# Republic v Deputy County Commissioner, Baringo North & 3 others; Kangogo & another (Interested Parties); Kitilit & 3 others (Exparte) (Judicial Review 2 of 2022) [2022] KEELC 15232 (KLR) (5 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15232 (KLR)

**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW 2 OF 2022**

**L WAITHAKA, J**

**DECEMBER 5, 2022**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF APPEALS TO THE MINISTER CASES NO.15 OF 2020, 215 OF 2020, 216 OF 2020 AND 217 OF 2020 IN RESPECT OF LAND PARCEL NO. 642 BARWESSA "A" ADJUDICATION**

**AND**

**IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284) LAWS OF KENYA**

**BETWEEN**

**REPUBLIC ........................................................................................... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER, BARINGO NORTH . 1ST RESPONDENT**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ................................................................................ 2ND RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING ....................................................................... 3RD RESPONDENT**

**BARINGO COUNTY GOVERNMENT .................................... 4TH RESPONDENT**

**AND**

**JACKSON KANGOGO .......................................................... INTERESTED PARTY**

**BRIAN YEGON ....................................................................... INTERESTED PARTY**

**AND**

**REBECA TALAA KITILIT ........................................................................ EXPARTE**

**CHRISTINA KIMOI CHEMELIL ........................................................... EXPARTE**

**DAVID KIPTOO CHESIRE ....................................................................... EXPARTE**

**CHARLES BERIMOI .................................................................................. EXPARTE**

## JUDGMENT

### Introduction

1. Pursuant to leave granted to the *ex parte* applicants to apply for judicial review orders of *certorari* and prohibition against the decision of the Deputy County Commissioner Baringo North Sub-County (1st respondent herein), made on 11th December 2020 in appeal to the Minister case No.216 of 2020, the ex parte applicants filed the notice of motion dated 10th July 2021 seeking an order of certiorari to remove to this court for the purpose of being quashed the decision of the 1st respondent; an order of prohibition to prohibit the 1st, 3rd and 4th respondent from implementing the impugned decision of the 1st respondent; an order setting aside the impugned decision of the 1st respondent and remitting the appeal for retrial.

2. The decision sought to be quashed relates to land parcel No.642 situated in Barwessa "A" Adjudication Section, Baringo County, hereinafter referred to as the suit property.

3. The suit property was during land demarcation reserved for Likwon Community Polytechnic.

4. Long after the suit property was set apart as a public utility reserved for Likwon Community polytechnic, the ex parte applicants filed objection proceedings before the Land Adjudication Officer (LAO), Baringo.

5. Through the objections proceedings filed before the LAO, the *ex parte* applicants claimed that the suit property belonged to them before it was registered in the name of the 4th respondent; that they do not know how the suit property was registered in the name of the 4th respondent.

6. The proceedings before the LAO annexed to the affidavit sworn in verification of the facts relied on in support of the facts on which the application for leave to apply for judicial review, marked R1, show that the LAO considered the case presented by the *ex parte* applicants (objectors) and the respondent's witnesses.

7. Upon considering the cases urged before him, the LAO made the following findings:-

   " Findings

   This is a land being contested by five (5) plaintiffs being a public utility reserved for Likwon Youth Polytechnic.

   First plaintiff claims their family resided here and his father subdivided this land amongst his sons.

   Second plaintiff claims that he bought this parcel from another person. That he has been utilizing this land for quite a long period of time.

Third plaintiff claims some portion of this land, the remaining portion he sold to Mukunji which was part of his land. That he was surprised how his parcel was recorded/registered as public land yet it belonged to his father;

Fourth plaintiff claims he lived here for quite some time. That he was present during demarcation and moved elsewhere.

Fifth plaintiff claims that he bought from five individuals. That he fenced and resided here for all those years he has been in this land. That he was surprised part of his land has been recorded under public utility.

Respondent claims are as follows: That this land belongs to Likwon Youth Polytechnic. He was a Committee Member when demarcation commenced. The parcel was alienated as a public land in the year 1987. That nobody has ever resided in this land. In the year 1992, he was in the authority protecting this parcel from individual exploitation.

From the statement presented by both parties and their witnesess, this court has to querry the intentions of some plaintiffs' argument:

(i) It is clear that this land was alienated as a public utility by the elders of this section then, why does their son raise complaints at the moment yet their fathers and grandfathers didn't?

(ii) Why did the plaintiffs fail to lodge LCC against the respondent yet they were very aware this land was recorded in the name of the respondent?

(iii) Why does plaintiff(s) raise allegations that they reside here yet some of their witnesses differ with them?

(iv) Why does plaintiff(s) take or why did they state they have been residing elsewhere, why at this moment?

Therefore this court finds the statement and evidence presented by plaintiffs to be null and void hence their argument and evidence is rejected. Based on what they presented to this court, their case does not warrant this court to award any portion while the statements and evidence presented by respondent and confirmed by his witness are tangible and accepted before this court hence this parcel is to remain in the name of the respondent."

8. Aggrieved by the decision of LAO, the *ex parte* applicants appealed to the Minister (read the 1st respondent) on the ground that registration of the suit property in the name of the respondent was done illegality and without their knowledge and consent.

