



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v County Commissioner, Elgeyo Marakwet & 3 others; Chelawa & 2 others (Exparte); Tanui & 2 others (Interested Party) (Judicial Review Cause 17 of 2022) [2022] KEELC 15281 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15281 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ITEN**

**JUDICIAL REVIEW CAUSE 17 OF 2022**

**L WAITHAKA, J**

**DECEMBER 6, 2022**

**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 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**

**AND**

**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 & 3  
OTHERS ..... RESPONDENT

AND

ISAAC KIBOR CHELAWA & 2 OTHERS ..... EXPARTE

AND

JOE KIPKEMOI TANUI & 2 OTHERS ..... INTERESTED PARTY

## JUDGMENT

### Introduction

1. Pursuant to leave granted on August 24, 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 September 14, 2021 and filed on September 15, 2021 seeking the following orders:-
  - i. An order of *certiorari* to remove to this court for purpose of being quashed the proceedings, ruling, judgment and decision of the 1<sup>st</sup> respondent given on February 12, 2021 in Elgeyo Marakwet East Sub County Chesoi Adjudication Section Appeal No464 of 2020 and any other order giving ownership of plot Nos 2433, 2436, 3512 and 2441 within Chesoi adjudication section to the interested parties;
  - ii. an order of prohibition directed at the 4<sup>th</sup> respondent and the Interested Parties prohibiting them from implementing the judgment/ruling of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents dated February 12, 2021 in Elgeyo Marakwet East Sub County Chesoi Adjudication Section Appeal No 464 of 2020 and any other order giving ownership of plot Nos 2433, 2436, 3512 and 2441 within Chesoi adjudication section to the interested parties;
  - iii. costs of the application.
2. The application is premised on the grounds on its face and the affidavit sworn in support thereof to wit, the *ex parte* applicants are the lawful owners of plot Nos 2433, 2436, 3512 and 2441 (suit lands) within Chesoi adjudication section; that the *ex parte* applicants have been in occupation of the suit lands with their families since time immemorial; that on March 19, 2011 the suit lands were awarded to the *ex parte* applicants and that the interested parties lodged an appeal to the minister against the award which appeal they won.
3. The *ex parte* applicants claim that they were not accorded a fair hearing (only one witness was allowed to articulate their issues). They also accuse the respondents of having acted in breach of the law and in total disregard of the principle of natural justice; unreasonably and unfairly; unlawfully and of having acted *ultra vires*.
4. The *ex parte* applicants further claim that the actions of the respondents complained of were tainted with procedural impropriety and contravened their constitutional right to property.



## 1<sup>st</sup> to 4<sup>th</sup> Respondents' response

5. Through the replying affidavit of Grace K Ondiga, land adjudication and settlement officer, Elgeyo Marakwet County, sworn on June 28, 2022 the 1<sup>st</sup> to 4<sup>th</sup> respondents have deponed that the suit lands are found in Chesoi adjudication section (hereinafter referred as the section); that the section was declared open for land adjudication on April 5, 2009 under the [Land Adjudication Act](#), Cap 284 Laws of Kenya (LAA); that the process of adjudication took off and parcels of land were demarcated and surveyed with the assistance of a Land Adjudication Committee, comprising of 17 members; that during demarcation, plot Nos 2433, 2436 and 2441 were recorded to Joel Kipkemoi Tanui; Julius Kiptoo Tanui and Chepkurui Suter; that the 1<sup>st</sup> *ex parte* applicant and the 1<sup>st</sup> and 2<sup>nd</sup> interested party filed a case to the Land Committee; that the Land Committee awarded plot Nos 2433 and 2436 to the 1<sup>st</sup> *ex parte* applicant and the 2<sup>nd</sup> interested party; that the case in respect of plot Nos 2433 and 2436 was referred to the Arbitration Board which owing to none appearance of the claimants, awarded the plots to the 1<sup>st</sup> *ex parte* applicant and Joseph Chelawa; that plot number 2441 was awarded to Isaac Suter by the Land Committee but following objection filed by Joseph Chelawa it was awarded to Joseph Chelawa; that plot number 2441 was subject of an appeal to the Minister (case No522 of 2020) between William Rotich Kisang and Isaac Suter; that the appeal (522 of 2020) was allowed, boundaries adjusted and the land equally shared among the three sons of Chererek Kiptoo, Suter Kiptoo and Kipsang Kiptoo; that plot (2441) remained in the name of Isaac Chepkurui Suter; that plot No 2441 is not subject of the *ex parte* applicants' appeal to the Minister hence no orders ought to issue in respect thereof as they may adversely affect persons who have interest in the proceedings but who have not been made party to the suit like Isaac Chepkurui Suter; that all the parties in appeal number 464 of 2020 were given an opportunity to be heard and their case determined after scrutinizing all the testimonies and evidence produced.

