



Republic v County Commissioner, Elgeyo Marakwet & 3 others; Suter & 11 others (Interested Parties); Chemastan & another (Exparte Applicants) (Judicial Review 18 of 2022) [2022] KEELC 15289 (KLR) (7 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15289 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
JUDICIAL REVIEW 18 OF 2022
L WAITHAKA, J
DECEMBER 7, 2022
FORMERLY ELDORET JUDICIAL REVIEW NO.10 OF 2021
IN THE MATTER OF LEAVE TO INSTITUTE JUDICIAL REVIEW
AND
IN THE MATTER OF CHESOI LAND ADJUDICATION SECTION
ELGEYO MARAKWET COUNTY, MARAKWET EAST SUB COUNTY
AND
IN THE MATTER OF LAND PARCELS NOS. 2379, 2378, 2391,
2374, 2376, 2394, 2371, 2377, 2355, 2373, 2373, 2392 AND 2375
AND
IN THE MATTER OF JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION
AGAINST
THE LAND ADJUDICATION AND SETTLEMENT
OFFICER ELGEYO MARAKWET COUNTY
THE COUNTY COMMISSIONER, ELGEYO MARAKWET COUNTY
LAND REGISTRAR, ELGEYO MARAKWET COUNTY
AND
IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA
IN THE MATTER OF LAND APPEAL CASE
NO.515 OF 2020 TO THE MINISTER FOR LANDS
AND
IN THE MATTER OF LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA



BETWEEN

REPUBLIC APPLICANT

AND

COUNTY COMMISSIONER, ELGEYO MARAKWET 1ST RESPONDENT

DIRECTOR LAND ADJUDICATION 2ND RESPONDENT

SETTLEMENT ADJUDICATION SECTION 3RD RESPONDENT

COUNTY LAND REGISTRAR- ELGEYO MARAKWET 4TH RESPONDENT

AND

ISAAC CHEPKURUI SUTER INTERESTED PARTY

JOHN CHERUIYOT CHELANGA INTERESTED PARTY

PAUL CHEBET CHESEREK INTERESTED PARTY

CHARLES KOSGEI TANUI INTERESTED PARTY

DAVID CHESEREK KIPTOO INTERESTED PARTY

EDWARD KOSGEI KIMAIYO INTERESTED PARTY

SAM YEGO CHESEREK INTERESTED PARTY

JAMES YATOR KISANG INTERESTED PARTY

ELIAS KIMUTAI KISANG INTERESTED PARTY

JOHN CHERUIYOT KISANG INTERESTED PARTY

JONATHAN CHERUIYOT CHELANGA INTERESTED PARTY

RICHARD CHEPKWONY CHESEREK INTERESTED PARTY

AND

TOROITICH CHEMASTAN EXPARTE APPLICANT

KIBIWOTT CHEMASTAN EXPARTE APPLICANT

JUDGMENT

Introduction

1. Pursuant to leave granted on 24th August, 2021 to the ex parte applicants to apply for judicial review orders of certiorari and prohibition, the ex parte applicants, filed the notice of motion dated 14th September, 2021 and filed on 15th September 2021 seeking the following orders:-

1. An order of certiorari to remove to this court for purpose of being quashed the proceedings, ruling, judgment and decision of the 1st respondent given on 24th February 2021 in Elgeyo Marakwet East Sub County Chesoi Adjudication Section appeal to the Minister No.515 of 2020 and any other order giving ownership of plot Nos. 2379, 2378, 2391, 2374, 2376, 2394,



2371, 2377, 2355, 2372, 2373, 2392 and 2375 within Chesoi Adjudication Section to the Interested Parties;

