



**Republic v Minister of Lands and Housing (through the Deputy Commissioner-Ikutha Sub-County) & 2 others; Munyalo (Exparte Applicant); Matheka (Interested Party) (Judicial Review E002 of 2023) [2023] KEELC 21428 (KLR) (7 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21428 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
JUDICIAL REVIEW E002 OF 2023  
LG KIMANI, J  
NOVEMBER 7, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE MINISTER OF LANDS AND HOUSING (THROUGH THE DEPUTY COMMISSIONER- IKUTHA SUB-COUNTY) ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER- IKUTHA SUB-COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PAUL KITUKU MUNYALO ..... EXPARTE APPLICANT**

**AND**

**FELIX MUTUA MATHEKA ..... INTERESTED PARTY**

**JUDGMENT**

1. Before this Court is a Judicial Review Application under Notice of Motion dated 18<sup>th</sup> April 2023 seeking orders:

1. That this Honourable Court be pleased to issue an order of *Mandamus* directed against the 1<sup>st</sup> Respondent, compelling him to bring forth here before his judgment read to the *Ex-parte* Applicant on the 11<sup>th</sup> day of April 2023 and whose contents he(the said respondent) refused and/or ignored to disclose to the said applicant and which judgment concerns Land Parcel No. 1055 Maluma Land Adjudication Section in Ikutha Sub-County.



2. That upon receipt of the said judgment (of in the event of the 1<sup>st</sup> Respondent failing to avail the same), this Honorable Court be pleased to quash the said Judgment and make orders that the findings of the 2<sup>nd</sup> Respondent dated the 4<sup>th</sup> day of November do hold.
  3. That this Honourable Court be pleased to issue further order(s) of mandamus directed upon the 2<sup>nd</sup> Respondent compelling the said respondent to register the Ex-parte Applicant Paul Kituku Munyalo as the proprietor of that parcel of land known as Plot No.1055 Maluma Adjudication Section Ikutha sub-County.
  4. That this Honourable Court be pleased to issue an order of prohibition, prohibiting the second respondent from registering Land Parcel No.1055 Maluma Land Adjudication Section in the name of any other persons other than the *ex-parte* Applicant who currently is the registered proprietor thereof.
2. The application is accompanied by a Statement of Facts dated 18<sup>th</sup> April 2023, verifying affidavit and an affidavit in support of the statement sworn on the same date by the ex-parte.
  3. The *ex parte* applicant depones that in the year 1972 he purchased land which came to be later known as Plot No.1055 Maluma Adjudication Section which he used to rear cattle. He stated that in the year 2013, he got a report that the interested party had entered into his land and was cutting down trees and burning charcoal. He reported the matter to the Assistant Chief Maluma sub-location and the interested party was summoned several times and in his defence he stated that he had purchased the land. The dispute went to the Deputy County Commissioner who awarded the land to the *ex-parte* applicant.
  4. The *ex parte* applicant claims that the area where the suit land is located was declared an adjudication section and land adjudication began in the year 2018. The Land Adjudication Board heard the dispute and awarded the land to him. The interested party objected to the findings and his objection was heard and dismissed on the 14<sup>th</sup> November 2021. The applicant stated that the interested party appealed to the Minister, but the *ex-parte* Applicant states that he was never served with the alleged appeal. The appeal was heard by the Deputy County Commissioner Ikutha sub-county, the 1<sup>st</sup> Respondent herein, notwithstanding his request to be served with a copy of the Appeal which request was declined.
  5. The Ex parte Applicant states that he was notified of the hearing on 14<sup>th</sup> February 2023. Both parties attended the hearing and the interested party presented the purported sale agreement which the 1<sup>st</sup> Respondent ordered to be passed over to the DCI-Mutombo for verification. He stated that they were summoned on 11<sup>th</sup> April 2023 to attend to the reading of the Minister's findings and he was advised to bring his witness and documents. When he attended the before the Deputy County Commissioner, the suit land was awarded to the interested party.
  6. The ex parte applicant claims that he asked the 1<sup>st</sup> Respondent to give him a copy of the judgment but he declined to do so and continues to deny him a copy to date. He therefore brings this suit to obtain a copy of the judgment, to quash the impugned judgment and to prohibit the 2<sup>nd</sup> Respondent from registering the interested party as a proprietor.

