



**Republic v Deputy County Commissioner Mbeere South Sub County,
Embu County; Elias (Exparte); Nyaga (Interested Party) (Judicial Review
5 of 2021) [2024] KEELC 1014 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1014 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
JUDICIAL REVIEW 5 OF 2021
A KANIARU, J
FEBRUARY 21, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE DEPUTY COUNTY COMMISSIONER MBEERE SOUTH SUB COUNTY,
EMBU COUNTY RESPONDENT**

AND

NJAGI NJERU ELIAS EXPARTE

AND

CHRISTOPHER NJERU NYAGA INTERESTED PARTY

JUDGMENT

1. This judgment is on a judicial review suit initiated via a Notice of Motion dated 30.03.2021 and filed on 31.03.2021. The motion is expressed to be brought under order 53 Rule 3(1) of the Civil Procedure Rules, Article 159(1) of *the Constitution* of Kenya, sections 7(1), 7(2) (a) (ii) (d) and 11 (a) & (b) of the Fair Administrative Act, 2015, and all other enabling provisions of the law. It is the substantive application for Judicial Review pursuant to leave granted on 18.03.2021 to the Exparte Applicant vide a summons in chambers dated 25.01.2021.
2. The Applicant is the Republic; while the Exparte Applicant is Njagi Njeru Elias. The Respondent is – The Deputy County Commissioner Mbeere South Sub County, Embu County while Christopher Njeru Nyaga is the Interested Party. The prayers sought are as follows:
 1. That an order of Certiorari do issue to remove into the High Court and quash the judgement and order made by the Deputy County Commissioner - Mbeere South Sub County, Embu



County in Ministers Appeal Cause No. 202 of 1999 between Rugano Nthiga (deceased) v Nyaga Wari (also deceased) delivered on the 26th November 2020.

2. That an order of Prohibition directed at the Deputy County Commissioner, Mbeere – South Sub County, Embu County do issue prohibiting the Deputy County Commissioner and the Interested Parties from acting on the said judgement and the decision by Land Adjudication Officer (LAO) made on 19th November 2019 in Objection No. 273 of 1981 affecting plot No. 2804 Mbita Adjudication directing land parcel, plot No. 2804 Mbita to be registered in the name of Christopher Njeru be quashed and cancelled and the said plot do revert to its original Plot No. 2519 Mbita Adjudication Section.
3. That costs of this application be provided for in any event.
3. The application is premised on the grounds on its face and the affidavit sworn in support thereof to wit, that the ex parte applicants are the owners and have been in possession and occupation of Plot No. 2804 which is a portion of plot No. 2519 Mbita Adjudication for many years; that land parcel No. 2804 Mbita Adjudication was unlawfully, illegally and unprocedurally created from plot No. 2519 which also belongs to the Ex parte applicant; that the decision and proceedings made by the Land Adjudication Officer on 19.11.1991 in objection No. 273/81 ordering land parcel Plot No. 2804 Mbita Adjudication to be registered in the name of Christopher Njeru Nyaga was wrong, unlawful and unjustified as the creation of plot No. 2804 and its subsequent transfer to Christopher Njeru Nyaga was illegal, fraudulent and unlawful; that the judgment and orders made by the Deputy Commissioner Mbeere South Sub County were made in excess of jurisdiction contrary to the provisions of law by confirming unlawful registration.
4. The Application was responded to by the Respondent through grounds of opposition dated 25.02.2022 where they opposed the said application on the grounds that; the ex-parte applicant merely cited issues of unlawfulness, illegality, fraud, unprocedurality and unjustifiability in an administrative action by the Respondents without demonstrating the exact manner in which the alleged misconduct occurred; that judicial review does not concern itself with the merits of the decision but the process through which the decisions were made; that the orders sought are discretionary and can be denied even when warranted; that the application is misconceived, a non-starter, vexatious, frivolous, scandalous and an abuse of court process.
5. A replying affidavit was also filed on 08.03.2022 sworn by Ezekiel K. Kiania who is said to be the Land Adjudication Officer Mbeere South. In his response he seems to identify irregularities in the procedure of transferring Plot No. 2804 to the interested party. The Ex parte Applicant in response to the said Replying Affidavit, filed a further affidavit on 12.05.2021.
6. The Interested Party also filed a Replying Affidavit 28.07.2021 where he deponed that the said application was unmerited and merely aimed at frustrating him in realizing the fruits of his judgement; that the decision by the Deputy County Commissioner was within his mandate in dealing with the appeal and that his decision was based on evidence on record and thus was proper and within the law; that this court lacks jurisdiction to look into the merit of the decision by the Minister but can only look at the process through which the said decision was arrived at.
7. It was agreed that the Application be disposed of by way of written submissions. The Ex parte applicant filed his submissions on two occasions that is on 03.11.2022 and on 27.02.2023 in response to the Interested Party's submissions. He gave a background of the application and averred that the that Exparte applicant's case is that he is the Chairman of the Ikandi Clan in Mbeere Sub County. That the application herein arose from an appeal to the Minister; Ministers Appeal No. 202 of 1999 between Rugano Nthiga (deceased) on behalf of the Ikandi Clan and Nyaga Wari (deceased). The interested