2. An order of prohibition directed at the 4th respondent and the interested parties restraining them from implementing the judgment/ruling from the 1st, 2nd and 3rd respondents dated 24th February 2021 in Elgeyo Marakwet East Sub County Chesoi Adjudication Section Appeal to the Minister No.515 of 2020 and any other order giving ownership of plot Nos. 2379, 2378, 2391, 2374, 2376, 2394, 2371, 2377, 2355, 2372, 2373, 2392 and 2375 within Chesoi Adjudication Section to the Interested Parties;
 3. costs of the application.
2. The application is premised on the grounds on its face and on the affidavit sworn in support thereof, which are that the ex parte applicants and their descendants have been in occupation of the suit lands since time immemorial; that before the area was declared an adjudication area and demarcation done, the suit lands were one to wit 2833; that on 14th September 2011 the respondent (not indicated which respondent) filed objection before the Adjudication Committee, Marakwet District; that the Land Adjudication Officer (LAO) awarded the respondents part of the suit lands; that on 18th June 2013 the ex parte applicants filed objections and the Adjudication officer ruled in their favour; that on 7th February 2019 the interested parties appealed to the Minister and the Appeal was determined in their favour.
 3. Contending that transfer of ownership of the suit lands contravenes their rights and Sections of the Limitation of Actions Act which is unlawful and ultra vires; the ex parte applicants urge the court to grant them the orders sought.
 4. The 1st Exparte applicant, Toroitich Chemastan, through the affidavit he swore in support to the application, has deponed that the suit land in issue was subject matter of an earlier adjudication, identified as parcel number 2833, measuring approximately 20 acres; that the suit land was demarcated to his late brother, Chepkurui Chemastan, his brother Kibiwott Chemastan and himself; that before adjudication of 2007 identifying his land as 2833, the matter had been heard by a panel of elders under the Land Disputes Tribunal Act No.18 of 1990 (now repealed); that the land was awarded to him and his family; that the father of the respondents, Kipsang Kiptoo (deceased) refused to accept the decision of the elders leading to filing a case by his late brother, Chepkurui Chemastan, Iten SPMCC No.1 of 2001; that the suit was withdrawn and the matter referred again to the panel of elders under the Land Disputes Tribunal Act, No.18 of 1990; that upon reference to the District Commissioner (DC), Elgeyo Marakwet District to establish panel of elders, the DC remarked that the case was handled by elders under the Chairmanship of District Officer (DO) Tirap on 25th October, 1993 and the land was awarded to Chepkurui Chemastan and therefore their office still stands by that ruling;
 5. In view of the foregoing, the ex parte applicants contend that there was no need for the proceedings which yielded the parcels of land which are the subject matter of this suit; that re-parcellation of plot No.2833 was illegal and that the Land Adjudication Officer had no jurisdiction to re-adjudicate the parcel of land, 2833, because the previous adjudication was never revoked.
 6. It is contended that the actions of Land Adjudication Officer in proceedings No.515 of 2020 were ultra vires, malitide and made in bad faith-intended to defraud and change the earlier position.
 7. It is further contended that the previous adjudication, court proceedings and the decision of the Land Dispute Tribunal, which were never set aside, ousted the jurisdiction of the Land Adjudication Officer.



8. The ex parte applicants contend that the subsequent process of adjudication was meant to deprive them of a right that had already vested in them hence illegal and unlawful.
9. The ex parte applicants' acknowledge that the previous records could not be traced but argue that lack of record could not form a good reason for re-adjudication of the area.

Respondent's Response

10. Through the replying affidavit of Grace K. Ondiga the Land Adjudication and Settlement Officer, Elgeyo Marakwet County, sworn on 30th June 2022, the respondents have deponed that the notice of motion is incurably defective, incompetent, frivolous, scandalous and devoid of substance in law; that the verifying affidavit is full of falsehoods and misrepresentations tailored to win the sympathy of the court and that Appeal No.515 of 2020 was heard and determined in early 2021 by the Deputy County Commissioner (DCC) Marakwet East sub county in exercise of delegated power of the Cabinet Secretary, Ministry of Lands and Physical Planning.
11. The respondents have further deponed that Chesoi Adjudication Section was declared open on 5th April 2009 under Land Adjudication Act (LAA); that the adjudication process took of immediately and the parcels were demarcated and surveyed with the assistance of the Land Adjudication Committee comprising 17 members; that dissatisfied with the demarcation outcome, the 1st and 2nd interested parties herein filed to the Land Adjudication Committee a case which was heard on 5th October, 2011; that the Committee awarded the land to Peter Chemastian and Francis Chesire-Plot Nos. 2376, 2377, 2379; part of 2391 and ½ of 2375; that the Land Committee also awarded the family of Kapsaur, represented by Samuel Cheserek, James Kisang and Isaac Suter plots Nos. 2394, 2373, 2372, ½ of 2375; part of 2374 and 2391 and the family of Kapkimosbei and Kandume plots No. 2371, 2355 and part of 2374; that the 1st ex parte applicant filed an Appeal to the Arbitration Board in respect of plots Nos. 2371, 2355, 2374, 2394, 2372, 2373, 2375 and 3591; that the Board awarded the 1st interested party the said parcels.
12. The respondents have further deponed that the interested parties herein and other persons, not parties to these proceedings, filed objections in respect of plots Nos.2379, 2378, 2391, 2374, 2376, 2394, 2371, 2377, 2355, 2372, 2373 and 2375; that a ruling was delivered amending the record as per the time of demarcation. Further, that the 1st ex parte applicant on behalf of Chemastan family appealed to the Minister over plots Nos.2371, 2372, 2374, 2375, 2376, 2377, 2378, 2379 and 2394 and that the Appeal was dismissed on 24th February 2021.
13. The respondents contend that the notice of motion raises issues of merit that can only be determined by way of viva voce evidence and which do not fall under the purview of judicial review proceedings.
14. The respondents acknowledge that adjudication over Chesoi had been done previously but explain that before it was completed the office was invaded and all documents destroyed necessitating a fresh adjudication.
15. In view of the foregoing, it is the respondent's case that adjudication cannot be said to have been twice since the whole process was restarted afresh because all the documents went missing and there was no trace of any.
16. It is the respondents' case that the correspondences being relied on by the ex parte applicants in support of the notice of motion cannot be verified since the land adjudication office has no records of the same.
17. According to the respondents, the proceedings did not in any way contravene the Limitations of Actions Act-Objection was filed within time and determined as provided by LAA.



