



Republic v Baringo County Government & another; Yator (Exparte Applicant) (Environment and Land Judicial Review Case E002B of 2022) [2023] KEELC 22639 (KLR) (20 February 2023) (Judgment)

Neutral citation: [2023] KEELC 22639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002B OF 2022
L WAITHAKA, J
FEBRUARY 20, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

BARINGO COUNTY GOVERNMENT 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER, BARINGO 2ND RESPONDENT

AND

SIMON K YATOR EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 6th April 2022 to the *ex parte* applicant to apply for judicial review orders of *Certiorari*, Prohibition and Mandamus in respect of the decision of the Deputy County Commissioner (DCC) Baringo Central (2nd respondent herein) made on 4th March 2022 in appeal to the Minister case No.116 of 1996, the *ex parte* applicant filed the notice of motion dated 7th April 2022 seeking an order of *Certiorari* to remove to this court for the purpose of being quashed the decision of the 2nd respondent in the said appeal over plot No.624 Kapchomuswo “A” Adjudication (suit land); an order of Prohibition to prohibit the 2nd respondent from transferring and registering the suit land to the County Government of Baringo (1st respondent) and an order of Mandamus to compel the 1st and 2nd respondent to compel the Land Registrar Baringo County to register the suit land to him. The *ex parte* applicant also seeks an order of permanent injunction to restrain the respondents whether acting by themselves, their agents, officers or any other person whomsoever, from interfering with the suit land.
2. The application is based upon the grounds set out in the statutory statement and the verifying affidavit of the *ex parte* applicant accompanying the application for leave sworn on 1st April, 2022. These are that the suit land belonged to his grant parents; that the suit land has never been a public utility; that



- the community requested for a small portion of the suit land to construct a cattle dip and that the suit land was demarcated as a cattle dip without his input or consideration of his input.
3. The *ex parte* applicant contends that there is no proof that his father donated the entire suit land; that the area allegedly donated is very big for the purpose for which it was allegedly donated; that the decision of the Land Adjudication Officer (LAO) was hurriedly made; that no investigations were done to find out whether due process was followed in setting aside the suit land as a public utility plot and that it was unfair to set aside 10 acres of the suit land as public utility without compensation.
 4. The application is opposed through the replying affidavit of the 2nd respondent, Reuben M. Ratemo, sworn on 28th June, 2022 on the grounds that that there was an appeal to the Minister against the decision of LAO; that the appeal was heard and a decision rendered and that the *ex parte* applicant was dissatisfied with the outcome of the appeal; that the suit land was donated by the *ex parte* applicant's father for public purpose and that the *ex parte* applicant's input was unnecessary in the implementation of the decision of his father.
 5. It is contended that being a third party in the donation of the suit land, the *ex parte* applicant cannot be heard to claim that he was not accorded an opportunity to be heard
 6. It is deponed that during of the appeal to the Minister, all parties were summoned for hearing and that their inputs were considered when making the impugned decision.
 7. Terming the application an appeal against the outcome of the Appeal disguised as a judicial review application, the 2nd respondent contends that the *ex parte* applicant has not made up a case for being granted the orders sought for there was no illegality, irrationality or procedural impropriety in the decision of the Minister to warrant granting the orders sought.
 8. Pursuant to directions given on 30th May 2022, the application was disposed off by way of written submissions

The *Ex parte* Applicant's Submissions

9. In his submissions filed on 20th June 2022, the *ex parte* applicant submits that setting aside 5.4 hectares for a cattle dip was unreasonable and irrational. In that regard reliance is placed on the case of [*Republic v Communication Authority of Kenya ex parte Information Communication Technology Association of Kenya*](#) [2021] eKLR where the judge cited with approval the decision in the case of [*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*](#) [1948]1 KB 223.
10. It is further submitted that the respondent acted unfairly by failing to take into account the applicant's case; failing to factor his sentiments that only a small portion of the suit land was required.

The Respondent's Submissions

11. On their submissions filed on 16th November 2022, an overview of the cases pleaded by the parties to this case is given and based on the proceedings and the cases of Medicament and Related Classes of Goods [2001] 1 WLR 700; [*Attorney General v Anyang' Nyong'o & Others*](#) [2007] 1 E.A 12 and [*Robert Tom Martins Kibisu v Republic*](#) [2018] eKLR submitted that the applicant has failed to demonstrate biasness on the part of the 2nd respondent before, during and after proceedings.
12. It is further submitted that the applicant has not shown in what form, nature or acts the 2nd respondent was biased in favour of the 1st respondent and that the fact that the applicant lost the appeal cannot form the basis of claiming that the 2nd respondent was biased against the applicant.



