Miliuntu v Deputy County Commissioner Igembe Central Sub County & another; Ndambuki (Interested Party) (Judicial Review E016 of 2021) [2023] KEELC 17976 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17976 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW E016 OF 2021

CK YANO, J

JUNE 7, 2023

IN THE MATTER OF THE APPLICATION FOR JUDICAL REVIEW ORDER OF CERTIORARI AGAINST THE DECISION OF THE MINISTER IN THE APPEAL TO THE MINISTER NO. 145 OF 2013 ATHIRU RUUJINE NDOLELI ADJUDICATION SECTION

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NUMBER 3963
ATHIRU RUUJINE NDOLELI ADJUDICATION SECTION

BETWEEN

FRANCIS MWITHALI MILIUNTU ..... APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER IGEMBE CENTRAL SUB COUNTY ..... 1ST RESPONDENT

THE MINISTER OF LAND ..... 2ND RESPONDENT

AND

RAHAB WANGUI NDAMBUKI ..... INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted by the court on 20th December, 2021, the ex-parte applicant filed a notice of motion application dated 10th January, 2022 seeking the following orders-;

    1. That this Honourable court be pleased to issue an order of certiorari to move to this court and quash the decision of the minister made on 6th day of July 2021 in the appeal to the minister No. 146 of 2013 in respect of Land Parcel No. 3963 Athiru Ruujine Ndoleli Land Adjudication Section.

    2. That the costs of the application be provided for.

Applicants' Case.

2. The application is based on the grounds set out in the statement of facts and the verifying affidavit of the applicant, Francis Mwithari Miliuntu sworn on 20th December, 2021. The applicant's case is that on 6th July 2021, the 1st respondent made a decision in the appeal to the minister case No. 146 of 2013 on behalf of the 2nd respondent in which he allowed the appeal and awarded Land Parcel No. 3963 Athiru Ruujine Ndoleli Adjudication Section to the interested party. The appeal to the minister was against the decision of the adjudication committee which had ruled that the suit land be shared equally between the ex-parte applicant and the interested party.

3. The ex-parte applicant states that he had lawfully bought the suit land in the year 2019 from one Buabi who had been given the land by his Kiegu clan. The ex-parte applicant further states that in the year 2006, he gathered the said land and it was duly demarcated in his name.

4. It is the ex-parte applicant's contention that during the hearing of the appeal, the 1st respondent refused to record the evidence adduced before him and failed to accord the ex-parte applicant an opportunity to call witnesses and arrived at the decision without analyzing and applying the applicant's evidence on ownership of the suit land. The applicant further contends that the 1st respondent's decision was unprocedural, unfair and irregular. It is the ex-parte applicant's contention that the decision of the respondent was against the evidence before him and that the decision was arrived at through a defective and irregular process, adding that the 1st respondent considered extraneous matters in arriving at his decision.

5. According to the ex-parte applicant the respondents decision is a nullity, bad in law, unprocedural for being based on non -existent evidence and that the 1st respondent acted unfairly and irregularly by favouring the interested party and totally failed to comply with the applicable procedure of hearing and determining the appeal by failing to record the evidence of the parties and especially that of the ex-parte applicant. The ex-parte applicant has annexed copies of the impugned decision and the demarcation record.

The 1st and 2nd Respondents' Case

6. The 1st and 2nd respondents oppose the application through grounds of opposition dated 30th November, 2022 on the grounds that:

    1. The notice of motion lacks merit as it has been brought late without any explanation on the delay.

2. The ex-parte applicant case dwells on the merits of the decision by the 1st respondent as opposed to demonstrating how the process leading to the decision offends the rules of natural justice.

3. The Order of certiorari is not the most efficacious in the circumstances for these reasons-;

   a. The exparte applicant has not demonstrated the status of the implementation of the decision by the 1st respondent given the application was brought close to 6 months from the time it was issued.

   b. The decision by the 1st respondent is the last step in the adjudication process and other steps have been pursued. Finality of issues needs to be achieved.

4. The notice of motion is mischievous and an abuse of court process since its evident from the 1st respondent's decision dated 6th July 2021 that all relevant factors were taken into account demonstrating reasonable compliance with the applicable law.

5. The said motion is without sufficient evidence save for scant allegations contained in the affidavit verifying the facts dated 20th December, 2021.

The Interested Party's Case.

7. The interested party opposed the application and filed a replying affidavit dated 17th June 2022 in which she avers that she is the owner of the suit land. That the decision or finding the ex-parte applicant is challenging in the application herein has since been implemented. The interested party termed the allegations by the ex-parte applicant that during the hearing of the appeal, the 1st respondent refused to record the evidence adduced before him as baseless and misplaced, pointing out that the exparte applicant duly participated in the proceedings and was unable to produce any document to show that he purchased land from one Buabi. That further, the ex-parte applicant never bothered to call the said Buabi as a witness to confirm if indeed he sold land to the applicant.

8. The interested party maintains that he is the bona fide owner of the suit land which she states she has committed colossal sums of money in developing the same and wondered why the ex-parte applicant readily agreed with the decision of the adjudication committee that the land be subdivided into two portions and shared between the applicant and the interested party if indeed the applicant was the owner of the land. It is the interested party's contention that the application is frivolous, vexatious, and legally incompetent and an abuse of the process of court and prayed for the same to be dismissed with costs.

The Ex-parte Applicant's Submissions

9. The ex-parte applicant counsel submitted that in their considered opinion, the fundamental issue for determination is whether the ex-parte applicant has established the grounds for the granting orders of Judicial Review as prayed in the application wholly.

10. The ex-parte applicant submitted that grounds on which court exercises its Judicial Review jurisdiction were restated in the case of Zacharia Wagunza & another v Office of the Registrar, Academic Kenya University & 2 others [2013] eKLR where the learned judge reiterated the broad grounds on which the court can grant orders of Judicial Review as was stated in the Uganda case of Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300 at page 300 – 304.

11. The ex-parte applicant submitted that in the case the court cited with approval of Council of Civil Unions and Minister for the Civil Service [1985] LAC 2 and an application by Bukoba Gymkhana Club [1963] EA 478 and held;

'In order to succeed in an application for Judicial Review the applicant has to show that the decision or act complained of is filled with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of making the decision or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality.

Irrationality, is when there is such gross un reasonableness on 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 is usually in defiance of the logic and acceptable moral standards.

Procedure impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be by no – observance of the rules of National Justice to act or act with procedural fairness towards one to be effected 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 same authority exercise jurisdiction to make a decision."

12. The exparte applicant stated that from the foregoing Judicial decisions they submit on the following;

    a) Whether there was procedural impropriety.

    b) Whether the respondents acted irrationally.

    c) Whether the respondent acted in ignorance of relevant considerations.

    d) Whether the orders sought here are available.

13. The ex-parte applicant submitted that the 1st respondent failed to record the evidence adduced before him and analyse the same before arriving at the decision.

14. The ex-parte applicant further submitted that a curse perusal of the copy of the respondent's decision dated 6th July 2021 and marked as annexture No. FM 1 as per paragraph 3 of the affidavit verifying the facts filed in court on 10th December, 2021 bears witness that the decision contains only the findings and rulings. That the decision does not contain the arguments and or evidence adduced by either parties in support or opposition of the appeal before the 1st respondent.

15. The ex-parte applicant submitted that the 1st respondent in arriving at his impugned decision considered extraneous fact that the ex-parte applicant being a committee member when the adjudication process was going on influenced his acquisition of the suit land and that the failure to record the evidence of the parties constitutes a grave procedural error on the part of the 1st respondent.

16. The ex-parte applicant submitted that there is no record in the decision of the 1st respondent to prove that indeed the ex-parte applicant was a committee member during the administration process and there is no basis to support the finding that the ex-parte applicant used his influence as a committee member in the acquisition of the suit land. The ex-parte applicant submitted that to that extent the decision of the 1st respondent failed the rationality test.

17. The ex-parte applicant submitted that the 1st respondent visited the disputed portion of land, the subject matter of the appeal and during the visit the 1st respondent made a finding of fact that both ex-parte applicant and the interested party were utilizing the disputed portion of land and further found

that there was no clear boundary separating the two portions of land. That however, in his decision the 1st respondent failed to consider and apply the evidence of occupation and user to the detriment of the ex-parte applicant.

18. The ex-parte applicant submitted that the 1st respondent's decision that the interested party was the owner of the two parcels was arrived at without consideration of very relevant facts of occupation and user.

19. The ex-parte applicant submitted that Article 47 of *the Constitution* of Kenya 2010 provides for a Fair Administrative Action and the Action should be expeditious, efficient, lawful, reasonable and procedurally fair.

20. The ex-parte applicant further submitted that from the foregoing submissions, he has demonstrated that the decision of the 1st respondent is in breach of the fundamental requirements of Article 47 of *the Constitution* of Kenya and some of the various judicial decisions and prayed for the prayers in the application herein.

The 1stand 2nd Respondents' Submissions

21. The respondents narrowed down the issues for determination to whether the 1st respondent's decision dated 6th July, 2021 is legitimate and whether the ex-parte applicant is entitled to the reliefs sought. The respondents submitted that it is trite law that all Judicial Review applications must be filed having complied with Article 159 (2) (c) of *the Constitution* that has expressly recognized alternative forms of Dispute Resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. That alternative dispute resolution mechanisms are anchored in the Kenya 2010 Constitution to the extent that *the constitution* requires these forms of dispute resolution mechanism to be promoted, usurpation of their jurisdiction by the High Court would not be promoting but rather undermining a clear constitutional objective.

22. It is the respondents' submissions that the 1st respondent is also guided by Section 29 of the *Land Adjudication Act* Cap 284 Laws of Kenya, which expressly provides an avenue for redress for aggrieved parties who are not satisfied with the decision of the Adjudication Officer. That a party aggrieved by the determination of an objection must within 60 days from the determination appeal against the determination to the minister and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

23. The respondents submitted that in the instant case it is clear that there is no cause of action against the 1st respondent since the Deputy County Commissioner Igembe Central Sub County acted within his powers as set out in the said section.

24. The respondents also relied on Section 34 of the *Land Adjudication Act* which provides for the protection of officers under the Act.

25. The respondents relied on re-Daniel Makau Munguti & others [2022] eKLR in which the court dismissed an application for Judicial Review after finding that the District County Commissioner did not act illegally or unprocedurally by rendering their decision based on the circumstances of the appellant's case.

26. The respondents further submitted that the applicant has not demonstrated the so called refusal to record the evidence adduced before the 1st respondent and that there is no proof of a request to be given a fair hearing by the respondent and the request being declined and neither is there a request to call their witness. That what is evident is just the decision and proceedings at the appeal to the Minister and the

proceedings which the 1st respondent dutifully recorded and relied on in making their determination hence acted in accordance to his duties as enshrined in the *Land Adjudication Act*.

27. The respondents further submitted that a perusal of the application reveals that the applicant is agitating for his rights and interests in land within Athiru Ruujine Ndoleli Adjudication Section and that the adjudication committee proceedings were ruled in his favour where he allegedly influenced the committee she is a member.

28. The respondents submitted that the dispute then escalated to the minister as an appeal and according to the *Land Adjudication Act*, the decision in the appeal proceedings was final unless the issue of compensation was raised.

29. The respondents submitted that the applicant herein has failed to attach any documentation or evidence which was not relied on by the 1st respondent and thus the District County Commissioner rightfully rendered his decision and stated reasons.

30. The respondents relied on the case of Municipal Council of Mombasa v Republic & another [2002] eKLR in which it was held as follows-;

> "Judicial Review is only 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 makers 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 – and that, as we have said, is not the province of Judicial Review."

31. Similarly, the respondents relied in the case of Edward Nzioka Kimasia & 3 others v County Director of Land Adjudication & Settlement (Makueni County) & another Josephat Mwania Kisuna (interested party) [2021] eKLR.

32. The respondents also relied on the case David Njoroge Kimani Vs Teachers Service Commission [2007] EKLR where Justice J.G Nyamu stated that :

> "While I am aware that I have ruled in the recent case of R. V Commissioner General of Kenya Revenue Authority & others Ex-parte Keroche Industries HC Misc Civil application No. 743 of 2006 that making a decision, without evidence in certain cases is a ground of intervention in Judicial review there is nothing before me in this case to show that the two bodies failed to take into account material evidence."

33. The respondents submitted that in arriving at its decision, the District Commissioner was guided by a visit to the suit land which revealed that among other things both the appellant and the interested party herein are utilizing their respective portions and the only issue was that there is no clear cut boundary between the two portions.

34. The respondents further submitted that there is no evidence that the applicant was prevented from calling witnesses or that if the time allowed was not sufficient or that he did apply for an adjournment of the proceedings and that that was declined. The respondents submitted that the applicant has also not shown that the decision was contrary to the evidence adduced to the extent to warrant interference by the court.

35. The respondents submitted that the misdeeds of the respondents have not been demonstrated and it is therefore the respondents' submission that the application has not disclosed any non-conformity with the principles in the *Land Adjudication Act* and should be dismissed.

36. The respondents submitted that for the relief of certiorari prayed by the applicant, the grant of the orders of certiorari is discretionary and the court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

37. The respondents relied on the case of Republic v Public Procurement Administrative Review Board & 2 others ex-parte Rongo University [2018] eKLR.

38. The respondents submitted that in addition, the applicant has not shown to court the factual and or legal provisions such an order can be anchored upon and finds the said prayer untenable.

39. The respondents' contended that the applicant has failed to prove his case and the applicant should be condemned to costs.

The Interested Party's Submissions

40. The interested party submitted that the decision or finding the ex-parte applicant is challenging has since been implemented. That the allegations by the applicant that during the hearing of the appeal, the 1st respondent refused to record the evidence adduced before him is clearly baseless and misplaced as the ex-parte applicants duly participated in the proceedings, hence the allegations are an afterthought, and that the ex-parte applicant was unable to produce any document to show that he indeed purchased land from one Buabi. The interested party further submitted that the ex-parte applicant never bothered to call the said Buabi who incidentally, has only one name, as a witness to confirm that he sold land to the applicant.

41. The interested party submitted that the application is legally incompetent and an abuse of the process of the court. It is the interested party's submission that the property in dispute is in her name, hence the applicant's claim over it is misplaced in law.

42. The interested party submitted that she has extensively developed the said parcel of land and has therefore satisfied the requirement of Section 3 of the *Law of Contract Act* Cap 23. The interested party submitted that the ex-parte applicant has not satisfied the grounds on which the interested party's title can be challenged and relied on the holding in the case of Nairobi Permanent Markets Society and Others v Salima Enterprises & another [1994 – 1981] EA 232.

43. The interested party further urged the court to be persuaded by the views of Aganyanya J (as he then was) in the case of James Waithaka Kamu & 3 others v Stanley Njoroge Nairobi HCC No. 6656 of 1991 where at page 121 of the said Judicial authority the learned judge inter alia held that the plaintiff took possession of the land immediately on purchase in 1962 and settled thereon thereby coming under the provisions of Section 3 (3) of the *Law of Contract Act*. (Cap 23). The interested party submitted that the above holding supported the interested party's case herein given that she has been utilizing her portion of land.

44. The interested party further submitted that Judicial Review is primarily concerned with the integrity that led to the impugned decision including an examination as to whether the decision maker acted ultra vires his jurisdiction, upheld the rules of natural justice including the need to conduct a fair hearing and in proper circumstances a court may address itself to the issues of irrationality, unreasonableness and proportionality. With regard to irrationality, a court can among other things

depending on the peculiarity of the particular case be guided by the wise words of Lord Diplock in Council of Civil Services Unions v Minister for Civil Service [1985] AC 374 where he was of the opinion "a decision is irrational if it is so outrageous in its deficiency of logic or accepted moral standards that no sensible person who has applied his mind to the question could have arrived at it." That the standard is also called the Wednesbury unreasonable principle after the decision in Association Principal Pincure Houses Ltd v Wednesbury Corporation [1948] 1KB 223.

45. The interested party submitted that a careful look at the proceedings conducted by the 1st respondent before he arrived at the decision that has spawned the suit shows that the ex-parte applicant actively participated in those proceedings. That the ex-parte applicant has not demonstrated by way of evidence, documentary or otherwise that there was bias on the part of the 1st respondent.

46. The interested party submitted that it is clear that Section 26 of the *Land Adjudication Act* clothed the 1st respondent with jurisdiction to conduct the proceedings in the way he conducted them. That a close perusal of the proceedings is also clear that the 1st respondent did not delve into irrelevant or irrational considerations as alleged by the ex-parte applicant.

47. The interested party urged the court to find that a fair hearing was accorded to the ex-parte applicant without discernable bias and that there was proper observance of the rules of natural justice.

48. It is the interested party's submissions that the ex-parte applicant has not proved his case to the required standard and urged the court to dismiss the same with costs to the interested party.

Analysis and Determination

49. The court has carefully considered the evidence on record, the submissions made and the relevant law. The issue that arises for determination is whether the orders sought herein should be granted or not.

50. It is the ex-parte applicant's case that the 1st respondent refused to record the evidence adduced before him and arrived at the decision without analyzing the evidence on ownership. That the decision was therefore unprocedural, unfair and irregular.

51. In this case, it is not in dispute that there was an appeal to the minister pursuant to the provisions of the *Land Adjudication Act*. I have perused the material on record. It is clear that the appeal was filed by the interested party. The proceedings indicates that both the ex-parte applicant and the interested party were present during the hearing of the appeal before the 1st respondent. I therefore take it that both parties received notices and appeared before the 1st respondent for the hearing of the appeal. Thereafter, the minister made a ruling. Whereas the ex-parte applicant alleges that the 1st respondent failed to accord him an opportunity to call witnesses, I note that both parties were heard. The proceedings further shows that the 1st respondent made a visit to the suit land and made some observations. I further note that the 1st respondent in his ruling indicated that he considered all facts as per the statements from both parties and their witnesses. The ex-parte applicant has not indicated which of his witnesses was denied an opportunity to testify and which part of the evidence adduced was not considered. What is evident is that the proceedings and the decision at the appeal to the minister is that the 1st respondent dutifully recorded and relied on the evidence that was adduced by the parties and their witnesses, and even visited the disputed parcel of land. In my view therefore, the 1st respondent acted in accordance with his powers as enshrined in the *Land Adjudication Act* and rendered his decision.

52. It should be noted that under the said Act, there is no prescribed procedure that the minister is to follow. No such duty as laid down for the hearing of civil suits has been prescribed in respect of hearings of appeals before the minister. I therefore find that the ex-parte applicant's complaint in this regard is unfounded and has no basis in law. Furthermore, the allegation by the ex-parte applicant that the

1st respondent considered extraneous facts in arriving at his decision has not been substantiated and is therefore a mere conjecture not based on any facts and I reject it.

53. The other issue for determination is whether the Judicial Review Orders sought in the application herein are available or not. As rightly submitted by all the parties herein, Judicial Review proceedings is concerned with the decision making process, not the merits of the decision itself. See the case of Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR cited hereinabove. It was also held in Republic v Kenya Revenue authority ex-parte Yaya towers Ltd [2008] eKLR 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.

54. The purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Accordingly, this court will only concern itself with the process followed by the respondents in arriving at the impugned decision and therefore will not dwell whether the decision arrived at was the correct one or otherwise. That is an issue which can only be resolved in a merit hearing before a court.

55. Analyzing the statements above made by the ex-parte applicant it is obvious that the ex-parte applicant is challenging the merits of the decisions of the minister. As stated it is evident that Judicial Review is only concerned with the decision making process not the merits of the case.

56. In the case of Municipal Council of Mombasa v Republic & Another [2002] eKLR, the Court of Appeal held as follows;

> "Judicial Review is only concerned with the decision- making process, not with the merit of the decision itself: the court would concern itself with such issue as to whether the decision makers 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"

57. In the same breath in the case of Republic v Kenya National Examination council ex-parte Gathenji and Civil Appeal No. 266 of 1996, the court of appeal stated inter alia, that;

> "It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision – making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal."

58. The broad grounds on which the court exercises its Judicial Review jurisdiction were also reiterated in Zachariah Wagunza & another v Office of the Registrar, Academic Kenyatta University & 2 others [2013] eKLR as was stated in the Uganda case of Pastoli v Kabale District Government Council and others [2008] 2EA 300 and observed among other things 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 making the decision or making the act, the subject of the complaint. Acting

without jurisdiction or ultra vires or contrary to the provisions of law or its principles are instances of illegality ..."

59. It is clear therefore that the purpose of Judicial Review is to check that public bodies or persons holding public authority and exercising their function, do not exceed their jurisdiction and carry out their duties within the limit defined by the law. Examples of these is where the lawful authority departed from procedures stipulated by statute and in this instant case it is not the case.

60. As was held in Public v Kenya National Examination Council ex-parte Geoffrey Gathenji and 9 others (supra).

> " The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment."

61. Having considered the application herein, I find that the minister acted procedurally and legally hence his decision stands. Consequently, the notice of motion application dated 10th January, 2022 is not merited and the same is disallowed. I also award the respondents and interested party the costs of the application to be borne by the ex-parte applicant.

62. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE 2023

In presence of

Aaron Gitonga present for applicant

Kimathi present for 1st and 2nd respondent

Omari present for interested party.

Court Assistant V. Kiragu

C.K YANO

JUDGE