



**Kenya Human Rights Commission & another v National Land Commission;  
Kakuzi PLC & 9 others (Interested Parties) (Environment and Land Case Judicial  
Review Application 3 of 2022) [2023] KEELC 18340 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18340 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 3 OF 2022  
LN GACHERU, J  
JUNE 8, 2023**

**BETWEEN**

**KENYA HUMAN RIGHTS COMMISSION ..... 1<sup>ST</sup> EXPARTE APPLICANT**

**NDULA RESOURCE CENTRE ..... 2<sup>ND</sup> EXPARTE APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**AND**

**KAKUZI PLC ..... INTERESTED PARTY**

**MURANG'A COUNTY GOVERNMENT ..... INTERESTED PARTY**

**GACHANGU MAKUYU IDPS ..... INTERESTED PARTY**

**GIACHANJIRU SELF HELP GROUP ..... INTERESTED PARTY**

**JOHN RUGANO NTHURAKU ..... INTERESTED PARTY**

**KAKUZI DEVELOPMENT ASSOCIATION ..... INTERESTED PARTY**

**KIHINGANDA SELF HELP GROUP ..... INTERESTED PARTY**

**KINYANGI SQUARTERS ..... INTERESTED PARTY**

**KITITO COMMUNITY IDPS ..... INTERESTED PARTY**

**MAKUYU SISAL IDPS ..... INTERESTED PARTY**



## RULING

1. On 23<sup>rd</sup> August 2023, the ex parte applicants herein Kenya Human Rights Commission and Ndula Resources Centre filed a Judicial Review Application dated 19<sup>th</sup> August 2022, and sought for leave to file Judicial Review proceedings seeking for;
  - a. An order of mandamus to compel the Respondent (National Land Commission) to hear and determine Historical Land Injustice Claims specifically NLC/HLI/530/2018, NLC/HLC/069/2017, NLC/HLI/063/2017, NLC/HLI/049/2017, NLC/HLI/170/2018, NLC/HLI/176/2018 and NLC/HLI/052/201, which claims had been filed by 3<sup>rd</sup> to 10<sup>th</sup> Interested Parties herein.
  - b. Leave be granted to the ex parte applicants to institute Judicial Review proceedings seeking an order of Prohibition, to restrain the Respondent from renewing the leases with respect to 1<sup>st</sup> Interested Party, pending the hearing and determination of the above referred Historical Land Injustices Claims.
  - c. Leave be granted to the Ex parte Applicants to institute Judicial Review proceedings seeking an order of Certiorari to quash the decision of the Respondent (NLC) on or about 3<sup>rd</sup> June 2022, to consider/extend/renew leases with respect to the 1<sup>st</sup> Interested Party, and any other subsequent decision to renew the 1<sup>st</sup> Interested Party leases, pending the hearing and determination of the referred Historical Injustices Claims.
  - d. That leave granted operates as a stay of any decision of the Respondent (NLC) to consider/renew/extend, the 1<sup>st</sup> Interested Party's leases in Murang'a County.
2. The matter was placed before the Duty Court on 25<sup>th</sup> August 2022, and leave to file the said Judicial Review proceedings was granted in respect of prayers for Mandamus, Certiorari and Prohibition were concerned. The Ex parte Applicants were directed to file the Substantive Judicial Review proceedings within a period of 21 days from the date of the grant of leave.
3. Indeed, the ex parte applicants instituted the Judicial Review proceedings vide a Notice of Motion Application dated 5<sup>th</sup> September 2022.
4. In the said Judicial Review, the Ex parte Applicants sought for orders of;
  1. Mandamus to compel the Respondent to hear and determine Historical Land Injustices Claims filed by 3<sup>rd</sup> to 10<sup>th</sup> Interested Parties.
  2. Prohibition to restrain the Respondent from renewing the leases with respect to the 1<sup>st</sup> Interested Party, pending the hearing and determination of Historical Land Injustices Claims filed by 3<sup>rd</sup> to 10<sup>th</sup> Interested Parties.
  3. Certiorari, to quash the decision of the Respondent on or about 3<sup>rd</sup> June 2022, to consider/extend/renew leases with respect to the 1<sup>st</sup> Interested Party, pending the hearing and determination of Historical Land Injustices Claims as filed by the 3<sup>rd</sup> to 10<sup>th</sup> Interested Parties.
5. The said Judicial Review Application was based on various grounds were stated on the face of it, and the Supporting Affidavit of Davis Malombe, sworn on 19<sup>th</sup> August 2022, attached to the application for leave.



