



Republic v Deputy County Commissioner, Kilungu Sub-County & 4 others; Sumuni (Exparte Applicant); Muindi & another (Interested Parties) (Environment and Land Judicial Review Miscellaneous Application E012 of 2022) [2024] KEELC 799 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E012 OF 2022**

TW MURIGI, J

FEBRUARY 14, 2024

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER, KILUNGU SUB-COUNTY 1ST
RESPONDENT**

**LAND ADJUDICATION AND SETTLEMENT OFFICER, MAKUENI
DISTRICT 2ND RESPONDENT**

LAND REGISTRAR, MAKUENI COUNTY 3RD RESPONDENT

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 4TH
RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

AND

BENJAMIN MBITHI SUMUNI EXPARTE APPLICANT

AND

JONES MUTHENYA MUINDI INTERESTED PARTY

FAUSTI MUTHIANI MOTE INTERESTED PARTY



JUDGMENT

1. By a Notice of Motion dated 24th September, 2022 the Ex-parte Applicant herein Benjamin Mbithi Sumuni seeks the following orders: -
 - i. That an order of certiorari do issue to remove into this Honourable Court and quash the decision of the 1st Respondent in an Appeal to the Minister Case No. 442 of 2021 delivered on 22/06/2022 over Land Parcel Nos. 1840, 1873 and 1874 Kyamuoso Adjudication Section.
 - ii. That an order of mandamus do issue to the Director of Land Adjudication and Settlement and the Land Registrar Makueni Land Registry to follow the decisions of the Objection Board in terms of the provisions of Section 142 and 143 of the Registered *Land Act* (repealed) and Sections 79 and 80 of *Land Registration Act*, 2012 and rectify the register of Land Reference Nos. 1840, 1873 and 1874 Kyamuoso Adjudication Section and enter the name of the Applicant Benjamin Mbithi Sumuni as the proprietor of the same.
 - iii. That costs of this application and the Chamber Summons herein previously filed be awarded to the Ex-parte Applicant.
2. The application is premised on the grounds appearing on its face and on the Statutory Statement together with the supporting affidavit of Benjamin Mbithi Sumuni sworn even date.

The Ex Parte Applicant's Case

3. The Applicant averred that sometime in the year 2007, Kyamuoso was declared an adjudication area. He further averred that he presented his claim of ownership over Plots Nos. 1840, 1873 and 1874 against the Interested Parties before the Committee which heard the dispute and subsequently awarded him the said plots.
4. That being aggrieved with the decision, the Interested Parties filed an appeal to the Arbitration Board which in its finding set aside the Committee's decision.
5. That aggrieved by the decision, he lodged an objection to the Land Adjudication Officer and that vide the decision dated 11th January, 2021, the decision by the Board was set aside.
6. That being aggrieved by the decision of the Land Adjudication Officer, the Interested Parties filed an Appeal to the Minister on 4th August, 2021. He contended that the Appeal to the Minister was lodged out of the stipulated time frame and that the Interested Parties did not seek leave to lodge the said appeal out of time.
7. He asserted that the proceedings and judgment of the 1st Respondent in Appeal Case No. 442 of 2021 are irregular and in excess of the 1st Respondent's jurisdiction and as such, the decision ought to be quashed.
8. The Applicant contended that the objection proceedings and the judgment of the Land Adjudication Officer ought to be implemented as the same are valid and remain unchallenged.

The Respondents Case

9. In opposing the application, the Respondents filed grounds of opposition dated 9th November, 2022 and cited the following grounds:-



1. That the Ex-parte Applicant participated in the Appeal proceedings.
 2. That the Ex-parte Applicant waived his rights when he participated in the appeal proceedings without raising any objection.
 3. That the suit herein is frivolous, vexatious and a waste of judicial time.
10. On the basis of the above, the Respondents urged the court to dismiss the application with costs.

The 1st and 2nd Interested Parties Case

11. The 1st and 2nd Interested Parties filed a joint replying affidavit dated 17th October, 2023 in opposition to the application. They averred that the parties in Appeal to the Minister Case No. 442 of 2021 were heard on merits and that the final decision was subsequently delivered on 22/6/2022.
12. They further averred that they appealed to the Minister within the time stipulated by the law. They attached a copy of the payment receipts dated 15/1/2021 as Exhibit "JMM2".
13. They further averred that the documents attached to the instant application do not contain any material that would make this court to arrive at a different finding. They urged the Court to dismiss application with costs

The 3rd Interested Party's Case

14. In opposing the application, the 3rd Interested Party filed a replying dated 11th January, 2023. He averred that the present application is an afterthought since the Ex-parte Applicant did not raise the issue of the appeal being time-barred before the Minister. He argued that the application herein is an abuse of the court process and urged the court to dismiss the same with costs.

