



Republic v Mumba & 2 others; Katana (Exparte Applicant) (Judicial Review 6 of 2022) [2023] KEELC 18563 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW 6 OF 2022**

EK MAKORI, J

JULY 5, 2023

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

AND

**IN THE MATTER OF ARTICLES 10, 23, 27, 40, 46,
AND 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 29 OF THE LAND
ADJUDICATION ACT CAP 284 LAWS OF KENYA**

AND

**IN THE MATTER OF THE DECISION OF PANEL CHAIRMAN/DEPUTY
COUNTY COMMISSIONER MADE IN 10TH MAY, 2022, APPEAL
CASE NO. 420 OF 2021 WITH RESPECT TO OWNERSHIP OF PLOT
NO. 1282 MWANDA/MBALAMWENI ADJUDICATION SECTION.**

AND

IN THE MATTER OF THE LAW REFORMS ACT CAP 226 LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

REPUBLIC APPLICANT

AND

SWALEHE HINZANO MUMBA 1ST RESPONDENT



**DEPUTY COUNTY COMMISSIONER, KALOLENI SUB-COUNTY 2ND
RESPONDENT**

THE HON ATTORNEY GENERAL 3RD RESPONDENT

AND

AUGUSTINE NGALA KATANA EXPARTE APPLICANT

JUDGMENT

1. Application dated 22nd August 2022 and filed on 2nd September 2022 by the Ex-Parte Applicant seeks the following Judicial Review orders among other reliefs:
 - a. THAT this court be pleased to grant the Applicant herein an order of Certiorari to remove into this court and quash the decision of the 2nd Respondent delivered on 24th May 2022 on Appeal Case no 420 of 2021.
 - b. THAT this court be pleased to grant the Applicant herein an order of Prohibition to remove into this court and prohibit the Land Registry Kilifi County from issuance and/or release of title deed relating to Land Parcel No Mwanda/Mbalamweni Adjudication Section 1282 until the hearing and determination of this case.
 - c. THAT this court be pleased to grant any other relief as the court may deem fit and just in the circumstances.
 - d. THAT, the costs of this application be provided for.
2. The 2nd & 3rd Respondents through their Grounds of Opposition dated 17th January 2023 and filed on an even date, opposed the application in this manner:
 - a. That the Applicant has not established and/or demonstrated any cause of action against the 2nd and 3rd Respondents.
 - b. That the Application is vexatious, frivolous, bad in law, and made in bad faith to scandalize the 2nd Respondent.
 - c. That the motion has not met the threshold for issuing judicial review orders hence the same should be dismissed.
3. The Ex parte Applicant's grievances are that he has been staying on the Land Parcel No 1282 Mwanda/Mbalamweni Adjudication Section together with his family, utilizing it before the demarcation and adjudication process commenced. One Swaleh Hinzano 1st Respondent a resident from a different locality was allowed by the Applicant's family to have a small portion to till for agricultural purposes. The understanding was that he was to use the land for farming only and no ownership rights were to be extended to him. After the death of the Applicant's grandfather, the said Swaleh Hinzano started to crave the sale of the land; it is when the grandfather and uncle took over the land in question.
4. This matter was heard in the various forums of the Dispute Resolution Mechanisms of the [Land Adjudication Act](#) with the final appeal to the Minister pursuant to Section 29 of the Act at some point the matter was heard before the defunct Land Disputes Tribunal and the Magistrates Court (which I



think is outside the scope of what we have). At the Committee Stage, a decision was made to have the land in question to be divided between the Applicant and 1st Respondent. At the Arbitration stage, the decision of the Committee was upheld. The decision was to have the land divided. The matter then went on Appeal to The Minister leading to the present proceedings.

