



**Republic v Attorney General & 2 others; Musesi (Interested Party); Ngii (Exparte Applicant)
(Judicial Review E007 of 2022) [2025] KEELC 851 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
JUDICIAL REVIEW E007 OF 2022**

LG KIMANI, J

FEBRUARY 27, 2025

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION BY JOHN MWINZI NGII
ON APPEAL TO THE MINISTER CASE NO.22 OF 2019 BEFORE OMARI DIMA
THE DEPUTY COUNTY COMMISSIONER MWINGI CENTRAL SUB-COUNTY
AND IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI,
PROHIBITION AND MANDAMUS AND IN THE MATTER OF THE LAW REFORM
ACT CAP 26 LAWS OF KENYA AND IN THE MATTER OF ORDER 53 OF THE CIVIL
PROCEDURE RULES. AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTION
ACT NO.4 OF 2015 AND IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

REPUBLIC APPLICANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

**THE DEPUTY COUNTY COMMISSIONER MWINGI CENTRAL SUB-
COUNTY 2ND RESPONDENT**

THE MINISTRY OF LANDS & PHYSICAL PLANNING 3RD RESPONDENT

AND

PETER MUSHOKI MUSESI INTERESTED PARTY

AND

JOHN MWINZI NGII EXPARTE APPLICANT



JUDGMENT

1. The Notice of Motion application dated 28th July 2022 by the ex parte applicant seeks the following orders:
 - a. An order of Certiorari be issued to remove into this Court for the purpose of it being quashed a decision made by and/or award by the 2nd Respondent (Mwingi Sub-County Deputy County Commissioner and Land Registrar, in respect of Land Parcel 345 Thitha Adjudication Section in respect of the decision of appeal to the Minister of No. 322 of 2019 communicated to the applicant and supplied on 26/1/2022 awarding land to the Interested Party.
 - b. An order of mandamus compelling the 2nd Respondent, agents Chief Land Registrar to register Land Parcel No.345 Thitha Adjudication to the ex-parte applicant.
 - c. An order of prohibition be issued prohibiting the 2nd and 3rd Respondents from further implementing/executing the decision of the Appeal to the Minister No.322 of 2019 awarding land parcel 345 Thitha Adjudication Section to the Interested Party.
 - d. That the leave granted do operate as stay of any further interference, transferring, registering, trespassing, using land parcel 345 Thitha Adjudication Section Mwingi East sub-county of Kitui County.
 - e. That costs of this application be awarded to the applicant.
2. The application is supported by the Verifying affidavit of the ex-parte applicant and a Statement of Facts dated 28th July 2022.
3. The ex-parte applicant claims that the suit parcel of land No. 245 Thitha adjudication section within Mwingi East Sub-County of Kitui County was subject to proceedings before the 2nd Respondent in Minister's Appeal No. 322 of 2019. The land was litigated at the committee, arbitration, objection and appeal to the minister and the decision in the appeal to the minister awarded it to the interested party.
4. He further claimed that the second respondent's decision was tainted with illegality and procedural impropriety because it was not dated and the verdict was not released to the parties promptly. The impugned decision was delivered on November 12, 2021, but it was supplied to the applicant on January 26, 2022. He further complained that the 2nd respondent was partial and his decision violated rules of natural justice and principles enshrined in the Fair Administrative Actions Act. The ex-parte applicant stated that the 2nd Respondent failed to grant him a fair hearing.
5. Further, the applicant stated that he was not issued a summons to attend proceedings and was not notified of the hearing and visits to the land. He also complained that he was not allowed to call witnesses.
6. The ex-parte applicant averred that he lives on the suit parcel of land with his family where he has built a house. The 2nd Respondent declined the Applicant's request to visit the locus and establish the correct status of the suit property but was taken to the suit property in the Interested Party's vehicle without giving the ex-parte applicant notification.



1st 3rd Respondent's Grounds of Opposition.

7. State Counsel for the 1st, 2nd and 3rd Respondents filed grounds of opposition dated 12th September 2022 opposing the application terming it as unmerited, misconceived, vexatious, bad in law and an abuse of the process of the court. They stated that the 2nd Respondent is mandated under the law to hear appeals and can delegate powers /mandate to the 2nd Respondent as in this case. They stated that both parties were heard and a determination made and it was upon the Applicant to follow up and obtain a copy of the decision. They further stated that the Applicant was challenging the merits and not the process and should have filed an appeal and not sought judicial review orders.

