Republic v National Land Commission; Board of Management Sitatunga Secondary School & another (Interested Parties) (Environment and Land Judicial Review Case 1 of 2017) [2024] KEELC 7520 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7520 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2017

FO NYAGAKA, J

NOVEMBER 8, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL LAND COMMISSION ..... RESPONDENT

AND

THE BOARD OF MANAGEMENT SITATUNGA SECONDARY SCHOOL ..... INTERESTED PARTY

CHRISTOPHER MUKHWANA ..... INTERESTED PARTY

RULING

1. When the application dated 22/02/2024 came up for Ruling on 07/11/2024, it was not ready. As the court addressed the parties to give them a new date for the Ruling an issue arose as to whether the Interested Parties was participating in the Application because the learned State Counsel was present to take the Ruling but on other occasions, specifically on 03/07/2024, 24/07/2024, 30/07/2024 and 17/09/2024, the office of the Attorney General had not been represented in the proceedings of the time. Worthy of note is that the date of 03/07/2024 was taken in 14/05/2024 in the presence of all counsel, that is to say, learned counsel for the Ex Parte Applicant, the Respondent and the Interested Parties.

2. Upon the court's inquiry whether the interested parties were participating, learned counsel for Respondent stated that they were not, which prompted the court to inquire as to why, yet the record shows that they were parties. Thus, the court sought information from the Parties, specifically, whether the Attorney-General had been served with the Supplementary Affidavit of the Respondent/ Applicant, which document was in response to a Further Affidavit filed by the Ex Parte Applicant

now Respondent, pursuant to orders made on 03/07/2024. Learned counsel for the Interested Parties stated that, in the first place there was no proof of service of the substantive Application because their entire filing system did not have a copy of the Application dated 22/02/2024. Of necessary note is that on the 03/07/2024 the Court struck out the Further Affidavit which had been filed by the Ex Parte Applicant because it was filed out of time and without leave of the court. By the order of striking out the document the Court directed that the Respondent files within three days a fresh Affidavit introducing the facts they wished to. The Applicant in the instant application was given leave of the court to file a response to the Affidavit within seven days of service and thereafter the parties file submissions.

3. In response to the Court's inquiry, counsel for the Interested Parties informed the court that besides lack of service of the Further Affidavit and the substantive application, the Applicant and Respondents had not been serving the office of the Attorney General that represented the Interested Parties with notices for the hearing of the Application and the mention notices. She challenged counsel for the Respondent to demonstrate that they had served their office with any documents. She stated that for the lack of service the Interested Parties had been left out of the proceedings in respect to the Application and they wished to be allowed to participate. She requested that they be served with the Application so that they too participate in it by filing responses to the documents filed by the parties. Further, she argued that the rules of natural justice required that they be heard. She prayed that the Interested Parties be permitted to file their documents within seven days from the date of service given that the ruling was yet to be prepared.

4. In response learned counsel for the Respondent who is the Applicant herein now stated when the application came out for hearing for the first time, the court had noted that the Attorney General was absent. It directed that the office be served. Further, subsequent to that she instructed a court clerk from their office to carry out the service of the Application. She added that, however, from her records, in attempting to confirm service in response to the challenge by the Attorney General, she was unable to ascertain that service was ever affected. She had not filed an (or had no) Affidavit of Service to prove the same. Equally, for subsequent dates (which this Court believes are in reference to the 03/07/2024, she had not been serving the Attorney General notices for hearing and mention.

5. She submitted that the participation of the Attorney General was paramount because the court had directed both the Interested Parties and the National Land Commission to share the taxed costs. She apologized over the error and offered to correct the anomaly and serve the Attorney General to enable them to participate in the proceedings. She submitted that the taxation Ruling was given in the year 2022 and not 2021.

