



Republic v District Commissioner (Acting as a delegate of the Minister Under Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya); Okello (Exparte Applicant); Oranya (Interested Party) (Environment and Land Judicial Review Miscellaneous Application E008 of 2021) [2023] KEELC 20644 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20644 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

**ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E008 OF 2021**

SO OKONG'O, J

OCTOBER 12, 2023

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP. 284 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION AGAINST THE DECISION OF THE DISTRICT COMMISSIONER BONDO ACTING AS A DELEGATE OF THE MINISTER PURSUANT TO SECTION 29 OF THE LAND ADJUDICATION ACT CAP. 284 LAWS OF KENYA IN APPEAL CASE NO. 236 OF 2007 ON PARCEL NO. NYANGOMA/UYAWI 2410 ADJUDICATION SECTION

BETWEEN

REPUBLIC APPLICANT

AND

DISTRICT COMMISSIONER (ACTING AS A DELEGATE OF THE MINISTER UNDER SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA) RESPONDENT

AND

WALTER OMBENG OKELLO EXPARTE APPLICANT

AND

LOYCE ADOYO ORANYA INTERESTED PARTY



JUDGMENT

Brief Facts

1. Pursuant to the leave that was granted on 25th November 2021, the Ex parte Applicant, Walter Ombeng Okello (hereinafter referred to only as “the Applicant”) brought this application by way of Notice of Motion dated 15th December 2021, seeking the following orders;
 1. An order of certiorari to remove into the Environment and Land Court at Kisumu for the purposes of quashing the decision of the Minister made through Bondo District Commissioner on 12th November 2020 in respect of land parcel number Nyangoma/uyawi 2410 in a dispute between the Applicant and the Interested Party.
 2. An order of mandamus compelling the Minister to award the disputed parcel of land to the Applicant, Walter Ombeng Okello.
 3. An order of prohibition directed at the Minister prohibiting him from implementing the decision made on 12th November 2020 in whatsoever manner through the Land Adjudication Officer, County Surveyor and the Land Registrar or any other person acting on his behalf in respect of the land parcel number Nyangoma/uyawi 2410.
 4. The costs of the application.
2. The Applicant’s application was based on a Statutory Statement dated 11th May 2021 and a Verifying Affidavit and a Supporting affidavit sworn by the Applicant on 11th May 2021 and 15th December 2021 respectively. The Applicant averred that he was the sole proprietor of the parcel of land known as Nyangoma/Uyawi /2405 a portion of which was unlawfully curved out and unprocedurally awarded to the Interested Party as Nyangoma /Uyawi/2410 which was the subject of Appeal No. 236 of 2007 before the Minister.
3. The Applicant averred that the Interested Party had never resided on the disputed piece of land and that, Martin Oloo Obonyo who was the one behind all the attempts to cause confusion in the adjudication of the said piece of land was a committee member in Nyangoma/Uyawi Adjudication Section which position he used to influence the adjudication of prime beach plots in the area including the disputed parcel of land belonging to the Applicant. The Applicant averred that in his appeal to the Minister which is the subject of these proceedings, the said Martin Oloo Obonyo and his son Philip Asewe purported to give evidence on behalf of the Interested Party who was just seated.
4. The Applicant averred that the Appeal No. 236 of 2007 to the Minister arose from the decision made in Objection Nos. 62, 63 and 64 of 21st August 2003 by the Applicant wherein the Adjudication Board dismissed the Objection Nos. 62 and 63 and ruled that the Interested Party was to retain the parcel of land in dispute. The Applicant averred that the Deputy County Commissioner purporting to be a delegate of the Minister erred in law and acted in excess of the powers conferred upon him under Section 29 (1) of the *Land Adjudication Act*, Chapter 284 Laws of Kenya (the Act) by entertaining fresh verbal evidence from the parties thereby causing a great injustice as he was not able to comprehend the complexity of the lies that were being peddled by the Interested Party.
5. The Applicant averred that the Minister failed to appreciate that the Interested Party was only interested in the beach plots. The Applicant averred that despite several attempts being made to merge all the parcels of land that had been erroneously curved out of Nyangoma/Uyawi/2405, the Minister



