



Republic v Katana & 2 others; Katana (Exparte) (Judicial Review 7 of 2021) [2022] KEELC 14613 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14613 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

JUDICIAL REVIEW 7 OF 2021

MAO ODENY, J

NOVEMBER 3, 2022

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

IN THE MATTER OF: ARTICLE 10, 23, 27, 40, 46 AND 47 OF THE CONSTITUTION

IN THE MATTER OF: SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284

IN THE MATTER OF: DECISION OF PANEL CHAIRMAN/DEPUTY COUNTY COMMISSIONER MADE ON 17TH JUNE 2021 IN THE APPEAL CASE NO. 51 OF 2016 IN RESPECT TO OWNERSHIP OF PLOT NO 575 MITANGONI/MADZIMBANI ADJUDICATION SECTION

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

IN THE MATTER OF: ORDERS OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC APPLICANT

AND

LENNOX CHANGAWA KATANA 1ST RESPONDENT

PANEL CHAIRMAN DEPUTY COUNTY COMMISSIONER KALOLENI SUB COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

STEPHEN NGUMBAO KATANA EXPARTE



RULING

1. The Ex parte Applicant Stephen Ngumbao Katana filed a Notice of Motion dated November 8, 2021 seeking the following orders: -
 - a. An order of prohibition prohibiting the Respondents from executing the decision of an appeal to the Minister of Land, section 2 of the *Land Adjudication Act* cap 284 against the decision of the Land Adjudication officer panel chaired by the Deputy County Commissioner Kaloleni Sub-county made on the June 17, 2021.
 - b. An order of certiorari do issue to quash the decision of adjudication panel chaired by the Deputy County Commissioner Kaloleni Sub County made on June 17, 2021.
 - c. The costs be provided for.
2. The application was accompanied with a statutory statement, statement and verifying affidavit of Stephen Ngumbao Katana, the Ex-parte Applicant. Briefly, the Ex- parte Applicant's case was that on June 17, 2021, the Respondents made a decision in Appeal No 51 of 2016 (the impugned decision being an appeal to the Minister of Lands against the decision of the adjudication officer over Plot No 575 Mitangoni/Madzimbani Adjudication Scheme (the suit property}). According to the Ex-parte Applicant, the decision was arrived at without giving him a chance to testify and give evidence.
3. The Attorney General on behalf of the 2nd and 3rd Respondents filed grounds of opposition dated January 26, 2022 which were listed as follows: -
 - a. That the application lacks merit as the proceedings conducted by the 1st and 2nd Respondents were done in compliance with section 29(1) of the *Land Adjudication Act*.
 - b. That the application is devoid of merit as the applicant has failed to include material considerations which indicate prima facie that the 2nd Respondent committed a failure of duty or abused its discretion or misused its authority which in public law calls for the remedies asked for.
 - c. That the discretion to grant the order is unexercisable since the application has been made after an inordinate delay which distorts the facts in contention and may supersede them with new situations.
 - d. That no allegation of irregularity, ultra vires or irrationality has been made or can be construed from the application and evidence adduced against the Respondent.
4. Counsel agreed to canvas the application by way of written submissions which were duly filed.

Ex-parte Applicant's Submissions

5. Counsel gave a brief background to the case and stated that the Ex-parte Applicant purchased a parcel of land situated at Mwaremi from Kazungu Iha in 1994 which parcel was neither adjudicated nor surveyed at the time of purchase.
6. That at the time of adjudication, the 1st Respondent lodged a claim stating that the subject land was a family land and as a result the land was demarcated to read Plot Number 575- Madzimbani/Mitangoni and registered in both the names of the Exparte Applicant and the 1st Respondent.



7. Counsel also stated that the Ex parte Applicant being aggrieved by the decision of the Land Adjudication Officer, appealed to the Minister on February 6, 2020 whereby the hearing took place on April 13, 2021 and the Appeal was dismissed and ordered the disputed parcel No 5757 to remain registered as before in trust of other family members.
8. Counsel identified two issues for determination namely, whether the Ex-parte Applicant was accorded his right to fair hearing/trial and whether the Honourable Court has the mandate to make the orders and costs of the application.
9. It was counsel's submission that the Applicant was not accorded a right to a fair hearing as was defined in the case of Zahira Habibullah Sheikh & Another vs State of Gujarat & Others AIR 2006 SC 1367, in Blacks Law Dictionary, Article 50 of the Constitution, Article 25 and Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa which applies in Kenya by virtue of Article 2 (5) and (6) which provides as follows:-

“The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore, the right to a fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.”
10. Counsel also relied on the cases of Fcs Ltd Vs Odhiambo & 9 others (1987) KLR 182-188 mentioned by the Honourable Court in Abraham Lenauia Lenkeu Vs Charles Katekeyo Nkaru (2016) eKLR, Union Insurance Co of Kenya Ltd vs Ramzan Abdul Dhanji Civil Application No 179 of 1998 where the court held that the right to be heard is a basic natural-justice concept and ought not to be taken away lightly.
11. Counsel submitted that the court has the jurisdiction to hear and determine judicial Review proceedings and relied on Article 162, 22, 23 (3) of the Constitution, Section 13 of the Environment and Land Court Act, and Order 53 of the Civil Procedure Rules.
12. It was counsel's submission that the hearing of the impugned Appeal and decision was not as per the provisions of Section 29 of the Land Adjudication Act and urged the court to quash the said decision.
13. According to counsel the Respondents failed to provide proper proceedings to the ex-parte Applicant contrary to Rule 4(5) of the Land Adjudication Regulations and relied on the cases of Gilbert Joseph Kabunjia v Land Adjudication and Settlement Officer Meru South & 3 others; County Government of Tharaka Nithi [2019] eKLR; Republic v Attorney General & another Exparte Munyokwang Kiyer & 3 others [2014] eKLR.

1st Respondent's Submissions

14. Counsel for the 1st Respondent submitted that the 2nd Respondent's decision having been made pursuant to provisions of Section 29 of the Land Adjudication Act, the same was conclusive and could not fall within the purview of judicial review.
15. On whether the impugned decision was made *ultra vires* or made contrary to rules of natural justice, counsel relied on the case of Republic v Deputy County Commissioner Mwingi East Exparte Katu Kasina Musyoki; Kinna Wambua (interested party) [2021] eKLR and submitted that Rule 4 (4) of the Land Adjudication Regulations 1970 was adhered to and the parties thereto both allowed to call witnesses.
16. Counsel further submitted that the court should be guided by the principles of judicial review as set out in the case of Municipal Council of Mombasa -v- Republic Umoja Consultants Limited Nbi Civil



Appeal No 185 of 2007 [2002] eKLR. Counsel therefore stated that the process followed by the 2nd Respondent was fair, objective and procedural.

2nd and 3rd Respondents' Submissions

17. Counsel of the 2nd and 3rd Respondents identified two issues for determination, namely: whether the ex-parte Applicant is entitled to the orders of certiorari and prohibition and whether judicial review was the proper mode of instituting this suit.
18. On the first issue, counsel submitted that for orders of certiorari to issue, the ex-parte Applicant have to prove that the decision made by the public officer was an abuse of power, unfair, irrational and a breach of the rules of natural justice as it was held in *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR.
19. Mr. Munga submitted that there was no proof of illegality, bias and/or irregularity in the action by the 2nd Respondent since the ex-parte Applicant was summoned to appear before the Appeals panel where he testified.
20. With regard to the prayer for prohibition, counsel relied on the case of *Jorum Mwenda Guantai v the Chief Magistrate Nairobi* Civil Appeal No 288 of 2003 cited in *Fredrick Masagwhe Mukasa v DPP & 3 others* [2016] eKLR where it was held that an order of prohibition from the High Court is an order that forbids an inferior tribunal to discontinue proceedings therein in excess of its jurisdiction or absence of it or a departure from the rules of natural justice and that it does not lie to correct the course, practice, procedure, or wrong decision on the merits of the inferior tribunal.
21. Mr. Munga further stated that Section 29 (4) of the *Land Adjudication Act*, gives the Minister powers to delegate his powers to hear appeals to any other public officer, and that the 2nd Respondent was exercising his lawful mandate and within his jurisdiction.
22. On the second issue, counsel argued that the issues raised by the Ex-parte Applicant were contentious matters that can only be redressed by way of an ordinary civil suit as opposed to judicial review which is designed to resolve uncontested matters of fact through affidavit evidence. Counsel relied on the case of *Republic v National Transport & Safety Authority & 10 others exparte James Maina Mugo* [2015] eKLR and urged the court to dismiss the application.