6. The prayer by the Interested Parties was opposed strongly by learned counsel for the Ex Parte Applicant. He argued that the former had been served with the Application. He referred the Court to the proceedings of 14/05/2024 when learned counsel for the Interested Party sought time to respond to the application. He argued that by that time counsel for the Interested Parties did raise the issue of non-service. Both parties were granted 14 days to respond to the application. Then on the 03/07/2024 only the Ex Parte Applicant and the Respondent attended court. His submission was that by law, as provided under Order 51 Rule 14 of the Civil Procedure Rules, they chose not to participate in the Application. Therefore, when they did not file any documents in response to the Application they (by necessary implication under the law) did not wish to participate in the Application hence there was no need, in the first place, to serve them with any further documents, and therefore to grant them the time sought and opportunity for service of the documents sought, file a response and even participate in the application. Further, his contention was that since the date was for delivery of the Ruling on the Application, the Court should proceed to do so to the exclusion of the Interested Parties. He submitted that under Order 51 Rule 14 Rules of the Civil Procedure Rules, a party wishing to oppose

an application had the opportunity to file a Notice of Preliminary Objection, a Replying Affidavit or Statement of Grounds of Opposition. The Interested Parties did not file any of those. Further, that the moment time lapsed for the party who did not file the said documents they cannot be said to be participating in the application. A party had a right to not participate if they chose not do so. Failure to file the documents meant the Interested Parties were not participating. They were deemed, by their conduct, not to be participating. He submitted, the prayer by them could not be said to be a right for them to be heard. They could not now turn and say that they had changed their mind and wished to participate. He argued that the Interested Party could not be prejudiced if the matter was to proceed without them. In any event, their failure to file documents meant they could only support the Application.

7. He submitted further that the Ex Parte Applicant would be prejudiced if the Interested Parties were given time this late to participate in the application because he had a certificate of taxation in his favor since 2022, he has been waiting for the execution of the costs arising from the said certificate. Further, upon receipt of the application, he responded to it. Therefore, if the Attorney General was permitted to file the documents, it would mean he would have a right to respond to them, which would prolong the proceedings. He said that the delay caused by counsel for the Attorney General in making the prayer would prejudice him because that request should have been made earlier. For that reason, no order of costs could compensate for the prejudice the Ex Parte Applicant would suffer if the prayer was allowed. In any event, the application remained the same and the primary pleadings. What was important were the said pleadings.

8. The Attorney General responded that they ought to be given the right to be heard, they remained parties in the proceedings and had relinquished neither that right to be heard nor the right of participation. Therefore, service ought to be made because it had been admitted the service was not made.

Issue, Analysis and Determination

9. I have considered the application by the Attorney General and the response thereto. I have also considered the law. I am of the view that the only issue that to determine at this point is whether, the Application by the Attorney General is merited.

10. For this court to determine this issue, it has to look at the Court record. From it, it is clear that the Respondent filed the application dated 22/02/2024 on 15/03/2024. When it came for inter partes hearing on the 04/04/2024, the learned State Counsel, Mr. Odongo, for the Attorney General was present. The Respondent counsel admitted that she had not served both the Attorney General and the Ex Parte. Regarding the representation of the Ex Parte Applicant, she submitted that there was confusion on the record because, at first, the law firm of Ms. Kefa Ombati Advocates had handled the matter to the conclusion but the Respondent had received communication from the firm of Milimo Muthomi & Company Advocates that they were on record for the said party. She wished to know if leave had been sought the said firm to come on record. The Court looked at the record and noted that there was no evidence of a Notice of Change of Advocates. Therefore, the Applicants were directed to take another date and serve the parties.

11. On 14/05/2024 the parties appeared before the Court. During the session it was Miss TIgoi the learned state counsel who appeared, holding brief for Mr. Odongo, and Mr. Ngethe the counsel for Ex Parte Applicant who argued the application before me yesterday. Learned counsel for the Ex Parte applicant stated that the law firm previously on record for the Ex Parte Applicant had not respond to Application. He prayed for 14 days to Reply. Similarly, the State Counsel sought leave for similar period to respond.