### **The Respondents' Case**

7. The Respondents filed Grounds of Opposition dated 13<sup>th</sup> June 2023 stating that the Notice of Motion application is bad in law and orders sought are untenable as the Applicant has failed to demonstrate any efforts to obtain the judgment and denial of the same. The Respondent states that application as well as the statement of facts are jumbled up with extraneous and incoherent matters that on the face



of it merely bring out speculative and emotive conclusions based on the applicant's dissatisfaction with the decision of the Minister.

8. They state that the Notice of Motion is outside the purview of Judicial Review and this court is not the right forum to adjudicate the dispute. They further state that the application is a non-starter as there is no decision on the application for judicial review orders to apply. They relied on the holding in the case of Republic v Mwangi S.Kimenyi Ex parte KIPRA[2013] eKLR.
9. The Respondents further stated that the purpose of the leave stage in judicial review is to filter frivolous applications and the Applicant has not demonstrated that he has an arguable case to warrant this Court to grant the orders sought as allegations made are mere hearsay without any corroborating evidence. They rely on the what was observed in the case of Republic vs District Land and Settlement Officer Maara Sub-county & 3 others[2021] eKLR.
10. They further object on the ground that the application seeks to paralyse and curtail the Respondents from carrying out their mandate since the Applicant has not demonstrated that the Respondents acted irregularly, unfairly, unreasonably and irrationally.
11. That the judicial review orders of mandamus and prohibition in particular are discretionary in nature and a court would deny to grant them even if grounds for their grant exist and further state that judicial review orders of prohibition cannot lie to correct a course, practice or procedure of inferior tribunal or to correct a wrong decision on the merits of the proceedings. They state further that mandamus cannot issue to compel exercise of statutory discretion in a particular way to achieve particular results.

### **The Interested Party's Case**

12. The Interested Party filed Grounds of Opposition dated 4<sup>th</sup> September 2023 opposing the application on the grounds that the application is incompetent, bad in law and an abuse of the court process. The interested party stated that the judgment of the Appeal to the Minister is yet to be delivered and the application herein is premature.
13. He stated that the application has no basis and does not disclose material facts as on how the applicants purports to have interest on a parcel of land belonging to the Interested Party.
14. All the parties herein filed written submissions which have been considered, as well as the authorities cited.

### **Analysis and Determination**

15. Having considered all the pleadings on record, I opine that the issues for determination are as stated in the prayers sought in the Notice of Motion dated 18<sup>th</sup> April 2023 and the same are dealt with as such;

#### **1. Whether the ex parte applicant is entitled to an order of mandamus**

16. The *ex parte* applicant seeks an order of *mandamus* directed against the 1<sup>st</sup> Respondent, compelling him to bring forth here before his judgment read to the ex-parte applicant on the 11<sup>th</sup> day of April 2023 and whose contents he (the said respondent) refused and/or ignored to disclose to the applicant and which judgment concerns Land Parcel No. 1055 Maluma land adjudication section in Ikutha Sub-County. The Respondents oppose the application stating that the Applicant has failed to demonstrate any efforts whatsoever to obtain the judgment and also denial of the same.



17. Black's Law Dictionary defines *mandamus* as:

“A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body usually to correct a prior action or failure to act -Also termed writ of mandamus”

18. In discussing the nature of the order of *mandamus* in the case of Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] eKLR, the Learned Judges of the Court of Appeal held as follows in this regard:

“The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus? Once again we turn to *Halsbury's Law Of England*, 4<sup>th</sup> Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation 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 the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“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 leaves discretion as to the mode of performing the duty in the hands 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.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”

19. The *ex parte* applicant annexed to his application copies of land adjudication proceedings relating to land parcel 1055 before the Arbitration Board and the decision thereof. He also attached objection proceedings before the Sub-County Land Adjudication and Settlement Officer Mutomo/Ikutha Sub-County and the decision thereof dated 4<sup>th</sup> November 2021. The land Adjudication Act provides that an appeal against the decision of the Land Adjudication and Settlement Officer lies to the Minister in charge of land under Section 29 of the said Act which states that