Interested Parties' Response

18. The interested parties, through the replying affidavit of James Yator Kisang, have deponed that the application is without merit; that the applicants have not made out a case for issuance of the orders sought; that there are no valid grounds upon which the court can issue the orders sought; that the interested parties are the owners of the suit lands and that the suit lands are the outcome of the process of ascertaining and adjudication of land rights under LAA.
19. The interested parties have further deponed that the Tribunals established under LAA are mandated and vested with jurisdiction to hear and determine all claims relating to interests in land in an adjudication area; that there is an elaborate process under LAA of identification of claims of interests in land within an adjudication section; that there were competing claims concerning the suit properties; that the interests were subjected to the various stages of adjudication of interests to land in an adjudication section; that the process of adjudication of interests in the suit lands culminated in an Appeal to the Minister to wit Appeal to the Minister case No.515 of 2020.
20. Explaining that the ex parte applicants and the interested parties were fully heard and determinations made concerning the ownership of the suit land; the interested parties contend that, under section 29 of LAA the decision of the Minister is final.
21. Concerning the contention that the adjudication involved a parcel of land that had already been demarcated, the interested parties acknowledge that there was a previous adjudication process but explain that the process was never finalized and all previous records could not be traced.
22. Maintaining that the impugned decisions were properly made by organs established under LAA, the interested parties have stated that there is no basis for granting the orders sought. Consequently, they urge the court to dismiss the application with costs to them.
23. Pursuant to directions given on 14th June 2022, the application was disposed off by way of written submissions.

Submissions

Ex parte Applicants' Submissions

24. In the submissions filed on behalf of the ex parte applicants', the case as pleaded, is given and submitted that from the evidence adduced by the ex parte applicants, it is clear that the suit lands, formerly known as parcel number 2833 had been fully adjudicated and it was not necessary to adjudicate it afresh and issue new adjudication numbers. It is the ex parte applicants' case that plot number 2833 was initially registered to the 1st ex parte applicant during the first demarcation.
25. It is submitted that it was unlawful for the land committee in committee case No.107 to subdivide the suit land and share it among the interested parties. It is pointed out that when the matter was heard by the Appeal Board in Appeal number 69, the Board awarded all the plots to the Chemastan family.
26. The ex parte applicants were dismayed when on Appeal to the Minister vide Appeal No.515 of 2020, the Minister gave all parcels to the interested party.
27. Terming the decision of the Chesoi Land Committee through which the suit land was subdivided into 13 parcels against their will and arguing that the Minister acted unreasonably by limiting witnesses for the applicants, the applicants contend that they were not given ample opportunity to ventilate their case.