The Response

15. In a supplementary affidavit dated 23/1/2023, the Ex Parte Applicant averred that he participated in the proceedings before the 1st Respondent by dint of summons, a copy of appeal and grounds of appeal lodged by the Interested Parties and served upon him. He argued that the 1st Respondent ought to have known the extent of his jurisdiction before hearing and determining the appeal.
16. He further averred that his participation in the appeal cannot cure the proceedings and the decision that was made by the 1st Respondent's in excess of his statutory powers. He stated that the Respondents had admitted that the Appeal to the Minister was admitted, heard and determined out of time. He insisted that the present application is merited and that it is in the interest of justice that the same be allowed as prayed.
17. In response to the 3rd Interested Party's replying affidavit, the Ex-parte Applicant filed a supplementary affidavit dated 23/1/2023. He averred that the 3rd Interested Party's replying affidavit is incurably defective as the same is not commissioned as required and hence the same should be struck out.
18. The application was canvassed by way of written submissions.

The Ex Parte Applicant's Submissions

19. The Ex-parte Applicant's submissions were filed on 20/2/2023. On his behalf, Counsel outlined the following issues for the court's determination:-
 - i) Whether the 1st Respondent acted ultra vires; and



- ii) Whether the Ex-parte Applicant is entitled to the relief sought.
20. On the first issue, Counsel submitted that the right of appeal was explained to the parties when the decision of the Land Adjudication Officer was made on 11/01/2021. Counsel submitted that Section 29 of the [Land Adjudication Act](#) provides for the time frame within which an appeal to the Minister should be lodged. It was further submitted that the Interested Parties lodged an appeal to the 1st Respondent on 4/8/2021. Counsel argued that the Ex-parte Applicant's participation in the Appeal to the Minister cannot oust the provisions of the law.
 21. Counsel argued that the 1st Respondent's powers emanate from Section 29 of the [Land Adjudication Act](#). That by purporting to hear the appeal outside the statutory time frame amounts to acting in excess of his powers.
 22. Counsel argued that Ex-parte Applicant is not challenging the decision of the Minister but the decision-making process. Counsel submitted that the application has met the threshold for the grant of judicial review orders of certiorari and mandamus as set out in Section 7 (2) of the [Fair Administrative Action Act](#) and urged the Court to allow the application with costs.
 23. To buttress his submissions, relied on the case of Republic v Cabinet Secretary Ministry of Lands & Physical Planning & 3 others Ex parte Applicant: John Mbiri Njagi; Joseph Kaguura Mbugi (Interested Party) [2021] eKLR.

The Respondents Submissions

24. The Respondents submissions were filed on 8/5/2023. On their behalf, Learned State Counsel Lynn Ngira, identified the following issues for the court's determination: -
 - i. Whether the appeal lodged was time barred and against rules of natural justice.
 - ii. Whether the 1st Respondent acted ultra vires in exercising his jurisdiction?
 - iii. Who is entitled to costs?
25. On the first issue, Learned State Counsel submitted that failure to lodge the appeal within the 60-day timeline is not fatal to the proceedings nor should it bar an appeal body to hear and determine an appeal. It was submitted that the Ex-parte Applicant ought to have raised the objection before the Minister at the earliest opportunity, if at all the appeal was time barred. It was further submitted that the Ex-parte Applicant ought to have shown how he was prejudiced instead of raising the issue after the appeal has been heard and concluded.
26. Learned State Counsel further submitted that the Ex-parte Applicant has failed to adduce evidence to show that the appeal was filed out of time. Concluding her submissions, Learned State Counsel urged the court to dismiss the application with costs.
27. On the second issue, Learned State Counsel submitted that the Appeal to the Minister was heard on merits.

Learned State Counsel contended that the Ex-parte Applicant had not proved that the proceedings and the decision of the 1st Respondent violated the rules of natural justice or that the decision was contrary to the evidence adduced. State Counsel argued that the Respondents' actions did not amount to a jurisdictional error or an act in ultra vires.
28. To buttress this point, Learned State Counsel cited the case of Watuku Mutsiemi & another v Republic & 5 others [2018] eKLR.



29. On the issue of costs, Learned State Counsel submitted that costs should follow the event. It was argued that since the Ex-parte Applicant has failed to demonstrate any cause of action against the Respondents, the application should be dismissed with costs.
30. None of the authorities cited were availed for the court's perusal.

