The applicants counsel relied on the case of *Lepore Ole Maito v Letwat Kortom & 2 Others* [2016] eKLR and submitted that the decision making process in this case constitutes an abuse of power and discretion, made in bad faith and violates the legitimate expectation of the applicants.
19. The applicants counsel also relied on the case of *Patolli v Kabale District Local Government Council and Others* (2008) EA 300 and submitted that they have demonstrated that the decision making process was marred with illegalities, bias and malice and urged the court to grant the orders sought.
20. In their submissions dated September 19, 2022 and filed on even date, the interested party agreed with the applicants' submissions that the purview of judicial review proceedings is limited to the procedure applied at arriving at the impugned decision, and not the merits of the decision. Counsel for the Interested party, however submitted that the application and submissions tendered by the ex-parte applicants seem, to a large extent, to be an attack on the merits of the decision of the minister.
21. The interested party also pointed out to the court that the appeal was instituted by the interested party, that the ex-parte applicants participated in the proceedings, and the minister dismissed the appeal,



- therefore the decision was in favour of the ex-parte applicants herein. That technically, the applicants are challenging a decision that resulted in their favour hence making these proceedings legally defective and an abuse of the court process.
22. Regarding the allegation raised that the appeal was heard by the Assistant County Commissioner and not the Deputy County Commissioner, the interested party submitted that the proceedings provided by the ex-parte applicants demonstrated expressly that the appeal proceeded before both officers while at the tail end, it is indicated that the ruling was delivered before the Deputy County Commissioner.
  23. It is submitted that it is a cardinal principle of law that he who alleges must prove. That the document provided by the ex-parte applicant does not support their allegations and that there is no indication that an objection was raised on the composition of those adjudicating on the appeal. The interested party also faulted the applicants for the introduction of evidence in written submissions being the gazette notice, and submitted that that is an irregular procedure, and that in any case, the said notice has not been exhibited and therefore that complaint must be rejected.
  24. The interested party submitted that the ex-parte applicants' contention that there is a policy that stipulates that a person shall have the land he or she was in occupation adjudicated and recorded under that person is a direct challenge on the merit of the decision which is not the concern of these proceedings.
  25. It is also submitted by the interested party that the ex-parte applicant have no sufficiently demonstrated that irrelevant material was considered prior to the making of the decisions. The interested party's counsel relied on the case of *Matwangara Kilonzo v District Commissioner, Kitui & Another* [2021] eKLR which cited with approval a passage in *Republic v Special District Commissioner & another* [2006] eKLR.
  26. The interested party submitted that no concrete evidence has been adduced by the ex-parte applicants to support the allegation of bias. That the minister's delegate had at his disposal the proceedings and findings of the earlier cases and it would be expected that he would discern all necessary information therefrom without necessarily making express reference to the source of information in his ruling. Counsel for the interested party relied on the case of *Republic v The Minister for Lands & Another ex-parte Boniface Njeru Ngari & Another* [2013] eKLR. The interested party's submission is that the entire application does not satisfy the threshold necessary to trigger the exercise of discretion of this court in favour of the applicants, adding that the applicants' claim is a challenge on the merits of the decision of the minister concealed as one against the procedure adopted and prayed that the entire application be dismissed with costs to the interested party.
  27. The respondents did not file any submissions.

### **Analysis And Determination**

28. I have considered the pleadings, the legal and statutory authorities and the written submissions filed. It is clear that all parties are in agreement that the purview of judicial review proceedings concerns itself with the procedure applied in arriving at the impugned decision and not the merits of the decision. The court will therefore confine itself with the decision making process and not the merits of the decision.
29. In the case of *Republic v Kenya National Examination Council Ex-parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR, 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 unreasonable and that the impugned decision was illegal...”

30. 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 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.”

31. I am therefore guided that in deciding the application herein, the court will not concern itself with the merits of the impugned decision. Instead, the court will decide whether the applicants have demonstrated that the decision making process was tainted with illegality, whether the decision was made without jurisdiction, and whether the rules of natural justice were not adhered to.

32. On the allegation that the respondents did not observe the rules of natural justice, I see no evidence of that. A perusal of the proceedings of the appeal to the minister case No 125 of 2018 indicate that all the parties, including the applicants were given a hearing and testified. It is not therefore true as suggested that the respondents refused to give the ex-parte applicants a hearing.

