



Chimbevo v Chief Land Registrar & 3 others; Kalama (Interested Party) (Judicial Review Miscellaneous Application 11 of 2019) [2022] KEELC 4773 (KLR) (9 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4773 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 11 OF 2019
MAO ODENY, J
SEPTEMBER 9, 2022
N THE MATTER OF AN APPLICATION BY JUSTUS CHIMBEVO FOR
JUDICIAL REVIEW
AND
IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP 284 OF THE
LAWS OF KENYA
AND
IN THE MATTER OF BEDZOMBO/KITSOENI ADJUDICATION SECTION

BETWEEN
JUSTUS CHIMBEVO APPLICANT

AND
CHIEF LAND REGISTRAR 1ST RESPONDENT
DIRECTOR, LAND ADJUDICATION AND SETTLEMENT . 2ND RESPONDENT
DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER,
KILIFI 3RD RESPONDENT
DISTRICT LAND REGISTRAR, KILIFI 4TH RESPONDENT

AND
KAZUNGU FONDO KALAMA INTERESTED PARTY



RULING

1. This ruling is in respect of a notice of motion dated August 8, 2019 by the ex parte applicant seeking the following orders:
 - a) That an order of *certiorari* do issue to remove into the High Court and quash all the adjudication proceedings and the consequent adjudication register for Bedzombo/Kitsoeni/811 to include any other orders, decisions, records or proceedings made concerning the said property Bedzombo/Kitsoeni/811 by the respondents herein.
 - b) That an order of *mandamus* do issue to compel the 1st, 2nd and 3rd respondents to commence investigation in regard to the register and ownership of record, land no. Bedzombo/Kitsoeni/811 particularly with regard to the said parcel of land in the said adjudication proceeding records and register of Bedzombo Kitsoeni adjudication section.
 - c) That an order of *mandamus* do issue to compel the 1st, 2nd, 3rd, 4th and 5th respondents to issue the applicant with certificate of ownership of title deed.
 - d) That an order of prohibition do issue to prohibit the respondents from issuing to either the interested party herein or to any other persons whomsoever and whatsoever with the certificate of ownership or title deed howsoever and whatsoever except the applicant herein, Justus Chimbevo as the registered owner pending hearing and determination of this suit or other than as directed and/or ordered by this honourable court.
 - e) That the costs of and incidental to this application be awarded to the applicant.
2. Counsel agreed to canvas the application *vide* written submissions which were duly filed.

Applicant's Submissions

3. The application was grounded on the matters raised in the statement of facts dated July 30, 2019, the applicant's affidavits sworn on July 31, 2019 and August 8, 2021.
4. A brief history of the applicant's case is that on April 17, 1990, he lodged a case against one John Kandoro, Bonfitus Karima and Morgan Kai, before the then land adjudication committee of Bedzombo/Kitsoeni adjudication section, over the land Bedzombo/Kitsoeni/811.
5. That on August 24, 2003, the interested party herein filed an objection against the applicant at the land tribunal over the same suit property wherein the matter was heard and dismissed. Later on, another objection was filed over the suit property by one Mwandondo Mwaringa on March 23, 2005 which was similarly dismissed.
6. On October 15, 2008, one Johnson Charo filed an appeal on the same dispute, before the minister of lands but the appeal was equally dismissed. Thereafter, the then director, land and adjudication wrote to the chief land registrar instructing him to implement the minister's decision and register the applicant as the owner of the suit property *vide* a letter dated November 25, 2015 to Kilifi land registrar.



7. The applicant deponed that four years down the line, the interested party filed an appeal before the cabinet secretary, lands, appeal which was allowed on June 26, 2019. It was the applicant's case that the land claimed by the interested party was Bedzombo/Katsoeni/1189 and not the suit property.
8. Counsel filed submissions and relied on the principles that guide a court in judicial review applications. Counsel cited the case of *Amota Nyasae Nyang'era v Public Service Commission of Kenya & 2 others* [2013] eKLR and the case of *Lawrence Mukiri v Attorney Genral & 4 others* [2013] eKLR, on the principle of *bona fide* purchaser for value.
9. Counsel further submitted that the appeal before the minister was null and void having been filed out of time after 4 years therefore the minister lacked the jurisdiction to hear and determine the appeal. Counsel urged the court to allow the application as prayed.

