



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 26 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DEPUTY COUNTY COMMISSIONER**

**KITUI CENTRAL SUB-COUNTY.....RESPONDENT**

**MUINDI KIMWELI (*Deceased*)**

**JOSEPH KITHEKA MUINDI.....INTERESTED PARTY**

**AND**

**MUNUVE KOLU (*Deceased*)**

**CHARLES MUKALA MUNUVE....EX-PARTE APPLICANT**

**JUDGMENT**

1. In the Notice of Motion dated 3<sup>rd</sup> August, 2018, the Ex-parte Applicant has prayed for the following orders:

***a. That an order of certiorari do issue removing to the High Court for purposes of being quashed the decisions of the Deputy County Commissioner-Kitui Central Sub-County dated 21<sup>st</sup> February, 2018 in Appeals to the Minister Numbers 39 of 1987 and 215 of 1987 in respect of Land Parcel Numbers 985 and 991-Kaveta Adjudication Section respectively (Munuve Kolu vs. Muindi Kimweli).***

***b. That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Ex-parte Applicant who deponed that in 1942, his father moved from Mutitu in Kitui East and purchased an unadjudicated parcel of land from one Munuve Mwaniki, which land bordered the Interested Party's land.

3. The Ex-parte Applicant deponed that after his father purchased the said land, he put up a home and developed the land; that amongst his father's neighbour was Kilonzi Mulu who had a land dispute with the Interested Party and that during a visit to the *locus quo*, the said Kilonzi Mulu erroneously encroached into a portion of the land.

4. The Ex-parte Applicant deponed that Kilonzi Mulu lost the entire of the case to the Interested Party; that when Kaveta was declared an adjudication Section, his father's land was adjudicated as parcel number 991 while that of the Interested Party was adjudicated as parcel number 985 and that the demarcation of his father's parcel of land was inclusive of the portion that the court in the African Court in Case No. 24 of 1961 had indicated in the sketch map.

5. The Ex-parte Applicant deponed that the Land Adjudication Officer contradicted the Arbitration Board's decision by observing that the land in dispute was the subject matter in African Court Case No. 24/61 which the Objector won; that the Land Adjudication Officer awarded the whole land parcel number 991 to the Interested Party and that his father filed two Appeals before the Minister in respect of parcels of land number 985 and 991.

6. It is the Ex-parte Applicant's case that during the pendency of the Appeals, the Interested Party went on to make changes in the register and had parcel number 991 registered in his name; that parcel number 991 was never a subject of the dispute in Case No. 24 of 1961 and that the Deputy County Commissioner failed to analyze the history of the suit land and totally ignored the evidence before him.

7. In his Replying Affidavit, the Interested Party deponed that the Ex-parte Applicant has not annexed on his Affidavit the proceedings in Case No. 24 of 1961; that the Judicial Review Application by the Applicant is concerned with his proprietorship rights, which is not allowed and that the Applicant has not pointed out the specific provision of the law where the Respondent exceeded his jurisdiction.

8. According to the Interested party, his deceased father was involved in Syongila Case Number 24 of 1961 with one Kilonzi Mulu who claimed parcel number Kyangwithya/Kaveta/991; that the court in the said case held that the land belonged to his father and that the Land Adjudication Officer and the Minister arrived at a correct decision when they awarded to his late father the whole parcel of land number 991.

9. In the Further Affidavit, the Ex-parte Applicant deponed that an attempt by the Interested Party to have a portion of his father's land sketched together with his land in Case No. 24 of 1961 was thwarted by his father and that then the Arbitration Board visited the disputed land and reviewed the sketches drawn by the African Court in Case No. 24 of 1961 (*Syongila*), the Board found that the land the Interested Party was claiming as having been included in his father's land number 991 was not so included.

10. In his submissions, the Interested Party's advocate submitted that Judicial Review is concerned with reviewing not the merits of the decision of which the application for Judicial Review is made but the decision making process itself; that the Ex-parte Applicant has deceptively couched his complaint as one challenging the procedure followed but is actually aggrieved with the merits of the decision and that this court cannot revisit the findings of the Respondent.

11. In determining the dispute before me, I must begin by considering the jurisdiction of the court in a matter seeking to review the decision of a body exercising administrative functions like the Respondent.

12. Previously, and for a long time, it was settled that a court exercising Judicial Review is concerned with the procedural propriety of a decision, rather than the merits of a decision, only in the circumstances set out in the case of *Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation (1947) 2 ALL ER. 680*, namely: where the administrative body has acted outside its jurisdiction; has taken into account matters it ought not to have taken into account; or failed to take into account matters it ought to have taken into account; or that it has made a decision that is so unreasonable that no reasonable authority could ever come to it.

13. The traditional method of not looking into the merits of a matter being reviewed was taken up by the Court of Appeal in the case of *Municipal Council of Mombasa vs. Republic and Umoja Consultants Ltd, Civil Appeal No. 185 of 2001*, where the court held as follows:

***“Judicial Review 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 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 no sufficient evidence to support the decision.”***

14. The court in the Ugandan case of *Pastoli vs. Kabale District Local Government Council and others (2008) 2 E.A 300*, while citing with approval the English case of *Council of Civil Servants Unions vs. Minister for the Civil Service (1985) AC 2* held as follows:

***“In order to succeed in an application for the 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 or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, an illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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. Such a decision is usually in defiance of logic and acceptable moral standards.... Procedural impropriety is when there is a 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 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.”***

15. Those are the considerations that are still applicable in assessing the issues raised in a Judicial Review Application. In addition to the above principles, I am guided by the Court of Appeal decision in the case of *Suchan Investment Limited vs. The Ministry of National Heritage & Culture & Others (2016) eKLR*, where the court held that a Judicial Review Court cannot ignore looking into the merits of the dispute under review. The court held as follows:

***“55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (1) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and***

**democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.”**

16. The Ex-parte Applicant is challenging the decision of the Respondent dated 21<sup>st</sup> February, 2018 in Appeals Number 39 of 1987 and 215 of 1987. The two Appeals were in respect of parcels of land number Kyangwithya/Kaveta/991 and 985.

17. The main grounds on which the Application is premised on is that the Respondent erred and misdirected himself by making a finding that the suit properties were subject matters in a court of law, which was not the case; that the Respondent failed to consider the findings of the Land Committee and the Arbitration Board and that the Respondent failed to appreciate the fact that what featured in African Court Case No. 24 of 1961 at Syongila was a portion of the Applicant’s Land parcel number 991 which was erroneously included in the sketch map in the case between the Interested Party and another.

18. According to the Ex-parte Applicant, the Interested Party initially claimed only a portion of parcel number 991 before claiming the whole portion later.

19. The Ex-parte Applicant has exhibited the proceedings of the Land Committee, the proceedings of the Arbitration Board in Case Number 97 of 1974 and the proceedings of the Respondent in Appeal Case No. 215 of 1987 and Appeal Case No. 39 of 1987.

20. In Appeal Case Number 215 of 1987, the Respondent made the following findings:

***“The land was subject suit in court being Case No. 24/61 Syongila Law Court then. The Appellant was not included in the case. Defendant won the case. The above case was decided long before demarcation started. The Appellant never occupied the land. Appeal dismissed.”***

21. In respect to Appeal No. 39 of 1987, the Respondent made the following findings:

***“The disputed part was subject to court and Muindi won the case. The court decision of 1961 stands because Munuve Kolu was not enjoined in the case as Interested Party. Appeal dismissed. The shaded part in dispute be part of parcel of parcel 985.”***

22. It would appear that the dispute between the Ex-parte Applicant’s father and the Interested Party’s father during the adjudication process was whether the ownership of the disputed parcel of land was determined by the court in Case No. 24 of 1961, Syongila African Court. Indeed, in his finding, the Land Officer allowed the Appeal as follows:

***“Objection allowed. Court decision to stand vide Case No. 24/61.”***

23. On the other hand, the Land Arbitration Board had made a decision in favour of the Applicant based on the same Judgment of the court in Case No. 24/61. In their decision, the Arbitration Board stated as follows:

***“After the Arbitration Board Members having visited the disputed land and read the Judgment from the court of law and also having seen the sketch map which was taken by the court in 1961 the plan which the Plaintiff’s Stephen Muindi claim is not included in the court of law. However, the plot in dispute is awarded to the Defendant Munuve Kolu. Land Adjudication Committee decision to stand case dismissed with costs.”***

24. Despite the importance of what transpired in Case Number 24 of 1961, Syongila, the Applicant did not exhibit the proceedings and the Judgment of the court. Having not included the proceedings and the Judgment of the court in these proceedings, the issue of whether the Minister misdirected himself in making a finding that the suit property was the subject matter in Case Number 24 of 1961 does not arise.

25. In the absence of those proceedings and Judgment, this court cannot determine if the Minister failed to appreciate that what featured in African Court Case No. 24 of 1961 at Syongila was a portion of parcel number 991 and not the whole land. Without those proceedings, this court will be engaging in speculation, which is not in its realm.

26. On that ground alone, this court is unable to arrive at a finding that the Minister’s decision is illegal, unreasonable or without merit. Consequently, the Application dated 3<sup>rd</sup> August, 2018 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**