



Republic v Deputy County Commissioner, Mukaa Sub-County; Muema (Interested Party); Kyengo (Exparte Applicant) (Environment and Land Judicial Review Case E005 of 2021) [2024] KEELC 952 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEELC 952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E005 OF 2021
TW MURIGI, J
FEBRUARY 21, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER, MUKAA SUB-COUNTY RESPONDENT

AND

DAVID KIMULI MUEMA INTERESTED PARTY

AND

BERNARD MWONGELA KYENGO EXPARTE APPLICANT

JUDGMENT

1. Before me for determination is the Notice of Motion dated 29th June, 2021 brought under Sections 8 and 9 of the *Law Reform Act* in addition to Order 53 Rule 3(1) of the Civil Procedure Rules in which the Ex-parte Applicant seeks the following orders: -
 - i. That the Court be pleased to issue an order of Certiorari to remove to this Honourable Court for the purpose of being quashed and quash the judgment made by the Deputy County Commissioner for Mukaa Sub- County in Appeal to the Minister Case No. 282 of 1997 on 13/1/2021 and availed to the Applicant on 29/1/2021.
 - ii. That the costs of and incidental to this application be provided for.
2. The application is premised on the grounds appearing on the Statutory statement together with the supporting affidavit of Bernard Mwangela Kyengo sworn on 14th June, 2021.



The Applicant's Case

3. The Applicant averred that he is the son of Simon Kyengo Mbuvi (Deceased) who was the Respondent in Appeal to the Minister Case No. 282 of 1997. That the dispute over the suit property (Plot No. 1556) began in the year 1975 between Kalanga Muema Ngiti and his late father.
4. He further averred that the dispute was first heard by the Land Adjudication Committee which found that Plot No. 1273 which was subdivided into Plot Nos. 1556 and 1634 belonged to Kalanga Muema Ngiti and Simon Kyengo Mbuvi.
5. That the dispute was then heard by the Arbitration Board which in its decision made on 12/6/1985 awarded both parcels of land to Kalanga Muema Ngiti, the father to the Interested Party. That being aggrieved, his late father filed an objection which was determined on 10/8/1992 and the suit property reverted back him. That the Interested Party filed an Appeal to the Minister after Kalanga Muema died.
6. He averred that even before the Appeal was heard, the Interested Party had started bragging that he knew the Respondent very well and that he had already won the case. That despite having written a letter dated 8/12/2019 expressing his reservations against the Respondent hearing the case, the Respondent insisted on hearing and determining the Appeal. He stated that Respondent imposed one George Kangethe Maweu as his witness without his consent despite the fact that he was not a witness in the earlier proceedings.
7. He averred that upon perusing the proceedings and the judgment, he realized that most of the questions that were recorded as having been posed by him were never asked. According to him, the proceedings before the Minister were biased in favour of the Interested Party because members of his family were asked to stay outside while those of the Interested Party were allowed inside during the hearing of the Appeal.
8. He contended that the proceedings and judgment of the Respondent were flawed because the Respondent flouted the principles of natural justice. He urged the Court to quash the decision of the Respondent made in Appeal No. 282 of 1997.

The Interested Party's Case

9. In opposing the application, the Interested Party vide her Replying affidavit dated 27/10/2021 averred that she is the daughter of the late David Kimuli Muema and was fully conversant with the facts of the case. She averred that the allegation that the Interested Party bragged about knowing the Respondent was false and misleading. That when the Ex-parte Applicant made the allegations, the Assistant County Commissioner adjourned the hearing so that the Ex-parte Applicant could make a report to the police. She stated that the Ex Parte Applicant later withdrew the allegation paving way for the hearing of appeal.
10. The Interested Party asserted that the Respondent conducted the proceedings in a fair manner as the parties therein were granted an opportunity to be heard in their respective cases. She denied the allegations that members of the Ex-parte Applicant's family were barred from the hearing. She stated that due to the COVID-19 protocols, not all people could be allowed inside the boardroom but the Ex-parte Applicant and his witnesses were present and they were allowed to testify. She averred that the rules of natural justice were not breached during the hearing of the Appeal.
11. The application was canvassed by way of written submissions.



The Ex Parte Applicant's Submissions

12. The Ex-parte Applicant's submissions were filed on 8/3/2023. On his behalf, Counsel submitted that the only issue for determination is whether the Ex-parte Applicant is entitled to the orders sought. Counsel submitted that the letter expressing the Ex-parte Applicant's reservations against the Respondent in hearing the Appeal marked as Exhibit "BMK5" was not withdrawn yet the Respondent insisted on hearing and determining the appeal.
13. Counsel further submitted that the letter dated 5/3/2020 annexed to the Interested Party's replying affidavit and marked as Exhibit "JMD1" is a forgery since the Ex-parte Applicant never withdrew his letter expressing his reservations against the Respondent.
14. Counsel submitted that the upon perusing the proceedings of the Appeal, the Ex Parte Applicant realized that most of the questions that were recorded as having been posed by him were never asked. Counsel argued that this was a violation of the rules of natural justice. In addition, Counsel argued that in the appeal proceedings, one George Kang'ethe Mweu was imposed on the Ex-parte Applicant as his witness which was a further violation of the rules of natural justice.
15. On the basis of the above violations, Counsel urged the Court to allow the application with costs. To buttress his submissions, Counsel relied on the following authorities: -
 - i. Judicial Service Commission v Mbalu Mutava & another [2015] eKLR.
 - ii. Dry Associates Limited v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd [2012] eKLR.

The Interested Party's Submissions

16. The Interested Party submissions were filed on 6th April, 2023. On his behalf, Counsel submitted that the Ex-parte Applicant did not controvert the Interested Party's replying affidavit. In particular, Counsel insisted that as per paragraph 4 of the replying affidavit, the Ex-parte Applicant withdrew the letter expressing his reservations against the Respondent proceeding with the hearing of the Appeal. Counsel further submitted that the Ex-parte Applicant has not sworn an affidavit stating that the letter withdrawing the allegation marked as "JMD1" is a forgery.
17. Counsel argued that the Notice of Motion dated 29/6/2021 violates Order 53 Rule 4 and Order 51 Rule 4 of the Civil Procedure Rules since it is not supported by the verifying affidavit and the supporting affidavit for leave. Counsel argued that the application is an abuse of the court process and urged the Court to dismiss the same with costs.

The Respondent's Submissions

18. The Respondent's submissions were filed on 31st May, 2023. Learned State Counsel outlined the following issues for the court's determination: -
 - i. Whether this Court has jurisdiction to determine the issues in the Notice of Motion;
 - ii. Whether the Court should grant the reliefs sought.
19. Learned State Counsel submitted that judicial review is not concerned with the merits of the decision but the decision making process. It was further submitted that the Ex-parte Applicant has failed to demonstrate that the Respondent and the Interested Party had personal relations or that the said relations played a role in the decision.



20. Learned State Counsel submitted that the Ex-parte Applicant was granted an opportunity to be heard as demonstrated by the proceedings before the Minister marked as “BMK1”. That all the respective responses in the proceedings were recorded in support of each party’s evidence and the rules applied similarly. Learned State Counsel argued that none of the parties raised any complaint during the proceedings over the manner in which they were conducted or that the Ex-parte Applicant’s complaint was overruled.
21. It was further submitted that the Ex-parte Applicant’s evidence was plain hearsay and that nothing would suggest that the Respondent and the Interested Party had any personal relations. Counsel submitted that the question which ought to be answered is whether the Applicant was accorded an opportunity to present his case.
22. Learned State Counsel submitted that the Ex-parte Applicant withdrew his complaint against the Respondent and that it was not raised during the hearing of the Appeal. That the said George Kangethe Maweu who testified as the Ex-parte Applicant’s case did not file an affidavit in these proceedings to substantiate evidence of impartiality and misconduct on the part of the Respondent.
23. Learned State Counsel argued that the Ex-parte Applicant has not sought for orders of mandamus in his application and as a result, Parcel No. 1556 would remain unregistered into the unforeseeable future. Learned State Counsel urged the court to dismiss the application.

Analysis And Determination

24. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Respondent’s decision was made in breach of the principles of natural justice.
25. The duty of a Court in Judicial Review proceedings was set out in the case of *Pastoli Vs Kabale District Local Government Council and Others* (2008) 2 E.A 300 where it was held as follows:-

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety Illegality is when the decision making authority commits an error of law in the process of 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 the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in 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 by which such authority exercises jurisdiction to make a decision.’

26. The parameters of Judicial Review were re-affirmed by the Court of Appeal in the case of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd* C.A Civil Appeal No. 185 of 2001 where it held:-

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision



maker 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. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision.”

27. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of Republic Vs Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eKLR, where it was held that;

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such 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/she has been subjected....”

28. It is not in dispute that the Respondent had the power to hear and determine the Appeal Case No. 282 of 1997 in accordance with Section 29 of the [Land Adjudication Act](#).

29. The Ex-parte Applicant is seeking to quash the Respondent’s decision in Minister Appeal Case No. 282 of 1997 delivered on 13/01/2021 on the grounds that the decision was made in breach of the principles of natural justice.

30. The principles of natural justice provide that no one should be condemned unheard, The right to be heard is a Constitutional right enshrined in Article 47 and 50 of [the Constitution](#) and Section 4 of the [Fair Administrative Action Act](#).

31. Article 47(1) and (2) of [the Constitution](#) provides as follows;

- i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- ii. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action

32. It is clear from the above provisions that the tribunal or authority entrusted with the mandate of making decisions must act in a fair manner. Procedural fairness is a Constitutional requirement in administrative actions.

33. Article 50(1) of [the Constitution](#) provides for fair trial as follows:-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.

34. Section 4(3)(b) of the [Fair Administrative Action Act](#), 2015 imports the rules of natural justice and provides as follows:-

1. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:
 - a. an opportunity to be heard and to make representations in that regard;



35. The Ex Parte Applicant averred that the Respondent's decision was made in violation of the principles of natural justice. The Applicant alleged that the hearing before the Minister was biased in favour of the Interested Party. In addition, he averred that the Respondent insisted on hearing the appeal despite his reservations and imposed upon him George Kangethe as his witness without his consent. According to the Respondent and the Interested Party, the parties in the Appeal proceedings were granted an opportunity to be heard and present their respective cases. At this juncture, the Court is called upon to determine whether the Ex Parte Applicant was granted a fair hearing in the proceedings before the Minister. It is a cardinal rule of natural justice that no one should be condemned unheard.
36. In *Onyango Oloo Vs Attorney General* [1986-1989] EA 456 the Court of Appeal expressed itself as follows;
- “The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....Denial of the right to be heard renders any decision made null and void ab initio.”
37. The Ex parte Applicant gave an elaborate background of the Appeal before the Minister. The Applicant averred that the dispute in respect of the suit property between Kalanga Muema Ngiti and his late father Simon Kyengo Mbuvi began in the year 1975 and was first heard by the Land Adjudication Committee which found that Plot No. 1273 which was subdivided into Plots Nos. 1556 and 1634 belonged to Kalanga Muema and Simon Kyengo Mbuvi. That the dispute was then heard and determined by the Arbitration Board on 12/6/1985 in favour of Kalanga Muema Ngiti.
38. The Ex Parte Applicant appealed against the decision to the Land Adjudication Officer who in his decision reverted back Plot No. 1556 to his late father.
39. According to the evidence presented by the parties herein, it is apparent that the appeal before the Minister emanated from the decision of the Land Adjudication Officer made on 10/08/1992.
40. I have perused the proceedings and findings in Minister's Appeal Case No. 282 of 1997 conducted before the Deputy County Commissioner Mukaa Sub County. In the appeal before the Minister, the Ex parte Applicant was the Respondent while the Interested Party was the Appellant. From the proceedings, the Appellant's witness is listed as Roosevelt Luka Kioko while the Respondent's witness is listed as George Kangethe Maweu. Both parties were recorded as having been sworn and gave evidence. It is evident that they participated in the proceedings by giving evidence, cross examination and calling witnesses.
41. The Applicant gave his testimony and was allowed to cross-examine the Appellant's witness. He fully participated in the proceedings before the Minister. The Deputy County Commissioner who was hearing the appeal took the evidence of the parties and the witnesses who were present during the hearing date. In the decision, the Minister allowed the appeal and ordered that Plot No. 1556 be registered in the name of David Kimuli Muema.



42. The Applicant averred that the Respondent insisted on hearing the Appeal despite having raised his reservations against him vide his letter dated 8/10/2019. The Ex Parte Applicant produced the letter dated 8/10/2019 as Exhibit “BMK5” which states as follows in part:-

“We have no confidence with this court due to the following reasons:-

- i. The Plaintiff David Kimuli has been going to this office several times from 18th April 2018 up to the present date thus causing doubts amongst us.
- ii. Also the Plaintiff David Kimuli has been telling the community around that he has already won the case.
- iii. The hearing of the case has been postponed several times from April 2019 up to the present time of which we are afraid that something is going on secretly.”

43. The letter was signed by six witness including George Kangethe Maweu. The Ex Parte Applicant submitted that he never withdrew the said letter. On the other hand, the Interested Party averred that the Respondent adjourned the proceedings to enable the Ex Parte Applicant to make a report at the police station. She stated that the Applicant later on withdrew the letter paving way for the hearing of the appeal. In this regard, the Interested Party produced the letter dated 5th March, 2020 as Exhibit “JMD1”. The letter is addressed to the Deputy County Commissioner Mukaa Sub County and states as follows:-

“We do hereby withdraw the letter dated 8th October 2019 to which we said that we have no confidence with this court. Let the case continue to be head by this court.”

44. The letter was signed by eight witnesses including the Ex Parte Applicant and Kangethe Maweu. As submitted by State Counsel and and the Interested Party, the Ex-parte Applicant did not controvert the letter dated 5/3/2020(Exhibit “JMD1) annexed in the Interested Party’s replying affidavit. It is crystal clear that the Ex-parte Applicant withdrew his complaints against the Respondent. The said complaint was not subsequently raised during the hearing of the appeal. No evidence was adduced to show that the letter withdrawing the complaint was a forgery.

45. This Court finds absolutely no evidence of bias or unfair treatment. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the Respondent was biased or unfair towards the Applicant.

46. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicant has not demonstrated that such was case in the instant application.

47. In the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR, the Court of Appeal held as follows: -

“The need to take into account relevant considerations and ignore irrelevant facts in the decision making has close nexus with the need to act reasonably. This much was appreciated by Lord Greene MR in Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223 thus, “For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are



irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.

48. Similarly, in Republic Vs Secretary of the Firearms Licensing Board & 2 Others Ex parte Senator Johnstone Muthama [2018] eKLR it was held, inter alia, that:

“The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of the purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in Republic Vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.”

49. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is in reality aggrieved by the merits of the decision of the Respondent. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a judicial review application. He was aggrieved because the Respondent overturned the earlier decision which was in his favour.

50. In my opinion, a judicial review remedy would not be available in these circumstances. The upshot of the foregoing is that the Court does not find merit in the Application for judicial review.

51. Accordingly, the Notice of Motion dated 29th June 2021 is hereby dismissed with costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF FEBRUARY, 2024.

In the presence of:

Kamolo Interested Party

Ms Makau holding brief for Mutia for the Ex Parte Applicant.

