



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kakumbi v Attorney General & 5 others (Environment and Land Judicial Review  
Case 12 of 2020) [2023] KEELC 18154 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 12 OF 2020  
NA MATHEKA, J  
JUNE 19, 2023**

**BETWEEN**

**ROPHAS KAKUMBI ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**LAND ADJUDICATION AND SETTLEMENT OFFICER MWATATE .... 2<sup>ND</sup>  
RESPONDENT**

**MARTIN KIMUNDA ..... 3<sup>RD</sup> RESPONDENT**

**MWADIME KIMUNDA ..... 4<sup>TH</sup> RESPONDENT**

**DIANA KIMUNDA ..... 5<sup>TH</sup> RESPONDENT**

**GLADYS SHAKE ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The application is dated 1<sup>st</sup> November 2018 and is brought pursuant to Order 53, Rule 1 and 2 of [Civil Procedure Rules](#) 2010 seeking the following orders;
  1. That this matter be certified as urgent.
  2. That leave do issue for the Applicant to apply for:
    - a. An order of mandamus directed to the Land Adjudication and Settlement Officer Mwatate to compel them to issue the Applicant with Proceedings and final Award in respect of Land Dispute S/No. 438, Chawia Wumari Sechu Scheme in Taita Taveta County.



3. That the leave so granted to operate as stay of the decision of the Respondent to amend or issue any contrary award adverse to the Applicant, than one read out on the 28<sup>th</sup> April, 2011 after site visit on the 26<sup>th</sup> April, 2011.
2. Which application is based on the grounds set out in the statutory statement annexed hereto and the verifying affidavit of Rophas Kakumbi.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Applicant is seeking orders for ownership of Serial no. 438 in Chawia/Wumari/Sechu Scheme. His claim is based on a purported arbitration sitting that the Land Adjudication office. In which he claims that an award was made in his favour. That this is an attempt to circumvent the mechanisms of dispute resolution provided in the [Land Adjudication Act](#) which should be invoked through the proper procedure. The Applicant's prayers are that an order of mandamus be made compelling the Land Adjudication Officer to provide a determination in their favour and an order preventing the order from being issued if it was against the Applicant. Despite there being issued summons to the parties the matter was not heard and concluded as the Applicant alleges. According to the affidavit of Timothy K Bosire there was no formal arbitration that was held.
4. That the lack of formal proceedings and final award are not out of mischief as alleged. The process of adjudication has not been completed and the avenues for considering ownership have not yet been completed. The Applicant is attempting to hoodwink the Court to being granted orders in their favour while the process of adjudication is still ongoing. This would be contrary to the principal of exhaustion since the [Land Adjudication Act](#) Section 30 excludes the jurisdiction of the Court in an adjudicated land. It states that;

Except with the consent in writing of the adjudication officer, no person shall institute, and no Court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

5. The Applicant has failed to provide any consent from the land adjudication office allowing the filing of the suit which clearly touches on unadjudicated land.
6. That the Environment and Land Court in [Board of Management of Frere Town Primary School v County Government of Mombasa](#) ELC 91 OF 2022 stated in obiter that;

This Court is fully aware that where a specific dispute resolution mechanism is prescribed by the *Constitution* or a statute, parties should to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court”

7. There has been no recorded dispute before the Land Adjudication Office at Mwatate. That the proceedings being alluded to have happen are said to be proceedings emanating from competing interests in land ownership between one Charles J Kakumbi (Applicant) and the beneficiaries of Shuke Mwakinando. The records of the Land Adjudication office do not show any competing land dispute claims. They even further show ownership of two separate parcels of Land being owned separately and demarcated by a road. This is indicated in the Demarcation rough books attached to the affidavit of Thomas K .Bosire marked as TKI . The Applicant owns the Land S/N/0438 which was gathered as a single fragment on the 12<sup>th</sup> September 1972 as part of the Chawia/Wumari/Sechu Scheme. The neighbour being Mr. Shuke Mwakinando owns the recorded 388 also gathered amounting to 160406 square feet on the 8<sup>th</sup> September 1972. That the process of Land Adjudication has not yet been completed and that the Applicant has to follow laid down process for challenging adjudication.



8. The process on ascertaining ownership begins under section 13 of the [Land Adjudication Act](#):

Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.'

9. The [Land Adjudication Act](#) further provides a process is outlined under section 26 of the [Land Adjudication Act](#) cap 284. Which states:

Objection to adjudication register

1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

10. The process of adjudication has not yet been completed and the stage for objections have not been undertaken. In accordance with the records on the Land Adjudication Office there was no recorded dispute at the stage of demarcation and at the stage of recording of interests. Furthermore, the Affidavit of Timothy K Bosire details that the purported arbitration at the land adjudication office do not qualify as proceedings unless the dispute is proceedings are likely to have been initiated.

