



**Kilonzo v Deputy County Commissioner Machakos County & 2 others; Ngumbi  
(Interested Party) (Environment and Land Case Judicial Review Application  
E008 of 2021) [2024] KEELC 434 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 434 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E008 OF 2021  
CA OCHIENG, J  
FEBRUARY 5, 2024  
ELC. JUDICIAL REVIEW APPLICATION NO. E008 OF  
2021**

**IN THE MATTER OF AN APPLICATION BY SAMMY MASAKU KILONZO FOR LEAVE  
TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION  
IN THE MATTER OF LAND ADJUDICATION ACT (CAP 284)  
IN THE MATTER OF NZIUNI ADJUDICATION SECTION P/NO.117  
IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES 2010  
AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**BETWEEN**

**SAMMY MASAKU KILONZO ..... APPLICANT**

**AND**

**THE DEPUTY COUNTY COMMISSIONER MACHAKOS COUNTY .... 1<sup>ST</sup>  
RESPONDENT**

**THE SUB COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER,  
MACHAKOS COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JOSHUA NDAMBUKI NGUMBI ..... INTERESTED PARTY**



## JUDGMENT

1. What is before Court for determination is the Ex parte Applicant's Notice of Motion Application dated the 11<sup>th</sup> June, 2021 brought pursuant to Article 50 of *the Constitution*, Order 53 Rule 1(2) of the Civil Procedure Rules and Sections 7, 8 and 9 of the *Fair Administrative Action Act*. The Ex parte Applicant seeks the following Orders:-
  1. That this Honourable Court be pleased to issue an order of Certiorari to quashing the Ruling delivered by the 1<sup>st</sup> Respondent on 30<sup>th</sup> March, 2021 and declare it unconstitutional, null and void.
  2. That this Honourable Court be pleased to issue an order of Prohibition directed to the Respondents and the Interested Party prohibiting them from enforcing, executing or in any manner whatsoever implementing the Ruling delivered by the 1<sup>st</sup> Respondent on 30<sup>th</sup> March, 2021.
  3. Costs of and incidental to this Application be provided for.
2. The Application is premised on the grounds on the face of it including the Statement of Facts and the Ex parte Applicant's Verifying Affidavit. The Ex parte contends that originally Nziuni Adjudication Section 117 hereinafter referred to as the 'suit land', belonged to one Mr. Mwata Mwinza (*deceased*) whose descendants have resided thereon for over fifty (50) years. He claims the deceased had developed the suit land including constructing permanent structures thereon, connected electricity, piped water as well as cultivated the said land. He insists that the Appellant (*Joshua Ndambuki's family in Appeal No. 70 of 1987*) which hails from Kangundo is not related to the Respondents. He explains that a Court Order was issued on 22<sup>nd</sup> February, 1983, when the dispute herein had been dealt with Committee Stage and Arbitration Board. Further, the Arbitration Board stated that they could not go against the Court decision. He states that Mwata Mwinzi was the successful party prompting Joshua Ndambuki to Appeal to the Minister. Further, the Minister in its decision ordered that the suit land was to be registered in the name of Joshua Ndambuki. He further explains that as per the Order of the Court in Civil Appeal No. 59 of 1979, the matter was referred to Land Adjudication as at 22<sup>nd</sup> December, 1983. He avers that the Adjudication Officer after considering evidence from the witnesses found that the suit land belonged to Mwata Mwinza. He argues that the Deputy County Commissioner, Machakos County should have conducted a detailed research of the disputed parcel of land and parties involved rather than unreasonably arriving into a decision without consultation of both family members as well as neighbours on the history of the land and thereafter make a one sided decision. He reiterates that the witnesses of both parties before adjudication had agreed that the suit land belonged to Mwata Mwinza.
3. The Respondents in opposing the instant Notice of Motion Application filed their Grounds of Opposition dated the 9<sup>th</sup> August, 2021 where they contended that the Judicial Review Orders sought are not merited as the Deputy County Commissioner conducted a fair hearing where both parties were heard and a decision rendered on merit. They argue that the Applicant's prayer for an order of Certiorari to quash the Ruling delivered by the 1<sup>st</sup> Respondent on 30<sup>th</sup> March, 2021 is not based on any illegality. They insist that Judicial Review does not deal with the merits of the decision but rather the manner in which the impugned decision was arrived at. They reiterate that the Application is frivolous, vexatious and an abuse of the court process thus should be dismissed with costs.
4. In response to the instant Application, the Interested Party filed a Replying Affidavit sworn by Joseph Ngumbi Ndambuki who deposes that he is the son of Joshua Ndambuki who passed away in 1990.



