



Republic v Deputy County Commissioner - Kilungu & 2 others; Matolo (Interested Party); Delesi (Exparte Applicant) (Environment and Land Judicial Review Case 18 of 2022) [2024] KEELC 508 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 18 OF 2022
TW MURIGI, J
JANUARY 31, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER - KILUNGU 1ST RESPONDENT
THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT,
MAKUENI 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT**

AND

KAMANTHE MATOLO INTERESTED PARTY

AND

MONI DELESI EXPARTE APPLICANT

JUDGMENT

1. By a Notice of Motion dated 14th December 2022 brought under Order 53 Rules 3, 5 & 7 of the [Civil Procedure Rules](#) and Sections 8 & 9 of the [Law Reform Act](#) Cap 26 the *Ex Parte* Applicant seeks the following orders:-
 1. That An Order of *Certiorari* do issue to remove into this Honourable Court and quash the decision of the 1st Respondent in Appeal to the Minister Case No 341 of 2019 delivered on 19th July 2022 over Land Parcel No 3065 Ndiani Adjudication Section.



2. That an Order of Prohibition do issue directed to the 2nd Respondent from effecting and/or implementing the decision of the 1st Respondent in an Appeal to the Minister Case No 342 of 2019 delivered on 19th July 2022 over Land Parcel No 3065 Ndiani Adjudication Section.
 3. Costs of this application be borne by the Respondents and the Interested Party jointly and severally.
2. The application is premised on the grounds appearing on the Statutory Statement together with the supporting affidavit of Moni Delesi sworn on even date.

The *Ex Parte* Applicant's Case

3. The *Ex Parte* Applicant averred that he is the registered owner of Plot No 3065 Ndiani Adjudication Section (the suit property herein) where he has lived with his family for more than 20 years while the Interested Party's husband Matolo Waema is the registered owner of Plot No 2807 Ndiani Adjudication Section. That in total disregard of his ownership over the suit property, the 1st Respondent awarded the same to the Interested Party herein.
4. The Applicant averred that he was not given a fair hearing contrary to the principles of natural justice. According to the Applicant, the 1st Respondent did not render an independent decision since she did not give sufficient reasons as to why the suit property should be recorded in the name of the Interested Party. The Applicant asserted that Plot No 2797 belongs to the family land and as such, he is entitled to an equal share of the same. He contended that the suit property and Plot No 2807 Ndiani Adjudication Section were hived from Plot No 2797. He stated that the entire family agreed that the Interested Party's family would stay on Plot No 2807 while his family would stay on the suit property.
5. The Applicant stated that there has never been a court case between his father (Mbilo Musau) and the Interested Party's husband (Maema Matolo) over the suit property. He asserted that the only dispute involved a boundary dispute between the family of Mukandia and that of Kiketi which was resolved in court.
6. According to the *Ex Parte* Applicant, the 1st Respondent over stepped her mandate by awarding the Interested Party a non-existent parcel. He contended that the 1st Respondent misinterpreted the ruling of the court to mean that the Interested Party's husband had been awarded the suit property.
7. He argued that the 1st Respondent abused her discretion by awarding the Interested Party the suit property where his family has resided for more than 20 years. He maintains that the decision of the 1st Respondent is illegal, arbitrary and unreasonable because she failed to give reasonable reasons for the same. He urged the court to allow the application as prayed.

The Respondents Case

8. In opposing the application, the Respondents filed grounds of opposition dated 19th January 2023 citing the following grounds:-
 1. The Motion dated 14th December 2022 is bad in law, incompetent and incurably defective.
 2. The application herein is brought in bad faith and a waste of court's judicious time.
 3. The orders sought are misleading and ambiguous therefore incapable of being granted by this honourable court.
 4. The application is misconceived, untenable and an abuse of the court process.



