



**Katana v Mwambegu & 2 others (Environment and Land Judicial Review
Case 7 of 2022) [2023] KEELC 17349 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 7 OF 2022**

EK MAKORI, J

MAY 4, 2023

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF PROHIBITION AND CERTIORARI.**

IN THE MATTER OF: ARTICLE 10, 23,27, 40, 46 AND 47 OF THE CONSTITUTION.

IN THE MATTER OF: SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284.

**IN THE MATTER OF: DECISION OF PANEL CHAIRMAN/DEPUTY COMMISSIONER
MADE ON 24TH MAY, 2022 THE APPEAL CASE NO. 417 OF 2021 IN
RESPECT TO OWENRSHIP OF PLOT NO. 2381 WANDA/MBALAMWENI
ADJUDICATION SECTION.**

IN THE MATTER OF: THE LAW REFORMS ACT CAP 226 LAWS OF KENYA.

IN THE MATTER OF: ORDERS OF THE CIVIL PROCEDURE RULES.

BETWEEN

AUGUSTINE NGALA KATANA APPLICANT

AND

KAHINDI NGALA MWAMBEGU 1ST RESPONDENT

**PANEL CHAIRMAN DEPUTY COUNTY COMMISSIONER KALOLENI
SUBCOUNTY 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT



JUDGMENT

1. This judgment is pursuant to Judicial Review Notice of Motion application dated September 10, 2022 brought under Section 8 (2) of the [Law Reform Act](#), Section 1A, 3A of the [Civil Procedure Act](#), Order 53 Rules 1, 2, 3 & 4 of the [Civil Procedure Rules](#), Articles 2, 10, 22, 24, 25, 27, 32, 36, 38, 47, 48, 50 & 159 of [the Constitution of Kenya](#), Section 4, 7, 8, 9 and 11 of the [Fair Administrative Action Act](#) of 2015 seeking the following orders:
 - a. That this Honourable Court be pleased to grant the Applicant herein an Order of Certiorari to remove into this court and quash the decision of the 2nd Respondent delivered on May 24, 2022 on Appeal Case No. 417 of 2021 being an Appeal to the Minister pursuant to Section 29 of the [Adjudication Act](#), Cap 284 Laws of Kenya.
 - b. That this Honourable Court be pleased to grant the Applicant herein an Order of Prohibition to remove into this court and prohibit the Land Registry Kilifi County from issuance and/or release of title deed relating to Land Parcel No Mwanda/Mbalamweni Adjudication Section 2381 until the hearing and determination of this case.
 - c. That the costs of this application be provided for.
2. The application was supported by the grounds on the face of the application and the affidavit of Augustine Ngala Katana sworn on the same day. He deponed that on the May 24, 2022, the 2nd Respondent proceeded to make a decision in Appeal No 417 of 2021 being an Appeal to the Minister pursuant to Section 29 of the [Adjudication Act](#), Cap 284 against the decision of the Adjudication officer over a Plot Number 2381 Mwanda/ Mbalamweni Adjudication Section. He stated that the Respondent did not consider what was evident during the site visit and that the decision at the Land Disputes Tribunal arrived at ex-parte as at the time, his father and uncle were unwell and could not attend the hearing.
3. The 3rd Respondent in response filed Grounds of Opposition dated January 17, 2023 stating the following grounds:
 - i. That Judicial Review is concerned with the procedure and not the merits of the case, while the Applicants issues revolves around factual matters, which are beyond the purview of Judicial Review.
 - ii. That the Applicant has not established and/or demonstrated any cause of action against the 2nd and 3rd Respondents.
 - iii. That the Application is vexatious, frivolous, bad in law, made in bad faith with an aim to scandalize the 2nd Respondent.
 - iv. That the motion has not met the threshold for issuing of judicial review orders hence the same should be dismissed.

Submissions

4. The applicant through the firm of Shabaan Associates LLP filed submissions on the 1st day of February, 2023. Counsel identified two issues for determination; whether the 2nd Respondent ought to have given a reason for the decision and whether the 2nd Respondent's decision was incorrect, irrational, unreasonable and tainted with impropriety.