He confirms he is the one who participated during the hearing of the Appeal before the Respondents, hence he is competent to swear the Affidavit. He insists that the instant Application lacks merit, is frivolous and an abuse of the court process. He contends that Judicial Review process does not venture into the merits of the process. He argues that the contents of the instant Application majorly relate to the facts of the case rather than the violations that affected the decision making process. He explains that when the dispute was heard by the Land Adjudication Committee on 5<sup>th</sup> July, 1983 and the District Arbitration Board on 26<sup>th</sup> October, 1983, the information relating to the suit land was documented and the decisions were that the said lands were to be registered in the names of Kimeu Mwalyo and the Interested Party. Further, that when the decision of the Land Adjudication Officer which has been provided by the Ex parte Applicant, overturned the decision of the Arbitration Board, his deceased father (*Interested Party*) exercised his right of Appeal to the Minister. He reiterates that the fact that the Appeal was successful does not in any way make the Judgment by the 1<sup>st</sup> Respondent unreasonable or unfair. He states that in the proceedings before the 1<sup>st</sup> Respondent, there was no violation of the rules of natural justice or violation of any principle that would make this court to quash the Judgment. He avers that it is clear from the Judgment that both parties were heard and it was not for the parties to dictate how the 1<sup>st</sup> Respondent was to handle the process and deliver the Judgment. Further, there is no regulation requiring the Appeals to the Minister to be handled in a particular way.

5. The Application was canvassed by way of written submissions.

## Submissions

### Ex parte Applicant's Submissions\*\*

6. The Ex parte Applicant in his submissions confirmed that leave to institute Judicial Review proceedings was granted on 28<sup>th</sup> May, 2021. He provided a background of the dispute herein and contended that he had been on the suit land for over fifty (50) years and has been cultivating it as well as grazing thereon. He submitted that the instant Application had met the threshold for grant of orders of Certiorari and Prohibition as due process was not complied with, in making the decision by the Minister dated the 30<sup>th</sup> March, 2021. He insisted that the decision of the Minister was erroneously arrived at without fair trial as the Deputy County Commissioner ought to have conducted a detailed research of the disputed parcel of land and the parties involved rather than unreasonably arriving at a decision without consultation of both families as well as asking neighbours on the history of the land. He further submitted that in Judicial Review, court is not seized with jurisdiction to interrogate and/or investigate the merits of a dispute but of paramount importance is whether due process was followed in the making of a decision. Further, that due process was not adhered to by the Deputy County Commissioner in arriving at the impugned decisions. To support his averments, he relied on Sections 4, 7 and 7 of the Fair Administrative Act including the following decision: **Republic v National Transport & Safety Authority & 100 Others Ex parte James Maina Mugo (2015) eKLR.**

### The Respondents' Submissions

7. The Respondents in their submissions insisted that the impugned Ruling/decision was not based on any illegality that was occasioned on the Ex parte Applicant. Further, that the Ex parte Applicant is questioning the merits of the decision. They argued that the 1<sup>st</sup> Respondent heard the Appeal arising from an objection to the Adjudication Register and the Ex parte Applicant cannot therefore claim that the 1<sup>st</sup> Respondent acted *ultra vires* in hearing the Appeal. Further, that the Ex parte Applicant has not demonstrated that he was not heard or that the Respondents acted in contravention of the fair administrative procedure. They reiterated that the 1<sup>st</sup> Respondent hears Appeals and delivers Rulings but does not implement its own decisions. To support their averments, they relied on Section



29 of the [Land Adjudication Act](#) as well as the following decisions: *OJSC Power Machines Ltd, Trans Century Ltd & Civicon Ltd (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others – NRB CA 28 of 2016 (2017) eKLR* and *Kenya National Examination Council v Republic, Ex parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR*.

