



**Republic v National Land Commission; Oraga & 6 others (Exparte);
Catholic Diocese of Homa Bay (Interested Party) (Judicial Review
2 of 2022) [2023] KEELC 15674 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15674 (KLR)

MIGORI MISC. LAND APPLICATION NO. 47 OF 2017

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
JUDICIAL REVIEW 2 OF 2022**

GMA ONGONDO, J

FEBRUARY 21, 2023

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

ANDREW JUMA ORAGA EXPARTE

JULIUS NYERERE OWUOR EXPARTE

DAVID OGISO OWUOR EXPARTE

BENARD NYATAMA KWACH EXPARTE

PETER JUMA ONGERE EXPARTE

MARY ACHIENG EXPARTE

CAREN ANYANGO AGUNYO EXPARTE

AND

CATHOLIC DIOCESE OF HOMA BAY INTERESTED PARTY

JUDGMENT

1. By an amended Notice of Motion dated 24th March 2022 and filed on 27th April 2022, the ex parte applicants through M/s G. S. Okoth and Company Advocates, are seeking the orders infra;



- a. The honourable court be pleased to issue an order of prohibition directed at the National Land Commission prohibiting the eviction of the ex parte applicants from the portion of land parcel no. Gem/Komolo/47 measuring 5.0 hectares (The suit land) on which their homesteads and farmlands are situated until and unless adequate compensation is first paid to the ex parte applicants or their next of kin resident thereon.
 - b. The honourable court be pleased to issue an order of mandamus directed at the Land Settlement Fund Board of Trustees National Land Commission compelling the Board Commission to either pay adequate and prompt compensation to all persons lawfully occupying the 5.0 hectares of land registered as part of and in the name of Nyauu D.O.K Primary School before requiring them to vacate the same or alternatively direct the National Land Commission to surrender the 5.0 hectares back to the ex parte applicants and only retain the original 4.8 hectares.
 - c. The honourable court be pleased to issue an order for costs to be awarded to the ex parte applicants.
2. The application is anchored on the Statement accompanying the chamber summons application for leave dated 30th June 2017 and the verifying affidavit sworn on even date by Andrew Juma Oraga, the 1st ex parte applicant herein and the accompanying documents.
 3. The applicants lament that their forefathers set aside land measuring 12 acres (4.8 hectares) in area for establishment of a Roman Catholic School, to wit, Nyauu D.O.K Primary School, in 1957. That during land adjudication in 1972, the fathers of the applicants were promised compensation if they agreed to add 5.0 hectares to the said school. That the said compensation was to be paid by either the Government of Kenya or the Roman Catholic Diocese of Kisii. That their fathers agreed and allowed the school land to be registered as 9.8 hectares. That however, no compensation has been paid to date, despite the register and survey map showing that the school land measures 9.8 hectares. That the applicants have resided on the suit land since 1972.
 4. The applicants further contend that on 2nd June 2017, the secretary of the board of management of Nyauu Secondary School, the county co-ordinator of the National Land Commission, a priest representing the Roman Catholic Church – Diocese of Homa Bay and several police officers fenced in the applicants and destroyed their crops in a purported eviction. That the said purported eviction was done without a statutory notice of eviction being issued. That the statutory notice of eviction was later served on the applicants on 17th June 2017. That the Chief held a meeting of West Gem Community on 28th September 2000, wherein it was resolved that since the Catholic Mission that was to pay the owners of the suit land failed to do so, the owners to approach the County Council and District Registrar to have the suit land returned to them.
 5. The applicants aver that the aforesaid actions are a violation of their rights and fundamental freedoms enshrined in the *Constitution of Kenya, 2010* (The Constitution herein) and a violation of Part VIII and IX of the *Land Act* as amended by the Land Laws (Amendment) Act, 2016.
 6. In a report by the Land Registrar dated 1st December 2016 on boundary dispute resolution relating to the suit land, upon hearing parties including Rosalida for the defense and the 1st applicant herein, it was ordered that:
 - a. The existing boundary remains their boundary and school management to reinforce its existence.