28. The Minister is said to have refused to receive and analyze documentary evidence presented by the ex parte applicants exhibits containing previous determinations over the disputed land thus denying the applicants the chance to provide material evidence. The Minister is said to have failed to take into account the evidence showing that the interested parties had invaded the suit lands.
29. Concerning the response by the interested parties to the effect that the ex parte applicants have not given valid grounds for judicial review, reference is made to the averments in paragraph 19 of the interested parties replying affidavit sworn by James Yator Kisang to the effect that the previous adjudication process was never finalized and all records could not be traced and the proceedings in the Appeal to the Minister, page 7 thereof, which contain the evidence of Yator's brother, Kimutai Kisang, to the effect that plot No.2833 was secretly recorded to Chepkurui Chemastan and his two brothers, and submitted that the interested parties are not telling the court the truth when they state that the new parcels of land are not the result of improper and illegal second demarcation which intefferred with the rights that had already been adjudicated before.
30. According to the ex parte applicants, the mere fact that the records at the lands office got lost, did not mean that people's lands were to be taken away.
31. Concerning the response by the respondents, it is pointed out that the respondents admit that at the committee stage and arbitration stage, the decision was in favour of the ex parte applicants and submitted that the ex parte applicants were surprised that the interested parties won the Appeal to the Minister.
32. On account of additional evidence introduced through the ex parte applicants' further replying affidavit dated 25th November 2021 showing that the suit property was subject of previous court actions, particularly Iten Senior Principal Magistrate Court's Civil Suit No. 1 of 2001, it is submitted that the Minister had no jurisdiction to redo the case and to vary the decision of the Land Disputes Tribunal.

Respondents' Submissions

33. In their submissions filed on 21st September, 2022 the respondents have submitted that the applicants have raised several issues in their application which are not triable in the ambit of judicial review as they are issues of merit.
34. Concerning the contention by the applicants that their rights to ownership of the suit land was contravened, it is submitted that viva voce evidence is required before the court can decide whether or not the applicants' constitutional rights were infringed.
35. According to the respondents, the decision as to whether the applicants' constitutional rights were violated can only be made through a civil suit and/or a constitutional petition and not in judicial review proceedings.
36. Regarding the contention that the proceedings that led to the impugned decision of the Minister were time barred, it is submitted that the issue ought to have been raised before the respondents. There being no evidence capable of showing that the issue was raised before the Tribunals whose decision is sought to be quashed, it is submitted that the issue has been raised in the wrong forum.
37. It is further submitted that the question as to whether the proceedings were time barred is a question of fact to be determined after considering various factors hence not the business of a judicial review court.
38. On the contention that demarcation was conducted twice, the respondents submit that the evidence adduced shows that demarcation was conducted in accordance with the applicable law and procedures.



39. It is further submitted that it is not in dispute that the LAO has jurisdiction to adjudicate over the area. The circumstances leading to the 2nd adjudication has been explained-office was invaded and destroyed before the adjudication process was completed. The process had to be restarted, in the circumstances.
40. It is further submitted that the mandate of the respondents emanates from the LAA which clearly stipulates the responsibilities of each person and that it is undisputed that each of the respondents during the adjudication process discharged its lawful mandate.
41. The ex parte applicants are said to have failed to proffer any explanation to back up their contention that the respondents failed to comply with the rules of natural justice, acted unlawfully and ultra vires.
42. According to the respondents, the proceedings of the various stages produced in evidence by the respondents as annexure 1 show that the ex parte applicants were heard.

Interested Parties Submissions

43. In their submissions filed on 21st September 2021, the interested parties have given an overview of the case pleaded by the ex parte applicants. In this regard, the interested parties have pointed out that in the grounds in support of their application, the ex parte applicants made claim to ownership of the suit lands which are situated within Chesoi Adjudication Section.
44. The interested parties have pointed out that the ex parte applicants have admitted that the process of adjudication and identification of interests went through the various stages established under the LAA but fault the ultimate merits of the adjudication outcome as contravening the Limitation of Actions Act and submitted that the ex parte applicants challenge the outcome rather than the process.
45. It is pointed out that in their affidavit in support of their application, the applicants have alleged that the land in issue had been subject to an earlier adjudication and was identified as land parcel number 2833 and submitted that it could not therefore be subject to further adjudication. That contention is based on a letter dated 12th April, 2007, annexure JC1. According to the interested parties, that letter shows that the adjudication referred to in the letter was not finalized and was still ongoing.
46. The applicants are said to have admitted that there were competing claims over parcels of land in issue; that the claims were handled by the organs established under LAA and that they fully participated in the process. Evidence of participation is said to be discernable from the proceedings at the various stages annexed to the affidavit. The processes culminated in an Appeal to the Minister.
47. The applicants allege that the decision by the Minister is unlawful and ultra vires and without any basis.
48. It is submitted that an Appeal to the Minister is final.
49. Concerning the allegation that the applicants' right to a fair hearing and natural justice was contravened, it is submitted that the evidence presented by the applicants shows that the ex-parte applicants were afforded an opportunity to be heard in all stages before the decisions were made.
50. The applicants' complaint is said to be against the merit of the decision and not the process hence not suited as a judicial review matter.
51. Based on the case of *Municipal Council of Mombasa v. Republic & Another* (2002) e KLR; it is submitted that this court ought not to sit as an appellate body against the decision of the Minister in a judicial review process. In the aforesaid case the Court of Appeal held:-