9. The proceedings of the case before the 1st respondent annexed to affidavit sworn in verification of the facts relied on in support of the application for leave to apply for judicial review, marked $R^2$, show that the 1st respondent heard and considered the parties in the appeal before he made his decision. In that regard see the following excerpts of the proceedings, which attest to that fact:

"

<u>Findings</u>

The appellant stated that she bought this land in 1999 and the same was set aside as public land without being involved. When she complained, she was advised to file objection case,

which she did and during hearing of the case her witnesses were not allowed to testify. Her witnesses also confirmed that they were not consulted in setting aside of the public land and that they border with the appellant.

The respondent on the other hand stated that this is public purpose land which was set aside by local elders in consultation with the local community. The respondent witness one Ronguno confirmed the same by stating that the public land was demarcated in 1986 and there was no complaint.

The second witness one John Rutto stated that he was among the eleven committee members who participated in setting aside the public land for the polytechnic and the appellant never complained apart from one Mr. Rerimoi who complained.

It is evident from the submissions of the respondent that this is public land which was set aside by local elders and leaders in consultation with the local community. There was no complaint during demarcation of this land in 1986 from the appellant.

The appellant never filed land committee case as required in land adjudication procedures that whomever affected by such demarcation should do so which the appellant never did, an indication that she was not affected by the demarcation of this public land.

It is evident that the claim of the appellant came up several years after demarcation of the public land that she bought land in 1999, which had been demarcated and registered to the Polytechnic in 1985.

Basing on the above facts and observations the claim of the appellant is dismissed.

Decision

Appeal to the Minister Case No.215 of 2020 is hereby dismissed. Land Adjudication Officer's decision is upheld. The land parcel number 642 to remain as registered to Baringo County Government-reserved for Likwon Community Polytechnic."

10. Aggrieved by the decision of the Minister, the *ex parte* applicant brought the instant proceedings on the grounds that they were at all times the beneficial owners of the suit property; that the respondents in collusion with land adjudication officials unlawfully took away their parcels and registered them in the name of the County Government of Baringo-reserved for Likwon Community Polytechnic; that their evidence and the evidence of their witnesses was disregarded during hearing and throughout the process of adjudication; that the 1st respondent violated the rules of natural justice by failing to consider their proprietary interest in the suit property and failing to consider their evidence.

11. It is further contended that the 1st respondent acted ultra vires his powers under section 29 of *LAA* by hearing the appeal alone.

12. Pursuant to directions given on 28th July 2022, to the effect that the application be disposed of by way of written submissions, the *ex parte* applicants filed submissions, dated 15th October, 2022 and filed on 17th October, 2022.

13. On 17th October, 2022, when the matter was called for confirmation that parties had filed submissions, counsel for the respondents, Ms. Cheruiyot, informed the court that the respondents had no intention of filing submissions. The court was also informed that the interested parties did not enter appearance.

**Analysis**

14. As pointed out herein above, the instant proceedings relate to the decision of the Minister in appeal to the Minister Case No.215 of 2020. The appeal to the Minister was in respect of the decision of the LAO, Baringo to dismiss the objections raised by the *ex parte* applicants against registration of parcel No.642 Barwessa "A" Adjudication Section in the name of County Government of Baringo (4th respondent herein) to hold in trust for Likwon Community Polytechnic.

15. The grounds on which the application was taken up were that the ex parte applicants were at all times the beneficial owners of the suit property; that respondents in collusion with land adjudication officials unlawfully took away their parcels and registered them in the name of the County Government of Baringo-reserved for Likwon Community Polytechnic; that their evidence and the evidence of their witnesses was disregarded during hearing and throughout the process of adjudication; that the 1st respondent violated the rules of natural justice by failing to consider their proprietary interest in the suit property and failing to consider their evidence and that the 1st respondent acted ultra vires his powers under section 29 of*LAA* by hearing the appeal alone.

**Departure from pleadings/new grounds of attack of the decision of the 1st respondent**

16. In their submissions filed on 17th October 2022, the *ex parte* applicants introduced the following new ground of attack of the decision of the 1st respondent and the proceedings that led to the making of the impugned decision namely; there was no constituted committee or arbitration panel.

17. Claiming that there was no constituted committee or arbitration panel formed which could deliberate on complaints raised by the ex parte applicants, the ex parte applicant contends that the entire process that culminated in the impugned decision of the Minister was flawed. The *ex parte* applicant further contend that there are no minutes to show how the 4th respondent became the owner of more than 100 acres of land registered in its favour.

18. Terming the process that led to alienation of the suit property in favour of the 4th respondent secretive and unprocedural, the ex parte applicants claim that they were not notified of the demarcation exercise that led to alienation of the suit property in favour of the 4th respondent.

19. Based on the decisions in the cases of *Speaker of National Assembly v James Njenga Karume* (1992) eKLR, *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002]eKLR and *Republic v Kenya National Examination Council Ex Parte Gathenji and Others* Civil Appeal No.266 of 1996 the *ex parte* applicants submit that they have made a case for being granted the orders sought as their grievances were not addressed by properly constituted tribunals thereby grossly affecting their rights and interests in the suit property.

