



Republic v Attorney General & another; Kimolo (Sued as the legal representative of the Estate of Mwatha Mutio - Deceased) (Interested Party) (Judicial Review 3 of 2021) [2025] KEELC 673 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
JUDICIAL REVIEW 3 OF 2021**

LG KIMANI, J

FEBRUARY 20, 2025

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES.

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015 SECTIONS 4,7,8,9,10,11 AND 12

AND

IN THE MATTER OF ARTICLE OF 22,23, AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING (THROUGH SUB-COUNTY COMMISSIONER MWINGI EAST DIRECTOR OF LAND ADJUDICATION CHIEF LAND REGISTRAR) 2ND RESPONDENT

AND



MWIKYA KIMOLO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MWATHA MUTIO - DECEASED) INTERESTED PARTY

JUDGMENT

1. The Notice of Motion application dated 10th December 2020 by the ex parte applicant seeks the following orders:
 - a. An order of MANDAMUS directed to the 2nd Respondent's agents Mwingi Sub-county Land Registrar, Chief Land Registrar to deregister, stop effecting registration of land Parcel No.659 Mwambiu Adjudication in the name of the Interested Party.
 - b. An order of CERTIORARI to remove to this Honourable Court to quash proceedings culminating in Minister's Appeal No. 561 of 2015 and communicated on 14/9/2020 the decision of the 2nd Respondent agent Sub-county Commissioner awarding land parcel No.659 Mwambiu Adjudication section to the interested party.
 - c. That the leave granted do operate as stay of any further interference, transferring, registering, trespassing, using land parcel No. 659 MWAMBIU Adjudication Section within Mwingi Sub-County Kitui County.
 - d. THAT costs of this application be awarded to the applicant.
2. The application is supported by an amended Statement of Facts dated 17 May 2021 and a verifying affidavit sworn on the same date.
3. The Applicant challenges proceedings of the 2nd Respondent's agents in Minister's Appeal No. 561 of 2015 and the decision of the Mwingi Sub-County Commissioner awarding land parcel No. 659 Mwambiu Adjudication section Mwingi East sub-county of Kitui county to the Interested Party.
4. The Applicant claims that the Land Adjudication Officer acted without jurisdiction and conducted proceedings before him as though they were an appeal from the Arbitration Board. He further claimed that the decision of the 2nd Respondent was communicated to the parties in an unprocedural manner and the same was undated.
5. He complained that the proceedings and decision of the 2nd Respondent were tainted with illegality, and procedural impropriety and was conducted unfairly. Further, the 2nd Respondent was unfair, unjust, and partial and the hearing of the appeal was not conducted within the parameters of the law. The decision is said to have been ultra vires, abuse of power, unreasonable and a breach of the constitutional right to a fair hearing.
6. The Applicant claims that the suit parcel of land No. 659 Mwambiu Adjudication Section was the subject of land adjudication and was originally adjudicated in his name. The land dispute went through all the stages of adjudication from the Committee stage, Arbitration Board stage and Objection before the Land Adjudication and settlement Officer to the Minister's appeal but the conduct of the proceedings showed open bias and the decisions were always in favour of the interested party.
7. The Applicant complains that the interested party had been colluding with the officers of the 2nd respondent to deprive him of the property and that the sub-county commissioner relied heavily on the proceedings of the objection and arbitration proceedings which were tainted by illegality and based on wrong principles.



8. The Applicant states that his legitimate expectation that he would be accorded a fair hearing was not met but instead he was subjected to an unfair decision which was arrived at without adherence to the due process of the law.
9. The Applicant claimed that the assistant chief informed his wife to move out of the suit land. He contends that no prejudice shall be visited upon the interested party as they have never occupied, possessed and/or held any proprietary interests in the suit property.
10. The Respondents filed an affidavit of service by Munyoki Mutunga Malombe sworn on 22/3/2021 and file on 26/3/2021 confirming service of pleadings on the Respondents herein. The Respondents did not enter appearance or file any reply to the Notice of Motion herein. The court however notes that on 5/10/2021 the Attorney General was represented in court.