5. The respondent maintained that the decision taken was procedural, unbiased, and above board.
6. Parties canvassed the application by way of written submissions.
7. The applicant averred that the decision arrived at was not unanimous having been signed by 3 instead of 7 members and therefore procedurally wrong.
8. The decision never took into account the site visit and the 2nd respondent misinterpreted it and failed to reckon its import and tenor.
9. That the panel did not give reasons for its decision. Article 47 of *the Constitution* was flouted. While Section 23 of the Fair Administrative Act, which buttresses the importance of reasons in decision-making, was also breached which resulted in the deprivation of the applicant's right to acquire property in Kenya. The case of *Suchan Investment v The Ministry of National Heritage and Culture* [2016] eKLR was cited which extolled the principles of natural justice and the right to be heard.
10. The applicant further quoted the case of *Philiph Mururi Ndaruga v Gatemu Housing Co-operative Society Ltd* [2016] eKLR on the rationale for giving reasons in a judgment or decision.
11. The applicant submitted further that the failure to deal with many issues made the decision unsatisfactory and amounts to a mistrial as held in the case of *Chandaria v Nyeri* [1982] KLR 84 at 85. The applicant is of the view that by failure to give reasons, the decision fell short of the test laid in the case of *Pastoli v Kabale District Local Government and others* [2008]2 EA 300.
12. The respondents submitted that Judicial Review is concerned with the procedure and not the merits of the case, while the applicant's issues revolved around factual matters, which are beyond the purview of judicial review.
13. On whether the Ex-Parte Applicant's motion has properly met the threshold for issuing Judicial Review orders, the respondents submitted that both the traditional common law grounds for judicial review and the expanded grounds of judicial review listed in Section 7 of the *Fair Administrative Action Act* are well known. The Ex-parte Applicant's judicial review application does not raise any judicial review grounds at all. It does not raise either the traditional common law judicial review grounds or the expanded grounds of judicial review listed in section 7 of the *Fair Administrative Action Act*.
14. That the Ex-parte Applicant has not established any illegality, irrationality, or, procedural impropriety in the procedure followed by the 1st Respondent, as cited in the Ugandan case of *Pastoli v Kabale District Local Government Council & Others* [2008] 2 E.A 300-301 quoted with approval by Odeny J. in *Chimbevo v Chief Land Registrar & 3 others; Kalama (Interested Party) (Judicial Review Miscellaneous Application 11 of 2019)* [2022] KEELC 4773 (KLR) (9 September 2022) (Ruling).
15. The respondent averred that this application brims with untruthfulness, lies, and deliberate omission of facts in order to mislead this Court. The Applicant has given his reasons for judicial review as an incorrect decision, irrationality, unreasonableness, and impropriety. He further claimed that the 2nd Respondent, failed to give reasons before arriving at his decision and that he did not consider the report of the site visit in his decision. This could not be further from the truth. 2nd Respondent's proceedings and ruling dated 10th May 2022 which the Applicant has deliberately omitted and/or failed to attach



and supplied by the 2nd respondent on page 3 of the said decision shows that the Minister considered the site visit report.

16. The Respondents contended that based on the evidence produced during the hearing from both parties and the findings of the site visit, the Minister made six findings that were the basis of his decision. It is not factual that the Minister did not give reasons for his decision. The Respondents further stated that it was dishonest on the part of the Applicant to remotely suggest that the minister was irrational in rendering his decision.
17. The respondent further relied on the case of *Peninah Nadako Kilishwa v Independent Electoral Boundaries Commission (IEBC) & 2 others* [2015] eKLR where the Supreme Court of Kenya stated what Judicial Review parameters are.

“The well-recognized principle in such cases, is that the court’s target in judicial review is always no more than the process which conveyed the ultimate decisions arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence an Applicant making a case for Judicial Review has to show that the decision in question was illegal, irrational, or procedurally defective.”
18. The respondent further cited the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, on the scope of Judicial Review.
19. Respondent submitted that the issues raised in the Statement in support of this Application are primary facts that will require the court to investigate through viva voce evidence, which can only be done through an ordinary suit that allows each party to be heard as envisaged in *the Constitution*. The main issue raised by the Applicant is on the ownership of parcel number Mwanda/Mbalamweni Adjudication Section 1282 and not on how the decision of the minister was arrived at. In that regard the Respondents relied on the case of *Republic v Non-Governmental Organizations Ex parte Linda Bonyo & 4 others; Philip Opiyo Sadjah & 5 others (Interested Parties)* [2020] eKLR.
20. The Respondents contended that Judicial Review does not deal with contested issues of facts, which require parties to adduce evidence and be cross-examined. The Respondents further cited the case of *Republic v Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 others* [2016] eKLR, on the same point where the court decried the practice of bringing claims through Judicial Review which requires the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.
21. Respondents stated the applicant attached the Minister’s decision and elected to attach only pages 1 and 4 of the decision and left out pages 2 and 3. This, the Respondent submitted was not by mistake but by design to mislead this court. The Respondents have attached the omitted decision of the land dispute tribunal No. LND/KAI/38/2006 which was delivered on 4th June 2009 and the land adjudication officer’s decision of 13th October 2017 claimed that these decisions were erroneous and illegal reasons that they combined several parcels of land. The Respondents further stated that it was worth noting the decision which is complained about is that of the Minister delivered on 10th May 2022 and not the two aforementioned decisions, the Minister was not concerned with those two decisions and therefore they cannot be used as the basis for quashing the Minister’s decision however improper or incorrect those decisions may be. Nowhere in the impugned decision has the Minister combined more than one parcel of land in making his determination. This is yet another instance according to the Respondent where the Applicant was lying.