The Interested Party's Replying Affidavit

8. Peter Musyoka Musei, the Interested party swore a replying affidavit deposing that he purchased the suit land from the ex-parte applicant in 1986 when it was still unsurveyed for a price of Ksh.25,000. The land was assigned number 345 Thitha Adjudication Section and was registered in his name when the adjudication process began in the area in 2018. It later emerged that the ex-parte applicant had sold the land to a third party only known to him as Nzeketha long after he had sold it to him. The said Nzeketha had in turn sold the parcel to yet another person who was laying claim to the land.
9. The ex-parte applicant challenged the registration of the land in the name of the interested party and the dispute was heard all the way to the appeal to the Minister. The ex-parte applicant was unsuccessful in all stages of the process as confirmed by the copies of the adjudication proceedings.
10. The Interested Party contended that the application is an appeal disguised as a judicial review application as the ex-parte applicant was challenging the merits of the Minister's decision.

The Ex-parte Applicant's Submissions

11. Counsel for the ex-parte applicant reiterated the grounds in support of the Notice of Motion herein and the facts thereof. He submitted that at the hearing of the appeal, the grounds of appeal were read to the ex-parte applicant and the grounds of corruption were treated casually.
12. He complained that, no agreement of sale of land was produced to support the claim of sale of the suit land. He submitted that the purchase price was not paid in full and that the Interested Party does not live on the suit land.
13. Further, the applicant found fault with the presiding officer's for bias reliance on and acting ultra vires. Counsel for the applicant submitted that the actions of the 2nd Respondent should be declared null and void and judged inconsistent with constitutional requirements. It was also submitted that the 2nd Respondent entertained new evidence by the Appellant which was contradictory to the evidence tendered during the adjudication beforehand and on this point, cited and relied upon the authority of Chuka JR Misc EOO4 of 2021 in the Matter of John Mbiri Njagi.
14. It is therefore the applicant's submission that the 2nd Respondent acted unprocedurally and illegally, hence his decision cannot stand.

The Interested Party's Submissions

15. Counsel for the Interested Party analysed the prayers sought by the ex-parte applicant and submitted that prayer (b) & (d) are untenable and redundant.



16. Regarding prayer (c), it is submitted that the same seeks an order of mandamus directed to the Chief Land who is not party to these proceedings, and further that it seeks to substitute the impugned decision with an order allowing the applicant's appeal to the Minister which is outside the purview of the Court's mandate in judicial review which is only supervisory. They cited the decision of the Kenya National Examinations Council v. Republic ex parte Geoffrey Gathenji Njoroge and 7 Others (1997)eKLR.
17. The Interested Party's view is that the only prayer for consideration is prayer (a). Counsel quoted Rule 11(3) and (4) of the Adjudication Rules, 1970 stating that assessors are allowed during the hearing of adjudication cases.
18. Their submission is that the majority of the matters raised in the suit go to the merits of the impugned decision, which is outside the purview of judicial review.
19. The Interested Party submitted that the proceedings do not show that the ex-parte applicant requested to call witnesses and the request was denied.
20. Counsel dismissed the claim of denial of proceedings and Judgement stating that they were supplied on time.
21. Regarding the Applicant's claim of bias and considering extraneous matters, Counsel for the Interested Party submitted that the same is unsubstantiated.

Analysis and Determination

22. The Notice of Motion dated 10th December 2020 challenges the decision of the 2nd Respondent in Minister's Appeal No. No. 322 of 2019 relating land parcel No. 245 Thitha Adjudication section which awarded the suit land to the interested party.
23. Having considered the Notice of Motion, Statement of Facts, verifying affidavit, replying affidavit and written submissions by Counsel for the parties, the court is of the view that the following issues arise for determination:

A. Whether the proceedings and decision of the 2nd Respondent were tainted with bias, illegality, or procedural impropriety and whether the 2nd Respondent considered extraneous matters, or violated the principles of natural justice and the provisions of the Fair Administrative Actions Act.

B. Whether the Applicant is entitled to the orders sought.

24. Article 47 Constitution of *the Constitution* of Kenya 2010 deals with fair administrative action and provides that;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
25. The above constitutional provision is also set out in the same terms in Section 4(1) of the Fair Administrative Actions *Act No. 4 of 2015*.
26. The ex-parte applicant complained that the proceedings and decision of the 2nd Respondent were biased, that the hearing did not adhere to the principles of natural justice and that the impugned



decision considered extraneous matters. Fair administrative action includes the right to a fair hearing and Article 50 of *the Constitution* provides for a fair hearing stating that;

“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.”

