



**Republic v Planning & 3 others; Gitonga & another (Exparte Applicants);
 Riungu & 3 others (Interested Parties) (Environment and Land Judicial Review
 Case E006 of 2022) [2022] KEELC 13535 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13535 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT CHUKA
 ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E006 OF 2022
 CK YANO, J
 OCTOBER 12, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

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

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

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

AND

FREDRICK GITONGA EXPARTE APPLICANT

AND

M'NYIRIRI RIUNGU INTERESTED PARTY

AND

M'NGERENI MATHAIYA EXPARTE APPLICANT

AND

ESTHER NKINDU MAKAMBA INTERESTED PARTY

SALESIO MICHENI INTERESTED PARTY

CHARLES KIMATHI MAKAMBA 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 and section 8 and 9 of the Law Reform Act (cap 26) and all enabling provisions of law seeking 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 805, 806, 817 and 818 Kamwimbi/'A' adjudication section in the minister appeal case No 297 of 2017 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 October 7, 2021 in regard to land parcel No 805, 806, 817 and 818 Kamwimbi 'A' Adjudication section in the minister's Appeal Case No 297 of 2017.
 - c. The cost of this application be provided for.
2. The application is supported by the affidavit of Fredrick Gitonga, the 1st *ex-parte* applicant sworn on April 14, 2022 and is based on the following grounds:
 1. That the judgment/ruling of the minister dated February 24, 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 assistance (sic) 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.
 2. That the judgment of the minister was against the establishment 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.
 3. 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 was unjust and unfair to the ex-arte applicant.
 4. That the respondent in contravention of the rules of natural justice regularized the illegal invasion of the applicants' parcel of land without proper analysis of the evidence produced.
 5. That the decision by the 1st respondent amount to an abuse of powers and or authority conferred to him by any statutes.
 6. 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.
 7. 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 parcel Kamwimbi 'A' Adjudication section parcels 803, 805, 806, 817 and 818 were ancestral land that their family gathered and has been utilizing it. That adjudication proceedings to parcels 803 and 805 began in 1999 and there was a case between the interested party and the applicants' uncle M'Ngereni Mathaiya which he lost. Copies of the proceedings marked 'FG 3' are annexed.
4. It is averred that during the committee stage, parcel 805 was awarded to M'Ngereni Maitha while parcel 803 was sub divided into parcel 985 allocated to M'Ngereni, and 803 which belonged to M'Nyeri.
5. That there was an appeal to the board and parcel 805 was allocated to the Interested parties. The proceedings marked 'FG4' are also annexed.
6. The applicants aver that parcel 805 was subdivided into parcels 817 and 818 and that after the objection the applicants made an appeal to the minister which they lost.
7. That one Dominic Mwangangi then entered into parcel 817 and started cultivating. The applicants aver that neither Charles Makamba nor Esther Ngindu occupies or cultivates parcels 805 and 817 as noted by the minister.
8. The applicants state that they made complaints to the District Land Adjudication and Settlement Office and the District Commissioner against Dominic Mwangangi over parcels 805, 817 and 818 but did not get a response. That the Land Adjudication and Settlement in response to a letter by the applicants wrote to Dominic Mwangangi and asked him to maintain the status quo which he did not adhere. Copies of letters marked FG6, 7, and 8 are annexed.
9. The applicants contend that they disclosed to the minister in regard to the same but he did not put their evidence into consideration while making his decision.
10. The applicants aver that they reside in upper part of parcel 818 and undertake farming in parcel 805 a fact they say was shown to the minister when he visited the ground, but he noted that it is the interested parties who reside thereon, a decision they state was malicious and illegal.
11. That at the committee stage, the interested parties stated that they had purchased the parcels of land but when the matter was being heard by the minister, they stated that the parcels of land were ancestral land.
12. The applicants aver that parcel 806 was initially not in the map but appeared at the register.
13. It is the applicants' contention that the minister's findings were malicious and biased when he noted that there was an ongoing construction on parcels 803, 805, 806 and 817 yet the construction was on parcel 2174. That parcels 805, 806, 817 and 818 originated from parcel 799.
14. The applicants aver that they buried their grandfather on parcel 806 in 1985 that the minister was shown the grave when he visited the ground, but still decided that the land belonged to the 3rd Interested party. That the 2nd respondent was misguided when he noted that parcels 805, 806, 817 and 818 did not originate from parcel 799 yet the evidence tendered by the applicants proved so and that it is ancestral land. That their evidence was not considered during the proceedings.

