



**Republic v Cabinet Secretary, Ministry of Lands and Physical Planning & another;  
Nzomo & another (Exparte); Ndilu (Interested Party) (Environment and Land Judicial  
Review Case 7 of 2020) [2022] KEELC 15441 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15441 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 7 OF 2020  
CG MBOGO, J  
DECEMBER 20, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ALOYSIUS KITUMU NZOMO ..... EXPARTE**

**MICHAEL MWIKYA MUASA ..... EXPARTE**

**AND**

**BENEDETTA MWIKALI NDILU ..... INTERESTED PARTY**

**JUDGMENT**

1. Before this Court for determination is the Notice of Motion dated November 4, 2020 and filed on even date. It is brought under Sections 8 and 9 of the *Law Reform Act*, Sections 7,8,9,10 and 11 of the *Fair Administrative Action Act* and all other enabling provisions of the Law.
2. The Applicants seek judicial review orders as follows: -
  - i) That an order of *certiorari* to bring into this Honourable Court and quash the Ruling of the Deputy County Commissioner (DCC) delivered on December 13, 2019 with immediate effect.



- ii) That an order of Prohibition do issue prohibiting the Interested Party from selling, transferring, delineating or in any other way interfering with the suit property.
  - iii) That the costs of the application be provided for.
3. The application is premised on the grounds on its face and the joint supporting affidavit sworn by Aloysius Kitumu Nzomo and Michael Mwikya Muasa on November 4, 2020. It was averred that the Deputy County Commissioner's (DCC) duties in Appeal Case No. 238/17 were delegated to her by the Minister and her actions are subject to the supervisory jurisdiction of this Court. That the proceedings before the DCC were arbitral and whose initiation is only known by the Interested party. That the DCC and the Interested Party never shared the Appeal/complaint with the Applicants.
4. It was further averred that the DCC ambushed the Applicants when summons to attend the hearing on November 26, 2019 were delivered on November 25, 2019 by headmen from a distant village when the same were supposed to be delivered through the Chief, Kikoko Location. That the suit property is located at Kyale Village within Kikoko Location. That during the site visit, the DCC used an unofficial sketch map that had been drawn by the Interested Party. That the said map was not shared with the Applicants during and after the proceedings. That the DCC refused to use the official Kisekini Adjudication Map Sheet No. 6 which was approved by the Adjudication Board despite request by the Applicants.
5. The Applicants further averred that despite several court judgements, tribunal findings and board decisions issued in favour of the Applicants, the DCC sought to restrain them from using the suit property which has been in their possession since the 1800s. That the DCC hurriedly issued summons dated November 28, 2019 for the delivery of her ruling which was subsequently delivered on December 13, 2019. That during the proceedings before the DCC, she ordered the Applicants to cooperate with the Interested Party for the speedy revocation of the confirmed letters of administration failure to which the DCC would initiate criminal proceedings against the Applicants.
6. Again, it was averred that the DCC did not correctly record the Applicant's testimony. That the DCC's ruling dated December 13, 2019 is illegal to the extent that it purported to overturn earlier decisions by courts of competent jurisdiction. That after delivery of the ruling, the DCC denied the Applicants a copy thereof until the Applicant's Advocates managed to obtain certified copies of the proceedings and the ruling on June 25, 2020. That the proceedings before the DCC denied the Applicants their right to a fair hearing and right to fair administrative action as enshrined under Articles 47 and 50 of the Constitution.
7. Vide grounds of opposition dated November 5, 2020, the Interested Party contested the application on the basis that judicial error is not for error but for legality. That the Applicants were accorded a hearing. That the process cannot be wrong simply because another institution would have conducted it differently. That challenging the Respondent's decision is not a ground for judicial review but a ground for civil dispute. That the Respondent did not exceed her mandate. That no objection was raised on the manner the appeal proceedings were being conducted. That the Respondent in hearing the matter is not bound by the rules of procedure. That the Respondent did not violate the rules of natural justice.
8. The Respondents filed a replying affidavit sworn by Cheramgoi Charles Langat, the Deputy County Commissioner Kilungu Sub- County on February 22, 2020. It was deponed therein that the all the parties herein were duly heard. In total, the averments in the replying affidavit reiterated the contents of the impugned ruling dated December 13, 2019.
9. In a further affidavit jointly sworn by the Applicants herein on March 18, 2021, it was averred that the Exhibit marked "CCL1" in the Respondents' replying affidavit was not annexed meaning that to