The 3rd Interested Party's Submissions

31. The 3rd Interested Party filed his submissions on 17/2/2023. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the appeal before the minister was time barred:-
 - ii. Whether the Applicant has demonstrated a case for the issuance of judicial review orders; and
 - iii. Who bears the costs of the application.
32. On the first issue, Counsel submitted that the Ex-parte Applicant did not produce any receipt to show whether or not the memorandum of appeal was filed out of time. Counsel argued that the Ex-parte Applicant did not raise the objection to the Minister's jurisdiction that the Appeal was time barred nor demonstrate that he had suffered any prejudice.
33. On the second issue, Counsel submitted that the Ex-parte Applicant is aggrieved with the merits of the decision and not with the process in arriving at the decision. Counsel further submitted that the Ex-parte Applicant is not entitled to the orders sought since he has not demonstrated any grounds for judicial review.
34. On the issue of costs, Counsel submitted that the Ex-parte Applicant has not demonstrated merit in the application and as such the application ought to be dismissed with costs to the 3rd Interested Party. To buttress his submissions, Counsel relied on the following authorities:-
 1. Republic v Deputy County Commissioner Kitui West Sub County & Another; Mukinya Muvevi & Another (Interested Parties) Ex Parte Justus Mwendwa Liku.
 2. Republic v Cabinet Secretary for Lands and Physical Planning & 2 Others; Eustace Kariuki Mwatthi & Another (Interested Parties)) (2020) eKLR.

Analysis and Determination

35. Having considered the application, the respective affidavits, the grounds of opposition and the rival submissions, the following issues arise for determination: -
 - i) Whether the 1st Respondent acted ultra vires or in excess of her jurisdiction?
 - ii) Whether the Ex-parte Applicant is entitled to the orders sought?

Whether the 1st respondent acted ultra vires or in excess of her jurisdiction

36. The Principles of Judicial Review were laid down by Lord Diplock in the case of Council of Civil Service Union & Others Vs the Minister for Civil Service [1985] AC 374 where the Judge held that;

“Judicial review has, I think developed to a stage today when one can conveniently classify into 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 unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or 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 as “procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

37. The Applicant averred that the 1st Respondent acted in excess of her jurisdiction because she admitted and heard an appeal that was filed out of time.

38. At this juncture, this court is called upon to determine whether appeal to the Minister Case No 442 of 2021 was filed out of the stipulated timeframe which in my view is the main issue for determination in the proceedings herein.

39. The *Land Adjudication Act* deals with all matters pertaining to adjudication. In its preamble it states that;

“It is an Act of Parliament to provide for the ascertainment and recording of rights and interest in Trust Land, and for purposes connected therewith and purposes incidental thereto.”

40. Section 29(1) of the *Land Adjudication Act* provides as follows: -

- (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.

41. It is clear from the above provision that any person aggrieved by the determination of an objection under Section 26 of the Act may file an appeal to the Minister within 60 days from the date of the decision.

42. The record shows that the Appeal Case No. 442 of 2021 emanated from an Objection that was raised by the Applicant in respect of land parcels 1840, 1873 and 1874 Kyamuso Adjudication Section. The Applicant produced the Land Adjudication Officer’s decision dated 11/01/2021 as Exhibit “BMS3”.

43. The objection was heard by the Land Adjudication Officer who in his findings stated as follows:-

“Objection 102, 103 and 104 are all allowed. Objection 101 is dismissed. Plot No.3488 to remain recorded in the names of Kamanthe Nuvi. Right of appeal is explained to all parties and is valid for sixty days from this date.”

44. Being aggrieved by the decision, the Interested Parties filed an Appeal to the Minister which is the heart of the proceedings herein. The Appeal was determined on 22/06/2021 in favour of the Interested Parties herein.



45. The Ex Parte Applicant contended that the Appeal was filed out of the 60 days stipulated by the [Land Adjudication Act](#) because the decision in the objection proceedings was delivered on 11/01/2021 whereas the Appeal to the Minister was filed on 4/08/2021.
46. In this regard, he produced the appeal form and the grounds in support of the appeal as exhibit “BMS4” which indicates that the said appeal and grounds in support thereof were endorsed with the District Land Adjudication and Settlement Officer’s official stamp and signature on 04/08/2021.
47. Under paragraph 7 of their joint replying affidavit, the 1st and 2nd Interested Parties argued that the appeal was filed within the statutory 60-days’ limitation period. In this regard, they produced a payment receipt dated 15/01/2021 as exhibit “JMM2”. There is no evidence that Interested parties filed an appeal before the Minister within 60 days.
48. A payment receipt is not an appeal within the meaning of Section 29 of the [Land Adjudication Act](#) which provides that the Appeal must be in writing specifying the grounds of Appeal.
49. Going by the provisions of Section 29 above, the 1st Respondent could only hear and determine an appeal lodged within 60 days. The form and grounds of appeal clearly indicates that they were filed on 4/8/2021 about two hundred and four days after delivery of the Land Adjudication Officer’s decision. There is no evidence that the appeal to the Minister was filed within sixty days as stipulated by the law. Similarly, no evidence was adduced to show that the Interested Parties sought leave to file the appeal out of time.
50. In Republic v Ministry of Lands and Settlement & 3 others Ex parte Kahareri Buri Karugu; Efireith Irima Mugo (Interested Party/Applicant) [2019] eKLR, when faced with a similar dilemma the court aptly observed as follows:-

