



REPUBLIC OF KENYA



KENYA LAW
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Republic v Cabinet Secretary for Lands, Housing and Physical Planning & 4 others; Kisinga (Exparte Applicant); Kasau (Interested Party) (Environment and Land Miscellaneous Application E006 of 2023) [2025] KEELC 706 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023**

LG KIMANI, J

FEBRUARY 20, 2025

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION
AND MANADAMUS BY PATRICK KISINGA**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 47

AND 48

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284

LAWS OF KENYA

AND

**IN THE MATTER OF PENDING APPEAL TO THE MINISTER DATED
16TH APRIL 1998**

AND

IN THE MATTER OF APPEAL CASE OVER PLOT NO.8114 AND 4281

**MUTONGUNI(KAIMU) ADJUDICATION SECTION BETWEEN
KISINGA KISENGENESE VERSUS PHILIP KASAU MUSILI**

AND

**IN THE MATTER OF ARTICLE 25(C), 47 AND 56 OF THE
CONSTITUTION**

AND

IN THE MATTER OF THE LAND ACT 2012

AND



**IN THE MATTER OF THE LAND REGISTRATION ACT CAP
300(LAWS OF KENYA)**

BETWEEN

REPUBLIC APPLICANT

AND

**CABINET SECRETARY FOR LANDS, HOUSING AND PHYSICAL
PLANNING 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

**DEPUTY COUNTY COMMISSIONER, KITUI WEST SUB COUNTY
KITUI 3RD RESPONDENT**

**LAND ADJUCICATION OFFICER, MUTONGUNI/NZALAE(KAIMU)
ADJUDICATION SECTION 4TH RESPONDENT**

COUNTY SURVEYOR KITUI. 5TH RESPONDENT

AND

PATRICK KISINGA EXPARTE APPLICANT

AND

CHARLES LASIA KASAU INTERESTED PARTY

RULING

1. The Applicant filed the Amended Chamber Summons dated 22nd May 2023 and amended on 8th November 2023 seeking the following orders:
 1. Spent
 2. That this Honourable Court be pleased to grant leave to the Applicant to apply for orders of prohibition to prohibit and stop the respondents from implementing the decision of the Land Adjudication Officer dated 23/2/1993 pending the hearing and determination of the pending appeal to the Minister filed on 16/04/1993.
 3. The this Honourable Court be pleased to grant leave to the Applicant to apply for an order of mandamus compelling the 1st Respondent to hear and determine the applicant's appeal to the Minister dated 16/4/1993 against the decision of the Land Adjudication Officer in Objection No.1308/90.
 4. That such leave, if granted do operate as stay of implementation Of the decision of the 4th Respondent dated 23-02-1993 and stopping the boundary re-identification by the County Surveyor vide a letter dated 26th April 2023.



5. That such leave, if granted do operate as a stay of implementation of the decision of the 4th Respondent dated 23-02-1993 and stopping the boundary reidentification by the County Surveyor vide a letter dated 26th April 2023.
2. The Application was supported by the affidavit and statement of facts of the Applicant. He deponed that he is the son of the late Kisinga Sengenge (Deceased) and the registered owner of Mutonguni/Kaimu/3114.
3. He stated that on or about 1990, his father had a land adjudication dispute over plot number 3114 with Philip Kasau Musili the father of the Interested Party herein. At the Objection stage of Adjudication proceedings, the dispute was decided in favour of Philip Kasau Musili and an order made that the land was to be sub-divided into two portions with one portion remaining in the name of Kisinga Sengenge (3114) and the other smaller portion to be given to Philip Kasau.
4. Being dissatisfied with the decision, the ex-parte applicant's father filed an Appeal to the Minister on 16/4/1993 which is still pending and has not been heard up to date.
5. The ex-parte Applicant received summons from the surveyor dated 26/4/2023 summoning him to attend a boundary re-identification exercise on 25/5/2023 together with the Interested Party.
6. He was caught by surprise to find out that the Interested Party had obtained a title deed while the appeal to the Minister is pending and his family is still in full occupation and use of all the two portions of land including the one that the Interested Party allegedly has title deed to. He therefore seeks the orders of prohibition and mandamus against the Respondents.
7. The ex-parte Applicant's view is that his right to a fair hearing has been infringed by the Respondents and he had a legitimate expectation that the Respondents would await the determination of the pending appeal.

