



Republic v Deputy County Commissioner, Bondo Sub - County & 2 others; Abaja (As the Legal Administrator of the Estate of Michael Kute - Deceased) (Interested Party); Obara (Exparte Applicant) (Judicial Review E002 of 2023) [2024] KEELC 4392 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
JUDICIAL REVIEW E002 OF 2023**

**AY KOROSS, J
MAY 30, 2024**

BETWEEN

REPUBLIC OF KENYA APPLICANT

AND

**THE DEPUTY COUNTY COMMISSIONER, BONDO SUB -
COUNTY 1ST RESPONDENT**

**THE MINISTER OF LANDS PUBLIC WORK, HOUSING AND URBAN
DEVELOPMENT 2ND RESPONDENT**

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

AND

**CHRISTOPHER OBINDA ABAJA (AS THE LEGAL ADMINISTRATOR OF THE
ESTATE OF MICHAEL KUTE - DECEASED) INTERESTED PARTY**

AND

DOMNIC OBARA EXPARTE APPLICANT

JUDGMENT

1. According to leave granted by this court on 16/10/2023, the ex parte applicant filed a notice of motion dated the same date. The motion was moved under the provisions of Order 53 Rule 3 and 4 of the [Civil Procedure Rules](#) whereby he sought the following judicial review orders and other orders: -
 - a. An order of prohibition directed at the chief land registrar stopping him from registering plot no. 722 in the Nyaguda Adjudication section in the name of Christopher Obinda Abaja.



- b. An order of certiorari directed at the deputy county commissioner-Bondo sub-county acting on the delegated powers of the minister of land, sitting at Bondo sub-county concerning Appeal case no. 223 of 1999 for purposes of quashing the decision.
 - c. Costs of the motion be in the cause.
2. The motion was supported by the supporting affidavit which was deposed on even date by the ex parte applicant Dominic Obara and premised on the following summarized grounds: -
 - a. In a decision by the minister dated 18/04/2023 in appeal no. 223, the minister reverted the ex parte applicant's parcel of land no. 722 to the interested party.
 - b. The process of arriving at the decision was tainted with illegality since the interested party and Francis Onegi (deceased) had at different intervals represented Michael Kute (deceased) without first obtaining letters of administration.
 - c. That in the absence of capacity, the minister's decision should be quashed.
 - d. The ex parte applicant will suffer irreparable loss and it was in the interests of justice if the motion was allowed.
3. It was the ex parte applicant's case that he and the interested party's family had a long-protracted dispute that had been adjudicated by various dispute resolution bodies created by the [Land Adjudication Act](#) which were respectively the district land adjudication committee ('LAC'), arbitration board ('AB'), land adjudication officer ('LAO') before a final appeal to the minister.
4. He contended that all these bodies with exception of the minister had found land parcel no. 722 (suit property) belonged to him.
5. He stated that before LAC, AB, and part of LAO, the dispute was between him and Michael Kute (Michael). Nevertheless, Michael died in the course of the proceedings before the LAO and he was replaced by his wife Maria Kute (Maria), and that all parties that represented Michael in the proceedings did not have the capacity as they did not have letters of representation.
6. The interested party was represented by Mr. Ochanyo of the firm of Ms. Jesse David, Ochanyo & Kurgat Advocates LLP (JDOK LLP). Though the interested party had filed a PO dated 29/01/2024, it was expunged from the court record. Consequently, the motion was unopposed.
7. The motion was disposed of by written submissions and the ex parte applicant's law firm on record M/s Owiti, Mwalo, Odhiambo & Associates Advocates filed their written submissions which were filed on 29/01/2024. Nevertheless, none of the other parties filed their respective written submissions.
9. In their submissions, the ex parte applicant's counsel submitted this court had jurisdiction to grant judicial review orders on grounds of illegality, irrationality, and procedural impropriety and relied on the case of [Council of Civil Service Unions v Minister for the Civil Service](#) (1984) 3 ALL ER 935.
10. In rehashing grounds contained in the motion, the ex parte applicant's counsel submitted in the absence of capacity during the hearing before the minister, the motion should be allowed and relied on the case of [Republic v Minister for Lands & another Ex-Parte Catherine Mateta Musinga](#) [2021] eKLR where the court stated: -

“In the instant case, the Respondent was obliged not to proceed with the hearing and determination of the Appeals until the estate of Loise Waiu was represented. The court equally notes that even at the time when the decision with respect to the objection was made,



Loise was deceased. The decision ought not to have been made until such a time proper legal representation had been made and presented to the adjudication officer. The adjudication officer ought not to have delivered his decision in the objection filed by the appellant herein on the grounds that one of the Respondent namely Loise Waiu was deceased.”

11. Before I identify the issues for determination and analyze them, I must deal with certain pertinent legal issues that arose from the ex-parte applicant’s motion.
12. The 1st one is that the republic and respondents who are public persons are ordinarily represented by the attorney general who is the chief legal adviser and is usually notified of civil proceedings and receives service of court pleadings and represents them.
13. However, notwithstanding not being joined to these proceedings, the attorney general entered appearance for them and cured the anomaly.
14. The 2nd one is that once leave had been granted to the ex parte applicant, he was expected to file the notice of motion which would ordinarily be accompanied by documents he filed at the leave stage which were the verifying affidavit, statutory statement, and annexures attached therein. Order 53, Rule 4 of the *Civil Procedure Rules* provides thus: -

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

15. Nonetheless, the ex parte applicant did not comply with these requirements of the law and instead filed a supporting affidavit together with several annexures attached to it. Be that as it may, the averments contained in the supporting affidavit rehashed containments of the statutory statement and verifying affidavit that were filed at the leave stage and the documents attached thereto were similar to the documents availed at the leave stage.
16. I have considered the ex parte applicant’s pleadings and submissions including the well-cited provisions of law and authorities. I find the following 2 issues fall for determination: -
 - a. Whether the interested party needed to obtain letters of administration on Michael’s estate before participating in proceedings before the minister and if in the affirmative, did the 1st respondent act illegally?
 - b. What orders should this court issue including an order as to costs?

a. Whether the interested party needed to obtain letters of administration on Michael’s estate before participating in proceedings before the minister and if in the affirmative, did the 1st respondent act illegally?

17. Section 13 (1) of the *Land Adjudication Act* provides for modalities of attendance by persons before the various quasi-judicial judicial entities that parties subject themselves to in the said Act in the following terms: -

“(1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out



his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.

- (2) Every person whose presence is required by the adjudication officer, demarcation officer, recording officer, committee or board shall attend in person or by a duly authorized agent at the time and place ordered.
- (3) If any person who is ordered to attend fails to attend in person or by a duly authorized agent, the demarcation, recording, adjudication or arbitration, as the case may be, may proceed in his absence.
- (4) If the demarcation officer or the recording officer considers that a person who has not made a claim has an interest in land within the adjudication section, he may, but is not bound to, proceed as if that person had made a claim.
- (5) Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.”

18. Considering the core mandate of the *Land Adjudication Act* is to ascertain customary interests over land, this provision of law breaths life into and gives room for any person including a successor of a deceased person to claim land, and such a successor is deemed to represent interests over the said land.
19. The question that suffices is whether such a successor who has an interest in the land needs to be appointed by the court as a legal administrator of the estate of a deceased person who had an interest in the land. This question is not new and has been the subject of interpretation and determination in various court decisions.
20. In the detailed decision of *Republic v District Commissioner Machakos & another ex-parte Kakui Mutiso* [2014] eKLR, Odunga J (as he then was) analyzed the preamble of the *Land Adjudication Act* and *Law of Succession Act* and stated thus: -

“In such instances, it is my view that the application of the strict succession legal regime does not apply since in my view the issue of estate may not be readily applicable to ancestral or communal property as such. My view is supported by the provisions of the *Law of Succession Act*, Cap 160 Laws of Kenya. Under section 79 of the Act:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

Therefore the property which vests in the personal representative of the deceased is the property of the deceased. Under section 3 thereof “estate” is defined to mean “the free property of a deceased person” while “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death”.

In my view communal property cannot therefore be said to form part of the estate of the deceased. It would therefore follow that before the land is registered in the name of a person and thus bestowed with individual tenure thereof, the land in question cannot form part of



the estate of the deceased in order to require a person claiming the same to obtain letters of administration before making such a claim.”

[See also *Peter N. Ngandi & 2 others v John Muthami & another* [2022] eKLR]

21. From the evidence, the ex-parte applicant has not been entirely truthful with this court. In following quasi-judicial procedures outlined in the said *Land Adjudication Act*, the ex-parte applicant complained against Michael before the LAC. Upon hearing all parties and their witnesses, the ex-parte applicant’s case was allowed on 18/07/1986.
22. Aggrieved, Michael appealed to the AB, and upon hearing both parties, the suit property was awarded to him on 22/04/1996. Dissatisfied, the ex-parte applicant appealed to the LAO who allowed his appeal. This appeal was against Michael who was then deceased and represented by Maria. It is noted the ex-parte applicant never raised any objection to her participation in the proceedings.
23. Due to Maria’s incapacity, Francis Onegi who was Michael’s stepson, appealed to the minister on her behalf. It appears Francis Onegi died and the interested party who was a cousin took over the proceedings. On hearing parties, the suit property was reverted to Michael on 18/04/2023.
24. The decision of the minister is usually final. From the proceedings and analysis of the law which were earlier highlighted in this judgment, there was no breach of the law by the LAO or minister in allowing any of Michael’s family members to proceed with the cases upon his demise. This explains the ex-parte applicant’s silence during the entire proceedings.
25. The *Law of Succession Act* deals with the free assets of deceased persons. Nevertheless, land within an adjudication process is not individual or free land of a person but rather it is communal land whose owner is yet to be established.
26. Once ascertainment of rights over land under the *Land Adjudication Act* concludes, then by Section 28 of this *Act*, the land registrar commences the process of individualism by registering land in the name of the individual owner who has been identified through the rigorous process of the said *Act* and this is done per Sections 6 and 7 of the *Land Registration Act*.
27. In the absence of an individual title document in respect of the suit property in Michael’s name, I find there was no need for the interested party or any other person who represented him during the land adjudication process to obtain letters of administration.
28. The decision of *Republic v Minister for Lands & another Ex-Parte Catherine Mateta Musinga* (supra) that counsel relies upon is distinguishable from the circumstances of this case since in that case, the deceased person was never represented in the proceedings by any party.
29. Thus, for the reasons stated above and in addressing the 2nd issue, I find the motion dated 16/10/2023 is not merited and I hereby dismiss it with costs to the respondents and interested party.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 30TH DAY OF MAY 2024.

HON. A. Y. KOROSS

JUDGE

30/5/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:



Mr. Odhiambo for *ex-parte* applicant.

Mr. Ochanyo for the interested party

N/A for the applicant

N/A for the respondents

