



M'kaura & another (Suing on Their Own Behalf and in Their Capacity as Officials and Representatives of Mwokamu Saba Self Help Group) v District Land Adjudication and Settlement Officer Igembe North Sub-County & 3 others; M'aciita (Interested Party) (Environment and Land Judicial Review Case E003 of 2024 & Judicial Review E004 of 2024 (Consolidated)) [2024] KEELC 6354 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE
E003 OF 2024 & JUDICIAL REVIEW E004 OF 2024 (CONSOLIDATED)**

CK NZILI, J

SEPTEMBER 25, 2024

BETWEEN

**SAMUEL M'MAROO M'KAURA 1ST EXPARTE APPLICANT
JOSEPH RWITO MUNGANIA 2ND EXPARTE APPLICANT
SUING ON THEIR OWN BEHALF AND IN THEIR CAPACITY AS OFFICIALS
AND REPRESENTATIVES OF MWOKAMU SABA SELF HELP GROUP**

AND

**THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER
IGEMBE NORTH SUB-COUNTY 1ST RESPONDENT
DEPUTY COUNTY COMMISISONER IGEMBE NORTH SUB-
COUNTY 2ND RESPONDENT
CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL
PLANNING 3RD RESPONDENT
THE HON. ATTORNEY GENERAL 4TH RESPONDENT**

AND

JOSHUA KAUNYANGI M'ACIITA INTERESTED PARTY



JUDGMENT

1. By notice of motion dated 25.4.2024, the court is asked to grant an order of certiorari, to call for and quash the decision and the findings of the 1st and 2nd respondents in Minister's Appeal No. 276 of 2023, delivered on 13.3.2024. The second prayer sought is an order of prohibition stopping the respondents from implementing or enforcing the offensive recommendations and the decision dated 13.3.2024, regarding parcel 8226 Naathu "B" Adjudication Section, formally 2196 Naathu "B" Adjudication Section.
2. The notice of motion is supported by a verifying affidavit of Samuel M'Maroo M'Kaura and Joseph Rwito Mungania and a statutory statement of facts dated 13.4.2024. The exparte applicants describe themselves as officials and representatives of the Mwokamu Self-Help Group of about 300 people from the Naathu location who, in 1996, gathered a block of land in the Northern Grazing Area.
3. The exparte applicants averred that in 2005, they registered the group, had the land demarcated to which the block was eventually subdivided into parcels No's 3943, 3944, 2197, 2194, 2193, 2189, 2190, 219 and 2196 now known as P. No. 8226 Naathu B Adjudication Section.
4. Further, the exparte applicant averred that they have been cultivating the land since 1996 and have even raised several complaints, including demand letters against pastoralists who have been trespassing into their farms and destroying crops.
5. The exparte applicants averred that the DLASO and a demarcation officer, by letters dated 12.5.2005 and 17.12.2019, confirmed that parcel No. then known as 2196, now 8226 Naathu "B" Adjudication section belonged to them, and therefore, the interested party did not have the parcel number demarcated to him, nor did he raise any dispute or objection on the ownership both at the committee and arbitration stage.
6. Similarly, the exparte applicants averred that the interested party only objected to the land adjudication officer with respect to parcels No 2193, 2194, and 2196, now parcel No. 8225 Naathu "B" Adjudication Section, which objections were heard together as the findings dated 6.8.2021 by the 1st respondent who dismissed objections against P. No's. 2193 and 2196, for lack of sufficient evidence, but proceeded to award parcel No. 2196 the subject matter to this proceedings and directed that Parcel No. 2196 be subdivided and a new Parcel No. 8226 be given to the interested party.
7. The exparte applicants averred that in the 1st respondent's findings, the objector did not claim the entire parcel number 2196 but did not state the acreage or size of the land he awarded to the objector, noting that in his decision, he was relying on evidence of beacons shown to him by the interested party as such the decision was not based upon logical proof or evidential material was ambiguous and unreasonable.
8. The exparte applicants averred that they had been given parcel No. 1062; however, the 1st respondent misconstrued the evidence to mean the parcel given was part of parcel No. 2196, now known as parcel No. 8226 Naathu B Adjudication Section, which was evidence of outright bias on the part of the 1st respondent.
9. The exparte applicants averred that being aggrieved by the 1st respondent's decision appealed to the minister, which appeal was heard by the Deputy County Commissioner Igembe North Sub-county, despite the land in dispute being situated in Mutuati sub-county; hence, the 2nd respondent lacked jurisdiction to hear and determine the appeal.



