Limbere v Ministry of Lands and Settlement & 3 others (Civil Appeal 219 of 2019) [2024] KECA 1293 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1293 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 219 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

SEPTEMBER 20, 2024

BETWEEN

JOHN MICHUBU LIMBERE ..... APPELLANT

AND

MINISTRY OF LANDS AND SETTLEMENT ..... 1ST RESPONDENT

HON ATTORNEY GENERAL ..... 2ND RESPONDENT

DISTRICT COMMISSIONER, IGEMBE SOUTH DISTRICT 3RD RESPONDENT

HARRISSON GITONGA MWIRARIA ..... 4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (L.N. Mbugua, J.) dated 21st September 2017)inMisc. ELC No. Application No. 66 OF 2011)

JUDGMENT

1. It is trite that an appeal to this Court from a trial by the Environment and Land Court (ELC) is by way of a retrial. This Court is required to reconsider and evaluate the evidence that was tendered before the ELC and reach its own conclusions thereon, while bearing in mind that it did not have the benefit of seeing and hearing the witnesses. (See Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123).

2. The background of this appeal is that, there was a dispute between the appellant, John Michubu Limbere, and the 4th respondent, Harrison Gitonga Mwiraria, over land parcel No.471 situated at Maua Kiengo (Kanjoo Adjudication Section) (the suit property). The appellant claimed that the suit property belonged to his late father; and that he had been born there and had lived thereon all his life, cultivating his crops on it. On the other hand, the 4th respondent's case was that this was his land which he had bought from one Eudicas Nyaga.

3. The appellant filed Objection No. 310 of 2009 before the Adjudication Officer under the Land Adjudication Act (Cap. 284). His objection was dismissed. He appealed to the Minister. The appeal was heard on behalf of the Minister by the District Commissioner, Igembe South District, the 2nd respondent. It was heard and dismissed; the suit property still being found to belong to the 4th respondent. The appellant was aggrieved and went before the ELC at Meru seeking orders of certiorari to remove to the court the decision of the 2nd respondent on behalf of the Minister and quash the decision which he claimed had been made against the rules of natural justice. His grounds were that, having been summoned to attend the appeal, he appeared severally without the matter being heard. The only time the appeal proceeded was on 16th February 2011. He later learned that the case had been heard on 19th April 2011, 26th April 2011, but on each occasion, he had no notice. Then that the judgment had been delivered on 9th March 2011, again without notice.

4. The judicial review application was opposed by the 4th respondent who stated that the appeal was heard on 8th November 2010 when the appellant and one witness testified, adjourned to 24th November 2010 when the appellant's mother testified, adjourned to 16th February 2011 when the respondent and his witnesses testified and were cross-examined. A judgment was rendered on 9th March 2011 following several adjournments. It was denied that there were proceedings on 19th April 2011, 26th April 2011 or on 28th April 2011.

5. The learned L.N. Mbugua, J. considered the evidence and the rival submissions. She agreed that the narration of the hearing dates as indicated by the 4th respondent was in line with the record kept by the 2nd respondent, and concluded that the appellant had been notified of each hearing date; had attended; had testified; he and his witnesses had been cross-examined; the 4th respondent and his witnesses had testified; and he had cross-examined them. The trial court found that the several adjournments before the judgment had been delivered had not prejudiced the appellant. The appeal was consequently dismissed, as the claim that the appellant's right to natural justice had not been breached.

6. The appellant has now come before us, appealing the decision by the learned Judge. His grounds are as follows:-

> " 1) That the learned judge erred in law and fact in dismissing the applicant's application on the evidence before her.
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> 2. That the learned trial judge erred in law and fact in holding that the rules of natural justice were not violated by the second respondent during the hearing of the objection.
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> 3. That the learned judge erred in law and fact in holding that the applicant was aware of the ruling date.
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> 4. That the learned trial judge erred in law and fact in failing to notice that the 2nd respondent was biased against the applicant from the word go.
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> 5. That the judgment of the learned judge dated 21/9/2017 is against the weight of the evidence and the law."

7. His appeal was canvased through written submissions. Learned counsel Ms. Mbubuya was present for the appellant and relied on the filed submissions. Learned counsel Ms. Lydia Atieno for the 4th respondent equally relied on the submissions filed on behalf of her client. In the submissions by counsel for the appellant,it was contended that the proceedings before the 2nd respondent showed partiality

and compromise. This was because, although several summonses were issued to the appellant, he only attended the hearing of 16th February 2011; that there were no further hearings, and the rest of the appeal proceeded in his absence. Learned counsel invited us to find that the proceedings were flawed, and to overturn the learned Judge's findings. We were referred to the decision in Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002]eKLR on the jurisdiction of a court when dealing with judicial review; that a court in such a case is concerned with the decision making process, not with the merit itself.

8. Learned counsel Ms. Atieno, relying on the record by the 2nd respondent, submitted that the appellant had been present at every occasion the appeal came up for hearing; that he had fully participated in the hearings; and had called witnesses as had the 4th respondent. It was on the basis of these that the appeal had been determined. Therefore, counsel submitted, the appellant had been accorded a fair hearing.

9. We have considered the record, the grounds of appeal and the rival submissions. The question that was before the learned Judge was whether the appellant had been afforded a fair hearing by the 2nd respondent who was hearing the appeal on behalf of the Minister. This is the same question for our determination.

10. We reiterate that the issues of fact and the inferences to be drawn from them should not be disturbed if there is evidence to support them.

11. Fortunately, the 2nd respondent kept a clear record of the proceedings in the appeal. The record was as sworn to by the 4th respondent; that the appellant was at every stage informed that the appeal was coming up for hearing. He was allowed to testify and to present witnesses who gave evidence. He was cross-examined, as were his witnesses. At the close of his case, the 4th respondent testified and called witnesses. He cross-examined them. The hearing happened on several occasions. A judgment was rendered on a date he was notified of, although it had been adjourned severally.

12. Article 50(1) of *the Constitution* makes provision for fair hearing. The right to a fair hearing requires that an individual shall not be penalized by a decision affecting his rights or legitimate expectations unless the individual had been given a prior notice of the case against him, a fair opportunity to answer and the opportunity to present his case. Then, the case should be heard in an impartial and fair manner. If the individual has witnesses, he should be given an opportunity to present them. The right to a fair hearing is a non-derogable right, and the court has no jurisdiction to deliberately ignore the evidence that a party has tendered in support of his case. (See *Githiga & 5 Others v Kiru Tea Factory Company Ltd (Petition No. 13 of 2019)* [2023] KESC 41 (KLR)). The right to fair hearing applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties.

13. The learned Judge was alive to the fact that she was not sitting as a court of appeal over the decision of the 2nd respondent which would have involved going into the merits of the decision itself. The court was concerned with whether or not the 2nd respondent flouted the appellant's right to a fair hearing; whether the rules of natural justice were flouted. (See Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (Supra)). On the evidence, the learned Judge found that the appellant had been treated fairly as his evidence and that of his witnesses had been tendered following an opportunity that the two had been accorded, and that had not suffered any prejudice in the conduct of the appeal up to its determination. Upon our reconsideration and evaluation of the record, and after hearing both counsel in the appeal, we come to the same conclusion.

14. Consequently, we find no merit in his appeal, which we dismiss with costs to the 4th respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

W. KARANJA

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

.....

A.O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the Original.

Signed

DEPUTY REGISTRAR