party is the son of Nyaga Wari. The appeal to the Minister was prompted by findings by the Land Adjudication Officer in Objection case 273 of 1981 between Rugano Nthiga v Nyaga Wari. It is said that the dispute related to plot No. 2804, which was a portion of plot No. 2519 that belonged to Ikandi Clan.

8. That the said plot No. 2804 was unlawfully and illegally created and registered in the name of Nyaga Wari and subsequently illegally, unprocedurally and unlawfully transferred and registered in the name of the Interested party - Christopher Njeru Nyaga - purportedly through an objection No. 639/1981. That the transfer and registration of Plot No. 2804 through objection No. 639 of 1981 was fraudulent in that, the objector and the defendant in the objection was one and the same person - Nyaga Wari. That the said Nyaga Wari could not file the objection against himself through which he subsequently transferred the plot No. 2804 to the interested party. That the nature and /or reasons for the objection were never cited and according to the ex parte applicant this was a fraudulent scheme between father and son to defeat and deprive Ikandi Clan of its rights to the land.
9. He submitted further that the [Land Adjudication Act](#) gives the Deputy County Commissioners power to hear and determine Ministers appeals. That the Act requires the Deputy County Commissioners in doing so to make a just decision which in this case he failed to do. He submitted further that there will be no prejudice suffered by the Respondent or the interested party if the prayers sought are granted and/ or if the matter is remitted back to the Minister for fresh hearing as submitted by the Respondent to ensure there is substantive justice to all the parties. That the Respondent conceded to the procedural malpractices; that there was impropriety and illegality in respect of the transfer of ownership of the suit land to the interested party, which if allowed to remain shall deprive the ex-parte applicant of his constitutional right of ownership of property without giving a fair hearing. Ultimately he urges that the court allows the application or in the alternative remit the matter back to the Minister for a fresh hearing.
10. He cited the cases of *Maalim v Registered Trustees of the Agricultural Society of Kenya and 33 others* (C2021) KECA 338, and *Republic vs Kenya Revenue Authority, Ex Parte Stanley Mombo Amuti* (2018) Eklr, to support his position.
11. The Respondent on the other hand filed his submissions on 08.12.2022 in which he also gave a background to the Application. He identified three issues for determination viz; whether the Deputy County Commissioner acted in excess of jurisdiction by dismissing the appeal to the Minister filed by Rugano Nthiga in 1999; whether the orders sought by the Ex-parte applicant fall within the purview of judicial review; and whether the ex-parte applicant is entitled to the orders sought.
12. On the first issue, he gave the definition of jurisdiction as was defined in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) Eklr. He submitted that the requirement that courts must operate within their designated jurisdiction applies mutatis mutandis to any tribunal or administrative body that sits in a decision making capacity. He further cited the provisions of Section 7(2)(a) (i) and (ii) of the Fair Administrative Actions Act 2015 which provides, interalia, that;
A court or Tribunal under subsection (1) may review an administrative action or decision if-
 - a. The person who made the decision-
 - i. Was not authorized to do so by the empowering provision;
 - ii. Acted in excess of jurisdiction or power conferred under any written law.
13. He also further submitted that as the Deputy County Commissioner, Mbeere South Sub County it was well within his statutory jurisdiction as provided for in Section 29 of the [Land Adjudication](#)



Act to hear and determine the Minister's Appeal 202 of 1990 and to make a decision as he deemed fit. It is his position that this renders the argument by the ex parte applicant that the Deputy County Commissioner acted in excess of his jurisdiction moot.

