



Muthoka & another (Suing as the administrators of the Estate of Mwangangi Muthoka) v Musyimi (Suing as the administrator of the Estate of Musyimi Kilonzo) & 3 others (Environment and Land Constitutional Petition 15 of 2020) [2024] KEELC 4611 (KLR) (10 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4611 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 15 OF 2020

CA OCHIENG, J

JUNE 10, 2024

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 27, 28, 29(D), 40, 47, 48, 50(1), 52, 64, 162(2) (B) AND 159 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 159 OF THE CONSTITUTION AND OTHER FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF CONTRAVENTION OF RIGHT TO ACQUIRE, OWN AND ACCESS PROPERTY

AND

IN THE MATTER OF LAND ACT AND LAND REGISTRATION ACT

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT

BETWEEN

ANDREW MUTHAISU MUTHOKA AND NDOLO MWANGANGI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF MWANGANGI MUTHOKA) PETITIONER

AND

GODFREY KISWII MUSYIMI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MUSYIMI KILONZO) 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LANDS AND HOUSING 2ND RESPONDENT



JUDGMENT

1. By an amended Petition dated the 25th February, 2022, the Petitioner seeks the following prayers as against the Respondents jointly and severally:-
 - a. That an Order of Certiorari do issue to bring to this Court and quash the decision of the 2nd Respondent contained in a judgement issued on 28th June, 2017 in Land Adjudication Appeal number 228 of 2007 over land parcel number 1525 Kangonde/Masinga Adjudication section.
 - b. That an Order of Prohibition do issue prohibiting the 3rd Respondent from registering the 1st Respondent as the proprietor of the land parcel number 1525 Kangonde/Masinga Adjudication section.
 - c. That an Order of mandamus do issue directing the 3rd Respondent to excise the portion in dispute awarded to the Petitioner by the District Magistrates Court at Yatta in Civil Case number L48 of 1973 and issued a new number from 1525 and the same registered in the name of the Petitioner.
 - d. That an Order of mandamus do issue directing the 3rd Respondent or any other person under him or Registrar of Lands in Charge of Kangonde/Masinga Adjudication section to register the Petitioner as the proprietor of land parcel number 1525 Kangonde/Masinga Adjudication section.
 - e. That in the alternative to prayer 3 above, the 2nd Respondent do appoint another Deputy County Commissioner to hear and determine the Appeal number 228 of 2007 in respect to land parcel number 1525 Kangonde/Masinga Adjudication section.
 - f. Any other relief or orders that this Honourable Court shall deem fit to grant.
2. The 1st Respondent opposed the Petition by filing a Replying Affidavit sworn by GODFREY KISWII MUSYIMI where he deposes that the instant Petition is res judicata as validity and legality of the Tribunal's decision was determined in HC (JR) 112 of 2017: Republic v Cabinet Secretary, Ministry of Lands Housing and Others, Josphat Mwanzia & 3 Other Interested Parties. Ex parte Musyimi Kilonzo. He contends that this court is functus officio. He highlights the background of the dispute herein and explains that his late father acquired the suit parcels of land when the said Land was governed by the Crown Lands Ordinance of 1901.
3. He states that in 2007, the late Mwangi Muthoka's family filed an appeal before the Minister, Lands and Settlement over land parcels 2330, 2331 and 1525 vide Appeal No. 228 of 2007. Further, the Appeal was filed in the name of the late Mwangi Muthoka as well as the names of his four sons among them the Petitioner herein who was listed as the second Appellant and who testified under oath in the said Appeal. He claims the late Mwangi Muthoka's Appeal was lodged, 10 years after the decision he wished to challenge had been made. Further, after hearing both parties, the Deputy County Commissioner sitting in as the duly delegated Officer by the Minister, Lands and Housing, issued a Judgment on 28th June, 2017 declaring that parcel No. 1525 was not part of the dispute and was to remain in the name of his late father. He avers that the Appeal was lodged by the Petitioner herein,



without any legal capacity to do so as his father, the late Mwangi Muthoka had long passed away and no Grant of Letters of Administration had been issued to the Petitioner or his siblings and therefore the entire proceedings were a nullity ab initio as held by this Court, when it issued Judgment in HC (JR) 112 of 2017.

4. He reiterates that the Petitioner is attempting to sanitize the illegality of the proceedings in Land Adjudication Appeal No. 228 of 2007 over land parcels No. 2330, 2331 and 1525 through the present Petition. Further, that the Petition is defective and ought to be dismissed. He reaffirms that this Court having rendered a determination over all other parcels of land earlier claimed by the Petitioner's late father, the Petitioner is now cleverly attempting to drag the last portion of his late father's land into the protracted and vexatious litigation that has been visited upon their late father by the Petitioner's father. He contends that the Petitioner herein is guilty of perjury in that, he averred that he was the one sued by his late father in 1973 at the District Magistrate's Court Kithimani, Yatta, in DMCC L. 48 of 1972, as stated in the Petitioner's paragraphs 5 to 22 of the Petition as well as paragraphs 38 to 44 of the Petition. Further, that the dispute over land was between the Petitioner's father and his late father. He deposes that the instant Petition is premised on fraud and does not disclose any breach of the Petitioner's rights. Further, it does not disclose any cause of action against the Respondents, is vexatious and an abuse of court process.
5. The 2nd, 3rd and 4th Respondents' opposed the Petition by filing Grounds of Opposition dated the 2nd December, 2022, seeking for the Petition to be dismissed with costs. In the said Grounds of Opposition, the said Respondents state that:-
 - a. That the Petitioners went through the procedure of redress provided for in the Land Adjudication Act i.e. Committee Stage, Arbitration Board Stage, Objection before the Adjudication Officer and finally Appeal before the Minister as demonstrated by their annexures.
 - b. That it is evident from annexure 'AM8' that the Petitioners appeared and fully participated during the hearing of Appeal No. 228/2007 before the Minister. The Petitioners' cannot therefore allege that the Appeal was heard in the absence of the Administrators of the Estate while it is evident they were both present.
 - c. That this Petition has not met the threshold for granting Judicial Review Orders sought.
 - d. That this Petition is misconceived, mischievous, an afterthought and an abuse of the court process hence subject for dismissal.
 - e. The Petition was canvassed by way of written submissions.

Submissions

6. The Petitioner in his submissions provided the background of the dispute herein. He provided the constitutional foundations of the Petition and enumerated the particulars of the violations which the Respondents meted upon him. He challenged the Respondents' case. He argued that there were two Appeals which culminated in the Appeal No. 228 of 2007, to the Minister. Further, the one he filed was number ADR/98 over parcel number 1525 and the one by the Respondent was number KND/66/98 over parcel number 1522. He insisted that the Appeal ARD 7/98 over parcel number 1525 was never heard and determined and if it was ever heard, then they were never granted a chance to be heard.
7. He further submitted that the decision was illegally arrived at and contrary to the Judgment of the Court in JR 112 of 2017. Further, that the Minister ignored the Court's Judgment in Kithimani District Magistrate's Court in Case No. L.48/7 - MUSYIMI KILONZO vs MWANGI MUTHOKA.



He reiterated that the Petition was merited as the Respondents violated their right to acquire, own, access and use land. Further, that the estate was not accorded a chance to be represented and heard. He further submitted that the right to be heard is a principle of natural justice and should not be curtailed. To support his averments, he relied on the following decisions: *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015)* (2021) KESC 39 (KLR) (Civ) (6 August 2021) (Judgement) and *Kimeu Musyoka v District Commissioner Kathiani District & 10 Others* (2019) eKLR.