The responses

15. The application was opposed by the Respondents through grounds of opposition dated May 11, 2022 and a replying affidavit sworn by C.K. Mbui, the Land Adjudication and Settlement Officer Meru South on June 28, 2022. The Respondents' case is 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 were conducted and the adjudication register for Kamwimbi 'A' was published on November 15, 2010.

16. It is averred that after 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 aggrieved by the decision of the Land Adjudication Officer were granted a further 60 days to appeal to the minister.
17. It is averred that the appeals were heard and determined by the Deputy County Commissioner and a copy of the proceedings marked 'CKM1' is annexed.
18. The respondents case is that the minister may delegate, by notice in the gazette, his powers to hear appeals and his duties and functions under section 29(4) of the *Land Adjudication Act* 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. 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 public office.
19. It is the respondents contention that judicial review proceedings purely deal with the procedure and process of decision making and not the merits and/or substance of the case. That the applicants are seeking that the court delves into the substance of the proceedings and review the evidence.
20. The respondents contend 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. That therefore the application lacks merit and is for dismissal.
21. The application was also opposed by the interested parties through a replying affidavit sworn by Charles Kimathi Makamba the 4th interested party on September 15, 2022. The deponent averred that the impugned proceedings were conducted by the Deputy County Commissioner, Meru South at Kamwimbi Chief's Camp before all the parties visited the ground. That all the parties were accorded ample and sufficient opportunity to advance their respective positions and therefore the allegation of breach of natural justice is unfounded. That the *ex-parte* applicants' undoing is the convolution of the dispute characterized by a multiplicity of claims against numerous persons.
22. The deponent stated that it will be noted that the minister's delegate made an observation that the *ex-parte* applicants were in a hurry to develop the suit properties to ostensibly create the false impression that they have always been in occupation. That indeed the 2nd *ex-parte* applicant is a passive litigant with the mastermind of the numerous land acquisition claims being the 1st *ex-parte* applicant. It is averred that the 2nd *ex-parte* applicant resides in Chera Location which is far away from the disputed parcels of land. That the 1st *ex-parte* applicant projects himself as the son of the 2nd *ex-parte* applicant whereas in reality, they are uncle and nephew.
23. It is stated that the 1st applicant is the son of Sebastian M'Bundi who was allocated parcel No 739 Kamwimbi Adjudication Section during the demarcation period and hence his claim based on ancestry should be directed at his father and not the interested parties who are descendants of one Maguni Gikiro who acquired the parent parcel of land long time ago and settled his extended family thereon besides giving a portion thereof as a gift to the Catholic Church. That the said family members settled on varied parts of the land while the church constructed a worship place and a primary school.



24. The deponent further stated that at the time of demarcation, the relevant government officers recorded the names of those in occupation of their respective portions of land, and that explains why the *ex-parte* applicants were not recorded then as they were not in occupation. It is stated that the 1st *ex-parte* applicant forcibly entered the already demarcated portions and began laying incessant claims thereon. That the 1st *ex-parte* applicant has an insatiable appetite for land and has demonstrated his desire to displace an entire community together with their social amenities. It is stated that the 1st *ex-parte* applicant commenced his onslaught in the year 2003 when he trespassed into parcel number 805 and 818 Kamwimbi 'A' Adjudication Section, prompting civil and criminal proceedings between him and one Justus Mukamba, father to the deponent.

That a perusal of the proceedings before the minister reveals that the *ex-parte* applicant was sentenced for the offence of creating disturbance. That in a nutshell, the *ex-parte* applicants claim is dubious and is not premised on any coherent legal basis. That the Deputy County Commissioner was able to read through the rule where he made a finding that the suit properties were not subdivisions of parcel Number 799, but were original parcel numbers created at the demarcation stage.

25. It is averred that the *ex-parte* applicants have not provided any contrary information to demonstrate that the findings of the minister on that account are not factual, adding that the minister carefully analyzed the evidence of the parties prior to making a considered decision.

That the minister's representative did not deviate from the established legal proceedings when adjudicating over the dispute.

26. The interested parties contend that in essence the *ex-parte* applicants are challenging the outcome of the appeal and not the process applied in arriving at the same and prayed that the application be dismissed with costs.

Submissions

27. The application proceeded by way of written submissions which were filed by the applicants on September 8, 2022 wherein the counsel for the *ex-parte* applicants submitted that the *ex-parte* applicants have been in occupation of the suit parcels of land since 1993 when their uncle instituted the adjudication process, a fact, they state, was made known to the minister. Counsel relied on the case of *County Government of Trans Nzoia & 7 Others (Interested parties)* [2021] eKLR and submitted that the *ex-parte* applicants should have been given precedence by virtue of the said long occupation. That the Respondents' decision to allocate the suit land to the interested parties which divested the *ex-parte* applicants of possession, was irregular, unreasonable and in violation of the principles of equity, inclusivity and transparency in article 10 of the *Constitution* and the right to non-discrimination and to fair administrative action under article 27 and 47 respectively.