6. Among of the grounds for the Judicial Review were;- that the exparte applicants had established that a number of leases held by the 1<sup>st</sup> Interested Party had lapsed and that the 1<sup>st</sup> Interested Party had applied for extension of the same;- that the Respondent was in the process of renewal/extension of the said leases and/or had renewed leases, despite its earlier recommendation and determination that pending the hearing and determination of the Historical Land Claims, the leases held by the 1<sup>st</sup> Interested Party shall not be renewed.
7. The exparte applicants specifically stated that on 3<sup>rd</sup> June 2022, the Respondent had vide a letter to its County Coordinator in Murang'a County confirmed that it had received a letter of no objection from the CECM – Lands Murang'a County with respect to the renewing of Kakuzi leases in the said County.
8. Further that the actions of the Respondent by extending/renewing the 1<sup>st</sup> Interested Party's leases are contrary to its earlier recommendations, and therefore that decision is illegal, unreasonable and violations of legitimate expectations and would affect the rights of Kakuzi Communities ownership, and use of the subject land.
9. The Judicial Review was opposed by the 1<sup>st</sup> Interested Party who filed Grounds of Opposition on 20<sup>th</sup> September 2022, and averred that the Court has no jurisdiction to deal with the matter on account of subjudice, as there are pending claims in respect of the subject matter.
10. That the Exparte Applicants have no locus standi to challenge the extension of leases, and there was no evidence of extension/renewal of leases for specific titles by the Respondent.
11. The 1<sup>st</sup> Interested Party also filed a Replying Affidavit through Denis Gataka, its Legal Manager, to oppose the Judicial Review and averred that the 1<sup>st</sup> Interested Party leases are currently running in accordance with *the Constitution* and therefore the instant Judicial Review proceedings in respect of non-renewal of the 1<sup>st</sup> Interested Party's leases are a breach of its Constitutional Rights to property under Article 40 (1).
12. The Respondent (NLC) also opposed the Judicial Review proceedings through the Replying Affidavit of Edmond Gichuru, its Deputy Director Legal Affairs who averred that the Respondent received the various Historical Land Injustices Claims as stated by the Exparte Applicants. But before the Respondent could hear and determine the said claim, a Petition No. 255 of 2018, was filed in Nairobi, challenging the constitutionality of Section 15 of *National Land Commission Act*. That the above Petition was determined on 29<sup>th</sup> October 2021, and thereafter the Respondent invited all the parties to a virtual status conference on 24<sup>th</sup> August 2022, to discuss the finalization of the said Historical Land Injustices Claims.
13. That all the parties were requested to submit all their supporting documents to the Respondent. But before the Respondent could give its decision, the Exparte Applicants filed this Judicial Review proceedings. Therefore, the Respondent averred that it has not declined to hear the claims, as it had invited the parties for the said status conference vide a letter dated 23<sup>rd</sup> August 2022. That the Respondent has not yet made a decision to extend and/or renew the 1<sup>st</sup> Interested Party's leases, and that the said claim was misplaced and an abuse of the Court process.
14. The 2<sup>nd</sup> Interested Party – Murang'a County Government, also filed its Grounds of Opposition and averred that the issues raised in this Judicial Review proceedings are issues raised in other courts. It further averred that the Orders of Mandamus and Prohibition are untenable, as renewal of leases is dependent on the mandate and the law, and as long as the process is legal, then it cannot be restrained. Further, that there are other related claims and squatters registered with the 2<sup>nd</sup> Interested Party.



15. Before the Judicial Review could be given directions, the 1<sup>st</sup> Interested Party, Kakuzi PLC filed a Notice of Motion Application dated 13<sup>th</sup> October 2022, under certificate of urgency. The said Notice of Motion is the subject of this Ruling.
16. In the said Notice of Motion Application dated 13<sup>th</sup> October 2022, the 1<sup>st</sup> Interested Party sought for the following orders:-
  1. That this Court does not have jurisdiction to deal with this matter;- ELC Judicial Review 3 of 2022.
  2. That the Court be pleased to strike out the instant Judicial Review, with costs to be borne by the Exparte Applicants.
17. There were various grounds stated to support the instant Notice of Motion, among them-
  - i. That in 2018, the 1<sup>st</sup> Interested Party was summoned to appear before the Respondent (NLC) to respond to various investigations proceedings, before NLC. There were various Historical Claims filed by various groups, being the 3<sup>rd</sup> to 10<sup>th</sup> Interested Parties herein.
  - ii. That 1<sup>st</sup> Interested Party moved to Nairobi and filed a Constitutional Petition No. 255 of 2018; Kakuzi PLC vs NLC & 2 others.
  - iii. That the Constitutional Court on 24<sup>th</sup> July 2018, issued a stay proceeding in respect NLC/HLI/065/2018.
  - iv. There is a conservatory order issued on 30<sup>th</sup> July 2019, in respect of other claims.
  - v. That the 1<sup>st</sup> Intended Petition was transferred to Malindi ELC, but it was never heard together with Malindi LSK Petition wherein Judgement was delivered on 29<sup>th</sup> October 2021.
  - vi. That the 1<sup>st</sup> Interested Party has sought to transfer its Petition back to Nairobi.
  - vii. That on 24<sup>th</sup> August 2022, NLC held a Pre-Trial Conference in respect of claims filed by the 3<sup>rd</sup>-10<sup>th</sup> Interested Parties herein. After the hearing on 24<sup>th</sup> August 2022, a Ruling was reserved for purposes of deciding whether the Historical Land Injustices Claims should proceed for hearing or not.
  - viii. However, before the said Ruling, could be delivered, the Exparte Applicants filed the instant Judicial Review and did not give material disclosures. They have gone against the doctrine of exhaustion.
  - ix. That NLC had issued a Gazette Notice on 1<sup>st</sup> March 2019, which the 1<sup>st</sup> Interested Party challenged via Judicial Review Misc. No. 4 of 2020, which is still pending before Justice Angote in Milimani ELC.
  - x. That the reliefs sought by the Exparte Applicants against the Respondent, are Historical Land Injustices Claims, are matters which are pending determination in various Courts.
  - xi. Therefore, the Court has no jurisdiction to deal with matters whose aspects are issues pending determination in other Courts and thus this Judicial Review application is subjudice.
  - xii. That it would defeat the Interest of Justice if the present Judicial Review proceedings are held and determined as the subject matter in relation to the 1<sup>st</sup> Interested Party's suit properties are subjudice Nairobi Judicial Review Misc No. 4 of 2020.



