Republic v Deputy County Commissioner - Kilungu County (As a delegate of the Cabinet Secretary, Lands and Physical Planning) & 2 others; Mwanzau & another (Exparte Applicants); Mutiso (Interested Party) (Environment and Land Judicial Review Case E013 of 2022) [2024] KEELC 1377 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1377 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E013 OF 2022

TW MURIGI, J

MARCH 6, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER - KILUNGU COUNTY (AS A DELEGATE OF THE CABINET SECRETARY, LANDS AND PHYSICAL PLANNING) ..... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION& SETTLEMENT KENYA ..... 2ND RESPONDENT

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

AND

DANIEL MULI MWANZAU ..... EXPARTE APPLICANT

DOMINIC MUTHAMA MUTISYA ..... EXPARTE APPLICANT

AND

THOMAS MUTUKU MUTISO ..... INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 6th October, 2022 brought under Order 53 Rules 3 and 4 of the Civil Procedure Rules, 2010, Sections 8 and 9 of the *Law Reform Act*, Sections 4 and 7 of the *Fair Administrative Action Act* and Articles 40, 47, 48, 50 and 159 of *the Constitution*, and the Ex-parte Applicants herein seek the following orders: -

1. That the court do grant to the Ex-parte Applicants a judicial review order of Certiorari to bring into the Environment and Land Court and quash the decision of the Deputy County Commissioner Kilungu Sub-County sitting as the delegate of the Cabinet Secretary, Lands and Physical Planning which decision was made on 17/6/2022 allowing the Minister's Appeal No. 488 of 2022 in respect of land parcels No. 3111 and 3145 Musalala Land Adjudication Section Kilungu Sub-County, Makueni County with the resultant effect being that plot numbers 3111 and 3145 were ordered to be recorded in the name of the Interested Party and the names of the Ex-parte Applicants be deleted from the records of the Land Adjudication Register.

2. That the court do grant to the Ex-parte Applicants a judicial review order of Prohibition to prohibit the implementation of the decision of the Deputy County Commissioner Kilungu Sub-County sitting as the delegate of the Cabinet Secretary, Lands and Physical Planning in Minister's Appeal No. 488 of 2022 in respect of parcels of land no. 3111 and 3145 Musalala Land Adjudication Section Makueni by ensuring that the Director of Lands Adjudication and Settlement does not submit the decision to the Land Registrar Makueni County for implementation.

3. That the costs of this application be granted to the Ex-parte Applicants.

2. The application is premised on the grounds appearing on the Statutory Statement together with the verifying affidavit of Daniel Muli Mwanzau sworn on even date.

The Ex Parte Applicants Case

3. The deponent averred that he lodged committee case Nos.78/2019 and 80/2019 seeking to be registered as the owner of Plot No. 3111 on the grounds that Thomas Mutuku Mutiso had no right over the land. That the Committee dismissed the cases and ordered that the parcels to remain recorded in the names of Thomas Mutuku Mutiso. That being aggrieved, the 2nd Ex-parte Applicant lodged an Objection to the Land Adjudication Officer who in his decision ordered that land Parcel Nos. 3111 and 3145 be registered in their names. He further averred that the Land Adjudication Officer observed that the clan had been unfair to the 1st Ex-parte Applicant in failing to consider that he had not been allocated land at Kivani Area where the family of the Interested Party had large parcels of land.

4. That being aggrieved with the decision of the Land Adjudication Officer, the Interested Party appealed to the Minister vide Appeal No. 488 of 2022. It is the Applicants case that the proceedings before the Minister were marred with errors which render them incapable of being understood so as to arrive at a sound decision.

5. The deponent averred that the said errors entail the following: -

   i. There is a misrepresentation of the parties and their respective capacities on record.

   ii. There is a total mix-up of the recording of the evidence such that an opposing party is deemed to give evidence for the other.

   iii. The order of recording the evidence of the parties is in a mumbo-jumbo style rendering the proceedings highly suspect.

6. He further averred that the findings of the Minister are based on evidence that was not adduced by the parties in the proceedings rendering the outcome of the Appeal illogical and illegal hence the application for judicial review.

The Respondents Case

7. The Respondents opposed the application through the replying affidavit of Philemon Kibet Mutai, the Principal Land Adjudication and Settlement Officer, Makueni County.