14. On the second issue, he submitted that the ambit of the courts judicial review powers was defined by the court in the case of High Court Misc Civil Application No. 1025 of 2003 R v Judicial Service Commission Ex -Parte Pareno [2004] Eklr widely known the Pareno case where it was stated;

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision – making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

15. In this case he submitted, that the ex parte applicant seeks for the court to look at the merits of the decision by the Deputy County Commissioner rather than the process by which that decision was made. That the grounds presented by the Applicant require the court to delve into the reasons for the Deputy County Commissioners decision whereas judicial review is restricted to the process by which that decision was made. He submitted further that the pertinent questions here are whether the Exparte Applicant was afforded a fair chance to argue his case and whether the Deputy County Commissioner considered the evidence that the applicant adduced. It was his position that from the annexed proceedings of the matter in the Ministers appeal, it is clear that the Eparte applicant was afforded a chance to be heard, to produce his evidence and to cross examine the Respondents which shows that due process was followed during the appeal to the Deputy County Commissioner.
16. On the third issue, he submitted that the ex parte applicant has not made his case against him as the respondent and as such his prayers are unmerited. That guided by the case of Republic v Public Procurement Administrative Review Board & Another Ex parte Express DDB Kenya Ltd [2018] Eklr judicial review orders are discretionary and can be denied even when warranted.
17. He further submitted that it would be remiss of him not to acknowledge that the process which led to the Appeal was flawed particularly in light of the affidavit dated 8.03.2022 by the current Land Adjudication Officer, Mr Ezekiel K. Kiania. That in the said affidavit, the Land Adjudication Officer identified some irregularities in which the objection filed by Rugano Nthiga against Nyaga Wari in plot No. 2804 was handled; he stated there was an anomaly because the land adjudication officer effected a transfer to Christopher Njeru Nyaga, the Interested party, who was Nyaga Wari's son before hearing and determining the ownership dispute between Nyaga Wari and Rugano Nthiga; and finally that procedurally, the ownership dispute should have been determined first, then the transfer effected.
18. In conclusion the view expressed was that it would be in the best interest of all the parties involved for the court to refer the dispute back to the Minister for a proper determination of ownership of Plot No. 2804 Mbita Adjudication Section. To support this position, the case of Republic v the Cabinet Secretary Ministry of Lands and Physical Planning & 3 others Ex-parte Phares Mugambi: Rauni Nkari (Interested Party) 2020 Eklr was cited.
19. The Interested Party filed his submissions on 08.02.2023. He sought to rely on his Replying Affidavit. He also urged the court to frown at the attempt by the Ex parte Applicant to challenge the decision of the Land Adjudication Officer as he says that those proceedings were extinguished upon a finding being made on the appeal. He submitted further that the application cannot be granted as sought



because the same is challenging the merits of the decision and is also seeking orders which cannot be granted by this court. He cited the cases of *Maalim v Registered Trustees of the Agricultural Society of Kenya & 33 Others (Civil Appeal 129 of 2018) [2021] KECA 338*, *Republic v Tigania East District Land Adjudication and Settlement Officer & Anor Ex Parte Joseph Mathita Ikirima; Nkunja Edward Mwenda (Interested Party) [2021] Eklr*.

20. I have considered the application, the responses made to it, and the rival submissions. I find that the issue for determination is whether the Notice of Motion has merit.
21. The law as spelt out under Order 53 of the Civil Procedure Rules provides for the procedure that parties must adhere to while seeking for judicial review orders of mandamus, prohibition or certiorari. Order 53 Rule 1 specifically provides for parties to first seek leave of the court before filing applications for the said orders as follows;
 - (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
22. The Applicants herein filed an Ex-parte chamber summons application dated 25.01.2021 seeking leave to apply for the following orders;
 - i. An order of certiorari to remove into the high court and quash the proceedings, the judgement and orders made by the Deputy County Commissioner Mbeere – South Sub-county, Embu County on 26th November 2020 in appeal to the Minister Case 202 of 1999 Rugano Nthiga (now deceased) v Nyaga Wari (also deceased)
 - ii. An order of prohibition, prohibiting the Deputy County Commissioner and/or his agents and the Land Registrar from processing, registering and/or issuing any title in respect of Plot no. 2804 Mbita Adjudication section and or transferring the said plot to 3rd parties and an order of mandamus be issued compelling the commissioner of lands through the Minister of Lands and settlement to issue the title deed in respect of plot No. 2804 Mbita Adjudication section to the ex-parte applicant on behalf of Ikandi Clan.
23. The court on 18.03.2021 granted leave to the applicants as sought in their chamber summons application and directed that the judicial review application, being the substantive application, be filed within 21 days. The Applicants filed the substantive application on 31.03.2021. However, it is notable that the Applicants instead of confining themselves to the orders that they were granted leave to seek at the leave stage, went on to introduce fresh prayers in their substantive application specifically in their prayer no. 2 as follows;

