



Republic v Attorney General & 2 others; Maingi Family (Interested Party); Nzioka (Legal Representative of the Estate of David Nzioka Mbai – Deceased) (Exparte Applicant) (Judicial Review 40 of 2020) [2024] KEELC 1273 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW 40 OF 2020
A NYUKURI, J
MARCH 6, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

**THE DEPUTY COUNTY COMMISSIONER MACHAKOS SUB-COUNTY,
MACHAKOS COUNTY 2ND RESPONDENT**

**KATELEMBO ATHIANI MUPUTI FARMING RANCHING CO-OPERATIVE
SOCIETY LIMITED 3RD RESPONDENT**

AND

THE MAINGI FAMILY INTERESTED PARTY

AND

**RACHAEL KAILU NZIOKA (LEGAL REPRESENTATIVE OF THE ESTATE OF
DAVID NZIOKA MBAI – DECEASED) EXPARTE APPLICANT**

JUDGMENT

Introduction

1. Pursuant to leave to apply for judicial review orders of prohibition, certiorari and mandamus, issued by this court on 26th October 2020, the exparte applicant herein filed a substantive motion dated 4th November 2020 seeking the following orders;

- a. That this Honourable Court be pleased to issue an order of certiorari to remove to this court and quash the decision of the Machakos Sub County Security Committee as expressed in the



Deputy Sub County Commissioner's letter dated 27th August 2020 instructing Katelembo Athiani Muputi Farming Ranching Cooperative Society Limited to transfer Plot Nos 3482, 3483 and 3484 in its register from David Nzioka Mbai to the Maingi family.

- b. That an order of prohibition be issued against Katelembo Athinai Muputi Farming Ranching Co-operative Society Limited, the 3rd interested party, barring her from implementing the decision of the Deputy County Commissioner communicated in his letter dated 27/8/2020 or in any other way tempering with the register in respect of plot Nos. 3482, 3883 and 3484 or in any other way dealing with the said plots.
 - c. That the costs of this application be borne by the respondent and the interested parties.
 - d. Such further and other reliefs as this Honourable Court may deem fit and just and expedient to grant.
2. The application is anchored on the grounds set out in the statutory statement and the verifying affidavit sworn on 17th November 2020 by Rachael Kailu Nzioka, the exparte applicant. The applicant's case is that she is the administrator of the estate of her deceased husband the late David Nzioka Mbai (deceased). She stated that the deceased was the lawful owner of land Parcels Numbers 3482, 3483 and 3484 Katelembo Athiani Muputi Farming Ranching Cooperative Society Limited (suit property) as demonstrated in the 3rd respondent's records. She stated that without any lawful powers, the 2nd respondent acted ultra vires the powers given to him under the National Government Co-ordination Act No. 1 of 2013, by purporting to have heard a dispute regarding ownership of the suit property and thereby issued a letter dated 27th August 2020 wherein he ruled that the suit property should be transferred by the 3rd respondent to form the estate of David Nzioka Mbai.
 3. She stated that the 2nd respondent and the Office of the President have no power to hear and determine disputes as that power is only vested exclusively in the Judiciary and Tribunals established under the Constitution and Statutes.
 4. She averred that the 3rd respondent is a cooperative society registered under the Cooperative Societies Act Cap 490 Laws of Kenya and that its dispute resolution organ is the Cooperative Tribunal. She stated further that the 2nd respondent is not a member of the Cooperatives Tribunal and that therefore has no power to hear and determine disputes. She maintained that as the suit property is registered under the Land Registration Act, any dispute over the same is beyond the powers of the Deputy County Commissioner. She attached a copy of a confirmed grant issued to her; a letter from the 2nd respondent dated 25th September 2020; and a letter/decision dated 27th August 2020 from the 2nd respondent.
 5. The application is opposed. Bernard Kimatu Maingi, the 1st interested party swore a replying affidavit dated 17th March 2021 in opposition to the application herein. His case was that he was the son of the late Maingi Wathome Nguta and the late Esther Ngwinya Maingi who died on 16th December 2002 and 18th December 1992 respectively.
 6. He further averred that his late parents had been members of the 3rd respondent by virtue of their membership numbers 1253 and 2118 respectively, and that by virtue of their membership, they were allocated the suit properties. That when he followed up on the ownership of the suit property, he realized that it had been transferred to the late David N. Mbai on 30th December 2003, that is after his parents' death. That there is no record showing his parents sold the suit properties to the deceased.
 7. According to the 1st interested party, he raised the above issue with the management committee of the 3rd respondent and that when he got no response, he raised it with the 2nd respondent. He maintained



that before the 2nd respondent made the decision communicated in his letter of 27th August 2020, the 3rd respondent was already seized of the matter.