- b. The homes and farming within the school boundaries is purely trespass, therefore the school management to institute a case at the Environment and Land Case for eviction.
7. However, the 1st applicant contends that the report aforesaid excluded the evidence that he provided during the meeting. That further, the school has not instituted a suit before the Environment and Land Court as directed. Thus, the National Land Commission erred in issuing an eviction order against the applicants herein.
 8. Despite service being effected as indicated in the Affidavit of Service dated 6th May 2022, the respondent did not file any response to the application.
 9. The interested party through the firm of Wasuna and Company Advocates, opposed the application by way of a 27-paragraphed replying affidavit sworn on 28th May 2022 by Fr. Eric Ochieng and duly filed in court on 15th July, 2020. He deposed, inter alia, that the initial land measuring approximately 12 acres was acquired from local residents of Gem Location namely Abonyo Akuku, Wasonga Randiki and Opande Ogosi who were duly compensated for the land. That the locals subsequently donated extra land. Thus, the suit land now measures approximately 24.2 acres in area. That the suit land is currently registered in the name of the Cabinet Secretary to the National Treasury as trustee for Nyauu D.O.K Primary School.
 10. Further, that the instant claim is untenable since the applicants lack locus standi to litigate on behalf of their fathers as they have not obtained letters of administration to their estates. That the claim is statute barred as title to the suit land passed to Nyauu Primary School in 1976 and the parcel of land has become public land. The 1st interested party further states that a party cannot claim for compensation in judicial review proceedings and that the Board of Management, the Sponsor of Nyauu Primary School and the Cabinet Secretary to the National Treasury ought to be parties in the instant suit.
 11. Initially, the application was lodged at Migori Environment and Land Court. On 15th March 2022, the same was transferred to this court, upon its establishment, for hearing and determination in the spirit of Articles 6 (3) and 48 of the *Constitution*.
 12. On 10th May 2022, the court directed that the instant application be heard by way of written submissions.
 13. Consequently, learned counsel for the applicants filed submissions dated 16th May 2022 on 18th May 2022. Counsel submitted that the respondent issued the eviction notice in accordance with Section 98 of the Land Laws (Amendment) Act 2016, which amended Section 152 of the *Land Act*, 2012 and essentially prohibits persons from unlawfully occupying private, community or public land. That the said notice was, however, served on the applicants after a purported eviction which was conducted contrary to the law. The suit land is public land. That the area in dispute measuring 5.0 hectares was unlawfully acquired as no compensation was paid in contravention of the provisions of Article 40 (4) of the *Constitution*.
 14. Thus, learned counsel urged the court to cancel the notice of intended eviction and order for compensation of the applicants or in the alternative, allow the applicants to submit a valuation report to determine the monetary value of the damages of the land acquired. Counsel relied on the case of *Sarah Jepwambok v Kibiwott Chepkuto; Geoffrey Kiprotich Chemweno (Interested party)* (2021) eKLR, to buttress his submissions.
 15. Learned counsel for the interested party, Quinter Adoyo and Company Advocates, filed submissions dated 28th May 2022 on 15th July 2022 and identified four issues for determination, to wit, the role of an interested party in proceedings, whether the ex-parte applicants have locus standi, whether the suit



- is time barred and whether the suit is meritorious. Counsel submitted, inter alia, that the interested party has an active role and stake in the proceedings. That the ex parte applicants lack locus since they have not obtained grant of letters of administration to the estates of their forefathers.
16. Further, counsel submitted that the instant suit is time barred pursuant to Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. That in any event, the contested portion constitutes a gift inter vivos, the applicants are estopped from recalling the same. Counsel submitted that the remedy of compensation being sought in the instant application is untenable in judicial review applications and urged the honourable court to dismiss the instant application for lack of merit. Counsel relied on the case of [Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama](#) (2014) eKLR, among other authoritative pronouncements, to fortify the submissions.
 17. I have carefully studied the entire application, the interested party's replying affidavit and their respective submissions. In that regard, have the applicants established their case for the grant of the orders sought in the application?
 18. It is noteworthy that the applicant initiated the application with leave of the court pursuant to Order 53 Rules 1 of the [Civil Procedure Rules, 2010](#) which reads;

