



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC JUDICIAL REVIEW NO. 23 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIRECTOR OF LAND ADJUDICATION.....1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....3<sup>RD</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER,**

**MWINGI EAST SUB-COUNTY.....4<sup>TH</sup> RESPONDENT**

**KITHUSI KULA.....EXPARTE APPLICANT**

**JUDGMENT**

**INTRODUCTION**

The exparte applicant moved this Honourable Court vide a Notice of Motion under L III Rules 1 (1) (2) (3) and (4) CPR and Section 8 and 9 of the Law Reform Act Cap. 26 Laws of Kenya seeking the following orders:

**1. (Spent)**

**2. THAT the court be pleased to grant leave to the exparte applicant to apply for Judicial Review orders directing that the decision of Deputy County Commissioner, Mwingi East in Land Appeal cases No. 558/2015 be brought to the High Court for purposes of being crashed.**

**3. THAT leave granted in (2) above do operate as stay of execution of proceedings touching and concerning land parcel No. Mwingi/Mwambiu 241.**

**4. THAT this Honourable Court be pleased to stay and issue a conservatory order to prevent eviction of the exparte applicant from land parcel No. Mwingi/Mwambiu 241 in time with the Notice issued by the Sub-county Land Registrar dated 27<sup>th</sup> September 2017.**

**5. Costs be provided for.**

When that application filed under certificate of urgency was placed before the duly court, the same was certified urgent to be heard exparte in the first instance. The duly court also granted the exparte applicant leave to institute Judicial Review motion against the orders of the Deputy County Commissioner Mwingi East in respect of Appeal Case No. 558/2015 into this Honourable Court for purposes of quashing and/or issuing further directions thereto.

The court further directed that the leave so granted do operate as a stay of proceedings touching and concerning land parcel number

Mwingi/Mwambiu 241. The *ex parte* applicant was given 21 days to file and serve the substantive motion. On 23/11/2017 the substantive notice of motion in compliance with the court's directions. On 3/4/2018, the respondent through Oscar Eredi, Deputy Chief State Counsel instructed by the Honourable Attorney General filed a Memorandum of Appearance and grounds of opposition. When the matter came up on 20/3/2018 for directions, the parties agreed to dispose of this Judicial Review application by way of written submissions on 25/04/2018 the parties through their legal representatives simultaneously.

### **EX PARTE APPLICANT'S CASE**

The main ground of this Judicial Review by the *Ex parte* Applicant is that he was not given a fair hearing by the Minister nor was he notified of its outcome. He also complained that the Deputy County Commissioner exceeded his statutory jurisdiction when considering the appeal and that the rules of natural justice were not observed. The *Ex parte* Applicant argued that after he appealed to the Minister, his appeal was dismissed without notice since he was neither involved nor informed during proceedings in appeal but was surprised when the Land Registrar was ordered to register the suit land in favour of the interested party. The other grounds of this application are concerned with the merit of the decision made by the respondent which in my view is beyond the jurisdiction of this court.

### **RESPONDENTS CASE**

According to the respondents the Judicial Review application is bad in law as the leave to apply for Judicial Review orders was filed out of time. The respondents also contend that this application is frivolous, vexatious and an abuse of court process. She sought to have the suit struck out with costs.

### **EX PARTE APPLICANT'S SUBMISSIONS**

The *ex parte* applicant through the firm of C. K Nzili & Co. Advocates submitted that the proceedings before the Minister were heard in the absence of the *ex parte* applicant. The *ex parte* applicant averred that there is no report of notification filed showing whether he had duly been given adequate notice and the time he was to appear for the hearing of his appeal.

The learned counsel also submitted that the respondent **averred** at the impugned decision by taking into consideration account irrelevant matters and failed to take into consideration relevant matters. The learned counsel did not cite any case in support of his submissions.

### **RESPONDENT'S SUBMISSIONS**

The respondent through freedom Kubai, Litigation Counsel instructed by the Honourable Attorney General submitted that Judicial Review orders are not concerned with the merits of the decision but by the decision making process. Learned Counsel further submitted 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 has been subjected. He argued that this court should not interfere with the exercise of any power or discretion which has been conferred in a body unless it has been exercised in a way which is not within its jurisdiction or unreasonably.

He cited the following cases in support of their position;

1. **Patrick Kariungi Versus Commissioner of Police & Another [2014] eKLR**
2. **Judicial Service Commission *Ex parte* Pareno [2004] 1 KLR 203-209.**
3. **Chief Constable of Northern Wales Police Versus Evan**  
**[1983] 3 All ER.**
4. **Municipal Council of Mombasa Versus Republic & Umoja Consultants Ltd CA No. 85 of 2001 (Unreported)**
5. **Republic Versus Attorney General (on behalf of Land Disputes Tribunal- Uasin Gishu) & 2 Others [2011] eKLR.**

### **DECISION**

I have considered the documents relied by the parties and the submissions by counsel. The appeal to the Minister is provided for under Section 29 (1) which reads;

**“29 (1) 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...”**

The *ex parte* has set out reasons upon which he is seeking the relief in this Judicial Review application. Those reasons in my view are that he was not given a fair administrative decision by the decision maker by failing to observe the rules of natural justice. After looking at the

proceedings and the decision of the Minister it is clear that Appeal was heard on 25/3/2013. The exparte applicant was represented by one Peninah Kasili Kula of ID NO. 20253440. He also sent a witness by the name Simon Muthangya. The exparte applicant through that proxy testified before the Minister and was cross-examined by the defendants and the Board Members.

The exparte applicant witness who was slated to testify in his support withdrew the last minute. The exparte applicant was not denied that he sent his daughter to represent him in that appeal. I find that the exparte applicant was fully represented before the Minister during his appeal on 25/03/2013.

The Minister in the proceedings even noted that the exparte applicant who was the appellant in that appeal had developed health problems and that explained why he had sent his daughter to represent him in the appeal. The exparte applicant has not disowned those proceedings or sought for a review of the decision of the Minister so that he can be given an opportunity to tender his evidence.

The other ground by the exparte applicant that the Deputy County Commissioner exceeded his jurisdiction is not specific. The exparte applicant has not given the specific provision of the law where the respondent exceeded his jurisdiction. That in my view is a general statement which has no legal basis. The exparte applicant has also complained that the respondent was biased and considered irrelevant factors. Those averments have not been specified in what manner the decision maker was biased. It was imperative for the exparte applicant to give specific incidents in the proceeding where the respondent demonstrated any bias or likelihood of biasness.

For the reasons I have stated herein above, I find no merit in this Judicial Review and the same is hereby dismissed with each party to bear her own costs. It is so ordered.

**Read, Delivered and Signed in the open court this 27<sup>th</sup> day of June 2018.**

**Hon. Justice E. C. Cheron**

**ELC JUDGE**

**In the presence of:**

1. Mr. Nzili for applicant
2. Respondent/advocate; absent.