10. The exparte applicants averred that the 2nd respondent proceeded to replicate the decision of the 1st respondent as is evident on the face of the appeal proceedings, namely land case No. 276/2023, Parcel No. 8226, which parcel was created by the 1st respondent's decision despite the appeal having been in respect to parcel No. 2196 Naathu B Adjudication Section and status quo having been issued by the 1st respondents as such the decision was marred by illegality, bias, and procedural impropriety.
11. Again the exparte applicants averred that the 2nd respondent was biased since he based his decision on the proceedings at the objection stage rather than the examination of the evidence that was adduced before him, which was contrary to the Land Adjudication Act, since it bestows upon the minister authority to make any orders, he deems fit.
12. In addition the exparte applicants averred that if the decision made by the minister is implemented in relation to parcel No. 2196, now known as P. No. 8226 Naathu B Adjudication Section, they shall stand to suffer irreparable harm as their right to property and protection for the said right shall be infringed. They urged the court to intervene and uphold the law and the Constitution in the interest of justice.
13. In the verifying affidavit sworn on 13.4.2024, the exparte applicants rehearsed the contents of the statement of facts, save to annex a copy of authority to plead and sue, the certificate of registration of the group, copies of assessment reports and demand letters, copies of land adjudication, demarcation officer's letters dated 12.5.2005 and 17.12.2019, copies of proceedings of the 1st respondent copies of appeal proceedings and a copy of a letter dated 19.8.2021 for maintenance of status quo as annexures marked SMM 1-7 respectively.
14. At the hearing of the notice of motion, the exparte applicants relied on written submissions dated 2.8.2024 and isolated two issues for the court's determination. On whether the impugned decision was arrived at in a manner as envisaged by law, the exparte applicants submitted that orders of certiorari issue if the decision being challenged was made without or in excess of jurisdiction or where rules of natural justice were not complied with as held in *KNEC vs Republic exparte Geoffrey Gathenji & others* NRB C.A No. 266 of 1996.
15. The exparte applicants submitted that whereas section 29 (4) of the Land Adjudication Act allows a minister to delegate his powers in hearing and determination of appeals, the norm has been to delegate those powers to Deputy County Commissioners (DCC) in the areas that the parcels of land were located. See *Republic vs Cabinet Secretary, Ministry of Land and Settlement and other exparte Gerald Mbuiiri Kabugu* (2018) eKLR.
16. In this instance, therefore, the exparte applicants submitted that a DCC had heard the appeal was without jurisdiction on land matters situated outside his area. As to illegality, biasness and procedural impropriety, the exparte applicants submitted that the test for the apprehension of partiality or bias for decision makers was set in *Jasbir Singh Rai vs Rai & others* (2013) eKLR, based on what a reasonable and a fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible.
17. In this instance, the exparte applicants submitted that the minister merely replicated the decision of the 1st respondent as per the proceedings of the appeal. Further, it was submitted that the 2nd respondent was biased since he did not examine the evidence afresh, had a predetermined mind or opinion, and therefore, there was no fair hearing and observance of the rules of natural justice.
18. The exparte applicants submitted that the objector was not claiming the entire Parcel No. 2196; the 1st respondent did not state the acreage or the size that he awarded to the objector but only relied on the



- beacons shown to him by the interested party; hence his decision was not based upon logical proof or material evidence, making the decision ambiguous or unreasonable, which unfortunately, the minister replicated. To this end, the *ex parte* applicants submitted that the decision was marred with illegalities, bias, procedural impropriety was unreasonable and unfair.
19. Similarly, the *ex parte* applicants submitted that the minister had a statutory duty to look at the previous proceedings, to consider the grounds of appeal and arrive at an independent decision. Reliance was placed on *Republic vs Special District Commissioner Machakos & another* (2006) eKLR.
 20. The *ex parte* applicants submitted that the minister failed to examine the ambiguity in the decision considering the history of both the matters and the proceedings and the activities of the group, membership since 1996, how the members came together in 2005 to register the group, and the nature of activities they have been undertaking on the land.
 21. The court has carefully gone through the pleadings and the submissions by the parties. The issues calling for my determination are:
 - i. Whether the 2nd respondent heard and determined the minister's appeal in line with the law.
 - ii. If the proceedings and the decision made on 13.3.2024 ought to be quashed.
 - iii. If the court should prohibit the implementation of the directions.
 - iv. What is the order as to costs?
 22. The proceedings before the court are brought under Articles 23 (3), (f), 40, 48, and 50 of *the Constitution*, Order 53 Civil Procedure Rules and Sections 26-21 of the *Land Adjudication Act* (Cap 284). Article 50 (1) of *the Constitution* provides that every person has a right to have disputes resolved by the application of law in a fair manner.
 23. Article 47 of *the Constitution* provides that a citizen has the right to a fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Section 2 of the *Fair Administrative Action Act* defines an administrative action to include the powers, functions, and duties exercised by authorities or quasi-judicial tribunals or any act, omission, or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates.
 24. Section 7 (1) of Part II of the Sixth Schedule to *the Constitution* provides that all law in force immediately before the effective date continues to be in force and shall be construed with alterations, adaptations, qualifications, and exceptions necessary to bring it in conformity with this Constitution.
 25. The powers of the minister to hear and determine an appeal are governed by Section 29 of the *Land Adjudication Act*.
 26. After 2010, judicial review was elevated to constitutional supervision of public authorities and quasi-judicial tribunals. It became a constitutional principle to safeguard constitutional principles, values and purposes.
 27. The principles for judicial review regarding certiorari before 2010 were discussed in *Republic vs. KNEC ex parte Geoffrey Gathuhi Njoroge and others* (1997) eKLR. The court said that an order of certiorari can only quash a decision already made, and an order of certiorari will be issued if the decision is made without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or for any other reasonable cause.
 28. Section 29 of the *Land Adjudication Act* provides that any person aggrieved by a determination of an objection under Section 26 of the act may appeal to the minister by delivering an appeal in writing



