Republic v Ministry of Lands Appeal Tribunal & 2 others; Masumbuko & 2 others (Exparte Applicants); Thotho (Interested Party) (Judicial Review Application 8 of 2019) [2024] KEELC 6900 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6900 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

JUDICIAL REVIEW APPLICATION 8 OF 2019

FM NJOROGE, J

OCTOBER 22, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

MINISTRY OF LANDS ..... 1ST RESPONDENT

MINISTRY OF LANDS APPEAL TRIBUNAL ..... 2ND RESPONDENT

CABINET SECRETARY FOR LANDS ..... 3RD RESPONDENT

AND

ONESMUS MASUMBUKO ..... EXPARTE APPLICANT

REBECCA MVERA MASUMBUKO ..... EXPARTE APPLICANT

EMMILY FIKIRINI KAWIHI ..... EXPARTE APPLICANT

AND

AUGUSTINO BAYA THOTHO ..... INTERESTED PARTY

JUDGMENT

1. Vide the Notice of Motion dated May 28, 2021 the ex parte applicants sought the following orders:

    a. An order of certiorarito quash the decision made by the Ministry of Lands Tribunal on the on the 25th October, 2019 ordering that the Plot No's 22,1,2,3,20,4,21,5,6,7,9,10,24,11,12,14,15,16,17,18,19 & 13/ Mwijo/ Milimani be registered in the name of Augustino Baya Thotho issued by the Respondents against the Applicant.

b. An order of prohibitiondirected at the Respondents their employees, officers, agents and persons working under their instructions restraining them from interfering and/or enforcing in any way the order made by the Tribunal on the 25th October, 2016 in Appeal Nos. 3 and 4 of 2015.

c. An order ofProhibitiondirected at the Respondents, their employees, officers, agents and persons working under the Tribunal's or the ministry's instructions restraining them from interfering in any way whatsoever with the Applicant's land plot No's 22,1,2,3,20,4,21,5,6,7,9,10,24,11,12,14,15,16,17,18,19 & 13/ Mwijo/ Milimani.

d. Costsof this Application be provided for.

2. The grounds in support of the application are that the Ex parte Applicants are the beneficial owners of the parcels of land known as Plot No's 22,1,2,3,20,4,21,5,6,7,9,10,24,11,12,14,15,16,17,18,19 & 13/ Mwijo/ Milimani(hereinafter referred to as the suit properties) situated at Kilifi/ Kaloleni District, Kilifi County together with all developments thereon; that the Ministry of Lands Tribunal Appeal Tribunal delivered adverse irregular orders against the Ex Parte Applicants herein on the 25th day of October, 2016 in Appeal Nos. 3 and 4 of 2015.

3. It was also stated that the interested party who was the Respondent in the Appeal started disposing off part of the suit property and the purchasers are now constructing on part of the suit property. The applicant contends that the tribunal's decision is without any factual and/or legal backing in light of the fact that the applicants legally acquired the suit property and followed due process and fulfilled all the conditions precedent to acquiring the suit property.

4. The applicants stated that their late father bought the suit property vide a vesting order dated 27th March, 1984 in Land Case No. 45 o 1978 and that they have been in occupation of the suit property since their late father acquired the land; that owing to a dispute as to ownership, the Land Adjudication Committee of Mwiji/ Milimani Adjudication Section- Kayagungo Location heard all the parties and made a decision that the Ex Parte applicant's father rightfully acquired the suit property; that in 2015 the Appeal to the Minister Lands Adjudication in Appeal No. 4 of 2015 and Appeal No. 3 of 2015 ruled that he suit property should be registered in the name of the Interested Party. According to him, the Respondents acted irrationally and unreasonably in arriving at that decision. He further stated that the order issued by the respondents violates the Applicants right to property as enshrined under Article 40 and 47 of *the Constitution*.

5. The Respondents in response to the application filed Grounds of opposition dated 21st November, 2023 raising the following grounds:

1. The panel hearing the appeal was constituted in accordance with Section 29 (4) of the *Land Adjudication Act* thus competent to hear the appeal.

2. The appeal to the minister case was heard and determined within the timelines provided for under Section 29 (1) of the *Land Adjudication Act*.

