



Kariuki v Land Control Board of Kakuzi/Ithanga (Environment and Land Judicial Review Case E002 of 2023) [2024] KEELC 244 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 244 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023
LN GACHERU, J
JANUARY 25, 2024
N THE MATTER OF THE ARTICLE OF THE CONSTITUTION OF KENYA,
2010
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS, 2015
AND
IN THE MATTER OF ORDER 53, OF THE CIVIL PROCEDURE RULES,
SECTIONS 3, 3A AND 63(E) OF THE CIVIL PROCEDURE ACT, SECTIONS
8 AND 9, OF THE LAND REFORM ACT, SECTION 9(1) OF THE
LAND CONTROL ACT, AND ALL ENABLING PROVISIONS OF LAW
IN THE MATTER OF LAND REFERENCE NO. KAKUZI/GITUAMBA/BLOCK
11/177, IN THE MATTER OF THE LAND CONTROL BOARD OF ITHAGA KAKUZI
BETWEEN
FRANCIS KIMANI KARIUKI APPLICANT
AND
THE LAND CONTROL BOARD OF KAKUZI/ITHANGA RESPONDENT

JUDGMENT

1. The Applicant herein Francis Kimani Kariuki, filed this suit for Judicial Review orders, against the Respondent vide a Notice of Motion Application, dated 24th April, 2023. Leave to file this suit was granted by this Court to apply for:
 - a. An Order of Certiorari to remove to this Honourable Court, the decision by the Land Control Board, KAKUZI/ITHANGA, to refuse to grant consent to the Applicant and have the same quashed.



- b. An Order of Mandamus directed to the Respondent compelling them to grant to the Applicant consent to partition all that parcel of land known as KAKUZI/GITUAMBA/BLOCK 11/177.
2. In his Application, the Applicant herein averred that he had made an application for partition of the suit land Kakuzi/ Gituamba/ Block 11/ 177, to the Respondent and the Board was scheduled on 10th March 2023. He also averred that the Respondent on this day refused to grant consent without any justifiable reason. He further stated that the Respondent informed the Applicant to go for a reconsideration on 14th March 2023, when the Respondent verbally declined to grant consent and no reason was given. The Applicant also averred that he has visited the Respondent's offices numerous times but he was not given any reason for refusal of the grant of the consent. Further, the Applicant averred that the Respondent's refusal to give reasons in writing was irregular and therefore was wrongful exercise of their discretion.
 3. The Attorney General on behalf of the Respondent herein filed a Notice of Appointment of Advocate through Oscar Eredi, Chief State Counsel dated 9th May 2023.
 4. Further, the Respondent responded to the Judicial Review by way of a Replying Affidavit dated 27th June 2023, sworn by Angela Makau, the Deputy County Commissioner of Ithaga/ Kakuzi Sub-County. In her Replying Affidavit, the Respondent avers that the Applicant only lodged a copy of the Ruling delivered by Hon. Justice A. O. Mchelule, in Nairobi, High Court Succession Cause No. 1138 of 2007, which was delivered on 26th October 2022, and not an application for Consent. She also averred that upon receipt of the said Ruling, she wrote to the Court seeking for certified copies of the said ruling. It was her allegations that she has not received a response from the Court to date. Further, that she was not aware of any application by the Applicant herein. She stated that she has been informed by her Advocate on record that Judicial Review is concerned with decision making process and since there was no application made by the Applicant, then the application herein has not met the threshold for grant of judicial review orders of certiorari or mandamus. It was her contention that the instant Judicial Review is misconceived, mischievous, an afterthought and an abuse of the court process. She urged the Court to dismiss the said Judicial Review with costs.
 5. Through a Further Affidavit, the Applicant stated that he had applied for the consent vide an application that he had presented to the Respondent, and he could prove it through the receipt showing payment, and that he also attended the Land Control Board on 10th March 2023, and the deponent Angela Makau, was present and she refused to consider his application. That though the Respondent has alleged that she wrote to Court seeking for certified copy of the ruling, the letter dated 14th March 2023, did not have a Court stamp to confirm receipt of the same. It was his contention that the said letter was meant to delay, scuttle and subvert justice and the Applicant stands to suffer prejudice if the application is not allowed.
 6. The Court on 25 September 2023, directed that the suit be canvassed by way of written submissions.
 7. In response thereto, the Applicant filed his written submissions on 22nd May 2023, through the Law Firm of Mumbi Muritu & Co Advocates, and urged the Court to allow his Judicial Review Application. The Respondent did not file any written submissions as directed by the Court even after being given several opportunities to do so.
 8. In his submissions, the Applicant submitted that he is one of the registered owners of the suit property. Pursuant to the Court Judgement in Nairobi Succession Cause 1138 of 2007, the Court ordered that the parcel of land be divided equally between the Applicant and Monica Mutono. The Respondent refused to grant the consent without any reason.