The Interested Party's Case

11. An application was made on 14th January 2022 seeking orders that the interested party be substituted with Mwikya Kimolo, since Mwatha Mutio, the interested party was deceased. The said application was allowed.
12. The Interested Party filed Grounds of Opposition dated 10th March 2021 and a replying affidavit sworn on 16th March 2021 stating that the orders sought in prayer (a) cannot be granted owing to the nature of the proceedings. He stated further that no sufficient grounds had been shown for the Court to interfere with the decision of the Minister as the Applicant's right to a fair hearing was not violated.
13. Further, the Interested Party claimed that the 2nd Respondent was not biased no known law or procedure was violated and the Minister's decision on facts and evidence is final. He stated that the decision was fair, legally and procedurally proper and justice was served to all parties. He denied that the 2nd Respondent abused his discretion and powers.
14. He deposed that the 2nd respondent's decision is not an abuse or misuse of statutory and constitutional powers, the decision is not malicious and is reasonable, legal, unoppressive and not a breach of the applicant's constitutional right.

The Ex-parte Applicant's submissions

15. Counsel for the ex-parte applicant submitted that the whole process of adjudication was flawed, unprocedural and tainted with illegality. The land adjudication officer was involved in hearing the matter during the entire process of adjudication which raised a lot of questions as to why he was sitting on appeal over his own decision.
16. It was submitted that the decision was not read to the parties as required and the 2nd respondent did not confirm delivering the decision to parties hence occasioning injustices to them.
17. The applicant highlighted that the interested party's evidence was not heard, which denied him the opportunity to question him and was a demonstration of open bias. That they were not allowed to cross-examine each other and that it was the Minister who did so.
18. Faulting the impugned decision, the Applicant submits that it was not in tandem with what the parties had said during the hearing.
19. Counsel submitted that the scope of judicial review has since expanded and that in appropriate cases, the courts will go into the merits of a decision made by an administrative body and rely on the



holding in the case of Suchan Investigation Limited vs Ministry of National Heritage Culture & 3 others(2016)eKLR.

20. The Applicant submits that the 2nd Respondent breached Articles 10,47, 50 and 277 as well as sections 4,7,8,9,10 and 11 of the *Fair Administrative Action Act* no.4 of 2015 by denying him a fair hearing, showing partiality and own bias and urged the Court to quash the said decision and render the objection and arbitration proceedings null due to the irregularities involved therein.
21. Counsel for the Applicant cited and relied on the following authorities:
Chuka JR E004 of 2021 R. v the Cabinet Secretary Ministry of Lands & Physical Planning & 5 others, Nyeri JR. E002 of 2021 R. v. Dedan Kimathi University of Technology, Mombasa JR E033 of 2021 R. vs. Magistrate's Court, Mombasa & Absin Synergy Limited.

Submissions by the Interested Party

22. Counsel for the interested party submitted that the ex-parte applicant seems to be dissatisfied with the outcome of the decision of the 2nd Respondent and has preferred an appeal rather than an application for judicial review.
23. Counsel further submits that the Minister's decision is final, and the principles of judicial review have been settled over the years that a superior court will not interfere with an impugned Minister's decision unless it is demonstrated that there was procedural impropriety including denial of fair hearing, bias and lack of jurisdiction. They also submitted that the court does not concern itself with the merits of the decision.
24. On whether the applicant was denied a fair hearing, their submission is that the ex parte applicant has not demonstrated any breach of the rules of natural justice, bias or malice in the proceedings. They also submitted that the 2nd Respondent acted ultra vires or without jurisdiction.
25. Further, there is no indication or allegation that the Applicant was prevented from giving evidence, producing documents or calling any witness Submitting on the reliefs sought, counsel noted that an order for mandamus and certiorari are not appropriate in the present case.

Analysis and Determination.

26. The application herein challenges the decision of the 2nd Respondent in Minister's Appeal No. 561 of 2015, Mwambiu Adjudication Section over land parcel No. 659 Mwingi Sub-County Kitui County. The grounds relied on have been enumerated in detail in this judgment.
27. Having considered the Notice of Motion herein, amended Statement of Facts, verifying affidavit and supplementary affidavit, the replying affidavit and written submissions by Counsel for the parties, the Court is of the view that the following issues arise for determination:
 - A. Whether the proceedings and decision of the 2nd Respondent were illegal, unreasonable, procedurally unfair and/or violated Article 47 of *the Constitution*
 - B. Whether the Applicant has met the threshold for grant of an order of Mandamus & Certiorari.



A. Whether the proceedings and decision of the 2nd Respondent were illegal, unreasonable, procedurally unfair and/or violated Article 47 of the Constitution

28. Judicial review of administrative action is anchored under Article 47 of the Constitution of Kenya 2010 which deals with fair administrative action and provides that;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

29. Article 50 of the Constitution provides for fair hearing stating that;

“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. The ex-parte applicant contends that he was not accorded a fair hearing in the Minister's Appeal and that the entire adjudication process was biased and tainted with illegality. He submits that there has been a breach of Articles 10, 47, 50 and 277 as well as sections 4, 7, 8, 9, 10 and 11 of the Fair Administrative Action Act no. 4 of 2015.

