



Republic v District Commissioner, Kibwezi District & another; Africa Brotherhood Church (ABC) Kambu & 4 others (Interested Parties); Waema (Suing as the Legal Representative of the Estate of Waema Masila Maingo (Deceased)) (Exparte Applicant) (Environment and Land Judicial Review Case 2 of 2017) [2024] KEELC 6065 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2017**

**TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE DISTRICT COMMISSIONER, KIBWEZI DISTRICT 1ST RESPONDENT
THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER,
KIBWEZI DISTRICT 2ND RESPONDENT**

AND

**AFRICA BROTHERHOOD CHURCH (ABC) KAMBU INTERESTED PARTY
TITUS KANYASYA INTERESTED PARTY
PAUL KIIO MUNUVE INTERESTED PARTY**

AND

**ALPHAXARD MUTHUSI WAEMA (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF WAEMA MASILA MAINGO
(DECEASED)) EXPARTE APPLICANT**

AND

**REBECCA KATIVO KAMOLO INTERESTED PARTY
ONESMUS NDUNDA MUINDI INTERESTED PARTY**



JUDGMENT

1. Pursuant to leave granted on 21st April 2010, Alphaxad Muthusi Waema, the Ex-parte Applicant herein filed the Notice of Motion dated 12th May, 2010 seeking the following orders: -
 - i. That an Order of Certiorari do issue to bring into this Honourable Court and quash the judgment or order of the 1st Respondent dated 18/02/2010.
 - ii. That an Order of prohibition do issue directed at the 1st Respondent, the 2nd Respondent and all the Interested Parties herein prohibiting them from enforcing, executing or implementing the judgment or order of the 1st Respondent dated 18/02/2010.
 - iii. That the Respondents and/or Interested Parties do 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 Alphaxad Muthusi Waema sworn on 16th April, 2010.

The Ex Parte Applicant's Case

3. The Ex-parte Applicant averred that he is the owner of land Parcel No. 517 and a portion of land parcel No. 543 situated within Kambu Settlement Scheme. He further averred that sometimes in August 2009, the 1st Interested Party through her agents the 2nd -5th Interested Parties started laying claim over a portion of his land which he had purchased from Timothy Nzive Nguku deceased.
4. He averred that that in October, 2009, the 2nd Respondent visited the disputed portion and resolved that he was the owner of the land.
5. He further averred that sometime in February, 2010, the Interested Parties lodged a land dispute claim with the 1st Respondent seeking to be awarded a portion of his land.
6. That vide the judgment delivered on 18/02/2010, the 1st Respondent directed that a portion of his land be allocated to the 1st Interested Party and that the 2nd Respondent to amend or rectify the lands register, re-draw the land map and amalgamate his portion of land with land Parcel No. 514 belonging to the 1st Interested Party.
7. He deposed that the 1st Respondent restrained him from claiming ownership over the said portion of land.
8. He went on to state that the Interested Parties did not lodge any claim over the disputed land during the land adjudication exercise conducted in 1996.
9. The Applicant contended that the 1st Respondent lacked jurisdiction to hear and determine the dispute as it was not a court or a tribunal constituted by the law and hence the judgment rendered therein was null and void. He further contended that the judgment is illegal and will unlawfully take away his land if it is implemented.

The Interested Party's Case

10. The 1st Interested Party opposed the application through the replying affidavit of Titus Kanyasya the Chairman of the Local Church Council sworn on 17th June, 2011.



11. He averred that the application is bad in law and incompetent as the Interested Parties were not properly sued. He further averred that the proceedings were a nullity for lack of consent of the Land Adjudication Officer. He asserted that the judgment was valid as the District Commissioner being the head of the Land Disputes Tribunal had jurisdiction to hear the boundary dispute between parcel Nos. 517 and 514.
12. He averred that the District Commissioner adhered to the rules of natural justice in the proceedings before him and accorded the Ex-parte Applicant an opportunity to present his case.
13. He argued that the Ex-parte Applicant is estopped from pleading jurisdiction as he voluntarily participated in the proceedings. He asserted that the 1st Respondent's decision was valid and therefore ought to be implemented.
14. The 1st Interested Party filed a replying affidavit of its Arch Bishop Timothy Ndambuki sworn on 6th April, 2023 in opposition to the application. He averred that the parties consented to resolve the boundary dispute between Plot Nos. 517 and 543 Kambu Adjudication Section before the District Commissioner.
15. He further averred that the parties voluntarily appeared before the District Commissioner and that they were accorded a fair hearing and agreed to abide by his findings. He averred that the Land Adjudication Officer visited the parcels of land on 2/10/2009 and restored the boundary in the presence of all the parties prior to the parties appearing before the District Commissioner.
16. He further averred that the decision of the District Commissioner was not implemented by the Land Adjudication as the Ex-parte Applicant rejected the decision.

The Response

17. In a supplementary affidavit filed on 18th September 2023, the Ex-parte Applicant denied the allegations that they consented to resolve the dispute before the 1st Respondent. He maintained that it was the Interested Parties who instituted the proceedings before the 1st Respondent after they were dissatisfied with the findings of the 2nd Respondent. He stated that he had no reason to be dissatisfied with the 2nd Respondent's findings as it was in his favour.
18. He reiterated that the proceedings before the 1st Respondent were a nullity ab initio for having been brought contrary to the provisions of the law.
19. The application was canvassed by way of written submissions.

