



Republic v Deputy County Commissioner Makueni County & 2 others; mwalu (Interested Party); Ngumbi (Exparte Applicant) (Environment and Land Judicial Review Case 2 of 2023) [2024] KEELC 7469 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7469 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2023**

TW MURIGI, J

NOVEMBER 6, 2024

**IN THE MATTER OF: MINISTERIAL APPEAL CASE NO. 442 OF 2020 PARCEL OF
LAND NO. 1520 NDIANI ADJUDICATION SECTION - KILUNGU SUB-COUNTY**

AND

IN THE MATTER OF:SECTION 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
ORDERS FOR CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF: ARTICLES 22, 23 (3)(F) AND 47 OF THE CONSTITUTION,
AND SECTION 13 (7) OF THE ENVIRONMENT AND LAND COURT ACT, 2011.**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER MAKUENI COUNTY 1ST
RESPONDENT**

**LAND ADJUDICATION AND SETTLEMENT OFFICER MAKUENI
COUNTY 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

LAWRENE MULILI MWALU INTERESTED PARTY

AND



JUDGMENT

1. By a Notice of Motion dated 13th February 2023 brought under Order 53 Rules 1(1), (2) and (4) of the Civil Procedure Rules, the Applicant seeks the following orders:-
 1. That this Honourable Court be pleased to issue an order of Certiorari directed to the 1st Respondent to bring to this court and quash the decision of the Deputy County Commissioner Makueni County dated 8/9/2022.
 2. That this Honourable court be pleased to issue an order of prohibition to prohibit the 2nd Respondent from implementing the decision of the Deputy County Commissioner Makueni County dated 8/9/2022.
 3. That this Honourable court be pleased to issue an order of Mandamus compelling the 2nd Respondent to immediately delete the existing name as recorded on their records in respect to Plot No. 1530 and enter the name of the Ex Parte Applicant upon the adjudication register.
 4. That the costs of this application be borne by the Respondents.
2. The application is premised on the grounds appearing on the statutory statement together with the verifying affidavit of Josiah Mwambi Ngumbi sworn on even date.

The Ex Parte Applicant's Case

3. The Ex Parte Applicant averred that he was the Appellant in Appeal to the Minister Case No. 422 of 2020 in respect of land parcel No. 1520 Ndiani Adjudication Section. That on 08/09/2022, the Deputy County Commissioner delivered her ruling in favour of Muthoka Mutua Nzomo deceased who died before the Appeal was heard but was represented by Lawrence Mulili Mwau a non member of the deceased family. It is the Applicant's case the suit property was the subject matter in Committee Case No. 27 of 2015 which was heard and determined in his favour.
4. That being aggrieved by the decision of the Committee, the Interested Party filed a complaint/objection with the Land Arbitration Board. That instead of conducting a hearing in accordance with Section 22 of the Land Adjudication Act, the Board overturned the decision of the Committee without giving any reasons for its decision.
5. He faulted the decision of the 1st Respondent on the grounds that it was anchored on purported proceedings and decision of the Land Adjudication Board.
6. According to the Applicant, the 1st Respondent failed to appreciate the procedure laid down in law and overlooked his grounds of appeal. He averred that the decision of the 1st Respondent was pre-determined as there were no proceedings presented from the Land Arbitration Board. The Applicant argued that the 1st Respondent relied on the document dated 19/10/1975 which was not the subject matter in regards to the sub-division of land parcel No. 1520 thereby arriving at a biased decision.
7. He further averred that the 1st Respondent did not give any reason why he agreed or disagreed with the Land Adjudication Board and ignored his grounds of appeal and that he was not accorded a hearing by the Land Adjudication Board.
8. Concluding his evidence, he urged the court to allow the application as prayed.



The Respondents Case

9. The Respondents filed grounds of opposition dated 21st March 2023 raising the following grounds:-
 1. That the issue of representation of deceased estate was not raised during the proceedings or the appeal to enable the Deputy County Commissioner make a ruling on any objection.
 2. That the Deputy County Commissioner was right to proceed with the Appeal as the parties before him were qualified to participate vide Section of [Land Adjudication Act](#).
 3. That letters of administration are not a requisite document in proceedings under the [Land Adjudication Act](#).
 4. That the ex parte applicant has not alleged that he was denied a fair hearing thus infringing on his right to natural justice.
 5. That the application is an abuse of process is frivolous, vexatious and a waste of judicial time and should be struck off with costs.
 6. That from the material available before the court, the ex parte applicant has not demonstrated that he has a *prima facie* case for consideration by the Honourable Court.
10. For the said reasons, the Respondents urged the court to dismiss the application with costs.
11. The 1st Respondent filed a replying affidavit dated 20th April 2023 in opposition to the application.
12. She averred that the application herein is incurably defective, incompetent and devoid of any substance in law. In explaining the genesis of the family dispute, the 1st Respondent averred that the ex parte applicant had filed a complaint to the Land Adjudication and Settlement Officer and the Land Adjudication Committee Ndiani Adjudication Section alleging that the Suit property was erroneously allocated. That in a ruling dated 08/06/2016, the Committee directed that the Defendant's name be deleted from the register and that of the ex parte Applicant be entered as the rightful owner.
13. That being aggrieved, the Interested Party appealed against the decision of the Committee to the Minister whose decision was in his favour. She asserted that the ex parte Applicant (the Respondent in the Appeal to the Minister) was granted an opportunity to present his case and to cross examine the Interested Party. She further averred that the decision on Appeal was based on the proceedings in the Committee case and the evidence adduced by the parties in the Appeal. She denied the allegation that the decision was based on non-existent proceedings by the Arbitration Board and added that the proceedings by the Board were not availed to her for consideration.
14. She contended that the Applicant did not adduce any evidence to show that the 1st Respondent violated the rules of natural justice while conducting the hearing of the appeal. She further contended that no evidence was adduced to show that the Applicants right to fair administrative action or any of the cited Constitutional and statutory provisions were violated. She urged the court to dismiss the application with costs.
15. Though duly served, the Interested Party did not enter appearance or file any response to the application.
16. The application was canvassed by way of written submissions.

The Ex Parte Applicant's Written Submissions

17. The Ex Parte Applicant's submissions were filed on 19th October 2023.



18. On his behalf, Counsel identified the following issues for the court's determination:-
- a. Whether the 1st Respondent's decision dated 8th September 2022 is tainted with illegality for being unreasonable and biased.
 - b. Whether the 1st Respondent's decision dated 8th September 2022 was unreasonable and irrational for being influenced by irrelevant consideration.
19. Counsel submitted that the decision of the 1st Respondent was based on non-existent proceedings of the Land Adjudication Officer. Counsel submitted that the 1st Respondent ignored the fact that the ex parte applicant filed the Appeal because he was denied the right to be heard by the Land Adjudication Board and subsequently by the Land Adjudication Officer.
20. Counsel argued that the decision of the Land Adjudication Committee awarding the suit property to the Applicant was overturned by the Arbitration Board and the Land Adjudication Officer without following the due process of the law. Counsel argued that the Land Arbitration Board as well as the Land Adjudication Officer did not conduct any hearing before arriving at their decision to award the suit property to the Interested Party. Counsel further argued that the 1st Respondent resorted to conducting a fresh hearing and considered extraneous evidence which consisted of a letter dated 19th October 1975 and summons by the area assistant chief dated 6th June 1981 which were not in respect of the suit property. Counsel argued that the Land Adjudication Committee established that the two letters were in regards to the subdivision of the ancestral land which had a dispute that was resolved in the year 1982.
21. Counsel further submitted that the 1st Respondent failed to interrogate/analyse the proceedings of the Land Adjudication Officer since they were non-existent and thereby arriving at an unreasonable decision. To buttress this point, Counsel relied on the provisions of Article 47(2) of the Constitution and Section 4(3) of the Fair Administrative Action Act. It was further submitted that from the decision of 1st Respondent, the ex parte Applicant cannot discern the extent to which the decision of the objection officer had been understood and accepted by the 1st Respondent. To buttress this point, Counsel relied on the case of Republic v Deputy County Commissioner Lower Yatta Sub County & another, Munyao(Exparte); Deputy County Commissioner Lower Yatta Sub-County & another (Interested Party) Judicial Review 17 of 2021 (2022) KEELC 2722 (KLR) (*supra*) where the court held as follows:-

“In the present case the decision maker did not show that he called to his own attention the matters which he was bound to consider or that he excluded from his consideration matters which are irrelevant to what he has to consider in arriving at his decision and for that reason his decision is deemed to have been unreasonable.”

22. Counsel further submitted that the 1st Respondent did not call to her attention to the decision of the Land Adjudication Officer which she was bound to consider but she instead included irrelevant matters in arriving at her decision.
23. Counsel further submitted that the 1st Respondent failed to uphold the principles of the Constitution and the Fair Administrative Act in arriving at her decision. To buttress his submissions, Counsel relied on the case of Justice Amraphael Mbogoli Msagah v Chief Justice of the Republic of Kenya & 7 others (2008) eKLR where the court expressed itself as follows:-

“If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of



the departure from essential principle of justice. The decision must be declared to be no decision.”

24. Concluding his submissions, Counsel urged the court to allow the application as prayed.

The Respondents’ Submissions

25. The Respondents’ submissions were filed on 31st May 2023.

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

- a. Whether the application is merited and meets the threshold for judicial review
- b. Whether the prayers sought should be granted.

27. On the first issue, the Learned State Counsel submitted that the application has not met the threshold for the grant of judicial review orders sought.

28. It was submitted that the Deputy County Commissioner carried out her mandate under Section 29 of the [Land Adjudication Act](#) in determining the appeal before her.

29. The Respondents denied the allegations by the Applicant that he was denied a right to fair administrative action and stated that the proceedings before the Minister clearly show that the Applicant was granted an opportunity to be heard, to cross examine the Interested Party and was given the reasons for the decision. The Respondents further denied the allegations that the decision was pre-determined or that it was based on the proceedings of the Land Arbitration Board.

30. It was argued that the 1st Respondent did not overstep her mandate and that she considered the evidence of the Applicant as well as that of the Interested Party in arriving at her decision

31. With regards to the second issue, the Learned State Counsel submitted that the application is incompetent, bad in law and an abuse of the court process since it is challenging the merits of the decision rather than the decision making process.

32. Concluding her submissions, Learned State Counsel urged the court to dismiss the application with costs.

Analysis and Determination

33. The duty of a Court in Judicial Review proceedings was set out in the case of *Pastoli v Kabale District Local Government Council and Others* (2008) 2 E.A 300 where 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 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.’

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

“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.”

35. The Ex parte Applicant gave an elaborate background of the Appeal to the Minister. He averred that the dispute in respect of the suit property was first heard by the Land Adjudication Committee in Case No. 27 of 2015 where he was awarded the suit property. That being aggrieved, the Interested Party filed an objection with the Arbitration Board. He lamented that the Board failed to conduct a hearing in accordance with Section 22 of the *Land Adjudication Act* and proceeded to dismiss his case without giving any reasons for its decision.
36. The 1st Respondent on the other hand explained that the family dispute was first heard by the Land Adjudication Committee in Case No. 27 of 2015. That being aggrieved the Interested Party appealed to the Minister whose decision was in his favour.
37. According to the evidence presented by the parties herein, it is apparent that the Appeal to the Minister emanated from the decision of the Committee made on 08/06/2016.
38. I have perused the proceedings and findings in Minister’s Appeal Case No. 422 of 2020 conducted before the Deputy County Commissioner Makeni County. In the Appeal to the Minister, the Ex parte Applicant was the Appellant while the Interested Party was the Respondent. Both parties were recorded as having been sworn and gave evidence. It is evident that they participated in the proceedings by giving evidence and cross examining the opposing party.
39. It is not in dispute that the suit property falls within Ndiani Adjudication Section.
40. The *Land Adjudication Act* deals with all matters pertaining to adjudication. The preamble to the *Land Adjudication Act* states that it is an Act of Parliament to provide for the ascertainment and recording of rights and interest in community land (formerly Trust Land) and for purposes connected therewith and purposes incidental thereto.
41. The Applicant faulted the decision of the 1st Respondent on the grounds that it was based on non-existent proceedings of the Arbitration Board and the Land Adjudication Officer. The 1st Respondent averred that the decision was based on the proceedings of the Committee and the evidence of the parties in the appeal to the Minister.
42. At this juncture this court is called upon to determine whether the procedure for resolving disputes in an adjudication area was adhered to in resolving the dispute herein. The *Land Adjudication Act* sets out the dispute resolution mechanism to be followed when a dispute involves land under an adjudication area.



43. The process starts with the appointment of the adjudication committee. Section 19(2) and (3) of *the Act* provides as follows:-
1. If there are two or more conflicting claims to an interest in land and the recording officer is unable to resolve the conflict, he shall submit the dispute to the Committee to decide.
 2. The recording officer shall rectify the forms in accordance with any decision which the adjudication officer, the committee or the board may make in accordance with this act.”
44. If a party is aggrieved with the decision of the Committee, he can appeal to the Arbitration Board in accordance with Section 21(3) of *the Act* which provides as follows:-
- “ Any person named by a decision of the Committee who considers the decision incorrect may within fourteen days after the decision, complain to the executive officer of the Committee saying in what respect he considers the decision to be incorrect.”
- Section 21(4) of the Acts states that:-“Upon receipt of a complaint under sub section (3) of this section, the executive officer of the committee shall refer it with all the particulars of the case to executive officer of the board who shall submit it to the board.”
45. Section 22 of the Act provided that the board shall hear and determine any matter referred to it or complaint made under Section 21 of *this Act*.
46. The Adjudication Register is prepared and closed under Section 25 of *the Act*.
47. Section 26 provides for filing of objections to the register and provides as follows:-
1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may within sixty days of the date upon which the notice of completion of the adjudication register is published object to the adjudication officer in writing saying in what respect he considers the adjudication register to be incorrect or incomplete.
 2. The adjudication officer shall consider any objection made to him under subsection (1) of this section and after such further consultation and inquiries as he thinks fit he shall determine the objection.
48. Section 26A of the Act provides that the Adjudication Officer is required to forward to the Director of Adjudication a final Adjudication register for the purposes of registration.
49. Section 27 provides for finalization of the adjudication register subject to appeals as follows:-
1. The adjudication officer shall from time to time alter the adjudication register to conform with any determination of objections under section 26 of *this Act*.
 2. If the adjudication officer considers that to alter the adjudication register would incur unreasonable expense, delay or inconvenience, he may instead recommend to the Minister that compensation be paid and the Minister may make such payment of compensation of moneys provided by parliament as he thinks fit.
 3. When all objections have been determined and the time for appeal under section 29 of this Act has expired the Adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall-
 - a. alter the duplicate adjudication register accordingly; and then



