



**Ntoburi (Suing as Legal Representative of Ntoburi Ithibutu & another
v Lands Adjudication and Settlement Officer, Igembe & 7 others (Civil
Appeal 116 of 2018) [2025] KECA 180 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 180 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 116 OF 2018
W KARANJA, J MOHAMMED & LK KIMARU, JJA
FEBRUARY 7, 2025**

BETWEEN

**JAPHET MICUBU NTOBURI (SUING AS LEGAL REPRESENTATIVE OF
NTOBURI ITHIBUTU 1ST APPELLANT
KOBIA KUBAI (SUING AS LEGAL REPRESENTATIVE OF ITHIBUTU
THANAIBA 2ND APPELLANT**

AND

**THE LANDS ADJUDICATION AND SETTLEMENT OFFICER,
IGEMBE 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
BAIMUKU 3RD RESPONDENT
REGISTRAR, MAUA 4TH RESPONDENT
REGINA KANANU 5TH RESPONDENT
MUROKI IMUNGIRI 6TH RESPONDENT
ANDREW LAIBUNI GICHUNGE 7TH RESPONDENT
MUREMERA 8TH RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court of
Kenya at Meru (L. Mbugua, J.) dated 16th May, 2018 in ELC J.R. No. 23 of 2016)*



JUDGMENT

Background

1. The appeal relates to a claim by Japhet Micubu Ntoburi (suing as legal representative of Ntoburi Ithibutu) and Henry Kobia Kubai (suing as legal representative of Ithibutu Thanaiba) (the 1st and 2nd appellants) that the adjudication process, the registration and issuance of titles in respect of parcel of land numbers LR.NO. Ithima/Antuambui/2406, 2424 and 5157 was done in a manner that left parcel No. LR. NO. Ithima/Antuambui/5157 landlocked without an access road and that the acreage indicated on the title deeds for the above 3 parcels of land differs from the acreage on the adjudication register thus causing parcel number 5157 to be land locked without an access road. The appellants maintain that their parcels of land were subsumed in the 4th to 6th respondent's parcels. The 4th to 6th respondents were sued as interested parties in the Environment and Land Court (ELC).

The Lands Adjudication and Settlement Officer, Igembe, Land Registrar, Maua, The Attorney General, Kubai Baimuku, Regina Kananu, Muroki Imungiri, Andrew Laibuni Gichunge and Inyingi Muremera are the 1st to 8th respondents.

2. By chamber summons dated 9th August, 2016 the appellants sought leave to apply for orders of Judicial Review in the form of mandamus to compel the respondents to correct the acreage of L.R No. Lthima/Antuambui/2406, 2424 and 5157 to read as per the adjudication record and to excise an access road to L. R. No. Ithima/ Antuambui/5157.
3. It was the appellants' contention that L.R No. Ithima/Antuambui/2406, 2424 and 5157 registered in the deceased's names were issued with title deeds that reflect different acreage from the acreage given during the adjudication process. The appellants further contended that the adjudication records of the said parcels of land show the discrepancies between the adjudication records and the title deed. L.R No. Ithima/Antuambui/5157 has no road of access and it is landlocked hence the application for leave to apply for an order of mandamus to compel the respondents to rectify the suit lands' titles. The leave to apply was granted paving way for hearing of the substantive issues.
4. The 6th respondent opposed the appellants' application through an affidavit sworn on 19th September, 2016 maintaining that his land parcel number Ithima/Antuambui/2455 was formerly registered and its title deed issued in 1992. That throughout, a period of 24 years, he was in occupation of the said land the appellants have never raised any issue. That he has stayed on the land with his family since 1970. Prior to transmission of the adjudication register to the relevant Government department for the issuance of title deeds under the *Land Consolidation Act* there was 60 days given under Section 26 (1) of the said Act for any party with an objection to raise which appellants failed to take advantage of.
5. The 6th respondent further averred that the appellants' parcel was one big parcel of land belonging to their late grandfather one M'ithibutu Thanaibe, which was sub-divided, and they obtained their respective shares. That and it is then that they were supposed to provide access road to their parcel no. Ithima/Antuambui/5157. The 6th respondent further averred that the 4th respondent was deceased and no substitution had been sought.
6. The 3rd respondent also opposed the appellants' application through an affidavit sworn on 19th September 2016. His averments are similar to those of the 6th respondent save that his parcel is number Ithima/Antuambui/810 registered in the year 1992 and the title deed issued. Similarly, the



5th respondent through his affidavit sworn on 19th September 2016 reiterates the averment of the 6th respondent save that his parcel of land is Ithima/Antuambui/5165.

7. After considering the pleadings and the submissions filed by the parties, the ELC (L. Mbugua, J.) delivered its judgment dated 16th May, 2018 stating that from the material availed by the appellants, it was not possible to make a finding that their acreages were reduced when it came to the issuance of titles. Further that the appellants' facts were disputed and it was not clear as to what point the alleged reduction of acreages was made. The ELC held that evidence ought to be adduced in a trial to shed light on the issue of the land locked land. That the sketch map annexed showing the suit land as landlocked cannot be ascertained in the event that it was the one used for registration of the titles. As such the ELC found that the suit filed was not the proper forum for determination of the issues. Consequently, the appellants' judicial review motion was dismissed.
8. The appellants are now aggrieved by the decision of the ELC and filed the instant appeal seeking the orders in the judicial review application to allowed citing the following grounds:-
 - i. The Judge erred in failing to grant orders of Mandamus to compel the respondent to create a road of access to the L.R NO. Ithima/antuambui/5157 when there was clear evidence that the said land is landlocked and only the 3rd respondent had mandate in law to do so;
 - ii. The Judge erred in failing to grant orders of Mandamus to compel the respondents to correct the errors in acreages of LR No. Ithima/ Antuambui/2406; 2424 and 5157 when it was clear in the evidence that the record in the land registrar's office, a function only the 3rd respondent can perform in law;
 - iii. The Judge erred in failing to appreciate that orders of judicial review are in respect to the process of the tribunal or judicial body and not on merit on finding of the said tribunal.

Submissions by Counsel

9. Counsel for the appellants, Messrs L. Kimathi Kiara & Co. Advocates filed their written submissions to the appeal. It was their submission that the 1st to 3rd respondents are mandated by law to register land in accordance with the records of adjudication register where wrong records are indicated as in the case herein. Counsel asserted that the law requires them to correct the error and issue the correct acreage. Any errors committed by adjudication officers can only be rectified through judicial review proceedings. Counsel submitted that the appellants' land was wrongly calculated and the appellants' land was left landlocked. Counsel asserted that land is the appellants' basic right that he cannot enjoy in the circumstances. Counsel asserted that the appellants were challenging the process of adjudication. Counsel further asserted that the 1st to 3rd respondents failed to follow the due process of the law when they allocated less land than what was gathered and failed to make an access road to the appellants' land. Counsel asserted that the ELC erred in failing to grant the orders sought.
10. On the other hand, the 4th to 8th respondents through their joint written submissions filed by Messrs. Mutembei & Kimathi & Co. Advocates submitted that the instant appeal is unmeritorious and frivolous, as the appellants did not exhaust the mechanisms provided by law, before they could move to court. Counsel relied on the provisions of Section 24 and 26 of Cap 284, on the adjudication register and filing of objections on the adjudication register. That the appellants herein did not object to the publication of the register and as such it was improper for the appellants to seek orders of mandamus yet they never acted at all.



11. Section 26 of the *Land Adjudication Act* provides as follows:
- i. “Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.”
 - ii. “The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection”.

26A. No Objection Register

- i. When the time for objection under section 26(1) has expired, the adjudication officer shall prepare a NO Objection Register in respect of any land not subject to an objection, and deliver the same to the Director of Land Adjudication who shall (a) certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and (b) forward the No Objection Register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section 28.
12. Counsel for the 4th to 8th respondents further submitted that it was improper for the appellants to file the Judicial Review application as there was no decision being challenged by the appellants. That there is no evidence adduced that the appellants had sought the intended correction of acreage of the suit properties and there was a refusal of the same.
13. Counsel further submitted that the issues being raised by the appellants in their appeal are matters that require proof as the appellants appeal is based on the fact that their acreage in the titles were reduced contrary to what is in the adjudication register. Counsel asserted that the search certificates of parcels number 2424, 2406 and 5157 indicate the acreage of the parcels as 0.20ha, 0.18ha and 0.22ha, yet the adjudication records do not contain such particulars, a fact that is clearly beyond the scope of Judicial review. That judicial review is concerned with the procedure of making a decision. As per the material availed by the appellants in the ELC, it was not possible for the court to reach a finding that the appellants’ acreage was reduced, as the appellants never availed any records that could be relied on to reach such a finding.
14. Counsel further submitted that the 4th -8th respondents have their separate parcels of land, have lived on their parcels for 24 years peacefully and they do not owe the appellants a right of access to their parcels of land. Counsel further submitted that the appellants failed to demonstrate any claim as against the 4th -8th respondent. As such it is not clear how the 4th -8th respondents stood to be affected by the proposed correction of the register.

Determination

15. This is a 1st appeal hence the Court has jurisdiction to review evidence as against the conclusion reached by the ELC. The suit before the ELC was filed by way of judicial review hence the ELC relied on the pleadings and submissions filed. No oral evidence was tendered.
16. We discern the following issues for determination in this appeal:-



- a. Whether the appellants' case is covered under the provisions of section 26 of CAP 284 in the matter;
 - b. Whether an order of Mandamus ought to issue to compel the 1st to 3rd respondents to create access road to the L.R No. Ithima/antuambui/5157;
 - c. Whether an order of Mandamus ought to issue to compel the respondents to correct the errors in acreages of LR No. Ithima/ Antuambui/2406; 2424 and 5157; and
 - d. Whether judicial review proceedings were proper for determining the appellants' issues before court.
17. The appellants' claim is that there are errors in acreages in respect of LR No. Ithima/antuambui/2406; 2424 and 5157, which need to be rectified. It came out from the pleadings that the acreage was reduced in the titles compared to what was provided in the adjudication register. Going by this narrative, it is clear that the adjudication register has no errors; the alleged errors on acreage are on the title deeds issued. Thus, Section 26 of the *Land Adjudication Act* does not apply in the circumstance. Inspection of the adjudication register would not reveal that the title deed would be issued with errors on acreage. The respondents' arguments that the appellants ought to have raised objection to the adjudication register are not valid.
 18. Notwithstanding the above, the issue whether the acreage on title differs from that in the adjudication register could only be determined on production of a certified copy of the adjudication register and the Map used in the registration process, which was not done. Moreover, the annexed copy of the adjudication register does not give the specific acreage to be relied upon to support the appellants' claim. As rightly observed by the ELC, the entries in respect of Parcel No. Ithima/antuambui/5157 on the adjudication register do not give any acreage of the land while the entries in respect of Parcel No. Ithima/antuambui/2424 gives five different figures whose meanings cannot be discerned. As for parcel 2406, it is shown as 0.95 but nothing indicates that that is the acreage. We find that in the circumstances, the ELC rightly found that the material placed before it by the appellants could not support a finding that the acreages in respect of the subject parcels of land were reduced during the issuance of titles.
 19. As regards the appellants' claim that parcel 5157 is landlocked and requires the 1st to 3rd respondent to rectify their records and create access to the said land, this is not supported by the facts. The appellants rely on sketch map annexed. There is no certified copy of the map that was used for the registration of titles. We find that the ELC did not err when it observed that the sketch map does not state who drew it and it cannot be discerned whether it was the one used for registration of titles. Thus, the sketch map cannot be reliable evidence to enable the court reach a finding that the said parcel is land locked and to compel the respondent to create an access road for it.
 20. As outlined above, the appellants moved the ELC by way of judicial review application. The ELC found that the issues raised by the appellants were disputed. The 4th to 6th respondents dispute that there are errors on acreage for the subject parcels of land as alleged by the appellants. The issue of whether or not the acreage for the appellants' parcels were reduced ought to be a matter for trial. The ELC observed that that evidence needs to be adduced in trial to determine the issue whether the land is landlocked and thus correctly found that the suit is not the proper forum to resolve the impasse. The ELC found that the 4th to 8th respondents have raised a valid argument that the facts raised by the appellants are beyond the scope of judicial review. We agree. Judicial review is about procedure and not the substance of the matter.



21. We are guided by the decision of this Court in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 that:-

“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 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 ... 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.”

22. Accordingly, we find that the ELC did not err in its finding that the Judicial Review was not the proper forum to resolve the dispute between the parties.

23. The upshot is that the appeal has no merit and it is dismissed with costs to the 4th to 8th respondents.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF FEBRUARY, 2025

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

