



Republic v Land Adjudication Officer, Bondo, Siaya and Busia & 2 others; Lawi & another (Exparte Applicants); Gilo (Interested Party) (Environment and Land Judicial Review Case 003 of 2021) [2022] KEELC 15004 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 003 OF 2021**

AY KOROSS, J

NOVEMBER 24, 2022

APPLICATION DISMISSED WITH WITH COSTS TO THE INTERESTED PARTY.

BETWEEN

REPUBLIC APPLICANT

AND

**LAND ADJUDICATION OFFICER, BONDO, SIAYA AND
BUSIA 1ST RESPONDENT**

**DEPUTY COUNTY COMMISSIONER BONDO SUB COUNTY 2ND
RESPONDENT**

DIRECTOR OF LAND ADJUDICATION 3RD RESPONDENT

AND

JAMES ODHIAMBO LAWI EXPARTE APPLICANT

DENNIS AWANA LAWI EXPARTE APPLICANT

AND

JARED GILO INTERESTED PARTY

JUDGMENT

1. The parcel of land known as 4253 ('mother parcel') is located in Nyangoma/Uyawi land adjudication section. The mother parcel has been the subject of litigation for close to 52 years either between the interested party's family and other 3rd parties or between the interested party's family and the *ex parte* applicants' family.



2. In the process, some of the initial parties died and some of those who joined the proceedings at various intervals also died. Based on documents that have been tendered by the *ex parte* applicants' and interested party, I will rehash the process in which the mother parcel has undergone over the years.
3. In the year 1973, one Joseph Omwanda instituted suit against Achieng Omondi ['Omondi'] who was either the father or close family member of the interested party. The suit was on the mother parcel which at that time was unadjudicated. After hearing the parties on merit, the court in Bondo Land Case No 5 of 1973 dismissed Joseph Omwanda's suit.
4. Sometimes on or before 1992, the area where the mother parcel was located was declared an adjudication section. At adjudication, the mother parcel was recorded in Omondi's name. He was then deceased. Aggrieved, the *ex parte* applicants, their siblings and their father Lawi Guya lodged 9 complaints with the adjudication committee against Pelesia Adhiambo Achieng who was the widow of Omondi ['Pelesia']. The complaint was in accordance with the provisions of sections 20 and 21 of the [Land Adjudication Act](#). Their claims were dismissed.
5. Not dejected and in line with sections 21 and 22 of the [Land Adjudication Act](#), they appealed to the arbitration board. The board allowed the appeal and ordered for portions of the mother parcel to be awarded to them.
6. Dissatisfied and pursuant to section 30 of the [Land Adjudication Act](#), Pelesia filed suit against Lawi Guya in Kisumu CM 1018 of 1993. At this point, the mother parcel had been subdivided into 10 parcels of land; the mother parcel's number was retained and the hived off portions created parcel numbers 4676, 4677, 4678, 4679, 4680, 4681, 4682, 4683 and 4684. The court found the arbitration board had erred and ordered the entire mother parcel to be registered in Pelesia's name.
7. In accordance with section 29 of the [Land Adjudication Act](#), Pelesia also appealed against the decision of the arbitration board to the adjudication officer. The adjudication officer varied the decision of the arbitration board and awarded land parcel numbers 4676, 4679, 4680, 4682 and 4684 to Pelesia and some undisclosed parcels to the *ex parte* applicants and their family.
8. By way of judicial review in Kisumu HC Misc 358 of 2005, the 2nd *ex parte* applicant and one of his brothers James Adhiambo Guya sought orders of mandamus, certiorari and prohibition. The court declined to grant orders of mandamus but quashed the decision of the adjudication officer and ordered a re-adjudication. An appeal to the Court of Appeal in Nairobi Civil Appeal No 133 of 2009 was dismissed.
9. In compliance with the court order, the adjudication officer reheard the complaint and redistributed the subdivisions of the mother parcel by awarding the *ex parte* applicants and their family land parcel numbers 4678, 4677, 4683 and 4681. Land parcel numbers 4676, 4679, 4680, 4682 and 4684 were awarded to Pelesia's family. By this time, several disputants were deceased including Pelesia. At this point, Pelesia was represented by the interested party.
10. Aggrieved by this decision and in line with section 29 of the [Land Adjudication Act](#), the *ex parte* applicants, interested party and their respective families appealed to the minister, the minister heard the parties and dismissed the appeals.
11. Dissatisfied and upon obtaining leave from this court, the *ex parte* applicants filed the substantive motion dated October 7, 2021. The motion is the subject of this court's determination.
12. The motion was moved within the provisions of articles 10, 27, 40, 48 and 50 of the [Constitution](#) of Kenya, sections 8 and 9 of the [Law Reform Act](#) and order 53 rules 1, 2 and 3 of the [Civil Procedure Rules](#).