5. On the 1st issue, counsel submitted that the 2nd Respondent did not give reasons for the decision rather went straight to the decision. He relied on Article 47 of *the Constitution*, which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. According to him, from the decision, there was no consideration of the site visit nor report as to the findings during the site visit conducted prior to the decision.
6. On the 2nd issue for determination, counsel submitted that the decision by the 2nd Respondent was incorrect and tainted with impropriety and according to him, by denying the applicant reasons for decision amounted to breach of his constitutional rights to own land. He relied on the cases of *Pastoli vs Kabale District Local Government and Others* [2008] 2 EA 300 and that of *Republic v Attorney General & 2 others Ex parte Emmanuel Poghisio* [2018] eKLR. He further submitted that the 2nd Respondent decision was not based on the grounds of appeal before the panel neither was it founded on the proceedings and the site visit conducted hence defective.
7. The 3rd Respondent filed submissions on the February 10, 2023. Counsel on behalf of the Attorney General identified two issues for determination, whether the Ex-parte Applicant's motion properly met the threshold for issuing of Judicial Review orders from this court and who ought to pay for the costs of the suit.
8. On the 1st issue, counsel submitted that the application did not raise the traditional common law judicial review grounds or the expanded grounds of judicial review listed under Section 7 of the *Fair Administrative Action Act* No 4 of 2015. He submitted that the applicant has not established any illegality, irrationality or procedural impropriety in the procedure followed by the 1st Respondent as was held in the case of *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300-301 and that of *Chimbevo v Chief Land Registrar & 3 others; Kalama (Interested Party)* [2022] KEELC 4773 KLR.
9. It was his submission that the 2nd Respondent's ruling dated May 10, 2022 considered the site visit which the applicant states was not considered. He relied on the cases of *Peninah Nadako Kilishwa v Independent Electoral Boundaries Commission & 2 Others* [2015] eKLR and that of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No 185 of 2001.
10. He also submitted that the issues raised in the statement in support of this application are primarily of facts, which will require the court to investigate through viva voce evidence, which can only be done through an ordinary suit that affords each party an opportunity to be heard as envisaged in *the Constitution*. According to counsel, Judicial Review does not deal with contested issues of facts which require parties to adduce evidence and be cross examined.
11. He further relied on the case of *Republic v Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others* [2016] eKLR where the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of facts.

Analysis and Determination

12. This court has considered the application dated September 10, 2022, the response vide grounds of opposition by the 3rd Respondent as well as the submissions and authorities cited by both counsels.
13. The applicant contends that on the 24th day of May, 2022, the 2nd Respondent proceeded to make a decision in Appeal No. 417 of 2021 being an Appeal to the Minister under the Lands Adjudication Act Section 29, *Cap 284* Laws of Kenya against the decision of the Adjudication officer over Plot Number 2381 Mwanda/ Mbalamweni Adjudication Section. He stated that the Respondent did not



consider what was evident during the site visit and that the decision at the Land Disputes Tribunal was done ex-parte as at the time, his father and uncle were unwell and could not attend the hearing. The 3rd Respondent on the other hand is of the view that that Judicial Review is concerned with the procedure and not the merits of the case, while the Applicants issues revolves around factual matters which are beyond the purview of Judicial Review and that the Applicant has not established and/or demonstrated any cause of action against the 2nd and 3rd Respondents.

14. The issue for determination is as whether the orders sought by the applicant can be granted by this court as pleaded. The *Ex Parte* Applicant approached this Court seeking for orders of Certiorari and Prohibition against the 2nd Respondent and the question is whether Judicial Review Orders can be issued under the circumstances as envisaged by the Ex parte Applicant.
15. In my view the Purpose of Judicial Review is set out in the case of *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd*, Nairobi Civil Appeal No 185 of 2007[2002] eKLR, where 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 ie 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”.

16. Circumstances under which orders of Judicial Review can be issued were elaborated in the Ugandan case of *Pastoli v Kabale District Local Government Canal & Others* [2008] 2EA 300 at pages 300-304 where Kasule J 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 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”.



17. This court will then apply the above test in analyzing whether the application by the Ex parte applicant is meritorious. I have had an opportunity to peruse the decision by the 2nd Respondent and I note that the Minister upon hearing the parties made six findings giving reasons for his decision. In my opinion, Judicial Review does not deal with contested issues of facts which require the parties to adduce evidence, the application before this court is calling upon the court to investigate the facts.
18. The issues being raised by the applicant cannot be made in a judicial review process. This is a wrong forum. Consequently, the application dated September 10, 2022 is hereby dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 4TH DAY OF MAY 2023.

E. K. MAKORI

Judge

In the Presence of: -

Mr. Jairo for the Applicant

Mr. Ojwang for the AG

Mr. Kenga for the 3rd Respondent

Court Clerk: Happy

