



REPUBLIC OF KENYA



Kajoi (Legal representative of Geoffrey Kajoi Akwalu) v Land Adjudication and Settlement officer (Igembe Settlement Officer) & another (Civil Appeal 99 of 2017) [2022] KECA 802 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KECA 802 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 99 OF 2017**

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

JULY 29, 2022

BETWEEN

ALEXANDER MEEME KAJOI (LEGAL REPRESENTATIVE OF GEOFFREY KAJOI AKWALU) APPELLANT

AND

LAND ADJUDICATION AND SETTLEMENT OFFICER (IGEMBE SETTLEMENT OFFICER) 1ST RESPONDENT

SAMUEL MBATARU 2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Environment and Land Court) (Njoroge, J.) delivered on 30th November 2016 in ELC No. 73 2009)

JUDGMENT

1. This appeal arises from the judgment of the Environment and Land Court (ELC) at Meru (Njoroge, J.) in which the learned Judge dismissed an application for judicial review orders of certiorari and mandamus. The orders had been sought by Geoffrey Kajoi Akwalu (Geoffrey), who died during the pendency of the judicial review proceedings. His son, Alexander Meeme Kajoi, who was substituted as his legal representative is now the appellant before us.
2. The subject of the orders of judicial review that were sought by Geoffrey was a letter dated 29th April, 2009. The letter was written by the 1st respondent, the Land Adjudication and Settlement Officer (Land Adjudication Officer) and addressed to the Demarcation Officer, Amwathi/Maua adjudication section, in regard to land parcel No. 3278 Amwathi/Maua adjudication section (Parcel No. 3278), which had been adjudicated in favour of Geoffrey. In the letter, it was indicated among other things, that the letter that had awarded Geoffrey land Parcel No. 3278, could not be traced; that Geoffrey had fraudulently acquired part of land Parcel No. 3278 that was demarcated in his favour; and that



land Parcel No. 3278 should be re-demarcated and 4.50 acres of the land demarcated in favour of Samuel Mbataru (Mbataru). Geoffrey sought to have the letter quashed through an order of certiorari, contending that it was made without jurisdiction and against the law. Geoffrey also prayed for an order of mandamus compelling the District Land adjudication and settlement officer to restore the register for land Parcel No. 3278 Amwathi/Maua adjudication section to its original state.

3. In his judgment, the learned Judge found that Geoffrey had not demonstrated that the Land Adjudication Officer was under a public duty to take action in his favour; or that there was failure arising from performance of such duty that amounted to the appellant being affected detrimentally. The learned Judge further found that the letter was written by the Land Adjudication Officer to the Demarcation Officer in exercise of his duty in accordance with the law, and with the intention of upholding the provisions of the applicable law and the processes established by the law.
4. The appellant has challenged the judgment of the ELC on six grounds that are contained in his memorandum of appeal. In summary, the salient grounds fault the learned Judge for having erred: in failing to find that the Land Adjudication Officer had no jurisdiction to make the decision he made; in failing to find that he acted outside the relevant law; in failing to find that the Adjudication Committee and relevant bodies had found that land Parcel No. 3278 wholly belonged to Geoffrey; in failing to find that the Land Adjudication Officer had no jurisdiction to interfere with land Parcel No. 3278 against the provisions of Section 26 of the *Land Consolidation Act*; and in not finding that there was bias and breach of natural justice on the part of the Land Adjudication Officer.
5. In support of his appeal, the appellant filed written submissions in which he submitted that land Parcel No. 3278 is governed by the *Land Consolidation Act*, and that the learned Judge relied on a report entitled: "Report on complaint in respect to P/No. 3278 Amwathi/Maua adjudication section dated 29th April 2009." He argued that the learned Judge erred in relying on the report as it was made contrary to the *Land Consolidation Act* and without the participation of the parties to the suit; that the Land Adjudication Officer had no jurisdiction to act as he did. Further, that Geoffrey had been awarded the suit land and, if there was any discrepancy arising therefrom, the land Adjudication Officer ought to have followed the procedure provided in the *Land Consolidation Act* by calling the committee and involving the parties in the dispute.
6. The appellant drew the Court's attention to section 9(1) of the *Land Consolidation Act*, which deals with ascertainment of disputes, and pointed out that the Land Adjudication Officer failed to comply with the statutory requirements and usurped the powers of Amwathi/Maua Adjudication Section Land Committee in addressing the dispute without constituting the committee. The appellant submitted that the report was biased and ultra vires the powers of the Land Adjudication Officer; that Geoffrey was denied a fair hearing because the report was compiled without his knowledge or participation; and that he was condemned because of refusing to perform the Kithiri oath to confirm the ownership of the disputed land.
7. Relying on Article 47(1) & (2) of *the Constitution*, the appellant argued that Geoffrey was not accorded his right to fair administrative action; and that his rights were violated as he was condemned unheard. He urged the Court to find that the process of arriving at the decision of the Land Adjudication Officer as indicated in his letter of 29th April 2009, was flawed from inception. He urged the Court to allow the appeal
8. Despite having been duly served with hearing notices, none of the respondents attended court for the hearing of the appeal, nor did they file any written submissions.
9. We have carefully considered this appeal together with the appellant's written submissions and the oral highlights that were made by counsel. As we have already stated, the judgment subject of the