- overlooked the fact and still went ahead to dismiss the appeal thereby causing an injustice to the Applicant.
6. The Applicant averred that the Minister overstepped his jurisdiction by entertaining an appeal in respect of Nyangoma/Uyaw/Adjudication 2410 without having all the evidence that had been adduced at the Objection stage. The Applicant averred that the Minister failed to appreciate the laid down procedure in law and overlooked the grounds of appeal raised by the Applicant. The Applicant averred that the Minister pronounced himself on non-existent Objection proceedings. The Applicant averred that the file with the initial Objection proceedings had gone missing for over 8 years and as such the same was not presented to the Minister during the hearing of the Appeal. The Applicant averred that this explained the very scanty proceedings availed to the Applicant when he applied for the proceedings.
 7. The Applicant averred that the Minister failed to appreciate all the evidence and decisions that were tabled before him with regard to Nyangoma/Uyaw/2405 which were the root of all the Objections by the various parties. The Applicant averred that the Minister failed to appreciate as a whole the evidence and the findings of the Arbitration Board as the same succinctly gave the history of the land in question and would have guided him so as not to occasion an injustice to any of the parties.
 8. The Applicant averred that the Minister failed to consider the evidence contained in the Objection proceedings that gave rise to the appeals because the original file that contained the said proceedings could not be traced hence the non-availability of the records. The Applicant averred that the Minister relied on extraneous evidence in arriving at his decision. The Applicant averred that the Minister failed to analyse and consider the evidence that was tabled before him as a whole hence occasioning a great injustice to the Applicant. The Applicant averred that there was an avalanche of errors apparent on the record. The Applicant averred that there were serious procedural errors in the filing and conduct of the entire adjudication and the appeal process.
 9. The Applicant averred that in the final analysis, the Minister acted ultra vires his powers conferred under the Land Adjudication Act Chapter 284 Laws of Kenya (the Act). The Applicant averred that there were several procedural irregularities. The Applicant averred that extraneous matters were considered, the practicality of implementing the decision was ignored, and there was manifest impartiality and outright deceit in the conduct of the Appeal.
 10. The application was opposed by the Interested Party through a replying affidavit sworn on 21st July 2022. The Interested Party averred that during the land adjudication and demarcation in Nyangoma Uyaw Adjudication Section in 1987, Plot No. 2405 was demarcated in favour of the Applicant, Walter Ombeng Okello. The Interested Party averred that afterward, the adjudication officers found that Martin Oloo was the one tilling the land and ordered that the status quo prevailing should remain. The Interested Party averred that Martin Oloo lodged a complaint against the Applicant, Walter Ombeng Okello before the Land Adjudication Committee and won the case. The Interested Party stated that Martin Oloo was given Plot No. 2405.
 11. The Interested Party averred that on 12th May 1988, the Applicant appealed against the decision of the Land Adjudication Committee to the Arbitration Board and the Board determined the Appeal in favour of Martin Oloo. The Interested Party averred that the Arbitration Board directed that Plot No. 2405 be subdivided because there was a tsetse fly control project on the land and the land under the project was donated by Martin Oloo's father. The Interested Party averred that following that decision by the Board, the Plot No. 2405 was subdivided and the Applicant remained with the portion bearing the original number 2405. The Interested Party stated that the tsetse fly camp was given Plot No. 2409.



- The Interested Party averred that the other parcels of land that were created during the exercise were Plot No. 2410 that was given to her and Plot Nos. 2407 and 2712 that were given to Martin Oloo.
12. The Interested Party averred that the Applicant was dissatisfied with the findings of the Board and filed an Appeal to the Minister, Appeal No. 237 of 2007. The Applicant averred that the said Appeal was heard and determined on 4th November 2020. The Interested Party averred that the Appeal was determined in her favour. The Interested Party averred that the Applicant's application was brought in bad faith and lacked merit. The Interested Party urged the court to dismiss the same with costs.
 13. The Applicant died on 11th October 2022 and was substituted by Joseph Obonyo Ombeng on 8th May 2023. The application was however not amended to effect the substitution as directed by the court.
 14. The application was argued by way of written submissions. The Interested Party filed her submissions on 30th January 2023 while the Applicant filed his submissions on 6th June 2023.

