



Republic v Nzunguli & 5 others; Nguni (Exparte) (Judicial Review E001 of 2023) [2024] KEHC 4821 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
JUDICIAL REVIEW E001 OF 2023
LG KIMANI, J
MAY 7, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

AUGUSTUS NDILI NZUNGULI 1ST RESPONDENT

THE ADJUDICATION OFFICER, NZAWA ADJUDICATION SECTION 2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION 3RD RESPONDENT

THE CHIEF LAND REGISTRAR 4TH RESPONDENT

CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING 5TH RESPONDENT

THE ATTORNEY GENERAL 6TH RESPONDENT

AND

PATRICK MUNYOKI NGUNI EXPARTE

RULING

1. This ruling is in respect of the Preliminary Objection by the 1st Respondent dated 6th June 2023 raised on the following grounds:
 1. That the 1st Respondent is not a public officer or public body amenable to the judicial review jurisdiction of this court.
 2. The 1st Respondent was merely a party in the appeal to the Minister proceedings.
 3. That the application is fatally defective as against the 1st Respondent.



4. That the appeal to the Minister was carried out in accordance with section 29 of the [Land Adjudication Act](#).
 5. That the ex-parte applicant has not impugned the procedure followed by the respondents in reaching a decision.
 6. Therefore, his application raises no grounds to warrant a judicial review and should be dismissed as it is fatally defective.
2. The substantive suit is the Ex Parte Applicant's judicial review application brought under the Notice of Motion dated 14th April 2023 seeking orders of Certiorari to remove into this court and quash the decision of the 2nd Respondent in Nzawa Adjudication Section Appeal cases No.102/1999, 28/2020 and 35/2000 in dismissing appeal nos. 35/2000 and 28/2020 and partly allowing appeal no.102/1999 where the tribunal directed that the ex parte applicant and the 1st respondent share parcel number 1677 equally. Further, the exparte applicant seeks orders of prohibition directed against the 2nd, 3rd and 4th respondents.
 3. The main application states that the parties herein were involved in land adjudication in the Nzawa Adjudication Section concerning land parcel numbers 1677, 578 and 1575 where the exparte applicant's father Nguni Thenga Katuli (represented by the exparte applicant) filed an appeal to the Minister case against the 1st Respondent's father Ngandi Kiluti (deceased) (represented by the 1st respondent).

1st Respondent's submissions

4. Counsel for the 1st Respondent filed written submissions stating that his client was wrongfully joined as a respondent and ought to have been added as an Interested Party. He submitted that section 9 of the [Fair Administrative Action Act](#) describes the process of judicial review and its scope was discussed in the court of appeal case of [Kadamas & Another vs Municipality of Kisumu](#) (1985) eKLR and the decision of [Wendoh J in Republic vs Kenya Cricket Association & 2 others, ex parte Maurice Omondi Odumbe](#) (2006) eKLR, as being limited to a person or body of persons who have authority conferred by legislation to make decisions that affect the rights of people noting that the 1st Respondent herein was only a party in the appeal to the Minister and does not have any authority conferred by statute or otherwise to get involved in the decision-making process and therefore cannot be subject to the court's supervisory jurisdiction.
5. Secondly, the 1st Respondent submitted that judicial review is not concerned with the merits of the case but rather the process as was held by the Court of Appeal in the case of [Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others](#) (2016) eKLR and on the case of [Municipal Council of Mombasa vs Republic & Another](#) (2002) eKLR where the Court of Appeal defined the duty of a court in judicial review as being limited to the process and not the merits of the decision. The 1st respondent noted that the ex parte applicant was accorded an opportunity to be heard and cross-examine witnesses and all relevant factors were taken into consideration and that the process was fair, objective and procedural.

The Ex-parte Applicant's Submissions

6. Counsel for the ex-parte applicant submitted that the 1st Respondent contended with him during the adjudication process and thus had an interest in the matter. He quoted the holding in the cases of John Harun Mwau vs Simon Hayson & 2 others; Attorney General (Interested Parties) (2021) eKLR where the court quoted Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) on the court's discretion to order



joinder of any party at any stage of the proceedings. Counsel further submitted on the question of the joinder of interested parties to the suit. They also relied on the authorities of *Habiba vs Ramadhan & 7 others v Mary Njeri Gitibu* (2017) eKLR, *Communications Commission of Kenya & 4 others v. Royal Media Services Limited & 7 others* (2014) eKLR.

7. It is therefore their submission that the description of Augustus Ndili Nzunguli is immaterial as he is an interested party in this matter and any outcome will affect him and urged the court to dismiss the preliminary objection for lack of merit.

Analysis and Determination

8. The 1st Respondent contends in his preliminary objection that he was improperly sued as a respondent in this suit since he is not a person or body of persons who have authority conferred by legislation to make decisions that affect the rights of people and thus amenable to the judicial review jurisdiction of this court. He states that he was merely a party in the appeal to the Minister proceedings. The ex-parte applicant on the other hand rebuts the 1st Respondent's contention and states that the 1st Respondent has an interest in this suit as one of the parties to the impugned appeal to the Minister.
9. According to the *Black Law Dictionary*, a Preliminary Objection is defined as being:

“In the case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
10. The above legal preposition has been cemented in the now famous case of *Mukisa Biscuit Manufacturing Co. Ltd -VS- West End Distributors Ltd*. [1969] E.A. 696. The Court then held that: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurrer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”
11. The 1st Respondent relied on the Court of Appeal case of *Kadamas & Another vs Municipality of Kisumu* (1985) eKLR and the decision of Wendoh J in *Republic vs Kenya Cricket Association & 2 others, ex parte Maurice Omondi Odumbe* (2006) eKLR, where the courts took the position that judicial review proceedings are limited to any person or body of persons who have authority conferred by legislation to make decisions that affect the rights of people and that judicial review remedies are only available against public bodies or persons performing public functions. Counsel submitted that the 1st Respondent was not such a public officer as he was only a party to the appeal to the minister and did not have authority conferred by statute or otherwise to get involved in the decision-making process.
12. The court notes that the above authorities cited by the 1st Respondent's Counsel are pre-Constitution of Kenya 2010. *The Constitution* of Kenya brought about changes in Administrative law and in that regard, the court has considered the provisions of Article 47 of *the Constitution* of Kenya 2010 on the right to fair administrative action which provides that;
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall--
 - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.
13. The Legislation enacted under Article 47 (3) is the *Fair Administrative Action Act* and Section 2 defines the terms “administrative action” to include—
- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
 - ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

The Section also defines “administrator” to mean

“a person who takes an administrative action or who makes an administrative decision.”

14. The foregoing sections clearly show that judicial review proceedings can be brought against any person who acts in the position of an administrator as defined above. The court has thus to determine whether the 1st respondent acted as an administrator or not. The Court has looked at the pleadings in this case and the role that the 1st Respondent is said to have played in the process of land adjudication and before the dispute resolution bodies under the *Land Adjudication Act*. The court notes that in Appeal to the minister case number 35 of 2000, the Appellant was Nguni Nthenga represented by Patrick Munyoki Nguni (the exparte applicant herein) while the Respondent was Nzunguli Ngandi represented by Augustus Ndili Nzunguli (the 1st Respondent herein). The findings and judgement in the said appeal were delivered on 22nd September 2022 by Jama M. Hirsi, Deputy County Commissioner Migwani Sub County on the behalf of the 5th Respondent. The Court is satisfied that nowhere in the proceedings is the 1st respondent said to have made any findings, rendered any decision or acted as an administrator by taking any administrative action or making any administrative decision. The 1st Respondent cannot therefore be said to be amenable to judicial review as envisaged by the law under Article 47 of *the Constitution* or under the *Fair Administrative Action Act*.
15. Further, the court notes that the prayers on the application dated 14th April 2023 are all directed at the 2nd 3rd 4th and 5th Respondents only and none is directed at the 1st Respondent.
16. Counsel for the exparte applicant argued that the description of the 1st respondent as a respondent is immaterial since he has an interest in this suit since he was involved in the case during the adjudication process. He cited Order 10 Rule 2 of the *Civil Procedure Rules* on the discretion of the court on joinder and striking out of parties to suit. He argues that the 1st respondent can be joined as an interested party to the suit since he has a stake in the proceedings. He relied on the case of *John Harun Mwau v Simon Haysom & 2 Others; Attorney General & 2 others* while citing the principles laid down by the Supreme Court of Kenya in the case of *Methodist Church in Kenya v Mohamed Fugicha & 3 Others* (2019) eKLR where it held:

“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the



principal parties or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court.”

17. From the above-cited Supreme Court decision, the position of the principal parties to a suit and that of an interested party are different. The Court confirmed that it is the pleadings and submissions filed by the principal parties to the suit that will form the issues for determination by the court and the interested party cannot bring forth any new issues for determination.
18. The Court agrees with Counsel for the 1st Respondent and the ex parte applicant that the 1st Respondent's position concerning the proceedings before this court is not that of a principal party to the suit, but that of an interested party or a person directly affected, as provided under Order 53, rule 2 and 4 of the Civil Procedure Rules. The said order provides for service of the Notice of Motion filed on all persons directly affected by the matters before the court and states as follows;
 1. When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.
 2. The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.
 3. An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.
 4. If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.
19. The foregoing provisions allow for the service of pleadings and the participation in these proceedings of persons directly affected by the matters before the court. The court is of the view that the 1st Respondent is such a person and as such the ex parte applicant is at liberty to amend the Notice of Motion dated 14th April 2023 within fourteen (14) days from today by striking out the name of Augustus Ndili Nzunguli as the 1st respondent and adding him as an interested party.
20. With regard to grounds 4, 5 and 6 of the 1st Respondent's preliminary objection, it is noted that the issues require an in-depth analysis of the facts of the case and touch on the final determination of the suit. The objections thus fail the test of a true preliminary objection.
21. From the foregoing, the court finds that the 1st Respondent is improperly joined as a Respondent in this suit. The preliminary objection dated 14th April 2023 is upheld partly and the following orders are made;



1. The name of the 1st Respondent Augustus Ndili Nzunguli be and is hereby struck out as a respondent in this suit.
2. All other grounds in the preliminary objection dated 14th April 2023 are hereby dismissed.
3. The ex parte applicant is at liberty to amend the Notice of Motion dated 14th April 2023 within fourteen (14) days from today by striking out the name of Augustus Ndili Nzunguli as the 1st respondent and adding him as an interested party.
4. There will be no orders for costs.

DELIVERED, DATED AND SIGNED AT KITUI ON THIS 7TH DAY OF MAY, 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

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

J. Musyoki - Court Assistant

Valerie Omar for the 1st Respondent

No attendance for the ex parte applicant

No attendance for the 2nd to 6th Respondents

