



Republic v Deputy County Commissioner Kitui West Sub-County; Ndonga (the legal representative of the Estate of Ndonga Mutunga (Deceased) (Interested Party); Mwalili (the legal representative of the Estate of Musili Mutunga (Deceased) (Exparte Applicant) (Environment & Land Miscellaneous Case 22 of 2021) [2022] KEELC 15301 (KLR) (6 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND MISCELLANEOUS CASE 22 OF 2021**

LG KIMANI, J

DECEMBER 6, 2022

BETWEEN

REPUBLIC APPLICANT

AND

DEPUTY COUNTY COMMISSIONER KITUI WEST SUB-COUNTY RESPONDENT

AND

JOSPHAT NGUU NDONGA (THE LEGAL REPRESENTATIVE OF THE ESTATE OF NDONGA MUTUNGA (DECEASED) INTERESTED PARTY

AND

FELIX KITHEKA MWALILI (THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUSILI MUTUNGA (DECEASED) EXPARTE APPLICANT

JUDGMENT

1. The Ex parte Applicant filed the Notice of Motion dated July 24, 2022 which seeks the following reliefs;
 - a. An Order of certiorari to move into this Honourable Court and quash the Judgment delivered on February 20, 2020 in respect of Land Parcel Number Mutonguni/nzalae/108 by the Deputy Count Commissioner, Kitui West Sub-County under powers conferred by Section 29 of *Land Adjudication Act* and delegated powers as per Gazette Notice No 6854 dated September 13, 2014 in Appeal Case No 190 of 1987 Musili Mutunga –versus- Ndonga Mutunga.



- b. An Order of Mandamus directing the Deputy County Commissioner, Kitui West Sub-County to vacate his decision delivered on February 20, 2020 in Appeal Case No 190 of 1987 and further direct the said Deputy County Commissioner to pronounce the earlier decision delivered on August 13, 2019 on the same matter.
2. The facts relied on are that Land Parcel No Mutonguni/Nzala/108 was registered in the name of Ndonga Mutunga after adjudication. Being dissatisfied with the decision of the Land Adjudication Officer, Musili Mutunga (now deceased) lodged an appeal to the Minister vide Appeal No 190 of 1987.
3. The Ex parte Applicant claims that the appeal was heard on August 13, 2019 and judgment delivered in his favour on the same date before all the parties by the then Deputy County Commissioner, Kitui West Sub-County one Peter N Gicheha. The parties were directed to collect the typed and signed judgement at a later date. However, immediately thereafter the said Deputy County Commissioner was transferred before signing the typed judgement. Thereafter the parties were summoned by the incoming Deputy County Commissioner one Tom O Liech for delivery of judgment on February 20, 2020 upon which a different decision was pronounced in favour of the Interested Party.
4. The Ex parte Applicant claims that the Deputy County Commissioner (Tom O Liech) did not hear the appeal hence his decision dated February 20, 2020 was biased and prejudicial to the ex-parte applicant's rights over the subject property and the same was a miscarriage of justice.
5. The Ex parte Applicant states that the Deputy County Commissioner acted in breach of the laws of natural justice and was openly biased and that he failed to ensure that the overriding objective of his mandate was to facilitate the just and equitable resolution of the dispute.
6. The interested party filed an affidavit in reply to the notice of motion and stated he was conversant with all the facts and circumstances surrounding parcel number Mutonguni/Nzala/108. He claimed that the Ex Parte Applicant was out rightly misleading the Court when he claimed that a decision was delivered in his favour on August 13, 2019 by the then Deputy County Commissioner one Peter N Gicheha.
7. He stated that the Appeal was actually heard by one Tom O Liech, the Deputy County Commissioner who heard all the parties and delivered a decision in his favour. He further stated that even on the face of it, the Appeal was time barred by the time it was filed by the Ex parte Applicant in the year 1987 in that sixty days had already lapsed by the time the appeal was lodged. He averred that there was only one decision on the minister which decision was delivered by the Deputy County Commissioner one Mr Tom O Liech and he annexed a copy of the said decision.