9. The Applicant produced a copy of the Judgement by Justice M.W.Muigai, in Succession Cause 1138 of 2007, as his exhibit marked A1. This judgement stated that the Applicant and Monica Mutono, should subdivide the land and each of them was to get 2 acres. The Applicant applied to the Respondent for a consent to subdivide the suit property, but the Respondent declined to grant consent verbally, and no reason was given. The Applicant also averred that the Respondent’s action is irregular, unprocedural and contrary to the provision of Section 16, of the Land Control Act, which states that:

- (1) Every decision of a board shall be given in writing in the prescribed manner and shall be signed by or on behalf of the chairman or other person presiding, and where consent is refused or an appeal is dismissed the reasons for the refusal or dismissal shall be stated in the decision.*
- (2) A copy of the decision shall in every case be delivered or sent by post to the Applicant and, in the case of an appeal, to the board whose decision is appealed against.

10. This was buttressed in the case of David Kiprugut Cheruiyot v Land Control Board of Belgut (2021) eKLR, where the Court stated that-

“20. From the above provision of the law, the same clearly imposes a statutory duty on the Board to give its decisions in writing stating the reasons thereof. The Applicant has deponed that the decision declining to grant the consent was verbal and that no reasons were given. That being the case, it is clear that the refusal to give the consent by the Respondent was clearly un-procedural and contrary to the provisions of Section 16 of the Land Control Act and Article 47 of the Constitution, as the same ought to have been given in written and the reasons thereof.

21. Whereas it is true that the decision whether or not to grant a consent is an exercise of discretion, yet there are circumstances under which the Court would be entitled to intervene and interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze [2008] 2 EA 323.”

11. On the exercise of the Board’s discretion, the Applicant relies on the case of Agricultural Finance Corporation v Land Control Board of Loitokitok & 3 others (2014) eKLR in which Justice G V Odunga states that:

“Whereas it is true that the decision whether or not to grant a consent is an exercise of discretion, public authorities are not entitled to abuse the discretion given to them since public offices are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights donated to him or her by the Constitution, in this case Article 40 thereof, without proper reasons would in my view amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the Constitution executive authority



derives from the people of Kenya and is to be exercised in accordance with the Constitution well-being and benefit.”

12. The Applicant further averred that the Respondent did not give reasons in writing as to why it could not allow the Applicant’s application. He also alleged that the decision by the Respondent not to grant the consent was prejudicial to him and thus this Judicial review application. It was also his contention that he has right as one of the registered owners of the land parcel No. Kakuzi/ Gituamba/ Block 11/177.
13. It was the Applicant further submissions that his Judicial Review has merit and that the Court should use its discretion to allow the said application.
14. As stated above, though the Respondent filed a Replying Affidavit, on 30th June 2023, it failed to file its written submissions. Therefore, the Applicant’s averments in his submissions remains uncontroverted.
15. It is evident that the Applicant had applied for leave to file the substantive Judicial Review. vide the Chamber Summons application dated 24th April 2023. The said Chamber Summons application had been brought under Order 53 Rule 1(3) of the Civil Procedure Rules and the said leave was granted on 25th April 2023, and the Applicant filed this substantive Judicial Review on 2nd June 2023.
16. The purpose of such leave for Judicial Review was stated in the case of Republic vs City Council of Kwale & Another exparte Kondo & 57 others (1998) 1 KLR(E&L), where the Court held as;