3. The Ministerial decision was proper and well within their powers as provided for by law and that no rules of natural justice are demonstrated to have been breached.

4. The Respondents acted in accordance with the law and that the orders made were reasonable in the circumstances and in good faith.

5. That no allegation of irregularity, ultra vires or irrationality has been made or can be construed from the pleadings and evidence adduced against the 1st Respondent.

Submissions.

6. Counsel for the Respondent filed submissions dated 8th May, 2024 and identified two issues for determination; whether the Ex parte applicants are entitled to the orders of certiorari and prohibition and whether Judicial Review is the proper mode of instituting the suit.

7. Counsel submitted that it is trite law that for orders of certiorari to issue, the Ex Parte Applicants have to prove that the decision made by the 1st Respondent was an abuse of power, unfair, irrational and a breach of the rules of natural justice. He contended that the applicants do not qualify for the order of certiorari and for that he relied on the case of Kenya National Examinations Councils vs Republic Exparte Geoffrey Gathenji Njoroge & 9 others (1997) eKLR.

8. He submitted that the Ex Parte Applicants have to demonstrate how in the process of reaching the decision herein, the 1st Respondent breached rules of natural justice or the decision was irrational, made in bad faith and how it constitutes errors of fact and law.

9. It was his submission that judicial review is concerned with the process of decision making and not the merits of the decision and the court in exercising its judicial review jurisdiction is restricted to examining the decision-making process based on affidavit evidence; that it ought not to trespass into jurisdiction of the civil courts which have the opportunity to evaluate contested matters of fact as the applicants are urging the court to do. On this, he relied on the case of Jorum Mwenda Guantai v The Chief Magistrate Nairobi Civil Appeal No. 288 of 2003 cited with approval in the case of Fredrick Masaghwe Mukasa v DPP & 3 Others (2016) eKLR. He equally relied on Section 29 (1) and 29 (4) of the *Land Adjudication Act*.

10. He further submitted that in the Ex parte applicant's verifying affidavit have raised issues of a dispute as to ownership which can only be properly interrogated in a suit before court. He relied on the case of Republic v National Transport and Safety Authority & 10 others exparte James Maina Mugo (2015) eKLR.

Analysis and Determination.

11. This court has considered the application and the response. The issues that arise for determination in the present matter are as follows:

    1. Whether the Applicant is entitled to orders of certiorari and prohibition;

    2. Who ought to bear the costs of these proceedings.

    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 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."

12. It is also trite 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 (See the Court of Appeal in the case of Republic Vs Kenya Revenue Authority Ex-parte Yaya Towers Limited (2008) eKLR).

13. The applicants seek to quash the decision made by the Ministry of Lands Tribunal on the on the 25th October, 2019 ordering that the Plot No's 22,1,2,3,20,4,21,5,6,7,9,10,24,11,12,14,15,16,17,18,19 & 13/ Mwijo/ Milimani be registered in the name of Augustino Baya Thotho issued by the Respondents against the Applicant. The applicant contends that his late father bought the suit property vide a vesting order dated 27th March, 1984 in Land Case No. 45 of 1978 and that they have been in occupation of the suit property since their late father acquired the land; that owing to a dispute as to ownership, the Land Adjudication Committee of Mwiji/ Milimani Adjudication Section- Kayagungo Location heard all the parties and made a decision that the Ex Parte applicant's father rightfully acquired the suit property.

14. The applicants assert that there was no hearing and that the Ex Parte applicants were not given an opportunity to be heard. According to them, the Respondents acted irrationally and unreasonably in arriving at the decision that the suit property should be registered in the name of the Interested Party.

15. The Respondents on the other hand argue that the panel hearing the appeal was constituted in accordance with Section 29 (4) of the *Land Adjudication Act* thus competent to hear the appeal and that the appeal to the minister case was heard and determined within the timelines provided for under Section 29 (1) of the *Land Adjudication Act*.

16. The applicant in my view is aggrieved by the decision and the ruling dated 18th January, 2019, they assert that the tribunal's decision is without any factual and/or legal backing in light of the fact that the applicants legally acquired the suit property and followed due process and fulfilled all the conditions precedent to acquiring the suit property. They are also of the view that the Respondents made the decision without putting the history of the suit property into consideration.