That was when the matter was fixed for 03/07/2024 and both parties were given fourteen (14) days to respond.

12. The record indicates further, by a consent letter dated 13/03/2024, filed together with the Notice of Change of Advocates dated 23/05/2024, the firm of Ms. Kefa Ombati & Company Advocates and that of Milimo Mithomi & Company Advocates had agreed that the latter would come on record. It appears the letter was filed with the Notice of Change of Advocates. As to whether it was served or not is an issue. The rest of the record is as summarized at paragraphs *10* and *11* above.

13. Turning to the issue, the law on it stems from the Constitutional provision of Article 25(c) of the *Constitution* 2010. It provides that:

> " Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-- (c) the right to a fair trial."

14. What is the nature of fair trial? Fair trial begins with a party to any proceedings being given an opportunity to be heard. It cannot operate in isolation. And it is a cardinal rule of divine reason which flows into the laws of the land, beginning with the *Constitution* that a party should never be condemned unheard. While the right to be heard may be limited, the opportunity for the party to exercise that right or for the right to then be limited as provided by law enacted in an open and democratic society should never be denied to anyone. This should not only be before public bodies but also in the courts. Courts have stated as much in many decisions, world over.

15. In The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010, the Ugandan Supreme Court stated as follows:

> " It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

16. Further away, in the United Kingdom, in General Medical Council vs. Spackman [1943] 2 All ER 337 the learned judges held,

> " If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

17. Also, in Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid wisely put it that:

> " Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

18. Additionally, in regard to justice, and it is not to be gainsaid that this Court shall never depart from the single-most important duty of doing justice, this court borrows from the wisdom of the Court in

International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013, where it was held:

> " Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the *Constitution* no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."

19. Further, in Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 Others [2019] eKLR the Court of Appeal rendered itself regarding service (of documents) as follows;

> " It is trite that one of the tenets of the rules of natural justice is that a party should not be condemned unheard. In other words, no proceedings should be conducted to the detriment of any person in his absence. It is in line with the actualization of this right that the provisions for summons to enter appearance and service thereof come into play. The essence of such summons is to give notice to the party sued of the existence of the suit and invite him/her to enter appearance and defend the suit if she/he so wishes."

20. Turning to the instant matter, the facts speak for themselves. There is no evidence of service of even the Notice of Change of Advocates filed by the law firm of Milimo Mithomi & Company Advocates because by the time the parties appeared before the Court learned the Ex Parte Applicant informed the court that the law firm that had not filed the response to the application was the firm of Ms. Kefa Ombati & Company Advocates. It was subsequent to this information that Notice of Change of Advocates was filed by the law firm said to be currently on record.

21. The law provides on how a change of advocates from one previous one on record occurs in any matter in order for it to be complete.

22. Order 9, Rule 5 of the Civil Procedure Rules provides that;

> " A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

23. Order 9 Rule 6 provides that:

> " The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it)."

24. And Order 9 Rule 9 provides:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court-
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

25. All the above provisions above-cited import the idea that a change of Advocates is only done when the incoming Advocates file, if permitted by law or order of court, a Notice of Change of Advocates and serve on all parties on record.

26. In the instant matter, there is no evidence on record that the Notice of Change of Advocates allegedly on record was served on the parties. It ought to have been served. Actually, it was submitted by learned counsel Mr. Ngethe that since the Attorney General did not file any response to the application, there was no need to serve them with any documents because by that failure the Attorney General chose not to participate in the proceedings. What that implies is that from the admission by counsel, the Notice of Change of Advocates was not served. Further, and of greater importance is that the Further Affidavit learned counsel for the Ex Parte applicant filed subsequent to the 03/07/2024 was not served on the Attorney General. From that submission and belief this Court finds that learned counsel was labouring under an extremely erroneous conclusion regarding the law.

