



Republic v Land Adjudication Officer Mbwa 1 Adjudication Section & another; Muthama (Exparte Applicant); Mbirithi & another (Interested Parties) (Environment and Land Judicial Review Case E005 of 2024) [2024] KEELC 6783 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E005 OF 2024**

CK NZILI, J

OCTOBER 9, 2024

IN THE MATTER OF LAND ADJUDICATION OFFICER MBWAA 1

AND

IN THE MATTER OF PARCEL NO. 790/MBWAA 1 ADJUDICATION SECTION

AND

IN THE MATTER OF AN APPLICATION BY SOLOMON BUNDI MUTHAMIA

BETWEEN

REPUBLIC APPLICANT

AND

LAND ADJUDICATION OFFICER MBWAA 1 ADJUDICATION SECTION 1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

SOLOMON BUNDI MUTHAMIA EXPARTE APPLICANT

AND

NAOMI GATETU MBIRITHI INTERESTED PARTY

NATHAN MUTWIRI MBIRITHI INTERESTED PARTY

JUDGMENT

1. What is before the court is a notice of motion seeking an order of certiorari to call for and quash the 1st respondent's unilateral decision made on 23.3.2023 and for a prohibition order stopping the



- implementation and enforcement of the said decision to hive off 2.5 acres of the exparte applicant's parcel No. 790 Mbwa 1 Adjudication Section land and allocate the same to the interested parties.
2. The notice of motion is based on the statutory statement of facts dated 3.5.2024. It was averred that the exparte applicant was the recorded owner of Parcel No. 790 Mbwa Adjudication Section, having bought the land from one Stanley M'Iberi M'Iraku measuring 10 acres, which was demarcated to him and having erected a homestead therein, keeps livestock and has farm workers therein.
 3. The exparte applicant avers that in December 2023, the farmhand informed him of some people who were claiming ownership of his land, and upon further inquiries, he realized the said people were the interested parties herein, purporting to have been allocated the land by the land adjudication officer.
 4. Further, the exparte applicant averred that, to his surprise, he found out that there were some proceedings at the land Adjudication office allegedly conducted on 23.3.2023 by the 1st respondent and a committee in presence of the interested parties, who were awarded 2.5 acres of his land, with a thumbprint on the said proceedings which was not his for he never participated in the same nor was he privy to it.
 5. The exparte applicant averred that he was never invited to such hearing, proceedings, or dispute of any nature by either the 1st respondent or the interested parties.
 6. Similarly, the exparte applicant averred that the said proceedings indicate that he was present and gave testimony on oath and was cross-examined, which facts were untrue or full of concocted lies, for he was in Nairobi on the said date and week.
 7. Again the exparte applicant averred that the portion that the 1st respondent carved out of his land was where his homestead, structure buildings and developments are situated.
 8. The exparte applicant averred that the interested parties have physically threatened to evict his workers and demolish his structures as well as to harm his livestock, sheep and goats.
 9. The exparte applicant also averred that the committee was not properly constituted when it heard the dispute as required under Section 6 of the Land Consolidation Act; he was condemned unheard and his parcel of land unprocedurally taken away by superimposing the interested party on his land.
 10. In the verifying affidavit sworn by Solomon Bundi Muthamia on 3.5.2024, the exparte applicant reiterated the contents of the statement of facts attached to the sale agreements dated 24.11.2011 & 6.8.2011, photographs of his developments on the land; the proceedings, and the decision dated 23.3.2023 as annexures marked S.B 1 (a) & (b), (2) and 3 respectively. The notice of motion was served upon the 1st & 2nd respondents.
 11. Daniel Julius M'Rimbere, on behalf of the 1st respondent, opposed the notice of motion through a replying affidavit sworn on 12.6.2024. As the chairman of the committee of the meeting held on 23.3.2023, he said that the exparte applicant and the interested parties were heard and accorded opportunities to present their cases; hence, there was adherence to the rules of natural justice and fair administrative action. The deponent averred that the committee was constituted correctly and that the proceedings and the decision were genuine, fair and a proper record.
 12. Moreso, the deponent averred that the record was a true reflection of what transpired in the presence of the exparte applicant, who appended his thumbprint on the proceedings, gave his testimony, and was cross-examined. He termed the decision as legal, valid, and specific. He added that there was no fraud or travesty of justice, invitations had been made on time, nobody was condemned unheard or unfairly, and therefore the application lacked merits.



