



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC JUDICIAL REVIEW NO. 01 OF 2020**

REPUBLIC.....APPLICANT

VERSUS

MUUNGUU NGUA NDONGOI .....1<sup>ST</sup> EX-PARTE APPLICANT

SHADRACK KIMOLO MUUNGUU.....2<sup>ND</sup> EX-PARTE APPLICANT

VERSUS

PETER MAVINDU NGUA .....1<sup>ST</sup> RESPONDENT

MESHACK NTHONGOI MAVINDU.....2<sup>ND</sup> RESPONDENT

WASUA NGUA .....3<sup>RD</sup> RESPONDENT

DEPUTY COMMISSIONER MAKUENI COUNTY .....4<sup>TH</sup> RESPONDENT

DIRECTOR OF LAND ADJUDICATION &

SETTLEMENT SCHEME.....5<sup>TH</sup> RESPONDENT

LAND REGISTRAR MAKUENI COUNTY .....6<sup>TH</sup> RESPONDENT

SENIOR RESIDENT MAGISTRATE COURT

AT MAKUENI.....7<sup>TH</sup> RESPONDENT

**JUDGEMENT**

1. By their Notice of Motion application dated 21<sup>st</sup> July, 2020 and filed in court on 22<sup>nd</sup> July, 2020. The Ex-parte Applicant moved this court for orders: -

- a) Leave granted to the Ex-Parte Applicant to apply for an order of *certiorari* to the Deputy Commissioner Makueni County to produce unto this Honourable his decision dated 23<sup>rd</sup> October, 2019 in appeal 130 of 2015 and the record on objections 415 and 418 of the Adjudication officer dated 28<sup>th</sup> June, 1989 to be quashed and set aside.
- b) An order of prohibition to the Resident Magistrate Makueni restraining the court not to hear ELC No. 5 of 2020 pending before the court and the 1<sup>st</sup> Respondent and his agents or servants from taking possession of parcel No. Okia/Iuani/2532 or interfere with Ex-parte quiet possession and improvements on the land parcel Makueni/Iuani/422 until further orders of the court.
- c) The court be pleased to grant an order of Mandamus to be issued to the Land Registrar Makueni not to issue title deed of parcel No. Okia/Iuani/2532 to Peter Mavindu Ngua and if issued to recall the same and be cancelled.
- d) Leave granted to operate as stay of the implementation of the orders of Land Adjudication Officer. Any other order this court may deem just.