**Determination**

20. This being an application for judicial review, I remind myself that this court has no jurisdiction to interfere with the decision of the Minister or the decisions of tribunals established under *LAA* on their merit. In that regard see the case of Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR thus:-

> "Judicial review is concerned with the decision making process, not with the merit itself, the court would concern itself with such issues as to whether decision makers had jurisdiction, whether the persons affected by the decision were heard before it was made and whether decision maker took into account irrelevant matters...The court should not act as a court of

appeal over the decider which would involve going into merits of the decision itself-such as whether there was sufficient evidence to support the decision"

And the case of *Pastoli v Kabale District Local Government Council & Others* [2008]2 EA 300 where it was held:-

> " In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety……
>
> Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of law or its principles are instances of illegality. It is for example, illegality, where a chief administrative officer of a district interdicts a public servant on direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission….Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards…..procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in statute or legislative instrument by which such authority exercises jurisdiction to make a decision."

Also see the case of the case of *Timotheo Makange v Manunga Ngochi* [1978] KLR 53 at page 63 where the court held:-

> " The Act (*Land Adjudication Act*) prescribes within itself a specific and complete code for treatment of the Land Adjudication cases through set stages, with the Minister empowered to determine appeals to him; and make such orders as he thinks just, his orders being final…for even at that stage it was not a matter of interference with vested rights of individuals."

21. In applying the above principles to the circumstances of this case, I begin by addressing the issue raised in the ex parte applicants' submissions that the procedure that led to the making of the impugned decision of the Minister was flawed and unprocedural on account of failure by the respondents to constitute the Committees contemplated under *LAA* namely Land Adjudication Committee and Land Arbitration Board/panel to which they could lodge their claim.

22. With regard to this contention or ground of attack of the decision of the Minister, it is noteworthy that it does not form part of the ground of attack of the decision of the Minister and/or LAO raised in the notice of motion or affidavit sworn in verification of the facts on which the application for judicial review is premised. That being the case, the attempt by the ex parte applicants to raise it through its submissions is a departure from its pleadings contrary to Order 2 Rule 6 of the *Civil Procedure Rules*.

Order 2 Rule 6 provides as follows:-

> "1. No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.
>
> 2. subrule 1 shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."

23. Having failed to make the issue of failure to constitute the Land Committee and Arbitration Board a ground of attack of the proceedings before the LAO or the Minister, the *ex parte* applicants are estopped from relying on such ground as a ground of attack of the decision of the Minister or the LAO. In that regard see Order 2 Rule 6 *supra* and the case of *Philmark Systems Co. Ltd v Andermore Enterprises* [2018] eKLR where it was held:-

> "It is trite that issues for determination in a suit generally flow from pleadings unless the pleadings are amended in accordance with the Civil Procedure Rules."

24. In any event, contrary to the contention by the *ex parte* applicants that the respondents did not constitute the Committees, the proceedings suggest that the Committees were formed. Besides, being the ones who claim that the Committees were not formed, the burden was on the ex parte applicants to prove that indeed the committees were not established and that they were prevented from lodging their complaint to the committee by none-availability of the Committees.

25. Concerning the alleged violation of the law by the LAO and the Minister in the manner they conducted the proceedings before them, from the proceedings attached to the application for judicial review, I am unable to gather any breaches of the law either by the LAO or the Minister that can warrant interference with the decision of the Minister.

26. What emerges from the proceedings attached to the ex parte applicants' application for judicial review is that the ex parte applicants were heard by themselves and their witnesses. The mere fact that the LAO or the Minister did not find in favour of the ex parte applicants is not proof that the LAO or the Minister was biased against them.

27. Contrary to the ex parte applicants' contention that the LAO and the Minister breached the rules of natural justice, the proceedings show that the *ex parte* applicants were accorded an opportunity to present their cases. Both the LAO and the Minister gave reasons why they did not find in favour of the *ex parte* applicants. I reiterate that the mere fact that the ex parte applicants lost the cases they prepared before the LAO and the Minister is not evidence of bias against the officers.

28. The proceedings further show that the ex parte applicants were not dilligent in urging their claim. They took quite a long period of time to challenge the decision to register the suit property in the name of the 4th respondent. In the peculiar circumstances of this case, the LAO and the Minister may not be faulted for determining that the ex parte applicants were belately challenging the decision of elders to donate the land for public purpose. Such inference is plausible given the fact that the *ex parte* applicants' fathers and grandfathers never challenged the alleged unlawful alienation of their land.

29. The upshot of the foregoing is that the notice of motion dated 10th July, 2021 is found not to have merit. Consequently, I dismiss it with costs to the respondents.

30. Orders accordingly.

**DATED, SIGNED AND DELIVERED, AT ITEN THIS 5TH DAY OF DECEMBER, 2022.**

**L. N. WAITHAKA**

**JUDGE**

Judgment read virtually in the presence of:

Mr. Kipkulei for the Exparte Applicants

Ms. Cheruiyot for the Respondents

N/A for the Interested Parties

Christine Towett: Court Assistant