



**Republic v District Adjudication Officer Kilungu Sub County & 3 others; Mutuku & 2 others (Interested Parties); Muteti (Exparte Applicant) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 6254 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6254 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023**  
**TW MURIGI, J**  
**SEPTEMBER 18, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DISTRICT ADJUDICATION OFFICER KILUNGU SUB COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER KILUNGU ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, MAKUENI ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**FRANCIS KIVUVA MUTUKU ..... INTERESTED PARTY**

**ANNA MAWIA MUTUKU ..... INTERESTED PARTY**

**PIUS NUNDU MUTUKU ..... INTERESTED PARTY**

**AND**

**DOMINIC MUTISYA MUTETI ..... EXPARTE APPLICANT**

**JUDGMENT**

1. By a Notice of Motion dated 31<sup>st</sup> August 2023 brought under Article 23(1) of *the Constitution*, Sections 8 and 9 of the *Law Reform Act* and Order 53(1) of the Civil Procedure Rules the Ex Parte Applicant seeks the following orders:-



1. That an order of Certiorari do issue to move this Honourable Court to quash the decision of the 1<sup>st</sup> Respondent herein made on 22<sup>nd</sup> June 2023 over land parcel number 3314 Kyamuoso Adjudication Section.
  2. That an order of Mandamus do issue to move this Honourable Court to compel the Respondents to amend the register of land parcel number 3314 KYamuoso Adjudication Section and have the Ex Parte Applicant as the registered owner.
  3. That the Respondents and Interested Parties herein be ordered to pay the costs of this application
2. The application is premised on the grounds appearing on the Statutory Statement together with the verifying affidavit of Dominic Mutisya Muteti sworn on even date.

### **The Ex Parte Applicant's Case**

3. The Applicant averred that together with his siblings, they have been in occupation of land parcel No. 3314 Kyamuoso Adjudication Section since 1984 to date.
4. He further averred that the suit property was the subject matter in Kilungu Case No. L53 of 1967 and that the Interested Parties families were not parties thereof. He deposed that his late father Muteti Kavuva lodged a dispute against the 1<sup>st</sup> -3<sup>rd</sup> Interested Parties families before the Assistant Chief in the year 1984 because they had trespassed into the suit property in breach of the court's decision. That upon hearing all the parties, the Chief ordered for the eviction of the Interested Parties from the suit property. That the interested Parties complied with the Chief's directives and vacated the suit property.
5. He averred that on 21<sup>st</sup> February 2010, he filed Case No. KMC/CE/39/07 against the 1<sup>st</sup> Interested Party seeking for his eviction from the suit property which was decided in his favour.
6. That being aggrieved, the 1<sup>st</sup> Interested Party appealed against the decision to the Board which dismissed his case vide the decision made on 15/05/2014. That being aggrieved by the decision of the Board, the 1<sup>st</sup> Interested Party filed an Objection which was thereafter dismissed on 18/10/2021.
7. The Applicant asserted that the 1<sup>st</sup> Respondent violated the rules of natural justice by allowing the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to litigate in the Appeal before him since they were not parties in the previous proceedings.
8. He contended that the 2<sup>nd</sup> Respondent awarded the suit property to the 2<sup>nd</sup> Interested Party without any justification and added that the Interested Parties were allowed to come back to the suit property vide the decision made on 22/6/2023.
9. According to the Applicant, the issue of ownership over the suit property was determined in the earlier decisions which the Minister failed to consider in arriving at his decision.
10. He further averred that the Appeal to the Minister was filed out of time and without leave.
11. He contended that his right to property under Article 40 of *the Constitution* has been grossly violated since he has been deprived of his property. In conclusion, he urged the court to allow the application as prayed.

### **The 1<sup>st</sup> Interested Party's Case**

12. The 1<sup>st</sup> Interested Party filed a replying affidavit sworn on 14<sup>th</sup> December 2023 in opposition to the application.



13. He averred that prior to the land adjudication exercise in Mukaa and Kilungu Districts, land parcels No. 319 and 3314 belonging to Mutuku Kivungi were comprised in one parcel of land.
14. He further averred that the dispute herein arose in the year 1967 when the late Philip Nyamai Katiku sued the late Kioko Kivuva in Kilungu Case No. L.53 of 1967 where the court in its judgment ordered Kioko Kivuva to compensate Philip Nyamai with another parcel of land.
15. He went on to state that in the year 1984, Muteti Kavuva the Ex Applicant's late father, lodged a dispute before the area chief alleging that they had trespassed into the suit property. That upon perusing the map, the area chief confirmed that the Interested Parties and not the Applicant were in occupation of the suit property and thereby directed that each party to occupy their rightful parcels of land.
16. That being aggrieved by the Chief's decision, the dispute was escalated to the DO who in turn referred the dispute to the clan elders but no resolution was arrived at.
17. That sometime in the year 1998, his late father Mutuku Kivungi together with Nungi Kivungi sued Muteti Kavuva before the Committee over the ownership of the suit property. That in its decision, the Committee conferred ownership of the suit property to his late father and Nungi Kivungi and ordered Muteti Kavuva to vacate or be evicted.
18. That being aggrieved by the Committee's decision, the late Muteti Kavuva appealed to the Arbitration Board which conferred ownership of the suit property to his late father and Nungi Kivungi and a title deed was issued thereafter.
19. That upon the demise of his father, the Ex Parte Applicant sued his father in Committee Case No. KMC/CE/39/07 over the ownership of the suit property whom he substituted in the proceedings therein.
20. That he appealed against the decision to the Board which in its decision conferred ownership of the suit property to the ex parte Applicant.
21. That being aggrieved by the decision of the Board, he filed Objection No. 1007 which was dismissed on 8/10/2021.
22. That being aggrieved by the decision, he lodged an Appeal to the Minister on 18/11/2021 within the time stipulated by the law. He went on to state that the Appeal was decided in his favour in which the Minister ordered that the suit property be registered in his mother's name.
23. He asserted that Kilungu Case No. L. 53 of 1967 did not confer ownership of the suit property to the Applicant. He insisted that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were not strangers in the Appeal to the Minister as they are related to Mutuku Kivungi and Nungi Kivungi who were previously awarded the suit property.
24. The Interested Parties contended that the Applicant is aggrieved with the merits of the decision since he did not adduce any evidence to show that the Minister acted ultra vires his powers in determining the appeal.
25. The Respondents filed a memorandum of appearance on 20<sup>th</sup> June 2024 but did not file any response to the application.
26. Parties were directed to canvas the application by way of written submissions. On 29<sup>th</sup> April 2024, the Ex Parte Applicant was granted 21 days to file and serve a further affidavit together with his submissions. As at the time of writing this judgment, the Ex Parte Applicant had not filed his further affidavit and submissions as directed.



## **The 1<sup>st</sup> Interested Party's Submissions**

27. The 1<sup>st</sup> Interested Parties submissions were filed on 16<sup>th</sup> February 2024.
28. In his submissions, Counsel reiterated the contents of the 1<sup>st</sup> Respondent's replying affidavit. Counsel submitted that the application is defective as the Applicant did not seek leave to apply for judicial review orders. To buttress this point, Counsel relied on the case of *Republic v Chief Magistrate Milimani Commercial Courts & 2 others Ex Parte Fredrick Bett (2022) eKLR* where the court stated as follows:-
- “The chamber summons dated 8<sup>th</sup> October 2021 has sought substantive judicial review reliefs without the applicant seeking leave to institute judicial review proceedings. In view of the foregoing, the application is thus fatally defective for flouting clear statutory provisions. I hereby strike it out with costs to the Respondents.”
29. Counsel further submitted an order of Certiorari can only issue where the judgment or action complained about is marred with illegality, irrationality and procedural improprieties which was not the case in the present application. It was submitted that the Minister had jurisdiction to hear and determine the Appeal and that he rendered a rational decision.
30. Counsel submitted that the parties in the Appeal to the Minister were granted an opportunity to be heard as shown in the proceedings before the Minister.
31. Counsel further submitted that there were no errors of law on the part of the 2<sup>nd</sup> Respondent. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

## **Analysis And Determination**

32. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination:-
1. Whether the Appeal to Minister was filed out of time?
  2. Whether the Ex-parte Applicant is entitled to the judicial review remedies sought.
33. The duty of a Court in Judicial Review proceedings was set out in the case of *Pastoli Vs Kabale District Local Government Council and Others (2008) 2 E.A 300* where the court 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.’



34. The parameters of Judicial Review were re-affirmed by the Court of Appeal in the case of *Municipal Council of Mombasa Vs 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.”

#### **Whether The Appeal To The Minister Was Filed Out Of Time.**

35. The Applicant alleged that the Appeal to the Minister was filed out of time and without leave. The interested Parties contended that the Appeal was filed within the time stipulated by the law.
36. Section 29 of the *Land Adjudication Act* provides for the procedure of filing an appeal to the Minister as follows:-
- (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.
37. The Ex Parte Applicant did not adduce any evidence to demonstrate that the appeal was filed out of time. In the circumstances, I find that the Appeal was filed within the time stipulated by the law.

#### **Whether The Ex Parte Applicant Is Entitled To The Judicial Remedies Sought**

38. The Ex-parte Applicant faulted the 2<sup>nd</sup> Respondent’s decision mainly on the grounds that he deviated from the earlier decisions made by the Committee, Arbitration Board and the Land Adjudication Officer without giving any reasons. He further faulted the Minister for allowing strangers to litigate in the proceedings before him.
39. It is not in dispute that the 2<sup>nd</sup> Respondent had power to hear and determine Appeal Case No. 673 of 2022 in accordance with Section 29 of the *Land Adjudication Act*.
40. Both parties gave an elaborate background of the dispute culminating to the Appeal to the Minister. The dispute was initially heard by the chief, the DO and the clan elders. The record shows that the dispute in respect of the suit property was heard by the Land Adjudication Committee which awarded the suit property to the Applicant. The dispute was then heard by the Arbitration Board which upheld the decision of the Committee.
41. The Interested appealed against the decision to the Land Adjudication Officer and his objection was dismissed on 8/10/2021 on the grounds of being res judicata.



