Kimuya v Deputy County Commissioner - Kilungu & 2 others; Musyimi & another (Interested Parties) (Environment and Land Judicial Review Case E007 of 2022) [2023] KEELC 21530 (KLR) (8 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21530 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2022

TW MURIGI, J

NOVEMBER 8, 2023

BETWEEN

JOSIAH MUKELI KIMUYA ..... APPLICANT

AND

DEPUTY COUNTY COMMISSIONER - KILUNGU ..... 1ST RESPONDENT

THE DIRECTOR LAND ADJUDICATION & SETTLEMENT .... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

JOHN MUTAKI MUSYIMI ..... INTERESTED PARTY

HENRY MUANGE NGUI ..... INTERESTED PARTY

JUDGMENT

1. Before me for determination is the Notice of Motion dated 14th July, 2022 brought under Order 53 Rule 1 and 2 of the *Civil Procedure Rules*, Sections 8 and 9 of the *Law Reform Act* and all other enabling provisions of the law in which the Applicant seeks the following orders:-

    1. That an order of *Certiorari* do issue to remove into this Honourable Court and quash the decision of the 1st Respondent in an Appeal to the Minister Case No 341 of 2019 delivered on 6th April, 2022 over land Parcel No 3075 Ndiani Adjudication Section.

    2. That an order of Prohibition do issue directed to the 2nd Respondent from effecting and/or implementing the decision of the 1st Respondent in an Appeal No 341 of 2019 delivered on 6th April, 2022 over land Parcel No 3075 Ndiani Adjudication Section.

3. Cost of this suit and incidental to the application be provided for.

4. Such further and other reliefs that the Honourable Court may deem just and expeditious to grant.

2. The application is based on the grounds appearing on the Statutory Statement together with the verifying affidavit of Josiah Mukeli Kimuya sworn on 15th July, 2022.

The Applicant's Case

3. The Applicant averred that Land Parcel No 3075 Ndiani Adjudication Section (the suit property herein) was excised from Land Parcel No 2700 Ndiani Adjudication Section and recorded in his name.

4. He averred that the decision by the Arbitration Board awarding the suit property to the 1st and 2nd Interested Parties was upheld by the 1st Respondent in Case No 341 of 2019 vide its decision dated 6th April 2022.

5. He further averred that he was not accorded a fair hearing in the proceedings before the Minister as the 1st Respondent declined to grant his request for a site visit. The Applicant averred that the Committee dismissed the Interested Parties claim and held that he was to remain on the suit property because he was the registered owner of the same.

6. The Applicant contended that the 1st Respondent acted ultra vires her jurisdiction by holding that the 1st and 2nd Interested Parties had acquired the suit property by adverse possession which mandate squarely falls under the the High Court.

7. The Applicant further averred that the hearing before the Minister was marred with procedural flaws. He asserted that the Minister relied on the previous decisions by the Committee to arrive at her decision. Lastly, the Applicant insisted that his application is merited and urged the court to grant the orders as prayed.

8. The first Respondent did not file any response to the application.

The Interested Parties Case

9. The Interested Parties opposed the application vide the replying affidavit of John Mutaki Musyimi sworn on his behalf and on behalf of the 2nd Interested Party. He gave a historical background of the suit property and stated that the dispute herein arose from a land dispute between his grandfather David Musyimi and the Applicant's father Kivelenge Kyanga.

10. He further averred that his grandfather acquired a parcel of land in the year 1913 and planted trees thereon. That later in the year 1976 his grandfather instituted Civil Case No 50/76 against the Applicant's father because he was harvesting trees on his land. That vide a judgment delivered on 15th January 1977, the District Magistrate Court held that his grandfather David Musyimi and Isaac Musiymi were the owners of the land. That being aggrieved with the said judgment, the Applicant's father and Kimuya Muoki appealed to the Resident Magistrate who in his judgment ordered that the land be awarded to his grandfather and the remaining land to the Appellants.

11. He further averred that during the land demarcation period, his grandfather was not given a portion of land as ordered by the courts since the entire parcel of land was registered in the name of Ndivo Kavelenge. That being aggrieved, he filed a complaint before the Ndiani Arbitration Board and the Board awarded the 2nd Interested Party and his grandfather a portion of the land.

12. That being aggrieved with the said decision, the Applicant filed an objection which was eventually dismissed on 22/03/2019.

