



**Republic v Deputy County Commissioner Mutomo Sub-County & 2 others;  
Munyalo (Interested Party); Kiniu (Exparte Applicant) (Judicial Review Application  
E011 of 2022) [2024] KEELC 421 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 421 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
JUDICIAL REVIEW APPLICATION E011 OF 2022**

**LG KIMANI, J**

**JANUARY 30, 2024**

**IN THE MATTER OF AN APPLICATION BY JUMA KINIU TO APPLY FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI AND PROHIBITION IN THE MATTER OF THE LAND  
ADJUDICATION ACT (CAP 284) IN THE MATTER OF PARCEL NUMBER 130 NDATANI  
ADJUDICATION SECTION IN THE MATTER OF ORDER 53 CIVIL PROCEDURE  
RULES 2010 AND ALL OTHER ENABLING PROVISIONS OF THE LAW-BETWEEN**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER MUTOMO SUB-COUNTY .... 1<sup>ST</sup>  
RESPONDENT**

**DISTRICT LAND REGISTRAR ADJUDICATION & SETTLEMENT OFFICER  
MUTOMO ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ANN MBUA MUNYALO ..... INTERESTED PARTY**

**AND**

**JUMA KINIU ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The Ex parte Applicant filed the Amended Notice of Motion dated 8<sup>th</sup> September 2022 and amended on 17<sup>th</sup> November 2022 seeking the following orders:



1. That this Honourable Court be pleased to issue an order of Certiorari to quash the decision of the 1<sup>st</sup> Respondent delivered on 10/3/2022.
2. That this Honourable Court be pleased to issue an order of prohibition directed to the respondents and the interested party prohibiting them from enforcing, executing or in any manner whatsoever implementing the judgment delivered by the 1<sup>st</sup> Respondent on 10/3/2022.
3. Costs and incidentals to this application be provided for.

### **The Ex parte Applicant's case**

2. The application is supported by the affidavit of the Applicant and a Statement of Facts where the Applicant claims that the original parcel of land subject matter of this suit is known as 130 Ndatani Adjudication Section measuring approximately 35 acres and is his ancestral land as it belonged to the applicant's grandfather Sila Muoki who had nine wives.
3. It is claimed that the interested party is the wife to Fredrick Munyalo Munyao(deceased) who is alleged to have purchased the suit property from Josephat Katanga, who is said to have purchased the land from one Ngenu Makau, who is said to have had no capacity to sell the land. It is claimed that a court case filed ordered the interested party to be refunded the purchase price.
4. The ex-parte applicant further states that a survey exercise was carried out on an unknown date, in his absence with the interested party being the only one in attendance and new boundaries were placed.
5. That the dispute over ownership was determined in favour of his father by the Aombe clan, and in Criminal Case No. 1701 of 2000 and that his grandfather had donated part of the land for a cattle dip and community playground.
6. The ex-parte applicant further states that he has been in occupation of the land since 1992 whereas the interested party has never been in occupation. He appealed to the Minister in case number 436 of 2019 which was dismissed and the suit property was ordered to remain in the name of the Respondent in the appeal the Minister, Fredrick Mungalo Munyao.
7. The ex-parte applicant claims that the interested party is in the process of obtaining a title deed while he remains in occupation and he is apprehensive that he and his family face imminent danger of being evicted.
8. The ex-parte applicant contends that the Deputy County Commissioner ought to have accorded him adequate opportunity to present his case and challenge the evidence presented rather than relying on a questionable and disputed sale agreement presented by the interested party as the basis of the claim to the suit land.

### **The Respondents' Replying Affidavit.**

9. The Respondents filed a replying affidavit sworn by Onesmus Muriuki, Deputy County Commissioner, Mutomo Sub-County where he stated that on demarcation and survey of Ndatani Adjudication Section land parcel 130 was recorded in the name of Fredrick Mungalo Munyalo. The ex parte applicant filed a committee case No. 1 claiming ownership of the land. The case was heard and the suit property was awarded to Fredrick Mungalo Munyalo. The ex-parte applicant filed Arbitration board case No. 2 which upheld the committee's findings. The ex-parte applicant filed an objection to adjudication record case No. 54 and land awarded to Fredrick Mungalo Munyao. The Applicant then filed an appeal to the Minister against Fredrick Mungalo Munyao.