2. The application is expressed to be brought under Order 53 Rules 1(1) and 4 of the Civil Procedure Rules, the Administrative Action Act 2015, the Law Reforms Act and all other enabling provisions of the Law.
3. The application is supported by the verifying and supporting affidavits of Munguu Ngua Ndongoi, the 1<sup>st</sup> Ex-parte Applicant herein, both sworn at Machakos on 31<sup>st</sup> January, 2020. It is also supported by the 1<sup>st</sup> Ex-parte Applicant's supplementary affidavit sworn at Makueni on 10<sup>th</sup> November, 2020. The application is also supported by the statement of facts dated 31<sup>st</sup> January, 2020.
4. The 1<sup>st</sup> and the 2<sup>nd</sup> Respondents have opposed the application vide the replying affidavit of Peter Mavindu Ngua, the 1<sup>st</sup> Respondent herein sworn at Nairobi on 12<sup>th</sup> October, 2020 on his own behalf and that of the 2<sup>nd</sup> Respondent and filed in court on 16<sup>th</sup> October, 2020.
5. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents have opposed the application vide their grounds of opposition dated 12<sup>th</sup> October, 2020 and filed in court on 19<sup>th</sup> November, 2020 where they state that the Ex-parte Applicant went through the procedure for redress provided for in the Land Adjudication Act i.e. Committee stage, Arbitration Board stage, Objection before the Adjudication Officer and finally Appeal before the Minister as demonstrated by his annexures, that it was evident from the annexure **MNN4** that the Ex-parte Applicant appeared and fully participated during the hearings of the objections No. 415 and 418. The Applicant cannot therefore allege that there was no hearing conducted, that it was further evident from annexure **MNN4** that the Ex-parte Applicant was granted 60 days to file his appeal from the 11<sup>th</sup> October, 1989 as provided by Section 29 of the Land Adjudication Act, however, the Ex-parte Applicant failed to do so and filed the appeal 22<sup>nd</sup> October, 1990 approximately a year later as evidenced by annexure **MNN6**, in contravention of the provisions of Section 29 of the Land Adjudication Act, that Judicial Review proceedings are concerned with the decision making process and not the merits of the decision itself, the Ex-parte Applicant is challenging the merit of the case and not the decision making process, that the application has not met the threshold for granting judicial review orders of *certiorari*, that the application does not meet the grounds set out in Section 7(2) of the Fair Administrative Action Act, that the application is misconceived, mischievous, an after-thought and an abuse of the court process hence subject for dismissal.
6. The application was canvassed by way of written submissions.
7. The dispute revolved around land parcel number Makueni/Iuani/2532 owned by the 1<sup>st</sup> Respondent which the 1<sup>st</sup> Ex-parte Applicant has claimed that it was unlawfully, fraudulently excised from his land parcel number Makueni/Iuani/422. He has deposed that in 1974 the family of one Nthongoi inherited four parcels of land from their grandfather that were situated in different places within Iuani of Kaiti Sub-county. He went on to depose that when the adjudication process commenced he and his three brother who include the 1<sup>st</sup> Respondent were each given one parcel of land. He deposed that the 1<sup>st</sup> Respondent had his name registered in respect of land parcel number Makueni/Iuani/411 while he himself got land parcel number Makueni/Iuani/422. That when he was away, the 1<sup>st</sup> Respondent unlawfully claimed and recorded his interest in the said land parcel number Makueni/Iuani/422. That when the matter was heard by the committee, the latter decided in favour of the Ex-parte Applicant whereupon the 1<sup>st</sup> Respondent appealed against the decision of the committee to the Arbitration Board.
8. The matter ended up with an appeal before the Minister. The Ex-parte Applicant further deposed that although he was given a hearing before the Minister, the latter dismissed the appeal on the grounds that it was filed out of time without giving the Ex-parte Applicant the chance to submit on the same.
9. The Ex-parte Applicant has termed the decision of the Minister as one that is *ultra vires*, irrational, an abuse of rules of natural justice and discretion.
10. On the other hand, the 1<sup>st</sup> Respondent has deposed that he has been advised by his advocates on record and whose advice he verily believes to be true that the application herein is an abuse of the court process since judicial review is concerned with the process rather than merits of a decision.
11. In his written submissions, the counsel for the Ex-parte Applicant submitted that the Minister's appeal is tainted with illegality, irrationality and procedural impropriety in that the minister did not answer the question that Ex-parte Applicant asked why a portion of land was excised from his parcel number 422. The counsel went on to submit that the Ex-parte Applicant ought to have been given time to respond on the issue of the appeal having been filed out of time before the Minister dismissed it. The counsel faulted the minister for failing to visit the suit premises, failing to recall the registry record, failing to avail the determination of the adjudication amongst other failures. The counsel relied on the case of **Timotheo Makenge -Vs- Manunga Ngochi [2017] eKLR**. The counsel concluded by urging the court to allow the application.
12. On their part, the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Ex-parte Applicant is inviting the court to determine contested issues of facts which is not a ground for judicial review. The counsel termed the instant application as an abuse of the judicial review process.
13. The counsel relied on the cases of **Republic -Vs- The Commissioner of Domestic Taxes Ex-parte Fleur Investments Ltd [2020] eKLR** and **Kenya National Examination Council -Vs- Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**.
14. The counsel for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents in her submissions framed three (3) issues for determination as follows:-
  - a) ***Whether this application has met the threshold for granting judicial review orders;***
  - b) ***Whether the application meets the grounds set out in Section 7 (2) of the Fair Administrative Action Act;***