- xiii. That the present Judicial Review is an abuse of the court process as the Exparte Applicants have filed multiple proceedings in respect of the same subject matter and same suit properties.
18. The Notice of Motion Application is opposed by the exparte applicants, vide the Replying Affidavit of Davis Malombe, the Executive Director of Kenya Human Rights Commission (KHRC).
  19. He averred that the issues in this Judicial Review proceedings are not pending and/or similar to the issues in Malindi ELC Constitutional Petition No. 255 of 2020. He further averred that the similar issue in Malindi ELC Constitutional Petition No. 255 of 2018, and in Nairobi ELC Judicial Review No. 4 of 2020 was the Constitutionality of Section 15 of the *National Land Commission Act*, which issue was determined with finality in Malindi Petition No. 19 of 2016.
  20. It was his further averments that he has been advised by his advocate on record that Malindi Petition No. 255 of 2018 and Nairobi ELC Judicial Review No. 4 of 2020, both instituted by the 1<sup>st</sup> Interested Party on the very same issue was determined by the 3 Judges bench and has been overtaken by events and cannot proceed, based on the doctrine of estoppel.
  21. He also averred that the issues in this Judicial Review proceedings are not similar to the proceedings in Malindi Petition 255 of 2018, and Nairobi Judicial Review ELC No. 4 of 2020, for reasons that the proceedings herein do not challenge the constitutionality of Section 15 of the NLC Act. That one of the Judicial Review order sought herein relates to the decision of the Respondent made on or about 3<sup>rd</sup> June 2022, which decision cannot and could not have been an issue in matter filed in the year 2018 and 2020.
  22. Further that he has been advised by his advocate on record that after the decision of the 3 bench Judge delivered on 29<sup>th</sup> October 2021, the Respondent has not taken any step to process and determine the pending Historical Land Injustices Claims and thus the reasons why the Exparte Applicants have sought for orders of Mandamus to compel the Respondent to perform its constitutional duty in accordance to Section 15 of NLC Act.
  23. Further that the Respondent cannot process the renewal of the 1<sup>st</sup> Interested Party's leases which have expired, and at the same time purports to hear and determine Historical Land Injustices Claims, involving the same parties. It was his further averments that from 24<sup>th</sup> August 2022, to date the Respondent has not responded on same or given any indication as to whether it will proceed with the claims or not, and it has been unresponsive to the exparte Applicant's letter. He alleged that the conduct of the Respondent in these proceedings is indicative of the fact that they do not want to process and hear the pending complaints on Historical Land Injustice Claims.
  24. He urged the Court to dismiss the instant Notice of Motion Application by the 1<sup>st</sup> Interested Party.
  25. The other parties did not participate in this application, but the 6<sup>th</sup> Interested Party – Kakuzi Division Development Association had filed an application dated 9<sup>th</sup> January 2023, seeking to be removed from the proceedings and its names be struck out of the pleadings on the basis that it was wrongly cited; is not interested in the proceedings; It is premised on a fake letter and the proceedings are baseless and are meant to stall and scuttle the hearing of the Historical Land Injustices Claims, before the Respondent. The said Notice of Motion Application was never given any direction and or has not been heard.
  26. The instant Notice of Motion Application was canvassed by way of written submissions.
  27. The 1<sup>st</sup> Interested Party through the Law Firm of Kaplan & Stratton & Co Advocates, filed its written submissions on 8<sup>th</sup> March 2023, and set out four issues for determination.



28. On whether the ex parte applicants are in breach of the doctrine of Exhaustion, in respect of hearing at the National Land Commission claims, it was submitted that in 2018, the 1<sup>st</sup> Interested Party was summoned by National Land Commission (Respondent) to respond to various investigations proceedings before the National Land Commission which were based on Historical Land Injustices Claims. It was also submitted that on 24<sup>th</sup> August 2022, the Respondent held a status conference in respect of hearing the said claims, and the ex parte Applicants and 6<sup>th</sup> Interested Party were present in the pre-trial conference on 24<sup>th</sup> August 2022. The Ruling was reserved on notice, but the Ex parte Applicants filed this Judicial Review proceedings before the Ruling. It was submitted that the ex parte applicants already had audience before the Respondent, and therefore the Respondent, has not failed to act as it already conducted status conference on 24<sup>th</sup> August 2022.
29. It was the 1<sup>st</sup> Interested Party's further submissions that the ex parte applicants are seeking Mandamus Order to compel the Respondent to proceed with the hearing of National Land Commission proceedings and yet the Respondent held a Pre-trial conference on 24<sup>th</sup> August 2022. Therefore, the Court has no jurisdiction to issue Mandamus Orders as the question of hearing of National Land Commission Claims is alive before the Respondent. The 1<sup>st</sup> Interested Party relied on various decided cases; among them the case of *United Millers Ltd Vs Kenya Bureau of Standards & 5 others (2021) eKLR*, where the Supreme Court held that;
- “... we emphasized that where there exists an alternative method of Dispute Resolution established by legislation, the Court must exercise restraint on exercising their jurisdiction conferred by *the Constitution*, and must give deference to the Dispute Resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance,”
30. They further relied on the Court of Appeal decision in the case of *Geoffrey Muthinja & Another vs Emmanuel Muguna Henry & 1756 others (2015) eKLR*, where the Court held;
- “... it is imperative that where a Dispute Resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Court is involved. Courts ought to be the last fora of last resort and not the first port of call the moment a storm brews ....
- The exhaustion doctrine is a sound one and it serves the purpose of ensuring that there is a postponement of Judicial consideration of matters to ensure that a party is first of all diligent in the protection of its own interest within the mechanism in place for resolution outside of the Court”.
31. The Applicant also relied on the case of *Okiya Omtata vs Kenya Power & Lighting Co. & others (2020) eKLR*, where the Court stated, that;
- “It is trite law that where procedures and processes exist for resolution of disputes, such processes must be exhausted first before a party can approach court”.
32. On the second issue of whether the present Judicial Review proceedings deals with the same subject matter as in National Land Commission Claims and in *Nairobi Judicial Review 4 of 2020* and are substantially the same issues and thus subjudice, the 1<sup>st</sup> Interested Party - Applicant submitted that the subject matter and issues are substantially the same. That the proceedings herein offends the provisions of Section 6 of the *Civil Procedure Act*, which bars a party from filing a suit in Court which is similar in issue or an already existing suit in the same Court or another Court of competent Jurisdiction.



33. The 1<sup>st</sup> Interested Party/Applicant further submitted that National Land Commission had on 1<sup>st</sup> March 2019, issued a Gazette Notice, whose contents affected the 1<sup>st</sup> Interested Party and subsequently it filed a Judicial Review Misc No. 4 of 2020 (Formerly Nairobi Judicial Review Misc. 94 of 2019). It was also submitted that on 1<sup>st</sup> April 2019, the Court granted a Stay of Implementation of the said National Land Commission Gazette Notice. Further that the 1<sup>st</sup> Interested Party in its Application dated 1<sup>st</sup> April 2019, had sought interlia for orders of Prohibition and Certiorari in respect of National Land Commission to the effect that;

“All leases held by the 2<sup>nd</sup> Interested Party in Murang’a County should not be renewed until the Historical Land Injustices Claim is heard and determined. The renewal of the leases to these lands are held in abeyance until an agreement is reached with the respective County Government”.

34. It was also submitted that;- “the present Judicial Review Proceedings are seeking orders of Prohibition to restrain the Respondent and Certiorari to quash the decision of the Respondent of renewing the 1<sup>st</sup> Interested Party Leases”.

35. According to the 1<sup>st</sup> Interested Party, the matter in Nairobi Judicial Review No. 4 of 2020, in as far as it relates to questions of renewal of the 1<sup>st</sup> Interested Party’s leases, pending hearing and determination of the National Land Commission matters, is the same subject matter as the current Judicial Review proceedings. Further that both Judicial Review proceedings deal with the same suit properties and therefore, since the subject matter and the suit properties are the same, the present Court proceedings are caught up by Section 6 of the *Civil Procedure Act*.

36. It was also submitted that the question of whether National Land Commission’s Claims should proceed for hearing is currently a live issue in the 1<sup>st</sup> Interested Party’s Constitution Petition No. 20 of 2022. Therefore, there was a risk of the Courts in the two matters issuing conflicting decisions on whether the National Land Commission claims should proceed or not.

37. The Applicant(1<sup>st</sup> Interested Party) relied on various decided cases;- among them the case of Abdulkadir A Khalif Vs Principal Secretary Ministry of Lands and Physical Planning & 4 Others; National Land Commission and Another (Interested Parties (2020) eKLR, where the Court held;-

“The basic purpose and the underlying object of Section 6 of the Code is to prevent the Courts of Concurrent Jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to put down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two Courts in respect of the same relief and is aimed to prevent multiplicity of proceedings”.

38. Further in the case of Republic vs Paul Kihara Kariuki AG & 2 others Exparte LSK (2020) eKLR, the Court while quoting the Supreme Court decision in KNCHR Vs AG IEBC & Others (2020) eKRL, held;-

... The purpose of subjudice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Court, with competent Jurisdiction issuing conflicting decisions over the same subject matter...”



39. The 1<sup>st</sup> Interested Party therefore submitted that the instant Judicial Review proceedings are subjudice to Nairobi Judicial Review ELC 4 of 2020, which is a pending matter before another Court. Thus, this Court has no Jurisdiction to deal with the present Judicial Review proceedings.
40. On whether the Court has Jurisdiction to deal with the present suit and whether the said suit should be struck out, it was submitted that since the *ex parte* applicants have contravened the Doctrine of exhaustion, then the Court has no Jurisdiction to deal with the present Judicial Review proceedings, reliance was placed on the case of *Cyrus Muthoni & Others VS National Land Commission & Others (2023) eKLR*.
41. Further, that the doctrine of Subjudice operates as a bar to the adjudication of suits by a Court with concurrent Jurisdiction from simultaneously entertaining a matter that is already in a different Court. Therefore, the Applicant submitted that this Court has no Jurisdiction under the doctrine of subjudice and Sections 1A, 1B and 3A & 6 of the *Civil Procedure Act*.