- specifying the grounds of appeal and sending a copy to the Director of the Land Adjudication. Section 29 (b) thereof provides that the minister shall determine the appeal and make such order thereon as he thinks just, and the order shall be final.
29. As indicated above, all the law in existence before 2010, as per the sixth schedule of *the Constitution* has to be read in conformity with *the Constitution*. Similarly, the scope of judicial review after its elevation as a substantive and justiciable right has been subject to court interpretation. In *Dande and others vs Inspector General of National Police Service & others* Petition 6 (E007), E005 (and 18) of E010 of 2022 (consolidated (2023) KESC 40 (KLR) June 16th, 2023) (Judgment), the Supreme Court of Kenya held that under Articles 23 (3) & 47 of *the Constitution* and Section 7 of the *Fair Administrative Action Act* and guided by its decision in *Praxedes Saisi & others vs DPP & others* (2023) KESC 6 (KLR) (Civ) (January 27th 2023) Judgment, the right to a fair administrative action was a constitutional imperative governing not only state bodies, but also any person, body or authority making administrative directives. The court said that when a party approaches a court under *the Constitution*, then the court can carry out a merit review of the case, unlike if it files the case under the traditional judicial review under the common law.
 30. In *Kiluwa Ltd & another vs. Business Liaison Co. Ltd & others* (Petition 14 of 2017) (2021) KESC 37 (KLR) (August 6th, 2021) (Judgment), the court observed that Article 47 of *the Constitution* and the intended law namely the *Fair Administrative Action Act* is aimed at an efficient administration based on the principles of expedition, efficiency, lawfulness, reasonableness and procedural fairness.
 31. In *Republic vs DCC Buuri EaSt Sub-County & 7 others Kathuri & others* (IP) Tirindi exparte applicant E & LJR case No. E004 of 2023 (2024) KEELC 59 (KLR) (January 17th, 2024 (Judgment) the court observed that Section 29 of the *Land Adjudication Act* has to be read alongside Section 9 (2) of the *Fair Administrative Action Act* and within the constitutional framework on fair administrative action. Further, the court said that any quasi and non-quasi-decision maker must correctly understand the law regulating their decision-making, power and give effect to it since to act otherwise than provided by the operative substantive and procedural law, the decision maker would be operating outside the law.
 32. In *Timotheo Makenge vs Manunga Ngochi* (1979) eKLR, the Court of Appeal held that a land adjudication officer, as far as was practicably possible, must follow the procedure directed to be observed in the hearing of civil suits and, therefore, his decision must contain a concise statement of the case, the points for determination of the decision and the reasons for such a decision. In *Republic vs Minister for Land & others* (1988) eKLR, the court observed that the minister had to admit, hear, and determine the appeal judicially and adhere to the law; otherwise, a court could intervene. The minister must also give reasons why he disagrees with the previous records and findings. See *Matwanga Kilonzo vs D.C Kiuti & another* (2021) eKLR *John Masiantet Saeni vs Daniel Aramat Lolungiro & others* (2017) eKLR and *DumeDeri Mumbo & others vs Cabinet Secretary Land Housing and Urban Development and others* (2016) eKLR.
 33. As to the procedure to hear an appeal, the minister has wide latitude on how he conducts the proceedings so long as they meet the substantive ends of justice. See *Dominic Musei Ikombo vs Kyule Makau* (2019) eKLR.
 34. A minister, while hearing and determining an appeal, must accord all the parties a fair hearing, consider relevant considerations, act reasonably, avoid errors of law, act fairly, decide on the nature and particulars of the grounds of appeal, analyze the facts and evidence and give reasons for his decision. A minister's decision may be reviewed under Section 7 (1) of the *Fair Administrative Action Act* if a mandatory and material procedure or conditions prescribed by the empowering law are not complied with if made in bad faith if it was rationally not connected to the purpose for which it was taken, where