Ex Parte Applicants' Case And Evidence

13. By the firm of Mwamu & Co Advocates, the *ex parte* applicants sought the following reliefs:
 - a. Spent
 - b. That the court grants orders of certiorari to move this court to quash the decision of the Deputy County Commissioner Bondo made on May 17, 2021.
 - c. That the court grants orders of mandamus compelling the 1st and 2nd respondents to register the *ex parte* applicants and their families inter alia, Lawi Guya Ogola, James Odhiambo Lawi, Dennis Awana Lawi, Samuel Adiado Ochola and Samuel Adido Ochola as the respective owners of land parcels numbers Nyangoma/Uyawu/4676, 4680, 4682, 4684 and 4679.
 - d. Costs of the application be provided for.
14. The motion was supported by a statutory statement of facts and supporting affidavit sworn by the 1st *ex parte* applicant James Odhiambo Lawi. Both were dated September 29, 2022. He adduced several annexures in support of his case.
15. The judicial review proceedings were based on the following grounds
 - (i) the minister exceeded his jurisdiction and powers
 - (ii) the minister was biased
 - (iii) the minister contravened the provisions of article 47 of the Constitution of Kenya and the Fair Administrative Action Act by failing to hear to the *ex parte* applicants and failing to handle the dispute in a manner that was fair, efficient, reasonable and procedurally fair and
 - (iv) the minister contravened the provisions of article 50 of the Constitution of Kenya by failing to accord the *ex parte* applicants a fair hearing
 - (v) the minister ignored that the matter had been settled and boundaries established by Bondo Land Case No 5 of 1973 and
 - (vi) the minister sat on an appeal against the decisions of the High Court and Court of Appeal which had settled the matter.
16. Save for the proceedings of the adjudication officers, the documents adduced by the *ex parte* applicants have been spelt out in the above background and I need not reiterate them.
17. According to the *ex parte* applicants, the mother parcel belonged to the Misachi clan and James Achieng which this court presumed to be the alias name of Omondi held it in trust for the family; the *ex parte* applicants' and Omondi's family had close family relations.

Respondents' Case And Evidence

18. Despite filing a memorandum of appearance dated October 21, 2021, the Attorney General who appeared for the 1st, 2nd and 3rd respondents failed to participate in these proceedings.

Interested Party's Case And Evidence

19. In opposition, the interested party Jared Gilo Opul who was represented by the firm of Owiti, Otieno & Ragot Advocates, filed a replying affidavit dated December 3, 2021. The interested party fleshed out and amplified the background above and I need not replicate them.



20. Additionally, he deponed inter alia, he was a stranger to the alleged Kisumu HC Appeal No 8 of 1998 between Lawi Guya & others v Pelesia which proceedings and judgement had never been shared with any party, public body or this court or reference ever made to it; the minister heard the dispute on April 7, 2021 and rendered his decision on April 12, 2021; the pleadings drawn by the ex parte applicants were wanting and he was unable to respond to most of the grounds; parties were accorded an opportunity by the minister to present their respective cases; the alleged disregard of settled boundaries and court decisions were unsubstantiated and unfounded and, lastly, this court could not grant orders of mandamus as a similar finding had been made by the courts in Kisumu HC Misc 358 of 2005 and Nairobi Civil Appeal No 133 of 2009.

