



**Mutua & another v County Commissioner Machakos; Ngunanga
(Interested Party) (Environment and Land Judicial Review Case
E011 of 2022) [2024] KEELC 153 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E011 OF 2022
A NYUKURI, J
JANUARY 25, 2024**

BETWEEN

FRANCIS MULWA MUTUA 1ST APPLICANT

BONIFACE KIMANTHI JOEL 2ND APPLICANT

AND

THE COUNTY COMMISSIONER MACHAKOS RESPONDENT

AND

JOHN MUTHUSI NGUNANGA INTERESTED PARTY

RULING

1. Before court is a chamber summons dated 11th November 2022 filed by the applicants seeking the following orders;
 - a. Spent
 - b. That leave be granted to the applicants to remove to the High Court for quashing the decision of the respondent made on 25th May 2022 in the Minister’s Appeal Number 91 of 2007.
 - c. That leave granted herein do operate as an order of stay of execution of the decision of the respondent made on 25th May 2022, until the judicial proceedings herein are heard and determined.
 - d. Costs of this application be provided for.
2. The application is supported by the verifying affidavit sworn by Francis Mulwa Mutua on 17th November 2022 as well as his statutory statement of even date. The applicants’ case is that parcel No. Mitaboni/Mitaboni/2612 is registered in the name of Ngunanga Kitele, Naftal Yusuf Kitele, Teresia



Monthe and Esther Muui, the last two who are now deceased, being the wives of the 1st applicant's grandfather one Zacharia Mulwa Kitele. He stated that he was the administrator of the estate of his father the late Sakayo Mutua Mulwa. He stated that in 2007, the interested party filed before the Land Adjudication Board land case No. 91 of 2007 which was heard and a decision made on 18th July 2008. That being dissatisfied with that decision, the interested party appealed before the Minister in Appeal Number 91 of 2007.

3. The 1st applicant further stated that although his father had passed on, he was summoned to appear in the appeal by being given a three day notice. His view was that the decision of the Minister was unlawful as the interested party ought to have appealed before the Land Adjudication Officer first and not before the Minister. The 1st applicant also faulted the interested party's action of filing the suit before the Minister when there is a pending case before Kangundo Principal Magistrate's Court Succession Case Number 35 of 2016 (in the matter of the estate of Zakayo Mutua Mulwa) where the applicant seeks half of the suit property pursuant to a decree he obtained from Machakos CMCC Miscellaneous Application Number 88 of 2008 seeking to enforce the decision of the board in land case No. 91 of 2007.
4. According to the applicants, the interested party had abandoned the appeal before the Minister and pursued implementation of the decision of the board.
5. The 1st applicant further complained that he was not given sufficient time to prepare for hearing before the Minister and that although his father was the named respondent before the Minister, he was ambushed to answer to the summons issued in the proceedings before the Minister. He maintained that other families whose relatives are registered as owners of the suit property including Naftal Yusuf's family, were not given opportunity to be heard. He stated that the Minister acted without jurisdiction. He attached authority to plead on behalf of the 2nd respondent; a grant of letters of administration; proceedings in case No. 91 of 2007; summons; application in the Kangundo case, ruling by the Minister; grant of representation by 2nd applicant; letter from the applicant's counsel and a copy of the title for parcel number Mitaboni/Mitaboni/3530.
6. When this matter was presented before court under certificate of urgency on 22nd November 2022, this court declined to certify the matter urgent and pointed out that the prayers sought were not clear but scheduled the hearing of the application on 6th December 2022. The applicant served the application and on 20th February 2023, John Muthusi Ngunanga, the interested party filed a replying affidavit sworn on 20th February 2023.
7. It was the interested party's case that the applicant will not be prejudiced if the Minister's decision is upheld. He stated that the 2nd applicant was not a party to the proceedings before the Minister and therefore lacked the necessary capacity to question the Minister's decision. He stated that parcel No. 2612 was registered in the names of their parents; that in 2007, he realized that the 1st applicant's father had curved off from Parcel No. 2612 parcel known as Mitaboni/Mitaboni/3530, while the case before the Minister was pending, without the knowledge of the interested party; that the Land Adjudication Board directed that the two properties be amalgamated and divided into two equal portions.
8. He stated that the 1st applicant was already the administrator of his late father's estate when he was appearing before the Minister and that all parties were given opportunity to be heard; that the applicants never appealed against the decision of the board; that he lives on parcel No. Mitaboni/Mitaboni/3530 as found by the Minister and that the title thereof was issued in 2014 without involving him; that he has never interfered with the deceased's property; and that the application lacks merit.