10. During the hearing of the appeal to the Minister, Fredrick Mungalo Munyao who was then deceased was represented by Ann Mbua Munyao, his wife and the interested party herein. She testified and called one witness. She said that they had bought the suit property in the year 1989 from Josephat Katang'a and thereafter marked their boundaries. That in 2000 the father of the Appellant trespassed on the suit property and was arrested and charged. The Appellant also testified and called one witness Titus Kala Makau.
11. Upon a site visit, the deputy county commissioner deposed that the Appellant showed boundaries of the suit property which were different from the ones the Respondent showed and that the Respondent showed clear boundaries which are the same as the ones on the land record.
12. On the Applicant's contention that the survey was done in his absence, it is deposed that there was public participation before the exercise where the local administration informed all the members of the community the tentative dates when the survey exercise was to be carried out. It was further stated that the Interested party had provided a detailed sale agreement which was witnessed by the area assistant chief where a detailed map of the land was provided.
13. He deposed that these findings and those at the committee hearing stage which is comprised of local people with clear knowledge of ownership of land in this area, that the appeal to the Minister number 436 of 2019 was dismissed and the suit property remained in the name of the Respondent, therefore the ex-parte Applicant is relying on untenable grounds and should be dismissed.

#### **The Interested Party's Replying Affidavit**

14. The Interested Party filed a replying affidavit sworn on 6<sup>th</sup> October 2022 and denied that the decision of the Minister was delivered on 10<sup>th</sup> March 2022 stating that the appeal was heard on 16<sup>th</sup> December 2019 and the judgment was delivered on the same date, after which the decision was forwarded to the Director Land Adjudication in Nairobi from where they were to get copies. She stated that she got a certified copy of the decision on 5<sup>th</sup> April 2021 while the ex parte Applicant got the decision on 10<sup>th</sup> March 2021 when six months had already lapsed since 16<sup>th</sup> December 2019.
15. She further deposed that there was no misconduct by the Respondents because each party was given an opportunity to be heard, to call witnesses, to be cross-examined and to cross-examine witnesses and all this appears in the proceedings. The Minister considered the grounds of appeal and analyzed them as against the evidence tendered at the trial and as against the decision of the Land Adjudication Officer and the officers below and arrived at a decision which he delivered as a judgment
16. She further stated that the court ought to consider the process of arriving at the decision and not the merit of the decision.

#### **Ex-parte applicant's submissions**

17. Counsel for the ex-parte applicant summarized the ex parte Applicant's case and urged the Court to be guided by the decision in Republic v Kenya Revenue Authority & another; Shapi & 3 others (ex parte) Judicial Review E038 of 2021 KEHC 401(KLR) where the court is to consider the reasons given for an administrative decision.
18. It is the ex parte applicant's case that he was not present during the survey exercise done by the 1<sup>st</sup> Respondent and the procedure used was not in line with principles of natural justice and due process was not followed. He also submits that the locals referred to in the 1<sup>st</sup> Respondent's judgement with clear knowledge of ownership of land in the area are unknown as they are not named in the proceedings and that he was therefore condemned unheard.



19. The ex-parte applicant also relied on the holding in the case of *Pastoli v Kabale District Government Council and others* (2008) EA 300, submitting that the decision of the 1<sup>st</sup> Respondent was illegal and irregular and that he is deserving of the orders as prayed for.

### **The Respondents' submissions**

20. Senior State Counsel for the Attorney General submitted that the application did not meet the threshold for grant of Judicial Review stating that Judicial Review proceedings are concerned with the decision-making process and not the merits of the decision itself. He relied on the holding in the case of *Kenya Re-Insurance Corporation v National Land Commission* (2018) eKLR.
21. On jurisdiction, it was submitted that the land adjudication officer and the Deputy County Commissioner had the jurisdiction to determine issues before them under Sections 26 and 29 of the [Land Adjudication Act](#).
22. On whether affected persons were heard, it was submitted that the ex-parte applicant went through all the procedures for redress as provided for in the [Land Adjudication Act](#) i.e. the Committee stage, the Arbitration board stage, objection and finally appeal to the Minister. All affected parties were granted a fair chance to present their cases and the ex-parte applicant even called in a witness and was given a chance to cross-examine the Respondent and her witness.
23. State counsel also submitted that the Deputy County Commissioner took into account relevant matters such as the different boundaries that the parties showed and the sale agreement that the Respondent had provided which was witnessed by the assistant chief among others. Further, the parties were given an opportunity to show the boundaries of the suit land.
24. Further, it was submitted that the ex-parte applicant is challenging the merits of the decisions as compared to the decision-making process, relying on the decision in the case of *Kenya Re-insurance Corporation v National Land Commission* (2018) eKLR that this Court should not act as a court of appeal.
25. Regarding whether the ex-parte applicant is entitled to the orders sought, it was submitted that Section 7(2) of the [Fair Administrative Action Act](#) provides for grounds of review and that the ex-parte applicant has not proven any of these grounds.

