



**Nyange & another v Community Land Registrar Taita Taveta County  
& another (Environment and Land Case Judicial Review Application  
3 of 2022) [2023] KEELC 16446 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16446 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 3 OF 2022**

**NA MATHEKA, J**

**MARCH 23, 2023**

**BETWEEN**

**BERNARD MSAWUGHI NYANGE ..... 1<sup>ST</sup> APPLICANT**

**MICHAEL MJOMBA MWASHIGHADI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**THE COMMUNITY LAND REGISTRAR TAITA TAVETA  
COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY COMMISSIONER TAITA TAVETA COUNTY .... 2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

1. The application is dated 19<sup>th</sup> May 2022 and is brought under Order 53 Rule 3 of the *Civil Procedure Rules* seeking the following orders;
  1. That Orders of certiorari do issue to remove to the court and quash the decision of the 1<sup>st</sup> Respondent to manage the election of Community Land Management Committee Members for Mramba Community Land.
  2. That Orders of Mandamus do issue compelling the Respondents to involve members of all 8 (eight) Sub Locations of Mramba Community in elections of Community Land Management Committee Members for Mramba Community Land.
  3. That the Court do issue any other or further orders as it may deem fit.



2. It is supported by the annexed affidavit of Benard Msawughi Nyange and on the grounds that leave has been obtained to file this Application for Judicial review, vide Misc No 33 Of 2022 in this Court. The Decision of the 1<sup>st</sup> Respondent to issue the Notice for the Meeting to elect Community Land Committee Members was done over the objections of members (Annexed and marked "A1" is a copy of Notice). Mramba Community comprises of 8 (Eight) Sub Locations namely: Mwakitau, Godoma, Mlughu /Mwashuma, Nyolo, Mnamu, Mrughua, Saghaighu and Ilole.
3. The Community Land in question is Mramba Community Land and it belongs to members of all eight Sub Locations. The 1<sup>st</sup> Respondent however has involved only a few members of Mwakitau Location in all decision making, locking out members of the other eight Sub Locations. Further the 2<sup>nd</sup> Respondent has had an undue influence in the decision making and has imposed his will on the 1<sup>st</sup> Respondent and the law grants the 2<sup>nd</sup> Respondent no jurisdiction. Members of the other Sub Locations other than Mwakitau have sought to be part of the process to no avail. Even the venue for the meeting, Rongoni, is in Mwakitau in the far West, and is intended to lock out members of the other Sub Locations. Matters concerning the said Mramba Community Land have always been deliberated upon at Lumo Gate which is central. The 2<sup>nd</sup> Applicant, in his capacity as chairman of the Mramba Trust, wrote to the 1<sup>st</sup> Respondent requesting full participation of all Locations, but the 1<sup>st</sup> Respondent ignored his said letter (Annexed and marked is a copy of letter). Meetings ostensibly for public education and participation have been held in Mwakitau Sub Location with no notice at all given to the other Sub Locations. The said County Commissioner, Taita Taveta County, has declared that his decisions at the elections shall be final. Consequently, the Applicants are convinced the said elections shall be a sham, and shall lead to the loss of their interests of the applicants and all other members of the Mramba Community from the seven Sub Locations in the land, and goes contrary to their rights. The Respondents have acted in extreme bad faith. The Respondents have abused his power. Even after service of the orders of the court as issued in Misc Cause No. 33 of 2022, the Respondents proceeded to call the meeting, and were intent on carrying out the elections, but members from the seven Sub Locations protested too hard they had to call it off.
4. This court has considered the application and the submissions therein. The Respondents were served but failed to file any response. 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".
5. 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. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1<sup>st</sup> Respondent.
6. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. v Wednesbury Corporation* (1947) 2 All E.R. 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.'"

7. 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."

8. It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the 1<sup>st</sup> Respondent acted ultra vires in making the impugned decision. 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."

9. 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"

10. 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."

11. 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.

12. In the case of *Republic v Inland Revenue Commissioner Ex Parte Opman International* 1986 1ALL E.R. 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"

13. In the case of *Speaker of National Assembly v Karume* C.A 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. Looking at the circumstances of this case, the Applicants submit that the 1<sup>st</sup> Respondent issued a Notice for the Meeting to elect Community Land Committee Members over the objections of members (Annexed and marked "A1" is a copy of Notice). Mramba Community comprises of eight Sub Locations namely, Mwakitau, Godoma, Mlughu/Mwashuma, Nyolo, Mnamu, Mrughua, Saghaighu and Ilole. The Community Land in question is Mramba Community Land and it belongs to members of all eight Sub Locations. The 1<sup>st</sup> Respondent however has involved only a few members of Mwakitau Location in all decision making, locking out members of the other eight Sub Locations. That the Respondents proceeded to call the meeting, and were intent on carrying out the elections, but members from the seven Sub Locations protested and they had to call it off.

14. 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* C.A 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".

15. As discussed above, the Judicial Review process is concerned with the decision making process and not with the merits of the decision itself. In the circumstances of this case, taking into account the fact that the meeting was cancelled and no election/decision has taken place the Applicants' judicial review before this court lacks merit and is dismissed. No orders as to costs as the same was undefended.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**N.A. MATHEKA**

**JUDGE**