17. Order 53 (1) (2) CPR provides as follows:

> "(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
>
> (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
>
> (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application."

18. There is no statutory statement attached to either the ex parte chamber summons for leave or the substantive judicial review notice of motion. The statutory statement is the document in which the

statements of fact are set out and grounds upon which the application is made are given. It is a vital document in judicial review. Its crucial role is realized upon a scrutiny of the provisions of Order 53 Rule 4(1) which states as follows:

Statements and affidavits [Order 53, rule 4]

1. Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."

19. In the present judicial review proceedings, a statutory statement and a verifying affidavit have been filed. The verifying affidavit is supposed to verify the facts in the statutory statement. A verifying affords the evidentiary basis for the statements made in the statutory statement and the prayers sought in the main notice of motion. Both the statutory statement and verifying affidavit are hence complementary ingredients of a judicial review application mandatorily provided for by law and without one or both of them the court lacks a basis for granting orders of judicial review. A judicial review application would be fatally flawed and without the statement, it can not be granted. I will delve into the merits of the applicants' case based on the contents of the statutory statement, the verifying affidavit and the grounds at the foot of the motion and the annexed documents.

20. In that regard, I note that the pillar of the applicant's case herein is twofold: that the respondents conducted no hearing and thus they were not given an opportunity to be heard before the panel and thus it violated the applicants' constitutional rights under Articles 40 and 47 of *the Constitution*; that the respondents' decision was irrational as their late father bought the property vide a vesting order in a case, Land Case No 45 Of 1978 way back in 1984.

21. The rule of evidence is that whoever alleges proves. This applies to judicial review matters as well. In judicial review matters, proof is usually by way of affidavit evidence.

22. Failure to conduct a hearing, whereby all the parties affected by a decision are given an opportunity to be heard prior to making the determination of a matter is denial of natural justice and affords a valid ground for seeking, and if proved, the granting, of the judicial review remedy of certiorari.

23. The first issue is whether there was a hearing or not. The applicant's state that there was none and comfortably leave it at that. One would expect that the respondents and the interested party would aid the court but having filed no substantive statements under oath by affidavit, the court is left very disadvantaged. While considering the comfort the applicants ensconce themselves in while stating that there was no hearing, I note that usually it is hard to prove a negative and asserters of negatives are given the benefit of doubt while their adversaries are put to task to prove a positive, especially when the success of their case or defence absolutely depends on it. I find it apt to quote the dicta of my brother Justice Odunga in Daniel Nzioki Kiangi & 2 others v Priscilla Musili Mulwa, Mutuku Kimanthi, Mueni Kikuswi (Suing on their Own Behalf and on Behalf of 47 Members of Meka Self Help Group) [2021] eKLR where he observed as follows:

> "75. It was further found by the trial court that the 1st Appellant in his defence did not avail before the Court evidence that would have proved that he did not receive the money in question or that he did not misappropriate it but his evidence was a bare denial of the allegations made against him explanation. In his evidence, the 1st Appellant's case was that his job was only that of record keeping as opposed to handling revenue. He however admitted that there was

a time he would receive money for onward transmission to the Secretary or Treasurer. One wonders what else he was supposed to say or prove apart from stating his position since he was asserting a negative. I appreciate that under Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I also appreciate the legal maxim that omnia praesumuntur legitime facta donec probetur in contrarium (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by Seaton, JSC in the Uganda Case of J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

> "The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general, the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson at Para 95.

76. Similarly, the Supreme Court of Uganda in Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA No. 9 of 1990 [1992] V KALR 30 was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

77. In other words, to justify calling upon the Defendant to answer the allegations made by the Plaintiff some evidence must be laid which if not answered raises the Plaintiff's to the standard of proof on a balance of probabilities before liability can be imputed. If the evidence presented by the Plaintiff does not meet the said threshold the Defendant ought not to be found liable simply because he has not rebutted the Plaintiff's case.