8. The 1st interested party stated that he appeared before the management of the committee of the 3rd respondent and that upon listening to his complaint, the committee confirmed that their former officials transferred the suit properties to the deceased wrongly and irregularly as it belongs to the interested party's parents. He took the position that the 3rd respondent who is the custodian of the register of members and records of plots has the mandate to correct any records found to have wrong entries. He stated that the decision of the 3rd respondent was an independent decision made on merit and not on the letter of the 2nd respondent. He argued that succession cannot confer ownership of property where title is tainted with illegality and that the application is an abuse of the court process.
9. The 3rd respondent also opposed the application herein. Wilson Masila Muema, the chairman of the management committee of the 3rd respondent swore a replying affidavit dated 18th March 2021. He stated that the decision of the 3rd respondent communicated through the letter dated 25th September 2021 was an independent decision informed by the records held by the 3rd respondent. He stated that the transfer register showed that the suit properties were transferred on 30th December 2003 when the owners thereof were deceased and that there are no supporting documents for the transfer done to David Nzioka Mbai.
10. He stated that at the time of the transfer, the deceased David Nzioka Mbai who was the beneficiary was the chairperson of the 3rd respondent. According to the 3rd respondent, the committees established that the transfers herein were done without involving the family of the interested party, and therefore revoked the transfers. He insisted that the decision of the management committee was done in the proper exercise of their mandate. He attached a copy of the register and transfer register.
11. The 1st and 2nd respondents did not file any response to the motion despite service.
12. The application was disposed by way of written submissions. On record are the ex parte applicant's submissions filed on 21st September 2021 and the submissions filed on 13th October 2022 by the 3rd respondent and 1st interested party.

Ex parte Applicant's Submissions

13. Counsel for the ex parte applicant submitted that the 3rd respondent's record show that the deceased David Nzioka Mbai legally owns the suit property and that the 2nd respondent acted ultra vires by his decision dated 27th August 2020 directing the 3rd respondent to transfer the suit property to the interested parties.
14. It was submitted that the Deputy County Commissioner has no power to hear and determine disputes as that power is the exclusive reserve of the Judiciary and Tribunals established under *the Constitution* and Statutes. Counsel maintained that the 3rd respondent is a cooperative society and that therefore disputes arising between members ought to be determined by the Cooperative Tribunals as provided for in Section 76 of the Cooperative *Societies Act*. Counsel argued that as the 2nd respondent is not a member of the Cooperative Tribunal, his decision of 27th August 2020 lacked legal basis and was ultra vires.
15. Reliance was placed on the case of Republic v. Non-Governmental Organization Ex parte Linda Bonyo & 4 Others, Philip Opiyo Sadjah & 5 Others (Interested parties) [2020] eKLR for the proposition that judicial review is more concerned with the decision making process and not the decision itself.



16. It was submitted for the exparte applicant that under Articles 159 (1) and 161 of *the Constitution* of Kenya, it is only the courts and Tribunals that can exercise judicial authority, and that that authority is exercised without control of any person or authority other than *the Constitution* and the law. Counsel referred to Sections 4 and 13 of the *Environment and Land Court Act*, and Section 9 (a) (i) of the Magistrates Court Act and argued that land disputes ought to be heard and determined by the Environment and Land Court and Magistrates who have been conferred power to hear and determine environment and land matters. Counsel also referred to the case of Secretary for Interior & Coordination of National Government & Another v. Peter Adiele Mmegwa & Another, Nairobi J/R No. 229 of 2019 and submitted that judicial review orders are meant to avail justice to a party prejudiced by administrative justice.