11. This Court has considered the application and the submissions therein. The purpose of judicial review was enunciated 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 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”.

12. It is trite law that a Court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits.

13. This position was adopted by the Court in [Associated Provincial Picture Houses, Ltd. v Wednesbury Corporation](#) (1947) 2 All ER 680. As a result, it is only in exceptional circumstances that the Court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in [Republic v Public Procurement Administrative Review Board & 2 others Ex Parte](#)



- *Sanitam Services (E.A) Limited* (2013) eKLR, while citing the *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* (*supra*) namely:

where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is ‘so unreasonable that no reasonable authority could ever come to it.’”

14. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision- making process as was held by Mumbi Ngugi J in the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (*supra*),

That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the Court for that of the administrative body in which is vested statutory authority to determine the matter in question.”

15. It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the Respondents acted ultra vires. In the case of *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* (2014) eKLR, the Court held that;

Where an Applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

16. Similarly, in the case of *Commissioner of Lands v Kunste Hotel Limited* (1997) eKLR (E & L) 1 at page 249, the Court of Appeal stated that;

But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”.

17. In *Halsbury’s Laws of England* 4<sup>th</sup> Edition Volume 2 Page 508 where it is stated that;

Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles”.

18. This Court will therefore be guided by the above principles and other binding precedents and the relevant laws in determining the matter at hand. The Judicial Review process is concerned with the decision making process and not with the merits of the decision itself. Further, that a Court hearing an application for Judicial Review should not sit as an Appellate Court and such orders will not be granted as a matter of course but are a discretion of the Court which must consider if such orders are most efficacious in the circumstances of each case.



19. In the case of *Republic v Inland Revenue Commissioner Ex Parte Opman International* 1986 1 ALL ER 328, the Court held that the fact that there is an alternative procedure available to address a particular grievance does not mean one cannot apply for the remedy of Judicial Review. The Court stated that;

Judicial Review is however the procedure of last resort and is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the Applicant's claim"

20. In the case of *Speaker of National Assembly v Karume* CA Civil Application No. 92 of 1992 (2008 1 K.L.R 426), the Court of Appeal stated that where there is a clear procedure to address a particular grievance, it should be followed.

21. Be that as it may, Judicial Review orders are granted at the discretion of the Court. Courts therefore have the discretion to refuse to grant such orders even where a foundation has been laid for the same although such discretion must be used sparingly. In the case of *Bluesea Shopping Mall Limited v City Council of Nairobi & Others* CA Civil Appeal No. 129 of 2013 (Nairobi), the Court of Appeal said the following on the issue of discretion in Judicial Review applications:

In administrative law matters, Courts have discretion to withhold a remedy of Judicial Review even where a substantive foundation has been laid because administrative law remedies are inherently discretionary. But Courts are slow to deny the remedy. The discretion to refuse to grant Judicial Review orders where they are merited must be very sparingly exercised".

22. In the instant case I find that,

Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides;

The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

Subsection (3) thereof provides;

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the Applicant, exempt such person from the obligation to exhaust any remedy if the Court considers such exemption to be in the interest of justice.

23. Be that as it may, the onus is upon the Applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. The Applicant has approached the Court seeking judicial review orders against the Land Adjudication and settlement officer at Mwatate, Taita Taveta County. The Applicant stated that he was invited through summons by the Land Adjudication and Settlement Office to litigate and resolve Land Dispute S/No. 438. The 2<sup>nd</sup> Respondent visited the site on the 26<sup>th</sup> April 2011 and confirmed the boundaries of the suit land. That judgement was due and was read out



on the 28<sup>th</sup> April 2011 in the presence of all parties. That the 2<sup>nd</sup> Respondent has refused to issue the Applicant with a copy of the proceedings and award pursuant to the land dispute. The Respondents insist that the adjudication process is not over and no award has been made. I find that the Applicant has failed to provide any other documentation showing that arbitration actually happened. The Applicant has not provided any witness statements or list of documents which were relied upon in the arbitration process. I find that there is no evidence that a decision has been made and the Applicant has not satisfied the Court that he ought to be exempted from resorting to the available remedies provided above in adjudication processes.

25. Judicial review is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of. I therefore find that these proceedings were prematurely instituted. In the premises, I decline to exercise my discretion in favour of the Applicant as sought herein. It follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, would be overstepping the judicial review mandate vested upon this Court; the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.
26. In the case of *Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others*, Miscellaneous Civil Application 170 of 2016 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. It is my considered view, therefore, that the application lacks merit and it is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