The Respondents' Grounds of Opposition.

8. State Counsel representing the Attorney General filed grounds of opposition dated 15th November 2023 opposing the instant application on the following grounds that:
 1. The application is fatally defective, incompetent, malapropism and untenable both in substance and form and contrary to the provisions of Order 53.
 2. The application fails to demonstrate how the actions of the respondents were laced with abuse of process or that the Interested Party was issued with title over the disputed parcel as alleged.
 3. The amended Chamber Summons is premised on hearsay as there is no evidence tendered to validate the Applicant's claim that the appeal is yet to be determined by the respondents.
 4. The applicants have failed to demonstrate and tender any evidence to show that the decision was exercised unlawfully and that the respondents have failed to invoke their statutory mandate in hearing the appeal as alleged.
 5. The amended Chamber Summons Application is based on erroneous, misleading assumption and misapprehension of the law in that the applicants are relying on documents which fail to demonstrate the impugned decision is in the process of implementation by the respondents.
 6. The amended Chamber Summons application does not meet the threshold for grant of leave as it was stated in the case of Republic vs. County Council of Kwale & Another ex-parte Kondo & 57 others, Mombasa HCMA No.384 of 1996.



7. That the judicial review orders of mandamus and prohibition in particular are discretionary in nature and a court would deny to grant them even if grounds for their granting exist.
8. That on the basis of Halsbury's Laws of England 4th Edition, judicial review order of prohibition cannot lie to correct a course, practice or procedure of inferior tribunal or correct a wrong decision on merits of the proceedings.
9. That further, an order of mandamus cannot issue to compel exercise of statutory discretion in a particular way or to achieve particular results.
10. The amended Chamber Summons Application is thus misconceived, without merit and an abuse of the court's process and the same should be dismissed with costs.

The Interested Party's Replying Affidavit

9. The Interested Party filed a replying affidavit deposing that he is the registered owner of Land Parcel Mutonguni/Kauwi/4231 and that he is not aware of any pending appeal over the said parcel of land which has never been encumbered nor restricted.
10. He deposed that the decision of the Land Adjudication Officer being complained of has already been implemented by the Director of Land Adjudication, the County Surveyor and the County Land Registrar by issuing a title deed and the request by the Applicant has been overtaken by events.
11. The Interested party deposes that the Title No. Mutonguni/Kauwi/4231 has been existing as a separate title from Mutonguni/Kauwi/3114 since the determination of the objection by the Adjudication officer in 1993.
12. His view is that the surveyor was working within his mandate when he verified the boundaries and that there is no mischief in the said government officers in doing what their duty entails them to do.
13. The Interested Party further accused the Applicant of encroaching onto Land Parcel Mutonguni/Kauwi/3231, which in his view is the reason why he does not want the boundary re-established and verified.
14. The interested party's contention is that the Minister for lands has not declined to hear the appeal and that it is the responsibility of the applicant to follow up the appeal if it exists.
15. His contention is that the orders of leave sought should not be granted as the Court will have nothing to hear and that it will be an exercise in futility. His view is that the government officers should be allowed to complete their work.