## 1<sup>st</sup> Interested party's response

6. The 1<sup>st</sup> interested party through the affidavit he swore on November 15, 2021, has deponed that the interested parties are the owners of plot Nos 2433, 2436, 3512 situated in Chesoi adjudication section; that adjudication of interests in the section has been on going; that the officers appointed under the [Land Adjudication Act](#) are mandated to 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 the [Land Adjudication Act](#) for identification of interests in land within an adjudication section; that among the stages involved in assessment of claims is the Adjudication Committee, the Arbitration Board, the land adjudication officer and the minister; that the suit lands were subject matter of cases/proceedings in the various Tribunals established under LAA, namely the Land Committee, Arbitration Board, land adjudication officer and the minister *vide* appeal to the minister case No464 of 2020; that the appeal to the minister was decided in favour of the interested parties; that under section 29 of [LAA](#) the appeal to the minister is final and that both the *ex parte* applicants and the interested parties were heard fully and determinations made concerning the ownership of the parcels of land in question.
7. Terming the application lacking in merits, the interested parties have deponed that the *ex parte* applicants have exhausted the procedure under LAA.
8. The application was disposed of by way of written submissions.
9. The respondents and the interested parties filed submissions. The *ex parte* applicants failed to file submissions within the time ordered by the court.



## Respondents' submissions

10. In their submissions filed on September 20, 2022, the respondents have pointed out that one of the reasons given by the *ex parte* applicants for moving the court is the claim that they were not given a chance to call their witnesses during hearing. It is pointed out that the *ex parte* applicants have not disclosed at what stage they were not allowed to call witnesses.
11. Based on proceedings of the case before the Minister, it is submitted that the *ex parte* applicants were heard and indeed called witnesses during hearing. According to the respondents, there is no evidence that the *ex parte* applicants were denied opportunity to call witnesses. For that reason, the respondents are said to have complied with the principles of natural justice entrenched in section 4 of the [Fair Administrative Act](#).
12. On whether the *ex parte* applicants have made up a case for being granted the orders sought, it is pointed out that the *ex parte* applicants' application is premised on appeal to the minister number 464 of 2020 which involved plots Nos 2433, 2436 and 3512 and that they inter alia seek orders in respect of plot No 2441 which was the subject matter of a distinct appeal, appeal No 522 of 2020, and submitted that it would be a miscarriage of justice if this court was to make any decision involving or affecting ownership of plot No 2441 whose proceedings are not subject to these judicial review proceedings.
13. According to the respondents, the proceedings involving plot No 2441 have not been brought to this court for quashing. The party who was awarded the plot one Isaac Jepkurui Suter, has not been made a party to these proceedings either.
14. Based on article 47 of the [Constitution](#) and the [Fair Administrative Action Act](#), it is submitted that, to the extent that the order of *certiorari* sought affects plot No 2441, whose owner has not been made a party to these proceedings, that the order should not be issued.
15. Concerning plots Nos 2433, 2436 and 3512, it is submitted that the *ex parte* applicants have not raised any triable issue within the purview of judicial review.
16. It is reiterated that the *ex parte* applicants failed to provide evidence capable of proving that they were not heard or were denied opportunity to call witnesses.
17. The averment by the *ex parte* applicants that they were denied an opportunity to call witness is said to be a naked statement, not clothed with information as to whether the applicant attempted to call witnesses and was denied or what kind of witness or evidence was locked out.
18. The *ex parte* applicants are said to have raised issues without any evidentially backing. For instance, it is submitted that they merely allege that the respondents acted unreasonably, unfairly and the decision is tainted with procedural irregularities. It is submitted that the allegations are not backed up with any evidence or particulars of facts on how the decision is unreasonable, unfair or tainted with procedural irregularities. It is submitted that failure to bring such particulars is fatal to the applicants' claim.
19. It is further submitted that the applicants did not discharge the onus of proving that which they allege/assert and that it is not the business of the rest of the parties or the court to go fishing into the applicants attached documents looking for reasons as to why the applicant is saying the decision is unfair, unprocedural, or unreasonable.
20. In view of the foregoing, it is submitted that the *ex parte* applicants have not proved their case on a balance of probabilities.