### **Analysis and Determination**

26. The ex-parte applicant challenges the decision of the 1<sup>st</sup> Respondent who awarded the suit land to Fredrick Munyalo Munyao (deceased) represented by the interested party herein. The Applicant stated that the persons who sold the land to the deceased had no right to sell the land. He further claims to have possession of the land to the exclusion of the Interested Party.
27. The counsel for the Ex parte applicant relied on the case of *Pastoli vs Kabale District Local Government Council & Others* [2008] 2 EA where the court pronounced itself on the requirements for an order of judicial review thus:

“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.”



28. They also relied on the findings in the case of Republic v Kenya Revenue Authority & another; Shapi & 3 others (Exparte) (Judicial Review E038 of 2021) [2021] KEHC 401 (KLR) where the Court found that:
- “It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.”
29. The court has considered the pleadings herein and submissions of counsel for the parties and considers the issue arising for determination is whether the ex parte Applicant has met the threshold for grant of the Judicial Review orders sought.
30. The ex-parte applicant complains that a survey of the land in dispute establishing boundaries, was done in his absence with only the Interested Party in attendance thus condemning him unheard. According to him the Aombe clan had heard the dispute and placed boundaries and he would like the said boundaries to be followed. He states that he has been in occupation of the suit property since 1992 whereas the interested party has never been in occupation.
31. The Respondents denied any wrongdoing due to the marking of boundaries stating that during the hearing of the appeal to the Minister, Ann Mbuu Munyalo who represented Fredrick Mungalo Munyao (deceased) testified that they had bought the suit property from Josephat Katang’a and thereafter marked their boundaries. She stated that in 2000 the father of the Appellant trespassed on the suit property and was arrested and charged.
32. The law on setting out boundaries during adjudication is set out under the [Land Adjudication Act](#) CAP 298 Laws of Kenya which provides for the commencement of the adjudication process and in particular how pointing out a claimant’s boundaries is done. Section 13(1) (2) and (3) of the [Land Adjudication Act](#) CAP 284 provides that:
- “1. Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.
  2. Every person whose presence is required by the adjudication officer, demarcation officer, recording officer, committee or board shall attend in person or by a duly authorized agent at the time and place ordered.
  3. If any person who is ordered to attend fails to attend in person or by a duly authorized agent, the demarcation, recording, adjudication or arbitration, as the case may be, may proceed in his absence.”
33. Having considered the entire adjudication proceedings and the dispute resolution process followed in this case, it is clear that the ex parte Applicant was aware of the land adjudication process and actively participated in it. It has been demonstrated that when the demarcation and survey of the Ndatani Adjudication Section was carried out, land parcel 130 was recorded in the name of the deceased Fredrick Mungalo Munyao. Being dissatisfied with the decision to record the land in the name of Fredrick Mungalo, the ex parte Applicant filed a land committee case number 1. The ex parte Applicant also filed Arbitration Board case number 2, Objection case number 54 and Ministers Appeal case number 436/2019.



34. Indeed, the ex parte Applicant's testimony during the hearing of the appeal clearly shows that he was aware that the survey process was going on. He testified that: "when the survey officers came, as a family we were disrespected and were summoned to the chief's office. I had applied for leave, but two weeks lapsed and the survey officers did not come. I went back to work in Mombasa. The survey officers came in my absence and surveyed the land with one party."
35. The 1<sup>st</sup> Respondent considered this ground of appeal in his findings and stated in finding number 2 that "this court has established beyond reasonable doubt that there was public participation before the exercise started and the local administration informed all the members of the community the tentative dates when the survey exercise was to be carried out"
36. In line with Section 13(3) of the Land Adjudication Act CAP 284 quoted above, it is the court's finding that the ex parte Applicant had the option of appointing an authorized agent to attend the survey exercise on his behalf if he could not be present. In the present case, the demarcation officer and surveyor were authorized by the law to proceed in the absence of the ex-parte Applicant since he had been informed and was aware of the exercise. The survey exercise was thus legal, fair and followed due process.
37. The Ex parte Applicant's counsel disputed finding number 6 of the Minister's appeal stating that the locals referred to in the 1<sup>st</sup> Respondents judgement with clear knowledge of ownership of land in the area are unknown as they are not named in the proceedings and no evidence was adduced that such persons were present. He submitted that this amounted to consideration of irrelevant matters in arriving at his decision and which consideration vitiates the judgment.
38. The finding of the 1<sup>st</sup> Respondent referred to state as follows;
- "At the committee hearing which comprised of local people with clear knowledge of ownership of land in the area, the appellant lost to the respondent. This means that the locals were satisfied that the land belonged to the respondent."
39. The court has considered the above observation by the 1<sup>st</sup> Respondent and confirms that the reference was to the proceedings during the hearing at the committee stage. The court is satisfied that the Respondent was referring to the composition of the adjudication Committee which initially heard the dispute. The said observation is supported by the provisions of Section 6 of the Land Adjudication Act CAP 284 which provides for the establishment and composition of the Land Adjudication Committee. The Section states that;
- "(1) In respect of each adjudication section, the adjudication officer, after consultation with the District Commissioner of the district within which the adjudication section lies, shall appoint not less than ten persons resident within the adjudication section to be the adjudication committee for that adjudication section."
40. Section 20 of the Act provides for the functions of the committee and states inter alia that the committee appointed for an adjudication section shall;
- a. adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer;
  - b. advise the adjudication officer or any officer subordinate to him upon any question of recognized customary law as to which he has sought its guidance;