5. The application lacks merit and ought to be dismissed.

The Interested Party's Case

9. The interested Party filed grounds of opposition dated 14th March 2023 and a replying affidavit sworn on 15th March 2023 in opposition to the application.
10. She averred that she is a widow of the late Matolo Waema and a member of the larger Mbaa Musau family. She further averred that her husband purchased the suit property from the late Kavulule Ndua in the year 1955. She further averred that the *Ex Parte* Applicant's father Mbilo Musau together with Mwololo Nthingo and Mbau Nthingo were unhappy that her husband had purchased the suit property since they were also interested in the land. That in this regard, they filed and lost several cases against her husband before the village elders, clan elders, local chief and Ithemboni court.
11. That in the year 1967 the *Ex Parte* Applicant's father together with Mbau Nthingo instituted Kilungu Land Case No 42 of 1967 against her husband which he eventually won and was declared the owner of the suit property. She contended that the *Ex Parte* Applicant and his father did not appeal against the said decision.
12. She further averred that after the *Ex Parte* Applicant's father encroached onto her husband's land, the elders resolved that his family should compensate her husband or purchase the land or vacate and give up land equivalent to the part they had encroached from Plot No 2797, the main family land as compensation.
13. That after she discovered that the *Ex Parte* Applicant and the Land Adjudication Officer had fraudulently subdivided her land to create Plot No 2807 and 3065, she filed an Appeal to the Minister. She averred that Plot No 2807 has never been family property since her husband purchased the same in the year 1950
14. She further averred that the *Ex Parte* Applicant has not lived on the suit property and only built houses after the demise of her husband. She asserted that the Appeal to the Minister was conducted in a fair manner because each party was granted sufficient time to present its case. She maintains that the *Ex Parte* Applicant acquired the plot in a dubious manner and that the issue of ownership was determined in Kilungu Land Case No 42 of 1967.
15. The application was canvassed by way of written submissions.

The *Ex Parte* Applicant's Submissions

16. The *Ex Parte* Applicant's submissions were filed on 24th August 2023.
On his behalf, Counsel submitted that the only issue for determination is whether the 1st Respondent acted irrationally or out rightly unfair in awarding the suit property to the Interested Party.
17. Counsel submitted that the suit property belongs to the family and as such each family member is entitled to an equal share of the same. It was submitted that the 1st Respondent perpetuated an illegality by awarding the Interested Party a share of the family property belonging to the *Ex Parte* Applicant. Counsel argued that if the decision is left to stand, the *Ex Parte* Applicant will be displaced with nowhere else to go.
18. It was submitted that the 1st Respondent acted unreasonably by relying on the judgment in Kilungu Land Case No 42 of 1967 where there was no mention that the Interested Party had purchased the suit property from Kavulule.



19. Counsel contended that the 1st Respondent acted irrationally and unreasonably by failing to appreciate that the decision to award the Interested Party the suit property would amount to displacing the *Ex Parte* Applicant and his family which would render them landless
20. It was further contended that the 1st Respondent acted unreasonably by failing to appreciate that the *Ex Parte* Applicant was awarded the suit property by the Land Adjudication Officer.
21. Lastly it was submitted that the 1st Respondent abused her authority by awarding the suit property to the Interested Party. Counsel urged the court to allow the application as prayed.

The Respondents' submissions

22. The Respondents submissions were filed on 30th March 2023.
On their behalf, Learned State Counsel Christine Momanyi outlined the following issues for the court's determination:-
 - i. Whether the application is merited and meets the threshold for judicial review.
 - ii. Whether the prayers sought should be granted.
23. On the first issue, Learned State Counsel submitted that the Applicant was granted a fair hearing as evidenced by the proceedings in Appeal to the Minister Case No 342 of 2019. It was submitted that the Applicant has not demonstrated how the 1st Respondent acted ultra vires her mandate by awarding the Interested Party a non-existent parcel of land.
24. It was submitted that the *Ex Parte* Applicant's ownership claim over the suit property cannot be canvassed in judicial review proceedings. To buttress this point, Counsel relied on the case of *Seventh Day Adventist Church (East Africa Ltd) v Permanent Secretary Ministry of Nairobi Metropolitan Development & another*(2014) eKLR.
25. It was further submitted that the application is an abuse of the court process and a waste of judicial time since it is challenging the merits of the decision rather than the decision making process.
26. Concluding her submission, Learned State Counsel urged the court to dismiss the application with costs.

The Interested Party's Submissions

27. The Interested Party's submissions were filed on 25th April 2023.
On her behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the 1st Respondent followed due process before coming to its decision.
 - ii. Whether the judicial review orders of *Certiorari* and Prohibition should be issued.
28. On the first issue, Counsel submitted that the Interested Party appealed to the 1st Respondent in accordance with Section 29 of the *Land Adjudication Act*. Counsel submitted that the 1st Respondent conducted the proceedings in accordance with the law and followed due process in arriving at her decision. Counsel submitted that the 1st Respondent acted within its jurisdiction as provided under Section 30 of the *Land Adjudication Act*.
29. On the second issue, Counsel submitted that for judicial review orders to issue, the *Ex Parte* Applicant ought to prove that the 1st Respondent did not follow the due process before making its decision. It



was submitted that the 1st Respondent followed due process in arriving at the decision in Appeal Case No 342 of 2019.