22. The issues for determination are whether Judicial Review orders of Certiorari should issue to remove into this court and quash the decision of the 2nd Respondent delivered on 24th May 2022 on Appeal Case No 420 of 2021. Whether Judicial Review orders of Prohibition should issue to remove into this court and prohibit the Land Registry Kilifi County from issuing and/or releasing title deeds relating to Land Parcel No. 1282 Mwanda/Mbalamweni Adjudication Section and, who to bear the costs.
23. I have considered the submissions and reviewed the materials placed before me. From the onset, it will seem the Applicant has attached several other proceedings from the defunct Land Disputes Tribunal and some decisions from the Magistrates Court, which have no relevance under the [Land Adjudication Act](#). The Applicant too attached 2 pages of the Minister's decision. The sequence of the proceedings and the mix-up made the arguments in this matter blurred. For instance, the Decision by the Defunct Land Disputes Tribunal and the Ruling from the Magistrates Court had no place in this trial at all.
24. There is also the issue of what the scope of this court's mandate is in this matter. The tone of the Applicant was that the court was to check the whole history of the trial and tussles between the parties in all the forums they have appeared in a bid to resolve the dispute on the suit property and remedy whatever "wrongs" that may have been committed in those forums by way of Judicial Review. A mixture of issues others touching on the Appellate jurisdiction of this court. A bagful so to say.
25. If I got what the Applicant sought from this court, it is to quash the decision by the 2nd respondent which was delivered on 24th of May May, 2022 affirming the decision of the Land Adjudication Officer and prohibit the Land Registry Kilifi from implementing it.
26. The main shove of this application as stated is that the Minister never gave reasons for his decision nor consider the import of the site visit.
27. It will be noted that the Applicant did not attach the entire decision by the Minister. Only choosing to attach 2 pages of 4. The 2nd Respondent attached all 4 pages of the decision.
28. The principles governing the issuance of Judicial Review orders are as stated for example in the decision in *Chimbevo v Chief Land Registrar & 3 others; Kalama (Interested Party) (Judicial Review Miscellaneous Application 11 of 2019) [2022] KEELC 4773 (KLR) (9 September 2022) (Ruling)* where Odeny J. stated as follows:

“Judicial review is concerned with the process that leads to the outcome. If the process is flawed, full of irregularities, bias, and impropriety in deciding as was held in the cases of *R v Nairobi City County Ex-parte: Gurcharn Singh Sihora & 4 Others [2014] eKLR*, and of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd, Nairobi Civil Appeal No 185 of 2007[2002] eKLR*, the Court of Appeal held that:-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.



29. See also *Peninah Nadako Kilishwa v Independent Electoral Boundaries Commission (IEBC) & 2 others* [2015] eKLR where the Supreme Court of Kenya stated what Judicial Review parameters are:

“The well-recognized principle in such cases, is that the court’s target in judicial review is always no more than the process which conveyed the ultimate decisions arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence an Applicant making a case for Judicial Review has to show that the decision in question was illegal, irrational, or procedurally defective.”

30. The acts complained of by the applicant are that no reasons were given for the decision and the site visit report was not taken into account. Looking at the four-page decision by the Minister, and as submitted by the 2nd and 3rd respondents, the Minister took into account the site visit as can be discerned from page 3 of the decision as follows:

“Site Visit Report

The panel conducted a site visit on 26th April 2022 and observed the following:
The respondent is residing on the disputed parcel- there are 5 houses. There are trees growing on that parcel. Graveyard for the respondent’s family is there.”

31. The Applicant contended that the import of the site visit was not well appreciated. This means that this court should review the evidence, sit on appeal, and arrive at its conclusion. That is the province of an Appellate court and not a Judicial Review jurisdiction of this court.

32. Whether the Minister gave reasons for the decision, a close look at the record shows the Minister did give reasons as can be found on page 4 of the decision. Those findings made the Minister conclude that:

“Given the above findings and other testimonials presented before the Panel, this appeal is hereby dismissed on grounds that the Respondent is residing there, utilizing it, and has buried his deceased family members without any interference from the Appellant’s family”

33. I reiterate that the applicant failed to properly invoke the jurisdiction of this court in Judicial Review cases. As I can see from the material put before me, the applicant's main tangent was to this court review earlier decisions (even unrelated to Adjudication) in related cases in an Appellate Court setting and replace them with Judicial Review orders. The applicant misunderstood the issue.

34. The upshot is that I see no procedural impropriety in the manner the proceedings were conducted by the Minister pursuant to Section 29 of the *Land Adjudication Act* and I declined to issue the orders sought. The Judicial Review application before me is thus dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 5TH DAY OF JULY 2023

E.K. MAKORI

JUDGE

In the presence of :

Mr. Ahenda for Mr. Masake for the Applicant

Court Clerk: Happy

In the Absence of:-



Mr. Mkala for the Respondent

