



Odhiambo & another (Appealing as representatives of the Estate of the late Jefitha George Odhambo Dosio) v National Land Commission (Civil Appeal 11 of 2020) [2022] KECA 635 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 635 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 11 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 8, 2022**

BETWEEN

MARY ODHIAMBO 1ST APPELLANT

ANTHONY OMONDI DOSIO 2ND APPELLANT

**APPEALING AS REPRESENTATIVES OF THE ESTATE OF THE LATE JEFITHA
GEORGE ODHAMBO DOSIO**

AND

NATIONAL LAND COMMISSION RESPONDENT

(Being an appeal against the judgment and decree of the Environmental and Land Court at Malindi delivered by Olola, J on 30th July 2019 in ELC JUDICIAL REVIEW No. 3 of 2018.)

JUDGMENT

1. The appellants herein, Mary Odhiambo and Anthony Omondi Dosio suing as representatives of the Estate of the late Jefitha George Odhambo Dosio, hereinafter the deceased, instituted judicial Review proceedings initially before Milimani Constitutional and Judicial Review Division, seeking for orders of certiorari and prohibition to issue against the respondent. Mativo, J. granted the appellants leave to institute judicial Review proceedings against the respondents on 30th August 2017. The Presiding Judge in Milimani Constitutional and Judicial Review Division transferred the matter to Machakos High Court, where Odunga, J. transferred the matter to Obaga, J. of the ELC, Machakos. Obaga, J. in turn transferred the matter to ELC Malindi where the Petition was heard and determined.
2. Pursuant to leave granted by the court, the appellants sought judicial review orders of Certiorari to remove into the court and quash the decision of the Respondent, as published in the Kenya Gazette Notice No. 6866 Vol. CXIX No. 97 dated 17th July 2017, cancelling the appellant's title to the parcel of land known as Plot No. 433-Watamu Township in Kilifi County and re-allocating it to one Nelson



- Mathenge Kirimire. Also sought was an Order of Prohibition prohibiting and/or restraining the Respondent by itself, its agents or persons acting on its behalf, from doing anything to cancel or in any other way interfere with the appellants' ownership of the suit land.
3. On 30th July 2019, Olola J delivered the impugned judgment in which he made findings of fact that while the appellants sought orders to quash the respondent's decision and to prohibit any interference with the suit land, Nelson Mathenge Kirimire who, according to the appellants own documents, was given the suit land by the respondent was not enjoined to the proceedings. The court declined to make the orders sought on grounds the grant of those orders were likely to adversely affect a third party whose interest in the suit land the appellants were aware of, but whom they chose not to enjoin in the proceedings. The ELC dismissed the appellants' suit.
 4. The dismissal of the application aggrieved the appellants, leading to the filing of this appeal. They have raised nine grounds of appeal. However in the written submissions filed by Sharia, Nyange Njuguna & Company Advocates for the appellants, these grounds were reduced to two; one, that the learned ELC judge erred when he reached a finding that the appellants were given an opportunity to be heard by the respondent; and, two, that the ELC erred when it concluded that the respondent's action was not *ultra vires*.
 5. The brief background of the judicial review application before the ELC was that the appellants were the wife and son of the deceased. Their case was that in the year 1992, the deceased acquired ownership of the parcel of land known as Plot No. 433-Watamu Township (hereinafter the Suit land), after the Commissioner of Lands allocated it to him vide an allotment letter dated 8th June 1992. As a condition of the allocation, the deceased was directed to comply with certain conditions including payment of various amounts of money as indicated in the allotment letter.
 6. The appellants case was that the deceased complied with all the terms and conditions of allotment, a fact that was acknowledged by the Commissioner of Lands vide a letter dated 4th June 1998. The appellants' case was that pursuant to compliance by the deceased, the Commissioner of Lands directed the Director of Surveys to carry out a survey of the land so as to facilitate registration of a title. That the deceased thereafter paid annual rent and other necessary outgoings on the parcel of land as required, and that upon his death, the appellants as representatives of his estate continued to do so.
 7. It was the appellants' case that while they were following up and waiting for registration and issuance of title documents they came to learn that vide Gazette Notice No. 6866 dated 17th July 2017, the respondent had done away with the allocation of the suit land, Plot No. 433 to the deceased, and had given it to one Nelson Mathenge Kirimire. In view of the foregoing, the appellants accused the respondent of violating their right to property, acting illegally and ultra vires its powers, and violating the provisions of the [*Fair Administrative Action Act*, 2015](#).
 8. The respondent was served with the application, but it failed to file any responses, and also did not participate at the hearing of the Judicial Review application. After hearing the appellants in the case, and upon considering the documents exhibited in court in support of the application, the ELC came to the conclusion that there was nothing on the record to support the appellants claim that the suit land belonged to the deceased; that it was apparent from the impugned Gazette Notice that public notices of public hearings and inspection of records were advertised in local media, and hearings took place, and that it was after the hearings that the allocation of the suit land was regularized in the name of Nelson Mathenge Kirimire. The ELC also found that no orders could lie as sought on account of the appellants deliberate decision not to enjoin Nelson Mathenge Kirimire to the suit, despite knowing that he would be adversely affected by the orders sought, were they to be granted.