- date, the Applicants have never had an opportunity to see the appeal lodged by the Interested party to the Minister. That the land dispute herein has been litigated before various courts and decisions have been issued which are binding upon the Minister. That upholding the decision of the Clan and the Adjudication Committee is improper.
10. The Applicants filed their submissions on May 26, 2021. On their behalf, Counsel argued that the evidence of the 1<sup>st</sup> Applicant before the DCC was taken in the afternoon all the way to 4pm before the proceedings were adjourned after the Applicants protested about the prolonged proceedings. That the DCC did not correctly record the evidence of the 1<sup>st</sup> Applicant as he testified. That the DCC also failed to use the official certified Kisekini Adjudication Map Sheet No. 6 and instead used a sketch map drawn by the Interested Party. That the above instances demonstrate violation of the Applicant's right to a fair hearing as provided under Article 50 (1) of the Constitution.
  11. It was further submitted that the Applicants' right to fair administrative action was violated by the DCC because she did not give the Applicants an opportunity to cross-examine the Interested Party. That the DCC did not give any reasons to the parties for the decision that was reached. That the DCC also overlooked other superior and binding decisions reached by the Courts when delivering her ruling. The counsel further submitted that this Court is empowered under Section 9 of the Fair Administrative Action Act to hear judicial review matters and to issue remedies under Section 11 of the Act. Counsel urged that the application be allowed with costs.
  12. The counsel relied on the following authorities to buttress his submissions: -
    - i) Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR
    - ii) Onesmus Daniel Masumbuko & others v Augustino Baya Thotho [2019] eKLR
    - iii) Samuel Gaichu Rinjeu v Mitambo Mangaara [2019] eKLR
    - iv) Republic v District Land Adjudication Officer Tigania East District & another Ex-Parte Joseph M'Ing'ala (Deceased) Represented By Jacob Atela M'Ing'ala [2018] eKLR
    - v) Peter Okech Kadamas v Municipality of Kisumu [1985] eKLR
    - vi) Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR
  13. The Interested Party filed submissions on July 23, 2021. The counsel submitted that the parties herein were given an opportunity to cross-examine before the DCC and no objection was raised then. That the Applicants have not demonstrated how the conduct of proceedings from 10.00 AM to 4.00 PM denotes bias or that it favoured the Interested Party. That if the Applicant was detained by the DCC as alleged, then further proof of a report being made to the police would have been availed. That the ruling of the DCC is detailed and well-reasoned indicating that the process was fair. That the Applicants have engaged in cherry-picking episodes of the proceedings in order to colour the process with impropriety.
  14. It was further submitted that the grant of orders of certiorari, mandamus and prohibition is discretionary. That the Court is entitled to take into account the nature of the process against which the judicial review is sought to satisfy itself that there is reasonable basis for the orders being granted. That the DCC's ruling is firmly grounded on the law and the Applicants have not demonstrated that the 1<sup>st</sup> Respondent acted ultra vires. That this Court should be slow to interfere with the administrative function of the 1<sup>st</sup> Respondent because otherwise, it would amount to a merit review. Lastly, it was submitted that the ex-parte Applicants had not established valid grounds to grant the judicial review orders of certiorari.



15. The Interested party relied on the case of *Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University* [2018] eKLR to buttress her submissions.
16. The only apparent issue for determination is whether the ex-parte Applicants have sufficiently demonstrated that judicial review orders of certiorari and prohibition ought to issue against the ruling of the 1<sup>st</sup> Respondent.
17. In *Municipal Council of Mombasa v Republic & another* [2002] eKLR the Court of Appeal held as follows: -

“Judicial review is concerned with the decision-making process, not with merits of the decision itself... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review.”
18. Further to that, the Court of Appeal held as follows in the case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR: -

“The need to take into account relevant considerations and ignore irrelevant facts in the decision making has close nexus with the need to act reasonably. This much was appreciated by Lord Greene MR in *Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation* [1948] 1 KB 223 thus, "For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.”
19. I have scrutinized the record of proceedings and the Minister’s decision delivered 13<sup>th</sup> December, 2019 which was produced as Exhibit “AKN3” and these are my views. I have noted that all the parties herein actively participated in the proceedings where they gave their evidence and were equally cross-examined. I have not seen any objection from any of the parties or any complaint over the manner in which the proceedings were being conducted. Evidently, due process was followed with each party being accorded an opportunity to present their case.
20. That notwithstanding, the underlying dispute between the parties herein appears to be an ownership tussle for the land. One faction’s claim is that since it has fended off trespassers from the suit property single-handedly, the opposing faction that did not defend the suit property should have no claim whatsoever. This can be gleaned from paragraphs 7, 8, 9 and 10 of the further affidavit March 18, 2021.
21. That aside, I have seen no proof of the allegations that the Minister took into consideration irrelevant or extraneous factors in making her decision or that she failed to take evidence into consideration. If that had been the case, it would invite this Court’s intervention as was aptly held by the learned Judges



Nyamu and Ibrahim JJ in the case of *Republic and others v Attorney General and another* [2006] 2 EA 265 (HCK): -

“We again hold that the taking into account an irrelevant consideration invites this Court’s intervention in Judicial Review.”

22. I have read through the ruling delivered on December 13, 2019 and it is well-reasoned. The upshot is that the *ex-parte* Applicants have failed to demonstrate an arguable case to warrant a grant of the orders of certiorari and prohibition as sought in the substantive motion herein. The application dated November 4, 2020 is hereby dismissed.

Each party to bear its own costs.

**SIGNED, DATED AND DELIVERED AT NAROK VIRTUALLY THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**MBOGO C.G.**

**JUDGE**

**DECEMBER 20, 2022**

Court Assistant: Mr. Chuma