“It is evident that Section 29 specifies the manner in which the appeal to the Minister is to be lodged. The appeal must be in writing and must specify the grounds of appeal. Neither the certificate of payment of appeal and tracing fees nor receipt No. AL 641922 dated 18.09.1989 indicates any grounds of appeal within the intendment of the law. The Interested Party must have construed them as such and that is why a proper appeal dated 5.04.1999 was lodged with the Minister on 5.04.1999 enumerating six (6) grounds of appeal. That appeal was filed specifically pursuant to Section 29 of the [Land Adjudication Act](#).

The court, therefore, does not accept the Interested party’s submission that the appeal was filed within time. The evidence on record demonstrates that the appeal was filed on 5.04.1999 several months after the decision of the Land Adjudication Officer...

The upshot of the foregoing is that despite the Interested Party having joined the proceedings and tendered some evidence on the appeal in question, the court still finds that the appeal was filed out of time. The appeal was statute-barred hence the Minister had no jurisdiction to entertain it.”

51. The court in the case of Kahareri Buri Karugu (supra) noted that a payment receipt does not constitute a valid appeal before the minister because it neither specifies the grounds in support of the appeal nor does it indicate that a copy thereof was duly sent to and received by the Director of Land Adjudication and Settlement. A payment receipt is therefore incompliant with Section 29 (1) of the [Land Adjudication Act](#).



52. Under Section 29 (1) of the *Land Adjudication Act*, the appeal to the Minister ought to have been filed within sixty days specifying the grounds of appeal in writing. The sixty days statutory limitation was bound to expire on or about 11/03/2021. The appeal to the Minister was clearly filed outside the statutory timelines under the *Land Adjudication Act*. The Minister entertained an appeal that was time barred and by doing so, he acted illegally and unprocedurally.
53. The purpose of judicial review is not to review the decision but the decision making process. In the case of *Municipal Council of Mombasa Vs and Umoja Consultants Ltd Civil Appeal No. 185 of 2001* the Court 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.....”
54. Further, in the case of *Republic Vs. Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eKLR*, the Court of Appeal held that;
- “The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected....”
55. More recently, the court weighed in on the need for compliance with the express provisions of Section 29 of the *Land Adjudication Act*. In *Kimwele Kithoka & 26 others v Deputy County Commissioner Kyuso Sub-County & 7 others [2022] eKLR* the court held as follows:-
- “Section 29 of the *Land Adjudication Act* is clear on how an appeal to the Minister ought to be filed: by delivering to the Minister an appeal in writing specifying the grounds of appeal and sending a copy of the appeal to the Director of Land Adjudication. As correctly stated by the Petitioners, the 7th Respondent ought to have exhibited the written grounds of appeal or memorandum of appeal as proof that the appeals were filed within the statutory window, which he has failed to do. Having failed to provide a copy of the memorandum of appeal which will have shown when the same was filed, or a receipt clearly showing the date the said memorandum of appeal was filed, it is my finding that the 7th Respondent has failed to show that indeed he filed appeal numbers 89 and 90 of 2013 with the requisite 60 days.” [Emphasis mine]
56. Based on the above authorities, it is crystal clear that the purpose of judicial review is to check that public bodies or persons holding authority and exercising such functions do not exceed their jurisdiction and carrying out their duties within the limits defined by the law.
57. Based on the evidence presented before me, it is evident that the 1st Respondent heard and determined Appeal Case No. 442/2021 which was time-barred and thus in excess of the jurisdiction granted under Section 29 (1) of the *Land Adjudication Act*.



58. On the second issue, the Ex Parte Applicant averred that the Interested parties having failed to pursue their appeal within the prescribed statutory limitation period, their right to lay a claim over the suit properties was extinguished and thus he is entitled to the orders of certiorari and mandamus as sought in the application in herein.
59. After a scrutiny of the evidence that has been adduced in support of the instant case and in opposition, it is crystal clear that the 1st Respondent's proceedings in Appeal to the Minister Case No. 442/2021 were conducted in excess of jurisdiction. I find that the Ex Parte Applicant has demonstrated merit in the application in so far as the 1st Respondent exceeded his jurisdiction as conferred under section 29 of the *Land Adjudication Act*.
60. The upshot of the foregoing is that the application is allowed to the extent that the 1st Respondent acted in excess of her jurisdiction in entertaining an appeal that was filed out of time.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF FEBRUARY, 2024.

IN THE PRESENCE OF:

