



Republic v District Commissioner, Narok North; Nkuruma (Suing as an administrator of the Estate of the Late Sironka Ole Nturere) (Exparte Applicant); Kumomali (Interested Party) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 91 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 91 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023**

**CG MBOGO, J
JANUARY 24, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE DISTRICT COMMISSIONER, NAROK NORTH RESPONDENT

AND

JOSEPH NKURUMA (SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE SIRONKA OLE NTURERE) EXPARTE APPLICANT

AND

KOMENTAI OLE KUMOMALI INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted on 3rd November, 2011, the Ex-Parte Applicant filed the notice of motion application dated 16th November, 2011 seeking the following orders: -
 1. That this honourable court be pleased to issue an order of certiorari to remove to this honourable court for purposes of quashing the respondent’s findings, judgment and ruling all combined and delivered on 10th May, 2011 together with all the proceedings conducted by the respondent which resulted in the said findings, judgment and ruling.
 2. That the costs of this application be borne by the interested party.
2. The application is supported by the copies of the verifying affidavit and the Statutory statement of facts by Sironka Ole Turere dated 3rd November, 2011.



3. In the affidavit verifying the facts sworn on 3rd November, 2011 by Sironka Ole Turere, the Ex Parte Applicant deposed that in the year 2009, he lodged an objection with the Land Adjudication Officer, Narok North over plot no. 331 against the interested party.
4. He further deposed that the objection proceedings were undertaken with full participation of all the parties, their witnesses and a verdict was rendered on 17th February, 2009. Further, that the Interested Party who lost the matter, was given 60 days from 17th February, 2009 to appeal against the said decision, and that was the last time that, he heard of the matter.
5. The Ex Parte Applicant deposed that on 1st November, 2011, an unknown person served him with the proceedings of the appeal and that as a party to the proceedings named as respondent, he was not served with a copy of the appeal documents, hearing notices or summons to attend the hearing. As such, he deposed that the respondent did not observe the rules of natural justice in dealing with the appeal and its findings should be found to be a nullity.
6. The application was opposed by the replying affidavit of the interested party sworn on 16th March, 2015. The Interested Party deposed that the decision of the Minister delivered on 10th May, 2011 was a lawful decision made after the Ex-Parte Applicant had been given the chance to be heard. Further, that when he first filed a case against the Ex-Parte Applicant in objection no. KJG/50/91, he did not attend the hearing when a decision was made in his favour. Further, that despite the fact that the Ex-Parte Applicant did not participate in the proceedings before the committee, he was still able to file objection no. 646 indicating, that he was fully aware of the proceedings. It was also deposed that it is apparent that the Ex Parte Applicant developed a habit of participating in proceedings initiated by himself and not those initiated by the Interested Party.
7. The Ex Parte Applicant passed on during the pendency of this suit and he was thus substituted by Joseph Nkuruma.
8. The application was further opposed by the Respondent vide a replying affidavit sworn by Vincent Lomacharr on 7th June, 2023. The Respondent deposed that the Ex-Parte Applicant was first served with summons dated 29th March, 2011 for the hearing of the appeal that was to take place on 12th April, 2011 through the chief, Ntulele location. That on 12th April, 2011, the hearing did not proceed since the Ex Parte Applicant failed to appear and no reason was given to support his absence.
9. He further deposed that summons to appear before the Respondent was then issued for hearing on 19th April, 2011 which again, did not proceed owing to the Ex-Parte Applicant's absence. Further, summons dated 27th April, 2011, was again effected through the office of the Chief for hearing on 4th May, 2011. Further, that on 4th May, 2011, the hearing proceeded as the Ex-Parte Applicant's absence could not hold the parties at ransom and cause delay without reasons.
10. The Interested Party filed a further affidavit sworn on 4th July, 2023. The Interested Party deposed that on 5th April, 2011, he was summoned to the chief's office, Ntulele sub-location and on arrival, he found the Ex Parte Applicant seated. Further, that they were served with the summons dated 29th March, 2011 to appear before the District Commissioner's office on 12th April, 2011. He deposed that on 12th April, 2011, he appeared before the Respondent's office and the Ex Parte Applicant failed to appear.
11. He further deposed that he was issued with fresh summons to appear before the Respondent on 19th April, 2011 for hearing of the appeal. That on the said date, he appeared before the Respondent and he was informed that the hearing could not proceed for the reason that the Ex Parte Applicant did not show up. Again, he was served with summons to appear dated 27th April, 2011 for hearing that was



- slated on 4th May, 2011. The Interested Party deposed that the Ex Parte Applicant refused to appear for the hearing of the appeal despite being served with the summons.
12. The Interested Party further deposed that this is not the only instance where the Ex-Parte Applicant has refused to honour summons to appear for hearing of the objection as he also refused to appear before the council of elders who tried mediate between them. Further, that despite not honouring summons to appear, he was able to file the instant application in a very timely manner which meant that he was fully aware of the proceedings.
 13. The Interested Party deposed that despite plot no. Cis-Mara/Kojonga/331 being under litigation, and despite not obtaining a full grant, the Ex-Parte Applicant has been selling the property and that the mere selling is an indication that the Ex-Parte Applicant has come to court with unclean hands. Also, that it is unconceivable that the Ex-Parte Applicant is selling the property yet at the time of filing the suit, he moved the court for orders on preservation of the subject matter.
 14. The Respondent filed a further affidavit which was sworn by Siameto Kilusu on 4th July, 2023. The Respondent in this affidavit deposed that he is the chief, who received summons to effect service upon the Ex-Parte Applicant and the Interested Party. He deposed that he received summons in his office dated 29th March, 2011 for hearing of the appeal which was to be heard on 12th April, 2011. That he wrote a letter dated 31st March, 2011 summoning both parties to his office on 5th April, 2011. That both the Ex-Parte Applicant and the Interested Party appeared in his office where he effected the said summons.
 15. The chief further deposed that on 12th April, 2011, he received fresh summons to effect service for the hearing slated on 19th April, 2011. Again, he received summons dated 27th April, 2011 for the hearing which was to be heard on 4th May, 2011. According to him, the Ex-Parte applicant was served with summons to appear before the Respondent as directed.
 16. The Respondent's filed a 2nd further replying affidavit (sic) sworn by Vincent Lomacharr on 7th July, 2023. The said affidavit sought to clarify that the summons dated 27th April, 2011 had been erroneously copied to the Chief of Topoti location instead of the Chief, Ntulele location.
 17. The Interested Party filed a further affidavit sworn on 27th November, 2023. In this affidavit, the Interested Party reiterated the averments contained in his further affidavit sworn on 4th July, 2023 and relied on the Respondent's affidavits sworn on 7th June, 2023 and 4th July, 2023 respectively.
 18. The substantive motion was canvassed by way of written submissions. On 23rd November, 2023, the Ex-Parte Applicant filed written submissions dated 18th October, 2023 where he raised six issues for determination as listed below: -
 1. Whether the applicant had a right to be heard before the respondent passed its decision.
 2. Whether the applicant or its representatives were heard before the decision was made.
 3. Whether the decision of the respondent was discriminatory.
 4. Whether the decision was made in contravention of the law.
 5. Whether the respondent had the powers or exceeded the power to make the rules; and



