



**Kihoro v Commissioner of Lands & 3 others (Civil Appeal
60 of 2015) [2022] KECA 958 (KLR) (26 August 2022) (Judgment)**

Neutral citation: [2022] KECA 958 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 60 OF 2015
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA
AUGUST 26, 2022**

BETWEEN

JENNIFER KOINATE KIHORO APPELLANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

MUNICIPAL COUNCIL OF NANYUKI 3RD RESPONDENT

JESSEL RANCHING COMPANY LIMITED 4TH RESPONDENT

*((An appeal from the Judgment and Orders of the High Court of Kenya at Nyeri
(Ombwayo, J.) dated 11th August, 2015 and delivered on 22nd September,
2015.)INMisc. Application No. 3 of 2013, And Civil Appeal No. 61 Of 2015)*

JUDGMENT

1. Appeal numbers 60, 61, and 62 of 2015 all emanate from the judgment of Ombwayo, J. delivered on 22nd September 2015. The subject matter in all the appeals are Land Parcel Numbers Nanyuki Municipality Block 12/123, 12/121, 12/120 and 12/122 which are all adjacent to each other and which had all initially been allocated to Jennifer Koinate Kihoro, the appellant in Civil Appeal No. 60 and 61 of 2015. On 15th July 2016, this Court directed that the appeals be heard together.
2. The appellant in Civil Appeal No. 60 and 61 is Jennifer Koinate Kihoro whereas the appellant in **Civil Appeal No. 62** is **Willy Sikuku Ooko**.
3. The brief facts of these appeals are essentially the same. For purposes of good order, we will use Civil Appeal No. 60 of 2015 as the lead file.



4. The brief facts in Civil Appeal No. 60 of 2015 are as follows; the 4th respondent herein (Jessel Ranching Company who was the Ex-Parte applicant before the High Court) had vide a motion dated 5th February 2013, sought inter alia orders of certiorari with respect to land title number Nanyuki Municipality Block 12/123 quashing registration of the parcel in favour of the present registered owners or at all. The gist of the 4th respondent's case was that it was the registered proprietor of Land Parcel Number 2787/424 which fronted Nanyuki river and that Nanyuki Municipality Block 12/123 had been considered riparian land and therefore not available for allocation and had instead been preserved as such.
5. It was the 4th respondents case before the High Court that the 1st respondent had made an attempt to allocate a portion of the riparian reserve to the appellant herein vide a letter of allotment dated 23rd June 1999, which allocation was prejudicial to the 4th respondent and other adjoining owners generally, in that they had always considered and had been made to believe that the land was available to them for access to the river and for their lawful use.
6. It was the 4th respondent's further contention that after the land was unlawfully allocated to the appellant, the 3rd respondent issued a notice of purported encroachment of public land by the owners of the adjacent parcels including the 4th respondent on the grounds that the aforementioned land was part of a road reserve. Further, the notice required the 4th respondent together with other land owners to clear branches and trunks allegedly causing obstruction on the purported access road. It was these contentions that precipitated the filing of the Judicial Review proceedings before the High Court by the 4th respondent. The matter was heard by Ombwayo, J. who in a judgment delivered on 22nd September 2015, found inter alia that the 4th respondent had not established that the disputed land was riparian land. He however found that the 1st and 2nd respondents were guilty of procedural impropriety and that the registration of the appellant as the proprietor of the suit property went against the 4th respondent's legitimate expectation that it would be given a hearing of its complaint. The learned judge proceeded to issue an order of certiorari quashing the registration of land parcel number Nanyuki Municipality Block 12/123 in favour of the registered owner. The judge further issued similar orders in Civil Appeal Numbers 61 and 62 of 2015.
7. The appellant was aggrieved by the aforesaid decision thus provoking the instant appeal vide a Notice of Appeal dated 28th September 2015 and a Memorandum of Appeal dated 4th December 2015, raising 7 grounds of appeal which we shall proceed to consider shortly.
8. The 4th respondent herein also filed a Notice of Cross Appeal on 11th May 2016 and an amended Notice of Cross Appeal on 19th May 2016, in this appeal and in Civil Appeal No. 61, faulting the learned judge for failing to find, inter alia, that the suit property was riparian land.
9. The appeal was urged by way of written submissions with oral highlights by the parties on 18th May 2022. Mr. Nderi learned counsel appeared for the appellant. There was no representation on the part of the 1st, 2nd and 3rd respondents whereas Mr. Enonda appeared for the 4th respondent.
10. Mr. Nderi urged Civil Appeals No. 60 and 61 of 2015 as one. It was submitted for the appellant that there was no competent application before the trial Judge upon which he could grant or refuse to grant the order of certiorari; that the orders sought to be quashed had been made outside the 6 months' period provided under Section 9 (3) of the [Law Reform Act](#) and Order 53 (2) of the [Civil Procedure Rules](#) and that the 4th respondent in the trial court had failed to annex a copy of the order and or proceeding that it wanted quashed.