13. Based on the proceedings of the appeal before the 2nd respondent, it is submitted that it is clear that the issue of donation of the suit land was dealt with by communities and that the suit land was willingly donated and ceded to the community by the original owner of the land, the *ex parte* applicant's father. The *ex parte* applicant is said to have conceded the fact that the suit property was donated by his father.
14. Terming the instant application an appeal disguised as a judicial review application, the respondent urges the court to dismiss the application as it is an attempt to appeal the decision of the Minister through the back door.

Analysis and determination

15. As pointed out herein above, the decision sought to be quashed relates to land parcel No.624 situated in Kapchomuswo "A" Adjudication Section, Baringo County, hereinafter referred to as the suit land.
16. The suit land was during land demarcation reserved as a public utility, a cattle dip.
17. It is not in dispute that the family of the *ex parte* applicant was the beneficial owner of the suit land and that the *ex parte* applicant's father was involved in setting aside the suit land as a public utility.
18. From the grounds on which the application is premised and the submissions filed in support of the application, I note that the *ex parte* applicant's borne of contention is the size that was allegedly donated by his father. He takes issue with the size of land allegedly donated by his father/family for construction of a cattle dip. He contends that the 10 acres or so allegedly set aside for construction of a cattle dip was very big for the purpose.
19. In view of the foregoing, I agree with the submissions by the 2nd respondent that the application is an appeal against the decision of the Minister disguised as a judicial review application.
20. Under Section 29(4) of [Land Adjudication Act](#) (LAA), the decision of the Minister on appeal is final. This court lacks jurisdiction to entertain an appeal in respect of the decision of the Minister. In that regard see the case of [Robert Kulinga Nyamu v Musembi Mutunga & another](#) [2022] eKLR where it was held:-

“...The quasi-judicial institutions referred to are established under the [Land Adjudication Act](#) whose purpose is to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto. The dispute resolution mechanism provided under the said Act is elaborate...., The elaborate dispute resolution process culminates with the Appeal to the Minister under Section 29 which provides that;

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— delivering to the Minister an Appeal in writing specifying the grounds of Appeal; and 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.

..... The Appellant submitted that there is no provision that limits the Appellant right after exhausting the adjudication mechanisms from filing a suit before the Magistrate's Court for determination. However, it is the Courts view that the above provision of Section 29 of the [Land Adjudication Act](#) that the Ministers decision is final is couched in mandatory terms. If the legislature meant to give the right to a party to re-litigate a dispute which



had been heard through the entire dispute resolution process provided under the Land Adjudication Act, nothing would have been easier than to state so clearly."

21. The provision in law that empowers Magistrates Courts to hear and determine environment and land cases is section 26 (3) of the Environment and Land Court Act which provides that "The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country" In my understanding such an appointment does not give power to the Magistrates Courts to hear cases whose specific mandate lies with other institutions and in this case the officers and quasi-judicial institutions under the Land Adjudication Act. This position is reiterated by Okongo J in Tobias Achola Osidi & 13 Others v Cyprianus Otieno Ogalo & 6 others [2013] eKLR where the court held as follows;

"It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act. It is for this reason that, there is injunction under section 30 of the Act to any civil suit being instituted over an interest in land in an adjudication area save with leave of the Land Adjudication Officer.

The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. (Emphasize added). As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. (Emphasize added). The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land".

22. I agree with the findings of the Court in the above case that the court has no jurisdiction to ascertain and determine interests in land in an adjudication area and that the role of the court is supposed to be supervisory only of the adjudication process. The Appellant ought to have filed his claim invoking the Courts supervisory jurisdiction if what he wished to challenge was the decision-making process that he claimed was marred by irregularities....."
23. In the instant case, the *ex parte* applicant's recourse would have been to file a civil suit, lead evidence to demonstrate that the portion set aside was not 15 acres but less.
24. It is not true that the land was set aside without involvement of the applicant or his predecessors in claim. Under the circumstances, I find that the remedies sought are not available in this case.
25. The upshot of the foregoing is that the *ex parte* applicant has not made a case for being granted the orders sought. Consequently, I dismiss the notice of motion dated 7th April, 2022 with costs to the respondents.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 20TH DAY FEBRUARY, 2023

L. N. WAITHAKA



JUDGE

In the presence of:-

Mr. Nyagaka for the exparte applicant

N/A for the 1st respondent

Mr. Letting for the 2nd respondent

court

Judgment delivered virtually.

L. N. WAITHAKA

JUDGE

20.2.2023