6. What orders, if any, should the court grant.
19. The Ex Parte Applicant submitted that apart from the need for independence and impartiality, the right to a fair hearing under Article 50 (1) of *the Constitution* encompasses several aspects. The aspects include the individual being informed of the case against him and the individual being given an opportunity to present his/her side of the story before a court of law or other impartial body. The Ex-Parte Applicant submitted that the allegations that he was served through the assistant chief does not reveal how service of the same was properly effected, and that these are merely statements of the administrative office.
20. The Ex-Parte Applicant submitted that the Respondent was exercising its statutory power by virtue of the powers conferred by legal notice no. 73 of 25/4/1978 which powers were judicial in nature. Further, that it was obliged to hear all those who were likely to be affected by its decision including the Applicant or its representative. Further, that the Respondent did not follow the rules of natural justice, he was not given a fair hearing and an opportunity to present his case. It was also submitted that the Respondent did not factor the objection proceedings that initiated the conception of the appeal.
21. The Ex-Parte Applicant further submitted that if at all, the Respondent was unable to find him, why then were his representative or witnesses not consulted for the Respondent to consider whether or not the decision was discriminatory. Reliance was placed in the cases of Republic versus National Land Commission & Another [2016] eKLR, Municipal Council of Mombasa & Umoja Consultants Limited CA 185/01 (2001) KLR 4816 CAK, Commissioner of Land versus Kunste Hotel Limited (1995-1998) EA 1 CAK, Mirugi Kariuki versus Attorney General and Civil Appeal no. 70 of 1991 And Council for Civil Service Unions versus Minister for Civil Service [1985] AC,374.
22. The Interested Party filed his written submissions dated 27th November, 2023 where he raised two issues for determination as follows: -
- i. Whether the respondent exceeded the power to make the orders.
 - ii. Whether the orders sought of judicial review are available.
23. On the first issue, the Interested Party submitted that the decision by the Minister should be faulted only if it is established that there was impropriety in the manner he conducted himself and that this court should not engage in interrogating the facts or the merit of the case. Further, that the Minister's decision was informed by all the hearings and no law was breached. The Interested Party relied on the case of Republic versus Nairobi City County, Bernadetter Gitari, Gucharn Singh Sihra, Maeve Mary Sihra, Davinder Singh Barij and Sorej Kumari Bharij, Misc Civil Application (JR) No. 59 of 2014.
24. On the second issue, the Interested Party submitted that this court should interrogate why in all stages of this objection, the Ex-Parte Applicant never appeared. Further, that he has intermeddled in the property by selling the suit property which indicates disobedience of court orders. Reliance was placed in the cases of Chief Constable of the North Wales Police versus Evans (1982) 1 WLR, Republic versus Director of Immigration Services & 2 Others Exparte Olamilekan Gbenga Fasuyi & 2 Others [2018] eKLR and Zacahriah Wagenza & Another versus Office of the Registrar, Academic Kenyatta University & 2 Others [2013] eKLR.
25. The grant of the orders of Certiorari, Mandamus and Prohibition is discretionary and the court is entitled to consider the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify or decline the orders sought.



26. In Halsbury's Laws of England 4th Edition. Vol. 1(1) para 12 page 270: it reads:-

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis added].

27. Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court or a Court of Equal status of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

28. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] eKLR,

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The



court in judicial review proceedings is mainly concerned with the question of fairness to the applicant...”

29. In this case, the Ex-Parte Applicant argued that he was not served with any hearing notices or summons to attend hearing of the appeal before the Minister concerning parcel no. 331 within Kojong’a Adjudication Section. From the pleadings, it can be seen that the Respondent’s derived its powers to perform its role from Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya which provides inter alia that;

“ 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
- b. Sending a copy of the appeal to the Director of the Land Adjudication.

And the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

2. The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

3. When the appeals have been determined, the Director of Land Adjudication shall-

- a. Alter the duplicate adjudication register to conform with the determinations; and
- b. Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

30. The Interested Party being dissatisfied with the decision of the Land Adjudication officer and the Land Adjudication Committee, filed an appeal before the Respondent. However, the manner of effecting service upon parties in such proceedings has not been provided by law. The Respondent sought to use the administrative office available which was the office of the chief and the assistant chief to do so. The Interested Party as well as the Respondent argued that summons were effected through the office of the chief wherein the Ex-Parte Applicant (deceased) and the Interested Party appeared before it. That despite service, the Ex-Parte Applicant failed to appear before the respondent.

31. From my analysis, I am satisfied that summons were indeed served upon the Ex-Parte Applicant only that he chose not to attend to the said hearing. The Ex-Parte Applicant did not rebut the claims of the Respondent’s raised through the affidavits. This raises the question as to how the Ex-Parte Applicant was able to file the instant appeal if he was not aware of the proceedings before the Respondent.

32. In view of my analysis herein above, I find and hold that the Ex-Parte Applicant has not established any grounds for this court to grant the Judicial Review Orders of Certiorari . The upshot of the foregoing is that the Ex Parte Applicant’s application dated 16th November, 2011 is hereby dismissed with costs to the Interested Party.



Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JANUARY, 2024.

HON. MBOGO C.G.

JUDGE