Respondents' Submissions

10. The respondents opposed the application and filed grounds of opposition that the applicant has not disclosed any cause of action against the respondents and urged the court to dismiss the application. Counsel identified three issues for determination namely:
 - a) Whether the *ex-parte* applicant's motion has properly met the threshold for issuing of judicial review orders from this court.
 - b) Whether the *ex-parte* applicant is entitled to the prayers sought.
 - c) Who pays costs of the suit?
11. On the issue as to whether the application has met the threshold for issuing judicial review orders, counsel relied on the case of *Pastoli v Kabali District Local Government Council & others* [2008] 2EA 300-301 and submitted that the applicant failed to establish any illegality, irrationality or procedural impropriety in the procedure by the 1st respondent.
12. Counsel further submitted that the issues raised in the application were factual and would require the court to investigate the same through hearing which cannot be done in judicial review proceedings.
13. Mr Mkala relied on the cases of *Peninah Nadako Kilishwa v IEBC & 2 others* [2015] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Limited* Civil Appeal No 185 of 2001; *Republic v Non-Governmental Organizations ex-parte Linda Bonyo & 4 others; Philip Opiyo Sadjah & 5 others [interested parties]* [2020] eKLR; and *Republic v Registrar of Societies & 3 others ex-parte Lydia Cherubet & 2 others* and submitted that the court's target in judicial review is on process and not the merits of the decision.
14. Secondly, on whether the applicant is entitled to the prayers sought, counsel submitted that the orders sought as framed were not capable of being issued and implemented for want of form as the applicant did not specify which proceedings he wanted quashed.
15. Counsel therefore urged the court to dismiss the application with costs.

Analysis And Determination

16. The issue for determination is whether the appeal to the minister was filed out of time and, if so, whether such late filing vitiated the proceedings before the respondents.



17. The applicant's case was that on April 17, 1990, he lodged a case against one John Kandoro, Bonfitus Karima and Morgan Kai, before the then land adjudication committee of Bedzombo/Kitsoeni adjudication section, over the land Bedzombo/Kitsoeni/811. That on August 24, 2003, the interested party herein filed an objection against the applicant at the land tribunal over the same suit property wherein the matter was heard and dismissed.
18. That on March 23, 2005 one Mwandondo Mwaringa filed another objection over the suit property which was similarly dismissed. On October 15, 2008, one Johnson Charo filed an appeal case No 278 of 2007 on the same dispute, before the minister of lands without leave to file out of time but the appeal was equally dismissed.
19. Thereafter, the then director, land and adjudication wrote to the chief land registrar instructing him to implement the minister's decision and register the applicant as the owner of the suit property *vide* a letter dated November 25, 2015 to Kilifi land registrar.
20. The decision of the minister dated June 26, 2019 in the appeal is the basis of this application which the applicant states that it was filed out of time without leave. It was the applicant's case that the period of 60 days prescribed by section 29 of the *Land Adjudication Act* had long expired as the appeal was filed after 4 years without leave hence the respondents had no jurisdiction to hear and determine the appeal.
21. Judicial review is concerned with the process that leads to the outcome. If the process is flawed, full of irregularities, bias, impropriety in arriving at the decision as was held in the cases of *R v Nairobi City County Ex-parte: Gurcharn Singh Sibora & 4 Others* [2014] eKLR, and of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No 185 of 2007[2002] eKLR, the Court of Appeal held that:-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.
22. The interested party had 60 days to prefer and appeal against the decision of the land tribunal but the same was not filed after the objection was dismissed as per the minutes dated June 15, 2005
23. The question is whether the Minister acted without jurisdiction or *ultra vires* or contrary to the provisions of a law or its principles in the circumstances where the appeal was filed out of time without leave. The relevant law that the minister was to adhere to is *Land Adjudication Act* cap 284 more specifically section 29 which provides that;
 - (1) Any person who is aggrieved by the determination of an objection under section 26 (1) & (2) 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.

(2) The minister shall cause copies of the order to be sent to the director of land adjudication and to the chief land registrar.

24. There is evidence that the appeal was filed outside the 60days provided for by the Act hence any decision from such proceedings were null and void as the minister acted without jurisdiction. In the case of *Pastoli v Kabale District Local Government Canal & others* (supra) the court explained the what judicial review is all about and stated that :

“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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision 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 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi v Secretary of State for the Housing Department [1990] AC 876”.

25. It follows that the purpose of judicial review is to check that public bodies or persons holding public authority and exercising such functions, do not exceed their jurisdiction and carry out their duties within the limit defined by the law. It is also trite and not disputed that the respondent has the mandate to hear and determine appeals of objections in accordance with section 29 of cap 284 Laws of Kenya but the respondent could not hear and determine appeals lodged outside the 60 days’ period. I therefore find and hold that the proceedings by the minister in this case was a nullity for all intents and purposes.

26. I have considered the application, the submissions by counsel and find that the decision in the appeal by the minister dated June 26, 2019 was without jurisdiction therefore null and void. The decision is therefore quashed.

27. Having found that the decision dated June 26, 2019 is null and void, an order of prohibition is hereby issued prohibiting the implementation of the impugned decision. Costs of the application to be borne by the respondents and the interested party.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF SEPTEMBER, 2022.

M.A. ODENY



JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