41. It is thus clear that the composition of the committee is by persons resident in the adjudication section with knowledge of recognized local customary law. In the court's view, the 1<sup>st</sup> Respondent was satisfied that the committee was comprised of local people and that they were satisfied that the land belonged to the Respondent in the appeal. The contention that the said persons with knowledge of the area were not present and they were unknown is not true. The record shows that the members of the committee were known and the composition of the committee is seen from the record of the proceedings of the said committee attached to the affidavits of the Applicant and the Respondents.
42. The 1<sup>st</sup> Respondent was entitled in law to consider all the proceedings that had dealt with the dispute over the suit land since this was an appeal. The manner in which proceedings should be conducted by the Minister under section 29 of the *Land Adjudication Act* was captured in the case of Republic vs. Special District Commissioner & another [2006] eKLR as follows:

“It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower...court record that will assist him to, “...determine the appeal and make such order thereon as he thinks just ....” ..... This means to me that the District Commissioner (Minister) has to examine the written grounds of appeal along with the Land Adjudication Officer's proceedings, judgment, ruling or award, and from it, he will make a just order or judgment. Can the District Commissioner refuse to read the substance of the evidence and the decision of the Land Adjudication Officer from whom the appeal came?”
43. The proceedings of the hearing before the Adjudication Committee were part of the record that the 1<sup>st</sup> Respondent had to consider in making the final determination. The 1<sup>st</sup> Respondent also considered the evidence of the sale agreement which the interested party and her husband had presented at every stage of the adjudication process and the existing boundaries of which both parties had expressed knowledge.
44. From the foregoing, it is clear that the 1<sup>st</sup> Respondent was referring to the qualifications of the members of the committee as provided by the law as opposed to reference to persons appearing before the committee or the Minister or other levels of the Adjudication dispute resolution process.

### **Was the Applicant heard?**

45. The Applicant challenges the decision of the 1<sup>st</sup> Respondent complaining that he was not heard and that he ought to have been accorded adequate opportunity to present his case and challenge the evidence presented rather than relying on a questionable and disputed sale agreement which was the basis upon which the interested party claims ownership of the land.
46. The proceedings before the 1<sup>st</sup> Respondent show that the ex-parte Applicant was given an opportunity to be heard. The 1<sup>st</sup> Respondent set out the grounds of appeal before taking the evidence of the ex-parte applicant. He was cross-examined by the Respondent in the appeal and the assessors and he called a witness. The ex-parte Applicant was also given an opportunity to cross-examine the interested party. The said proceedings do not show any unfairness in the treatment of the ex-parte Applicant by the 1<sup>st</sup> Respondent.
47. The question of the sale agreement was considered in the judgement of the 1<sup>st</sup> Respondent who was satisfied it was valid noting that the agreement was accompanied by a detailed map of the disputed land. The court finds that there is no evidence that the conclusion the 1<sup>st</sup> Respondent made on the validity of the sale agreement violated the law.



- 48. The decision of the 1<sup>st</sup> Respondent also shows that there was a site visit conducted and that it revealed information that though the ex parte Applicant had stated in the grounds of appeal that there was a grave in parcel number 130 it was revealed that the grave was on a different parcel of land. Further, the 1<sup>st</sup> Respondent deposed that during the site visit, the Appellant showed boundaries of the suit property which were different from the ones the Respondent showed and that the Respondent showed clear boundaries which are the same as the ones on the land record.
- 49. The court is satisfied that the Applicant was not denied an opportunity to be heard as claimed
- 50. The Court finds that the decision of the Minister was not tainted with illegality, irrationality or procedural impropriety as defined in the Ugandan case of Pastoli vs Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304 where it was held 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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or acts 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision.”

- 51. For the above reasons, the court finds that the Amended Notice of Motion dated 8<sup>th</sup> September 2022 and amended on 17<sup>th</sup> November 2022 lacks merit and the same is hereby dismissed with costs.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 30TH DAY OF JANUARY 2024.**

**HON. L. G. KIMANI**

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**ENVIRONMENT AND LAND COURT JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**Judgement read in open court and virtually in the presence of-**

Musyoki: Court Assistant

M/S Mbilu holding brief for Kalili for interested party

Andrew Makundi for Ex parte Applicant – Absent

N/A for Respondent

