



**Oyier v Deputy County Commissioner, Suba on behalf of the Minister for Lands & Settlement
& another; Ogutu & another (Interested Parties) (Environment and Land Judicial Review
Miscellaneous Application E003 of 2023) [2024] KEELC 1621 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E003 OF 2023
GMA ONGONDO, J
MARCH 13, 2024
IN THE MATTER OF LAND ADJUDICATION ACT (CAP 284)**

-AND-

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO 19 OF 2011)

-AND-

**IN THE MATTER OF AN APPLICATION FOR
ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

MICHAEL OTIENO OYIER APPLICANT

AND

**THE DEPUTY COUNTY COMMISSIONER, SUBA ON BEHALF OF THE
MINISTER FOR LANDS & SETTLEMENT 1ST RESPONDENT**

**THE DISTRICT LAND ADJUDICATION OFFICER SUBA SUB-
COUNTY 2ND RESPONDENT**

AND

MAURICE MASARA OGUTU INTERESTED PARTY

RAPHAEL OLEWE OGUTU INTERESTED PARTY



JUDGMENT

1. On 8th May 2023, the court granted leave to the Ex parte Applicant, Michael Ogweno Oyier (The applicant herein) to commence Judicial Review Proceedings and stay of execution of the 1st respondent's decision rendered on 22nd November 2022.
2. At the same time, the court ordered the status quo with regard to possession of the disputed land namely number 706 Kitawa Adjudication Section, be maintained. That the substantive motion be filed and served within 21 days from that date.
3. Accordingly, the applicant through G. S Okoth and Company Advocates, lodged the Notice of Motion application dated 8th May 2023 under Order 53 Rule 2 and 3 of the [Civil Procedure Rules, 2010](#) seeking the following orders;
 - a. The Honourable Court be pleased to issue an order of Certiorari Directed At The Deputy County Commissioner In charge of Suba-County acting on behalf of the Minister for Lands and Settlement, Quashing the decision read to the parties on the 22nd day of November 2022 in respect of Land Parcel Nos. 706 in Kitawa Adjudication Section.
 - b. The Honourable Court be pleased to issue an order of Prohibition directed at the District Land Adjudication Officer in charge of Suba Sub-County and Kitawa Adjudication Section from implementing the decision of the Deputy County Commissioner read to the parties on the 22nd day of November 2022 in respect of Land Parcel No 706 in Kitawa Adjudication Section from registering the same in the names of the interested parties as directed by the Deputy County Commissioner.
 - c. The costs of the application be provided for in favour of the applicant.
4. The anchorage of the application are grounds (a) (b) and (c) set out on the face of it, the statement accompanying the application and the affidavit verifying the statement and the annexed documents marked "MOO-1" to "MOO-5" which include; copies of sketch map and ruling of the 1st respondent. Briefly, the applicant's complaint is that the instant dispute first started by way of Civil Suit No. 12 of 1991 then Civil Suit No. 254 of 1992 before the District Officer, Gwassi Division. Thereafter, the applicant filed Land Adjudication Arbitration Board case No. 14 of 2011 and after several objections were heard, it was determined that the land in dispute belongs to the applicant, his brother and mother.
5. Further, the applicant laments that on 22nd November 2022, the 1st respondent summoned the parties herein to his office for the hearing of the dispute. That surprisingly, the 1st respondent handed a ruling sub dividing the land in dispute into two equal portions without according the parties a hearing thereof. That thus, the decision of the 1st respondent was *ultra vires* and arbitrary.
6. By a Replying affidavit sworn on 17th July 2023, the 1st respondent through the Honourable Attorney General averred, inter alia, that he had powers under section 29 (4) of the [Land Adjudication Act](#) Chapter 284 Laws of Kenya to entertain appeals from land adjudication matters. That he heard the parties on 3rd March 2022 and visited the suit land on 13th May 2022. That the impugned decision was fair and that the applicant did not raise any complaint in the dispute at all.
7. In the replying affidavit sworn on 6th November 2023, the interested parties refuted the applicant's claim and averred that the dispute was heard by the 1st respondent who even visited the site on 13th