33. Further, on the allegation that the minister for Lands as represented by the Deputy County Commissioner was biased, I again see no evidence of that. The Deputy County Commissioner while hearing the appeal had the discretion of who to believe and who not to believe. The impugned decision was a decision of the minister’s representative based on the evidence before him and the demeanour of the witnesses. I therefore reject this submission.

34. It is also the applicants’ case that the decision of the minister was tainted with issues of jurisdiction on account of the fact that the hearing was conducted before the Assistant County Commissioner of Igamba Ng’ombe Sub-County instead of the Deputy County Commissioner of Meru South Sub-County.

35. In the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others* [2012] eKLR, the Supreme Court stated:

“A court’s jurisdiction flows from 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...”

36. The issues that call for determination in this application 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 therefore who had no jurisdiction, and whether the orders of judicial review sought herein should issue.

37. Section 29 of the *Land Adjudication Act* (Cap 284) deals with appeals to the minister. Sub section 4 of section 29 provides that the minister may delegate his duties and functions to any public office by



name by notice in the gazette and secondly by such notice, the minister may delegate his functions and duties to any person for the time being holding any public office. The law is therefore clear that the minister had 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.

38. In this case, the applicants' complaint is that the impugned appeal was tainted with issues of jurisdiction on the fact that the Deputy County Commissioner issued the notice for hearing of the appeal, but the hearing proper was done by the Assistant County Commissioner of Igamba Ng'ombe Sub-County who was not delegated the duties and functions by the minister, and all that the Deputy County Commissioner did was to endorse the judgment by signing it. The applicants' case therefore is that the Assistant County Commissioner had no jurisdiction to hear the appeal, and his actions were ultra vires for lack of jurisdiction.
39. The court has perused the proceedings in Appeal Case No 125 of 2018. The same are indicated to have been before both the Deputy County Commissioner Meru South by the name Nkaduda M Hiribae, and the Assistant County Commissioner of Igamba Ng'ombe Fred Masinjila.
40. In paragraph 8 of the replying affidavit of C KMbui, the respondents aver that the minister delegated his powers to the Deputy County Commissioner vide gazette notice No 6854. The respondents however, did not annex the said gazette but reiterated that 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. The respondents and the interested party did not however allude that both officers were gazetted by the minister to hear and determine the appeal in question.
41. In this case, it is my considered opinion that the issue of jurisdiction has not been rebutted or sufficiently settled, yet it goes to the root of the application herein. By failing to exhibit the germane gazette notice and not explaining the role of the Assistant County Commissioner of Igamba Ng'ombe Sub-County in the case, gives credence to the allegation made by the applicants that the Assistant County Commissioner did not have jurisdiction. That may also explain why the Assistant County Commissioner did not append his signature on the ruling. The ruling was only signed by the Deputy County Commissioner, Meru South.
42. In the circumstances, this court finds that the applicants have, on a balance of probabilities, proved that their application is merited on account of lack of jurisdiction on the part of the Assistant County Commissioner of Igamba Ng'ombe Sub-County.
43. Consequently, the court allows the application in the following terms:
  - a. An order of *certiorari* be and is hereby issued bringing to this court and quashing the decision made by the 1<sup>st</sup> respondent in respect of Land Parcel No 804 Kamwimbi 'A' Adjudication Section in the minister Appeal Case No 125 of 2018.
  - b. An order of *prohibition* be and is hereby issued prohibiting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from implementing the decision of the 1<sup>st</sup> respondent dated February 24, 2022 in regard to Parcel No 804, Kamwimbi 'A' Adjudication Section in minister's Appeal Case No 125 of 2018.
  - c. The appeal is remitted back for hearing and determination by a person properly and legally authorized to do so.
  - d. Parties to bear their own costs since the hearing by a person who lacked jurisdiction may have been an honest mistake.



44. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 12<sup>TH</sup> DAY OF OCTOBER, 2022**

In the presence of:

CA; Martha

Ms. Wahome for Ex-parte Applicants

Ms. Kendi for Respondents

N/A for Interested party

**C. K. YANO,**

**JUDGE.**

