Mohamed v Mariakani Holdings Limited & another (Civil Appeal 76 of 2019) [2022] KECA 1340 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1340 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 76 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

DECEMBER 2, 2022

BETWEEN

SHAMSHUDIN TAR MOHAMED ..... APPELLANT

AND

MINISTER'S APPEAL TRIBUNAL ..... 1ST RESPONDENT

MARIAKANI HOLDINGS LIMITED ..... 2ND RESPONDENT

(An appeal against the ruling of the High Court of Kenya at Mombasa (Ogola, J.) delivered on 12th April 2018 in Judicial Review Miscellaneous Application No. 45 of 2015)

JUDGMENT

1. In this appeal, the appellant, Shamshudin Tar Mohamed, has challenged a ruling delivered on April 12, 2018 by which the High Court at Mombasa (E.K.O Ogola, J) quashed, by an order of *certiorari*, the decision of the Minister and/or District Commissioner Kaloleni District contained in a decision certified by the Director of Land Adjudication Nairobi on August 3, 2015. In that decision, the minister dismissed an appeal by Mariakani Holdings Limited, the 1st respondent, against the appellant regarding proprietorship of plot No 5 Kawala "B" Adjudication Section Kilifi County Kaloleni District (the property). The High Court in the same ruling issued an order of prohibition, prohibiting the appellant together with his agents or the Land Registrar Kilifi from registering or causing to register the appellant as proprietor of the property pursuant to the decision of the minister.

2. The 1st respondent's case before the High Court in its judicial review application that culminated in the impugned ruling is that it is the owner in possession of a parcel of land measuring 7.3 hectares at Kabendarani/Mkwajuni, Mariakani, Kilifi County which he purchased in four parts from different vendors in 1986; that at the time it purchased the same in 1986, those parcels were un-surveyed and unadjudicated and it formally applied to the Town Council of Mariakani to set the same apart and following approval in that regard a survey was done by the Ministry of Lands and Settlement.

3. The 1st respondent averred that in 2005, two individuals named as Purshottam Govind Parmar and Somchand Mulji Shah trespassed on his land claiming ownership whereupon it (the 1st respondent) lodged a claim against them at the Kilifi District Lands Dispute Tribunal at Kaloleni, and after a trial, that Tribunal upheld the 1st respondent's claim of ownership in an award rendered on March 12, 2007; that the award was adopted as a decree by the Senior Resident Magistrates Court at Kaloleni in land case No 9 of 2007; that thereafter, the 1st respondent filed suit before the High Court against Purshottam Govind Parmar and Somchand Mulji Shah, being civil case No 324 of 2007 seeking a declaration that it is the owner of the said property and judgment was rendered in its favour on June 26, 2008.

4. In that judgment in civil case No 324 of 2007, the High Court decreed that the 1st respondent "is the owner and occupier of the parcel of land situate at Kabendarani/Mkwajuni in Mariakani Kilifi District measuring 7.310474 Ha the subject of the reference No LND/KAL/29/2005 before the Kilifi District Land Disputes Tribunal-Kaloleni". In the same judgment, the High Court also directed the Registrar of Titles to register the parcel of land "measuring 7.310474 Ha the subject of the reference No LND/KAL/29/2005 before the Kilifi District Land Disputes Tribunal-Kaloleni" in the name of the 1st respondent.

5. According to the 1st respondent, the area where its land is situated was later proclaimed and declared an adjudication area before the process of setting apart was completed and the appellant claimed to have purchased a portion of the 1st respondent's land measuring approximately 1.3 acres from one Dio Ngoka. After hearing the appellant's claim, the adjudication committee awarded that portion to the 1st respondent whereupon the appellant appealed that decision to the Adjudication Board of the adjudication area which ruled in favour of the appellant. Dissatisfied, the 1st respondent appealed to the Minister of Lands under section 29 of the *Land Adjudication Act*.

6. By notification of August 3, 2015, the minister, through the District Commissioner Kaloleni, informed the 1st respondent that its appeal had been dismissed. That set the stage for the judicial review proceedings before the High Court culminating in the impugned ruling of April 12, 2018.