Reliance was placed again on the Case of *R Vs Paul Kihara Kariuki & Others (Supra)* where the Court held; -

“The subjudice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of subjudice is to prevent the Court of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action. Same subject matter and the same relief”.

In urging the Court to strike out this Judicial Review, the 1<sup>st</sup> Interested Party - applicant relied on the case of *Ali Bakari Vs Chairman County Services Board of Garissa (2014) eKLR*, where the Court held;-

“The principle that a Court should not proceed with the trial of a matter in which the matter in issue is also directly and substantially an issue in a previously instituted proceedings between the same parties is well founded. It finds expression for instance in Section 6 of the *Civil Procedure Act* ..... Undoubtedly Court have inherent powers to make orders necessary for the ends of Justice and to prevent abuse of the process of the Court”.

42. On whether the Applicant will suffer prejudice, in the event that the application is not allowed, it was submitted that if the instant application is disallowed, the 1<sup>st</sup> Interested Party will suffer prejudice as it will be obliged to defend multiple suits, which suits deal with the same matters in issue and are substantially the same. Reliance was also placed in the case of *R Vs Paul K. Kariuki (AG & 2 others (Supra))*, where the Court held;-

“The Multiplicity of suits is unnecessary and impermissible. It would amount to unfairly burdening a Respondent by requiring them to defend the same suit twice, which is an affront to the doctrine of Subjudice. It amounts to imprudent use of the Court valuable time....”.

Thus the 1<sup>st</sup> Interested Party - applicant urged the Court to strike out the instant Judicial Review proceedings for being subjudice to National Land Commission Claims and Nairobi Judicial Review ELC No. 4 of 2020 which is still pending in Court.

43. On their part, the *ex parte* applicants through the Law Firm of Chimei & Co. Advocate, filed their written submissions dated 18<sup>th</sup> January 2023, in opposition to the instant Notice of Motion Application.



44. The *ex parte* applicants submitted that the issues in this Judicial Review proceedings do not raise pertinent issues that are under consideration before another Court. It was submitted that the issue in Malindi Case and Nairobi Judicial Review No. 4 of 2020, was the Constitutionality of Section 15 of the *National Land Commission Act*, which issue was determined with finality in the consolidated Malindi Petition ELC 19 and 291 of 2016.
45. Further, it was submitted that the reliefs sought in the present proceedings relate to a decision rendered by the Respondent on 3<sup>rd</sup> June 2022, and the same could not have been addressed by the suits alluded by the 1<sup>st</sup> Interested Party which were filed in 2018 and 2020.
46. Further, that since the status conference of 24<sup>th</sup> August 2022, the Respondent has been adamant to proceed with the claims and has failed to respond to the *ex parte* applicant's letter enquiring on the status of the matter.
47. The *ex parte* applicants raised two issues for determination.
48. The first one on whether the Judicial Review proceedings are *subjudice*, it was submitted that the central basis of the doctrine of *Subjudice* is the substance of the claim and not necessary the relief sought. They relied on various decided cases such as KNCHR Vs AG IEBC & 16 Others (Supra). R Vs Paul Kihara Kariuki AG & 2 Others (2020) eKLR, where the Court held;-
- “Therefore, *subjudice* would apply only if there is identity of the matters in issue in both the suits, meaning thereby that the whole of the subject matter in both the proceedings is identical ..... the test for applicability of the *subjudice* rule is whether on a final decision being reached in the previous instituted suit, such decision would operate as *Resjudicata* in the subsequent suit”.
49. Reliance was also placed in the case of Thiba Min. Hydro Co. Ltd Vs Josphat Karu Ndwiga (2023) eKLR, where the Court held;-
- “... It is not the form in which the suit is framed that determine whether it is *subjudice*, rather it is the substance of the suit and that there can be no justification in having the two cases being heard parallel to each other”.
50. It was the *ex parte* applicants' further submissions that the issue in the instant Judicial Review proceedings are not the same as in Malindi Case as the reliefs sought are different. That the Malindi Law Society Case dealt with the constitutionality of Section 15 of the *National Land Commission Act*, which case has already been disposed off and thus overtaken by events.
51. Further, that the issues herein are not similar to Nairobi Judicial Review No. 4 of 2020, as the reliefs sought in the said Judicial Review are to quash the Respondent's Gazette Notice No. 1 of 2019, which was issued on 1<sup>st</sup> March 2019. The Gazette Notice had sought to stop the renewal of leases held by the 1<sup>st</sup> Interested Party. It was also submitted that the Court issued a stay of Implementation of the Gazette Notice and the Judgment was to be rendered on 23<sup>rd</sup> February 2023.
52. However, in the instant Judicial Review, it is prompted by the Respondent's action of attempting to renew the 1<sup>st</sup> Interested Party's leases. Further that on 24<sup>th</sup> August 2022, the Respondent conducted a pre-trial conference, wherein it stated it would issue a Ruling on whether the Historical Land Injustices Claims would proceed or not, but todate, the Respondent has not given further directions.



