



Republic v Deputy County Commissioner Makueni County & 2 others; Maingi (Interested Party); Maluta & another (Exparte Applicants) (Environment and Land Judicial Review Case E003 of 2023) [2024] KEELC 6255 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2023
TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER MAKUENI COUNTY 1ST
RESPONDENT**

THE DIRECTOR OF LAND ADJUDICATION 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

AND

PAUL KASYOKA MAINGI INTERESTED PARTY

AND

PETER MUTWII MALUTA EXPARTE APPLICANT

JAPHUS THATHI MALUTA EXPARTE APPLICANT

JUDGMENT

1. By an amended Notice of Motion dated 20th March 2023 brought under Order 53 Rule 1 and 2 of the Civil Procedure Rules, Sections 8 and 9 of the [Law Reform Act](#) the Ex Parte Applicants seek the following orders:-
 1. That an Order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent in an Appeal to the Minister Case No. 288 of 1997 delivered on 25th September 2022 over land parcel No. 956 Mukuyuni Adjudication Section.



2. That an Order of Prohibition directed to the 2nd Respondent from effecting and/or implementing the decision of the 1st Respondent in an Appeal to the Minister Case No. 288 of 1997 delivered on 25th September 2022 over land parcel No. 956 Mukuyuni Adjudication Section.
3. Costs of this cause to be borne by the Interested Party.
4. Such further and other reliefs that this Honourable Court may deem just and expedient to grant.
2. The application is premised on the grounds appearing on the body of the Statutory Statement together with the supporting affidavit of Peter Mutwii Maluta sworn on even date.

The Applicants' Case

3. The deponent averred that land parcel No. 956 Mukuyuni Adjudication Section belongs to his family and that they have been utilising the same since time immemorial until 25th September 2022 when the Minister decided that it belongs to the Interested Party.
4. He deposed that the dispute over the suit property was first heard by Mukuyuni Land Adjudication Committee in Case No. MKY/156/80 which decided that his father Maluta Muteti was the owner thereof.
5. That being aggrieved, the Interested Party appealed against the decision to the Arbitration Board which upheld the decision of the Committee. That being aggrieved by the decision of the Board, the Interested Party lodged Objection proceedings to the Land Adjudication Officer who dismissed the objection for lack of evidence.
6. That being aggrieved by the decision of the Land Adjudication Officer, the Interested Party lodged an appeal to the Minister whose outcome is the subject matter of the proceedings herein.
7. He asserted that the hearing of the Appeal to the Minister was unfair and marred with procedural flaws. He further averred that the decision of the Minister was unreasonable since he did not give any reason as to why he deviated from the findings of the Committee, the Arbitration Board and in the Objection proceedings.
8. He contended that the Minister violated the rules of natural justice in the proceedings before him as they were not granted an opportunity to cross examine the Interested Party. He further contended that the 1st Respondent took into account irrelevant considerations in arriving at his decision. In conclusion, he urged the court to allow the application as prayed.

The Interested Party's Case

9. The Interested Party filed a replying affidavit sworn on 5th June 2023 in opposition to the application.
10. He averred that the suit property was not sold to Maluta Muteti as alleged by the Applicants. He further averred that the 1st Ex Parte Applicant's family had been utilising the suit property in defiance of the notices issued by relevant authorities.
11. He deposed that the suit property belongs to Maingi Mutisya but was registered in the name of Maluta Muteti through a flawed adjudication process. He argued that the 1st Ex Parte Applicant being the grandson of Maluta Mutei has no proprietary rights over the suit property.
12. Though duly served, the Respondents did not enter appearance or file any response to the application.



13. The application was canvassed by way of written submissions.

The Ex Parte Applicants Submissions

14. The Ex Parte Applicants submissions were filed on 12th July 2023.

15. On their behalf, Counsel outlined the following issues for the court's determination:-

- a. Whether the 1st Respondent adhered to the prescribed procedure in arriving at the impugned decision?
- b. Whether the Ex Parte Applicants are entitled to the orders sought in the application?