27. The court has considered the question of whether the 2nd Respondent exhibited bias against the applicant. As proof of bias, the Applicant claimed that he was not allowed to call a witness. He also claimed that part of the hearing was conducted in his absence, including the site visit where the interested party's vehicle was used.
28. The court has looked at the proceedings in Minister's Appeal No. No. 322 of 2019 and see no indication that the applicant applied or showed any intention to call witnesses and was denied the opportunity. Further, the hearing notice dated 2nd February 2021 issued by the 2nd respondent to the two parties, notified them of the hearing date and allowed them to produce the witnesses they intended to rely on. The proceedings do not show that the applicant availed any witnesses.
29. In the Court's assessment of the law, the mandate of the Minister or the Deputy County Commissioner while acting under Section 29 of the *Land Adjudication Act* is to consider the grounds of appeal filed, previous evidence tendered and thereafter make a determination as he deems just and fair. The said section sets out the procedure for filing an appeal and the process of hearing the appeal. Section 29(1) of the *Land Adjudication Act* reads as follows:

“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; and
 - b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”
30. The procedure for conducting an appeal to the Minister is also provided under the Land Adjudication Regulations, 1970 at Regulation 4. The same is clear that before one can appear before the Minister and call witnesses leave of the Minister must be obtained. The regulation states as follows:

“Subject to the leave of the Minister being first obtained the appellant or any other part to an appeal may attend before the Minister either in person or by duly authorised agent, and shall be entitled to call witnesses.”
31. Nothing in the proceedings indicates that the Applicant sought leave to call witnesses.
32. On the complaint about the site visit, the court finds a contradiction in the applicant's claim in that he first stated that the 2nd Respondent declined his request for a site visit. In the 2nd place, the Applicant claimed that there was a site visit when the 2nd Respondent was taken in the interested party's motor vehicle. The applicant did not clarify if he was present during the site visit or the particulars of the interested party's vehicle. The Court notes that the proceedings before the 2nd respondent do not refer to any visit to the land.



33. It has been held in various cases that when dealing with an appeal to the minister, calling witnesses and making site visits are not mandatory requirements as suggested by the Ex parte Applicant. This was held in

Matwanga Kilonzo v District Commissioner, Kitui & another [2021] eKLR that:

“The Minister’s mandate under Section 29 of the Act is to consider the grounds of appeal raised by any person appealing against the decision of the Land Adjudication Officer, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision. Indeed, just like what happens in an appellate court, the Minister need not take fresh evidence while dealing with the appeal, although he may do so to seek clarification on certain issues. However, he must consider the grounds of appeal and the evidence that was adduced before the Land Adjudication Officer before making his decision. The said decision must give reasons as to why he agrees or disagrees with the decision of the Land Adjudication Officer..... The 1st Respondent made the above finding after hearing the parties herein, and after considering the decision of the Land Adjudication Officer. Considering that the 1st Respondent heard both parties and considered the proceedings of the Land Adjudication Officer, I am not convinced that the 1st Respondent was biased while arriving at his decision.”

34. For the foregoing reasons the court is not convinced that the 2nd Respondent was biased.
35. The second issue raised was that the proceedings were not conducted fairly in adherence to the rules of procedure and natural justice. The claims that the applicant was not allowed to call witnesses have been addressed above. The Applicant also complained that his accusation of corruption and bribery by the Interested Party was not considered nor taken seriously. The other complaint is that the decision was read in his absence and he only came to know of the same after visiting and requesting the Land Adjudication Office. Further, it was stated that the 2nd Respondent relied on an agreement for sale that was not produced as evidence.
36. Section 12 of the *Fair Administrative Action Act* No.4 of 2015, provides that the general principles of common law and rules of natural justice continue to apply in review of administrative actions. This was emphasised by the Court of Appeal in the case of Suchan Investment vs. The Ministry of National Heritage and Culture (2016) eKLR.
37. On the complaint by the Applicant that there was bribery by the Interested Party to the adjudication officer, the Court notes that the ex-parte applicant was cross-examined by the 2nd Respondent on this matter and stated that he did not know how much was given. In the court’s view, corruption is a serious allegation that must be proven by evidence. The Applicant did not adduce any evidence on the same and it appears to be the reason the 2nd Respondent did not dwell on this allegation. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

38. The Applicant contends that after the decision was made on 9th November 2021, the respondents declined to give him copies until it was given to him on 26th January 2022 after writing letters. However, the documents attached to the applicant’s supporting affidavit include a letter from the 2nd Respondent dated 1st November 2021 informing him of the ruling date on 9th November 2021. The applicant confirms that the decision was read on the same date. The applicant’s advocate wrote a letter dated 15th