8. The 1st Respondent in his submissions reiterated his averments as per the Replying Affidavit and insisted that the Petitioner's fundamental rights and freedoms were not violated/infringed. He explained that there was a previous court decision, which had demarcated the land belonging to the 1st Respondent and the Petitioner herein. Further, that the 2nd Respondent was mandated to align his decision with that of the learned Magistrate since the Petitioner's late father never appealed the said decision. Further, that the Minister complied with the law by holding that parcel no. 1525 should remain as registered in the Adjudication Register.
9. He argued that, from the record of proceedings of the Appeal, before the Deputy County Commissioner on 28th February, 2017, the Petitioner and his witnesses were heard hence the 2nd Respondent did not contravene *the Constitution*. He contended that the Petitioner participated in the Appeal to the Minister and in the Judicial Review Application No. 112 of 2017 as he was mentioned as the 2nd Interested Party. It was hence incorrect for the Petitioner to aver that the District Magistrate's Court at Yatta in Civil Case No. L 48 of 1973 granted the suit land to him. To buttress his averments, he relied on the following decisions: *Dominic Musei Kombo v Kyule Makau* (2019) eKLR and *Joseph Mudamba Ojwang v John Opondo Onyango & 4 Others* (2022) eKLR.
10. The 2nd, 3rd and 4th Respondents' in their submissions contended that the Petition did not meet the test of a Constitutional Petition as laid down in the case of *Anarita Karimi Njeru v Republic* (1979) eKLR and buttressed in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR. They argued that the Petitioner had not demonstrated how his rights under Articles 19, 20, 21, 22, 23, 25, 27, 28, 40, 47, 48, 50 and 159 of *the Constitution* were violated or infringed upon by the Respondents. They contended that the Petition had not met the threshold for granting judicial review orders as sought. They averred that the Deputy County Commissioner had jurisdiction to hear the Appeal as provided for under section 29 of the *Land Adjudication Act*. Further, that the persons' affected by his decision were heard as the Petitioner went through the process of redress. They further submitted that the Deputy County Commissioner while making his decision took into account relevant matters as parcel No. 1525 was separate from the disputed parcels in the said Appeal. To support their averments, they relied on the following decisions: *Republic v Attorney General & Another, Ex parte Joyce Muthoni Michuki* (2019) eKLR; *Gilbert Joseph Kabunjia v Land Adjudication and Settlement Officer Meru South & 3 others*; *County Government of Tharaka Nithi (Interested Party)* (2019) eKLR and *Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others* (1997) eKLR.

Analysis and Determination

11. Upon consideration of the Petition, the respective affidavits, annexures and submissions, the following are the issues for determination:
 - a. Whether the Petitioner is entitled to orders of mandamus, certiorari and prohibition in respect to decision of the Minister in Appeal No. 228 of 2017 in regard to land parcel number 1525 Masinga/Kangonde.



- b. Whether the Petition is merited.
12. The Petitioner claims the Respondents' violated his rights because they failed to consider the judgement in Yatta District Magistrate's Court Case No. L 48 of 1973, which had been instituted in 1973, wherein the trial Magistrate had declared that the boundary between the Petitioner's and 1st Respondent's land was Katuta River. He insists that the area was declared an adjudication section during which process the demarcation officer, gave a portion of land which was awarded to him, to the 1st Respondent. Further, that the portion was incorporated into the land belonging to the 1st Respondent and assigned parcel number 1525. He contends that the 1st Respondent filed Committee Case No. 21 dated the 28th June, 1994, wherein the Committee acknowledged that the Petitioner had a portion awarded to him by Court at Yatta but never gave orders to that effect. He confirms appealing to the Arbitration Board vide Case Number ARD/7/98 dated 27th February, 2001 which was heard and dismissed. Further, he lodged an Appeal to the Minister, but before the Appeal was heard their father passed on. Consequently, the Appeal was heard in the absence of the Administrator of the Petitioner's estate and dismissed with costs. He insists that the representative of the Minister who heard the Appeal was biased and considered extraneous matters. Further, he failed to rely on the Judgement from the Yatta Court and denied him a fair hearing. He hence seeks to quash the decision under the Appeal No. ARD/7/98 concerning parcel no. 1525.
13. On perusal of annexure 'GKM 2' which includes the proceedings and Judgment in Appeal No. ARD/7/98, I note the Appellant therein testified including two witnesses. The Respondent also testified after which, the Appeal was dismissed and it was directed that the land in dispute to remain the property of the Respondent Musyimi Kilonzo. The impugned proceedings and Judgment forms part of the fulcrum of this Petition wherein the Petitioner seeks orders of Judicial Review.
14. Lord Diplock in the case of Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D clearly set the standards of Judicial Review when he stated thus:-
- “Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”
15. While in the Supreme Court in Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 it was held that:-
- “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”



16. Further, in the case of *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001, it was held that:-

“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 makers 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... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

17. On Fair Administrative Action, Article 47 of *the Constitution* provides that:-

“(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 (1) 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.”