16. On the first issue, Counsel submitted that in order to succeed in an application for judicial review, the Applicants must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

17. Counsel further submitted that where a person's rights and fundamental freedoms are likely to be affected by an administrative decision, the administrator is under an obligation to give the affected party an opportunity to be heard, to cross examine the adverse party and to be supplied with evidence to be relied upon. To buttress this point, Counsel relied on Article 47 of *the Constitution* and on Section 4 of the Fair Administrative Actions Act.

18. Counsel further submitted that the Applicants were not granted an opportunity to cross examine the Interested Party in the proceedings before the Minister. It was further submitted that the 2nd Applicant was not granted an opportunity to be heard contrary to the rules of natural justice.

19. Counsel contended that the Minister acted unreasonably by deviating from the earlier decisions made by the Committee, Arbitration Board and the Land Adjudication Officer without substantiating any reasons for doing so. To buttress this point, Counsel relied on the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 Others* [2007] eKLR where it was held that:-

“Nothing is to be done in the name of justice which stems from abuse of power. It must be settled by now that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision.....”.

20. Counsel submitted that the process of making the impugned decision was flawed and that the 1st Respondent abused his powers and violated the Applicants right to fair hearing. Counsel argued that there was a legitimate expectation that the 1st Respondent would comply with the laid down procedure appertaining to fair hearing.

21. To buttress his submissions, Counsel relied on the case of *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR. where the court held that:-

22. “It is trite law that all persons who come to court are entitled to a fair hearing whether the matter is instituted in criminal or civil nature. That fair hearing in principle incorporates the rules of natural justice which included the concept of audi alteram partem (hear the other sided or no one is condemned unheard)”.

23. Concluding his submissions, Counsel submitted that Minister failed to comply with the rules of natural justice in arriving at his decision. He urged the court to allow the application as prayed.



The Interested Party's Submissions

24. The Interested Party's submissions were filed on 29th August 2023.
25. On his behalf, Counsel outlined the following issues for the court's determination:-
 - a. Whether there was procedural fairness in the Appeal before the Minister in arriving at the decision.
 - b. Whether the Ex Parte Applicants are entitled to the orders sought.
26. As regards the first issue, Counsel submitted that the Minister complied with the rules of natural justice in conducting the proceedings before him.
27. The Interested Party contended that the Applicants have approached the court with dirty hands as they had breached the order issued by the Minister requiring the parties to maintain status quo pending the hearing and determination of the appeal by constructing on the suit property.
28. Counsel contended that the procedure culminating to the decision of the Minister was fair and in accordance with the provisions of Section 12 of the [Land Adjudication Act](#).
29. Counsel further contended that the Applicants were not supposed to cross examine the Interested Party since Appeal proceedings entail the examination of the evidence already on record without necessarily hearing the parties unless leave is sought.
30. Counsel contended that the Applicants failed to point out any provision in the [Land Adjudication Act](#) which allows a party to call witnesses during the hearing of an Appeal. To buttress this point, Counsel relied on the case of Republic v Deputy County Commissioner Mwingi East Ex parte Katu Musyoki [2021] eKLR where the court held that:-

“The other complaint that the Applicant has raised is that the Respondent did not give him an opportunity to call witness while hearing the appeal. However, The Applicant did not point out any provision in the [Land Adjudication Act](#) which allows a party to call witnesses during the hearing of an appeal”
31. Counsel submitted that the Minister arrived at his decision after examining the records and proceedings of the decisions appealed against by the Interested party together with the statements of the Appellants as well as those of the Interested Parties.
32. Counsel submitted that the Applicants are not entitled to an order of Certiorari as the Minister had jurisdiction to hear and determine the appeal before him and that he adhered with the procedure set out in Section 29 of the [Land Adjudication Act](#). To buttress this point, Counsel relied on the case of Republic v District Land Adjudication and Settlement Officer Maara Sub County & 3 others; Ex Parte Applicant; M'nyiriRagwa; Njeru Kirika (Interested Party) [2022] eKLR where the court held that:-

“The principles for Judicial Review were set out in a land mark case of Republic v [Kenya National Examination Council Ex Parte Gathenji and others civil Appeal No. 266 of 1996](#) where the court of Appeal stated inter alia; “that an order of certiorari can only quash a decision already made an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause”.