Parties' Submissions

21. As directed by the court, parties disposed of the motion by way of written submissions. Mr Mwamu, counsel for the *ex parte* applicants filed his written submissions dated April 21, 2022. Counsel identified two issues for determination;
- (i) whether the *ex parte* applicants' right to fair hearing and administrative action were infringed and
 - (ii) whether the *ex parte* applicants were entitled to judicial review orders as prayed.
22. On the 1st issue, it was counsel's submission that in contravention with article 47 on the right to fair hearing and section 4(3) of the *Fair Administrative Action Act*, the *ex parte* applicants were not accorded a hearing by the minister and the minister pegged his decision on extraneous factors and not on the history of the suit property. Counsel relied on the decision of Odunga J in *Republic v Non-Governmental Organisation Coordination Board ex parte Evans Kidero Foundation* [2017] eKLR which cited with approval the Court of Appeal decision of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR where the court expressed itself as follows;
- ‘The administrative actions of public officers, state organs and other administrative bodies are now subjected to article 47 (1) to the principle of constitutionality rather than the doctrine of *ultra vires* from which administrative law under the common law was developed.’
23. He also placed reliance on the decision of Odunga J in *Republic v National Land Commission & 2 others ex parte Archdiocese of Nairobi Kenya Registered Trustees (St Joseph Mukasa Catholic Church Kabawa West)* [2018] eKLR where the court stated thus;
- ‘whereas the authority concerned may well have proper reasons to act in the manner it intends to act, where its decision is tainted with procedural impropriety the same cannot stand.’
24. On the 2nd issue, Counsel submitted that if an administrative action fell short of article 47, then a party could move the court in an appropriate manner including seeking orders of mandamus. Counsel placed reliance on the case of *Shah v Attorney General (Number 3)* Kampala HMC Number 31 of 1969 [1970] EA 543 where the court in referring to mandamus held;
- ‘Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by an Act of Parliament for the benefit of an individual’



Counsel also placed reliance on the case of *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR where the court stated as follows;

‘The remedy of judicial review is concerned with reviewing not the merits of the decision ... but the decision making process itself’

25. By counsel Mr Ragot, the interested party filed written submissions dated July 12, 2022. Counsel identified a single issue for determination; whether the *ex parte* applicants had met the threshold to warrant grant of the orders sought.
26. Counsel submitted that a decision was never rendered by the minister on May 17, 2021 as asserted by the *ex parte* applicants and on that basis alone, the *ex parte* applicants’ motion should fail. Counsel submitted that order 53 rule 4 of the *Civil Procedure Rules* upon which the pleadings were predicated only limited amendments to statement of facts subject to leave of the court; a chamber summon and or a notice of motion could never be amended. Therefore, the order of *certiorari* was untenable.
27. Counsel submitted that the *ex parte* applicants had not sought leave to commence judicial review proceedings against the decision of the minister dated April 12, 2021 and as consequence, the proceedings should be dismissed. Counsel relied on the decision of *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge* [1997] eKLR where the court expressed itself thus;

‘An order of mandamus cannot quash what has already been done. Only an order of *certiorari* can quash a decision already made...’

28. Counsel submitted that pursuant to the provisions section 29 (4) of the *Land Adjudication Act*, the minister rendered his decision. Additionally, the *ex parte* applicants in their pleadings and submissions had failed to substantiate grounds warranting a review of this decision.
29. Counsel submitted that Bondo Land Case No 5 of 1973 affirmed the mother parcel belonged to Omondi and Kisumu HC Misc. 358 of 2005 and Nairobi Civil Appeal No 133 of 2009 could not be deemed to have settled the dispute.
30. Counsel submitted that the submissions of the *ex parte* applicants dealt with the merits of the minister’s decision and this was not the purview judicial review. He placed reliance on the Court of Appeal decision of *Municipal Council of Mombasa v Republic and another* [2002] eKLR where the court stated thus:

‘The court would only be concerned with the process leading to the making of the decision’

Analysis And Determination

31. Having considered the parties’ pleadings and submissions, these are the issues falling for determination;
 - (i) whether the *ex parte* applicants had met the threshold to warrant grant of the orders sought and
 - (ii) what about costs.

I will proceed to address these issues in a sequential manner.

32. Judicial review remedies afford an aggrieved party administrative justice from the courts and courts in their supervisory role ensure public bodies conduct their affairs in a manner that are legal, rational and with procedural propriety. These three precepts govern judicial review proceedings. Judicial review is



anchored on article 47 of the Constitution of Kenya and section 4(3) of the Fair Administrative Action Act. This article stipulates as follows;

‘(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action’

Subsection (3) of this article 47 was given effect by the Fair Administrative Action Act where in its section 4(3) it provides as follows;

‘(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.’

33. As rightfully posited by both counsel, this court will only delve into the process of how the decision was made and not its merits and outcome. See Republic v Kenya Revenue Authority ex parte Yaya Towers Limited (supra) and Municipal Council of Mombasa v Republic and another (supra).
34. By the relief of certiorari, the *ex parte* applicants sought to quash the decision of the minister rendered on May 17, 2021. Reference to this particular date has been in the entire proceedings by the *ex parte* applicants.
35. From the evidence adduced, the only decision the minister rendered on May 17, 2021 was that of remitting the proceedings of several appeal files including those of land parcels numbers 4678, 4677, 4683, 4681, 4676, 4679, 4680, 4682 and 4684 which appertain to the parcels of land between the *ex parte* applicants and interested party, to the department of adjudication and settlement, ministry of lands and physical planning. This action by the minister was within the purview of section 29 (2) of the Land Adjudication Act.
36. From the *ex parte* applicant’s pleadings and documents, the grounds for judicial review and the relief of certiorari are a total departure from each other. In my considered view, the *ex parte* applicants should have posited grounds as to why the decision of the minister to remit the letter dated May 17, 2021 violated their rights thus warranting an order of certiorari; which they did not. On this ground, the relief of *certiorari* would fail.