Ex Parte Applicants Submissions

8. The Ex parte Applicant filed written submissions reiterating the contents of the Statement of facts and the supporting affidavit and submitted that the Deputy County Commissioner Tom O Oliech did not observe rules of natural justice and fairness required of an administrative officer when making a decision. Counsel submitted that the said Tom O Oliech acted ultra vires his jurisdiction as he purported to sit on appeal on the decision of his predecessor and rendered a 2nd judgement. Counsel relied on the case of *Republic V National Land Commission & 2 Others Ex parte Archdiocese of Nairobi Kenya Registered Trustees ((St Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR* on the ingredients of fairness or natural justice.
9. The Respondents did not enter appearance nor file any documents in reply to the application herein though served.



10. The Interested party did not file any written submissions and indicated that he relied on his replying affidavit.

Analysis and Determination

11. I have considered the Notice of Motion application dated July 24, 2022, the supporting affidavit, the statement of facts and the attached documents. I have further considered the replying affidavit filed by the Interested Party and the submissions filed by the Ex parte Applicant and find that the following issues arise for determination in this matter;
 - a. Whether the decision of the Respondent was ultra vires the jurisdiction conferred upon him by the law.
 - b. Whether the Respondent acted in breach of the rules of natural justice and fairness

A. Whether the decision of the Respondent was ultra vires the jurisdiction conferred upon him by the law.

12. Sections 26 and 29 of the *Land Adjudication Act* Cap 284 sets out the legal provisions on objections during the adjudication process and appeals to such objections respectively. The two sections provide as follows:
 26. Objection to adjudication register
 - (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
 - (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.
 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.'



13. The Court in *Republic vs Special District Commissioner & another Machakos Civil Miscellaneous 124 of 2004 [2006] eKLR* set out the mandate of the Minister or his official in conducting appeal proceedings under Section 29 of the *Land Adjudication Act* as follows:

' It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower court record that will assist him to, 'determine the appeal and make such order thereon as he thinks just.'
14. The above decision was considered in *Matwanga Kilonzo vs District Commissioner, Kitui & another [2021] eKLR* and the court confirmed that the Minister's mandate under Section 29 of the Act is to consider the grounds of appeal raised by any person appealing against the decision of the Land Adjudication Officer, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision and that while the Minister need not take fresh evidence while dealing with the appeal, he may do so to seek clarification on certain issues.
15. In the present case there are conflicting claims as to whether the Deputy County Commissioner, Kitui West Sub-County by the name Peter N Gicheha heard the appeal on August 13, 2019 and delivered judgment on the same date before all the parties with the ex parte applicant claiming that judgement was indeed delivered in his favour while the Interested party denied there being such a hearing of the appeal or any judgement delivered. The Interested party stated that the Appeal was actually heard by one Tom O Liech, the Deputy County Commissioner who heard all the parties and delivered a decision in his favour.
16. To confound matters the two parties have attached to their affidavits copies of what they claim to be the proceedings before the Respondent. The said proceedings are completely different and only the judgement of the DCC Tom Oliech is similar in both. I have noted the following discrepancies;
 - i. The Ex parte Applicants copy of proceedings contains the claimed unsigned decision of Peter N Gicheha together with the decision of the subsequent Deputy County Commissioner, Kitui West Sub-County by the name of Tom O Liech.
 - ii. Though the exparte Applicant states that they appeared before the DCC Peter N Gicheha on August 13, 2019, were heard and judgement delivered, the proceedings he has supplied shows the testimony of the Appellant/Plaintiff and his witness and does not show the evidence of the Respondent/Defendant in the appeal who is the interested party herein.
 - iii. The proceedings provided by the Interested Party contain the testimony of the Appellant/Plaintiff and the Respondent/Defendant in the appeal and the decision of DCC Tom O Liech.
 - iv. The proceedings provided by the interested party indicate the words 'Findings' in two places where there is no finding and a third place where the findings of DCC Tom Oliech is placed.
17. Looking at the two sets of proceedings and the anomalies and discrepancies noted, I am more inclined to find the proceedings provided by the Ex parte Applicant to be a true reflection of what transpired and to be the legitimate bona fide and true proceedings in the appeal to the Minister case No 190 of 1987. I am persuaded on this issue by the confusion in the proceedings provided by the interested party with the presence of the misplaced wording 'Finding' where there are no findings. This is more so considering that this is a dispute where the claim is that there was more than one set of finding and decision of the Respondent.