“That an order of prohibition directed at the Deputy County Commissioner, Mbeere- South Sub County, Embu County do issue prohibiting the Deputy County Commissioner and interested parties from acting on the said judgement and the decision by Land Adjudication Officer made on 19.11.2019 in objection No. 273 of 1981 affecting plot no. 2804 Mbita Adjudication directing land parcel no. 2804 to be registered in the name of Christopher Njeru Nyaga be quashed and cancelled and the said plot do revert to its original plot No. 2519 Mbita Adjudication section.”



24. It is a requirement under Order 53 of the Civil Procedure Rules that reliefs intended to be sought when seeking leave are the same ones to form the basis of the main reliefs in the substantive application. The Applicants herein were granted leave to apply for orders prohibiting the processing, registration and issuance of title in respect of Plot No. 2804 by the Deputy County Commissioner, his agents and the Land Registrar. They were also granted leave to apply for an order of certiorari to quash the proceedings and judgement of the Deputy County Commissioner made on 26.11.2020 in minister Case No. 202 of 1999. It is clear also that the Exparte applicant was asking for an order of mandamus at the leave stage.
25. The orders sought in prayer no. 2 of the substantive application and in particular, leave to file for orders prohibiting action on the decision and judgment of the Land Adjudication Officer in Objection No. 273 of 1981 made on 19.11.2019; as well as quashing of the same and for the suit land to revert to its original plot no. 2519 with all due respect was not granted. For this reason the application made by the Applicant is irregular. Even the prayer for mandamus is abandoned. In making this decision, I am persuaded by the court in the case of Republic v Secretary, BOM, Kakamega High School & another Ex parte Boaz Vida [2021] eKLR
- “Is the court dwelling on a technicality of procedure? I do not think so. Where a party comes to court and seeks an order, and that order is granted to it on certain terms, that party ought to comply with the terms of the order. Leave was given under certain terms, and the substantive application ought to have been brought in those terms. Failure to adhere to those terms has meant that the order sought is substantially different from that which leave was grant for.”
26. The court also in the case of Kenya National Chamber of Commerce & County Council of Makueni v County Council of Makueni [2003] eKLR also observed;
- “Counsel for the applicants has urged the court to go for the substance and overlook the technicalities. I have considered this fact and I agree with the submission of the respondent’s counsel that there is no safety valve or a saving rule under order 53 CPR whereby a court can ignore irregularities. It is therefore the finding of this court that although the applicants had genuine complaints their action is bound to fail for failure to comply with the provisions of Order 53 Civil Procedure Rules as set out above in this ruling.”
27. Further, in Kenya African National Union Vs Kibaki and 6 others; (2005) 2 KLR 435, the court held, interlia, that by virtue of section 9 of the *Law Reform ACT* (cap 26) a party will only rely upon and seek relief for that which the court has granted leave and will only rely on the grounds specified in the application for leave. A party will only rely on other grounds and / or seek other relief only with leave of court.
28. The prayer sought by the Exparte applicant is different from what was asked for in the application for leave. It is, in Kenyan lingo, a “chini ya maji” alteration. It amounts to an illegal amendment in law. The court can not allow this unwarranted deviation from procedure.
29. The upshot of the foregoing is that the Notice of Motion dated 30.3.2021 is hereby dismissed for failing to comply with the law. I make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF FEBRUARY, 2024.

In the presence of;

Applicant – present



Respondent – present

Mutua for Kiongo for respondent – present

Interested party – present

Exparte applicant – present

Ms Chepkorir for Muia for Exparte Applicant

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

21.2.2024

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