27. Be that as it may, that failure by the Ex Parte Applicant to serve left the Interested Parties in the dark regarding the issues the Ex Parte Applicant raised in response to the application. Similarly, it left them out of the knowledge of the content of the submissions they made thereto.

28. On the part of the Respondent counsel admitted that they did not serve the application on the Interested Parties. That corroborated the lament by the latter that they had never been served with the Application, the hearing notices and the mention notices. They apologized for this error and offered to make amends.

29. Contrary to the argument by the Ex parte Applicant that for reason that the Interested Party appeared on 14/05/2024 and prayed for time to respond to the application it goes without saying that they had been served and chose not to attend, the admission by the Respondent on the failure to serve is a fact that cannot be gainsaid, particularly when it affects one's right to be heard. It is worthy of note that on the 04/04/2024 and 14/05/2024 different State Counsel appeared on behalf of the Interested Parties. As seen from the record summarized above, the one who appeared on the latter date held brief for the one who appeared earlier. That may have brought the confusion on the part of the State Counsel who appeared on 14/05/2024 by making her to believe that service had been effected earlier on the one handling the matter save that he had not filed a response, hence she sought time to do so.

30. In the circumstances the Interested Parties' right to fair hearing was breached and the court cannot ignore the fact of such a fundamental infraction. On his part, it was submitted by the Ex Parte Applicant that the prejudice that he would suffer would not be compensated for by way of costs because he had waited since the year 2022 to execute the taxed costs. Therefore, any further delay would be greatly prejudicial. On their part, the Interested Parties claimed and argued that their right to be heard was cardinal and they should be given it. When these two contending positions are balanced, and the court deeply analyses their underpinning importance, this Court is of the view that the right to be heard being a constitutional principle and a cardinal rule of natural justice must outweigh the

pecuniary gain of the Ex Parte Applicant and the injustice that may arise by way of a slight delay in this matter by according a party an opportunity to be heard. While justice delayed is justice denied, justice not given at all is eternally destructive and against nature.

31. Moreover, just prior to the outset of the objection leading to the instant Ruling the learned Judge tried to implore the parties, especially, the Ex Parte Applicant to consider compromising the application in favour of either agreeing to filing of a reference or an agreement of some kind, with a view to expediting the matter or saving on time. He stated that his instructions were clear that his client was willing to "take a chance in the application" and have the court to prepare and deliver a ruling on it. That being so, justice demands that all the parties be given an opportunity to be heard. It means further, that the Ex Parte Applicant was willing to wait longer. Thus, he cannot hear that a party who has been left out of the proceedings prays for time and opportunity to be heard and then raises objection to lock out the party out of a mistake not of its own making and claim prejudice on his part. That is bad faith, to say the least. In any event, to deny a party not served with process an opportunity to be heard when they have discovered their exclusion and are humbly praying for a chance is akin to causing them not to breathe, nay, strangling them while they watch and mourn like the infamous 25/05/2020 occurrence in the USA of the nipping of the life of George Flyod. That certainly is not dignifying!

32. The upshot is that the Interested Parties' oral application is merited. It is allowed. The ruling due for delivery herein on the Application dated 22/02/2024 is arrested. Both parties, Ex Parte Applicant and Respondent, are directed to serve the Interested Parties through their office email before the close of business today. The Attorney General is given only seven (7) days to respond to the application and submit and serve the Ex Parte Applicant and Respondent. The Respondent shall have seven (7) days to respond and submit and serve all parties. Then the Ex Parte Applicant is given seven (7) days, upon service, to file any Further Affidavit together with Supplementary submissions thereto. Due to the urgency of time, it is important that a party serving the other via email calls the learned counsel served to notify them of the delivery of process. The application will be heard on 10/12/2024 at 8:30 AM.

33. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 8TH DAY OF NOVEMBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Ngethe Advocate----------for the Ex Parte Applicant

Ms Obino Advocate ----------for the Respondent

Mr. Odongo Senior State Counsel------for the Interested Party