8. He averred that after the Minister's Appeal Case No. 488 of 2022 was lodged, the 1st Respondent duly summoned the parties for the hearing of the case. That all the parties were accorded a fair hearing together with their witnesses and that they actively participated as evidenced by the proceedings annexed as Exhibit DMM5. He stated that the 1st Respondent recorded all the evidence in verbatim and gave reasons for the decision.

9. He further averred that no evidence was adduced to demonstrate that the 1st Respondent violated the rules of natural justice. According to him, the application herein offends the provisions of Section 29 of the *Land Adjudication Act* as it seeks to appeal against the merits of the decision of the 1st Respondent hence it falls outside the purview of judicial review. He urged the court to dismiss the application with costs.

The Interested Party's Case

10. In opposing the application, the Interested Party filed a replying affidavit sworn on 13th December, 2022.

11. He averred that after perusing the typed proceedings in Appeal to the Minister Case No. 488 of 2022 annexed as Exhibit "DMM5", he was taken aback by their incomplete state and the apparent errors on the record. That on 8th November, 2022 he applied for a certified copy of the proceedings which were duly supplied and produced the same as Exhibit "TMM1".

12. The deponent averred that the proceedings before the Minister were conducted in accordance with the law and the rules of natural justice since every party was given an opportunity to be heard, to call witnesses and a just decision was arrived at. He urged the Court to dismiss the application with costs.

13. The application was canvassed by way of written submissions.

The Ex Parte Applicants Submissions

14. The Ex-Parte Applicant's submissions were filed on 21/6/2023. On their behalf, Counsel reiterated the contents of the 1st Ex-parte Applicant's verifying affidavit sworn on 15/9/2022.

15. Counsel submitted that the 2nd Ex-Parte Applicant was not accorded the right to cross-examine the Interested Party and his witnesses in the proceedings before the Minister despite his protestations, which is a violation of his right under Article 50 (1) (k) as read together with Section 4 (4) of the *Fair Administrative Action Act*.

16. Counsel further submitted that the 1st Respondent exhibited open bias in favour of the Interested Party and as a consequence, the 1st Respondent violated Section 4 (3) and (4) of the *Fair Administrative Action Act*. Counsel submitted that the proceedings before the 1st Respondent were materially influenced by an error of the law. Counsel argued that the decision of the 1st Respondent was flawed because he failed to obtain evidence from the Ex-parte Applicants at the site.

17. Finally, Counsel submitted that the 1st Respondent failed to take into account relevant considerations when making the decision. Counsel urged the Court to grant the orders sought. To buttress his submissions, Counsel relied on the following authorities: -

i. Louis Dreyfus Company (K) Limited v Kenya Revenue Authority [2021] eKLR.

ii. Republic v Kenyatta University Ex-parte Martha Waihuini Ndungu [2019] eKLR.

iii. Republic v Chuka University Ex-parte Kennedy Omondi Waringa & 16 Others [2018] eKLR

The Respondents Submissions

18. The Respondents' submissions were filed on 3/10/2023.

19. On their behalf, Learned State Counsel outlined the following issues for the court's determination: -

i. Whether the Court has jurisdiction to determine the issues in the Notice of Motion?

ii. Whether the Court should grant the reliefs sought?

20. Learned State Counsel submitted that the ex parte Applicants were inviting the court to determine the merits of the 1st Respondent's decision which is beyond the scope of judicial review. It was further submitted that the Ex-parte Applicants' contention that the 1st Respondent's decision was vitiated by errors on the face of the record does not constitute to an error in the decision-making process. Learned State Counsel contended that the Ex-parte Applicant was asking the court to correct the errors apparent on the record which is not the place of judicial review.

21. Learned State Counsel further submitted that the Ex-parte Applicants did not prove that they raised any complaint with regards to the manner in which the proceedings were being conducted. It was further submitted that the Ex-parte Applicants were afforded a fair hearing and that they presented their respective cases.

22. Concluding his submissions, Learned State Counsel submitted that the application lacks merit and ought to be dismissed with cost.

Analysis and Determination

23. Having considered the application, the respective affidavits and the rival submissions, the main issue for determination is whether the Ex-parte Applicants have made out a case for the grant of judicial review orders of Certiorari and Prohibition.

24. The duty of a Court in Judicial Review proceedings was set out in the case of Pastoli Vs Kabale District Local Government Council and Others (2008) 2 E.A 300 where it was 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.'