appeal arose from judicial review proceedings. The principle upon which this Court may interfere with the judgment of the superior court arising from such proceedings was stated by this Court in *Kenya Revenue Authority & 2 others vs. Darasa Investments Limited* [2018] eKLR as follows:

“... judicial review orders are still discretionary by nature and whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in *Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others* [2014] eKLR. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.”

10. In *United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd* [1985] E.A 898}}, at page 908 Madan, JA (as he then was) restated the circumstances when such interference may be called for as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

11. In the exercise of our appellate jurisdiction in this matter, the following proposition made by the Court in *Peter Kimandiu vs Land adjudication officer Tigania West District & 4 others* [2016] eKLR: (Peter Kimandiu decision) is also relevant:

“The issue before us is basically one of law as it is trite that Judicial Review, which is the genesis of the appeal, is not concerned with the merits of the case but the decision making process- see *Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPR)* [2013] eKLR. We are thus not called upon to pronounce in this appeal who, between the appellant and the respondents is the rightful owner of the disputed land or lands.”

12. Applying the afore stated principles, our mandate in this appeal is not to engage in a merit review of the decision of the learned Judge, or that of the Land Adjudication Officer as expressed in the impugned letter, but to interrogate, first, the probity of the process adopted by the Land Adjudication Officer in arriving at the decision subject of the judicial review and, secondly, the exercise of discretion by the learned Judge in declining to interfere with the decision of the Land Adjudication Officer. This will lead to a conclusion as to whether or not the learned Judge adopted the proper procedure; and whether the learned Judge, in exercising his discretion, properly directed himself in accordance with the law, and took into account all relevant factors.
13. It is apparent that the letter subject of the appellant’s judicial review proceedings arose from a land adjudication process. In making his application for judicial review, the appellant invoked both the *Land Adjudication Act* (Cap. 284) and the *Land Consolidation Act* (cap. 283).



14. In the *Peter Kimandiu decision* (supra), this Court examined the two Acts and observed:

“We have examined both Acts and found that the LCA was enacted in 1959 and commenced operation on 28th July 1959. That was before independence, but there have been amendments along the way through other Acts of Parliament and Legal Notices. Its purpose according to the preamble was:

“...to provide for the ascertainment of rights and interests in, and for the consolidation of land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto” (Emphasis added)

The LAA on the other hand, was enacted in 1968 and came into operation on 28th June 1968:

“to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto.” (Emphasis added).

The emphasis underscores the similarity that both Acts relate to ascertainment and recording of rights and interests in land or generally land adjudication, but also the differences in the manner of ascertaining those rights and interests as well as the geographical application of the two statutes.”

15. Although the two Acts deal with ascertainment of rights and interests in land, the two Acts deal with different types of land, *Land Consolidation Act* applying to land in special areas and *Land Adjudication Act* applying to trust land. Therefore, only one of the Acts could be applicable. The question is, which one?