“...judicial review is concerned with the decision-making process, not with the merits of the decision itself....the court would not be concerned with the issue of whether the increases



in the fees and charges were or were not justified. 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 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 were not sufficient evidence to support the decision—and that, as we have said, is not the province of judicial review.’

Analysis and determination

52. I have carefully read and considered the case pleaded and urged by the ex parte applicants, the response by the respondents and the interested parties. From the pleadings and the evidence adduced by the parties, it is common ground that the subject matter of this application to wit plots No. 2379, 2378, 2391, 2374, 2376, 2394, 2371, 2377, 2355, 2372, 2373, 2392 and 2375 all situated in Chesoi Adjudication Section, Marakwet East Sub County, Marakwet County were subject of the process of ascertaining and adjudication of rights and interests to land provided for under the Land Adjudication Act, Cap 284 Laws of Kenya. The exercise of ascertainment and adjudication of rights to the parcels of land culminated in an Appeals to the Minister, specifically Chesoi Adjudication Section Appeal to the Minister Nos. 515 of 2020.
53. It is common ground that there were competing claims between the ex parte applicants and the interested parties concerning interests in those plots. It is also common ground that the competing claims were processed through the processes contemplated under the Land Adjudication Act, Cap 284. The process of ascertaining, recording and adjudication of rights to the plots culminated in an Appeal to the Minister to wit Appeal No. 515 of 2020 between the ex parte applicants (and/or their representatives) and the interested parties and/or their representatives.
54. The proceedings attached to the verifying affidavit of the 1st ex parte applicant, Isaac Kibor Chelawa, sworn on 20th August 2021 show that the suit properties, particularly plot Nos.2433 and 2436 were subject of Marakwet District Land Committee Case No.203. The case was between the 1st ex parte applicant and Joel Tanui and Julius Tanui. The Committee heard the case and awarded a portion of plot No.2433 and the whole of plot No. 2436 to the 1st ex parte applicant.
55. The totality of the evidence adduced in these cases shows that the dispute between the ex parte applicants and the interested parties culminated in an Appeal to the Minister to wit Appeal number 515 of 2020.
56. The proceedings of the Appeal show that the Appeal was heard by the DCC Marakwet East Sub County with the aid of assessors. Contrary to the ex parte applicants’ contention that he was not given an opportunity to be heard, the proceedings show that the appellant was heard by himself and through his witness. It is not therefore, factually correct, to say that the ex parte applicants were denied an opportunity to be heard or to present their evidence.
57. Being the ones who alleged that they were denied an opportunity to present their cases, it behooved the ex parte applicants to produce evidence capable of proving those allegations. No evidence, whatsoever was produced capable of proving the alleged denial of the applicants right to be heard.
58. The Institutions/Tribunals established under the Land Adjudication Act have the mandate to hear and determine disputes arising out of the process of land adjudication and demarcation. The only



circumstances upon which this court can interfere with the exercise of those mandates are those contemplated in the case of *Municipal Council of Mombasa v. Republic & Another* (supra).

59. In the circumstances of this case, the ex parte applicants merely pleaded those circumstances but failed to adduce evidence capable of proving their existence.
60. The upshot of the foregoing is that I find and hold that the ex parte applicants have not made up a case for being granted the orders sought.
61. Consequently, I dismiss the Notice of Motion dated 14th September 2021 with costs to the respondents and the interested parties.
62. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 7TH DAY OF DECEMBER, 2022.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Chebii for the Exparte/Applicant

Ms. Odyo for the Respondents

Mr. Keter for Interested Parties

Christine Towett: Court Assistant