24. In the present case the respondents have in their grounds of opposition asserted that not only did the panel constituted in accordance with the law hear and determine the appeal, they also did it within their powers and within the timelines provided for under Section 29(1) of the *Land Adjudication Act*.

However, they laid no evidence before the court by way of affidavit to prove that there was a hearing prior to the determination.

25. A determination without a hearing is quite a vexatious state of affairs in a jurisdiction where Article 50 of *the Constitution* provides that:

> " ...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 or impartial tribunal or body."

26. In Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR it was stated as follows:

> " The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law."

27. There being no evidence of hearing from the respondents or the interested party this court is obliged to rely on the applicant's documents only. This court has noted that there is attached to the application two decisions from the same panel. The applicant's case springs from those two determinations.

28. The dicta of the panel in the two determinations can not be ignored. In Appeal No 3 of2015 the appellant was the 2nd ex parte applicant herein. One officer was recorded as being in the chair and another as taking minutes. The date of hearing is given as 24/8/2016. The appellant and the respondent were recorded as having one witness each. The record is not paginated. The first page cites the parties and their witnesses and the nature of the proceedings before the three-member panel. The second page outlines the panel's findings. No recorded proceedings regarding taking of evidence or examination are exhibited, which is surprising given the detail with which the findings are presented. The question arising in the mind is whether the proceedings were inadvertently omitted. Notwithstanding the apparent omission, the language of the findings is indicative that the evidence of the parties and their witnesses were heard by the panels and that there was a site visit. Reliance was also laid on the description of the subject land by the court as contained in the vesting order. Part of the findings are presented as follows:

> " The auctioned land was clearly described by the court as a property within Mwanda Mbalamweni Kayafungo Location and not Mwijo Milimani. This court (sic) panel visited the site and confirmed from the area administrators (Asst Chiefs, Chiefs and other reliable village elders) that the road has been used as a boundary between the two adjudication sections for a long time...
>
> ...the appellant claims the witness to the respondent to have been one of the committee members during the adjudication process; this has been found false since his name does not appear among the committee members of Mwijo Milimani but was only found as a witness during the committee case... in view of the above findings and other information and testimonies produced before this court (sic) the appeal is hereby dismissed. Parcel no 8 10 & 16 to remain registered in the names of Augustino Baya Thotho in trust for the family members."

29. In Appeal No 4 of2015 where the interested party was the appellant, the record reflects that there was a ground visit made on 17/5/2016 which confirmed the presence of the landmarks of the land described in the court proceeding that led to the vesting order. One wonders how such eruditely presented final findings of the panels could refer to other information and testimonies produced before the panel if

the panel never conducted any hearing. On the basis of the ex parte applicants own evidence, I find that the allegation that there was no hearing is untrue and that the panels went beyond an oral hearing to conducting site visits in both appeals, and no evidence of violation of the applicant's rights under either Article 40 or 47 of *the Constitution* has been presented.

30. The second ground relied on by the applicants is that the decisions of the panels were irrational. This ground can be dealt with in a brief manner by first of all indicating that there is a great dearth of evidence of irrationality brought before this court. Secondly, from the proceedings relied on by the two panels and the parties themselves, which described the land that was sold by vesting order of the court, the parties agreed that the purchased land was in Mwanda Mbalamweni and not Mwijo Milimani. I think that the panels' decisions would have been otherwise held as irrational and subject to quashing had they arrived at the conclusion that the land purchased was in Mwijo Milimani while the vesting order and other court documents dictated otherwise. In particular, the panel in Appeal No 3 Of 2015 noted as a fact that the appellant had even been registered as owner of Parcel No 1111 in Mwanda Mbalamweni which she admitted to have been part of the land bought at the auction. Quite a crucial observation for which the panel must be credited. How then, this court must inquire, could the auctioned land be located in two differently named adjudication sections as alleged by the applicants while the court documents including the vesting order giving birth to their right to land confined them in only one named section? Having established that is not possible, this court must, and so does, arrive at the finding that no irrationality can be found in the decisions of the two panels.

31. I am convinced that the Applicants have failed to made out a case for the grant of the judicial review orders sought in their substantive notice of motion dated 28/5/2021 and consequently that motion is hereby dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 22ND DAY OF OCTOBER 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI