Waita v Deputy County Commander, Kilungu Sub-County & 2 others; Mwove (Interested Party) (Environment and Land Judicial Review Case E016 of 2022) [2024] KEELC 3754 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3754 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E016 OF 2022

TW MURIGI, J

APRIL 24, 2024

BETWEEN

JACKSON NYAMAI WAITA .... APPLICANT

AND

THE DEPUTY COUNTY COMMANDER, KILUNGU SUB-COUNTY .... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT (MAKUENI-COUNTY) .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

AND

FRANSICA RHODA MWOVE .... INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 14th November, 2022 brought under Order 53 Rules 1(4), 1(1), (2) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the Ex-parte Applicant seeks the following orders: -
    1. THAT an order of Certiorari to remove into the High Court and quash the proceedings, judgment and orders made by the 1st Respondent on 17th March 2022 in appeal to the Minister Case No. 136 of 2016 between the Applicant and the Interested Party.
    2. THAT an order of Prohibition against the 1st Respondent and/or her agents be issued to prohibit Surveyors from entering, interfering, implementing and/or effecting the decision of the 1st Respondent delivered on 17th March 2022 over land parcel No. 3303 Wautu Adjudication Section.

3. THAT an order of Mandamus be issued compelling the Commissioner of Lands through the Minister of Lands and Settlement to issue Title Deed in respect of Parcel No. 3303 Wautu Adjudication Section to the Applicant herein.

4. THATthe costs of this application be in the cause.

2. The application is premised on the grounds appearing on the Statutory Statement together with the verifying affidavit of Jackson Nyamai Waita sworn on even date.

The Ex Parte Applicant's Case

3. The Applicant averred that he was not accorded a fair hearing in the Appeal before the Minister. He averred that he successfully challenged the dispute in respect of the suit property before Machakos Law Courts and that the decision was upheld by the High Court in Nairobi. According to the Applicant, the Minister did not arrive at an independent decision and as such, he urged the court to quash the decision of the 1st Respondent and compel the Commissioner of Lands to issue him with a title deed in respect of Plot No. 3303 Wautu Adjudication Section.

The Respondents Case

4. The Respondents opposed the application through the grounds of opposition dated 30th November 2022 citing the following grounds:-

   1. THAT Section 29(1) of the *Land Adjudication Act* Cap 284 provides that the decision of the Minister in an Appeal to the Minister is final hence this Honourable court has no jurisdiction to entertain this application which challenges the merits of the decision of the Minister.

   2. THAT a judicial review court is concerned with reviewing not the merits of the decision of which the application for judicial review is made but the decision making process itself.

   3. That the application herein offends the mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules as read with Section 9(3) of the *Law Reform Act* as it was filed more than 6 months after the impugned decision was delivered.

   4. That contrary to the allegations by the Applicant, the said Applicant was accorded a fair hearing as he was present and participated in the proceedings before the Minister.

   5. That the application as drawn has not disclosed the relevant grounds for grant of the reliefs sought.

   6. That the application as drawn and taken out is bad in law, incompetent and otherwise an abuse of the process of this Honourable Court.

5. On the basis of the above, the Respondents urged the court to dismiss the application with costs.

The Interested Party's Case

6. In opposing the application, the Interested Party filed a replying affidavit dated 10th February 2023.

7. According to the Interested Party, the instant application does not fall within the ambit of judicial review since the Applicant is challenging the merits of the decision.

8. The Interested Party gave a background of the dispute in respect of the suit property and stated that it was heard at the Committee stage all the way to the Minister on Appeal. She averred that Serah Mutu

the wife to the late Nathan Mulili sold to her the suit property and denied the allegations that the Applicant was the successful party in the case against Serah Mutu.

9. According to the Interested Party, Nundu Kitulu appealed against the judgment in Kilungu Civil Case No. L56/70 to the RM Court in Machakos where the court found that the land was different from the suit property. She went on to state that in the year 2000, the Applicant's father along with his relatives were charged and convicted for the offence of trespassing on her land in Criminal Case No 279/2000. She asserted that both parties were accorded a fair hearing in the Appeal before the Minister.

10. She contended that though the judgment in Civil Appeal No. 121 of 1971 was in favour of the Applicant's grandfather, the same has no bearing to the instant proceedings since it does not affect the suit property.

11. She denied the allegations that the suit property belongs to the Applicant or that his father ever owned the same.

12. The parties filed their respective submissions which I have duly considered.

Analysis And Determination

13. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination:-

    1. Whether the application has been filed out of time.

    2. Whether the Applicant is entitled to judicial review orders.

Whether The Application Has Been Filed Out Of Time

14. The Respondents argued that the application herein offends the provisions of Order 53 of the Civil Procedure Rules as read together with Section 9(3) of the *Law Reform Act* as the same was filed more than six months after the decision was made.

15. Section 9(3) of the *Law Reform Act* provides for the time frame within which an application for an order of Certiorari should be made and states as follows;

> "In the case of an application for an order for certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to an appeal, and a time is limited by the law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

16. The above provision is echoed in Order 53 Rule 2 of the Civil Procedure Rules which provides as follows;

> "Leave shall not be granted to apply for an order of certiorari to remove to court any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal,

the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

17. The provisions are couched in mandatory terms that leave shall not be granted unless the application for leave is made not later than six months after the date of the decision.

18. In the case of Republic v Mwangi Nguyai & 3 Others Ex – Parte Haru Nguyai High Court Constitutional & Judicial Review Division Misc. Application No. 89 of 2008 the court stated as follows;

> "Judicial review proceedings ought as a matter of public policy to be instituted heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognized that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order the affairs in light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to far that their investment or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot to have such uncertainity. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes."

19. Similarly, in Republic v the Minister for Lands and Settlement & Others Mombasa HCMCA No. 1091 of 2006 the Court held that the legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

20. In the matter at hand, the impugned decision was made on 17th March 2022. The instant application was filed on 1st November 2022 seven months and 25 days after the decision was made. It is clear that the instant application was filed outside the time frame stipulated by the law.

Whether The Applicant Is Entitled To Judicial Review Orders

21. The duty of a Court in Judicial Review proceedings was set out in the case of Pastoli Vs Kabale District Local Government Council and Others (2008) 2 E.A 300 where it was held as follows:-

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ..... Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality .... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards ..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with

procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.'

22. The parameters of Judicial Review were re-affirmed by the Court of Appeal in the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd C.A Civil Appeal No. 185 of 2001 where it held as follows:-

> "Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision."

23. It is not in dispute that the 1st Respondent had power to hear and determine Appeal Case No. 136 of 2016 in accordance with Section 29 of the *Land Adjudication Act*.

24. The Ex-parte Applicant is seeking to quash the decision of the 1st Respondent in Minister Appeal Case No. 136 of 2016 delivered on 17/03/2022 on the grounds that the was not accorded a fair trial.

25. The right to be heard is a Constitutional right enshrined in Article 47 and 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.

26. Article 47(1) and (2) of *the Constitution* provides as follows;

    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.

27. It is clear from the above provisions that the tribunal or authority entrusted with the mandate of making decisions must act in a fair manner. Procedural fairness is a Constitutional requirement in administrative actions.

28. Article 50(1) of *the Constitution* provides for fair trial as follows:-

> Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.

29. Section 4(3)(b) of the *Fair Administrative Action Act*, 2015 imports the rules of natural justice and provides as follows:-

    1. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:

        a. an opportunity to be heard and to make representations in that regard;

30. The Ex Parte Applicant averred that the 1st Respondent did not render an independent decision because he was not accorded a fair trial. According to the Respondents as well as the Interested Party,

the parties in the Appeal proceedings were accorded an opportunity to be heard and present their respective cases. At this juncture, this Court is called upon to determine whether the Ex Parte Applicant was granted a fair hearing in the Appeal proceedings before the Minister.

31. The Ex parte Applicant averred that the dispute in respect of the suit property was successfully challenged in Machakos Civil Appeal No. 73 of 1971 and subsequently upheld in by the High Court in Civil Appeal No. 121 of 1971. The Interested Party on the other hand averred that the dispute was first heard by the Land Adjudication Committee all the way to the Minister on Appeal. She maintained that the decision on Appeal has no relevance to the instant proceedings since it does not relate to the suit property herein.

32. According to the evidence presented by the parties herein, it is apparent that the Appeal before the Minister emanated from the decision of the Land Adjudication Officer made on 27/02/2014 in favour of the Applicant.

33. I have perused the proceedings and findings in Minister's Appeal Case No. 136 of 2016 conducted before the Deputy County Commissioner Kilungu Sub County and I note that the Ex parte Applicant was the Appellant while the Interested Party was the Respondent. Both parties were recorded as having been sworn and gave evidence. It is evident that they participated in the proceedings by giving evidence, cross examination and calling witnesses.

34. The Applicant gave his testimony and was allowed to cross-examine the Respondent and her witness. He fully participated in the proceedings before the Minister. The Minister dismissed the Appeal and ordered that Plot No. 3303 to remain the property of the Respondent as recorded.

35. This Court finds absolutely no evidence of bias or unfair treatment. There is similarly no evidence on record, or material from which it may reasonably be inferred, that the 1st Respondent was biased or unfair towards the Applicant.

36. There is no evidence to demonstrate that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicant has not demonstrated that such was case in the instant application.

37. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of Republic Vs Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eKLR, where it was held that;

> " The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected…."

38. Similarly, in Republic Vs Secretary of the Firearms Licensing Board & 2 Others Ex parte Senator Johnstone Muthama [2018] eKLR it was held, inter alia, that:

> " The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of the purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in Republic Vs. Kenya

Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself."

39. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is in reality aggrieved by the merits of the decision of the 1st Respondent. They have nothing to do with the decision making process. This was, in effect, an appeal disguised as a judicial review application. He was aggrieved because the 1st Respondent overturned the earlier decision which was in his favour. In my opinion, a judicial review remedy would not be available in these circumstances.

40. In the end, I find that the Ex Parte Applicant has not met the threshold for the grant of the orders sought.

41. The upshot of the foregoing is that the Notice of Motion dated 14th November 2022 is hereby dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 24TH DAY OF APRIL, 2024.

IN THE PRESENCE OF

HON. T. MURIGI

JUDGE

Onyancha for the Ex Parte Applicant

Kiluva for the Interested Party

Court assistant Alfred.