13. That being aggrieved by the Board's decision, the Applicant filed an appeal to the Minister which was also dismissed.

14. He contended that the Applicant did not plead or prove the particulars of unfairness on the part of the 1st Respondent.

15. The application was canvassed by way of written submissions.

The *Ex parte* Applicant's Submissions

16. The *Ex parte* Applicant's submissions were filed on 25th April, 2023.

17. Counsel outlined the following issues for the court's determination:-

    i. Whether the decision of the 1st Respondent against the *Ex parte* Applicant was out rightly unfair and against the principles of natural justice.

    ii. Whether the 1st Respondent acted ultra vires in granting the subject suit parcel of land to the Interested Party herein on the grounds of adverse possession.

    iii. Whether the *Ex parte* Applicant is entitled to the order sought in the application

18. On the first issue, Counsel submitted that the decision of the Minister offends the principles of natural justice as the Applicant was not granted an opportunity to explain his case before the decision was made. According to Counsel, failure by the 1st Respondent to visit the site clearly demonstrates that the hearing was biased and pre-determined in favour of the Interested Parties case. Counsel insisted that the decision of the Minister is illegal and should be quashed since it violates the principles of natural justice.

19. On the second issue, Counsel submitted that the 1st Respondent acted ultra vires her jurisdiction since she awarded the suit property to the Interested Parties on the basis of adverse possession which mandate squarely falls under the High Court.

20. On the third issue, Counsel submitted that the Applicant has demonstrated that he is entitled to the orders sought because the Minister acted ultra vires her jurisdiction. In addition, Counsel submitted that the decision is marred with procedural flaws.

21. To buttress his submissions Counsel relied on the authorities attached to his submissions.

The Interested Parties Submissions

22. The Interested parties filed their submissions on 22nd May, 2023.

23. On their behalf, Counsel outlined the following issues for the court's determination:-

    i. Whether the issues raised in the Applicant's Notice of Motion dated 14th July 2022 fall within the purview of Judicial Review.

    ii. Whether the 1st Respondent based her decision on the doctrine of adverse possession.

    iii. Whether the decision of the 1st Respondent is impugned by bias illegality and procedural impropriety.

    iv. Whether the Applicant is entitled to the reliefs sought.

24. Counsel submitted that the issues raised in the instant application do not fall under the purview of Judicial Review. It was submitted that the application was based on the merits of the decision of the 1st Respondent with regards to the subdivision of Plot Nos. 3075 and 2700. For that, Counsel argued that the Applicant was inviting the court to act as an appellate court over the said decision.

25. On the second issue, Counsel submitted that the decision of the 1st Respondent was based on the findings of the court and the quasi-judicial bodies and not on the doctrine of adverse possession. Counsel submitted that the Applicant failed to disclose to the court that the suit property is registered in the name of Ndivo Kavelenge and that David Musyimi, the 1st Interested Party's father was not given a portion as ordered by the courts.

26. On the third issue, Counsel submitted that the Applicant did not demonstrate how the 1st Respondent was biased towards him. It was submitted that both parties were notified of the hearing and were granted an opportunity to cross examine witnesses.

27. Lastly Counsel submitted that the Applicant is not entitled to the orders sought and urged the court to dismiss the application with costs to the Interested Parties.

28. To buttress his submissions Counsel relied on the list and bundle of authorities dated 28th April, 2023.

Analysis And Determination.

Having considered the application, the affidavits and the rival submissions, the following issues arise for determination:-

i. Whether the decision of the 1st Respondent was made in breach of the principles of natural justice.

ii. Whether the Applicant is entitled to the orders sought.

iii. Who is to bear the costs.

29. The Principles of Judicial Review were laid down by Lord Diplock in the case of *Civil Servants Union v the Minister for Civil Service* [1985] AC where it was held that;

> "Judicial review has, I think developed to a stage today when one can conveniently classify into 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 unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or 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 as "procedural impropriety", rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision."

30. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of *Republic v Kenya Revenue Authority Exparte Yaya Towers Limited* (2008) eKLR, where it was held 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. It is important to remember in such case that the purpose of the remedy of judicial review

is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected...."

31. In the case of *Pastoli v Kabale District Local Government Council and others* (2008) 2E.A 300 the Court set out the duty of a Court in Judicial Review applications as follows:-

> " 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."