18. The Ex parte Applicant claims that the later decision by DCC Tom O Oliech was ultra vires his powers since there was already a decision on the appeal in place. In my view the decision by DCC Peter N Gicheha had actually been made but the same was not signed. Section 29 of the [Land Adjudication Act](#) does not contemplate that in a situation where an appeal has been heard and a decision made and read to the parties and upon unavailability of the DCC to sign the typed decision, a subsequent DCC would have to rehear the appeal and pronounce another decision. In this particular case it is alleged that the only remaining action was typing the decision by Peter N Gicheha and signing of the typed copy. However the ex parte Applicant does not state whether the handwritten judgment had been signed.
19. I wish to apply the provisions of Order 21 Rule 3 of the [Civil Procedure Rules](#) which provides for signing of judgments and states;
1. A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.
 2. A judgment pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it.
 3. A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review.
20. When Counsel for the parties appeared before the court in Machakos on October 7, 2020, they agreed that the then Deputy County Commissioner, Kitui West Sub-County to appear before court to be cross-examined on the proceedings before the court. The court record shows that it was reported to the court by the Advocates that the said DCC was reluctant to attend court since he did not deal with the appeal and he sought to have the two DCCs who are said to have heard the appeal be summoned to attend court since they were the concerned officers. On July 14, 2021 the court made an order issuing witness summons to the two DCCs to attend court and testify on the two awards on record.
21. When this matter was transferred to this court and the same came up for directions on November 17, 2021, Counsel for the parties indicated that they were unable to serve the witness summons to the two DCCs and proposed to have the matter determined based on the evidence on record. Under the circumstances this court is faced with two conflicting versions of what transpired before the two DCCs.
22. Courts have held that administrative actions must now meet the constitutional test of legality, reasonableness and procedural fairness. This new standard was well articulated by the court in [Kenya Human Rights Commission & another vs Non-Governmental Organizations Co-ordination Board & another \[2018\] eKLR](#):
- ' Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.
- This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.'
23. In the current case it is my finding that the decision alleged to have been made by the Deputy County Commissioner Peter N Gicheha on August 13, 2019 and communicated to the partes is incompetent



and illegal as the same was not signed by the said officer. I further find that the decision of the DCC Tom O Oliech violated the rights of the parties is incompetent, illegal and ultra vires his powers since it appears that the appeal had already been heard and the parties informed of the decision made and that what was remaining was the typing and signing of the typed proceedings. Notwithstanding the fact that information has not been given on whether the handwritten decision was signed or not, I do find that making a finding that contradicted the earlier decision that had been pronounced and communicated to the parties was unfair and unreasonable. It is further stated that the decision of the DCC Tom O Oliech was arrived at without hearing the parties.

24. I do find that the entire process was in violation of the right to a lawful, reasonable and procedurally fair decision and the legitimate expectations of the parties contrary to the provisions of Article 47 of the Constitution of Kenya 2010 and Section 7 (2) (A) (v), (c) (m) and (n) of the Fair Administrative Actions Act.
25. For the foregoing reasons I do find that the Notice of Motion Application dated July 24, 2022 has merit and the same is allowed in the following terms;
- A. An Order of certiorari do and is hereby issued to move into this Honorable Court and quash the Judgment delivered on August 13, 2019 and on February 20, 2020 in respect of Land Parcel Number Mutonguni/Nzala/108 by the Deputy County Commissioner, Kitui West Sub-County in Appeal Case No 190 of 1987 Musili Mutunga –versus- Ndonga Mutunga.
- B. An order directing that the Appeal Case No 190 of 1987 Musili Mutunga –versus- Ndonga Mutunga be remitted back to the Respondent for hearing before another Deputy County Commissioner, Kitui West Sub-County other than Peter N Gicheha or Tom O Oliech
- C. Costs of the suit are hereby awarded to the ex parte applicant to be paid by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN KITUI THIS 6TH DAY OF DECEMBER 2022.

L. G. KIMANI

ENVIRONMENT & LAND COURT JUDGE - KITUI

Judgment read in open court and virtually

In the presence of:

Musyoki Court Assistant

J. K. Mwalimu Advocate for the ex parte applicant

Mbilo Advocate holding brief for Ngolya for the interested party

No attendance for the Respondents