- reasons for it are lacking, or where there is a failure to act or the decision is unreasonable or unfair or taken in abuse of power.
35. In *Republic vs Public Procurement, Administrative Review Board & others exparte Sanitam Services E. An Ltd* (2013) eKLR, the court said that procedural impropriety was the hallmark of judicial review going by the Wednesbury Principles that if the decision was so unreasonable, no reasonable authority could have ever come to it.
 36. In *Bukoba Gyumkhana Club* (1963) E.A 478, the court observed that the failure to act fairly while making the decision, non-observance of rules of natural justice, or failure to act reasonably to the affected person by the decision or to observe or adhere to procedural rules, could attract court intervention.
 37. Similarly, in *Penina Nadako Kisilwa vs IEBC & others* (2015) eKLR, the Supreme Court of Kenya held that in judicial review, the court's target is always no more than the processes in which the ultimate decision was arrived at to correct any mistake of illegality, irrationality, and procedural defects. Further, in *Suchan Investment Ltd vs. Ministry of National Heritage and Culture and others* (2016) eKLR, the court observed that, above the traditional judicial review, Section 7 (2) of the *Fair Administrative Action Act* provides proportionality as a ground where a court has to evaluate the decision on its merits, assess the balance which the decision maker struck to its relative weight accorded to its interest and consideration.
 38. In *Republic vs KRA exparte Tom Odhiambo Ojienda t/a Prof. Tom Ojienda and Associates* (2018) eKLR, the court observed that the decision had to bypass the balancing test necessity test and the suitability test.
 39. In *Edwin Harold Dayan Dande & others vs Inspector General, National Police Service & others* (2023) KESC 40 (KLR), the court observed that a dual approach to judicial review must be adopted. In *Murungi vs AG & others E & L Constitutional Petition E007 of 2023* (2024) KEELC 4343 (KLR) (May 22nd, 2024) (Judgment), the court cited *Msagha vs Chief Justice & others* (2006) 2 KLR 553, that the ingredients of fairness or natural justice entail allowing a person an adequate opportunity to present his case before an unbiased decision maker, whose decision must be based upon logical proof or evidential material. The court also cited *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* (1948) 1 KB 223, that a person entrusted with discretion must direct himself properly in law, to consider the matters he is supposed or bound to consider and exclude irrelevant matters; otherwise, he will be said to have acted unreasonably.
 40. In *Githinga & others vs Kiru Tea Factory Co. Ltd* Petition No. 12 of 2019 (2023) KESC 41 (KLR), June 16th 2023), the court said that courts must equally adhere to the principles of natural justice and procedural fairness, the right to a fair hearing, by evaluating all the evidence brought forth by the parties depending on the matter in issue, without bias, following due process, hearing the testimonies, granting a right to controvert, ensuring proof of any material fact, treating parties fairly and acting effectively and efficiently in the administration of justice.
 41. Applying the preceding case law, the main grounds for faulting the minister's decision are:
 - i. The designated DCC was from a different sub-county.
 - ii. The minister replicated the decision of the land adjudication officer.
 - iii. There was illegality, bias, procedural impropriety, unfairness, injustice and infringement of the proprietary right to property of the exparte applicants.



42. Article 40 (3) of *the Constitution* provides that parliament shall not enact a law that permits the state or any person to deprive a person of property arbitrarily. The proceedings and decision attached as SMM "6" do not show what the grounds of appeal were, if the minister considered the grounds of appeal, the reasons for dismissing the grounds of appeal, the basis upon which he disbelieved the evidence of the applicants as compared to the evidence of the interested, any review of the previous proceedings and documents and lastly, the basis why he was confirming the earlier findings by the land adjudication officer.
43. In *Pastoli vs Kabale District Local Government Council & others* (2018) 2 E. A 300, the court observed that 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, 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 for the same was in deviance of logic and acceptable moral standards, while procedural impropriety was when there was a failure to act reasonably on the part of the decision maker in the process of taking a decision.
44. In my considered view, I think the decision-maker failed to consider the grounds of appeal, review and determine the same in the light of the evidence tendered during the hearing of the appeal, consider the existing history of the dispute from the adjudication records held by the land adjudication officer and lastly, give reasons for the decision that he had arrived at. The upshot is that I call for and quash the decision on account of procedural impropriety, unfairness and unreasonableness.
45. The appeal is as a result of this remitted for re-hearing by a different minister's delegatee apart from M. C Wambugu, within six months from the date hereof. A prohibition order shall issue, stopping the implementation of the said decision.
46. Costs to the exparte applicants.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 25TH DAY OF SEPTEMBER, 2024

In presence of

C.A Kananu

Miss Sudi for exparte applicant

Asuma for Mose for interested party

HON. C K NZILI

JUDGE