The Hearing of the Application

16. The hearing of the application proceeded on the 8th of October 2024 when Counsel for the Applicant submitted that there is a pending Appeal to the Minister dated 16/4/1993 which appeals the decision of the Land Adjudication and Settlement Officer at the Objection stage dated 23/2/1993.
17. It is the applicant's contention that when the appeal is pending, title deed should not be issued and invited the Court to consider Sections 26-29 of the *Land Adjudication Act* which provides the procedure to be followed once there is an appeal to the minister, noting that a restriction ought to be filed.
18. With reference to Section 26(1)(b) of the *Land Registration Act* which allows titles to be challenged if they were issued irregularly or unprocedurally, as was held in the case of Euton Njuki Makango v



Republic & 2 others (2014) eKLR as well as the holding of this Court in the case of Judicial Review Case No.6/2021 R v. Cabinet Minister for Lands ex-parte Francis Nyeki Maundu.

19. State Counsel Kuria for the Respondents opposed the instant application through Grounds of Opposition dated 15/11/2023 which they relied on. It was contended that the attached Notice of Appeal to the Minister is not clear and one is unable to identify the party initiating the appeal and what the objection number is and the basis of the appeal. He sought dismissal of the application.
20. Counsel Kalili for the interested party opposed the instant application, relying on his client's replying affidavit sworn on 12/2/2024. His submission is that this application seeks to stop the respondents from implementing the decision of the District Land Adjudication and Settlement Officer (DLASO) dated 23rd February 1993.
21. The interested party's argument is that the decision has already been implemented and that the title deeds have been issued, therefore there is nothing to prohibit and they referred to annexure "PM 4" Certificate of Official Search in respect of Land Parcel Mutonguni/Kauwi/4231. They submit that an order of prohibition cannot be sought to undo what has already taken place.
22. Regarding the Order of Mandamus, it was submitted that it is the duty of the Applicant to appear before the Deputy County Commissioner to take a date for hearing of the Minister's appeal. That the Applicant has not shown that he has appeared before the Deputy County Commissioner and he/she has refused to hear the appeal. Their submission therefore is that the order has been prematurely sought.
23. On rebuttal, Counsel for the Applicant stated that the receipt after paying the required amount for the Minister's Appeal contains the name of the parties.
24. Counsel also stated that he is not arguing the merits of the appeal but on the process. He noted that the implementation of the decision in the Objection stage was only brought to the attention of the Applicant by the letter from the surveyor.
25. Counsel for the Applicant concluded by stating that the issuance of a title deed is not a bar from hearing the appeal to the Minister.

Analysis and Determination

26. The Applicant seeks leave to file for judicial review orders of prohibition to stop the respondents from implementing the decision of the Land Adjudication Officer dated 23/2/1993 and mandamus to compel the 1st Respondent to hear and determine the applicant's appeal to the Minister dated 16/4/1993 against the decision of the Land Adjudication Officer in Objection No.1308/90.
27. Section 9 of the [Law Reform Act](#) has a similar provision to Order 53(1) of the Civil Procedure Rules (2010) which provides for leave of court in the filing of an application for judicial review and states that:

“Applications for mandamus, prohibition and certiorari to be made only with leave.

1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
2. An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”