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”
 19. This court is aware of the property in dispute and proprietor's rights and interests as provided for in Sections 24, 25, 26 and 28 of the [Land Registration Act](#), 2016 (2012). More fundamentally, the protection of right to property is anchored under Article 40 (1) of the [Constitution](#).
 20. It is common ground that at the heart of instant application is the decision of the Land Registrar dated 1st December 2016 on boundary dispute resolution relating to the suit land. The applicants further contend that the area in dispute measuring 5.0 hectares was unlawfully acquired as no compensation was paid in contravention of the provisions of Article 40 (4) of the [Constitution](#). Although the respondent did not oppose the application, the interested party's counsel submitted that the disputed land is a gift inter vivos. Further, that the applicants lack locus standi. That the instant suit is time barred and lacks merit.
 21. Article 47 of the [Constitution](#) provides for the right to fair administrative action. That every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, among others. This provision is operationalized by, inter alia, Sections 3(b) and 4 (1) of the [Fair Administrative Action Act](#), 2015.
 22. It is trite law that a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession; see [Rajesh Pranjivan Chudasama](#) case (*supra*).
 23. It is also important to note that no evidence has been adduced showing that Andrew Juma Oraga, Julius Nyerere Owuor, David Ogiso Owuor, Benard Nyatama Kwach, Peter Juma Ongere, Mary Achieng Ochare and Caren Anyango Agunyo who have lodged the instant application are the legal representatives of the Estates of Abonyo Akuku, Wasonga Randiki and Opande Ogosi. Therefore, the applicants have no *locus standi* herein as noted in [Chudasama](#) case (*supra*).
 24. The interested party's counsel submitted that the owners of the contested portion of land freely gave it to the church, which took possession of the same. That the contested portion became a gift inter vivos that only the deceased owners could recall during their lifetimes. However, the applicants stated that the same was given on promise of consideration, which consideration was never paid.



25. Reference is made to Peter Kaluma’s book, *Judicial Review, Law Procedure and Practice* at page 46 where it is stated thus:

“The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision making process and the legality of the decision making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely in Judicial review the court’s exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for that of another body, as happens in appeals, the court in an application for judicial review is concerned with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed.” (Emphasis added).

26. As cited in my decision in *Johnson Otieno Adera v Lucas Angonga & another* [2020] eKLR, the courts and tribunals as provided for under Article 159(1) of the *Constitution*, have a duty to hear the parties on matters before them. This ensures that the audi alteram partem rule (right to be heard) is not violated as noted in *Re-Hebtulla Properties Ltd* (1976-80) 1 KLR 1195 at 1209.

27. So, did the Land Registrar properly discharge his duties and follow due process to arrive at the decision of 1st December 2016 in the manner required under Sections 18 and 19 of the *Land Registration Act* 2016 (2012) and guided by the principles enshrined in Articles 48 and 50 of the *Constitution*?

28. Article 47 of the *Constitution* as read with Section 4 of the *Fair Administrative Action Act*, 2015, prescribe the right to be given written reasons for administrative actions and decisions.

29. In the instant application, the Land Registrar accorded parties an opportunity to be heard before reaching a reasoned decision, which was reduced in writing. The Land Registrar noted in part:

“... the boundary dispute was resolved long ago in 2004 and there is no reason of instituting a fresh boundary dispute case...”

30. Notably, the applicants herein did not file an appeal against the said decision but instead lodged the instant judicial review application.

31. It is therefore, this court’s considered view that the Land Registrar followed due process in arriving at the said decision. Thus, the applicants’ right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as enshrined under Article 47(1) of the *Constitution* (*supra*), was not contravened.

32. This court is cognizant of the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya which provides thus:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

33. The cause of action arose in the 1950s yet the instant application was filed in 2017. Clearly, the period of twelve years had lapsed. Therefore, the instant claim is time-barred.

34. In the foregone, it is the finding of this court that the application is incompetent and unmeritorious.



35. Wherefore, the application dated 24th March 2022 and lodged herein on 27th April 2022, be and is hereby struck out.
36. Given the character of the application and an element of public interest in the same, each party to bear own costs; see also *Samwel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2-others* (2012) eKLR.
37. Orders accordingly.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF FEBRUARY, 2023.

G M A ONGONDO

JUDGE

Present

1. Mr. R. Ochieng holding brief for G. S. Okoth, learned counsel for the applicants
2. Ms. Oriche holding brief for Ms. Adoyo, learned counsel for the interested party
3. Okello, Court Assistant