Whether The Decision Of The 1st Respondent Was Made In Breach Of The Principles Of Natural Justice

32. The *Ex parte* Applicant is seeking for an order of *Certiorari* to quash the decision in Minister Land Case No 341 of 2019 on the grounds that the decision reached was against the principles of natural justice.

33. The Applicant contended that he was not accorded a fair trial in the proceedings before the Minister. He further averred that the hearing before the Minister was marred with procedural flaws. According to the Applicant, the decision of the Minister was pre-determined in favour of the Interested Parties since the 1st Respondent declined his request for a site visit.

34. On the other hand, the Interested Parties contended that both parties were granted an opportunity to adduce evidence, to call witnesses and to cross examine the adverse party.

35. In *Onyango Oloo v Attorney General* [1986-1989] EA 456 the Court of Appeal expressed itself as follows;

> " The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law

> required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

36. I have perused the proceedings and findings in Appeal Case No 341 of 2019 conducted before the Deputy County Commissioner Kilungu Sub County. The Applicant was the Appellant, while the Interested Parties were the Respondents. The parties were recorded as having been sworn and gave evidence.

37. It is evident that both parties participated in the proceedings by giving evidence and cross examining the adverse party. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the 1st Respondent was biased or unfair towards the Applicant. The Applicant gave his testimony, he was allowed to cross-examine the Respondents and fully participated in the proceedings.

38. The Applicant faulted the Minister for not visiting the site before rendering her decision. The procedure that must be adopted by the Minister while conducting an Appeal was stated in the case of *Republic v Special District Commissioner & another* (2006) eKLR as follows:-

> " It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower...court record that will assist him to, "...determine the appeal and make such order thereon as he thinks just ...." It is fashionable in this kind of applications, for Interested Parties to argue that the District Commissioner has a free hand to conduct the appeal in any manner he wishes. That the Act has not specified a procedure for him to follow in determining the appeal so long as he finally makes such orders thereon as he thinks just."

39. There is no requirement in law stipulating that the Minister must visit the locus in quo before rendering his/her decision.

40. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court is satisfied that the Applicant actively participated in the said proceedings. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account

irrelevant considerations and omitted the relevant factors. The Applicant has not demonstrated that such was case in the instant application.

41. Accordingly, this Court finds that the Applicant has failed to establish a case of breach of the principles of natural justice.

Whether the applicant is entitled to the orders sought

42. The Applicant contended that the Minister acted ultra vires her statutory mandate. According to the Applicant, the Minister exceeded her jurisdiction by awarding the Interested Parties the suit property on the basis of the doctrine of adverse possession. The decision of the 1st Respondent dated 6th April 2022, stated as follows in part:-

> " This court scrutinized the said court proceedings and decision thereof and confirmed the respondents sentiments as true. The decision by the Adjudication Board to award the respondents plot number 3075 was based on the said ruling. The respondents family has also used the land in dispute for a very long time and therefore the principle of adverse possession can be applied. Appeal case No 341 of 2010 is hereby dismissed. Plot number 3075 to remain property of the respondent as recorded."

43. It is clear from the decision that the Minister relied on the decisions made by Kilungu law court and the Resident Magistrate Court at Machakos. It is also clear that the decision by the Adjudication Board to award the Respondents plot No 3075 was based on the court's ruling. From the foregoing I find that the Minister decision was not founded on the doctrine of adverse possession.

44. In the case of *Municipal Council of Mombasa v Republic & Umoja Consultant Limited* [2002] eKLR it was held, *inter alia*, 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 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 decider; acting as an appeal court over the decider 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."

45. Similarly, in *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited*, (2008) eKLR, it was held 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."

46. 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 merits of the decision of the 1st Respondent. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a Judicial Review application. The Applicant is aggrieved because the earlier decision of the Committee which was in his favour was overturned.

47. In my opinion, a Judicial Review remedy would not be available in those circumstances.

48. The final issue relates to costs. Although the costs of an action are at the discretion of the court, the general and well established rule is that costs follow the event. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. So, a successful party should be awarded costs, unless, for good reason, the court orders otherwise as provided for under section 27 (1) of the *Civil Procedure Act* (Cap 21).

49. In the end, I find that the application dated 14th July, 2022 is devoid of merit and the same is hereby dismissed. Each party shall bear its own cost.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF NOVEMBER, 2023.

In the presence of:-

Court assistant - Mr. Kwemboi.

Muthiani for the *Ex parte* Applicant.