The Ex Parte Applicant's Submissions

20. The Ex-parte Applicant's submissions were filed on 18/09/2023.
21. On his behalf, Counsel submitted that the Ex-parte Applicant has met the threshold for grant of judicial review orders sought. Counsel submitted that the decision of the 1st Respondent was illegal, irrational and marred with procedural impropriety.
22. On illegality, Counsel submitted that the proceedings before the 1st Respondent did not comply with the provisions of Section 29 of the *Land Adjudication Act*. Counsel argued that the 1st Interested Party being dissatisfied with the 2nd Respondent's decision ought to have filed an appeal in the manner provided by the law. Counsel submitted that the 1st Respondent lacked jurisdiction to hear and determine the dispute.



23. On procedural impropriety, Counsel submitted that the 1st Respondent failed to adhere to the express procedure laid down in the statute and hence the decision ought to be quashed. It was submitted that failure by the 1st Interested Party to lodge an appeal to the Minister amounts to procedural impropriety.
24. Concluding his submissions, Counsel urged the court to allow the application as prayed.
25. To buttress his submissions, Counsel relied on the list and bundle of authorities dated 18/09/2023.

The 1st Interested Party's Submissions

26. The 1st Interested Party filed its submissions on 26/09/2023.
27. In his submissions, Counsel reiterated the contents of the 1st Interested Party's replying affidavit. Counsel submitted that it was needless to quash the judgment of the 1st Respondent since it was not executed. Counsel urged the court to dismiss the application so as to allow a resurvey to be done as earlier set.

The 1st and 2nd Respondents Submissions

28. The 1st and 2nd Respondents' submissions were filed on 02/11/2023.
On their behalf, Learned State Counsel submitted that the application offends the provisions of Section 29 of the Land Adjudication Act as the Applicant is seeking to review the merits of the decision rather than the decision making process. Learned State Counsel submitted that judicial review is concerned with the decision making process and not the merits of a decision. To buttress this point Counsel relied on Republic v Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others [2018] eKLR where the court held that: ".....Judicial Review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach."
29. Learned State Counsel submitted that the Ex-parte Applicant did not prove that the process followed in arriving at the decision was marred with irregularities and procedural impropriety. It was further submitted that the 1st Respondent had jurisdiction to hear and determine the appeal. Counsel submitted that the Minister is not bound by earlier decisions of adjudicating bodies. To buttress this point Counsel relied on the case of Ngari Kiranga v Jerusha Mucogo Kiura & 2 others [2020] eKLR where the court stated that: ".....the mere fact that the Minister departed from the previous decisions of other adjudicating authorities cannot be a good ground for either filing a declaratory suit or even an application for judicial review." Concluding his submissions, Learned State Counsel urged the court to dismiss the application with costs to the Respondents.

Analysis and Determination

30. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Ex-parte Applicant has made out a case for the grant of judicial review orders sought.
31. 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 it was held as follows:-

“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.’

32. 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.”

33. 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 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....”

34. The Ex-parte Applicant faulted the decision of the 1st Respondent on the grounds that he acted ultra vires his powers. He contended that the 1st Respondent lacked jurisdiction to hear and determine the dispute.
35. The 1st Interested party on the other hand contended that that the 1st Respondent being the head of the Land Disputes Tribunal had jurisdiction to hear and determine the dispute as it involved a boundary dispute between land parcel No. 514 and 543. It was contended that the 1st Respondent adhered to the rules of natural justice and accorded the Applicant an opportunity to present his case. That the Applicant voluntarily participated in the proceedings and is therefore estopped from pleading jurisdiction.
36. The Respondents on their part submitted that the 1st Respondent complied with the provisions of Section 29 of the *Land Adjudication Act* in arriving at his decision.
37. At this juncture. this court is called upon to determine whether the 1st Respondent acted ultra vires his powers in determining the dispute before him. It is the Applicant’s case that the 1st Respondent’s



is not a court or a tribunal constituted by the law and as such, the judgment rendered therein was null and void ab initio.

38. It is not in dispute that the suit property falls within Kambu Adjudication Section.
39. The ascertainment of interests in land within an Adjudication Section is governed by Section 13 of the [Land Adjudication Act](#) which provides as follows: -
 - (1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under Section 5 of this Act.
40. The [Land Adjudication Act](#) deals with all matters pertaining to adjudication. It provides on how disputes pertaining to interest are to be heard and determined. Section 10 of the [Land Adjudication Act](#) provides how a dispute in an adjudication section is heard as follows: -
 - (1) The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connection with such claims, and for that purpose he shall be legally competent to administer oaths and to issue summonses, notices or orders requiring the attendance of such persons or the production of such documents as he may consider necessary for the carrying out of the adjudication.
 - (2) The adjudication officer may himself exercise all or any of the powers which are given by this Act to officers subordinate to him.
41. The procedure for filing objections before the land adjudication officer is set out in Section 12 of the [Land Adjudication Act](#) which provides as follows: -
 - (1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.
 - (2) Any proceeding conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of Chapters XI and XVIII of the Penal Code (Cap. 63).
42. Section 26 to 29 of the Act provides for an elaborate dispute resolution mechanism for solving any dispute arising from the adjudication process.
43. Once an adjudication register is completed and any person considers himself aggrieved with the correctness thereof, the procedure for filing an objection is provided under Section 26 of the Act which outlines as follows: -
 - (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.