9. When this appeal was called out for virtual hearing on 15th March 2022, Mr. Nyange learned counsel for the appellants, and Mr. Mbuthia, learned counsel for the respondents were present and ready to be heard. Mr. Nyange relied on the written submissions filed on the 10th June 2021. Mr. Mbuthia had not filed any submissions and so gave oral submissions.

10. We have considered this appeal, the record of the appeal and the submissions of counsel. This is a first appeal. The appeal undisputedly challenges the exercise of discretion of the trial ELC. The principles that guide an appellate Court when considering an appeal of this nature are now well settled. In *Mark William Trevor Price & Caroline Elsa Anne Sturdy vs John Greaves Hilder*[1984] eKLR this Court observed thus:

“The law on the matter is now settled. The English case of *EL AMRIA* (1981) 2 Lloyds Law Reports page 119 at page 123 as per Brandon L J, which has been applied in Kenya, has comprehensive principles that are accepted as applying to an application concerning the exercise of a Judge’s discretion. The leading local decision is the case of *MBOGO v SHAH* (1968) EA 93 in which *DE LESTANG v* (as he then was) observed at page 94.

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

11. The matter before the ELC was a challenge of the basis upon which the respondent changed the allocation of the suit property, Plot No. 433- Watamu Township from the deceased to one Nelson Mathenge Kirimire. The allocation to the deceased was supported by an allotment letter from the Commissioner of Lands dated 8th June 1992, an acknowledgment by the Commissioner of Lands vide a letter dated 4th June 1998 that the deceased had complied with all the pre-conditions for allocation of the suit property as set down in the allotment letter, and a letter from the Commissioner of Lands directing the Director of Surveys to carry out a survey of the land so as to facilitate registration of a title. These documents were part of the exhibits which the appellants adduced in support of the judicial review application.

12. Judicial Review is concerned with the decision making process. It is an examination into the process undertaken by the decision making body to arrive at its decision. It is an inquiry into the administrative steps undertaken by such body, in order to decipher whether the process was lawful, procedurally fair, and reasonable. Article 47 of the *Constitution* reaffirms the importance of fair administrative action and provides as follows:

47. Fair Administration Action

1. Every person has the right to administrative action that is expeditious, efficient lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (I) and that legislation shall –



- a) Provide for the review of administrative action by a court or, if appropriate an independent and impartial tribunal; and
- b) Promote efficient administration.

13. In examining the actions of the body that are challenged through judicial review, the court should put into focus and scrutiny certain factors. In the case of *Municipal Council of Mombasa vs Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, this Court put these factors succinctly thus:

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who made the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial review.”