53. It was also submitted that the instant Judicial Review proceedings are based on the actions of the Respondent to renew/and/or extend the leases held by the 1<sup>st</sup> Interested Party. Further, that on 3<sup>rd</sup> June 2022, the Respondent informed its County Coordinator – National Land Commission Murang’a County, of a receipt of a letter of no objection to proceed with the renewal of leases held by the 1<sup>st</sup> Interested Party. Therefore, the exparte applicants are seeking orders of Mandamus to compel the Respondent to hear and determine the Historical Land Injustices Claims. It was further submitted that the exparte applicants are also seeking to restrain the Respondent from renewing the 1<sup>st</sup> Interested Party leases and quash the decision to consider/extend/or renew such leases. That the reliefs sought emanates from recent actions of the Respondent, and would not be an issue of substance in the previous claims.
54. In conclusion, the exparte applicants submitted that Nairobi Judicial Review ELC No. 4 of 2020, was premised on Gazette Notice issued on 1<sup>st</sup> of March 2019, whereas the substance in issue in present Judicial Review proceedings is distinct from that or the other suits cited by the 1<sup>st</sup> Interested Party.
55. On the doctrine of exhaustion, the exparte applicants submitted that the 1<sup>st</sup> Interested Party has not demonstrated the manner in which the instant Judicial Review proceedings have violated the said doctrine. That the present Judicial Review proceedings are meant to compel the Respondent to discharge its duty to hear and determine the Historical Land Injustices Claims as opposed to seeking the Court to determine the claims itself. Further that the proceedings are meant to challenge the decisions of the Respondent to renew and/extend leases. It was thus submitted that these proceedings are well suited within the purview of Judicial Review proceedings and the application herein should be dismissed. That the exparte applicants have not violated the doctrine of exhaustion.
56. Reliance was placed on the Case of Mombasa HCC Pet No. 159 of 2018 consolidated with Pet. No. 201 of 2019(2020) eKLR, where the Court held; -
- “The question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency’s action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is postponement of Judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of its own interest within the mechanism in place for resolution outside the Court”.
57. The above being the pleadings in general, the rival written submissions and the case law relied upon, the Court has considered them carefully and finds the issues for determination as ;-
- i. Whether the Exparte Applicants have breached the doctrine of exhaustion in respect of the hearing of the National Land Commission matters?
  - ii. Whether the current Judicial Review proceedings are subjudice to Nairobi ELC JR. No. 4 of 2020 and National Land Commission Claims?
  - iii. Whether the Court has Jurisdiction to hear the current Judicial Review proceedings?
  - iv. Whether the instant Notice of Motion Application dated 13<sup>th</sup> October 2022 is merited?