11. With regard to grounds 3, 4 and 5 of appeal, it was submitted that the judge proceeded to entertain and made a finding on irrelevant matters and that if the 4th respondent was challenging the procedural impropriety in the process of allocation of the suit parcel as the judge postulated, then it was not enough for the 4th respondent to allege it.
12. It was further submitted that in applying the doctrine of legitimate expectation as raised by the 4th respondent, it was incumbent upon the 4th respondent to show to the court that there must have arisen an unequivocal representation so as to justify an estoppel against the Commissioner of Lands (the 1st respondent herein) to deal with the suit property.
13. Finally, it was submitted for the appellant that in spite of the suit property being allocated, processed and registered in the same set of circumstances and initially to the same appellant, three matters were decided differently from the fourth. Consequently, we were urged to allow the appeal.
14. On the other hand, it was submitted for the 4th respondent that contrary to the appellant's submissions, there were two decisions sought to be impugned; the 1st one being the decision by the 1st respondent to allocate the disputed parcel to the appellant and the 2nd one being the offending notice from the 3rd respondent to the appellant on 31st December, 2012.
15. With regard to the finding that the order for certiorari had been brought outside the timelines set out under the law, it was submitted that what was being quashed was the registration of the parcel of land namely Nanyuki/Block 12/123 in favour of the present registered owners and that further the 4th respondent was never aware of the purported registration and issuance of title to the appellant and only became aware of the same upon being served with the enforcement notice by the 3rd respondent on **31st December 2012**. Further that registration of the suit property in favour of the appellant does not fall within the provisions of Order 53 (2) of the *Civil Procedure Rules*, 2010 and Section 9 (2) of the *Law Reform Act* as it is not a "*judgment, an order, a decree, a conviction or other proceedings*".
16. It was further submitted that the trial court was correct in finding that there was procedural impropriety in allocating the suit property to the appellant since the initial letter of allotment purportedly issued to the appellant by the 1st respondent was cancelled vide the letter dated 29th June 2001 on the ground that the Part Development Plan had not been approved and that there had been public outcry that resulted from the said allocation.
17. On applicability of the doctrine of legitimate expectation, it was submitted that a pre-requisite to successful invocation of the doctrine is that the person who bases his/her claim on the doctrine has to satisfy that he or she has relied on the decision maker's representation to his or her detriment and that in the instant case, the 4th respondent had demonstrated how they relied on the 1st respondent's decision to their detriment by showing that they had invested heavily in the suit property.
18. Finally, on failure to ensure parity of reasoning, it was submitted that the facts in Nyeri Judicial Review No. 4 of 2016 were different from the facts that have given rise to this appeal.
19. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by Rule 29 of the Court of Appeal Rules, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Kenya Anti-Corruption Commission v Republic & 4 others* [2013] eKLR.



20. The appellant has advanced 7 grounds of appeal challenging the findings of the trial court. From the pleadings on record, it is discernible that the appellant's appeal coalesces around 4 thematic areas. These are:
1. Whether the learned judge erred in fact and in law in failing to consider that there was not in existence a decision upon which the court would exercise its jurisdiction under Judicial Review and whether the application for certiorari had been sought within the timelines set under the law;
 2. Whether the learned judge erred in law and fact in finding that there had been procedural impropriety on the part of the 1st and 2nd respondents in exercise of their statutory duty;
 3. Whether the learned judge erred in applying the doctrine of legitimate expectation; and
 4. Whether the learned judge erred in fact and in law in failing to ensure a parity of reasoning for similar set of facts and the law.
21. The first issue that we wish to address is whether the learned judge erred in fact and in law in failing to consider that there was no decision in existence upon which the court could exercise its jurisdiction under Judicial Review and whether the learned judge erred in making a finding that an order for certiorari had been sought within the timelines set under the law. It is indeed not in dispute that one of the orders sought by the 4th respondent was an order for certiorari with respect to land title Number Nanyuki Municipality Block 12/123 quashing registration of the parcel in favour of the registered owners. The gist of the 4th respondent's application before the High Court was that the land adjacent to its property namely, land reference number 2787/424 was fronting Nanyuki river and had always been considered riparian reserve and therefore not available for allocation.

