



Wambua & another (Suing as the administrator and/or personal representative of Wambua Kiseve) v Maingi (Sued as the administrator and/or personal representative of the Estate of the Late Teresa Mueni Kiseve) & 4 others (Environment and Land Case Judicial Review Application E001 of 2024) [2024] KEELC 7484 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7484 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E001 OF 2024
CA OCHIENG, J

NOVEMBER 7, 2024

IN THE MATTER OF AN APPLICATION BY PETER TONNY WAMBUA & HENRY WAMBUA (SUING AS THE ADMINISTRATOR AND/OR PERSONAL REPRESENTATIVE OF WAMBUA KISEVE) FOR LEAVE TO COMMENCE JUDICIAL REVIEW APPLICATION FOR AN ORDER OF MANDAMUS, CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTIONS 26, 27, 28 AND 29 OF THE LAND ADJUDICATION ACT CAP. 284 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

PETER TONNY WAMBUA 1ST APPLICANT

HENRY WAMBUA 2ND APPLICANT

SUING AS THE ADMINISTRATOR AND/OR PERSONAL REPRESENTATIVE OF WAMBUA KISEVE

AND



MUSAU MAINGI (SUED AS THE ADMINISTRATOR AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE TERESIA MUENI KISEVE) 1ST RESPONDENT
DIRECTOR OF SURVEY OF KENYA 2ND RESPONDENT
COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER 3RD RESPONDENT
LAND REGISTRAR-MACHAKOS 4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA 5TH RESPONDENT

RULING

1. What is before Court for determination is the Ex parte Applicant's Chamber Summons Application dated the 23rd May, 2024 where he seeks the following Orders:-
 1. Spent
 2. That this Honourable Court be pleased to grant leave to the Applicant to apply for Judicial Review order of Certiorari to bring to this court and quash the decision of the 2nd, 3rd and 4th Respondent to issue the late Teresia Mueni Kiseve a title deed over land parcel number Machakos/Nguluni/1686 while the land adjudication process was still ongoing and while ignoring the decision of the Arbitration Board and the Land Adjudication Officer.
 3. That this Honourable Court be pleased to grant leave to the Applicant to apply for Judicial Review orders of Mandamus compelling and/or directing the 2nd, 3rd and 4th Respondent to cancel the title deed issued on 3rd November, 2014 to the late Teresia Mueni Kiseve over land parcel number Machakos/Nguluni/1686 and to apply the decision of the Land Adjudication Officer in issuing titles over land parcel number Machakos/Nguluni/1686 and land parcel number Machakos/Nguluni/1683.
 4. That this Honourable Court be pleased to Order that the leave granted to operate as stay restraining the Respondents and/or agents, servants, employees and/or any one claiming under them or through them from interfering with and/or fixing the boundary between land parcel number Machakos /Nguluni/1686 and land parcel number Machakos/Nguluni/ 1683.
 5. That costs of this Application be awarded to the Applicant.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Henry Wambua where he deposes that together with his Co-Applicant, they are administrators of the Estate of the late Wambua Kiseve. Further, that the 1st Respondent is sued in his capacity as the personal representative to the Estate of the late Teresia Mueni Kiseve. He confirms that the late Kiseve Musau, was father to the late Wambua Kiseve and father in law to the late Teresia Mueni Kiseve. Further, that the deceased was the registered proprietor of land parcel numbers Machakos/Nguluni/1683 and 1686 respectively. He avers that on 1st April, 1980, the land adjudication process in Nguluni area commenced and subsequently the block owned by the late Kiseve Musau was subdivided between the family members. He states that Machakos/Nguluni/1683 was allocated to the late Wambua Kiseve while Machakos/Nguluni 1686 to the late Teresia Mueni Kiseve.



3. He contends that upon the Demarcation Officer drawing up the boundaries for the two parcels of land, the late Teresia Mueni Kiseve challenged the said demarcation before the Land Adjudication Committee, which allowed the complaint, redrew the maps for the said two parcels of land and changed the boundaries in her favour. Further, aggrieved by the said decision, Wambua Kiseve appealed at the Land Arbitration Board, which set aside the decision of the Land Adjudication Committee and reinstated the boundaries as drawn by the Demarcation Officer.
4. He avers that the late Teresia Mueni Kiseve being aggrieved with this decision, lodged an appeal to the Land Adjudication Officer, who dismissed the Appeal and the said Teresia Mueni Kiseve proceeded to again file an Appeal to the Minister being Land Appeal No. 21 of 1994. Further a title deed to Machakos/Nguluni/1686 was issued to the late Teresia Mueni Kiseve on the 3rd November, 2014, during the pendency of the Appeal. He contends that the 4th Respondent in contravention of Section 29 of the *Land Adjudication Act* registered land parcel number Machakos/Nguluni/1686 using the map adopted by the Land Adjudication Committee and ignored the decision of the Land Arbitration Board and the Land Adjudication Officer. He states that the 2nd, 3rd and 4th Respondents have hived off a portion of the land belonging to land parcel number Machakos/Nguluni/1683 and allocated it, to Machakos/Nguluni/1686 to the prejudice of the Applicants'. He reiterates that the 2nd, 3rd and 4th Respondents have declined to rectify the erroneous amendments to the map of the disputed boundaries between Machakos/Nguluni/1683 and Machakos/Nguluni/1686. He further claims that the 1st Respondent, on 1st February, 2021 wrote to the Minister seeking to withdraw Land Appeal Case No. 21 of 1994 and on 16th April, 2024, the Applicants attended the scheduled hearing of the Appeal, but the request for withdrawal is yet to be endorsed.
5. The 1st Respondent opposed the instant Application by filing a Replying Affidavit sworn by Musau Maingi who confirms being a beneficiary to the Estate of the late Teresia Mueni Kiseve, owner of LR No. Machakos/Nguluni/1686. He avers that his late mother had an issue with demarcation of boundaries and filed an Appeal No. 21 of 1994 to the Minister, but the same was not resolved due to frustration from the Applicant owing to his non-attendance and non-compliance. He confirms applying through the Succession Cause No. 211 of 2011 to have the Estate's boundaries delimited and an order was issued to that effect, in December, 2019. He contends that he subsequently engaged the 2nd Respondent through the Land Registrar, Machakos to delimit the boundaries of the property and adjoining parcels. He avers that the County Surveyor set dates for delimitation and notified owners of the adjoining properties as required, to enable them give their input in the process, but the Applicant frustrated the process leading to postponements. He reiterates that the Applicant filed a suit, at the Chief Magistrate's Court at Kangundo being ELC No. 95 of 2020 and obtained interim orders stopping the survey exercise but never proceeded to prosecute the said suit. Further, in light of the Kangundo Case, he withdrew the Appeal Case vide letter dated 26th January, 2021. He confirms that after two (2) years without setting the aforementioned Kangundo case for hearing, he applied to have the suit dismissed for want of prosecution, which was done. He reiterates that he sought from the 2nd and 4th Respondents for the resolution of the boundaries between the two parcels of land and on 19th March, 2024, the 4th Respondent issued a notice of intention to ascertain boundaries, for all the adjoining parcels of land. Further, to scuttle the process, the Applicant sought to revive the Appeal to the Minister at the Sub County Commissioner's office and this culminated in a meeting held on 16th April, 2024 wherein it was confirmed that there was no case pending therein. He insists that it is the 2nd Respondent that is legally mandated to deal with boundaries, and he should be let to do his work. Further, that titling and demarcation are distinct and the claim by the Applicant that he illegally processed title for his land, is misleading. He reaffirms that the Applicant is a vexatious litigant and is engaged in forum shopping.



6. The Application was canvassed by way of written submissions.

Analysis and Determination

7. I have considered the Chamber Summons Application dated the 23rd May, 2024 including the respective Affidavits, Statement, Annexures including rivaling submissions and the only issue for determination is whether the Ex parte Applicant is entitled to leave to commence Judicial Review proceedings in the nature of certiorari and mandamus to quash the decision of the 2nd, 3rd and 4th Respondents to issue title on LR. No. Machakos/Nguluni/1686 to Teresia Mueni Kiseve (deceased), cancel the said title and if leave so granted, to operate as a stay restraining the 2nd, 3rd and 4th Respondents from fixing the boundaries between Machakos/Nguluni/1683 and 1686 respectively.

8. Order 53 Rule 1 of the [Civil Procedure Rules](#) prescribes the procedure of commencing Judicial Review and stipulates inter alia:-

“(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

9. In this instance, the Ex parte Applicant seeks leave to commence Judicial Review in the nature of Certiorari to quash the decision of the 2nd, 3rd and 4th Respondents issuing the late Teresia Mueni Kiseve a title deed over land parcel number Machakos/Nguluni/1686 and an Order of Mandamus compelling and/or directing the 2nd, 3rd and 4th Respondents to cancel the title deed issued on 3rd November, 2014 to the late Teresia Mueni Kiseve over land parcel number Machakos/Nguluni/1686. Further, that the leave do operate as a stay of determination of the boundaries between Machakos/Nguluni/1686 and 1683 respectively.

10. Lord Diplock in the case of [Council for Civil Service Unions v. Minister for Civil Service](#) [1985] AC 374, at 401D set the standards of Judicial Review and stated that:-

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the



third ‘procedural impropriety’ ...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

11. Further, in the case of the [*Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo*](#) [2015] eKLR, it was held that:-

“It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

12. It is trite that Judicial Review challenges the administrative action of a person in position of authority. Further, it seeks to demonstrate that the actions of the person in authority was illegal, ultra vires, irrational, improper and violated the rules of Natural Justice. From the averments in the respective Affidavits, the Ex parte Applicant claims the 2nd, 3rd and 4th Respondents issued a title to the late Teresia Mueni Kiseve before the Appeal to the Minister was concluded and relied on a wrong map to issue the said title. He sought for the planned boundaries ascertainment between the two aforementioned parcels of land to be stopped. The 1st Respondent insisted that it is actually the Ex parte Applicant who has interfered with the processes. Further, that the Ex parte Applicant tried to reinstate an Appeal which had been withdrawn and opposes the ascertainment of the boundaries between the aforementioned two parcels of land. It is trite that titling process can only occur when the adjudication process is complete. Further, that it is the Land Surveyor through the Land Registrar who is mandated to deal with issues of boundary disputes and decisions emanating therefrom can be appealed to this court. I note the boundaries to the aforementioned parcels of land are yet to be determined. Further, that for a title to be cancelled, a party will have to demonstrate that the same was acquired through fraud, misrepresentation and unprocedurally. Further, *vivo voce* evidence has to be adduced to prove allegations of illegal acquisition of title.
13. Based on the facts before me including associating myself with the decisions cited above, I find that the Ex parte Applicant has not demonstrated how the 2nd, 3rd and 4th Respondents acted illegally, irrationally and ultra vires their powers, culminating in his seeking to quash their proceedings. It is my considered view that the issues raised in the instant Application can be determined in a civil suit. Further, I wish to reiterate that it is the Land Registrar mandated to deal with the boundary disputes first, and it is after his/her decision, that an order for Judicial Review can be sought. I opine that the prayer to quash the proceedings seeking to determine boundaries is hence premature and do not fall within the ambit of Judicial Review. To my mind, I am of the view that the Applicant, has not exhausted all administrative remedies to warrant seeking orders of Judicial Review.
14. In the foregoing, I find that the Ex parte Applicant has not met the criteria for grant of leave to commence Judicial Review orders and will decline to grant him, the orders as sought.



15. In the circumstances, I find the Notice of Motion Application dated the 23rd May, 2024 unmerited and will dismiss it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7TH DAY OF NOVEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kaminza for Applicant

Gitungo for 1st Respondent

No appearance for Attorney General for 2nd – 5th Respondents

Court Assistant – Simon/Ashley