21. With regard to the prayer for prohibition, based on the decision in the case of *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* (1997) eKLR, it is submitted that the order of prohibition cannot issue against the interested parties since they are not public bodies and did not make any decision and because they are mere subjects of decision-making process and its ultimate decision.
22. The *ex parte* applicants are said to have cast their nets far and wide with the hope that it can catch anything not directed at anything at all. In this regard, it is submitted that there is nothing like any other decision or orders.

### **Interested party's submissions**

23. In their submissions filed on September 21, 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 plot Nos 2433, 2436, 3512 and 2441 within Chesoi Adjudication Section; that the *ex parte* applicants have admitted that the process of adjudication and identification of interests through the various stages established under the LAA were undertaken 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. It is also pointed out that the *ex parte* applicants allege that the decision is unlawful and ultra vires.
24. It is further pointed out that in the affidavit in support of their application, the applicants admit that there are competing claims over the suit lands and that adjudication was carried out by organs established under *LAA* and they fully participated in the process. Evidence of the *ex parte* applicant's participation is said to be discernable from the proceedings at the various stages annexed to the affidavit. The final appeal to the minister by the applicants which upheld the award of the parcels of land to the interested party resulted in the current application.
25. It is pointed out that the *ex parte* applicants allege that the decision by the Minister is unlawful and ultra vires and without any basis and submitted that an appeal to the minister is a final.
26. Concerning the allegation that the *ex parte* applicants' right to a fair hearing and natural justice was contravened, it is submitted that the evidence presented by the *ex parte* applicants concerning the process show that the *ex parte* applicants were afforded an opportunity to be heard in all stages before the decisions were made. The *ex parte* applicants' complaint is said to be against the merit of the decision and not the process hence not suited as a judicial review matter.
27. Based on the decision in the case of *Municipal Council of Mombasa v. Republic & another* (2002) eKLR where 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;” 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.”

### **Analysis and determination**

28. 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 affidavit evidence adduced by the parties, it is common ground that the subject matter of this application to wit plots No 2433, 2436, 3512 and 2441 all situated in Chesoi adjudication section, Marakwet East Sub County, Marakwet County were subject of the process of ascertaining 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 land culminated in appeals to the minister, specifically Chesoi Adjudication Section Appeal to the Minister Nos 464 of 2020 and 522 of 2020.
29. Appeal No 464 of 2020 was in respect of parcels number 2433, 2436 and 3512 while appeal number 522 was in respect of parcel number 2441.
30. Apart from including plot No 2441, the *ex parte* applicants have not given any explanation or justification for including it in their application. The explanation/evidence offered by the respondents to the effect that plot No 2441 was the subject matter of a different appeal, not before this court has not been controverted. For that reason, I agree with the submissions by the respondents’ counsel that this court cannot issue any orders concerning that property on the grounds that no justification has been given by the applicants for including it in this application, secondly it relates to proceedings that are not before this court and thirdly the persons said to be the owners of the property are not parties to this suit. This court cannot issue any orders adverse to the owners or persons with interest in that parcel of land without giving them an opportunity to be heard.
31. With regard to parcels number 2433, 2436 and 3512, 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 464 of 2020 between the *ex parte* applicants (and/or their representatives) and the interested parties and/or their representatives.
32. The proceedings attached to the verifying affidavit of the 1<sup>st</sup> *ex parte* applicant, Isaac Kibor Chelawa, sworn on August 20, 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 1<sup>st</sup> *ex parte* applicant and Joel Tanui and Julius Tanui. The Land Committee heard the case and awarded a portion of plot No 2433 and the whole of plot No 2436 to the 1<sup>st</sup> *ex parte* applicant.
33. The totality of the evidence adduced in these cases shows that the dispute between the 1<sup>st</sup> *ex parte* applicant and the interested parties culminated in an appeal to the minister to wit appeal number 464 of 2020.
34. The proceedings of the appeal show that the appeal was heard by 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.
35. In view of the foregoing, it is not factually correct to say that the *ex parte* applicants were denied an opportunity to be heard or to present their evidence.



36. Being the ones who alleged that they were denied an opportunity to present their case, the legal burden was on 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 *ex parte* applicants' right to be heard or breach of law and procedures in hearing the appeal.
37. 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 mandate are those contemplated in the case of *Municipal Council of Mombasa v Republic & another* (supra). In the circumstances of this case, the ex parte applicants have not made a case for grant of the orders made.
38. Consequently, I find the application to be lacking in merit and dismiss it with costs to the respondents and the interested parties.

**DATED, SIGNED AND DELIVERED, AT ITEN THIS 6<sup>TH</sup> DAY OF DECEMBER, 2022.**

**L. N. WAITHAKA**

**JUDGE**