18. From perusal of the proceedings including findings of the impugned Appeal, I note the Petitioner who was one of the Appellants, therein actually participated in the hearing, extensively presented his claim including witnesses and thereafter received the verdict of the Deputy County Commissioner (DCC) representing the Minister. This is evident in annexure ‘AM8’, where the Appellants were Mwangangi Muthoka (deceased), Andrew Muthoka, Ndolo Mwangangi and Josphat Mwanzia. Further, the three appeared and fully participated during the hearing of Appeal No. 228/2007 before the Minister. I find that the Petitioner cannot therefore allege that the Appeal was heard in the absence of the Administrators of the Estate, yet the sons of the deceased including himself, were Appellants. I note they presented evidence including witnesses and on 28th June, 2017, the DCC entered Judgment as follows:-

“The Appeal on parcel no. 2330 and 2331 is allowed. The parcels to be registered in the names of the Appellant - Mwangangi Muthoka. The Appeal on parcel No. 1525 is dismissed with costs. The land to remain as registered.”

19. The Petitioner has sought to heavily rely on the proceedings and Judgment in the Yatta Case, which was between the 1st Respondent’s father as Plaintiff and his father as the Defendant. The said Proceedings and Judgment are marked as annexure ‘GKM – 1(a) and (b)’. I wish to reproduce an excerpt therefrom:-

“I find that there is a river they call Kwakatuta stream, which divides the Plaintiff’s and Defendant. I find that Plaintiff came there first and Defendant him, in his house. Lastly Defendant moved on his new land and left Plaintiff where he found him living... I have



considered this case carefully and found that clan elders had no right to divide it. This is simply because the Plaintiff came there in 1943 while Defendant followed him in 1955 Since the Defendant moved on his own land in 1961 he never raised any claim across the stream.”

20. The Petitioner insists that the Minister should have relied on the Judgment therefrom which, I note was actually decided in favour of the 1st Respondent.
21. Based on the facts as presented while associating myself with the decisions quoted, I find that the Petitioner was indeed accorded an audience. To my mind, I find that no rules of Natural Justice were violated by the Respondents as against the Petitioner. Further, from the proceedings, I do not see any elements of procedural impropriety, unfairness or bias as claimed.
22. It seems to me that the Petitioner had a challenge with the decision of the DCC and wanted the court to go to the merits of the said decision by analyzing the evidence presented but this is not within the ambit of the orders of Judicial Review, that he is seeking. It is my considered view that the DCC acted within his duty by granting the parties audience and communicating the final decision to them. In my view, I find that it is not enough for the Petitioner to claim that the DCC was biased and relied on extraneous issues in dealing with parcel No. 1525, Kangonde/Masinga Adjudication Section, without presenting tangible evidence to prove this claim. In absence of evidence to the contrary, I find that there was procedural fairness in the hearing of the Appeal as the DCC acted within his legal mandate.
23. In the circumstances, I find that the Petitioner has not demonstrated how his rights as enshrined under Articles 19, 20, 21, 22, 23, 25, 27, 28, 40, 47, 48, 50 and 159 of *the Constitution* were violated or infringed upon by the Respondents in dealing with Parcel No. 1525 Kangonde/Masinga Adjudication Section. I further find that the Petition did not meet the test of a Constitutional Petition nor the threshold for issuing Judicial Review orders of Mandamus, Prohibition as well as Certiorari and will decline to grant them.
24. In the foregoing, I find the instant Petition unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10TH DAY OF JUNE, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kerubo for 2nd, 3rd, 4th Respondents

Mutua for 1st Respondent

Ms. Mutua for Petitioner

Court Assistant – Simon