28. Further it is submitted that the minister considered extraneous and irrelevant evidence and failed to consider the evidence on record wholly and impartially. The *ex-parte* applicants submitted that the minister was biased against them, and took issue with the statement by the Deputy County Commissioner that "...in view of the concocted facts presented by the appellants, I am convinced that this appeal is not genuine but meant to further the appellants' quest for land acquisition. I, therefore, dismiss Appeal case No 297 of 2017." On the test for the apprehension of partiality or bias for decision makers, the applicants' counsel relied on the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others* [2013] eKLR and submitted that the final decision was not fair and against section 9(4) of the *Fair Administrative Action Act*.



29. The applicants further submitted that the minister had a duty to look at previous proceedings and consider the grounds of appeal, and took issue with the statement made in the decision that the applicants herein had filed appeal cases for all parcels within the neighbourhood, including the school, market and local church. The applicants counsel relied on the case of *Republic v Special District Commissioner & another* [2006] eKLR. It is submitted by the applicants that in this case, the minister did not look at the proceedings that took place before the matter proceeded to appeal and urged the court to grant the orders sought in the application.
30. In their submissions, counsel for the interested parties submitted that as correctly submitted by the ex-parte applicants, 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. It was their submission that the application herein is to a large extent an attack on the merits of the decision of the minister.
31. On whether the appeal was heard by a person without jurisdiction, the interested parties' counsel submitted that the proceedings provided by the ex-parte applicants demonstrate expressly that the appeal proceeded before both the Assistant County Commissioner and the Deputy County Commissioner while at the tail end, it is indicated that the ruling was delivered before the Deputy County Commissioner. Counsel further submitted that it is a cardinal principle of law that he who alleges must prove, and that the document provided by the ex-parte applicants does not support their allegations and that there is no indication to show that an objection was raised in the composition of those adjudicating on the appeal. It was also submitted that the introduction of a gazette notice as evidence in submissions is an irregular procedure, adding that no such notice has been exhibited.
32. Counsel submitted that the contention that there was failure to adhere to policy and principle of a statute goes to the merit of the decision which is not the concern of these proceedings.
33. Counsel for the interested parties submitted that the ex-parte applicants have not sufficiently demonstrated that irrelevant material was considered prior to the making of the decision or that there was bias. Counsel relied on the case of *Republic v The Minister for Lands & another ex-parte Boniface Njeru Ngari & another* [2013] eKLR. It is submitted that the entire application does not satisfy the threshold necessary to trigger the exercise of the court's discretion in the applicants' favour and urged the court to dismiss the application with costs to the interested parties.
34. The respondents did not file submissions either within the period allowed by the court or at all.

Analysis and determination

35. 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. Therefore, this court will confine itself to the decision making process and not dwell on matters that go to the merits of the decision itself.
36. In the case of *Republic –vs Kenya National Examination Counsel 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...”

37. 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.”

38. 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.

39. 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 297 of 2017 indicated 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.

40. 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 demeanor of the witnesses. I therefore reject this submission.

41. 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.

42. 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...”

43. 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.

44. 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 this 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.

45. In this case, the parties seem to be in agreement that the minister had delegated his duties and functions to the Deputy County Commissioner. In their replying affidavit, the Respondents aver that the minister delegated his powers to the Deputy County Commissioner vide Gazette Notice number 6854. However, the gazette notice in question was not exhibited. Further, the applicants' complaint is that the appeal was heard by the Assistant County Commissioner of Igamba Ng'ombe Sub-County and merely signed by the Deputy County Commissioner of Meru South Sub-county.
46. The court has perused the proceedings in Appeal Case No297 of 2017. The same are indicated to have been before both the Deputy County Commissioner of Meru South, and the Assistant County Commissioner of Igamba Ng'ombe Sub-County. The respondents and the interested parties did not allude that both officers were gazetted by the minister to hear and determine the appeal in question.
47. In this case, 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 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.
48. 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.
49. 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 1st respondent in respect of land parcel No805, 806, 817 and 818 Kamwimbi 'a' Adjudication Section in the minister appeal case No 297 of 2017.
 - 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 October 7, 2021 in regard to parcel No 805, 806, 817 and 818 Kamwimbi 'A' Adjudication Section in minister's Appeal Case No 297 of 2017.
 - 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.

50. 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.