25. The parameters of Judicial Review were re-affirmed by the Court of Appeal in the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd C.A Civil Appeal No. 185 of 2001 where it held:-

> " 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 maker 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."

26. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of Republic Vs Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eKLR, where it was 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...."

27. The Ex-parte Applicants are seeking to quash the Respondent's decision in Minister Appeal Case No. 488 of 2022 delivered on 17/06/2022 on the grounds that the decision was made in breach of the principles of natural justice. The principles of natural justice provide that no one should be condemned unheard. The right to be heard is a Constitutional right enshrined in Article 47 and 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.

28. Article 47(1) and (2) of *the Constitution* provides as follows;

    i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    ii. 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

29. It is clear from the above provisions that the tribunal or authority entrusted with the mandate of making decisions must act in a fair manner. Procedural fairness is a Constitutional requirement in administrative actions.

30. Article 50(1) of *the Constitution* provides for fair trial as follows:-

> Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.

31. Section 4(3)(b) of the *Fair Administrative Action Act*, 2015 imports the rules of natural justice and provides as follows:-

1. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:

    a. an opportunity to be heard and to make representations in that regard;

32. In Onyango Oloo Vs Attorney General [1986-1989] EA 456 the Court of Appeal expressed itself as follows;

> " The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....Denial of the right to be heard renders any decision made null and void ab initio."

33. The Ex parte Applicants gave an elaborate background of the Appeal before the Minister. The Applicants averred that they filed committee Case Nos. 78 of 2019 and 80/2019 seeking to be registered as the owners of the suit property which were subsequently dismissed. That being aggrieved the 2nd Ex Parte Applicant lodged an objection to the Land Adjudication Officer who in his findings awarded him the suit property.

34. According to the evidence presented by the parties herein, it is evident that the Appeal before the Minister emanated from the decision of the Land Adjudication Officer made on 15/11/2021.

35. I have perused the proceedings and findings in Appeal to the Minister Case No. 488 of 2022 conducted before the Deputy County Commissioner Kilungu Sub County. In the Appeal before the Minister, the Ex parte Applicants were the Respondents while the Interested Party was the Appellant. From the proceedings, the Appellant's witnesses are listed as Samson Mwalusa Musyimi and Alois Mutuku Masil while the Respondents did not call any witnesses. Both parties were recorded as having been sworn and gave evidence. It is evident that they participated in the proceedings by giving evidence, cross examination and calling witnesses.

36. The Applicants gave their testimony and were allowed to cross-examine the Appellant's witnesses. In allowing the Appeal, the Minister ordered that Plot No. 3111 and 3145 be recorded in the names of the Appellant.

37. The Applicants averred that the 1st Respondent did not take evidence from the Applicants at the site which amounts to violation of the law. This Court finds absolutely no evidence of bias or unfair treatment against the Applicants. There is no law requiring that the Minister must take evidence at the site. There is no evidence to show that that the 2nd Ex parte Applicant protested that he was not accorded an opportunity to cross examine the Appellant and his witnesses. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the 1st Respondent was biased or unfair towards the Applicants.

38. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicants have not demonstrated that such was case in the instant application.

39. In the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR, the Court of Appeal held as follows: -

> " The need to take into account relevant considerations and ignore irrelevant facts in the decision making has close nexus with the need to act reasonably. This much was appreciated by Lord Greene MR in Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223 thus, "For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.

40. Similarly, in Republic Vs Secretary of the Firearms Licensing Board & 2 Others Ex parte Senator Johnstone Muthama [2018] eKLR it was held, inter alia, that:

> " The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of the purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in Republic Vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR, 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."

41. In my view, when the complaints of the Applicants are considered as a whole, it would appear that the Applicants are in reality aggrieved by the merits of the decision of the 1st Respondent. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a judicial review application. The Applicants are aggrieved because the 1st Respondent overturned the earlier decision which was in their favour.

42. In my opinion, a judicial review remedy would not be available in these circumstances. The upshot of the foregoing is that the Court does not find merit in the application for judicial review.

43. Accordingly, the Notice of Motion dated 6th October 2022 is hereby dismissed with costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAM THIS 6TH DAY OF MARCH, 2024.

In the presence of:

Court assistant Kwemboi.

Mathuva for the Interested Party.