“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.....and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”



20. The ministers designate under the *Land Adjudication Act* is a government officer against whom an order of mandamus can issue for the purpose of remedying any defects of justice in the performance of a public duty imposed upon him/her and has failed to perform the duty to the detriment of a party. In this case the public duty imposed on the 1<sup>st</sup> respondent was to hear and determine the appeal before him. He was also under a duty to provide reasons for his decision/judgement.
21. The ex parte applicant states that he was in the 1<sup>st</sup> instance not served with the appeal to the Minister. Counsel for the *ex-parte* Applicant submitted that the 1<sup>st</sup> Respondent was under a duty to ensure that all the necessary documents were in the hands of the parties before embarking on the hearing of the appeal. He claimed that since the 1<sup>st</sup> respondent did not answer to this claim the court ought to find the proceedings to have been in contravention of the provisions of Article 47(1) and (2) of the *Constitution* on fair administrative action and a travesty of the rules of natural justice.
22. However, the court observes that when served and called upon to attend the hearing before the 1<sup>st</sup> respondent, the ex parte applicant did attend the hearing even though he says that before the hearing he requested to be served with the appeal documents and the said documents were not provided to him. It is not clear at this point the basis upon which the applicant proceeded with the hearing without knowing the claim that had been made against him.
23. It is noted that among the prayers sought, the ex parte applicant does not seek from this court an order to be provided with the appeal documents but he seeks to be provided with the judgement that was delivered. He stated that when the judgement was read to him on 11<sup>th</sup> April 2023, he asked to be given a copy of the judgement but his request was declined.
24. From the evidence adduced by the applicant it appears that the ex parte applicant knew the case number for the appeal that was to be heard since the same is contained in the letter addressed to him dated 08<sup>th</sup> January 2023. The applicant does not show the efforts he made to obtain the documents of appeal before attending the hearing before the 1<sup>st</sup> Respondent. The said appeal documents were filed by the interested party and the said interested party would also have served the them to the applicant. The *ex parte* applicant does not show that he requested to be served by the interested party.
25. Apart from his own statement in the supporting affidavit, the applicant has not shown that he requested for the judgement in writing from the 1<sup>st</sup> respondent. There is not even a suggestion that the advocate for the ex parte applicant before filing the proceedings before the court demanded to be supplied with the judgement herein and the said demand was declined.
26. Mativo J. (as he then was) in *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] eKLR set out factors for consideration for the order of mandamus to be granted and stated as follows;

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. v Canada (Attorney General)*, 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100. and, was also discussed in *Dragan v Canada (Minister of Citizenship and Immigration)*. 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233). The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;



- (iii) There must be a clear right to the performance of that duty, meaning that:
  - a. The Applicants have satisfied all conditions precedent; and
  - b. There must have been:
    - I. A prior demand for performance;
    - II. A reasonable time to comply with the demand, unless there was outright refusal; and
    - III. An express refusal, or an implied refusal through unreasonable delay;
- (iv) No other adequate remedy is available to the Applicants;
- (v) The Order sought must be of some practical value or effect;
- (vi) There is no equitable bar to the relief sought;
- (vii) On a balance of convenience, mandamus should lie.

27. Following the above criteria and factors to be considered before issuing an order of mandamus the court finds that there is insufficient evidence to show that the *ex parte* applicant issued a prior demand to be supplied with a copy of the judgement, if at all the same was read to the parties. It is further the courts view that there is insufficient evidence provided by the *ex parte* applicant that there was any or any reasonable time given to the 1<sup>st</sup> Respondent to comply with any such demand. In the court's view there is also insufficient evidence of an express or implied refusal to supply the said copy of judgement. The court is also of the view that there are other avenues available to the *ex parte* applicant in seeking to be given information and/or documents in the custody of the 1<sup>st</sup> respondent through access to information rights and the said avenues have not been shown to have been exhausted before moving to this court.

28. In the courts's view the *ex parte* applicant is not entitled to the order of mandamus as prayed in prayer 1 of the Notice of Motion dated 18<sup>th</sup> April 2023.

