



Republic v District Adjudication Officer Ruiru/Rwarera Adjudication Section & 2 others; Karimi (Exparte Applicant); Marete (Interested Party) (Environment and Land Case Judicial Review Application E006 of 2023) [2024] KEELC 236 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E006 OF 2023
CK NZILI, J
JANUARY 24, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

DISTRICT ADJUDICATION OFFICER RUIRI/RWARERA ADJUDICATION SECTION 1ST RESPONDENT

CABINET SECRETARY FOR LANDS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

GLADYS KARIMI EXPARTE APPLICANT

AND

MARGARET NYOROKA MARETE INTERESTED PARTY

JUDGMENT

1. The notice of motion dated 8.8.2023 is brought by the exparte applicant seeking orders of certiorari to call for and quash the 2nd respondent's decision made on 19.10.2022 in Case No. 255 of 2019 regarding Parcel No. 3047 Ruiru/Rwarera Adjudication Section. The notice of motion is supported by a statutory statement and a verifying affidavit of Gladys Karimi dated 17.4.2023.
2. The exparte applicant averred that the late Zipporah Kinaitore was allocated Parcel No. 303 measuring 24.5 acres by the Minister of land in 1969, which she occupied undisturbed till 2015 when she discovered it had been subdivided into Parcels No's. 302 and 3047. The exparte applicant indicated she objected to the subdivisions by the 1st respondent, but the objection was dismissed. Further, she said



- she received a letter from an advocate stopping her from cultivating on Parcel No. 3047, after which she filed a Minister's Appeal No. 255 of 2019 against the interested party.
3. It was averred that the 2nd respondent failed to consider that the interested party had never utilized the land unfairly, directed the land be subdivided equally, and failed to consider any evidence on how Parcel No. 3047 came about and the legality of the interested party confirmation letter for Parcel No. 3047, despite subdivision having occurred in 2015. The ex parte applicant attached copies of the appeal and Ministers' decision as annexures marked G.K. "1" and "2" to the verifying affidavit.
 4. When the matter came up for directions on 28.9.2023, the respondents and the interested parties were directed to file and serve any responses and written submissions supporting the notice of motion by 28.9.2023. As of 6.11.2023, counsel appearing for the parties and, in particular, the respondents confirmed compliance with the court's directives from the court's record other than written submissions dated 27.10.2023; there is no evidence of such response. Therefore, the factual issues addressed in paragraphs 6 – 11 in the respondents' written submissions were not pleaded as required under Order 53 of the Civil Procedure Rules and Sections 7 of the [Fair Administrative Action Act](#) 2015.
 5. The interested party opposed the notice of motion through a replying affidavit sworn by Margaret Nyoroka Marete on 3.10.2023. It was averred that Parcel No. 3047 was allocated to the late M'Marete M'Ringera on 29.10.1990 by an arbitration board Case No. 19/1986 as per its proceedings and judgment annexed as MNM "1".
 6. The interested party averred that the suit parcel was adjacent to Parcel No. 303, which the then-Minister allocated to her husband in 1969, measuring 24.15 acres. The interested party averred one M'Rimbere, a member of the adjudication committee, was the one who, in 1974, brought Zipporah Kinaitore, a mother to the ex parte applicant and allocated her Parcel No. 303, which was part of her husband's land and took vacant possession.
 7. The interested party continued that her late husband complained to the committee, which dismissed his claim and ordered the whole land previously registered under his name to be recorded for Zipporah Kinaitore. After that, the interested party averred the late husband appealed against the decision to the arbitration board, who ruled the land subdivided into shares of 14.15 acres and 10 acres in favor of him and the ex parte applicant's late mother.
 8. Following this, it was averred that the land registrar, while implementing the decisions, found it was wise that since Parcel No. 303 was already in the name of Zipporah Kinaitore, the late husband be given a new Parcel No. 3047, to cover his 14.15 acres as directed by the board. It was averred that the parties were contented with the decision and lived peacefully alongside each other until their demise.
 9. The interested party averred it was false for the ex parte applicant to allege that Parcel No. 303 was allocated to his mother, measuring 24.5 acres, in 1969 and continued occupying it until 2015, when she discovered the alleged subdivision into two portions. The interested party averred that her late husband had also written to the District Land Adjudication Settlement Officer to confirm the actual position of ownership of parcel No. 3405 and that the 1st respondent, in a letter dated 25.9.1996, which was marked an annexure MNM "2", confirmed the status of the land.
 10. The interested party averred it was only after the demise of Zipporah Kinaitore that the ex parte applicant filed a Minister's appeal in which the Sub-county Commissioner, in his decision, made findings based on the existing documents and record from the lands office but, in an unprecedented manner ordered Parcel No.3047 be shared equally, despite evidence to the contrary that Parcel No. 3047 belonged to her late husband.



11. As to occupation, the interested party confirmed that her husband has been on the land since 1990, and she only ceased cultivating it following threats from the ex parte-applicant's family. Further, the interested party averred that it was shocking for the 2nd Respondent to base his judgment on contradicting facts. Additionally, the interested party said the proceedings were based on falsehoods since the late Zipporah Kinaitore was never allocated Parcel No. 303 measuring 24.15 acres in 1969 and or continued occupying the whole of the land until 2015, yet the subdivision occurred in 1991, after the arbitration board verdict.
12. Therefore, the interested party affirmed that she opposed the 2nd respondent's decision since it deprived her half of the land recorded in the name of her late husband, which she had occupied since 1969. Additionally, the interested party averred it was selfish for the ex parte applicant to dispute a decision favoring her even though she had no documents to prove her interests in the disputed land. The interested party urged the court to quash the decision, for it was not determined as per the law.
13. The ex parte applicant filed written submissions dated 27.10.2023 and isolated one issue for determination: whether the 2nd respondent's decision was as per the law. Replying on Republic vs Cabinet Secretary Ministry of Lands and Physical Planning and 3 others ex parte John Mbiri Njagi (2021) eKLR, the applicant said the 2nd respondent failed to consider that the interested party had not utilized Parcel No.3407 for many years to be entitled to an equal share. The ex parte applicant termed the decision as unreasonable, lacking evidence to sustain its findings, made without reasons ignorant of his evidence, and made in abuse of power. Reliance was placed on Republic vs Attorney General & 7 others ex parte Emmanuel Poghiso (2018) eKLR.
14. The 1st – 3rd respondents relied on written submissions dated 27.10.2023. On whether the ex parte applicant deserves the reliefs sought, it was submitted that since the decision of the 1st Respondent followed the process set under Section 29 of the [Land Adjudication Act](#), and an appeal was preferred to the 2nd Respondent, who rendered its decision after careful consideration of the evidence presented and concluding the divisions was warranted the claim that the decision is unreasonable and not backed by any evidence is far-fetched and lacking legal standing. Reliance was placed on Republic vs. Kenya National Examination Council ex parte Gathenji & others C. A No. 266 of 1996 on the proposition that Judicial Review is not concerned with the decision's merits but the process leading to the decision.
15. The respondents submitted that none of the ex parte applicants rights were violated or irrelevant matters taken into consideration save for the evidence presented by the parties. Further, the respondents submitted that the notice of motion did not meet the requirements of granting the orders sought, for the 2nd respondent had acted within its jurisdiction by observing all rules of procedural fairness and fair hearing, reaching a just decision based on facts established on ownership and occupation on the ground.
16. The respondents submitted the notice of motion seem to question the merits of the decision, which should not be the case with judicial review as held in Municipal Council of Mombasa vs Republic ex parte Umoja Consultants Ltd (2002) eKLR since the process leading to the decision was fair, objective and procedural, based on vested powers to hear and determine the appeal which powers were never abused by the 2nd respondent.
17. On her part, the interested party relied on written submissions dated 27.10.2023. To this end, the interested party isolates two issues for the court's determination. On whether orders of certiorari are merited, the interested party submitted that though she had confirmation letters of ownership of Parcel No. 3047, the Minister ruled that the said parcel be divided equally between her and the ex parte



- applicant without any reason or basis in law. Reliance was placed on Meru ELC JR Application No. E010 of 2021.
18. Additionally, the interested party submitted the history of the suit parcels of land as set out in her replying affidavit, which was evident on how the two parcels of land came about in the years 1969, 1974, and 1990, up to when the arbitration board decision was implemented going by MNM "1" and MNM "2", ruling out any alleged fraud in 2015. The interested party submitted such a chronology of events, which the *ex parte* applicant had not challenged, was inconsistent with the decision by the 2nd respondent of 19.10.2022.
 19. On whether the appeal should be referred back to the minister, the interested party submitted that under Sections 7(1) & (2) of the *Fair Administrative Action Act*, the court has powers to establish if the decision maker failed to follow mandatory and material procedure, was unfair, erred in law decided in bad faith, was irrational, abused discretion was unreasonable or disproportionate, abused power and violated legitimate expectations of the parties.
 20. Further, the interested party submitted under Article 47 of *the Constitution* that citizens have a right to an administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, including the right to be given written reasons for the decisions.
 21. In this instance, the interested party submitted the decision to deny her half share of her parcel of land despite having documents confirming ownership of the said parcel of land, was wrong. Further, it was submitted that the 2nd respondent did not give reasons why he arrived at the said decision, and for that reason, the decision offended Section 7 of the *Fair Administrative Action Act* and Article 47 of *the Constitution*.
 22. The issues for determination are:
 - i. If the *ex parte* applicant is entitled to orders of certiorari
 - ii. What is the order as to costs?
 23. The *ex parte* applicant bases her complaint on the statutory statement of facts and the affidavit verifying facts dated 17.4.2023. She terms the decision of the 2nd respondent made on 19.10.2022 as unreasonable and not backed by any evidence or law. Further, she says the 2nd respondent failed to consider relevant issues, for instance, fraud and corruption, in arriving at the decision. The respondents have not refuted by way of evidence the issues of fact as pleaded by the *ex parte* applicant. On the other hand, the interested party has denied the chronology of events as pleaded by the *ex parte* applicant. She equally faults the decision made by the 2nd respondent, terming it as erroneous and unsupported by the evidence availed by the parties before the decider.
 24. In particular, the interested party avers that following the arbitration board decision, Parcel No.3047, measuring 14.15 acres, was created in favor of her deceased husband on 29th October 1990, while the *ex parte* applicant retained parcel No. 303, measuring 10 acres. She denies any alleged fraud in the creation of the two parcels of land in 2015, as alleged in the statement of facts. Further, the interested party faults the Minister's decision since it went against the documentary evidence per the adjudication board proceedings, the judgment, and a letter from the DLASO showing that she owned Parcel No. 3047. She attached the documents as annexures marked MNM "1" and "2," respectively. Unfortunately, the annexures are ineligible, uncertified, and lack authentication.
 25. The primary law governing the hearing and determination of the Ministers' appeals is Article 47 of *the Constitution*, Section 29 of the *Land Adjudication Act*, and the *Fair Administrative Action Act*. Article 47 of *the Constitution* grants rights to an expeditious, efficient, lawful, reasonable and procedurally fair