### Interested Party's Submissions

8. The Interested Party in his submissions insisted that no procedure nor rules of natural justice were flouted as claimed. He explained that in Judicial Review proceedings, the court's jurisdiction is limited to examining the process and not the merits of the decisions. He further submitted that the process of adjudication is governed by the [Land Adjudication Act](#) and the process under the said Act was duly adhered to, as the 1<sup>st</sup> Respondent lawfully exercised his mandate under Section 29(1) of the [Land Adjudication Act](#). He reiterated that the Ex parte Applicant failed to demonstrate any violation of right or ground that would entitle him to orders of Judicial Review as sought. He sought for costs. To support his submissions, he relied on Section 7(2) of the [Fair Administrative Action Act](#) as well as the following decisions: *Accounting Officer Kenya Ports Authority (Ex parte) v Public Procurement Administrative Review Board & 3 Others (Interested Parties) (2019) eKLR*; *Republic v Deputy County Commissioner, Kitui West Sub County; Kilonzi Mukinya Muvevi & Another (Interested Parties) Ex parte; Justus Mwendwa Liku (2021) eKLR* and *Republic & 3 others v Special District Commissioner, Machakos, Joshua Nthenge & Another (2020) eKLR*.

### Analysis and Determination

9. Upon consideration of the Notice of Motion Application dated the 11<sup>th</sup> June, 2021 including the Statement of Facts, Grounds of Opposition, respective Affidavits, annexures and rivalling submissions, the only issue for determination is whether the Ex parte Applicant is entitled to the orders of Certiorari and Prohibition as sought.

Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** provided the criteria on Judicial Review when he stated thus:-

"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' ...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

10. On Judicial Review, the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6* observed thus:-

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair,



impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

11. Further, in the case of *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*, it was held that:-

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which 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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

12. See also the decision in *Kenya National Examination Council v Republic, Ex parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR*.

13. On administrative action, Article 47 of *the Constitution* stipulates thus:-

(1) “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.”

14. While Section 7 of the Fair Administrative Actions Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the said administrative action or decision to— (a) a court in accordance with Section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) further stipulates that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said Section.

15. In this instance, the Ex parte Applicant has sought for orders of Certiorari and Prohibition to quash the Ruling of the Deputy County Commissioner delivered on 30<sup>th</sup> March, 2021 insisting that in the said Appeal, the Minister failed to consider the history of the dispute herein as well as the fact that he had resided on the suit land for fifty (50) years. The Respondents and the Interested Party insisted that there was no merit in the instant application since the Ex parte Applicant has not demonstrated how there was procedural impropriety.

16. From a cursory glance at all the proceedings as well as the decisions in respect to the suit land including the ones from the Arbitration Board, Adjudication Hearing and Appeal to the Minister, I note the Ex parte Applicant and some representatives from his family have participated in the process and were actually accorded a hearing. From the averments in the Ex parte Applicant’s Supporting Affidavit, it is evident he is mainly aggrieved with the decision from the Deputy County Commissioner and not the procedure that was adhered to, in arriving at the impugned decision.



17. In the circumstance, while associating myself with the decisions cited as well as relying on the legal provisions I have quoted, I find that the Ex parte Applicant was indeed accorded an audience during the hearing of the Appeal to the Minister. Further, I find that no rules of natural justice were violated by the 1<sup>st</sup> Respondent as claimed by the Ex parte Applicant. I opine that the Ex parte Applicant in his Statement of Facts and Verifying Affidavit has failed to demonstrate that there was procedural impropriety, unfairness or bias during the hearing of the aforementioned Appeal. To my mind, the Ex parte Applicant sought for the court to analyse the merits of the Deputy County Commissioner decision on Appeal but this is not permissible within a Judicial Review process. In line with my analysis above, I find that there was procedural fairness in the hearing of the Appeal by the Deputy County Commissioner who acted in accordance with his legal mandate.
18. In the foregoing, I hold that the prayers for Prohibition and Certiorari sought cannot issue at this juncture. I further find the instant Notice of Motion Application unmerited and will proceed to dismiss it with costs to the Interested Party.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

