



**Republic v County Commissioner, Baringo County & 6 others; Kiptala (Exparte);
Board of Management, Barwessa Secondary School (Interested Party) (Judicial Review
Application 16 of 2022) [2022] KEELC 14530 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
JUDICIAL REVIEW APPLICATION 16 OF 2022
L WAITHAKA, J
NOVEMBER 1, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY COMMISSIONER, BARINGO COUNTY 1ST RESPONDENT
CABINET SECRETARY FOR LANDS, HOUSING & URBAN
DEVELOPMENT 2ND RESPONDENT
DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 3RD RESPONDENT
LAND REGISTRAR, BARINGO LANDS REGISTRY 4TH RESPONDENT
COUNTY LANDS ADJUDICATION & SETTLEMENT OFFICER,
BARINGO 5TH RESPONDENT
CHIEF LAND REGISTRAR 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT**

AND

THOMAS C KIPTALA EXPARTE

AND

**BOARD OF MANAGEMENT, BARWESSA SECONDARY
SCHOOL INTERESTED PARTY**



JUDGMENT

1. Pursuant to leave granted on May 19, 2021 to the *ex parte* applicant, Thomas C. Kiptala, to institute judicial review proceedings against the decision of the Deputy County Commissioner, Baringo North made on November 25, 2020 in Appeal to the Minister case No 222 of 2020, the *ex parte* applicant filed the notice of motion dated June 4, 2021 and filed on June 7, 2021 seeking an order of *Certiorari* to remove to this court for purpose of being quashed the decision of the Minister. The *ex parte* applicant also seeks an order of Prohibition to prohibit the 3rd to 6th respondents from implementing the decision of the Minister.
2. The decision sought to be quashed relates to the Parcel of Land known as plot No.220 (suit land) situated in Barwessa “A” Adjudication Section.
3. The suit land, measuring two acres or there about, was subject of the processes of adjudication of rights to land provided for under the *Land Adjudication Act*, cap 284, Laws of Kenya (LAA). The process of adjudication of rights over the suit land culminated in an Appeal to the Minister to wit Appeal No.222 of 2020.
4. Aggrieved by the outcome of the appeal, the *ex parte* applicant brought the instant proceedings/suit claiming that the 1st respondent, who heard the Appeal, failed to accord him ample opportunity to present his Appeal to his satisfaction; was biased and conflicted; had a predetermined outcome; failed to take into account the evidence he offered (both oral and documentary); failed to evaluate and/or consider all evidence presented vis-a-vis the grounds of Appeal he presented.
5. The *ex parte* applicant further contended that the 1st respondent failed to capture all evidence he tendered; failed to swear witnesses before testifying rendering the proceedings unprocedural; largely relied on the decisions of the previous committees instead of reaching an independent decision upon the evidence put forth; made his decision hurriedly; wrongly evaluated the evidence presented before him and relied on extraneous evidence to reach his determination.
6. The application is opposed through the replying affidavit of John Ongalo Laku, the Principal Land Adjudication & Settlement Officer Baringo County, sworn on September 16, 2021, on the grounds that it is devoid of substance in law; that there is no evidence that the *ex parte* applicant was not accorded time to prepare or was threatened; that the proceedings of the Appeal to the Minister show that the *ex parte* applicant actively participated in the Appeal and that he was given an opportunity to present his case; that there is no evidence of bias or conflict of interest against the 1st respondent and the application is bad in law, offends the provisions of section 29 of LAA.
7. In a rejoinder, the *ex parte* applicant, through the replying affidavit he swore on January 13, 2022 has deposed that he won the case at the committee stage but lost the cases in all other stages; that the cases in the other stages were not fairly and impartially conducted; that the decision in the Appeal was done in contravention of the provisions of the *Constitution* and rules of natural justice; that the decision was devoid of merit and fairness; that during hearing of the Appeal he sought for adjournment on the ground that one of his witnesses was absent to no avail; that he was coerced and threatened to give his evidence and that no reasons were given for the Minister’s decision.
8. The *ex parte* applicant has further deposed that the application seeks to deal with the decision of the Minister and not the previous processes; that during site visit, the 1st respondent ordered the *ex parte* applicant to keep quiet showing he had a predetermined outcome; that the 1st respondent failed to



adjourn hearing of the Appeal to accord him an opportunity to call his witness thus watering down his case; that section 29 of LAA does not close the door for judicial review and that the application is premised on such grounds as bias, non-observance of the rules of natural justice and violations of rights of a litigant in a judicial process hence properly grounded.

9. Pursuant to directions given on June 27, 2022, the application was disposed of by way of written submissions.
10. In his written submissions filed on August 24, 2022, the *ex parte* applicant has basically reiterated the grounds on the face of the application and submitted that he has made up a case for being granted the orders sought.
11. Despite having been accorded opportunity to file their submissions, the respondents did not file their submissions.

