



**Republic v District Adjudication & Settlement Officer, Meru Central & 2 others;
Kangethe & another (Exparte Applicants); Ngai (Interested Party) (Judicial
Review E005 of 2022) [2023] KEELC 18116 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW E005 OF 2022**

CK YANO, J

JUNE 14, 2023

BETWEEN

REPUBLIC APPLICANT

AND

**DISTRICT ADJUDICATION & SETTLEMENT OFFICER, MERU
CENTRAL 1ST RESPONDENT**

LAND REGISTRAR 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

LOISE NJIRU KANGETHE EXPARTE APPLICANT

NICHOLAS KANGETHE EXPARTE APPLICANT

AND

FRANKLINE GITONGA NGAI INTERESTED PARTY

RULING

1. Coming up for determination is the issue whether the suit should be heard by way of viva voce evidence or on affidavit evidence. When this matter came up for directions, the ex-parte applicants sought directions that the suit be heard by way of viva voce evidence whereas the interested party argued that the nature of the suit being judicial review proceedings, the same should be decided on affidavit evidence.
2. In their submissions the ex-parte applicants urged the court to consider the proportionality of the decision of the 2nd respondent in view of the decision of the 1st respondent pursuant to objection No.



153 Mweru III Adjudication Section proceedings. That in as much as the gist of the case is that the 2nd respondent failed to implement the decision of the 1st respondent upon conclusion of the adjudication proceedings, they would wish the court to assess whether the decision of the 2nd respondent was rational, reasonable or an abuse of discretion. Counsel for the ex-parte applicants relied on the case of *Suchan investment Limited vs Ministry of National Heritage and Culture & 3 others* [2015] eKLR. It is their guided view that this court can look at whether the 2nd respondent took into consideration the decision of the 1st respondent while registering the interests of the ex-parte applicants and the interested party and whether there was an abuse of discretion. That in this particular case, it is proper for the court to look at the propriety of the decision made by the 2nd respondent which is the gravamen of the proceedings herein.

3. In support of their submissions that the matter be heard by affidavit evidence, the interested party relied on the case of *Praxidis Namomi Saisi & others v Director of Public Prosecution & 2 others* SC Petitions 39 Consolidated with Sc Petition 40 of 2019.
4. Counsel for the interested party submitted that judicial review proceedings are only concerned with reviewing the decision making process and not the merits of the decision. That the court as such sitting as a Judicial review court is thus restricted from acting as a court of appeal over the decider which would involve going into the merits of the decision. Counsel for the interested party relied on the case of *SGS Kenya Limited v Energy Regulatory Commission & 2 others*, Sc Petition No. 2 of 2019 [2019] Eklr and submitted that in Judicial review proceedings, proof of facts is by way of affidavit evidence and there is therefore no room for oral cross examination to interrogate facts like ordinary ELC claims. That if the ex-parte applicants are so hard pressed in seeking to interrogate the sufficiency of evidence tendered by the interested party, the appropriate forum is filing of an ordinary Environment and Land Court claim. The interested party also relied on the case of *Praxidis Namoni Saisi & 7 others* (*supra*) and submitted that allowing viva voce evidence shall lead to cross examination of witnesses which shall entail the court embarking on analyzing the sufficiency and quality of evidence tendered which is not a function of a judicial review court.
5. It is the interested party's submissions that the ex-parte applicants herein are seeking to introduce factual matters and seeking cross examination of witnesses which orders cannot be issued in judicial review proceedings. That in determining the issue of acreage by way of viva voce evidence as sought by the ex-parte applicants it shall result in the court evaluating the sufficiency of evidence and delving into the merits of the decision of the Land Registrar in issuance of title deeds. It is thus the interested party's submissions that matters in judicial review proceedings are pleaded and only proved by affidavit evidence and there is no legal justification for viva voce evidence.
6. I have considered the rival submissions. The issue for determination is whether the matter herein should be heard by way of viva voce evidence or by affidavit evidence.
7. Traditionally, judicial review was concerned with decision making process and not the decision itself. However after promulgation of n the Constitution 2010, judicial review shifted to merit review in appropriate cases. In the case of *Communication Commission of Kenya vs Royal Media Services & 5 others*, Sc. Petition 14 consolidated with Nos. 14A, 14B & 14C of 2014, [2014] eKLR, the Supreme Court recognized the elevation of judicial review to a pedestal that transcends the technicalities of common law. The Supreme Court observed that following the promulgation of the Constitution 2010 and upon the enactment of the *Fair Administrative Action Act*, there has been a shift from the traditional approach to the scope of judicial review. The court however did not say more on the shift.



8. In *SGS Kenya Limited, v Energy Regulatory Commission & 2 others* (supra), the Supreme Court held that judicial review is limited to the interrogation of the process and not the merits of the decision being challenged.

9. And while analyzing the case of *Suchan investment Limited v Ministry of National Heritage & culture & 3 others* (supra), the Supreme Court held as follows-;

“102. Despite the shift from common law to codification in the Constitution and the Fair Administrative Actions Act, the purpose of 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 itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision.”

10. Further, in the case of *Praxidis Namoni Saisi & others v Director of Public Prosecutions, & others* (supra), the Supreme Court was of the considered opinion that a court should be limited to the examination of uncontroverted evidence, and stated that controverted evidence is best addressed by the person, body, or authority in charge. However, the Supreme Court went on and stated-;

“(76) be that as it may it is the court’s firm view that the intention was never to transform Judicial review into a full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialized institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash on impugned decision. This is codified in section 11 (1) (e) and (h) of the Fair Administrative Actions Act. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced...”

11. Therefore, being guided by the above decisions by the Supreme Court which are binding on me, this court finds that it would be inappropriate to direct that this matter be heard by way of viva voce evidence. This matter being judicial review proceedings, I direct that the same be heard by affidavit evidence.

12. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE 2023

In the presence of

Court Assistant – V. Kiragu



No appearance for applicant

No appearance for respondent

Mwirigi B. for interested party – present

C.K YANO

JUDGE