33. Counsel submitted that the Minister considered the grounds of appeal, the statements by both parties and the proceedings in the appeal in arriving at his decision.
34. Counsel further submitted that an order of Prohibition is untenable as Section 29 of the [Land Adjudication Act](#) provides that the decision of the Minister is final. It was argued that an order of Prohibition against the 2nd Respondent cannot stand since there is no decision pending to be undertaken by the 2nd Respondent. To buttress this point, Counsel relied on decision of the Court of Appeal in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR where the court defined an order of Prohibition as follows:-

“It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not for excess of jurisdiction or absence of it but for a departure from the rule of natural justice. It does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings”.
35. Counsel submitted that the Minister had jurisdiction to hear and determine the Appeal and that he considered the evidence presented before him in arriving at his decision. Counsel submitted that the Applicants did not challenge the jurisdiction of the Minister in making the decision on Appeal.
36. Counsel contended that the Minister adhered to the rules of natural justice in that he was privy to the written grounds of appeal, the proceedings in the initial dispute adjudication and the statements and evidence presented by the parties.
37. It was further submitted that the Ex Parte Applicants have not demonstrated that the decision is tainted with illegality, irrationality and procedural impropriety and as such they are not entitled to judicial review orders. Counsel further submitted that the [Land Adjudication Act](#) has no provision for calling or cross examination of witnesses.
38. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

Analysis And Determination

39. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the 1st Respondent’s decision was made in breach of the principles of natural justice.
40. The duty of a Court in Judicial Review proceedings was set out in the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 E.A 300 where it was held that:-

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety 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. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality 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. Such a decision is usually in defiance of logic and acceptable moral standards Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with



procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.’

41. The parameters of Judicial Review were re-affirmed by the Court of Appeal in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd C.A Civil Appeal No. 185 of 2001* where 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 maker 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.”

42. The purpose of judicial review is not to review the decision but the decision making process. This was stipulated by the Court of Appeal in the case of *Republic v Kenya Revenue Authority Exparte Yaya Towers Limited [2008] eKLR*, where it was held that:

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected....”

43. It is not in dispute that the 1st Respondent had power to hear and determine the Appeal Case No. 288 of 1997 in accordance with Section 29 of the *Land Adjudication Act*.

44. The Ex-parte Applicants faulted the decision of the 1st Respondent on the grounds that it was made in breach of the principles of natural justice. The Applicants alleged that they were not granted an opportunity to cross examine the Interested Party in the proceedings before the Minister. They further alleged that the 2nd Ex Parte Applicant was not granted an opportunity to be heard.

45. The Interested Party on the other hand contended that the Minister adhered to the principles of fair hearing in the proceedings before him. He asserted that the *Land Adjudication Act* has no provision for calling or cross examination of witnesses.

46. At this juncture, this Court is called upon to determine whether the 1st Respondent adhered to the rules of natural justice in the proceedings before him.

47. The principles of natural justice provide that no one should be condemned unheard. In *Onyango Oloo v Attorney General [1986-1989] EA 456* the Court of Appeal expressed itself as follows;

“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant’s legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply



and therefore the authority is required to act fairly and so to apply the principle of natural justice.....Denial of the right to be heard renders any decision made null and void ab initio.”

48. The right to cross examine is anchored in Article 50(2)(k) of *the Constitution* which provides as follows:-

2 “Every person has the right to a fair trial which right includes-

(k) to adduce and challenge evidence.”