Analysis and determination

12. As pointed out herein above, this application arises from the Appeal to the Minister Case No. 222 of 2020 through which the *ex parte* applicant sought to overturn the decision of the Land Adjudication Officer declaring the interested party the owner of parcel number 220 Barwessa “A” Adjudication Section.
13. A review of the proceedings annexed to the affidavit which the *ex parte* applicant swore in verification of the facts on which the application is premised, marked “TCK1” shows that witnesses were sworn; that both parties to the Appeal were given time to state and present their cases; that parties and their witnesses were cross examined on their cases and that parties and their witnesses were given services of an interpreter.
14. The proceedings do not bear any evidence of suppression of the appellant or his witness in prosecution of the Appeal. Most importantly, no evidence was tendered of any complaint lodged by the appellant against the manner in which the 1st respondent conducted the Appeal or even the alleged bias or conflict of interest on the part of the 1st respondent. If the *ex parte* applicant had any issues concerning participation of the 1st respondent or ground to believe that the 1st respondent was conflicted or otherwise biased, it was his duty to bring his displeasure to the Minister or his supervisor. In the absence of any evidence capable of proving the alleged bias or conflict of interest against the Minister, this court cannot reasonably be expected to determine that the *ex parte* applicant has discharged the burden placed on him of proving that which he asserts.
15. The proceedings of the Appeal to the Minister further show that the Minister considered the case presented before him before making his decision. In that regard see the relevant part of the proceedings which is as follows:-

“Findings

The appellant stated that the school land was excised from primary and Irrigation Scheme land and his land borders the irrigation scheme along a water canal and it is where he has fenced. His witness Sumukwo who was irrigation chairman stated and confirmed that the boundary is along the canal, even the first witness Kandagor confirmed the same.

The respondent on the other hand stated that when he reported on posting, the school management in company of Teachers Service Commission and officials from the Ministry of Education took him along the school boundary and the boundary at the side of the appellant was open and he was told to request for a surveyor from Kabarnet for boundary



marking which was done but the appellant was not satisfied and was advised to follow land procedures. He stated that the school has been winning all cases affecting their land. The school land was excised from irrigation scheme land. Local people had refused to donate land to establish the secondary school. That the appellant had encroached on the irrigation scheme land. The second respondent witness one Cheserem stated that the appellant has extended his boundary to the school land and that the boundary is marked by a Sekwende tree.

It is evident from submissions of both parties that the school was established on land which was excised from Barwessa Irrigation Scheme and primary school. There was no individual land donated to establish the school. Witnesses from both sides one Kiptalla and Sumukwo were part of the team entrusted with the responsibility of marking the boundary of the school excising it from the irrigation land and non amongst them have talked about extending the boundary into individual parcels of land. The proceedings of the objection case indicates that the court visited the disputed land, the appellant's side contradicted the boundary while the respondent's side identified the boundary without contradiction hence the claim of appellant was dismissed. It is also evident that the appellant has been losing land cases affecting this parcel of land.

16. The above excerpts of the proceedings of the case before the Minister make it clear that the Minister considered the cases presented before him. The statement of fact contained in the proceedings to the effect that the appellant had lost all cases affecting the land is not a good ground for asserting that the Minister did not consider the case presented before him when the proceedings show that he considered them and made his decision based on the totality of the evidence presented before him.
17. Concerning the *ex parte* applicant's claim that the proceedings are not a true reflection of what transpired before the Minister, no evidence was adduced capable of proving that fact. Similarly, no evidence has been adduced capable of proving that the applicant applied for adjournment of hearing of the case on the ground that one of his witnesses was missing and that the application was denied.
18. Having carefully analyzed the *ex parte* applicant's case vis-a-vis the proceedings of the case before the Minister, the only reasonable conclusion I can draw therefrom is that the *ex parte* applicant is merely appealing the decision of the Minister through the back door. The law does not allow him to do so. In that regard see the case of of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* (2002) eKLR thus:-

“Judicial review is concerned with the decision making process, not with the merit itself, the court would concern itself with such issues as to whether decision makers had jurisdiction, whether the persons affected by the decision were heard before it was made and whether decision maker took into account irrelevant matters...The court should not act as a court of appeal over the decider which would involve going into merits of the decision itself-such as whether there was sufficient evidence to support the decision”

19. Also see the case of *Timotheo Makange v Manunga Ngochi* (1978) KLR 53 at page 63 where the Court of Appeal held:-

“The Act (*Land Adjudication Act*) prescribes within itself a specific and complete code for treatment of the Land Adjudication cases through set stages, with the Minister empowered to determine appeals to him; and make such orders as he thinks just, his orders being final... for even at that stage it was not a matter of interference with vested rights of individuals.”



20. The Minister had power to hear the Appeal preferred before him. This court has no mandate to sit on Appeal against the decision of the Minister on its merits.
21. Consequently, I find the *ex parte* applicant has failed to prove his case and I dismiss his suit with costs to the respondents.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 1ST DAY OF NOVEMBER, 2022.

L. N. WAITHAKA

JUDGE

Judgment read virtually in the presence of:

N/A for the Exparte Applicant

Mr. Letting for the Respondents and 1st Interested party

Christine Towett: Court Assistant

