



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITUI

MISC CIVIL APPLICATION NO. 8 OF 2021

(FORMERLY MACHAKOS MISC APPLICATION NO. 18 OF 2019)

IN THE MATTER OF AN APPLICATION BY DOMINIC MWENDWA MUTHUI FOR AN ORDER OF CERTIORARI

-AND-

IN THE MATTER OF AN APPEAL TO THE CABINET SECRETARY FOR LANDS IN RESPECT OF LAND PARCEL NO.1758 MIAMBANI ADJUDICATION SECTION IN KITUI COUNTY.

-AND-

IN THE MATTER OF THE DECISION OF THE DEPUTY COUNTY COMMISSIONER, KITUI CENTRAL SUB-COUNTY IN MINISTER'S APPEAL CASE NO. 371 OF 2012 OVER LAND PARCEL NO. 1758 MIAMBANI ADJUDICATION SECTION BETWEEN DOMINIC MWENDWA MUTHUI-VS JULIUS WAMBUA KANYENZE

BETWEEN

THE REPUBLIC.....APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERAL..... RESPONDENT

AND

JULIUS WAMBUA KANYENZE..... INTERESTED PARTY

DOMINIC MWENDWA MUTHUI..... EX-PARTE APPLICANT

JUDGEMENT

1. The application before the Court is a Judicial Review Application by way of Notice of Motion dated 3rd July 2019 brought under Order 53 Rule 3 (1) of the Civil Procedure Rules seeking for ORDERS:

i) That an order of Certiorari do issue to recall to this court and quash the decision of the Deputy County Commissioner, Kitui Central Sub-county, Kitui County in Minister's Appeal Case No. 371 of 2012 over land parcel no.1758 Miambani Adjudication Section dated 25/10/2018 between DOMINIC MWENDWA MUTHUI-VS-JULIUS WAMBUA KANYENZE awarding the disputed land to the interested party, JULIUS WAMBUA KANYENZE.

ii) That the costs of this Application be provided for.

The Applicant's Case and Submissions

2. The Applicant's verifying affidavit and the Statement of Fact set forth the following grounds in support of the Notice of Motion Application. The Applicant states that the Deputy County Commissioner failed to consider a very relevant fact that the Applicant who was in possession of the land was an innocent purchaser for value without notice, a fact admitted by the 1st Respondent. That the Vendor testified

before the tribunal and confirmed that she sold her own land to the Applicant and the 1st Respondent never sued the said vendor over ownership. The Applicant claims that his claim was supported by a sale agreement which the Deputy County Commissioner failed to consider the sale agreement and hence rendered the decision bad for unreasonableness.

3. The Decision of the Deputy County Commissioner violated the legitimate expectation of the Applicant as a purchaser of the land, was bad for unfairness, that it was biased or may reasonably be suspected of bias and that it was materially influenced by an error of law.

4. The Applicant further stated that the sale to the Applicant was attested by elders including their local administrator and was not in secret. That the money paid as purchase price was not considered and he was ordered to lose both the money and the land as refund was ordered. The Applicant claims that his possession and occupation to the land since 1986 was long enough to entitle him to ownership. He further complained that the decision of the Deputy Commissioner did not accord with the cogent evidence and was bad for irrationality.

5. The Ex parte Applicant filed written submissions and reiterated the facts as stated above. He therefore submitted that the decision of the Deputy County Commissioner violated the his legitimate expectation and that the decision is bad for unfairness and relied on the holding in **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300**. He also cited the decision of Odunga J in **The Republic-vs-Nairobi City Council and another ex parte Wainaina Kigathi Mungai in Nairobi High Court JR. Misc Appl. No.356 of 2013** where the Court held that the decision of the Deputy County Commissioner was grossly unreasonable for failing to consider the fate of the purchase price that the Ex parte Applicant had paid for the land.

6. Further, the ex parte Applicant had been in the land since 1985 and 12 years had lapsed at the time. The ex parte Applicant states that the Decision was bad for illegality considering the provisions of Section 7 of the Limitation of Actions Act and that no claim for the recovery of land could be sustained if brought after twelve years from the date of the cause of action.

7. The Respondents did not enter appearance and did not file their response to the claim.

The Interested Party's submissions

8. The firm of J.K Mwalimu and Co. Advocates filed their Notice of Appointment of Advocates on behalf of the Interested Party herein but failed to file their Response to the substantive application within the time directed by the Court. Although the Court gave directions on the 9th of December 2021 that the application was to proceed undefended, the Interested Party filed a Replying Affidavit sworn on 11th November 2021.

