



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

JUDICIAL REVIEW APPLICATION NO. E004 OF 2021

**IN THE MATTER OF AN APPLICATION BY JOHN MBIRI NJAGI FOR LEAVE TO
COMMENCE PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: ARTICLES 23 (3) (f),40,48,50 THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF THE LAND PARCEL NO.931 KAMANYAKI.KAMARANDI ADJUDICATION SECTION

AND

**IN THE MATTER OF AN APPEAL TO THE MINISTER IN CHARGE OF LANDS AND PHYSICAL PLANNING
CASE NO.101 OF 2018 AND IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

AND

THE ATTORNEY GENERAL OF KENYA.....4TH RESPONDENT

JOSEPH KAGUURA MBUGI.....INTERESTED PARTY

JOHN MBIRI NJAGI.....EXPARTE APPLICANT

JUDGEMENT

1. Pursuant to leave granted by court on **17th May 2021** the exparte Applicant filed a notice of motion application dated **20th May, 2021** seeking orders that:

- a. An order of Certiorari be issued to remove to this court for the purpose of being quashed the undated judgement/decision of the minister in appeal to the minister appeal No.101 of 2018 in respect of land parcel no.931 KAMANYAKI/KAMARANDI adjudication section between the interested party appellant and exparte applicant (respondent).
- b. An order of prohibition be issued prohibiting the 2nd and 3rd Respondents from implementing the decision of the 1st respondent (the cabinet secretary ministry of lands and physical planning) judgement award or decision which is undated but pronounced to the interested party and exparte applicant on 15th March 2021 in regard to land parcel no.931 KAMANYAKI/KAMARANDI adjudication section in the ministers appeal no.101 of 2018.
- c. The costs of this application be provided.

APPLICANT'S CASE

2. The motion is supported by the affidavit of JOHN MBIRI NJAGI sworn on 20.5.2021 and is based on the grounds;

- a. That the decision/judgement/ruling/award of the minister (undated) but pronounced over on 15th March 2021 in relation to parcel no.931 KAMAYAKI/KAMARANDI/ADJUDICATION SECTION was made without jurisdiction.
- b. The appeal to the minister was rendered nugatory null and void for all intent and purpose given that by the time the appeal was lodged and heard parcel no.931 KAMANYAKI/KAMARANDI/ADJUDICATION SECTION had been registered and title deed issued to the exparte applicant.
- c. That the appeal to the minister was time barred and no leave was sought from the court to file the appeal out of time.
- d. That the decision by the minister was undated.
- e. That the minister entertained a hearing on appeal instead of analyzing and interrogating the evidence already on record (the decision of DLASO appealed against).
- f. That the minister entertained new evidence by the appellant which was contradictory to his evidence before DLASO in objection No.11 of 2008 a fact that was noted by the minister.
- g. That the minister did not visit the suit land as he had intimated before the commencement of the hearing.
- h. That the minister gave the exparte applicant a very short time within which to prepare for the appeal granted that the local chief informed him over the phone of the hearing of the appeal on 14th November 2020 when the appeal was slated for hearing on 17th November 2020.
- i. That the interested party only came to the picture during the AR Objections and when he lost, he preferred the appeal no.101 of 2018, after the title deed to L.R KAMANYAKI/KAMARANDI/931 had already been issued.
- j. That the Interested Party claim is for Land Parcel KAMANYAKI/931 which is the legally and lawfully acquired property of the exparte applicant.
- k. That the parcel no.931 KAMANYAKI/KAMARANDI adjudication section was adjudicated as a big block by Kamuringen Thimbu (clan) shared the same to clan members and those nonmembers residing on the block and the interested party was given his share out of the big block.
- l. That the interested party has never occupied nor made use of parcel no.931 KAMANYAKI/KAMARANDI ADJUDICATION SECTION.
- m. That the interested party has only sent his brother JAMES NJERU to enter, encroach and trespass into 931/KAMANYAKI/KAMARANDI ADJUDICATION SECTION, using him as a ploy to claim the land a fact that was noted by the Minister.
- n. That in his findings the 1st respondent is openly biased as he tries to justify the indolence shown by the interested party of his failure to raise an objection at committee objection where ownership of land is ascertained in adjudication area.
- o. That no objection was ever raised against the exparte applicant or anyone claiming through him after demarcation.
- p. That the 1st respondent who was represented by the deputy county commissioner never set foot on parcel no.931 KAMANYAKI/KAMARANDI adjudication section to prove or disapprove the interested party claim and applicant claims as a visit on the suit land clearly would have proved that the Interested Party does not reside nor use LR: KAMANYAKI/KAMARANDI/931.

q. That the award to the Interested Party of the entire land parcel No. 931 Kamanyaki/Kamarandi was fraud, unjust and irregular as the 1st Respondent failed to consider material facts in his ruling.

r. That the 1st respondent acted in bad faith when he convened a hearing on the 17th November 2020 without paying due regard to the fact that late service was effected upon the exparte applicant who was residing and working for gain at Mombasa.

s. That the 1st respondent abused his powers by awarding the Interested Party the parcel of land No.931 KAMANYAKI/KAMARANDI/931 and not only rendering the exparte applicant and all those claiming through him landless, and did not consider that the applicant herein terms the land as share from his clan and the Interested Party had his own share. That the 1st Respondent abused his powers by awarding the Interested Party the parcel of land No. 931 KAMANYAKI/KAMARANDI without considering any material evidence, and only oral statements of witnesses adduced by the Interested Party and totally disregarding the applicant's protest that he has never had a case against the Interested Party at the commencement of objections at both levels of committee nor board whereof issues of ownership were canvassed.

3. The ex-parte applicant reiterated the above grounds in his supporting affidavit and annexed the undated judgment/ruling, copies of the register and official search and the AR objection No. 11 OF 2008 from which appeal to the minister was preferred.

4. Replying on **R –V – Nairobi City County Ex-parte: Gurcharn Singh Sihora & 4 Others [2014] eKLR**, the advocate for the ex-parte Applicant submitted that Judicial Review is not about merits or demerits of a decision, but impropriety in arriving at the decision being challenged. It was submitted that the 1st Respondent acted without jurisdiction since an appeal to the minister must be preferred within 60 days after the hearing and determination of objection under section 26 of the Land Adjudication Act Cap 284 as provided for in section 29(1) of the said Act. The Applicant argued that the appeal to the minister in this case was against the decision of DLASO dated 13th May, 2009. That whereas the Interested Party had 60 days from that date to lodge appeal, it was not until 2018 that the Interested Party filed the appeal to the minister, approximately 9 years from the date the decision appealed against was made by DLASO. It was therefore the applicant's submissions that the appeal was made out of time and therefore the minister had no jurisdiction over the matter. That the appeal to the minister was time barred.

5. The Ex-parte Applicant further contended that the suit land was already registered by the time the appeal was preferred. The applicant pointed out that the copies of the register and official search exhibited confirm that matters of adjudication had been finalized and the adjudication register forwarded to the Director of Adjudication and the Chief Land Registrar as per section 27 and 28 of Cap 284. The Applicant submitted that the intervention of the minister had been rendered useless and inapplicable by the registration of the ex-parte Applicant as the proprietor of the Land L.R. KAMARANDI/KAMANYAKI/931, and that any challenge to the registration could only be made to the court.

6. The Ex-Parte Applicant also submitted that the decision, Judgment or award by the minister was undated, and therefore its authenticity is unknown. Counsel for the Ex-parte Applicant cited the provision of Order 21 Rule 3 of the Civil Procedure Rules that requires that a Judgment should be signed.

7. The Ex-Parte Applicant also faulted the minister for entertaining a hearing on appeal instead of analyzing and interrogating the evidence that was on record. Counsel for the Ex-parte Applicant relied on the Judgment in Meru High Court, Civil Appeal No. 106 of 2008 and faulted the minister for entertaining new evidence and for failing to visit the suit land before the commencement of the hearing.

8. The Ex-parte Applicant further submitted that he was not given enough time to prepare and attend the hearing, arguing that the local chief telephoned him on 14.11.2020 which was only 3 days to the date of hearing of the appeal, and that the notice was very short considering that he was residing at Mombasa.

9. The Ex-parte Applicant further submitted that the appeal to the minister by the Interested Party was an afterthought, the same having been lodged by the Interested Party who only came into the picture during the AR objections, and who preferred appeal No. 101 of 2018 after Title deed to LR: KAMANYAKI/KAMARANDI/931 had already been issued.

10. While appreciating that Judicial Review does not concern itself with the merits and demerits of the decision challenged, the advocate for the Ex-parte Applicant abandoned grounds 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 20 of the application and urged the court to allow the application and grant the orders sought.

THE RESPONDENTS' CASE

11. The Respondents opposed the application and filed grounds of opposition dated 15th June, 2021, on the following grounds:

i. That the application does not demonstrate with sufficient clarity the nature of misconduct in the action of the Respondents in the exercise of their statutory duties.

ii. That Judicial Review deals with procedure and not results.

iii. That the orders sought are discretionary and can be denied even warranted (sic).

iv. That the application is misconceived and a non-starter.

v. That the application is vexatious, frivolous, scandalous and an abuse of court process.

12. The Respondents' counsel submitted that it is trite law in evidence that he who asserts must prove his case and argued that apart from alleging biasness on the part of the 1st Respondent, the applicant does not go any further to establish whether the process was tainted with illegality, irrationality and procedural impropriety as was held in the case of **Pastoli –vs- Kabale District Local Government Council and Others (2008) 2 EA 300**, a Ugandan case quoted in **John C. Chelanga v Minister for Lands & 3 Others [2021] eKLR**. The Respondents submitted that the applicant herein was afforded an avenue to settle the dispute as per the law, and the matter was heard and determined fully by the minister who acted within his authority and mandate as stipulated under the law. That the applicant is inviting the court to delve into the merits of the decision rather than the decision-making process which is not within the perview and or remedy of judicial review. The Respondents' counsel relied on the case of **Municipal Council of Mombasa –vs- Republic, Umoja Consultants Ltd Nairobi Civil Appeal No. 185 of 2007 [2002] eKLR** as quoted in the case of **John C. Chelanga (supra)** and argued that the matter herein in its first instance went through the Land Committee established under Kamanyaki/Kamarandi Adjudication section, that an objection was lodged at the Arbitration Board and the dissatisfied party lodged an appeal to the minister as per the law. That at the appeal to the minister, all parties were afforded opportunity to call witnesses and adduced evidence which culminated in the judgment made by the minister, and which the applicant herein is aggrieved with, hence the application for Judicial Review. It was submitted by the Respondents' counsel that it is trite law that a court exercising Judicial Review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. That the court cannot be invited to act as an appellate court to reverse the decision of the 1st Respondent as the ex-parte applicant is insinuating. Counsel for the Respondents relied on the case of **Douglas Tsuma Mumba –vs- National Land Commission & 2 Others [2020] eKLR** and **Republic –vs- Attorney General & 4 Others Ex-parte Diamond Hasim Lalji & Another [2014] eKLR**.

13. The Respondents' counsel further submitted that Judicial Review is discretionary and can be denied. That for the court to exercise its discretion, the ex-parte applicant ought to place before the court sufficient evidence showing that Rules of Natural Justice were not adhered to. It was their submissions that having been granted an opportunity to give his testimony, call witnesses and adduce evidence, justice was deemed to have been served as it ought to have, and therefore the applicant cannot then question the mandate and authority of the 1st Respondent who followed the procedure laid in law to arrive at the Judgment he made. That the allegations by the applicant are mere fabrications and falsehoods that are farfetched and cannot be a basis for quashing the Judgment made by the minister. The Respondents urged the court to dismiss the application with costs.

THE INTERESTED PARTY' CASE

14. The Interested Party echoed, identified, and associated himself with the Respondents' Grounds of opposition and submissions. The Interested Party contended that the Ex-parte Applicant is trying to invite the court to determine a myriad of contested issues adding that the application herein is an appeal disguised as a Judicial Review application. The Interested Party submitted that the application can neither stand nor pass the very well and clearly established tests and/or threshold for a competent Judicial Review. According to the Interested Party, there is nothing in the instant application that demonstrate any illegality, procedural unfairness and/or irrationality on the part of the respective authorities while arriving at the decision/judgment. That there is also nothing in the application to demonstrate that the decisions by the adjudicating authorities were ultra vires. It is the Interested Party's submissions that the application is wanting and poignantly incompetent, adding that the same lacks the core elements and essential clarity that are the hallmark of and which may warrant a Judicial Review of any obtaining acts by an authority. The Interested Party further submitted that what is before court is a situation where the resolution of the dispute at hand will require the court to make a determination on some disputed issues of fact. The Interested Party's advocate relied on the case of **Republic –v- National Transport & Safety Authority & 10 Others Ex-parte James Maina Mugo; Republic –vs- Attorney General & 4 Others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji and Republic –vs- Registrar of Societies & 3 Others Ex-parte Lydia Cherubet & 2 Others**. The Interested Party submitted that the Ex-parte Applicant has not demonstrated any instances of alleged bias, bad faith or any procedural illegalities on the part of the minister and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

15. I have considered the arguments and submissions made and find that three issues arise for determination. The first issue is whether the 1st Respondent acted without jurisdiction, the second issue for determination is whether the Respondents acted ultra vires their powers under the Land Adjudication Act Cap 284 Laws of Kenya and the last issue is whether the applicant is entitled to the remedies he seeks.

16. On the first issue, the applicant's case is that the appeal before the 1st Respondent arose from the decision of the District Land Adjudication and Settlement Officer dated **13th May, 2009**. The Applicant argued that the Interested Party had 60 days from **13th May, 2009** to lodge an appeal before the minister but filed the appeal in the **year 2018**, which is approximately 9 years from the date the decision appealed against was made. It was the applicant's submissions that the appeal was made out of time and therefore the 1st Respondent acted without jurisdiction. In the affidavit in support of the application, the applicant has annexed the proceedings in AR objection case No. 11 of 2008 as well as the decision dated **13th May, 2009**. The respondents and the Interested Party have not disputed that it was that decision that triggered the proceedings in Appeal to the minister being case No. 108 of 2018, and now the subject of these proceedings. There is also no dispute that the subject of both proceedings was Land Parcel No. 931, Kamanyaki/Kamarandi Adjudication section. There is also no dispute that the present Interested Party was one of the Plaintiffs in the A/R objection and the Appellant in the appeal while the Ex-parte Applicants herein was the Defendant in the A/R objection and Respondent in the appeal before the minister.

17. Section 29 of the Land Adjudication Act provides that:

“(1) Any person who is aggrieved by the determination of an objection under section 26(1) & (2) 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.”

18. There is no rocket science needed to discern that the appeal to the minister in this case was lodged in the **year 2018**, which is a period of about 9 years from the date the decision appealed against was made on **13th May, 2008**. Section 29 of the Act clearly provides that any person aggrieved by the determination of an objection under section 26 had 60 days to lodge an appeal to the minister. In the present case, the appeal was not filed within 60 days. Instead, the appeal was filed after a period of about nine years, which was clearly out of the time stipulated by the Act.

19. In the case of *Municipal Council of Mombasa –vs- Republic & Another* [2002] eKLR, the Court of Appeal held as follows:

“Judicial Review is only 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 a 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.”

20. In the case of *Republic –vs- Kenya National Examination Council Ex-parte Gathenji and Civil Appeal No. 266 of 1996*, the Court of Appeal stated inter alia, that:

“It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision –making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.”

21. The broad grounds on which the court exercises its Judicial Review jurisdiction was also reiterated in *Zachariah Wagunza & Another –vs- Office of the Registrar, Academic Kenyatta University & 2 Others* [2013] eKLR as was stated in the *Uganda case of Pastoli –vs- Kabale District Government Council and Others* (2008) 2 EA 300 and observed among other things 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 illegally, 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...”

22. It is clear therefore that the purpose of Judicial Review is to check that public bodies or persons holding public authority and exercising their function, do not exceed their jurisdiction and carry out their duties within the limit defined by the law. Examples of these is where the lawful authority departed from procedures stipulated by statute.

23. That the 1st Respondent has power to hear and determine appeals of objections in accordance with section 29 of Cap 284 Laws of Kenya is not in dispute, the 1st Respondent however could only hear and determine appeals lodged within 60 days. In my view, the 1st Respondent had no jurisdiction to hear and determine an appeal that was brought after about 9 years. There was no leave to file appeal out of time. The minister entertained an appeal that was clearly time barred, and by so doing, acted illegally and unprocedurally, hence his decision was tainted by procedural impropriety and the same cannot stand.

24. The next issue for determination is whether the Respondents acted ultra vires their powers. It is evident from the material on record that following the decision in the A/R objection, the Ex-parte Applicant was registered as proprietor of LR. KAMANYAKI/KAMARANDI/931 and was issued with a title deed. The Applicant has exhibited a copy of the title deed in his name and a certificate of official search confirming that the applicant was registered as proprietor of the land on **28th November, 2014**. It is evident from the impugned decision that the 1st Respondent in that decision awarded the suit land to Joseph Kaguura Mbugi, the Interested Party herein. No doubt that would entail the rectification of the title document. Section 80(1) of the Land Registration Act No. 3 of 2012 provides:-

“subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

25. The above section makes clear that rectification can only be ordered by a court as defined under that Act. In my view, the 1st Respondent had no power to make a decision that amounts to an order for rectification of a title. In this regard, I am in agreement with the applicant’s submissions that the 1st Respondent’s action was ultra vires. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles no doubt amounts to an illegality on the part of the 1st Respondent.

26. Having considered the application herein, I find that the 1st Respondent acted unprocedurally and illegally hence his decision cannot stand. Consequently, the Notice of Motion application dated **20th May, 2021** is merited and the same is allowed in terms of prayers 1 and 2. I also award the applicant the costs of the application to be borne by the Respondents and the Interested Party.

27. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF DECEMBER, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Mwenda h/b for Kirimi for the Interested Party

Kitata h/b for Kiongo for Respondent & for I.C. Mugo for Applicant

C. K. YANO,

JUDGE.

Court

Judgment delivered in open court in the presence of the advocates for all the parties.

C. K. YANO – JUDGE

7.12.2021