**c) Whether the Ex-parte Applicants are entitled to the orders sought.**

15. On whether the application has met the threshold for granting judicial review orders, the learned counsel correctly submitted that judicial review proceedings are concerned with decision making process and not with the merits itself. In support of her submissions, the counsel relied on the case of **Kenya Re-Insurance Corporation -Vs- National Land Commission [2018] eKLR** where Yano, J. while relying on the case of **Municipal Council of Mombasa -Vs- Republic & Umoja Consultants Ltd in Civil Appeal No. 185 of 2001** held;

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

16. On whether the persons affected by the decision of the minister were heard, the counsel submitted that all the affected parties were granted a fair chance to present their cases and given a chance of being heard as is demonstrated by the Ex-parte Applicant’s annexures MNN5 and MNN6. The counsel added that the annexures show that during the hearing of the appeal, the Ex-parte Applicants participated in the proceedings before the Deputy County Commissioner where they called one witness by the name of Willy Ngua who was the 2<sup>nd</sup> Appellant and who testified on their case, and was given a chance to cross-examine the Respondent’s witnesses. The counsel went on to submit that it is clear that the appeal was dismissed because it was filed out of time in accordance with Section 29(1) of the Land Adjudication Act which provides;

***“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.”***

17. On whether the Ex-parte Applicants are entitled to the orders sought, the counsel cited the case of **Kenya National Examination Council -Vs- Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** where the court of appeal held;

***“.....an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”***

18. The counsel concluded by urging the court to dismiss the application dated 31<sup>st</sup> January, 2020 with costs to the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents.

19. Having considered the rival submissions filed by the counsel on record for the parties, I am of the view that the only issue for determination is whether the application has met the threshold for the granting judicial review orders. At the outset, it must be appreciated that the Judicial review is concerned with the decision making process and not with the merit of the decision. This was so held by the Court of Appeal in the case of **Municipal Council of Mombasa -Vs- Republic & Another [2002] eKLR** where the court stated thus;

***“Judicial review is concerned with the decision making process, not with the merits of the decision itself.....The court would only be concerned with the process leading to the making of the decision. How was the decision carried at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant modes or did he take into account irrelevant matter? These are the land of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a Court of Appeal over the dealer; acting an appeal court over the decider would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions and that, as we have said, is not the promise of Judicial Review.”***

20. Similarly, in the case of **Ransa Company Ltd -Vs- Manoa Francesco & 2 Others [2015] eKLR**, the Court of Appeal stated thus;

***“We all appreciate a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than merits of the case. It is also very restrictive in the nature of reliefs available to the parties.”***

21. Having read the decision of the Deputy County Commissioner, I do note that the Ex-parte Applicants herein who were the Appellants in the Minister’s case number 130/2015 (MNN6) were given a hearing before the minister made his decision. On whether or not the Ex-parte Applicants were given the opportunity to submit on the issue of the appeal having been filed out of time, the law i.e. Section 29(1) of the Land Adjudication Act is clear that on appeal over an objection ought to be filed before the Minister within 60 days. I am of the view that the Ex-parte Applicants are trying to invite the court to look into the merits behind the Minister’s decision to dismiss the appeal which cannot be the province of judicial review. The requirement of filing an appeal within 60 days is statutory and couched in mandatory terms.

22. I have come to the conclusion that the Ex-parte Applicants have failed to demonstrate an arguable case to warrant the grant of the orders sought. In the circumstances, I hereby proceed to dismiss the application dated 21<sup>st</sup> July, 2020 with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents.

Signed, dated and delivered via email at Makueni this 2<sup>nd</sup> day of **September, 2021**.

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**MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. Kwemboi.