- May 2022. That the applicant did not raise any complaint thereof hence the impugned decision was lawful, among other things.
8. On 21st November 2023, the court directed that the application be heard by written submissions
 9. In applicant's written submissions herein, it was stated that the 1st respondent's decision was *ultra vires* as the appeal to Minister was filed in the year 2015. That there was a delay of nine months to mount the appeal which was not filed within 60 days as prescribed under section 26 of the [Land Adjudication Act](#) Chapter 284 Laws of Kenya. That there was no leave to file the appeal out of time.
 10. Furthermore, the applicant's counsel submitted that that the hearing fixed for 2nd March 2022 before the 1st respondent was amended as shown in the document marked "MOO-5" hence, the action was unreasonable, un-procedural and the impugned decision is illegal. That thus, the application be allowed accordingly. To buttress the submissions, reliance was placed on [Kenya National Examination Council-vs-Republic Ex Parte Godfrey Gathenji Njoroge and 9 others](#) (1997) eKLR and [Municipal Council of Mombasa-vs-Republic and nother](#) (2002) eKLR, among others authorities.
 11. In the submissions herein, Lorna Orege Senior State Counsel for the respondents stated, inter alia, that there is no proof that the 1st respondent acted *ultra vires* and that the application be dismissed with costs to the respondents. That the 1st respondent was not biased on the appeal which was possibly filed earlier than 2015 and that the applicant submitted to the jurisdiction of the 1st respondent in the appeal. To fortify the submissions, counsel relied in the case of [Republic-vs-The Honourable Chief Justice of Kenya and others Ex parte Justice Moiwo Mataiya Ole Keiwa](#) Nairobi HCMA No. 1298 of 2004, among others.
 12. By the submissions herein, learned counsel for the interested party stated that the 1st respondent heard the complaint fairly and in company of the parties, visited the site on 13th May 2022. That the applicant actively and enthusiastically participated in the hearing of his complaint before the impugned decision was arrived at. That the the application is incompetent and the applicant is not entitled to the orders sought therein. To reinforce the submissions, counsel cited [Republic-vs-Director of Land Adjudication and Settlement and another, Japhet Miriti Thilange \(Interested party\) Ex parte Fredrick Simon Mburuga and another](#) (2019) eKLR, and others.
 13. I have duly considered the application, the replying affidavits and the rival submissions in their entirety. So, the issues for determination in this application are condensed to whether the applicant has established his claim to attract the orders sought in the application.
 14. Article 22 of the [Constitution](#) of Kenya, 2010 (the [Constitution](#)) provides for enforcement of the Bill of Rights. Article 23 (3) (f) of the [Constitution](#) stipulates that in any proceedings originated under the said Article, the court may grant appropriate relief, inter alia, an order of judicial review inclusive of the orders of certiorari and prohibition sought in the application.
 15. The applicant's complaint relates to the alleged violation of protection of their right to property under 40 of the [Constitution](#) by the respondents. This court is aware of the meaning of "Property" and "land" under Article 260 of the [Constitution](#). The land in dispute herein is as captured in paragraph 1 (a) and (b) hereinabove.
 16. It must be noted that Article 47 (1) (*supra*) provides;

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."



17. The right under the said Article is operationalized and elaborated in section 4 of the [Fair Administrative Action Act](#) No. 4 of 2015. The application reveals that the respondents failed to accord the applicant the right under Article 47(*supra*).
18. In the case of [Republic-vs-Kenya Revenue Authority Ex Parte Yaya Towers Ltd](#) (2008) KLR, it was held that judicial review remedy is concerned with reviewing not the merits but the decision-making process itself; see also [Kenya Nation Examination Council case](#) (*supra*).
19. In Peter Kaluma's book, [Judicial Review, Law Procedure and Practice](#) at page 46, it is stated that:

“The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision-making process and the legality of the decision-making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely in Judicial review the court's exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for that of another body, as happens in appeals, the court in an application for judicial review is concerned with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed.” (Emphasis added).
20. Notably, in the case of [Johnson Otieno Adera -vs- Lucas Angonga & another](#) [2020] eKLR, this court observed that the courts and tribunals as provided for under Article 159 (1) of the [Constitution](#), have a duty to hear the parties on matters before them. This ensures that the *audi alteram partem* rule (right to be heard) is not violated as noted in [Re-Hebtulla Properties Ltd](#) (1976-80) 1 KLR 1195 at 1209 and [James Kanyiita Nderitu and another -vs- Marios Philotas Ghikas and another](#) (2016) eKLR.
21. Article 60 (1) (g) of the [Constitution](#) of Kenya, 2010 provides for encouragement of communities to settle land disputes through recognized local community initiatives consistent with the same Constitution. The impugned decision was made as envisioned under the said Article as read with Article 159 (2) (c) of the [Constitution](#).
22. In opposing the application, it was the assertion of the respondents' counsel that that the applicant never raised any complaint before the 1st respondent and that he submitted to the process which resulted in the impugned decision. Plainly, assumed jurisdiction is a nullity as noted in [Desai-vs-Warsama](#) (1967) EA 351 and [Equity Bank Ltd-vs-Bruce Mutie t/a Diani Tour Travel](#) (2016) eKLR.
23. It is trite law that lack of jurisdiction renders a decision of a court or tribunal or a decision making body null and void; see [Macfoy-vs-United Africa Co.Ltd](#) (1961) 3 ALL ER 1169 and [Republic-vs-Karisa-vs-Chengo and 2 Others](#) (2017) eKLR.
24. It is therefore, the finding of this court that the 1st respondent unprocedurally and unreasonably amended the hearing coming up before him in respect of the dispute on 2nd March 2022. That he arrived at the impugned decision which was statute barred as submitted in paragraph 9 hereinabove. That no requisite leave was obtained before mounting the appeal hence, the process thereof fell below the requirements under Article 47 (*supra*). The 1st respondent acted *ultra vires* as he had no jurisdiction to render the impugned judgment in the circumstances.
25. Wherefore, the application dated 8th May 2023 is merited. The applicant is deserving of the orders sought in the application. The same is hereby allowed in terms of orders 1, 2 and 3 sought in it as set out in paragraph 1 (a), (b) and (c) hereinabove.
26. It is so ordered.



DATED AND DELIVERED AT HOMA BAY THIS 13TH DAY OF MARCH 2024

G M A ONGONDO

JUDGE

Present;

- a. P Odhiambo instructed by G S Okoth learned counsel for the Applicant
- b. Ms Kijana instructed by Obwanda learned counsel for the Interested Parties
- c. T. Luanga, Court Assistant