7. Having obtained leave to apply for judicial review through its application to the High Court dated October 12, 2015, the 1st respondent lodged its substantive motion dated October 28, 2015 challenging the decision of the minister to dismiss its appeal. The 1st respondent's grievances with the decision of the minister were: that the panel of three members that presided over its appeal was illegally constituted contrary to section 29 of the *Land Adjudication Act*; that the decision of the panel was undated and the only person who signed the minister's decision, one Fredrick Ayieko, was not a member of the panel that heard the 1st respondent's appeal; that the 1st respondent's right to be heard was violated as the appeal was not heard in full as its witness was denied a hearing on grounds of not having identified himself; that the decision to dismiss the appeal was based on erroneous conclusion of facts, namely that the 1st respondent bought the land in 1996 when in fact the purchase was in 1986; and that the judgments of the Magistrates Court and of the High Court in land case numbers 7 of 2007 and 324 of 2007 respectively declaring the 1st respondent as owner were ignored.

8. The 1st respondent contended that the decision of the minister was therefore an abuse of statutory power, unreasonable and irrational; made without jurisdiction and in breach of the provisions of the *Land Adjudication Act*; made in bad faith and in error of fact and in breach of natural justice; an abuse of statutory discretion; biased, oppressive, and unlawful; arbitrary and un-procedural and ultra vires the provisions of the *Land Adjudication Act*.

9. The 2nd respondent, named as minister's appeal tribunal, did not defend the judicial review application. The record of proceedings shows that a Mr Ngari made appearances before the High Court on behalf

of the 2nd respondent and was granted leave to file submissions, but none were filed on behalf of the 2nd respondent.

10. On his part, the appellant, as an interested party, filed grounds of opposition asserting that the application was filed over two years from the date of the decision without a valid reason for the delay and that the application was based on factual issues which do not constitute grounds to interfere with the minister's decision. The appellant also filed replying affidavit sworn on January 20, 2016 in which he deposed that he purchased the property known as plot No Mariakani/Kawala "B"/5 on April 25, 1985 from one Dio Ngoka and has been in possession since then; that the 1st respondent "is the owner of a property situated next to [his] property known as plot No Mariakani/Kawala "B"/5"; that the Government Surveyor, one Lewis Nyangau, demarcated plot No Kawala B No 5 to him and that he approached the Adjudication Committee on August 19, 2010 which, after hearing the case, awarded him that property; that a title deed of the property was already issued to him; that the decision of the minister was given on July 17, 2013 and there was no explanation of the delay of 2 years before the judicial review proceedings were filed.

11. The 1st respondent in a further affidavit of its Director Himatlal Dharamshi Patel contested that the appellant is the owner of plot No Mariakani/Kawala "B"/5 maintaining that "the portion of land comprised in and now referred to as plot number 5 Kawala "B" Adjudication Section was purchased and occupied" by the 1st respondent since 1986 since when it "has been in continuous use and possession thereof continuously and without let or hindrance to date" and that the appellant has never been in occupation thereof.

12. The application was disposed on basis of the pleadings, affidavits and submissions filed on behalf of the 1st respondent and the appellant. As already indicated, although the 2nd respondent, whose decision was the subject of the judicial review application, was granted leave to file submissions, it did not do so.

13. In his impugned ruling, the learned judge expressed that "the sole question to be determined in this judicial review motion" is "the violations, irrationality and breaches of the law" in the decision making process of the minister's tribunal and that beyond asserting in his defence that judicial review orders were not available, the appellant did "not in his entire replying affidavit address the question and issue of the validity of the decision of the minister's tribunal which the motion sought to quash".

14. In quashing the minister's decision, the judge held that the decision of the minister was not signed by all three members of the minister's tribunal but was signed by Fredrick Ayieko alone and that "it was a procedural and legal impropriety" to omit the signatures of the other members of the tribunal; that "the decision made without the signatures of the other 2 members of the tribunal is accordingly invalid in law"; that the minister's tribunal ignored valid court orders in which a determination of ownership of the property had been made and "could not purport to decide on an issue which had already been decided"; and that in ordering the land to be registered in favour of the appellant, the panel ignored a ruling of the High Court which had already ruled that the property belonged to the 1st respondent.

15. Rejecting the contention by the appellant that the judicial review application was time barred, the judge found that the minister's decision "is not dated" and the only visible date on the record is August 3, 2015 being the date the decision was certified; that the proceedings were within the time limit under the *Civil Procedure Act* and under the *Law Reform Act* as the decision was certified on August 3, 2015 while the proceedings were filed in court on October 30, 2015. The judge expressed:

> " ...it is the finding of the court that the minister's decision certified and communicated to the applicant on August 3, 2015 is an abuse of statutory power, unreasonable, and irrational and made without jurisdiction and in breach of the provisions of the *Land Adjudication*

Act; was made in bad faith and in error of fact and in breach of natural justice. Accordingly, the notice of motion dated October 28, 2015 is allowed as prayed with costs to the ex parte applicant."