13. The 1st interested party opposed the notice of motion through a replying affidavit sworn on 3.6.2024 on behalf of herself and the 2nd interested party, a brother, terming the application an afterthought, false, misleading and aimed at infringing the right to own the property of her deceased mother.
14. The 1st & 2nd interested parties averred that the exparte applicant was heard and presented his case with no breach of rules of natural justice or fair administrative action; otherwise, the proceedings were generated because he was present and even thumb printed the same as indicated in the affidavit of the chairman of the committee.
15. The 1st interested party averred that Parcel No. 790 Mbwaa 1 Adjudication Section was sold to the exparte applicant by Stanley M'Iberi M'Iraku, who was not the rightful owner contrary to her right to ownership of property, was illegal, unprocedural and unlawful. She denied the alleged threat physically or otherwise to the exparte applicant his workers, attempts to evict or demolish his structures. The interested parties averred that they would suffer grave loss and damage if the orders sought were to be granted.
16. With leave of court, the parties were directed to file written submissions. The exparte applicant relied on written submissions dated 25.7.2024. It was submitted that having learned of the decision in December 2023 and moved the court in May before the six months. Therefore, the applicant urged the court that consideration should be had on when he came to be aware of the decision, not when it was made, since he has invoked *the Constitution* as held in Dande & others vs Inspector General of National Police Service and others (2023) KESC 40 (KLR) 16th June 2023 (judgment), the court should consider the writ of certiorari beyond six months.
17. The exparte applicant submitted that under Section 6 of the *Land Adjudication Act*, the committee should not be less than 10 members. In the instant case, eight members handled the dispute. Relying on Meru ELCJR E009 of 2021 Mariquetta Nkoyai M'Thiringi vs DLASO Karama Adjudication Section, the court was urged to find the proceedings and decision falling short of meeting both constitutional and statutory test.
18. Regarding rules of natural justice, it was submitted that the exparte applicant was denied a fair hearing and *fair administrative action act* by imposing a false thumbprint on the proceedings purporting to show that he participated in the proceedings and which the court should remedy for he was condemned unheard.
19. The exparte applicant submitted, just like in Mariquetta Nkoyai (supra), that the interested party cannot assume the statutory roles of the 1st respondent and explain whether or not the statutory or constitutional test was met.
20. In addition, the exparte applicant submitted that it was curious that the committee met the same day, heard the case, visited the land, and made the decision to implement it the same day, which was a clear case of malice, underhand tactics, and the desire to steal a match against the exparte applicant.
21. The issue calling for my determination is whether the exparte applicant is entitled to the writs of certiorari & prohibitions. The purpose of judicial review is to superintend bodies and tribunals with a view of ensuring that Article 47 of *the Constitution* is protected and in doing so, the court is not restricted to the traditional judicial review grounds. In CCK vs Royal Media Services (2014) eKLR, the court observed that *the Constitution* of Kenya 2010 had elevated judicial review to a pedestal that transcends the technicalities of common law, clothing the grievance to a constitutional question.
22. In this notice to motion, the exparte applicant has invoked Sections 8 & 9 of the *Law Reform Act*, Sections 6 & 8 of the Fair Administrative Action, and Articles 40, 47, and 50 of *the Constitution*. In



Dande (supra), the Supreme Court of Kenya observed that the entrenchment of judicial review to *the Constitution* elevated it to a substantive and a justiciable right, giving every person a right to an administrative action that is efficient, lawful, expeditious, reasonable, and procedurally fair. The court said that when a party approaches a court under *the Constitution*, then the court ought to carry out a merit review of the case, unlike where a party only invokes Order 53 of the Civil Procedure Rules and does not claim violation of rights or even violation of *the Constitution*.

23. The 1st respondent has not replied to the notice of motion, yet it is the duty holder who must ensure that its statutory duties and decisions adhere to Article 47 of *the Constitution*; otherwise, it would be amenable to court superintendence if made ultra vires against rules of natural justice or his illegalities and procedural improprieties occur along the way, the question of proportionality and legitimate expectation, that a party has in exercising the ascertainment of interests and rights to land under adjudication that there would be strict compliance with the law.
24. The ex parte applicant has averred that he was not aware of Land Case No. 29/15/16 over Parcel No. 790 brought against him by the interested parties. He has averred that he was not present at the hearing and had not been notified of it.
25. The 1st respondent has not filed a response showing that summons to attend the hearing were duly served upon the ex parte applicant and what means were used to serve him. There is equally nothing from the affidavit of the 1st interested party and Daniel Julius M'Rimberere to show service of summons. The said Daniel M'Rimberere describes himself as the chairman of the committee that heard and determined the dispute. He has produced nothing to show that the land adjudication officer had appointed him to superintend the exercise under the law. He did not answer as to whether eight members, instead of ten as required by law, could hear and determine the dispute. The interested party and Daniel Julius M'Rimberere cannot assume statutory duties and purport to answer to the notice of motion for and on behalf of the 1st respondent and the Hon. Attorney General.
26. The ex parte applicant has produced documents to prove ownership and developments on his land. The interested parties had no rival documents to show the root of their claim to the land. The identity card number or phone number of the ex parte applicant is missing in the proceedings if at all he was the one present during the hearing and determination of the dispute. All the committee members present did not sign the decision or the proceedings. The names of the signatories are missing on the last page. The reasons and the basis for making the findings are not clear. The locality of the 2.5 acres to be carved out of the ex parte applicants' land is not indicated in the proceedings and the decision.
27. If at all the ex parte applicant was present, it is not clear if he produced any sale agreements to sustain his claim or was given an opportunity to bring the person who sold the land to him in 2011 for the committee to interrogate him and form a basis to make a finding that the seller had no land there which he could have sold to the ex parte applicant.
28. To succeed in judicial review, in *Pastoli Kabale District vs Local Government Council and others* (2008) 2 E. A 300, the court said that a party has to show the decision or act complained of was tainted with illegality, irrationality and procedural impropriety. Illegality was described as committing errors of law in the process of taking or making the act, acting without jurisdiction, or contrary to the provisions of the law. Irrationality was described as grossly unreasonable and arriving at a decision defying logic, and procedural impropriety, was described as failing to act fairly and non-adherence to the rule of natural justice.
29. In the proceedings before the court, there are apparent issues raised and glaring errors on the main decision and the decision-making process was made by an improperly constituted decision-making



body composed of a smaller number than required by statute. Service of summons and evidence of the presence and participation of the *exparte* applicant is in doubt.

30. The nature of the dispute in terms of whether it was before an adjudication board or an A/R board is unclear. All these glaring omissions, errors, and transgressions of the law would have been addressed by the 1st respondent, who unfortunately did not respond to the notice to motion. The upshot is that the proceedings and the decision dated 23.3.2023 are, as a result of this, quashed, vacated, and or set aside. There shall be an order of prohibition against its implementation both on paper and on the ground. Costs to the *exparte* applicant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 9TH DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Muriuki for the applicant

Interested parties

Miss Kerubo for Mwenda for interested parties

HON. C K NZILI

JUDGE