14. The issue is whether the learned Judge of the ELC, when considering the application before it took these factors into consideration, or whether it acted on matters it ought not to have, or failed to take into account matters it ought to have, or whether it misdirected itself, thus arriving at a wrong conclusion, or whether its decision was plainly wrong.
15. The ELC, after reviewing the case by the appellants identified what their complaint against the respondent was. In summary the ELC found that in the case before it, the appellants accused the respondent of violating their right to property, acting illegally and ultra vires its powers and violating the *Fair Administrative Action Act* of 2015. The ELC observed that the respondent did not respond to service of the application, nor did it file any papers in Court.
16. The impugned decision by the respondent was expressed in the form of the Gazette Notice No. 6866 dated 17th July 2017, where the respondent did away with the allocation of the suit land, Plot No. 433 from the deceased, and gave it to one Nelson Mathenge Kirimire. The ELC studied the Gazette and concluded thus “In the impugned Gazette Notice No. 6866 of 17th July 2017, the Respondent Commission indicates that the Plot No. 433 was registered in the name of one Nelson Mathenge Kirimire and that there was no appearance when the matter came up for hearing. It was thus their determination that the parcel of land be regularized in the name of Nelson Mathenge Kirimire. As it were, as the Applicants accuse the Respondent of denying them natural justice, it would appear to me that there was nothing on the records of the said parcel of land to reflect that the Ex parte Applicants and or the deceased ...was the owner of the said parcel of land...” The ELC concluded that reading from the Gazette Notice, the Commission put up public notices in the national dailies inviting all interested parties to the properties advertised to appear before it. However, there was no proof such adverts were carried in any national dailies as the dailies carrying the alleged notices were not before the Court.
17. The ELC should have concerned itself with the decision making process, whether there was procedural fairness and reasonableness. In order to draw conclusions of whether these factors were proved, the burden lay on the body under scrutiny to establish through evidential demonstration that indeed it followed the due, fair, reasonable and procedural process. The ELC noted from the onset that the



respondent did not respond to any court processes, filed no documents and did not honour hearing notices. In other words, the respondent did not challenge the appellants' case. Further, there was no evidence before the ELC speaking to the process adopted by the respondent in arriving at the decision to allocate the suit land from the deceased to the said Nelson. That evidence could not have been discerned by an examination of the Gazette Notice presented to the ELC by the appellants, as the ELC attempted to do. There was no such demonstration made before the ELC, not just by failure to file responses to the appellants' pleadings, but by total failure by the respondent to participate at the trial. That consequently means that there was no basis upon which the ELC could have arrived at the determination it made in this matter.

18. This brings us to another point. When an application for leave to file a judicial review application is placed before a judge, it is an interlocutory application. It is always heard in chambers, and is heard ex-parte. The judge hearing such an application is expected to give directions on three issues, one whether leave to file the judicial review application should be granted or not; two, whether leave to file the application will serve as stay of the impugned decision or any part of it; three, directions as to service of the application, that is, who should be served with the application and within which time frame.
19. It is at that interlocutory stage that the Court should have directed the ex- parte applicants (the appellants) to serve all parties who were likely to be adversely affected by orders that may be made in the case. Failure to serve all the parties that would be affected by the ELC decision was as much an error on the part of the Court as it was on the part of the appellants, since the Court had a window at the interlocutory stage to require all parties likely to be affected to be served before hearing the applications. All in all, the ELC fell into error to spring up a surprise on the appellants that they failed to serve a necessary party, for the first time in the judgment, and not during the proceedings when the appellants may have been able to remedy the situation.
20. There was a serious misdirection by the ELC when it made a finding to the effect that there was nothing on the records of the said parcel of land that reflects that the ex parte applicants, the appellants, and or the deceased was the owner of the said parcel of land. That conclusion went into the merit of the decision making process, which is outside the province of judicial review.
21. Taking all the facts and circumstances of the case into consideration we find that there were serious flaws, and also misdirection by the ELC, and that as a result the decision arrived at was plainly wrong. We are of the view that the only remedy is to have the matter retried.
22. In the result, we allow the appeal, set aside the judgment of the ELC delivered on the 30th July 2019 and any consequential orders or decrees arising thereto, and in substitution thereof order a re-trial of the Judicial Review application before any ELC Judge, except Olola, J. who heard the matter.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JULY, 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