9. The Interested Party then filed written submissions and reiterated that the clan of Mbaa Ngesa (the Interested Party's Clan) disowned Mrs. Sengenge Ngandi who sold the land to the ex parte applicant because she was not legally married and she did not inform any elder from Mbaa Ngesa clan of this transaction. When the matter was referred to Adjudication, the Interested Party submits that they were still awarded the land. The Interested Party claimed that at all stages of adjudication process the ex parte applicant's claim over the land was rejected and the land was repeatedly awarded to him. He is of the view that the Minister determined the Appeal fairly and objectively and did not breach any rules of natural justice.

10. Regarding the question of whether the Minister followed due process while determining the appeal, the Interested Party submitted that under Section 29 of the Land Adjudication Act, the Minister shall determine the appeal and make orders as he thinks just and that determination shall be final. The Interested Party's Counsel submitted that the court lacks jurisdiction to sit on appeal against the determination of the Minister. They relied on the decision in **Onesmus Daniel Masumbuko & others vs Augustino Baya Thotho 2019 eKLR** where the court held that it has no jurisdiction to sit on appeal against the decision of the Minister under the Land Adjudication Act.

11. The Interested Party's further submitted that the Minister adhered to all the rules of natural justice as all the parties involved in the dispute presented their cases in a fair hearing. They therefore stated that this application is an abuse of the court process and should be dismissed with costs. He further stated that the applicant has not pointed out any illegality or impropriety in arriving to the decision of the Minister. He stated that the application herein does not disclose any sufficient basis for interfering with the Decision of the Minister.

Analysis and Determination

12. I have considered the Notice of Motion application together with all accompanying documents and the documents filed opposing the said application. I am of the view that the issues arising for determination are

A) whether the application has met the threshold for grant of an order of certiorari.

B) Whether the decision of the Deputy County Commissioner was bad for unreasonableness, irrationality, unfairness, illegality and failure to meet the Applicant's legitimate expectation.

A) Whether the application has met the threshold for grant of an order of certiorari.

13. It is important to note that Judicial Review as a relief is provided for in among others; Article 23 (3) of the Constitution of Kenya 2010, section 8 of the Law Reform Act Chapter 26 Laws of Kenya, section 13(7) of the Environment and Land Court Act 2011, section 7 of the Fair Administrative Action Act 2015 and the Common law.

14. Article 47 of the Constitution provides for the substantive right and provides that;

“Every person has the right to administrative action that is *expeditious, efficient, lawful, reasonable and procedurally fair.*”

Further the Fair Administrative Action Act 2015 sets out and elaborates the grounds for Judicial Review orders at Section 7 as follows:

“A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

i. was not authorized to do so by the empowering provision;

ii. acted in excess of jurisdiction or power conferred under any written law;

iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv. was biased or may reasonably be suspected of bias; or

v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations; (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

i) the administrative action or decision is not rationally connected to (i) the purpose for which it was taken;

ii) the purpose of the empowering provision;

iii) the information before the administrator; or

(iv) the reasons given for it by the administrator; or there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.”

15. The Applicant's grounds in support for his application are *inter alia* that the Minister's decision failed to consider a relevant fact that he had acquired the suit land through an Agreement for sale of the subject land and that he was a purchaser for value without notice of any defect in the seller's title. He also relies on the fact that he had been in occupation of the land for a long period of time. The Applicant being aggrieved with the decision of the Deputy County Commissioner now seeks legal redress citing unreasonableness, breach of legitimate expectation, bias, unfairness and error of law over the decision.

16. Looking at the documents filed by the Applicant it is noted that there were two sale agreements between the seller Segenge Mwanzia (also referred to elsewhere as Segenge Ngandi/Mbole/Masila) and the Applicant Dominic Muthui Mwendwa dated 26th August 1985 and the one dated 1st April 1986. The said agreements were considered by the District Officer in Land Case No. 5 of 1985 between Julius Kanyenze and Dominic Mwendwa Muthui. The same were also considered during Land Adjudication process in the proceedings before the Land Adjudication Officer in Objection case No. 211 of 2010 between the same parties. The Land Adjudication Officer heard the dispute and awarded the land to the Interested Party. An appeal was lodged before the Minister being appeal No. 371 of 2012 between Dominic Mwendwa and Julius Kanyenze. The findings of the Deputy County Commissioner are contained in the decision and the same were *inter*

alia that the Plaintiff had bought the land from Segenge at Kshs 10,500 in 1985, that the Appellant had no relationship with the seller neither her clan, the land became his possession by sale, that Segenge was not legally married to Mbole (the initial owner of the suit land) under Kamba customary laws. That Segenge was disowned by the clan as she was known to have been married to Ngandi Kilute but not Mbole.