## **2. Whether the *ex parte* applicant is entitled to an order of certiorari.**

29. The *ex parte* applicant seeks that upon receipt of the judgment sought in prayer 1, the Court issues an order quashing the said Judgment and make orders that the findings of the 2<sup>nd</sup> Respondent dated the 4<sup>th</sup> day of November do hold.

30. Order 53 Rule 7(1) of the [Civil Procedure Rules](#) requires a party to attach an impugned decision in an application for an order of certiorari. The said rule provides:

“In the case of an Application for an order of certiorari, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition, or record unless before the hearing of the motion he has lodged a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the High Court”.

31. The reason for the requirement is that the Court must actually be certain that the decision exists and the contents thereof. The *ex-parte* Applicant has sought prior to the order of certiorari to be granted an order of *mandamus* to compel 1<sup>st</sup> Respondent to produce a copy of the said impugned decision.



32. While dealing with the 1<sup>st</sup> prayer in the Notice of Motion herein the court has found that the ex parte applicant has not given sufficient evidence that he sought the judgement from the 1<sup>st</sup> respondent and that his request for the same was declined. In the case of Samson Kirerea M'Ruchu v Minister For Lands & Settlement Ca 21 Of 1999, cited with approval in Musa Kingori Gaita Vs Kenya Wildlife Service [2006] eKLR the Court of Appeal held-

“Compliance with the above provision is a precondition to seeking an order or certiorari. An applicant who fails to comply with the requirements of that provision dis-entitles himself to a hearing of his Motion under *Order Rule 3 of the Civil Procedure Rules*. It would appear to us that the failure to comply with Rule 7 (1) above, does not render the application incompetent ab initio but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the Motion for an order of *certiorari*”.

31. In the present case the copy of the decision has not been supplied, understandably because the same is said not to have been available to the applicant. In the absence of the said decision the order of *certiorari* cannot issue. The rationale behind Order 53 Rule 7 is to enable the court satisfy itself of the existence of the orders sought to be quashed, their contents and whether the application was filed in time. This was ably captured by Wendoh, J in Waweru v District Veterinary Office, Maragua & Another [2006] 1 KLR (E & L) as follows;

“A reading of the above provision indicates that it is mandatory to lodge the decision sought to be quashed. I believe the reason behind it is that the court should know whether the order does exist, its nature and contents and avoid acting in vain or giving an order that may end up being contradictory and an embarrassment to the court”.

27. The Court of Appeal Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute For Public Policy And Research Analysis (KIPRA) [2013] held as follows on the need for a court to ascertain itself of the existence of orders and/or decision before granting an order of certiorari-

“29. The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August, 2005 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August, 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December, 2004 when the court had not determined that the decision made on 3rd December, 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned Judge erred and it was not appropriate to issue the judicial review orders in this matter”.

28. The court has declined to issue an order of *certiorari* quashing the decision claimed to have been made by the 1<sup>st</sup> Respondent. In the circumstances the prayer sought for an order of mandamus directed to the 2<sup>nd</sup> Respondent compelling the said respondent to register the *ex-parte* Applicant Paul Kituku Munyalo as the proprietor of the suit land cannot be made since the decision of the 1<sup>st</sup> respondent, if any, concerning the suit parcel of land is not known.



**3. Whether the ex parte applicant is entitled to an order of prohibition.**

29. The *ex parte* applicant seeks an order of prohibition, prohibiting the second respondent from registering the suit land in the name of any other persons other than the *ex-parte* Applicant who currently is the registered proprietor thereof. Following the courts finding on the prayers 1, 2 and 3 of the Notice of Motion dated 18<sup>th</sup> April 2023 the court declines to issue the order of prohibition as prayed again for the reason that the decision of the 1<sup>st</sup> respondent herein remains unkonwn and the *ex parte* applicant has failed to convince the court that sufficient efforts were made to obtain the said decision for the purpose of these court’s proceedings.
30. For the foregoing reasons the court finds that Notice of Motion dated 18<sup>th</sup> April 2023 lacks merit and the same is hereby dismissed with costs to the Respondents and the Interested Party.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 7TH DAY OF NOVEMBER, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

The ruling read in open court and virtually in the presence of:

Musyoki Court Assistant

Matata for the ex parte applicant

Seda holding brief for Kuria for the respondents

Felix Matheka interested party present in person