- November 2021 requesting for proceedings and the decision. The proceedings and decision of the 2nd Respondent are said to have been supplied on 26th January 2022. In the court's view, the period taken to supply the proceedings and decision was not inordinate.
39. Further, the applicant was not in any way prejudiced by the proceedings and decision being supplied on the said dates since he was able to file an application for leave to institute the current proceedings in the timelines allowed by the law. Leave was granted on 12th April 2022
 40. The Court thus finds no merit in this ground of challenge.
 41. The Applicant complained that the 2nd Respondent considered extraneous matters and approved an agreement for sale that was not before the court. The Interested Party claimed that he bought the suit land from the ex-parte applicant and paid the full purchase price. He stated that in 2001 his house was broken into and many things were stolen, including the sale agreement.
 42. The ex-parte applicant, on his part admitted in his affidavit that he sold the land to the Interested Party but was not paid the entire purchase price. The 2nd Respondent in his findings, concluded that the Appellant willingly sold the land at a price of Ksh.25,000. Relying on the evidence of one Sammy Mutemi who was the interested party's witness during the adjudication proceedings, the 2nd Respondent described the witnesses to the sale agreement and even the fact that the agreement was written in two exercise books. This showed that the 2nd Respondent had studied the proceedings in the other land adjudication tribunals and established as a fact that the sale took place and the purchase price was paid. He was also satisfied that the respondent, before him lost his sale agreement.
 43. The court agrees with the findings of the 2nd Respondent on this issue noting that if the ex parte applicant had wished to rely on the sale agreement to show that he sold the land but the terms of the agreement were not complied with by failure to pay the balance of the purchase price, he would have produced his own copy of the agreement.
 44. Looking at the proceedings before the Adjudication Committee annexed to the Interested Party's replying affidavit, Indeed it is noted that Samuel Mutua Mutemi testified on behalf of the Interested Party herein confirming the sale of the land to the Interested Party.
 45. The court has considered the issue of whether or not the Interested Party paid the entire purchase price and the importance of producing the sale agreement before the 2nd Respondent. The court has approached this issue by reiterating the position of the law that these proceedings are not an appeal from the decision of the 2nd Respondent.
 46. The proceedings before the 2nd Respondent show that he considered the evidence adduced before him and the evidence adduced before the other land adjudication tribunals. He came to the same conclusion as the Arbitration Board and the Land Adjudication and Settlement Officer that the ex-parte applicant sold the suit land to the interested party and there were witnesses to the sale. The 2nd Respondent concluded that Applicant sold the suit land to another party knowing he had sold the land to the Interested Party and failed to refund the money he had received thus putting his integrity into question.
 47. The court is of the view that the finding of the 2nd Respondent was not unreasonable or illegal and was within his jurisdiction. The court further finds that in arriving at his decision, the 2nd Respondent did not take into account irrelevant considerations and neither did he fail to take into account relevant considerations.

Has the ex parte Applicant met the threshold for the grant of orders sought?



48. The applicant has sought an order of certiorari. Certiorari is defined in the Black's Law Dictionary as follows:

“An extraordinary writ issued by an appellate court, at its discretion directing a lower court to deliver a record in the case for review.”

49. The court has found that the decision of the 2nd Respondent was not unreasonable or illegal and was within his jurisdiction. In the circumstances an order cannot issue to quash the said decision. Prayer(b) of the applicant's notice of motion is a prayer for Mandamus, which is defined in the Black's Law Dictionary as follows:

“A writ issued by a court to compel performance of a particular act by a lower court or a government officer or body, usually to correct a prior action or failure to act.”

50. The order seeks to compel the Chief Land Registrar to register Land Parcel No.345 Thitha Adjudication Section in the name of the ex-parte applicant. Such an order would, in the court's view, be akin to the Court taking the position of the 2nd Respondent and determining the case on their behalf. This is beyond the scope of judicial review applications. The Court of Appeal in the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR which was cited by Counsel for the interested party held that:

“What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..... The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence. The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence. The Act provides for appeals to the High Court by persons whose licences the licensing court has refused to renew or whose licences have been cancelled.”

51. Prayer (c) seeks an order of prohibition which is defined by the Black's Law Dictionary as such:

“In practice, the name of a writ issued by a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same.”

52. In the circumstance of the present case, the orders of mandamus and prohibition cannot issue in absence of an order of certiorari to quash the 2nd Respondent's decision.

53. From the foregoing consideration of the case brought by the ex-parte applicant as set out above, the court is not convinced that the ex-parte applicant has met the threshold for the grant of the orders sought.

54. The final orders of the court are that the Notice of Motion dated 28th July 2022 lacks merit and is hereby dismissed with costs to the Respondents and the Interested Party.

JUDGEMENT READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF FEBRUARY 2025.

In the presence of:

Muigai for the Interested Party.



No appearance for Respondents.

No appearance for applicant.

Court assistant: Kendi

HON. LADY JUSTICE L. G. KIMANI

JUDGE