The learned judge at page 18 of his judgment stated as follows:

“In the case before this Court, what is being challenged is the registration of the parcel of land namely Nanyuki Block 12/123 in favour of the present registered owners on grounds that the said registration was in respect of riparian reserve and that the said registration was unreasonable as the principle of legitimate expectation was not applied by the Commissioner of Lands....” (Emphasis added).

In Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR this Court differently constituted stated thus:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands v Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers v Republic Civil Appeal No. 265 of 1997 (UR).

22. From the circumstances of this case, it is indeed not in dispute that what was being challenged is the allocation and registration of the parcel of land namely Nanyuki Block 12/123 in favour of the present registered owners namely, the appellant. As a matter of fact, in paragraph 22 in support of the motion, the 4th respondent contended that:

“The applicant had previously brought a suit being HCCC No. 25 of 2003 that is pending in this honourable court in regard to land reference number 12/120 which was also allocated



to the interested party and blocks the river frontage for the adjoining land parcel number 2787/417 also owned by the applicant herein.”

23. In any event, the decision that was sought to be impugned was not even annexed to the motion.
24. Regarding the other limb of this ground of appeal namely, whether the order of certiorari had been sought within the timelines set out under the law it is indeed not in dispute that one of the orders that the ex-parte applicant (now the 4th respondent) had sought in the trial court was an order of certiorari with respect to land title Number Nanyuki Municipality Block 12/123 quashing registration of the parcel in favour of the present registered owners or at all. It is also not in dispute that the appellant was registered as the owner of the aforesaid land on 23rd January 2002 whereas the 4th respondent sought leave to institute Judicial Review proceedings on 17th January 2013, a period of about 11 years from the date of the impugned allocation.
25. The learned judge while considering this issue at page 18 of the judgment stated inter alia as follows:

“Order 53, Rule 2 of the Civil Procedure Rules 2010 is a replica of Section 9 (3) of the Law Reform Act, CAP 26 Laws of Kenya and provides that leave shall not be granted for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for purposes of being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by an Act; and where the proceedings are subject to an appeal and a time is limited by law for the bringing of an appeal, the judge may adjourn the application for leave until the determination of the appeal or the time for the bringing of appeal has expired. This court has considered the two provisions and a proper construction of the said provisions would lead to a conclusion that the six months’ limitation is only in respect of judgments, orders, decrees, convictions ejusdem generis. In the case before this court, what is being challenged is the registration of the parcel of land namely Nanyuki Block 12/123 in favour of the present registered owners on grounds that the said registration was in respect of riparian reserve and that the said registration was unreasonable as the principle of legitimate expectation was not applied by the Commissioner of Lands.

I do find that the six months’ limitation is not applicable in this case as the act being challenged is not a judgment, order, decree, conviction or other proceedings as contemplated by section 9 (3) of the Law Reform Act CAP 26 Laws of Kenya and Order 53 Rule 2 of the Civil Procedure Rule, 2010 hence the argument by the interested party that the application as filed out of time is dismissed. Moreover, this court finds that there cannot be a time limit for challenging nullities unless barred by law.” (Emphasis ours)

26. The above position runs contrary to this Court’s decision in Republic v Kenya National Highway Authority & 2 Others ex-parte Amica Business Solutions Limited [2016] eKLR, where this Court (differently constituted) rendered itself inter alia thus:

“There has been debate as to whether the six months’ limitation envisaged in order 53 Rule 2 of the Civil Procedure Rules applies strictly to “any judgment, order, decree, or conviction, or other proceedings”, or whether this also includes decisions of other kinds, or letters such as the one that is the subject of this case.

In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were



aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. ...”