16. In his memorandum of appeal, the appellant complains that the judge failed to consider: that the 1st respondent was accorded a fair hearing; that the judicial review application was time barred; that section 29(4) of the *Land Adjudication Act* and the actual working of the appeals tribunal was not considered; and that as the appellant is already registered as the proprietor of the property, the judge erred in granting an order of prohibition well after the registration had taken place.

17. During the virtual hearing of the appeal on July 19, 2022, learned counsel Mr Njengo and Mr J. Asige for the appellant and 1st respondent respectively relied entirely on their respective written submissions. Mrs Waswa learned counsel for the Attorney General for the 2nd respondent associated herself fully with submissions by the 1st respondent in urging the court to uphold the impugned ruling of the High Court.

18. We have considered the appeal and the rival submissions. For the court to interfere with the impugned decision of the High Court, it is incumbent on the appellant to demonstrate that the judge misdirected himself in law or misapprehended the facts or took into account considerations he should not have or failed to take into account considerations he should have, or the decision is plainly wrong. See *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR where Madan, JA stated that:

> " 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."

19. Against those principles, the question in this appeal is whether the appellant has established a basis for this court to interfere with the ruling of the learned judge.

20. The first complaint by the appellant, as already noted, is that the judge fell into error in finding that the decision of the 2nd respondent was irregular and invalid on account of failure of all members of the tribunal to sign the decision. In that regard counsel for the appellant submitted that the judge misapprehended the evidence and dealt with the "proceedings like an ordinary" matter not appreciating that in judicial review proceedings the court does not sit on judgment on the correctness of the decision itself.

21. It was submitted for the appellant that the power given to the minister under section 29 of the *Land Adjudication Act* "is delegated to a single public officer" and only that person is thus empowered to decide the appeal and in this case the District Commissioner did that. According to counsel, the Judge erred in treating the entity under section 29(4) "as a collegiate tribunal or a panel hence his invalidation of the decision for lack of signatures was bad in law and should be vacated."

22. Counsel for the 1st respondent on the other hand submitted that failure by members of the tribunal to sign the decision of the 2nd respondent is a procedural impropriety and breach of natural justice, a

matter within the jurisdiction of the court in judicial review proceedings. It was urged that the claim by the 1st respondent that Fredrick Ayieko, the person who signed the decision of the Minister, was not a member of the tribunal which sat to hear and determine the appeal, was not controverted; that not having been a member of the tribunal, he had no jurisdiction to sign the decision of the tribunal.

23. We have considered this grievance. Section 29 of the *Land Adjudication Act* on appeals provides that any person who is aggrieved by the determination of an objection to adjudication register by an adjudication officer may, within sixty days after the date of determination, appeal to the minister. Section 29(4) of the same Act provides that the minister may delegate, by notice in the gazette, his powers to hear appeals...to any public office by name, or to the person for the time being holding any public office specified in such notice "and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the minister." The section reads as follows:

> "Notwithstanding the provisions of section 38(2) of the *Interpretation and General Provisions Act* (cap2) or any other written law, the minister may delegate, by notice in the gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the minister."

24. It bears repeating that, the 2nd respondent, the main protagonist in the judicial review application did not file any reply to the application. The way the panel was constituted or the way the minister exercised his power under section 29(4) was not demonstrated. No gazette notice was produced to demonstrate to whom the minister delegated his powers under section 2(4) of the Act.

25. The only material that was placed before the judge in that regard was a copy of the decision in appeal case No 87 of 2013 titled "Appeal to the Minister Lands Adjudication Act sec 29 of the *Land Adjudication Act* cap 248 against the decision of Land Adjudication Officer" in which the date of hearing is indicated as "July 17, 2013". Under the heading, "panel members" the names of "Fredrick Ayieko-District Commissioner-Kaloleni, Laban Mwanzo-technical officer, Nathaniel Mendza-taking minutes" are indicated as comprising members of the panel.

26. In the same document containing the decision, it is indicated that after presenting his submissions, the appellant was cross examination "by panel". Similarly, after the 1st respondent presented its case, there was again cross examination "by panel". The decision is then signed by Fredrick Ayieko, District Commissioner Kaloleni District and is certified on August 3, 2015. If, as counsel for the appellant would have the court believe, the tribunal was made up of Fredrick Ayieko alone, it was incumbent upon the appellant or the 2nd respondent to produce the gazette notice or other evidence showing delegation of the minister's duty to Fredrick Ayieko alone. It is also instructive that the cross examination of the parties in that appeal was undertaken by the panel.