30. Section 4(1) of the Fair Administrative Actions Act No. 4 of 2015 is in similar terms as Article 47 of the Constitution and provides thus:

“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.”

31. Further to the above provisions of the law, Section 12 of the Fair Administrative Action Act, provides that the general principles of common law and rules of natural justice continue to apply in review of administrative actions. This was noted in the case of Suchan Investment vs. The Ministry of National Heritage and Culture (2016) eKLR where the Court of Appeal allowed for merit review even in the supervisory function of the court administrative actions as follows:

“Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make



orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.”

32. The Applicant contends that he was not informed of the decision in the Minister’s Appeal and had to visit the offices of the 2nd Respondent to find out what the decision was. A person who has been or is likely to be adversely affected by administrative action, has the right to be given written reasons for the action. This Article has been given effect through the *Fair Administrative Action Act*, 2015 section 4(3) (d) which provides as follows:

“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-

- (d) a statement of reasons pursuant to section 6;

33. Onguto, J in Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR restated what constitutes fair administrative action and stated as follows:

“As to what constitutes fair administrative action, the court in President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, stated:

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.”

34. From the foregoing, the legal position is that the applicant was entitled to be given the decision in the minister’s appeal before any action was taken to implement it. From a perusal of the decision of the 2nd Respondent attached to the applicant’s affidavit, Appeal number 561 of 2015 in respect of land parcel No. 659 Mwambiu Adjudication Section was heard on 1st March 2017.
35. The ex parte applicant avers that the decision in the appeal was supplied to the parties on 14th September 2020, when the same had already been forwarded to the Director of Land Adjudication for implementation. The Court notes the long period between the hearing date on 1st March 2017 and the date the Ex parte Applicant states he obtained the decision. It is, however, noted that the decision is not dated and does not show the date on which the judgment was delivered. It is thus not clear the date on which the decision was delivered to the parties and whether the parties were aware of the delivery of the decision. Was that decision communicated unprocedurally?. The court notes that even though the Applicant does not state when the decision was delivered, in his prayer No. 2, he indicates that the decision was delivered on 14/9/2020.
36. The Applicant on his part does not state the date that was given to the parties by the 2nd Respondent for delivery of the judgement or indeed what information they were given for delivery of the judgement when the trial ended. In the Court’s view, the fact that the judgement of the 2nd Respondent was certified as a true copy on 14th September 2020 is only indicative of the date of such certification and not



- the date of delivery of the said judgment. Further, the Applicant did not show that after the hearing, he had made any effort to find out if the decision had been made and obtain a copy of the judgement.
37. The Court observes that the Applicant was not prejudiced by the fact that he obtained the judgement of the 2nd Respondent on 4th September 2020. He filed a Chamber Summons application dated 27th November 2020 for leave to file the present proceedings in which he indicated the day on which the judgement was communicated to him. Based on the presentation to the court the application for leave was allowed.
 38. Further, even though the 2nd Respondent's decision had been forwarded to the Director of Land Adjudication for implementation, it is not claimed that by the time the Applicant obtained the said decision action had been taken to implement it.
 39. The other issue for consideration is whether the hearing that led to the Minister's appeal was conducted fairly in line with the rules of natural justice. Were all parties heard and given an equal chance to cross-examine each other?
 40. From the record of proceedings, the ex-parte applicant had the grounds of appeal read to him and he stated that he inherited the subject land from his father. He was then cross-examined by the Chairman and the Respondent was also cross-examined.
 41. There is no indication that the Interested Party gave his statement, but the record shows he was cross-examined by the said Chairman as well. The applicant had complained that the interested party's evidence was not heard, which denied him the opportunity to question him and was a demonstration of open bias. That they were not allowed to cross-examine each other and that it was the Minister who did so.
 42. The Court takes the position that an appeal to the Minister is an appeal like any other where the court or quasi-judicial authority considers the previous record before arriving at its own decision. The Minister or the Deputy County Commissioner in this case had the mandate to consider the grounds of appeal, and previous evidence tendered and make his determination as he deems just and fair as provided under Section 29 of the *Land Adjudication Act*. The said section provides for the procedure of filing an appeal and the process the appeal is to take. Section 29(1) of the *Land Adjudication Act* reads as follows:

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

- a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
- b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”



43. The procedure for conducting an appeal to the Minister is also provided under the Land Adjudication Regulations, 1970 Regulation 4 and the same is clear that before one can appear before the Minister and call witnesses leave of the Minister must be obtained. The regulation states as follows:

“Subject to the leave of the Minister being first obtained the appellant or any other part to an appeal may attend before the Minister either in person or by duly authorised agent, and shall be entitled to call witnesses.”

44. In this case, the Minister’s delegate did not need to call witnesses or conduct a site visit as suggested by the Ex parte Applicant. It was held in *Matwanga Kilonzo v District Commissioner, Kitui & another* [2021] eKLR that:

“The Minister’s mandate under Section 29 of the Act is to consider the grounds of appeal raised by any person appealing against the decision of the Land Adjudication Officer, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision. Indeed, just like what happens in an appellate court, the Minister need not take fresh evidence while dealing with the appeal, although he may do so to seek clarification on certain issues. However, he must consider the grounds of appeal and the evidence that was adduced before the Land Adjudication Officer before making his decision. The said decision must give reasons as to why he agrees or disagrees with the decision of the Land Adjudication Officer..... The 1st Respondent made the above finding after hearing the parties herein, and after considering the decision of the Land Adjudication Officer. Considering that the 1st Respondent heard both parties and considered the proceedings of the Land Adjudication Officer, I am not convinced that the 1st Respondent was biased while arriving at his decision.”

45. The proceedings before the 2nd Respondent show that he read the grounds of appeal to the Appellant and took into account the further evidence adduced by the parties during the other adjudication proceedings. From the decisions themselves, it is clear that the 2nd Respondent considered the proceedings before the Land Adjudication Officer before arriving at his decision.

46. The Ex parte Applicant faults the 2nd Respondent for having relied on the evidence adduced in the previous proceedings. The court is of the view that this indeed ought to be the proper legal procedure for hearing an appeal to the Minister as per the findings of the court in the *Matwanga Kilonzo* case (supra).

47. The ex-parte applicant has faulted the entire adjudication process that the suit properties went through from the initial adjudication to the committee stage, the arbitration stage, the objection stage all the way to the Minister’s Appeal. However, the prayers in his Notice of Motion, he directed the challenge to the 2nd Respondent.

48. Further, the applicant seems to be challenging the factual findings of the various tribunals that heard the dispute seeking to challenge reasons why certain witnesses were not called and why certain evidence was not relied upon by the tribunals.

49. In the Court’s view the Applicant seeks review of the decision of the adjudication process that is only available on appeal. It is trite law that this court cannot determine rights and interests over land that is within an adjudication area. As has been restated in various court decisions, the court’s role while hearing an application for judicial review is supervisory over the adjudication process. As Okongo J



held in Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others (2013) eKLR so aptly noted as follows;

“In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. (Emphasize added). The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land.”

B. Whether the Applicant has met the threshold for grant of an order of Mandamus & Certiorari.

50. Certiorari is defined in the Black’s Law Dictionary as follows:

“An extraordinary writ issued by an appellate court, at its discretion directing a lower court to deliver a record in the case for review.”

51. In the present case, the court finds that the Applicant has not shown that the proceedings and decision of the 2nd Respondent were unlawful, biased, unreasonable, flawed or conducted unfairly. He has also not shown that the same were conducted outside the parameters provided by the law. Consequently, the prayer for an order of certiorari to remove to this Honourable Court to quash proceedings and decision of the 2nd Respondent agents culminating in Minister’s Appeal No. 561 of 2015 is hereby found to be unmerited and the same is dismissed.

54. Mandamus is defined in the Black’s Law Dictionary as follows:

“A writ issued by a court to compel performance of a particular act by a lower court or a government officer or body, usually to correct a prior action or failure to act.”

53. For an order of mandamus to issue it must be found that there is a necessity to correct a prior act or failure to act. In the present case, the court finds that the orders have already been issued by the 2nd Respondent and the same are in force. The prayer made by the applicant for certiorari has been found to have no merit. Consequently, the 2nd Respondent agent, Sub-County County Commissioner Mwingi Sub-County of Kitui County, the Land Registrar and the Chief Land Registrar cannot be compelled to deregister or stop Parcel No. 659 Mwambiu Adjudication being registered in the name of the Interested Party.

54. The final order of the court is that the Notice of Motion application dated 10th December 2020 is hereby dismissed with costs to the Interested Party.

READ, DATED SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 20TH DAY OF FEBRUARY 2025.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

In the presence of:

No appearance for the ex-parte applicant.

No appearance for the Respondents.

No appearance for the Interested Party.



Court assistant: Michael.