42. According to the evidence presented by the parties herein, it is apparent that the Appeal before the Minister emanated from the decision of the Land Adjudication Officer made on 8/10/2021.
43. I have perused the proceedings and findings in Minister's Appeal Case No. 673 of 2022 conducted before the Deputy County Commissioner Kilungu Sub County. In the Appeal before the Minister, the Ex parte Applicant was the Respondent while the Interested Parties were the Appellants. From the proceedings, the Appellant's witness is listed as Martin Kimweli Mulei while the Respondent witness is listed as James Musau Kawia. Both parties were recorded as having been sworn and gave evidence. It is evident that the Parties herein participated in the proceedings by giving evidence, cross examination and calling witnesses.
44. The Applicant was represented by Thomas Nyamai Muteti gave his testimony and was allowed to cross-examine the Appellants and their witness. He fully participated in the proceedings before the Minister. In his decision, the Minister stated as follows: "Appeal case No. 673 of 2022 is hereby allowed. Plot No. 3314 be recorded in the name of the 2<sup>nd</sup> Appellant as requested by the 1<sup>st</sup> Appellant and the name of the Respondent be deleted from the records."
45. The record shows that throughout the adjudication proceedings, the parties herein made reference to Kilungu Civil Case No. L.53/1967. Both parties produced the judgment in Kilungu District Magistrates Court Land Case No. 53 of 1967 dated 12/2/1969. The judgment shows that the Plaintiff Philip Nyamai Katiku had sued the Defendant Kioko Kivuva where he sought for the boundary to be placed between their parcels of land as the Defendant was said to have sold his parcel of land. The Learned Magistrate stated in part as follows:-
- "I found that they have all been living in together for quite a long time. I consider that each one of them should keep the area of his land that he is using at the present time.....The area D is in possession of one Mumbi. The D area is also quite far and separate this area of dispute. It is for both parties to settle about the D area as they wish. By dividing area A, B and C two boundaries have been indicated by red crosses. The Plaintiff is awarded a boundary with half costs of Kshs.132 divided by 2=66+36=s/fx150 TPT charges to the Plaintiff."
46. It is clear from the judgment in Kilungu Civil Case No. L.53 of 1967 that each party was directed to keep the area of his land that he was using at that time. The issue for determination was a boundary dispute which the Plaintiff was awarded. The court did not determine the issue ownership of the suit property nor confer the ownership to the Applicant herein.
47. The Applicant contended that the proceedings before the Minister violated of the rules of natural justice as the Minister allowed strangers to litigate in the Appeal before him. In his supporting affidavit, the Applicant averred that his father had sued the families of the 1<sup>st</sup> – 3<sup>rd</sup> Interested Parties to the chief for trespassing into his land. The 1<sup>st</sup> Interested party stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were not strangers in the proceedings as they are relatives of Mutuku Kivungi and Nungi Kivungi who had been previously awarded the suit property. I have looked at the proceedings in Committee Case No. KMC/CE/39/07. The Plaintiff was Dominic Mutisya and was represented by Lucia Mutisya and Tomas Muteti while the Defendant was Mutuku Kivungi Mbithi (deceased) and was represented by Francis Kivuva Mutuku and supported by Raphael Nuve Kivungi and Pius Mutuku.
48. The Applicant averred that the 1<sup>st</sup> Respondent awarded the suit property to 2<sup>nd</sup> Interested Party without any justification. The 2<sup>nd</sup> Respondent in his decision awarded the suit property to the 2<sup>nd</sup> Interested Party as requested by the 1<sup>st</sup> Interested Party. The 1<sup>st</sup> Interested Party averred that the 2<sup>nd</sup> Interest party is his mother. From the foregoing it is crystal clear that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties



were all along parties to the dispute herein and as such they were not strangers in the proceedings before the Minister.

49. 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 Vs Kenya Revenue Authority Ex parte 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....”

50. Similarly, in Republic Vs Secretary of the Firearms Licensing Board & 2 Others Ex parte Senator Johnstone Muthama [2018] eKLR it was 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 Vs. 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.”

51. The ex parte Applicant did not adduce any evidence to show that the Minister took into account irrelevant considerations or that he failed to take into account relevant considerations in the appeal. The Court would hardly intervene unless it is clearly demonstrated that the decision maker acted upon no evidence, or that he took into account irrelevant considerations and omitted the relevant factors. The Applicant has not demonstrated that such was case in the instant application.

52. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is in reality aggrieved by the merits of the decision of the 2<sup>nd</sup> Respondent. They have nothing to do with the decision making process. The Applicant is aggrieved because the 2<sup>nd</sup> Respondent overturned the earlier decision which was in his favour.

53. In my opinion, a judicial review remedy would not be available in these circumstances.

54. From the foregoing, I find that the Ex Parte Applicant has not met the threshold for the grant of the orders sought.

55. Accordingly, I find that the Notice of Motion dated 31<sup>st</sup> August 2023 is devoid of merit and the same is hereby dismissed with costs to the 1<sup>st</sup> Interested Party.

**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**In The Presence Of:**

Kithuka for the Ex Parte Applicant.

Court assistant Stephen