- b. certify the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
- c. forward the adjudication register to the Chief Land Registrar together with the list of the appeals.

50. Section 28 provides that:-

Upon receiving the adjudication register under Section 27 of this Act, the Chief Land Registrar shall cause registration to be effected in accordance with the adjudication register.

Provided that where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.

51. If a party is aggrieved by the determination of an objection under the provisions of Section 26 of the Act, he/she may file an appeal to the Minister in accordance with the provisions of Section 29(1) of the *Land Adjudication Act*.

The record shows that the dispute herein was first heard by the Ndiani Adjudication Committee in Case No. 27 of 2015. The proceedings in Committee Case No. 27 of 2015 show that the Plaintiffs therein were Josiah Muambi Ngumbi, Pius Muema Ngumbi, Moses Mailu Mwangela and Sila Muambi while the Defendants were Muthoka Mutua, Lawrence Mwau and Muthiani Muthoka. The case was heard and determined on 08/06/2016. The Committee allowed the case and ordered that the name of the Defendant to be deleted from the register and enter the name of the Plaintiff Josiah Muambi Ngumbi.

52. It is the Applicant's case that the Interested Party appealed against the decision of the Committee to the Arbitration Board which thereafter overturned the decision of the Committee without adhering to the provisions of Section 22 of the Act.

53. The 1st Respondent on the other hand averred that the Interested Party appealed against the decision of the Committee to the Minister in Minister Case No.422/2020. She stated that the decision of the Land Adjudication Officer was not availed to her and that she based her decision on the proceedings of the Committee Case and the evidence adduced by the parties herein. Section 29(1) of the *Land Adjudication Act* provides for the procedure to lodge appeals to the Minister as follow:-

- 1. Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
 - a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

54. Section 29 of the *Land Adjudication Act* contemplates finality of disputes which have been determined as per the outlined procedures under the Act.

55. The 1st Respondent confirmed in her sworn affidavit that the Appeal emanated from the decision of the Committee. In her decision, she stated as follows in part:-“I therefore find no reason to depart from the objection court's decision.”



56. No evidence was adduced to show that an objection under Section 26 of the Act that had been determined by the Land Adjudication Officer. Similarly, no evidence was adduced to show whether the register in respect of Ndiani Adjudication Section was closed.
57. It is clear that the parties herein did not follow the procedure laid out by the Land Adjudication Act. In the case of Abdalla Mangi Mohammed v Lazarus & 5 others (2012) eKLR the court held that:-
- “...where there is a dispute as to the Applicant’s entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the Applicant’s claim to the property.”
58. There are no proceedings on record to show that the dispute was heard and determined by the Land Arbitration Board and the Land Adjudication Officer as alleged by the Applicant.
59. The parties ought to have followed the dispute resolution mechanism laid out by the Act.
60. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is in reality aggrieved by the decision making process. The Applicant was aggrieved because the 1st Respondent did not follow the procedure laid out by the Act.
61. In my opinion, a judicial review remedy is available in these circumstances.
62. From the foregoing, I find that the Ex Parte Applicant has met the threshold for the grant of the orders sought.
63. Accordingly, I find that the Notice of Motion dated 13th February 2023 is merited and the same is hereby allowed in the following terms:-
1. An order of Certiorari is hereby issued bringing into this court for the purposes of being quashed the decision of the Deputy County Commissioner Makueni County dated 8/9/2022.
 2. An order of Prohibition is hereby issued prohibiting the 2nd Respondent from implementing the decision of the Deputy County Commissioner Makueni County dated 8/9/2022.
 3. Each party to bear its own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF NOVEMBER, 2024.

.....

HON. T. MURIGI

JUDGE

In the Presence of:

Parties absent.

Court assistant Alfred