9. The application was disposed by way of written submissions and on record are submissions filed on 1st November 2023 by the applicant and submissions filed on 22nd November 2023 by the interested party.

Submissions by the applicants

10. Counsel for the applicant submitted that the applicant was seeking leave to remove to the High Court for the purpose of quashing decision of the respondent made on 25th May 2022 in Appeal Case No. 91 of 2007. Counsel also submitted that the leave obtained ought to operate as stay of execution of the respondent's decision. Counsel argued that the applicant had met conditions for grant of leave to seek for an order of certiorari as the decision of the Minister was made less than six months before the application was filed and that the affidavit statutory statements and documents produced by the applicants demonstrate that the applicants were disputing the process of the Minister's decision making and the Minister's jurisdiction.

Submissions by the respondent

11. Counsel for the respondent submitted that the issue for determination was whether the proceedings and determination by the Minister offend the rules of natural justice. It was submitted for the respondent that the applicants have not demonstrated that they were condemned unheard as the notice to the applicant for hearing of the appeal was served on 4th December 2021 for hearing on 8th December 2021 and that proceedings confirm that the 1st applicant was present and given opportunity to be heard, and that therefore their argument that they were not afforded an opportunity to be heard has no basis.
12. On whether the interested party failed to appeal to the adjudication officer, counsel argued that the onus of proving that allegation lay on the applicants which they had failed to discharge. Counsel argued further that the succession cause filed was in regard to a citation and the same did not affect the appeal.
13. Counsel further pointed out that the applicants were present during the site visit and that title for parcel No. Mitaboni/Mitaboni/3530 was unlawfully obtained in 2014 when the appeal before the Minister was pending.

Analysis and determination

14. I have carefully considered the application, the response thereto and the parties' rival submissions. The issue to be determined is whether the applicants are entitled to the orders sought.
15. The applicant sought for an order for "leave to remove to the High Court for quashing, the decision of the respondent made on 25th May 2022 in the Minister's appeal number 91 of 2007". They also sought for orders that the leave so granted do operate as stay of execution of the Minister's decision until judicial proceedings herein are heard and determined. The applicants approached this court under the provisions of Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 53 of the Civil Procedure Rules. As earlier pointed out in this ruling, from the onset, it is not clear the nature of the orders that the applicants seek. This is because Order 53 of the Civil Procedure Rules provides for the court's jurisdiction to grant leave to seek judicial review orders; and the jurisdiction of the court to grant the ultimate judicial review orders, where leave has been granted earlier.
16. In this matter, the applicants sought for "leave to remove to the High Court for quashing the Minister's decision". That in my view is a prayer unknown in law. Parties are bound by their pleadings and it is the nature of those pleadings that will inform the trajectory of the responses from the opposing party. In this case, the response filed by the interested party is that the applicants are not entitled to orders of judicial review. While under Order 53 of the Civil Procedure Rules, leave is supposed to be sought



first to apply for judicial review orders before an applicant can file a substantive motion for judicial review orders; the application herein and the prayers therein do not clearly show whether it is leave that is sought or whether it is a substantive judicial review order that is sought.

17. In the premises as the prayer sought in the application is a prayer unknown in law under the judicial review legal regime, I find no merit in the application and the same is hereby dismissed. As the parties are related, I make no order as to costs.

18. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Kioko for interested party

Ms. King'oo for the applicant

Josephine - Court Assistant