3rd respondent and 1st interested party's submissions

17. Counsel for the 3rd respondent and 1st interested party submitted that two issues arise herein, namely; whether the Deputy County Commissioner had authority to write the impugned letter and whether it is binding upon the 3rd respondent.
18. Counsel argued that the impugned letter of the 2nd respondent raised valid concerns by pointing out that there was an illegality in the transfer of the suit property from the 1st interested party's parents. Counsel argued that the 2nd respondent did not purport to act as the Cooperative Tribunal and that the impugned letter was not binding on the 3rd respondent.
19. It was argued for the 3rd respondent and the 1st interested party that the 3rd respondent had shown the basis upon which they acted as demonstrated in their replying affidavit. Reliance was placed on Sections 12 and 13 of the Cooperative *Societies Act* to contend that the 3rd respondent is a body corporate and can make independent decisions. Counsel argued that the exparte applicant had failed to show that the 3rd respondent violated the Cooperative *Societies Act*.

Analysis and determination

20. I have carefully considered the application herein, the responses thereto and rival submissions filed by the parties. In my considered view, two issues arise for determination, namely;
- a. Whether the decision in the 2nd respondent's letter dated 27th August 2020 was made without jurisdiction.
 - b. Whether the applicant is entitled to the orders sought.
21. The power of the court to grant judicial review orders is donated by Article 23 (3) (f) of *the Constitution* of Kenya 2010 and Order 53 Rule (3) (1) of the Civil Procedure Rules.

Article 23 (3) (f) of *the Constitution* of Kenya provides as follows;

In any proceedings brought under Article 22, a court may grant appropriate relief, including;

- a.
- b.
- c.
- d.
- e.



f. An order of judicial review.

Order 53 Rule 3 (1) of the Civil Procedure Rules provides;

When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

22. The remedy of judicial review is mainly concerned with the decision making process and not the merits of the decision. In an application for judicial review, the court focuses on the process applied in arriving at the decision and therefore interrogates matters including the legality; rationality; procedural propriety of the decision; and whether the decision maker had the jurisdiction to make the decision.

23. In the case of *Pastoli v. Kabale District Local Government Council & Others* [2008] 2 EA 300, the court held as follows;

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 a law or its principles are instances of illegality.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 a 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 a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

24. Similarly, in the case of *Municipal Council of Mombasa v. Republic & Umoja Consultants Civil Appeal No. 185 of 201*, the court held as follows;

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 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 mattersthe 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.

25. In the instant case, the applicant's complaint is that the Deputy County Commissioner is neither a court or tribunal and cannot therefore determine or resolve a dispute, hence his decision was without jurisdiction thus ultra vires.

26. On the other hand, the 3rd respondent and 1st interested party contended that the decision to transfer the suit properties to the interested parties was done independently by the 3rd respondent and not pursuant to the impugned letter of the 2nd respondent.

27. The sovereign power which includes the power to resolve disputes including judicial authority, belongs to the people of Kenya. Article 1 of *the Constitution* of Kenya provides on sovereignty of the people as follows;



1. All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
 2. The people may exercise their sovereign power either directly or through their democratically elected representation.
 3. Sovereign power under this Constitution is delegated to the following state organs, which shall perform to functions in accordance with this Constitution –
 - a. Parliament and the legislative assemblies in the County Government.
 - b. The national executive and the executive structures in the County Governments; and
 - c. The judiciary and independent tribunals.
 4. The sovereign power of the people is exercised at –
 - a. the national level; and
 - b. the county level.
28. Judicial authority is delegated authority from the people of Kenya and is therefore exercised by courts and tribunals on behalf of the people. Article 159(1) and (2) of *the Constitution* of Kenya 2010 provides as follows;
- 159 Judicial authority
1. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and Tribunals established by or under this Constitution.
 2. In exercising judicial authority the courts and tribunals shall be guided by the following principles –
 - a.
 - b.
 - c. Alternative forms of dispute resolution including reconciliation mediation, arbitration and tradition dispute resolution mechanisms shall be promoted, subject to clause.
 3. traditional dispute resolution mechanisms shall not be used in a way that –
 - a. contravenes the bill of rights;
 - b. is repayment to justice and morality or results in outcomes that are regnant to justice or morality; or
 - c. is inconsistent with this Constitution or any written law.
29. Therefore while judicial authority exercised by courts and tribunals is only one among many other mechanisms of dispute resolution, it is clear that under *the Constitution*, dispute resolution is not an exclusive preserve of courts and tribunals. Other dispute resolution mechanisms are done out of court and tribunals and include reconciliation, mediation, arbitration and Constitutionally compliant traditional dispute resolution mechanisms.
30. Besides, as judicial authority is delegated authority from the people of Kenya, that authority can be exercised by the courts and tribunals or by the people themselves in the exercise of their sovereign power through alternative dispute resolution mechanisms including reconciliation, mediation, arbitration



and traditional dispute resolution mechanisms. This is because all sovereign power emanates from the people. It is therefore clear that for a person, authority, body, court or tribunal to assume jurisdiction or power or legal authority to resolve any dispute such power can only be derived from *the Constitution*, statute, any other law or the disputants to the dispute. Hence, disputes can lawfully be resolved within Constitutional bounds without involving courts or tribunals. And decisions emanating from bodies and persons other than the courts and tribunals, have the same weight as court/tribunal decisions, and are not inferior to the latter.