27. There was a decision by way of allotment of the suit property to the appellant. In our view, this decision fell under the ambit of Order 53 Rule 2 of the *Civil Procedure Rules* and hence the six-months rule was applicable.
28. The contention by the 4th respondent that he only became aware that the appellant had been registered as the owner of the suit property when they were served with an enforcement notice from the 3rd respondent on 13th December 2012, was clearly without basis. The appellant’s evidence that prior to registration she was in possession and use of the property from the year 1999 and that the 4th respondent had never taken any court action, remained uncontroverted.
29. Consequently, we hold and find that leave to institute Judicial Review proceedings having been sought on **17th January 2013**, eleven years from the date of the impugned decision i.e. on **23rd January 2002**, the 4th respondent’s Judicial Review application before the High Court was incompetent and time barred and could subsequently not stand. Accordingly, we find this ground of appeal to be merited and we hereby allow the same.
30. As to whether the learned judge erred in law and fact in making a finding that there had been any procedural impropriety shown to have been occasioned by the respondent in exercise of their statutory duty, it is indeed not in dispute that the gist of the 4th respondent’s motion in the trial court was that the suit property had always been considered riparian reserve and was therefore not available for allocation.
31. The learned judge at page 19 of his judgment held *inter alia* and in our view rightly so, that the suit property was not riparian reserve as there was no evidence to prove the same. The learned judge then proceeded to hold that there was procedural impropriety in the allocation of the land to the appellant on the grounds that the 1st and 2nd respondents did not file any replying affidavit to challenge the allegation that the 1st respondent cancelled the initial allocation and allotment vide the letter dated **29th June 2001**. It is indeed not in dispute that vide a letter dated **29th June 2001**, the 1st respondent cancelled allocation of the suit property to the appellant on the grounds that part development plan for the same had not been approved and due to public outcry. It is also not in dispute that vide a letter dated **25th September 2002**, addressed to the 1st respondent by one **J.M Ndavi**, a Land Officer with Nanyuki District Lands office he stated:

“An inspection of plot No’s Block 12/114, 115 and 116 has yielded no details as regards ownership of the same. They fall in the same zone as the ones allocated to Jennifer K. Kihoro and ironically no planning complaint has ever been raised despite that they enjoy the same river frontage. They are all fenced with plot no. 116 developed with atemporary structure.

In my opinion, it would look odd and unfair to entertain complaints raised against the allocation of Block 12/120-123 yet plot No’s 114,115 and 116 which share the river frontage and are intact and no similar complaints are being raised.

Accordingly, therefore this office is of the view that the allocation to Jennifer K. Kihoro be retained as long as the 30M riparian reserve requirement is respected...” (Emphasis added).

32. Again vide a letter dated 23rd October 2002 by the 1st respondent addressed to the 3rd respondent it was stated as follows:

“The above mentioned plots are allocated to Mrs. Jennifer Koinato Kihoro. She has paid for the same, surveyed them and preparation of titles is in progress.



However, complaints against this allocation have been received from neighbours citing various reasons. Copies of the letters are attached.

This office had considered cancellation of the said allocations, but after Mrs. Kihoro's appeal the matter has been reconsidered, therefore requiring your comments and advise.

Our District Land Officer has already done a site inspection and has expressed the view that the allottee has not interfered with the 30M riparian reserve already provide for. He has further commented that the zone has similar allocations and the allottee should not be treated differently from the rest of the neighbours.

Before I release the titles to her, please favour me with your opinion.”(Emphasis supplied).

In response to the above letter the District Commissioner, Laikipia vide a letter dated 24th October 2002 replied as follows:

Since the District Land Officer has already done a site inspection and has expressed the view that the allottee has not interfered with the 30M riparian reserve already provided for, then I have no objection for her getting the titles.” (Emphasis added).

33. In light of the above correspondences and the appellant having successfully appealed against the letter dated **29th June 2001**, which was one of the basis for the learned judge finding that there was procedural impropriety in the allocation of the suit property to the appellant, we are unable to agree with the learned judge that there was procedural impropriety in allocation of the suit property to the appellant. On the contrary as evidenced by the letters we have reproduced above, the process was transparent. Similarly, the finding by the learned judge that the 1st and 2nd respondents had not filed a reply to the suit was wholly erroneous as they had filed grounds of opposition dated **1st October 2013**, denying any impropriety on their part as well as submissions. Accordingly, this ground of appeal is merited and we accordingly allow the same.
34. The learned judge was further faulted for applying the doctrine of legitimate expectation in a suit of this nature. The learned judge while considering this issue at page 23 of the judgment stated as follows:

“The question one asks is whether the applicant had a legitimate expectation to be heard before the Commissioner of Lands caused the disputed parcel of land to be registered in the name of the interested party. This Court finds that the Commissioner of Lands cancelled the allotment letter in respect of the interested party after a public outcry including complaints by the applicant that the parcel of land in dispute was adjoining his and that it was riparian land. Moreover, there were recommendations from the District Physical Planning Officer that the registered owners of adjoining or neighbouring parcels of land be allocated the plots fronting the river and the interested party to be considered for alternative plots when available. Despite these recommendations, the Commissioner of Lands went ahead and registered the parcel of land in the names of the interested party without considering the complaints by the applicant. in the letter dated 23rd October 2002 by the Commissioner of Lands to the clerk Nanyuki Municipal Council, the Commissioner of Lands appears to have considered the interested party's appeal without affording the ex parte applicant a hearing as the decision was communicated to the applicant's lawyer for information.

