Mulwa & another v Deputy County Commissioner Kilungu & 2 others; Mbwiki & another (Interested Parties) (Environment and Land Judicial Review Case E002 of 2023) [2025] KEELC 3968 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3968 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023

EO OBAGA, J

MAY 22, 2025

BETWEEN

NTHAMBI MULWA ..... 1ST APPLICANT

GEORGE NTHINZI MULWA ..... 2ND APPLICANT

AND

DEPUTY COUNTY COMMISSIONER KILUNGU ..... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT (MAKUENI COUNTY ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

PETER NZEKELE MBWIKI ..... INTERESTED PARTY

MUSYIMI NZEKELE ..... INTERESTED PARTY

JUDGMENT

1. The Applicants filed the Motion dated 26th October, 2023 under the provisions of Article 23 (3) (f) of *the Constitution* in addition to Order 53 Rule 3 (1) of the Civil Procedure Rules. The Ex-parte Applicant seeks the following orders:-

    1. That an order of certiorari do issue to remove into the High Court and quash the judgment and order made by the Deputy County Commissioner, Kilungu Sub-County, Makueni County in Ministers Appeal Case No. 149 of 2021 delivered on 8th June, 2023 between the Applicants and the Interested parties herein.

2. That an order of prohibition directed at the Deputy County Commissioner Kilungu Sub-County, Makueni County do issue prohibiting the Deputy County Commissioner and the Respondents from acting on the said judgment and the decision made on 8th June, 2023 from entering, interfering, trespassing, evicting and/or carrying out any acts whatsoever on Plot No. 4599 Kalongo Adjudication Section.

3. That an order of mandamus be issued compelling the Commissioner of Lands through the Minister of Lands and Settlement to issue Title Deed in respect to parcel no. 4599 Kalongo Adjudication Section to the Applicants herein.

4. That costs of this application be in the cause.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the 2nd Applicant sworn on 26th October, 2023 and the statutory statement of even date. The deponent averred that he is the son of the 1st Applicant. He contended that vide the letter dated 24th May, 2023, the parties were invited by the 1st Respondent for hearing of the Appeal Case No. 149 of 2012 with regards to Plot No. 4599 Kalongo Adjudication Section.

3. The Applicant averred that on 8th June, 2023 during the hearing of the appeal before the 1st Respondent, the Appellant did not produce any documents in support of his case. On the other hand, the Applicant contended that his supporting documents were not retained by the 1st Respondent yet he had them during the hearing.

4. He added that after conclusion of the hearing, the parties were advised that they would be called for delivery of the judgment but the Applicant only came to learn that the judgment was delivered on the same date of the hearing without his knowledge.

5. The Applicant lamented that the 1st Respondent failed to take his documentary evidence and also failed to appreciate that the suit property has never been the subject of dispute yet the land was awarded to the Interested Parties. It was further contended that the 1st Respondent acted ultra vires by considering matters that were not in dispute and failed to investigate what was actually in dispute.

6. The Applicant averred that if the 1st Respondent's decision is implemented, the Applicants and their family will be evicted from their own land where they have been settled since time immemorial.

7. The application was opposed by the Respondents through grounds of opposition dated 10th June, 2024. State Counsel contended as follows: -

1. That the application herein is totally groundless, speculative, full of misleading and uncorroborated allegations meant to hoodwink the Honourable Court into believing the Respondents acted ultra vires their mandate.

2. That the application herein is bad in law, incompetent, incurably defective and a waste of the court's judicial time.

3. That the orders sought in the application are misleading and misconceived and therefore incapable of being granted by this Honourable Court.

4. That the application lacks merit and ought to be dismissed with costs.

8. Parties agreed to canvass the application by way of written submissions.

9. In the Applicant's submissions dated 18th February, 2025, Counsel contended that by disregarding the Applicant's documentary evidence during the hearing of the appeal, the 1st Respondent denied

the Applicants a fair hearing. Counsel further contended that there were procedural flaws during the hearing and that the 1st Respondent acted in an arbitral and selective manner by delivering the ruling on the same date in the absence of the Applicants.

10. Urging the court to allow the application as prayed, Counsel placed reliance on the following case law: -

    i. Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR)

    ii. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR

11. On behalf of the Respondents, learned State Counsel contended that the Ex-parte Applicants had failed to demonstrate how the Respondents acted ultra vires. It was added that they had also failed to prove illegality, irrationality and impropriety and that the prayers that have been sought are an invitation to the court to consider the merits of the case rather than the process.