Applicant's submissions

15. The Applicant submitted that he had established that he was entitled to the orders of judicial review sought in the application. In support of this submission, the Applicant cited several cases on how the judicial review jurisdiction is exercised by the court including *Municipal Council of Mombasa v. Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No. 185 of 2007 [2002] eKLR, *Pastoli v. Kabale District Local Government Canal & Others* [2008] 2 EA 300 and *Kenya National Examination v. Republic Ex parte Geoffrey Gathenji & 9 Others*, Nairobi[1997]eKLR.
16. The Applicant submitted that he had demonstrated that the Minister had violated the rules of natural justice and acted ultra vires the powers conferred upon him under Section 29 of the Act by admitting evidence that was not tendered before the Arbitration Board. The Applicant submitted that the Minister did not have in his possession all the previous proceedings on the dispute that commenced at the Adjudication Committee. The Applicant submitted further that having established that the Minister acted ultra vires, he was entitled to an order of prohibition prohibiting the implementation of the impugned decision of the Minister made on 12th November 2020. The Applicant submitted that the Minister made an award without looking at all evidence that was tabled before him and proceeded to quickly dispense with the matter without taking into consideration the correct procedure.
17. The Applicant submitted further that he had made out a case for an order of mandamus compelling the Minister to award the parcel of land in dispute to the Applicant. The Applicant submitted that the Minister was under an obligation to act according to the law. The Applicant submitted that it was clear from the material placed before the court by the Applicant that the Minister did not do his public duty and thus ended up occasioning an injustice to the Applicant. The Applicant urged the court to grant the orders sought in his application together with costs.
18. The Interested Party's submissions
19. The Interested Party submitted that under Sections 26 and 29 of the *Land Adjudication Act*, Chapter 284 Laws of Kenya (the Act), the appellate process in land adjudication and demarcation disputes is well laid out. The Interested Party submitted that a party aggrieved with the decision of the Adjudication Officer in an Objection is required to appeal to the Minister within 60 days of that decision. The Interested Party cited *Martha Kigeu v. Johana Tibino* [2014] eKLR in support of her submission on that point. The Interested Party submitted that the Applicant's Objection Nos. 62, 63 and 64 were determined on 21st November 2003.
21. The Interested Party submitted that the Applicant did file an appeal to the Minister against the said decision until 4 years later in 2007. The Interested Party submitted that the Appeal to the Minister was



filed out of time. The Interested Party submitted although the Applicant had contended that there were gross procedural errors in the manner the Minister conducted the Appeal, the Applicant did not specify the alleged errors. The Interested Party submitted that the Applicant did not also tell the court the extraneous and irrelevant evidence that the Minister considered.

23. The Interested Party submitted further that the Applicant was notified in good time of the date for the hearing of the appeal and informed of his right to call witnesses and produce any documents he wished to rely on in support of his appeal. The Interested Party submitted that it was clear from the Minister's proceedings that the parties were accorded a fair hearing. The Interested Party submitted further that the Applicant's application was *res judicata*, misconceived in law, and lacked merit. The Interested Party urged the court to dismiss the application with costs.

Analysis and determination

24. I have considered the Applicant's application together with the statutory statement and the affidavits filed in support thereof. I have also considered the replying affidavit by the Interested Party and the submissions by the advocates for the parties. The issue arising for determination in the application before me is whether the Applicant has made a case for the grant of the orders of judicial review sought.

25. In *Municipal Council of Mombasa v. Republic & another* [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

"... And as the Court has repeatedly said, judicial review is concerned with the decision - making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. 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 made 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 he 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 decision; acting as an appeal court over the decision 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..."

26. In *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v. Public Procurement Administrative Review Board Kenya & 2 others* NRB CA 28 of 2016, [2017] eKLR, the Court of Appeal stated as follows:

"The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect; That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision



was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters”.