“the purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for the judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceeding for judicial review of it were actually pending even though misconceived.....”
17. The Applicant herein has brought this claim for orders under the Judicial Review regime. Judicial Review is the authority of the court to review the constitutionality or validity of legislative Acts and pass upon the constitutionality or validity of executive and administrative acts and disregard or direct such acts as are held to be unconstitutional.
18. The Judicial Review herein is brought under the various Articles of the Constitution and the Fair Administrative Actions Act 2015. Under Article 47 of the Constitution, every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
19. The Applicant has alleged that the Respondent has failed to carry out its mandate as provided by the law, and thus the reasons for the judicial review orders.
20. It is evident that Judicial Review is not an appeal from a decision, but it is a review of the decision making process and the legality of the decision making. See the case of Republic Vs Public Procurement Administrative Review Board & Another Ex parte Intertek Testing Services (EA)(2022) eKLR, and the case of Judicial Service Commission vs Mbalu Mutava & Another (2018) eKLR, where the Court held that “Fair administrative action” is a Constitutional right.



21. With the above background, this court finds the issue for determination is whether the instant Judicial Review Application is merited.
22. The parameters for judicial review were well set out by the Court in the case of *Pastoli vs Kabale District Local Government Council & another* (2008) 2EA 300, where it held;

“in order to succeed in an application for judicial review, the Applicant has to show that the decision or the act complained of is tainted with illegality, irrationality and procedural impropriety.....

and 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 facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standard.

.....procedural impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking decision. The unfairness may be in the 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....”
23. Bearing the above parameters in mind, the Court will look at the complaint made by the Ex parte Applicant herein and the response by the Respondent and the determines whether indeed the Respondent acted unfairly, irrationally and unprocedurally as complained by the Ex parte Applicant.
24. It is trite that Court would be entitled to intervenes and interferes with the discretion if there is evidence of the following instances: -
 1. Where there is an abuse of discretion;
 2. the decision maker exercises discretion for an improper purpose;
 3. Where the decision maker is in breach of duty to act fairly;
 4. Where the decision maker has failed to exercise statutory discretion reasonably;
 5. Where the decision maker acts in a manner to frustrate the purpose of the donating the power;
 6. Where the decision maker fetters the discretion given;
 7. Where the decision maker fails to exercise discretion;
 8. Where the decision maker is irrational and unreasonable (see *Republic vs Minister for Home Affairs & Others Exparte Sitamze* (2008) 2EA. 323.
25. From the available evidence, there is no doubt that a Court of law issued a judgement and directed that land parcel No. Kakuzi/ Gituamba/block 11/177, be subdivided so that the Applicant and one Monica Mutono, would each receive 2 acres. To actualize the above judgement and subdivision of the parcel of land, consent to subdivide is required. The Applicant could only obtain the said consent from the local Land Control Board. For this case, it is Kakuzi/ ithanga Land Control Board headed by the Deputy County Commissioner, who did file a Replying Affidavit and denied that the Applicant ever lodged an application for consent. She alleged that the Applicant only lodged the judgement from the



Succession Court. She further stated that she sent a letter to the Court seeking for certified copy of the judgement. However, she was not categorical on whether she was ready to issue the said consent.