12. State Counsel contended that the Applicants are questioning the decision and not the manner in which the same was reached. It was further contended that the Ex-parte Applicants were accorded a fair hearing by the Respondents and therefore the decision that was made should not be interfered with. State Counsel submitted that the application herein is devoid of merit and should be dismissed with costs.

13. The Interested Parties did not file a replying affidavit. However, they filed their submissions dated 23rd April, 2025 opposing the instant application.

14. The apparent issues for determination are whether the 1st Respondent accorded the Ex-parte Applicants a fair hearing and whether she acted ultra vires when making the decision dated 8th June, 2023.

15. Black's Law Dictionary 9th Edition page 789 defines a fair hearing as follows:-

> " A judicial or administrative hearing conducted in accordance with due process."

16. From the evidence that was presented, Exhibit "GNM2" shows that the Ex-parte Applicants were invited for the hearing of the Appeal Case No. 149 of 2012. It is also evident that the 1st Ex-parte Applicant gave evidence in respect of the dispute concerning the suit property. All the parties were heard, their witnesses cross-examined and a decision delivered. That is what entails due process.

17. As Grace. W. Ngenye J. (as she then was) observed in Republic v Public Service Commission of Kenya & 4 others [2014] eKLR: -

> " As "audi alteram partem" rule is concerned with the manner a decision is taken as opposed to whether the decision is correct, it cannot be underrated that whoever is accused of an illegality must be given an opportunity to defend himself/herself before a final decision is taken. But another question arises; what is the threshold of audi alteram partem rule?
>
> In Simon Gakuo -vs- Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009 (UR), the court said:-
>
> > "The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per Section 77 of *the Constitution*. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally

fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc." (See also Odunga J. in Peris Wambogo Nyaga V. Kenyatta University [2014] eKLR)"

18. Similarly, the Court of Appeal in Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR aptly held as follows: -

> " The thrust of Dr Kuria's submissions was that the internal disciplinary procedures of the appellant should have involved an oral hearing of the respondent either by the Staff Committee or the Board being the appellate body or both. However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.
>
> In the case of Local Government Board vs Arlidge [1915] A.C. 120, 132-133, SELVARAJAN vs Race Relations Board [1975] I WLR 1686, 1694, and in R vs Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481 it was held:-
>
> > "the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing."
> >
> > .....
> >
> > Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ...""

19. On a balance of probabilities, it is impossible to come to the conclusion that the Ex-parte Applicants were denied a fair hearing as due process was indeed followed.

20. On whether the 1st Respondent acted ultra vires, the Court in Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others (Petition 42 & 27 of 2014 (Consolidated)) [2021] KEELRC 2306 (KLR) had the occasion to express itself on what amounts to an ultra vires act. The three-judge bench stated as follows: -

> " 72. An act is ultra vires when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles renders the decision made laced with illegality. See Republic v Secretary of the Firearms Licensing Board & 2 others ex -parte: Senator Johnson Muthama [2018] eKLR. In the case of Pastoli v Kabale District Local Government Council & others, (2008) 2 EA 300 the court held that;

> 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."

21. It is not in doubt that the 1st Respondent had the power to hear and determine the Appeal Case No. 149 of 2012 in accordance with Section 29 of the *Land Adjudication Act*. That being said, it is observable from a perusal of the impugned decision dated 8th June, 2023 and the proceedings therein that the Ex-parte Applicant was accorded the opportunity to defend his case.

22. In Municipal Council of Mombasa v Republic & another [2002] eKLR, the Court held as follows: -

> "Judicial review is concerned with the decision-making process, not with merits of the decision itself... 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 court 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 was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

23. After a scrutiny of the 1st Respondent's decision, it is clear that due process was accorded to both the Ex-parte Applicants and the Interested Parties. The Ex-parte Applicant herein was allowed to call witnesses and both sides were thoroughly cross-examined. There is no proof of illegality in the proceedings or that the 1st Respondent relied on irrelevant considerations. The instant application constitutes an appeal on the merits of the 1st Respondent's decision and these are not the proper proceedings for such a challenge.

24. In the end, the application is devoid of merit. It is dismissed with costs.

.....

HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MAY, 2025.

In the presence of:

Ms. Mutuku for Exparte Applicant.

Mr. Namaswa for Ms. Mumo for Respondent.

Court assistant – Steve Musyoki