17. The final verdict by the Deputy County Commissioner was that *“the parcel No. 1758 belongs to the Respondent Julius Wambua Kanyenze who gained the parcel by inheritance from his parents”* From the foregoing facts it is clear and apparent from the proceeding, findings and verdict that the sale agreements were considered and a finding on the same made.

18. The Court has considered that the decision complained of emanates from the land adjudication process under the Land Adjudication Act CAP 284 Laws of Kenya. The said Act is *“An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto.”* Section 10 (1) of the Act provides for the general powers of the adjudication officer and the Officer is given jurisdiction in all claims made under the Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connexion with such claims. It is under the powers donated by law that the Land Adjudication heard the dispute/objection raised by the parties herein under Section 26 of the Act. The proceedings before the Land Adjudication Officer are exhibited by the Applicant and the same show that witnesses were called and documents produced and a decision made.

19. Within the same land adjudication process Section 29 of the Act provides that any person who is aggrieved by the determination of an objection under [section 26](#) of the Act may, within sixty days after the date of 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.

20. It is the Courts view that disputes relating to rights and interests in land falling under adjudication ought to be heard by the bodies authorized under Land Adjudication Act. It is imperative that the Court does not usurp the mandate given to the adjudication process in establishing land rights in Adjudication sections. This was aptly captured by **Okongo Jin Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others (2013) Eklr** where the court held as follows; *“It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act. It is for this reason that, there is injunction under section 30 of the Act to any civil suit being instituted over an interest in land in an adjudication area save with leave of the Land Adjudication Officer. The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. (Emphasize added). As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. (Emphasize added). The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land”*. What resonates from the aforementioned jurisprudence is that the courts role is limited to supervision and enforcement of the decisions of adjudication bodies. The courts also ensure that the process of adjudication is undertaken in accordance with the law.

21. Based on the summary of the Applicants claim the court is of the view that the issues raised involve mainly contested issues of fact. The court is being asked to determine among other issues, whether the Applicant was indeed an innocent purchaser for value without notice, whether the seller of the land had any rights or interests in the land or had the requisite capacity to sell, whether the seller was a legal widow of the deceased owner of the land, whether the seller was disowned by the clan and what the consequence of that would be. All these are contested facts that are apparent from the dispute resolution proceedings during adjudication. It is basic to law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof. For the facts presented by the applicant to be proved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been up held in numerous court decisions. In **Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo {2015} e KLR** it was held: -

“It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

22. The court is further of the view that the Applicant herein seeks to have the court determine the merits of the case. It is trite in law that a court hearing a judicial review case is concerned only with the lawfulness of the process by which the decision was arrived at. Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory and not appellate. I would therefore agree with the submissions by the Counsel for the Interested Party that this court cannot sit on appeal on the decision of the Deputy County Commissioner and review the merits of the same as one would do when dealing with an appeal.

23. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. The case of **Minister for Immigration and Citizenship v SZJSS {2010} HCA 48**, reaffirmed the proper role of courts in reviewing administrative decisions. It held that *“courts should not delve into the merits of administrative decisions on the ground that the decision-maker did not give ‘proper, genuine and realistic consideration’ to the evidence before it — the weighing of evidence, and the preference for some evidence over other, is a matter for decision-makers, not for courts exercising supervisory jurisdiction.”* The court affirmed what was said by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 that *“the merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.”*

24. The above position was further re-enforced By Hon. Mativo J. in the case of **Republic v Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [2020] eKLR**

“It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been upheld by our superior courts on numerous occasions. In Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo it was held: -

... where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.” (Emphasis supplied)

Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.”

25. There are however exceptions to the rule that Judicial Review should not go into the merits of a decision. In **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited [2013] eKLR** Mumbi Ngugi J held as follows:

“It is, I believe, settled law that a court exercising judicial review jurisdiction is concerned with the procedural propriety of a decision, rather than with its merits. A court will consider the merits of a decision only in the circumstances set out in the case of Associated Provincial Picture Houses Ltd –versus- Wednesbury Corporation, namely: where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is ‘so unreasonable that no reasonable authority could ever come to it.’”

B) Whether the decision of the Deputy County Commissioner was bad for unreasonableness, irrationality, unfairness, illegality and failure to meet the Applicant’s legitimate expectation.

