



**Republic v County Government of Kirinyaga & 2 others; Mwangi (Exparte Applicant)
(Judicial Review E002 of 2022) [2024] KEELC 5065 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
JUDICIAL REVIEW E002 OF 2022**

JM MUTUNGI, J

JULY 4, 2024

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KIRINYAGA 1ST RESPONDENT

**CHAIRMAN OF THE DISPUTE RESOLUTION COMMITTEE 2ND
RESPONDENT**

BENSON KIMARU 3RD RESPONDENT

AND

JAMES MACHARIA MWANGI EXPARTE APPLICANT

JUDGMENT

1. The Ex-parte Applicant commenced these Judicial Review proceedings by way of an Ex-parte Notice of Motion dated 4th October 2022 seeking leave to file Judicial Review proceedings against the Respondents. The Court granted the leave and the exparte Applicant filed the substantive Motion dated 17th November 2022, praying for the following reliefs:
 1. That the Applicant herein be granted an order of certiorari to remove into the High Court and quash the report, findings, remarks, resolution and/or decision of Dispute Resolution Committee of the County Government of Kirinyaga made on 13th November, 2019 vide minute number L/H/UD/32/2020.
 2. That the costs of this application be provided for.
2. The motion was based on the grounds set out on face of the application and on the Supporting Affidavit of James Macharia Mwangi. The Applicant deponed that he was the legitimate owner of



Plot No. E33 in Sagana and had occupied the plot continuously and without interruption since 1995. According to the *ex parte* Applicant, the 3rd Respondent in 2019 contested the ownership of the land, prompting a dispute referral to the 1st Respondent for resolution. The Applicant averred that the dispute was heard sometime in the year 2020 but the decision was not communicated to him by the 1st Respondent despite his persistent follow up. He averred that he came to learn the 1st Respondent had rendered a decision when the 3rd Respondent annexed a copy of the decision in a Replying Affidavit he had filed in Baricho Magistrate's Court in a case the Applicant had filed against him that the records show the decision was made following a site visit, a session he confirms he did not attend. Moreover, he pointed out that the committee did not give prior notice to the parties of the site visit. Further the Applicant highlighted his inability to review the documents of the 3rd Respondent, as they were not presented during the hearing of the dispute.

3. The 1st Respondent filed its Replying Affidavit on 8th March, 2023 and stated that the *Ex parte* Applicant had initiated a claim concerning Plot No. E33 Sagana, which was disputed as against Plot No. A60 Sagana, owned by the 3rd Respondent. The 1st Respondent detailed that the dispute was duly reviewed and resolved, determining that the contested plot rightfully belonged to the 3rd Respondent as it was located amongst the A-series plots at Sagana. The 1st Respondent further noted that the decision was based on the fact that the 3rd Respondent's acquisition of Plot No. A60 Sagana, documented under Minute No. WTPM & H 115/88 predated the Applicant's claim, which was documented under Minute No. WTPM & H 57/95. The 1st Respondent argued that the decision made by the County Government's Dispute Resolution Committee was proper, as the Committee was duly constituted and the decision was made based on merit. The 1st Respondent urged the Court to dismiss the application by the *Ex parte* Applicant.
4. The 3rd Respondent filed his Replying Affidavit on 13th March, 2023. He confirmed that the dispute before the Dispute Resolution Committee concerned the ownership of plots E33 and A60 in Sagana Township. In contract to the *Ex parte* Applicant's claims, the 3rd Respondent asserted that he provided documents at the hearing, proving that he and his wife are the legitimate owners of Plot No. A60. He emphasized that they have owned Plot No. A60, since 1988, has continuously been in possession of it and has consistently paid the land rates for the property. Furthermore, he affirmed that the Committee conducted a site visit and averred that the Committee's decision to conduct a site visit was well within its rights and responsibilities.

Submission, Analysis and Determination

5. Parties were directed to file their submissions. The *Ex parte* Applicant filed his submission on 16th February 2024. The 1st and 3rd Respondents too filed their respective submissions.
6. The *ex parte* Applicant argued that the dispute resolution process overseen by the Dispute Resolution Committee was procedurally unfair. This assertion was made on the grounds that the committee's conclusion was drawn following a site visit in which the applicant did not participate. He relied on the Cases of Republic v Dedan Kimathi University of Technology, [2022] KEHC 494 KLR and Republic versus Secretary County Public Board & Another Ex Parte Hulbai Gedi Abdille [2015] eKLR.
7. I have carefully considered the *Ex parte* Applicant's Notice of Motion, the Statutory Statement, Verifying Affidavit, and Replying Affidavits and the Supplementary Affidavit as well as the submissions, made on behalf of the parties and the issue for determination is whether there was procedural impropriety to warrant the grant of an Order of Certiorari that the *ex parte* Applicant prays for.



8. It is trite that where discretion is donated to a particular body, the Courts should exercise restraint and not readily accede to invitations to interfere with such powers and discretion. In [Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001](#) the Court of Appeal held:

“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...”

9. However, as outlined in the "Judicial Review Handbook, 6th Edition" by Michael Fordham, on page 5, Judicial Review stands as a pivotal mechanism within Administrative Law, serving to uphold the Judiciary's Constitutional duty to guard against the misuse of power by public authorities. This process acts as a crucial safeguard for the rule of Law, ensuring that the public interest is maintained. It monitors the adherence to limits and obligations set by Parliament, directs public bodies to act within legal boundaries, guarantees that these entities are answerable to the law and not exempt from it, and safeguards individual rights.

10. The ex-parte Applicant argues that his right to be heard was violated on two grounds. First, the 3rd Respondent failed to present his ownership documents at the dispute hearing, preventing the Ex parte Applicant from inspecting them. Second, the committee conducted a site visit without informing the ex-parte Applicant or allowing him to participate.

11. The 1st Respondent in its submissions dated 15th March 2024 argued there was no impropriety on the part of the Dispute Resolution Committee as all the parties were given the opportunity to present their cases and produce documents in support of their cases. The 1st Respondent placed reliance on the Case of Pastoli v Kabale District Local Government Council & Others [2008] 2, EA 300 to buttress its submission that the Court is not required to concern itself with the merits of the case but rather whether the decision making process was procedurally fair. The 1st Respondent contended that the Dispute Resolution Committee observed and complied with the rules of Natural Justice as envisaged under Section 4 of the [Fair Administrative Action Act](#), 2015.

12. The 3rd Respondent submitted vide his submissions dated 11th April 2024 that the Exparte Applicant had not demonstrated the process that the Dispute Resolution Committee followed was flawed to warrant its decision being quashed. The 3rd Respondent stated the Committee gave each party a fair hearing and that there was no breach of Article 47 (1) of [the Constitution](#) and/or Section 4 of the Fair Administrative Act, 2015.

Article 47(1) and (2) of [the Constitution](#) provides as follows:

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.

The provisions of Sections 4(1), (2) and (3) of the [Fair Administrative Action Act](#) provide as follows:

- (1) 1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.



- (3) 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) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

13. While the 1st Respondent's Minute of 13th November 2019 containing the decision of the Dispute Resolution Committee indicates the submissions made by each of the parties, it is silent on when the site visit was made and if the site visit was made in the presence of the affected parties and/or at the request of any party. The Applicant has averred that he was not informed of and/or present during the site visit. From the Resolution/decision, it is not clear whether the two disputed plots E33 Sagana and A60 Sagana physically exist on the ground as two separate and distinct plots. The site visit that the Dispute Resolution Committee states it conducted, definitely must have influenced the decision that the Committee reached. Owing to the significance of the site visit in the Resolution of the dispute, the parties to the dispute ought to have been give notice of the visit and permitted to participate during the visit and if necessary to seek clarifications at the site being parties who stood to be affected.

14. Where a necessity arises for a Court to visit a locus in quo, parties must be made aware and should be permitted to be present and to participate as the visit essentially forms part of the proceedings. The Court of Appeal in the Case of *Cyrus Nyaga Kabute v Kirinyaga County Council* [1987] eKLR observed as follows in regard to site visits:-

“...it is established law that when a magistrate or judge visits land and makes notes, the parties should be given a chance to agree, deny, or contradict the notes on oath if those notes were to be relied upon in Judgment.

15. In the present case the purpose of the site visit should have been to ascertain whether plots Nos. E33 and A60 in Sagana were indeed separate entities, each with its own unique identifier, or if they represented a single plot identified by two different numbers. Moreover, the visit aimed to clarify the ownership status and the exact locations of each plot. This determination was crucial as it had the potential to significantly impact the involved parties. As such, it was imperative for the committee to ensure effective communication with all the parties regarding the planned site visit. By incorporating everyone in this process, the committee could have safeguarded against any party being unjustly disadvantaged.

16. In the Case of *Gathigia v Kenyatta University Nairobi HCMA No. 1029 of [2008] KLR 587* the Court held:

“I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting



in a quasi-judicial capacity. P 386 – the court said; “1. if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3. In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses, and it can obtain information in any way it thinks best... 4. The person accused must know the nature of the accusation made; 5. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6. The tribunal should see to it that matter that has come into existence for the purpose of the quasi-lis is made available to both sides and once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”

17. In *Board of Education v Rice*; [1911] AC 179 Lord Loreburn LC stated that:

“a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is ‘a duty lying upon everyone who decides anything.’”

18. In the instant matter, the committee has indicated that their resolution was arrived at subsequent to conducting a site visit. The assertion by the ex-parte Applicant that he was not notified of the site visit and he was not present when the visit was made by Committee was not refuted. Though it is also not clear whether the 3rd Respondent was involved in the site visit, the failure to notify the ex-parte Applicant of the visit, being a party who stood to be affected by any findings reached where he had no opportunity to ask questions and/or seek clarifications, rendered the entire process unprocedural and liable to be quashed. In the premises I find and hold that the procedure through which the Committee reached the decision that it did was flawed. I find the Notice of Motion application dated 17th November, 2022 meritorious and I allow the same. An order of certiorari is accordingly issued in terms of prayer (1) of the Notice of Motion.

19. I have considered the circumstances of this matter and in exercise of my discretion I order that each party will bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 4TH DAY OF JULY 2024.

J. M. MUTUNGI

ELC - JUDGE