- administrative action, including the right to be given written reasons for the decision. Section 29 of the [Land Adjudication Act](#) grants the Minister the powers to hear and determine appeals filed by aggrieved parties out of ascertainment and recording of interests on land falling under [Land Adjudication Act](#).
26. Under Rule 4 of the [Land Adjudication Act](#) Regulations 1970, any person submitting an appeal to the Minister under Section 29 of the Act must attach a tracing from the demarcation map of the boundaries of the holdings in dispute to his appeal. Sub-rule 4 (4) provides that subject to the Minister's leave being first obtained, the appellant or any other party to the appeal may attend before the Minister in person or by duly authorized agent and shall be entitled to call witnesses.
 27. Section 29(5) of the [Land Adjudication Act](#) provides that a party aggrieved by an arbitration board decision must file an appeal within 60 days from the decision date. The annexure marked GK. "1" is blank. The second page lacks the details of the decision appealed against and the parties to the appeal. On page three of the annexure, the date the appellant signed the grounds of the appeal is not indicated.
 28. In paragraph 3 of the interested party's replying affidavit, she agrees that the arbitration board's decision to allocate Parcel No. 3047 to her late husband occurred on 29.10.1990 in Case No. 19 of 1986. So if the decision the *exparte* applicant was appealing against to the Minister was made on 29.10.1990, her appeal was incompetent since it appears it was filed outside the statutory period of 60 days.
 29. None of the parties herein had pleaded when the adjudication register was published, and parties were invited to file objections. The Minister's jurisdiction is correctly invoked if there is a competent appeal under Sections 26 (1), (2) and 29 of the Act. Nothing shows that the appeal was filed within 60 days from the date the arbitration board determined the claim in 1990.
 30. To entertain the appeal outside time and proceed to hear it was unprocedural, illegal, and prejudicial to the interested party and the 2nd *exparte* applicant. See *Republic vs. KNEC exparte Gathenji* (supra), *Pastoli vs Kabale District Government Council and others* (2008) 2 E. A 300, *Municipal Council of Mombasa vs Republic & another* (2002) eKLR, *Zacharia Wagunza & another vs. Office of the Registrar Academic Kenyatta University & others* (2013) eKLR, *Republic vs Cabinet Secretary Ministry of Land and Physical Planning & others exparte John Mbiri Njagi, Joseph Kaguara Mbugi (IP)* (2021) eKLR, *Republic vs. Ministry of Lands & Settlement & 3 others exparte Kahareri Buri Karugu Efureith Irima Mugo (interested party)* (2019) eKLR, *Nicholas Njeru vs Attorney General & others* (2013) eKLR, *Watuku Mutsimi and Another vs Republic & others* (2018) eKLR.
 31. In *Jasper Maluki Kitavi vs Minister for Lands and Settlement and Physical Planning and another* (2017) eKLR, the court cited with approval *Judicial Service Commission vs Mbalu Mutava & another* (2015) eKLR, where the court had relied on *Ridge vs Baldwin* (1964) A.C 40 and *Selvarajan vs Race Relations Board* (1976) 1 ALL ER 12, that investigative bodies were under a duty to act reasonably and accord parties the principles of natural justice.
 32. The *exparte* applicant blames the 2nd respondent for making an unreasonable decision not backed by evidence. She states that the issue of fraud and corruption was not addressed. She says she only discovered the subdivisions in 2015. Unfortunately, the grounds of appeal do not contain such issues. The *exparte* applicant appeared before the 2nd respondent with nothing to prove that she was the recorded owner of Parcel No.3047. She mentioned that her objection had been dismissed.
 33. Before this court, the *exparte* applicant was unable to challenge the documents produced by the interested party showing that the two parcels of land had arisen out of arbitration decision in Case No. 19/1986, which was made on 29.10.1990. The late Zipporah Kinaitore was a party but did not lodge a Minister's appeal immediately. Therefore, it cannot be true that the *exparte* applicant learned of the subdivisions in 2015.



34. As to whether the Minister violated the rights of the ex parte applicant in hearing and determining the appeal, particularly in the manner the two parcels of land were created, the nature of the occupation and utilization of the parcels of land by the interested party, and the production to prove ownership, the respondents have submitted the ex parte applicant's notice of motion is about the merits of the decision, which this court has no jurisdiction to entertain or determine. The respondents rely on the *Municipal Council of Mombasa vs the Republic* (supra).
35. I think the cited authority is no longer good law after Article 47 of *the Constitution* and Section 7 of the *Fair Administrative Action Act* regarding proportionality and legitimate expectation tests. In *Dande & 3 others vs. Inspector General National Police Service & 5 others* Petition 6 (E007) & (E005) and E010 of 2022 (consolidated (2023) KESC 40 (KLR) 16th June 2023 (Judgment), one of the issues was whether the High Court in exercising its judicial review jurisdiction can carry out merit review of an administration decision or action and the nature of judicial review under *the Constitution* of Kenya 2010.
36. The court cited Mark Ryak's *Unlocking Constitutional and Administrative Law* 3rd edition Routledge/Taylor & Francis Gray 204, that judicial review is constitutionally justified as a legal control on the misuse of public law and power, including statutory and common law prerogative powers. The court observed that after 2010, judicial review was a substantive and justiciable right under *the Constitution*, which was no longer a strict administrative law remedy but a fundamental right under Articles 23 (3) and 47 of *the Constitution*. The court cited the two schools of thought that have emerged on the issue per *Communication Commission of Kenya & 5 others vs Royal Media Services Ltd & others* (2014) eKLR, *SG5 (K) Ltd vs. Energy Regulatory Commission and others* (2020) eKLR, *Praxedes Saiji & 7 others vs Director Public Prosecution & 2 others* (2023) KESC 6 (KLR) (Civ) 27th January (2023) Judgment.
37. The court said that where a party approaches a court under the provisions of *the Constitution*, the court can then carry out a merit review of the case. However, if he comes under Order 53 of the Civil Procedure Rules and does not claim any violation of right or even violation of *the Constitution*, the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se. The court differed with the Court of Appeal decision in *Suchan Investment Ltd vs. Ministry of National Heritage & Culture and 3 others* (2016) eKLR, since the appellants in the Dande case (supra) had clothed their grievances as constitutional questions. The court said it could not issue judicial review orders under *the Constitution* if it limited itself to the turbulent review known to common law and codified in Order 53 of the Civil Procedure Rules. The court further said the dual approach to judicial review did not exist, but that approach must be determined based on the pleadings and the procedure adopted by parties at the inception of the proceedings.
38. The ex parte applicant took the judicial review route based on Order 53 of the Civil Procedure Rules and Sections 8 & 9 of the *Law Reform Act*. She did not invoke any breach of her constitutional rights and fundamental freedoms. What is before the court is not a constitutional petition or a suit seeking declaratory orders. The ex parte applicant has pleaded unreasonableness and a decision not based on evidence or law in general terms. Both the ex parte applicant and the interested party urge this court to remand the appeal for rehearing. The court cannot do so unless there is evidence that a competent appeal existed in the first instance and had been brought by a competent party since the late Zipporah Kinaitore passed on before lodging such an appeal.
39. A writ of mandamus was also not sought, commanding the Minister to rehear the appeal in line with the law. The purpose of mandamus is to remedy the defects of justice where a specific legal right exists.



What is couched as an order of mandamus in terms of prayer 2 of the notice of motion can only be issued if a competent appeal existed before the Minister in the first instance. The annexures to the verifying affidavit do not contain any filing date or stamps showing the date on which an appeal was received by the 1st respondent and forwarded to the 2nd respondent. It is not for this court to fill in the gaps for parties.

40. It is expected that parties who come before the court should approach the seat of justice fully armed with all the requisite documents to help the court determine the dispute.
41. In *Penina Wadako Kitiswa vs IEBC & others* (2015) eKLR, the Supreme Court of Kenya held that the court's target in judicial review is always no more than the process that conveys the ultimate decisions. The process starts with the filing of an appeal under Sections 26 (1) (2) and 29 of the *Land Adjudication Act*. The ex parte applicant has to show she had filed an appeal within the set timelines. The court observed that Section 7 (2) of the *Fair Administrative Action Act* requires the reviewing court to remit the matter to the administrators or make orders under Section 11.
42. The ex parte applicant urges the court to find that the decision was not made based on the law and evidence. Whereas courts can interfere by quashing the decision of inferior tribunals, an applicant must manifest that the decision was not made fairly, justly, reasonably, or logically. See *Daniel Nyongesa & others vs Egerton University College C.A No. 90 of 1986*, *Republic vs Wavinya Ndeti & 4 others; Gideon Ndegwa & another Wiper Democratic Party Mount Kenya (interested party) J.R. 3 of 2022* (2022) KEHC (KLR) 18th July (2022) Judgment.
43. On the other hand, the respondents have opted to submit to the legality of the proceedings and the decision. The 2nd respondent did not confirm if its jurisdiction was invoked correctly in the first instance. The proceedings and the decision are neither dated nor signed, nor do they indicate who the decision maker was. See *Keroche Industries Ltd vs Kenya Revenue Authority* (2007) KLR 240. Other than written submissions, the respondents failed to justify the decision or the proceedings. Written submissions cannot amount to evidence or pleadings. See *Daniel Toroitich Moi vs Murithi* (2014) eKLR.
44. The upshot is the appeal before the Minister was incompetent. Consequently, the proceedings and the decision were an illegality. The same is quashed and set aside. There would be no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 24TH DAY OF JANUARY 2024

In presence of

C.A Kananu/Mukami

Miss Onyango for the ex parte applicant

Miss Maina for the respondent

Miss Kaimenyi for Atheru for interested party

HON. CK NZILI

JUDGE