16. In his written submissions, the appellant submitted that land Parcel No. 3278 was governed by the *Land Consolidation Act*. We note that in the statement of facts and the affidavits sworn in reply to the petition in the judicial review proceedings, land Parcel No. 3278 was not adverted to as trust land by any of the parties, nor is there evidence of the land being community land. Be that as it may, Geoffrey and Mbataru each claimed specific ownership rights. We are therefore satisfied that land Parcel No. 3278 was not trust land, and that it is the *Land Consolidation Act* that was applicable to land Parcel No. 3278. Therefore, the land adjudication relating to this parcel was being done under the *Land Consolidation Act*, not the *Land Adjudication Act*.

17. Section 26 of the *Land Consolidation Act* provides for the process in dealing with complaints or objections arising from the adjudication register as follows:

- (1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.



2. If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate.
 3. No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.
 4. Any compensation awarded by the Adjudication Officer under this section, together with such costs as the Court may award, shall be paid by the Minister.
 27. Adjudication Register to be final After the expiration of sixty days from the date of the certificate mentioned in section 25, or on the determination of all objections in accordance with section 26, of this Act, whichever shall be the later, the Adjudication Register shall be final.
 27. Correction of errors in Adjudication Register The Adjudication Officer may correct any clerical error or error of a like nature in the Adjudication Register.”
18. Sections 26, 27 and 28 of the [Land Consolidation Act](#), apply to any person who is aggrieved by an entry in the adjudication register following the process under the [Land Consolidation Act](#). Such complaints are to be dealt with by the Adjudication officer in conjunction with a committee appointed by the Adjudication Officer for the relevant District under section 9 of the [Land Consolidation Act](#).
 19. The letter dated 29th April 2009 was addressed to the demarcation officer by the Land Adjudication Officer in his capacity as the Land Adjudication and Settlement officer. It required the demarcation officer to re-demarcate Parcel No. 3278, which had previously been demarcated in the appellant’s favor. The issue is, did the Land Adjudication officer have the jurisdiction to make the decision and take action as he did in the impugned letter? and did the learned Judge properly exercise his discretion in declining to issue the order of certiorari and mandamus as sought by the appellant?
 20. The following extract from the judgment reveals how the learned judge addressed the issues and arrived at his decision:

“... I find that the Exparte Applicant has not demonstrated that a public duty existed for the Respondent to take action in favour of the Exparte Applicant. I also find that there was no failure arising from such duty that amounted to the Exparte Applicant being affected detrimentally. Finally, there is no indication anywhere in the pleadings that the Exparte Applicant had demanded of the Respondent that a decision had to be made.

.....

27. I find that the DLASO in writing this letter to the Demarcation Officer was exercising his duties, in accordance with the law, to see to, that what had been properly done through the established legal process was upheld. From the pleadings filed by the exparte applicant, I find that he has not impeached the detailed reasons given by the DLASO for making his decision which is being challenged in these proceedings.
28. Allegations and counter-allegations and assertions made by the exparte applicant and the Interested Party amount to cross-accusations. I do not find



them central to the determination of this suit. The important thing is that I do not find that in arriving at his decision, the DLASO had gone against any statutory provisions, was biased, was unreasonable, had not acted in a proportionate manner, breached any rules of Natural Justice or had failed to proffer valid reasons before arriving at the challenged decisions.