37. From the documents proffered by the *ex parte* applicants to this court, the minister rendered his decision on the consolidated appeals on April 12, 2021. Mr Mwamu never addressed this court on whether there was oversight in citing the wrong date. Even assuming for a second, that there was blunder by the *ex parte* applicants in referring to the wrong date in the reliefs sought, I do not think that this is a technical error but rather it is a substantive issue that goes to the root of the issues for determination; quashing a decision that was rendered on a particular date. It is so fundamental that it cannot be cured or discharged by article 159(2)(d) of the *Constitution*. I place reliance on the Supreme Court of Kenya decision in *Odinga v Independent Electoral and Boundaries Commission & 3 others* (Petition 5 of 2013) [2013] KESC 2 (KLR) (26 March 2013) (Ruling) where the apex court expressed itself as follows;

‘The article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law’

38. Even if the *ex parte* applicants, had sought to impugn the decision of the minister delivered on April 12, 2021 which they did not, and based on the grounds set out in their pleadings, it would have been my finding that the *ex-parte* applicants had failed to satisfy the threshold for a judicial review on grounds inter alia; the contention that the minister failed to consider that the issues in dispute had been settled would be questioning the merits of the decision which would be outside the purview of judicial review; they had failed to substantiate how the minister was biased; from the decision, there was nothing to suggest that the minister acted in excess of his jurisdiction; in compliance with articles 47 and 50 of the *Constitution* and section 4 of the *Fair Administrative Action Act*. The minister afforded the *ex parte* applicants an opportunity to adopt statements, testify and cross examine witnesses and rendered a rationale for arriving at his decision and there was no evidence that they ever sought for a copy of the decision and they were denied. In my considered view, their act of tendering a copy of the decision to this court negated their submissions on this.

39. It is trite law that parties are bound by their pleadings and this court can only render itself on what was pleaded. See the Supreme Court of Kenya decision of *Raila Amollo Odinga & anor v IEBC & 2 others* [2017] eKLR. I must also not hesitate to mention that the *ex parte* applicants filed a supporting affidavit instead of a verifying affidavit. See order 53 rule 1 (2) (b) of the *Civil Procedure Rules*.

40. In the circumstances, I am persuaded to find that the *ex parte* applicants have failed to discharge proof that the decision rendered on May 17, 2021 was illegal, irrational or tainted with procedural impropriety. I will proceed to deal with the relief of mandamus.

41. I agree with Mr Mwamu that if an administrative action fell short of article 47, then a party could move the court to seek legal recourse. I also agree with the decisions of *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge* (supra) and *Shah v Attorney General (Number 3)* Kampala HCCM. From these two decisions, it can be deduced that for judicial review orders of mandamus to suffice, the public body must be required to statutorily perform a particular public duty and the relief would be issued if the public body failed to perform its duty to the detriment of a party who had a statutory right to expect the particular duty to be performed.

42. The minister in his delegated authority was mandated by section 29 (1) and (2) of the *Land Adjudication Act* to hear appeals emanating from decisions of the adjudication officer and once he did



so, he would remit his outcomes to the director of land adjudication and chief land registrar. These provisions state as follows;

‘29.Appeal

- (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’
43. The statute did not confer any duty upon the minister to register any person as the registered proprietor of land. It is only within the provisions of section 7 of the *Land Registration Act* that land registrars can effect registrations. It is my finding that the relief of mandamus is misplaced.
44. In a nutshell and for the reasons stated above, it is my finding the motion lacks merit and the *ex parte* applicants are not deserving of the prayers sought in the substantive motion. I hereby proceed to dismiss the motion with costs to the interested party.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF NOVEMBER 2022.

HON AY KOROSS

JUDGE

November 24, 2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in open court in the Presence of:

Mr Ragot for the interested party

Ms Machuka h/b for Mr Mwamu for the ex-parte applicants

Court assistant: Ishmael Orwa