Analysis and Determination

30. Having considered the material on record, the following issues arise for determination:-
1. Whether the Applicant has made out a case for the grant of judicial review orders.
 2. Who should bear the costs.

Whether the Applicant has Made out a Case for the Grant of Judicial Review Orders

31. The Principles of Judicial Review were laid down by Lord Diplock in the case of *Civil Servants Union v the Minister for Civil Service* [1985] AC 374 where it was held that;

“Judicial review has, I think developed to a stage today when one can conveniently classify into three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality” the second, “irrationality”, and the third procedural “impropriety”. By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.... By “irrationality” I mean what can now be succinctly referred to as unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as “procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

32. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of *Republic v Kenya Revenue Authority Ex Parte Yaya Towers Limited* [2008] eKLR, where it was held that;

“The remedy of 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. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected....”

33. The duty of a Court in Judicial Review applications was set out in the case of *Pastoli v Kabale District Local Government Council and others* [2008] 2E.A 300 as follows:-

“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 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 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.”

34. The *Ex Parte* Applicant is seeking for an order of *Certiorari* to quash the decision in Minister Land Case No 342 of 2019 on the grounds that the decision reached was against the principles of natural justice.
35. The Applicant contended that he was not accorded a fair trial in the proceedings before the Minister. He was aggrieved by the decision of the Respondent on the grounds it did not provide sufficient reasons as to why the Interested Party was awarded the suit property.
36. On the other hand, the Interested Parties contended that both parties were granted an opportunity to adduce evidence, to call witnesses and to cross examine the adverse party.
37. It is a cardinal rule of natural justice that no one should be condemned unheard.

I have perused the proceedings and findings in Appeal Case No 342 of 2019 conducted before the Deputy County Commissioner Kilungu Sub County. The Interested Party was the Appellant, while the *Ex Parte* Applicant was the Respondent. The parties were recorded as having been sworn and gave evidence.

It is evident that both parties participated in the proceedings by giving evidence and cross examining the adverse party. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the Respondent was biased or unfair towards the Applicant.

38. The *Ex Parte* Applicant gave his testimony, he was allowed to cross-examine the Respondent and fully participated in the proceedings.

The Applicant faulted the Minister for not giving sufficient reasons for her decision to award the Interested Party the suit property. The decision of the Respondent dated 19th July 2022, clearly states the reasons for the decision in its findings. It is crystal clear that the Minister gave sufficient reasons as to why she awarded the suit property to the Interested Party.

39. In the case of *Municipal Council of Mombasa v Republic & Umoja Consultant Limited* [2002] eKLR it was held, inter alia, that:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived 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 matters or did he take into account irrelevant matters” These are the kind 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 decider; acting as 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 decision – and that, as we have said, is not the province of judicial review.”

40. Similarly, in *Republic v Kenya Revenue Authority Ex Parte Yaya Towers Limited*, [2008] eKLR, it was held that;

“the remedy of 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.”



41. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is in reality aggrieved by the merits of the decision of the 1st Respondent. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a Judicial Review application. The Applicant is aggrieved because the earlier decision of the Committee which was in his favour was overturned.
42. In my opinion, a Judicial Review remedy would not be available in those circumstances.
43. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court is satisfied that the Applicant actively participated in the said proceedings. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicant has not demonstrated that such was the case in the instant application.
44. Accordingly, this Court finds that the Applicant has failed to establish a case of breach of the principles of natural justice.
45. The final issue relates to costs. Although the costs of an action are at the discretion of the court, the general and well established rule is that costs follow the event. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. A successful party should be awarded costs, unless, for good reason, the court orders otherwise as provided for under section 27 (1) of the [Civil Procedure Act](#) (Cap 21).
46. In the end, I find that the application dated 14th July, 2022 is devoid of merit and the same is hereby dismissed with costs.

HON. T. MURIGI

JUDGE

RULING DELIVERED DATED AND SIGNED VIA MICROSOFT TEAM THIS 31ST DAY OF JANUARY 2024.

In the presence of

Kiio for the Interested party.

Court assistant Kwemboi.