This Court finds that the applicant had a legitimate expectation that he would be heard before a decision being made by the Commissioner of Lands. The audi alterium perterm rule applies in this case especially where the Commissioner of Lands makes a decision affecting the applicants land rights. The decision by the Commissioner of Lands to register



the interested party was made without offering the applicant an opportunity of making representation.”

35. The appellant is aggrieved by this finding.

According to **Harry Woolf, Jeffrey Jowell and Andrew Le Sueur** at **page 609 of the 6th Edition of DE SMITH'S JUDICIAL REVIEW**, it is stated as follows as regards to legitimate expectation:

“Such an expectation arises where a decision-maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken).”

36. We have carefully looked at the record and particularly pages **32, 39-40, 41, 42 and 43** which have been referred to us in the submissions and there is nowhere in the record where the 1st respondent allegedly made a promise to the 4th respondent regarding the suit property. The letter by the 1st respondent dated **29th June 2001** to the appellant cancelling allocation of the suit property due to, inter alia, public outcry does not amount and cannot amount to a promise to the 4th respondent that it would be allocated the suit property. As a matter of fact, there was no evidence whatsoever that the 4th respondent was one of these people who had complained to the 1st respondent regarding the aforesaid allocation. The 4th respondent seemed to be saying, if they were heard before the allocation was made to the appellant, possibly they would have been the beneficiaries. In our view, the submission by the 4th respondent in the trial court that allocation of the suit property to the appellant was prejudicial to them in “that they had always considered and had been made to believe that the land was available to them as an access to the river not to mention their lawful use” is self-defeating as the 4th respondent could not be heard to be saying on one hand that they were entitled to the suit property while on the other hand that the same was riparian land and therefore not available for allocation. We think we have said enough to demonstrate that this ground of appeal is merited and we accordingly allow the same.
37. Finally, as to whether the learned judge erred in law and fact in failing to ensure a parity of reasoning for similar facts and law in dealing with matters that were before him, we shall revert to this ground shortly when dealing with Civil Appeal No 26 of 2016, since this ground is cross cutting in all the appeals.
38. In Civil Appeal No. 62 of 2015, it was submitted that there was one peculiar issue in that leave was never obtained prior to filing of the judicial review proceedings and that the record did not show any such leave having been obtained and that the court proceeded on the premise that it had been obtained.
39. The learned judge while addressing this issue at page 2 of his judgment stated inter alia that “leave was accordingly granted on 14th January 2003 pursuant to which the notice of motion was filed on the 3.2.2003....”
40. We have carefully perused the record and it is evidently clear that the application for leave dated 22nd July 2002, was filed simultaneously with the substantive motion on 3rd February 2003. The contention by the learned judge that leave was obtained 14th January 2003 was clearly erroneous and as a matter of fact, there was no evidence of such leave having been obtained and as such the proceedings were null and void Ab initio. Consequently, we find merit in this ground of appeal as well.
41. In conclusion therefore and in light of our above findings and having considered Civil Appeal Numbers 60, 61 and 62 of 2015, we come to the inevitable conclusion that these appeals must all succeed and we hereby allow the same with an order that each party will bear its own costs. In light of the fact that we had made an order that Civil Appeal No. 60 of 2015 be the lead file, and since the circumstances in Civil Appeal Numbers 61 and 62 of 2015, are similar to Civil Appeal Number 60



of 2015, the finding in this appeal shall apply mutatis mutandis in Civil Appeal Numbers 61 and 62 of 2015.

42. With regard to the 4th respondent's Cross of Appeal where the learned judge was faulted for inter alia holding that the 4th respondent had not proved that the land in dispute was riparian reserve, we note that the 4th respondent did not address us on this issue either in its written submissions dated 18th September 2017 or in the oral highlights before us on 18th May 2022. Be that as it may, and as we have earlier found in this judgment, there was no evidence whatsoever that the suit property was on riparian reserve. To the contrary, evidence from the 3rd respondent showed that the suit property was well off within 30 meters' riparian reserve.
43. Additionally, the issues that the learned judge allegedly did not address were not stated and we further find no merit in grounds 3,4 and 5 in the Notice of Cross Appeal dated 10th May 2016. Accordingly, the 4th respondents Cross Appeal is hereby dismissed in its entirety with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