49. In the case of *Edward R. Ouko v Speaker of the National Assembly & 4 others* [2017] eKLR, the court held that:-

“Cross examination is now a component of fair administrative action. To that extent the previous decisions that held that in administrative action, cross examination is inapplicable can no longer be good law”.

50. The Ex parte Applicants gave an elaborate background of the Appeal to the Minister. The dispute regarding the suit property was heard by the Land Adjudication Committee Mukuyuni all the way to the Land Adjudication Officer.

51. Based on the evidence presented by the parties herein, it is apparent that the appeal to the Minister emanated from the decision of the Land Adjudication Officer made on 23rd July 1990.

52. I have perused the proceedings and findings in Minister’s Appeal Case No. 288 of 1997 conducted before the Deputy County Commissioner Makueni Sub County. In the Appeal before the Minister, the Ex parte Applicants were the Respondents while the Interested Party was the Appellant. The proceedings before the District Commissioner Makueni show that the Appellant (Interested Party herein) represented by Paul Kasyoka cross examined the Respondent (the Applicant herein). The Appellant called one witness Michael Mutie in support of his case. The proceedings show that the witness was not cross examined by the Respondents(the Applicants herein).

53. The proceedings before the Minister show that the Interested party and his witness were not cross examined by the Applicants or whether the District Commissioner notified them of this right. Failure to do so was an error which cannot be overlooked. The Applicants had a right to cross examine the Interested Party and his witness as the right to cross examination is a component of fair administrative action. Failure to accord or inform the Applicants of this right was a violation of the principles of Natural Justice.

54. The Applicants contended that the proceedings before the Minister violated their right to fair trial as the 2nd Ex Parte Applicant was not granted an opportunity to be heard. The right to be heard is a Constitutional right enshrined in Article 47 and 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.

55. Article 47(1) of *the Constitution* provides as follows:

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

56. Section 4(3)(b) of the *Fair Administrative Action Act*, 2015 imports the rules of natural justice and provides as follows:-

1. 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:



a. an opportunity to be heard and to make representations in that regard;

57. Article 50(1) of *the Constitution* provides for fair trial as follows:-

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.

58. One of the cardinal principles of the rules of natural justice is the right to be heard.

59. The procedure to followed by the Minister in determining an appeal is provided for under Section 29 of the *Land Adjudication Act*.

60. The proceedings in the appeal to the Minister show that the Applicants were the Respondents. No evidence was adduced to show that they were absent during the hearing of the Appeal. From the proceedings, it is not clear which of the Applicants testified in the proceedings before the Minister. The proceedings indicate “statement of the Respondent” but does identify which of Respondents testified before the Minister. The Interested Party did not rebut the Applicants evidence that the 2nd Applicant did not testify in the proceedings before the Minister. The Minister did not state why the evidence of the second Appellant was not taken or why he did not testify. The court can safely conclude that the 2nd Applicant was not accorded the right to adduce evidence or to be heard. The proceedings show that he did not participate in the proceedings before the Minister.

61. The purpose of judicial review is to examine the process and not the merits of the decision.

62. In Republic v Secretary of the Firearms Licensing Board & 2 Others Ex parte Senator Johnstone Muthama [2018] eKLR the court held that:

“The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of the purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited, [2008] eKLR, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.”

63. In my view, when the complaints of the Applicants are considered as a whole, it would appear that the Applicants are aggrieved with the decision making process. It is crystal clear that the 1st Respondent failed to adhere to the rules of natural justice in the proceedings before him.

64. In my opinion, a judicial review remedy is available in these circumstances.

65. The upshot of the foregoing is that the Court does find merit in the Application for judicial review.

66. Accordingly, the Notice of Motion dated March 20, 2023 is hereby allowed with costs to the Ex parte Applicants.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2024.



IN THE PRESENCE OF:

Munyasya for the Interested Party

Muthiani for the Ex parte Applicants

Court assistant Stephen