31. Therefore, the dispute herein turns on whether the Deputy County Commissioner Machakos Sub County had legal authority or jurisdiction from *the Constitution*, statute, any other law or the disputants herein, to make the decision dated 27th August 2020.
32. The dispute herein is a dispute concerning title to land. Article 162 (2) (b) of *the Constitution* of Kenya as read with Section 13 of the *Environment and Land Court Act* vests jurisdiction of determining a dispute concerning title to land in the Environment and Land Court. That jurisdiction is exercised by the said court where parties present their dispute to the court and choose not to exercise their sovereign power directly in dispute resolution by themselves, through alternative methods.
33. It is not in dispute that the 2nd respondent is not a court or a tribunal. In addition, none of the parties herein allege that the disputants herein agreed to submit their dispute to the 2nd respondent to resolve the same. Therefore, the 2nd respondent had no jurisdiction under Articles 159 (2) (c) and 162 (2) (b) of *the Constitution* to determine the dispute between the parties herein as he had no power to preside over the dispute from the law or the disputants. Although the respondent alleged that the impugned decision was an independent decision of the 2nd respondent, a reading of the letter dated 27th August 2020 by the 2nd respondent and the 3rd respondent's letter dated 25th September 2020 clearly show that the 3rd respondent merely transmitted the decision of the 2nd respondent to the 2nd interested party and said nothing else. Therefore the decision in the letter dated 27th August 2020 is the decision of the 2nd respondent and not the 3rd respondent.
34. The effect of the 2nd respondent's decision was to transfer the suit property from the deceased to the interested parties. Having found that there is no provision under *the Constitution*, statute or any other law clothing the 2nd respondent with the power to hear and determine the dispute in regard to the suit property and also having found that the parties herein had not agreed to have the dispute determined by the 2nd respondent, I find and hold that the decision by the 2nd respondent dated 27th August 2020 was made without jurisdiction and therefore the same is ultra vires.
35. The applicant sought for orders of certiorari to remove into this court and quash the 2nd respondent's impugned decision. He also sought for an order of prohibition to bar the 3rd respondent from implementing the impugned decision. A decision made without jurisdiction is a nullity in law and ought to be quashed. Therefore I am satisfied that the applicant is entitled to the orders sought.
36. On the question of who should bear the costs of this suit, the pleadings and evidence show that the exparte applicant challenged the legality of the 2nd respondent's decision on the basis of want of jurisdiction, but did not challenge the evidence of the 3rd respondent and 1st interested party, that the suit property was transferred from the 1st interested party's parents when they were already deceased and that therefore the applicant did not explain how the deceased got the suit property transferred to him. That being the case, my view is that it would be in the interest of justice that each party bears their own costs.
37. In the premises, I find and hold that the Notice of Motion dated 4th November 2020 is merited and the same is allowed in the following terms;



- a. An order of certiorari be and is hereby issued to remove into this court and quash the decision of Machakos Sub County Security Committee as expressed in the Deputy Sub County Commissioner's letter dated 27th August 2020 instructing Katelembo Athiani Muputi Farming Ranching Co-operative Society Limited to transfer Plot Numbers 3482, 3483 and 3484 in its register from David Nzioka Mbai to the Maingi family.
- b. An order of prohibition be and is hereby issued against Katelembo Athiani Muputi Farming Ranching Co-operative Society Limited, the 3rd interested party, barring them from implementing the decision of the Deputy Sub County Commissioner communicating in his letter dated 27th August 2020 or in any other way tempering with the register in respect of Plot Numbers 3482, 3483 and 3484 or in any other way dealing with the said plots.
- c. Each party shall bear their own costs.

38. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Makau holding brief for Mr. Mutia for 3rd respondent and interested party

Ms Kavita for applicant

Josephine – Court Assistant