26. Section 16 of the *Land Control Act* provides as follow;
 1. Every decision of a board shall be given in writing in the prescribed manner and shall be signed by or on behalf of the chairman or other person presiding and where consent is refused or an appeal is dismissed, the reasons for the refusal or dismissal shall be stated in the decision.
 2. A copy of the decision shall in every case be delivered or sent by post to the Applicant and in the case of appeal, to the board whose decision is appealed against”
27. From the above provision of law, it is clear that the same imposes a statutory duty on the Board to give its decisions in writing stating the reasons thereof. In this case, the Applicant averred in his supporting Affidavit that he presented the Application for Consent of Land Control Board, before the Respondent, who categorically refused to grant the said consent and did not give reasons in writing. The said contention has been denied by the Respondent. However, the Respondent failed to file its written submissions and controvert the Applicant’s submissions which is the evidence of the Applicant, as the Court had directed that the Judicial Review be canvassed by way of written submissions.
28. The Respondent admitted that when it received the judgement of the Court, the deponent sent a letter to Court seeking for its authenticity. However, she never told the Court what she has done as a follow up. The Applicant alleged that he has appeared in the Respondent office many times seeking for consent to partition, but the said consent was denied.
29. The provisions of the Land Control Board, are clear that once a decision of the Land Control Board, is made. it shall be made in writing and where the application is denied, reasons for such refusal must be in writing too. Further **Article 47**, of *the Constitution* also oblige the Respondent to give its decision in writing with reasons for such decision. The written decision will inform the Applicant on the next course of action. Failure to give the Applicant written reasons for the denial goes against the statutory duty of the Respondent and is thus unprocedural.
30. Though the Respondent averred that she was not aware of any application for consent in respect of the suit property Kakuzi/Gituamba/Block11/177, at least she was aware of the judgment of the succession court, but she was not categorical on what she had done about it.
31. There is no doubt that the decision whether to grant or not to grant consent is an exercise of discretion, but the public authorities are entitled to give reasons for their decisions and also not to abuse their discretion since public offices are held in trust for the people and they must carry their duty for the benefit of the people of Kenya.
32. To deny a citizen such right goes against the tenents of *the Constitution* and also denied the Applicant herein right to property as provided by **Article 40** of the said Constitution. There were no proper reasons given for such denial, and this was therefore wrong exercise of discretion. The Court finds and holds that there is abuse of discretion, and thus the court is entitled to intervene.
33. The Respondent herein is bound to consider the Exparte Applicant’s application for consent for partition and give reasons in writing, and failure to do so would amount to abuse of discretion. As was held in the case of Republic Vs Kenya National Examination Council exparte Gathenji & others Civil Appeal No, 266 Of 1996, this court cannot issue a mandamus order, to command the Respondent to carry out the duty in question as the Respondent has discretion on the mode of performing that duty. The court will only compel the Respondent herein to consider the said application and issue a



decision in writing. Therefore, this court proceeds to compel the Respondent herein to consider the Applicant's Application and thereafter issue a decision in writing as provided by **Section 16** of the **Land Control Board**, and **Article 47** of *the Constitution*.

34. The Applicant had also sought for an order of certiorari to quash the decision of the Applicant not to grant the consent. It is evident the order of certiorari is issued to quash a decision which decision does not meet the constitutional tenets or violates the rule of natural justice. This Court has found that there is no decision made in writing denying the Applicant the sought consent. Therefore, there is no decision to quash. (See the case of Agricultural Finance Corporation vs Land Control Board of Loitoktok & 3 Others) supra)
35. Having found and held that this Court can only compel the Respondent to consider the Applicant's application for consent and then give its decision in writing giving reasons for such decision, this court directs as follows; -
 1. An order of mandamus is hereby issued compelling the Respondent herein to consider the Applicant's application for consent to partition land parcel no Kakuzi/ Gituamba/ Block 11/177, in line with the judgement of the succession court in Succession Cause No 1138 of 2007, and then give the Applicant reasons if the decision is adverse to the interests of the Applicant. This consideration to be done within a period of 30 days from the date hereof.
 2. In default of such reasons, the Respondent shall be deemed to have no reasons and thus abused discretion and a mandamus shall issue to compel the Respondent to issue the said consent.
 3. The Applicant herein is entitled to costs of this Judicial Review Application.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF JANUARY, 2024

L. GACHERU.

JUDGE.

Delivered online in the presence of;

M/s Muritu for the Exparte Applicant

Respondent – N/A

Joel Njonjo - Court Assistant.

L. GACHERU.

JUDGE

25/1/2024