26. The Applicant claims that failure by the Deputy County Commissioner to consider the sale agreement referred to herein and the fact that the applicant lost both the land and the purchase price led to an irrational, unfair and unreasonable decision.

44. The test of what amounts to illegality, irrationality and procedural impropriety was captured and elaborated by Justice Kasule in the Ugandan case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 as follows:

“Illegality is when the decision-making authority commits an error of law in the process of taking the decision 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: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural 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 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. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

27. Considering the facts of the present case I find that the Applicant has not satisfied the court that the decision of the Deputy County Commissioner was tainted with irrationality or unreasonableness or that there was any procedural impropriety as defined above. This is for the reason that Sengenge the seller of the land was found not to have had rights or interests in the land she purported to sell she thus had no capacity to sell the land. The clan and subsequent adjudication proceedings found that the seller was not a lawful wife to Mbole the initial owner of the land, and the clan disowned her. It is the position in law that one cannot pass good title if one does not have good title. In the case of **Katana Kalume & another vs Municipal Council of Mombasa & another (2019) eKLR** the court cited the holding in **Bishops gate Motor Finance Corporation Ltd vs Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-337** where it was held as follows:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

28. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be “objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be “verging on absurdity” in order for it to be vitiated (see **Associated Provincial Picture Houses, Ltd. –vs- Wednesbury Corporation** [1947] 2 All E.R 680.) I find that the decision of the Deputy County Commissioner cannot be said to be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision or that the decision was in defiance of logic and acceptable moral standards. Further, the said decision cannot be said to have been unreasonable as defined in the *Wednesbury test*.

29. The Applicant relies on the ground of unfairness due to loss of the land together with the purchase price. The term fair according to the Blacks Law Dictionary 8th Edition means “*Characterized by honesty, impartiality, and candor; just; equitable; disinterested, Free of bias or prejudice*” Looking at all the proceedings and communication attached to the application it appears that the Applicant was aware of the existence of a dispute over the suit land between the Interested Party and Segenge, the seller, before he purchased the land in 1985-86. There was also a suit filed being land case number 5 of 1985 involving the Applicant and the Interested Party over the same parcel of land. It must also be noted that the purchase price for the land was not paid to the Interested Party but to a party who was found not to have the capacity to sell the land. Further, throughout the dispute resolution process, the Applicant was heard and he was allowed to call witnesses and their evidence was considered in decision making. The appeal before the Minister was for determination of rights and interests to the suit land and the Applicant was found not to have any rights or interests in the land. I agree with Counsel for the Interested Party that this determination in the Ministers appeal was well articulated and considered the earlier proceedings and evidence tendered therein together with the evidence tendered before him. I find that the Applicant has not shown that the Deputy County Commissioner’s decision lacked honesty, impartiality, and candor; or that it was not just; equitable or disinterested. The Applicant has also not shown that the decision was influenced by bias or prejudice.

30. The court further finds that the claim of illegality has not been proved. The Applicant claims that the Deputy County Commissioner did not consider the issue of his long period of possession of the land giving rise to rights under Section 7 of the Limitations of Actions Act. It is the Courts view that the applicant has not shown that the suit herein and the entire process leading to the decision of the Deputy County Commissioner was a process of recovery of land that was capable of establishing a right falling under Section 7 of the Limitation of Actions Act. Indeed, as stated earlier, the process of land adjudication is for ascertainment and recording of rights and interests in community land (previously trust land). The dispute concerning the rights over the land subject matter of the proceedings herein was before the adjudication dispute resolution bodies all through. The dispute resolution process provides for hearing and determination of disputes and appeals arising from the adjudication process. I therefore find that the question of Limitation of Actions did not arise.

For the foregoing reasons the Court finds that the Applicant has failed to show that the decision of the Deputy County Commissioner, Kitui Central Sub-county, Kitui County in Minister’s Appeal Case No. 371 of 2012 was bad for unreasonableness, irrationality, unfairness, illegality and failure to meet the Applicant’s legitimate expectation. The Applicant has failed to meet the threshold for the grant of an order Certiorari as prayed in the Notice of Motion dated 3rd July 2019 and the same is dismissed with costs to the Interested Party.

Dated, signed and Delivered at Kitui this 9th day of March, 2022

HON. L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT

Judgement delivered in open court

In the presence of:

C/A C Nzioka

No attendance for the Ex parte Applicant

Dominic Mwendwa Ex parte Applicant present

No attendance for Respondent

M/S Ngala Advocate holding brief for Mwalimu..... for Interested Party