28. The Court has looked at the Form of Appeal to the Minister attached to the affidavit of the Applicant and notes that the said form is completely illegible. This Court on 20/02/2024 notified the parties that the documents filed by the Applicant were illegible especially the appeal to the Minister. The Court directed the Applicant to file clear copies of the documents before directions could be given.
29. On 24/07/2024 Mr. Mwendwa Counsel for the Applicant confirmed to the Court that indeed the appeal to the Minister was illegible but stated that he was unable to get a clearer copy. He asked the Court to proceed with the matter based on the documents filed.
30. Appeals to the Minister against the determination of an objection is provided for under Section 29 of the *Land Adjudication Act*. The said section states that;
1. 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.
31. The LAND ADJUDICATION REGULATIONS, 1970 further provide for the procedure for filing the appeal to the Minister. Regulation 4 provides as follows;
- (1) Any person submitting an appeal to the Minister under section 29 of the Act shall attach to his appeal a tracing from the demarcation map of the boundaries of the holdings in dispute.
 - (2) A fee shall be payable in respect of each appeal at the rate specified in the Second Schedule to these Regulations: Provided that the Minister may, in his discretion, waive part of the fees or the whole of the fees payable under this paragraph.
 - (3) In any case in which the Minister decides in favour of the appellant the Minister shall have discretion to order that any fees paid under paragraph (2) above shall be refunded to the appellant in whole or in part, and may also make orders as to payment of costs.
 - (4) Subject to the leave of the Minister being first obtained the appellant or any other party to an appeal may attend before the Minister either in person or by duly authorised agent, and shall be entitled to call witnesses.
 - (5) Obtaining copies of records— Any party to an appeal shall be entitled to obtain copies of demarcation maps on payment of fees at the rates prescribed for certified copies of Registry Maps by the Fifth Schedule to the Registered *Land Act* (Cap. 300), and copies of relevant documents including the proceedings and decisions of committees, boards and adjudication officers in respect of the holdings in dispute on payment of copying fees at the rates prescribed for the provision of copies of court judgments in a subordinate court.
32. From the foregoing Regulation 4 (1) the Applicant filed the form or Appeal to the Minister. It is presumed he would have a clean legible copy of the form. In case he did not have one, Regulation 4 (5) provides the rights of the Applicant to obtain copies of any relevant documents they may not have had or if he had them they were illegible and unclear and were required for filing and prosecuting the application herein. The Applicant did not show to the Court that any effort was made to obtain clear copies of the documents that were at the center of the application herein.



33. It is the Court's view that the document provided as proof of the existing appeal is unclear and illegible and the court is unable to confirm that indeed an appeal to the Minister was filed by the Applicant or his father Kisinga Sengenge (Deceased) and whether the same is pending hearing. The Court is further unable to confirm that if any appeal was filed, the same involved the suit parcel of land No.3114 and was against the decision of the Land Adjudication Officer in Objection number 1308/90.
34. The Chamber Summons application herein seeks leave to apply for orders of prohibition to prohibit and stop the respondents from implementing the decision of the Land Adjudication Officer pending the hearing and determination of the pending appeal to the Minister filed on 16/04/1993.
35. The Applicant further seeks an order of leave to apply for an order of mandamus compelling the 1st Respondent to hear and determine the applicant's appeal to the Minister dated 16/4/1993 against the decision of the Land Adjudication Officer in Objection No.1308/90. They seek that such leave, if granted do operate as stay of implementation of the decision of the 4th Respondent dated 23/02/1993 and stopping the boundary re-identification by the County Surveyor vide a letter dated 26th April 2023.
36. In the Court's view, all the above prayers sought are dependent on proof by the Applicant of the existence of the appeal and in the court's view the applicant has failed to provide such proof even after being given an opportunity to provide such proof.
37. Nyamweya J. in the case of Republic v Registrar of Companies & another Ex parte Prakla East Africa Limited; Prakla Bohrtecknic GMBH (Interested Party) [2021] eKLR broke down the rationale for applications for leave to apply for Judicial Review and stated that;

“I have considered the arguments made by the parties herein, and the applicable law for leave to commence judicial review proceedings, namely Order 53 Rule 1 of the Civil Procedure Rules. The main reason for the leave as explained by Waki J. (as he then was), in Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

38. In the case of Uwe Meixner & another v Attorney General [2005] eKLR the Court of Appeal held that:

“The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion.”

39. The Court is satisfied that the Applicant has not shown that there is a case fit for further consideration to warrant the court exercise its discretion and allow him to proceed to substantive hearing.
40. The final order of the Court is that the Chamber Summons application dated 22nd May 2023 and amended on 8th November 2023 lacks merit and the same is hereby dismissed with no order as to costs.

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

In the presence of:

No appearance for the Applicant.

No appearance for Respondents.

No appearance for Interested Party.



Court assistant: Michael.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