29. I do find that the respondent did not make a decision without jurisdiction and against the provisions of the [Land Adjudication Act](#) and the [Land Consolidation Act](#). I find that the letter containing the decision the *exparte* applicant is challenging had the effect and intention of upholding the provision of the applicable law and the processes established by the said law. I opine that the respondent did not act illegally.
 30. In the circumstances, I find that the order of Certiorari prayed for by the *exparte* applicant is not merited. I decline to grant it.
 31. As I have already decided that an order of mandamus is not merited, I dismiss the suit.”
21. The learned Judge was not clear under which specific Act the adjudication of the suit property was being done. Secondly, although he referred to both the [land Consolidation Act](#) and the [Land Adjudication Act](#), and ruled that the Land Adjudication Officer was executing his duties in accordance with the law, he did not refer to the specific sections of the law, nor did he identify any specific provisions in the two Acts. The learned Judge also appears to have been swayed by the merit of the decision when he states that the appellant “has not impeached the detailed reasons given by the DLASO for making his decision”.
 22. Both the [Land Adjudication Act](#) and the [Land Consolidation Act](#) provide clear steps that are required to be taken in the adjudication process where a party is aggrieved by an entry in the adjudication register. Under the [Land Consolidation Act](#), the complaints are to be dealt with by the adjudication officer in conjunction with a committee appointed by the adjudication officer for the relevant district, under section 9 of the [Land Consolidation Act](#).
 23. In the letter dated 29th April 2009, the Land Adjudication Officer talks of investigations from which he made some conclusions. The letter does not give any information on who carried out the investigation and nor is there any mention of the involvement of any committee. Secondly, the appellant complained that he was not given a hearing before the decision in the letter, which had the effect of depriving him of 4.5 acres of his land, was made. Yet, the learned Judge capriciously dismissed the appellant’s complaints holding that they were not central to the determination of the suit.
 24. Clearly, the learned Judge fell in error and failed to properly exercise his supervisory jurisdiction in respect of the adverse decision of the Land Adjudication Officer made in breach of due process. As the High Court at Kisii correctly held in [Tobias Achola Osindi & 13 others vs. Cyprianus Otieno Ogalo & 6 others](#) [2013] eKLR –

“... The role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land.”



25. The appellant asserted that he was condemned without being heard and that the respondent had no jurisdiction to take the decision that he did. The appellant's complaints were responded to, by the Land Adjudication Officer in a short affidavit sworn on 13th September 2012, and in which the Land Adjudication Officer swore that the appellant's father (the deceased) was, on several occasions before his death, given the opportunity to be heard, but never explained to the Land Adjudication Officer his claim against the said parcel of land.
26. In *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, this Court stated that:
- “Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”
27. The 1st respondent, as the Land Adjudication and Settlement Officer, had a public duty imposed upon him under the *Land Adjudication Act* and the *Land Consolidation Act*. The appellant having sought judicial review orders of certiorari and mandamus, before the learned Judge could determine whether the Land and adjudication officer had acted in accordance with the law, it was incumbent upon the trial Judge to establish the nature of the public duty that was imposed upon the Land Adjudication Officer, and interrogate: first, whether the Land Adjudication Officer acted within his powers; secondly, whether the process that he adopted in carrying out his duties was proper; and, thirdly, whether the appellant was properly heard. It is only by taking into account these factors that the learned Judge could properly exercise his discretion in granting or refusing to grant the judicial review orders sought.
28. Further, a reading of the appellant's notice of motion, the verifying affidavit, the statement of facts and the annexures thereto, confirm that the land adjudication process involving the suit property had reached the tail end during which the land was adjudicated in favour of the appellant. The 2nd respondent, being dissatisfied with the adjudication register, lodged a complaint, which was apparently dismissed. He then filed a suit in the Chief Magistrate's Court at Meru, which he later withdrew. In the letter of 29th April 2009, the Land Adjudication Officer made findings, which completely reversed the situation. These findings were prejudicial to the appellant, and his complaints were not without substance. Hence, it was necessary for the court to inquire into the process through which the Land Adjudication officer had arrived at his conclusion. To the contrary, the learned Judge ruled against the appellant without evidence, and without giving cogent reasons to support his conclusion.
29. For the above reasons, we find that the learned Judge failed to properly exercise his discretion as he failed to address the process resulting in the letter dated 29th April 2009; failed to consider relevant factors such as the statutory requirements regarding resolution of objections arising from the consolidation register, and whether the same were complied with; and also failed to consider whether the appellant was given a proper hearing.
30. For these reasons, we find that there is sufficient reason for this Court to interfere with the judgment of the trial court. Accordingly, we allow this appeal, set aside the judgment of the trial court, and order that the appellant's motion for judicial review orders be placed before a judge of competent jurisdiction (other than Njoroge, J.), for rehearing. We award costs of this appeal to the appellant.

Those shall be the orders of this Court.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.



HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