27. Based on our own evaluation of the material placed before the High Court, the finding by the judge that "the decision has not been signed by all the members of the tribunal. It is Fredrick Ayieko who signed the decision alone" is well supported by the evidence. For the same reason, the conclusion that the decision made without the signatures of the other two members of the tribunal is invalid in law cannot be faulted and we have no basis for interfering with that conclusion.

28. Next is the complaint by the appellant that the judge erred in finding that the 1st respondent was not accorded a fair hearing. The 1st respondent in its application for judicial review asserted that that its witness, its caretaker of the property, was denied an opportunity to testify before the panel. In that regard, it was the 1st respondent's case before the High Court that the panel declined to hear the

applicant's case in full on the ground that the its witness had not identified himself by producing his identity card.

29. In his submissions before this court, learned counsel for the appellant has urged that there is nothing in the proceedings showing that the 1st respondent's witness was denied an opportunity to be heard. The appellant maintains that basic tenets of fair hearing were adhered to. Counsel for the 1st respondent has on the other hand submitted that the judge was right in holding that refusal by the tribunal to take evidence of the 1st respondent's witness was illegal, unfair and in breach of the rules of natural justice.

30. But what does the record reveal? In its findings, the minister's tribunal stated:

> " The original sellers of these plots are still alive and the area Chief and Assistant Chief are there to confirm the sale agreement and give witness but the appellant has never bothered to involve them in any of the cases instead he does come with a caretaker whom in this appeal case was not allowed to give evidence since he couldn't identify himself (he didn't have an ID)." [emphasis added]

31. The record of the decision of the tribunal speaks for itself. The claim by the appellant that there is nothing to show that the 1st respondent's witness was denied audience is therefore incorrect. It is clear from the record that the witness was not permitted to testify. The conclusion by the judge that the process was flawed is well supported by the material that was before the court. As the learned judge correctly observed in his impugned ruling, the appellant did not in his replying affidavit address the 1st respondent's grievances relating to unfairness of the decision-making process of the tribunal.

32. We next consider the complaint by the appellant that the judge erred in failing to hold that the 1st respondent's claim was time barred. Counsel for the appellant submitted that the decision of the minister was made on July 17, 2013 whilst the proceedings for judicial review were initiated on October 13, 2015. Citing order 53 of the *Civil Procedure Rules* and section 9 of the *Law Reform Act*, and the decision in *Raila Odinga & 6 others v Nairobi City Council,* Nairobi HCCC No 899 of 1993 (1990-1994) EA482, it was submitted that an application for judicial review should be made within a maximum period of 6 months from the date when the ground of the application arose.

33. Counsel for the 1st respondent has on the other hand submitted the contention that the decision was made on July 17, 2013 is not supported by any evidence; that the proceedings of the tribunal were certified on August 3, 2015 and the application for judicial review was filed two and half months thereafter.

34. The learned judge in rejecting the contention that the proceedings were time barred found that the minister's decision "is not dated" and that there is no evidence that the decision was made in 2013 as the only date visible on record is August 3, 2015, the date the decision was certified. The judge concluded:

> " The submissions by the interested party that the decision sought to be quashed is time barred is therefore not correct since the decision is certified and dated August 3, 2015 while the current proceedings are filed in court on October 30, 2015. The proceedings here in are within the time limit under the *Civil Procedure act* and under the *law Reform Act*."

35. As already stated, the decision of the minister is part of the record. Two dates appear in the entire record of that decision. The date of hearing is shown on the face of the document as July 17, 2013. The date of certification on each of the five pages of the decision is August 3, 2015.

36. No evidence was presented by the appellant that the decision of the tribunal was rendered on the same date the hearing took place. As the learned judge reasoned, there was no basis for contending that the

decision could not have been issued on the date it was certified. There is no merit in our view for faulting the judge for declining to uphold the appellant's contention that the proceedings were time barred.

37. All in all, the decision of the minister's tribunal was procedurally infirm. We think we have said enough to show that the conclusion reached by the learned judge that the minister's decision was not procedurally made, was unreasonable, and irrational is well founded and we have no basis for interfering with it. The appellant has not in our view demonstrated that the judge misdirected himself in law or misapprehended the facts or took into account considerations he should not have or failed to take into account considerations he should have, or the decision is plainly wrong.

38. In conclusion therefore, the appeal fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER 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