27. In the book, H. W. Wade and C. F. Forsyth, *Administrative Law*, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

“The quashing order and prohibiting order are complementing remedies, based upon common law principles A quashing order issues to quash a decision which is ultra-vires. A prohibiting order issues to forbid some act or decision which will be ultra-vires. A quashing order looks to the past, a prohibiting order to the future.”*

28. In *Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others*(supra), the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

“... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land....Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

29. In *Halsbury’s Laws of England*, 4th Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

“The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leave discretion as to the mode of performing the duty in the hand of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

30. In the book; *Public Law in East Africa* published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”

31. Section 26 of the [Land Adjudication Act](#), Chapter 284 Laws of Kenya (the Act) 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”.

32. Section 29 of the Act provides as follows:

“(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”.

33. I am not persuaded that the Applicant has made a case for the grant of the orders sought. Before going into the merit of the application, I wish to say that I am in agreement with the Interested Party that the Applicant’s appeal before the Minister was filed out of time and should not have been entertained at all. It is common ground that the decision in the Objection proceedings that were appealed to the Minister was made on 11th November 2003. From the appeal case number that was assigned to the Appellant’s appeal to the Minister, all indications point to the fact that the appeal was not filed until 2007 which was several years after the expiry of the 60 days within which the appeal should have been lodged.

34. On the merit of the application, again, I am in agreement with the Interested Party that the Applicant made several allegations that he failed to establish. It was the Applicant’s case that the Deputy County Commissioner to whom the Minister had delegated the power to hear the appeal acted in excess of the powers conferred upon him under Section 29(2) of the *Land Adjudication Act* by entertaining fresh verbal evidence from the parties. The Applicant also accused the Minister of determining the appeal without considering the record of the Objection proceedings which according to the Applicant was not available. I have reproduced Section 29(1) of the Act which gives the Minister power to determine the appeal from Objection proceedings. The relevant part provides that “...the Minister shall determine the appeal and make such order thereon as he thinks just...”. I am of the view that when hearing the appeal, the Minister had a free hand. The appeal was actually a retrial of the Objection as it challenged the merit of the decision of the Arbitration Board. I am not aware and none was pointed out by the Applicant of the existence of any rules or regulations under the Act for the hearing of the Appeals to the Minister. I am of the view that what was required of the Minister was to ensure that the parties were both given a fair hearing. I have noted from the record that the parties were given a notice of the hearing of the appeal by the Minister. The parties were also informed of their right to give evidence and produce documents in support of their respective cases. I have noted that both parties appeared before the Minister (his appointee) and were given the opportunity to present their cases. I have noted that the parties essentially adopted the evidence that they tendered during the Objection proceedings and each party was given the opportunity to cross-examine the other on that evidence. I have also noted that Martin Obonyo and Philip Asewe Oloo who testified on behalf of the Interested Party were cross-examined by the Applicant. After hearing the parties and their witnesses, the Minister considered the previous proceedings between the parties and the appeal and made findings on the issues that arose and final orders. The Applicant has not convinced me that the Minister did not observe the rules of natural justice. The Applicant was given the opportunity to present documents, give evidence, and call witnesses. It appears that he did not utilise the opportunity. He cannot now blame the Interested Party for calling witnesses and terming their evidence extraneous.



35. As stated in the authorities I have cited, judicial review jurisdiction is concerned with the decision-making process. It is my finding that the Applicant has failed to prove that the process adopted by the Minister in the appeal was unlawful or against the rules of natural justice. I am also not satisfied that the Minister acted ultra vires his powers.

Conclusion

36. This court finds that the Applicant's Notice of Motion application dated 15th December 2021 lacks merit. The application is dismissed with costs to the Interested Party.

DELIVERED AND DATED AT KISUMU ON THIS 12TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERRING PLATFORM IN THE PRESENCE OF:**

Ms. Ochieng h/b for Mr. Nyanga for the Applicant

Mr. Omondi T. for the Interested Party

N/A for Respondent

Ms. J. Omondi-Court Assistant