Analysis and Determination

23. Section 29 of the *Land Adjudication Act* Cap 284 Laws of Kenya provides that;
 - "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.
 2. The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.



3. When the appeals have been determined, the Director of Land Adjudication shall—
 - a. alter the duplicate adjudication register to conform with the determinations; and
 - b. certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.
 4. Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.
24. The Ex-parte Applicant lodged an objection to the adjudication committee in charge of Mitangoni/Madzimbani Adjudication Section, regarding the suit property, but the same was dismissed. Dissatisfied, he filed an appeal to the Minister as envisaged under Section 29 above whereby the Minister through the 2nd Respondent conducted proceeded to hear the appeal and gave a verdict on June 17, 2021 and dismissed the appeal.
25. The Ex-parte Applicant’s contention is that the 2nd Respondent proceeded without giving him a chance to testify hence it was prejudicial to his right to a fair hearing.
26. I notice that the impugned decision was not attached but it is trite that whether the decision is attached or not is not fatal to the application as was held in the case of *Independent Electoral and Boundaries Commission (IEBC) versus National Super Alliance (NASA) Kenya & 6 Others* (2017) eKLR. The Court of Appeal held as follows: -
- “ 104. In this appeal, we have considered the submission by the 6th Respondent and the reasoning by the trial court in declining to find that the 1st Respondent’s application was fatal for failure to attach the decision to be quashed. The legal issue for our determination is whether there are exceptions to the general rule that the decision to be quashed must be attached. In our considered view, the exceptions include when leave is granted by the trial court to lodge the decision before the final determination of the case. This is the exception revealed by the decisions in amongst others *Ashraf Savani & Another -v- Chief Magistrate’s Court Kibera & 4 Others* [2012] eKLR and *Republic -v- The Commissioner of Lands ex-parte Lake Flowers Limited Nairobi HCMISC App No 1235 of 1998 and Republic -V- Chairman District Alcoholic Drinks Regulation Committee & 4 Others Ex-Parte Detlef Heier & Another* [2013].
 105. In the present appeal, the record shows that the 1st Respondent neither attached the decision to be quashed nor applied for leave to attach the same. The trial judges observed that it was not in dispute that a decision had been made by the Appellant to adopt direct procurement method. It is our considered view, that the learned judges did not err in observing that a decision



had in fact been made by the Appellant and the court did not err in failing to strike out the Application as incompetent for failure to attach the decision to be quashed. The record shows that there was no dispute that a decision had been made and that the decision existed; there was no dispute as to the nature of the decision. In our view, depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision. In such cases, the need to attach or produce the decision to be quashed can be waived. We are of this view cognizant of the provisions of Article 159 (2) (d) of the Constitution which enjoins courts to administer justice without undue regard to technicalities."

27. The ex parte Applicant alleged that he was not given a chance to give evidence and the Respondents have submitted that the Applicant was given a right to be heard and to cross examine the 1st Respondent and to call witnesses. Further that the panel also had an opportunity to cross examine both the Applicant and the 1st Respondent.

28. In the case of *Republic v Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others* (2018) e KLR it was held that:

"Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction-reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. 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 process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere."

29. Similarly, in the case of *Zachariah Wagunza & Another v Office of the Registrar, Academic Kenyatta University & 2 others* (2013) eKLR the court reiterated the broad grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of *Pastoli vs Kabale District Local Government council and Other* (2008) 2 EA 300, and observed that: -

"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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of 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 is usually in defiance of logic and acceptable moral standards.



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 act 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.”

30. The Ex- parte Applicant has not provided any evidence in support of his allegations that he was not accorded a fair hearing by the panel. From the record and the submissions by 2nd and 3rd Respondents it is evident that the ex parte Applicant was present during the hearing as per the proceedings marked as SNK1.
31. It is further on record that the ex-parte Applicant even called a witness, one Joyce Tabu Ngumbao. Applicant has not demonstrated how the Minister breached the rules of natural justice in arriving at the decision or that the decision was irrational, made in bad faith or constituted errors of facts and law.
32. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