- (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.
44. If a party is aggrieved by the determination of an objection under the provisions of Section 26 of the Act, he/she may file an appeal to the Minister in accordance with the provisions of Section 29 of the [Land Adjudication Act](#).
45. The Applicant averred that the Land Adjudication Officer visited the disputed portion and resolved that he was the owner of the land. In this regard, the Applicant produced a letter by the District Land Adjudication & Settlement Officer, Kibwezi dated 28/10/2009 (Exhibit WMM1) District which states as follows in part: -
- “Please note that according to our records, the disputed portion was demarcated as Plot No. 543 for Timothy Nzive Nguku. Mr Miango purchased this portion of 543 from the recorded owner. However when he started fencing and cultivating the same, A.B.C church stated laying claim on it. On scrutiny of demarcation information A.B.C church owns Plot No. 514 which is opposite this plot and there is a road of access between them.....During the visit by the surveyor, there was no evidence adduced to support the claim by the A.B.C or why they have not laid claim to this portion nor objected to the demarcation as it were done several years back. Indeed, there was no credible evidence adduced to warrant me change the records as it were.”
46. From the foregoing, it is crystal clear that the disputed portion was demarcated as Plot No. 543 to Timothy Nzive who later on sold it to Mr Maingo. The Land Adjudication Officer held that the 1st Interested Party did not lay any claim over the disputed portion nor file an objection against the demarcation. He thus resolved that the disputed portion was to remain part of Plot No. 517 belonging to the Applicant herein.
47. The 1st Interested Party ought to have filed an objection in accordance with Section 10 of the of the [Land Adjudication Act](#). No evidence was adduced to show that the Interested Party filed an objection with the Land Adjudication Officer over the disputed portion of land.
48. The Interested Party contended that both parties consented to have the 1st Respondent arbitrate over the matter. The Learned State Counsel submitted that the judgment of the 1st Respondent was valid as he complied with the provisions of Section 29 of the [Land Adjudication Act](#). The Respondents argued that the Applicant was aggrieved by the merits of the decision and not the decision making process.
49. The procedure to be followed by the Minister in determining an appeal is set out in Section 29(1) of the [Land Adjudication Act](#) which provides 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.



50. The Interested Party did not adduce any evidence to show that a determination of an objection had been made under Section 26 of the [Land Adjudication Act](#). No evidence was adduced to show that an appeal was filed within sixty days after the date of the determination specifying the grounds of appeal in accordance with Section 29(1) of the [Land Adjudication Act](#). The record shows that no appeal was lodged to the 1st Respondent in accordance with Section 29(1) of the [Land Adjudication Act](#). It is therefore clear from the judgment dated 18/02/2010 (Exhibit WMM4) that the 1st Respondent acted ultra vires his powers as he did not comply with the procedure set out in Section 29(1) of the [Land Adjudication Act](#).
51. The 1st Respondent had no jurisdiction to determine the land dispute herein since the parties did not comply with mandatory provisions of the [Land Adjudication Act](#).
52. In Kenya Revenue Authority v Export Trading Company Limited (Petition [20 of 2020](#)) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) the Supreme Court held as follows: -
- “This court in Martin Wanderi & 106 others v Engineers Registration Board & 10 others, SC Petition [No 19 of 2015](#); [2018] eKLR found that the question of legality or the lawfulness of an act lies at the core of article 47(1) by finding:
- “(126) In examining article 47(1) of [the Constitution](#), the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was ultra vires the mandate of the administrative entity, the act is void ab initio and the inquiry stops there as there is an outright violation of [the Constitution](#). The question of legality or the lawfulness of an act lies at the core article 47(1).”
53. Similarly, in [Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge Nbi Civil Appeal No. 266 of 1996](#) the Court of Appeal stated that: -
- “Prohibition 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 only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....Only an order of certiorari can quash a decision already made and 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 complied with or for such like reasons.”
54. In my view, when the complaints of the Applicant are considered as a whole, it would appear that the Applicant is aggrieved because the 1st Respondent acted ultra vires his powers in determining the dispute the way he did. It is crystal clear that the 1st Respondent did not have jurisdiction to entertain the proceedings before him.
55. In my opinion, a judicial review remedy is available in these circumstances.
56. The upshot of the foregoing is that the Court does find merit in the Application for judicial review.



57. The upshot of the foregoing is that I find that the application dated 12th May 2010 is merited and is hereby allowed as prayed. On costs, given the age of the matter, I hereby direct that each party bears its own costs.

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HON. T. MURIGI

JUDGE

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

In the presence of:-

Muumbi for the Ex Parte Applicant

Kamolo for the Interested Parties

Court assistant Stephen