**i. Whether the exparte applicants have breached the doctrine of Exhaustion in respect of the hearing of the National Land Commission Claims?**

58. The doctrine of exhaustion promotes the postponement of Judicial consideration of matters to ensure that a party is first of all, diligent in the protection of its own interest within the mechanism in place for resolution outside the Courts. See the case of Muka & Another Vs Malala & 12 Others (Interested



Party) Constitution Petition E002 & E007 of 2022 (Consolidated) (2022) KEHC10131KLR, where the Court held;-

“... The Constitution of Kenya 2010 assigned different organs Jurisdiction to determine disputes in different categories and those organs and bodied ought to be allowed to execute their mandate”.

59. The Applicant – 1<sup>st</sup> Interested Party has averred and submitted that various parties had filed various complaints at the National Land Commission over Historical Land Injustices Claims. That the 1<sup>st</sup> Interested Party was summoned by the National Land Commission in 2018, to answer to the said claims. However, various suits were filed to challenge Section 15 of National Land Commission Act. However, the said suit was determined on 29<sup>th</sup> October 2021, and on 24<sup>th</sup> August 2022, the Respondent- National Land Commission summoned the various parties for a Pre-trial conference in respect of the hearing of the stated claims. That the parties appeared before National Land Commission(Respondent) and after submissions, the National Land Commission, indicated that it would give a Ruling on a later date to decide whether to proceed with the alleged Historical Land Disputes Claims or not. But before the Ruling could be issued, the exparte applicants filed this Judicial Review on 23<sup>rd</sup> August 2023.
60. The exparte applicants denied having violated the said doctrine of exhaustion and submitted that the current Judicial Review proceedings are meant to compel the Respondent to discharge its duties.
61. Article 67(2) of the Constitution, Section 5(1)(e) and 15(1) of the National Land Commission (Respondent) gives the National Land Commission(Respondent) power to investigate Historical Land Injustices and then come up with a report. Therefore, it is apparent that National Land Commission is the first statutory Institution that should investigate Historical Land Injustices Claims. It is evident that these claims are indeed pending before the Respondent.
62. From the pleadings, it is evident that on 24<sup>th</sup> August 2022, the Respondent held a status conference where the exparte applicants officials and some of the Interested Parties were present and submissions were done by the parties on the status of the Historical Land Injustices Claims. It is also evident that National Land Commission(Respondent) reserved a Ruling, but before the said Ruling could be issued, the exparte applicants brought this Judicial Review in Court. While seeking for leave to file the current Judicial Review, the exparte applicants did not disclose to the Court that they had been summoned to appear before the Respondent for a status conference over the various claims filed before National Land Commission.
63. Infact, from the pleadings, the Judicial Review was prepared on 19<sup>th</sup> August 2022, and filed in Court on 23<sup>rd</sup> August 2022. By the time the parties appeared before the Respondent on 24<sup>th</sup> August 2022, the exparte applicants had already filed the Application for leave to file a Judicial Review. There is no evidence that the exparte applicants made material disclosure that they had filed an application for Judicial Review. Even after the Respondent called the Interested Parties for status conference, the exparte applicant still insisted on proceedings with the instant Judicial Review. As stated above, the exparte applicants while seeking for leave to file Judicial Review did not bother to disclose to this Court that they had been summoned for status conference by the National Land Commission, over the said Historical Land Injustices Claims.
64. The exparte applicants alleged in their Replying Affidavit that from 24<sup>th</sup> August 2022, the Respondent has not given indication as to whether it will proceed with the claims or not and has not responded to their letter DM1. However, it is evident the letter DMI was written on 11<sup>th</sup> October 2022, after this Judicial Review had already been filed. Further after filing the instant Judicial Review, the Respondent



could have chosen to await the outcome of the said Judicial Review proceedings and thus this Judicial Review might have scuttled the progress of National Land Commission(Respondent) of issuing directions over the hearing of the filed Historical Land Injustices Claims.

65. The *ex parte* Applicants should indeed have postponed the filing of this Judicial Review proceedings and await the hearing of the claims before the National Land Commission. There was no tangible evidence availed by the *ex parte* applicants to confirm that National Land Commission (Respondent) has failed to carry out its mandate of investigating the Historical Land Injustices Claims, as filed by the different Interested Parties herein. Given that there is a live Judicial Review matter in Court, this Court cannot fault the Respondent for failure to issue a Ruling of the status conference held on 24<sup>th</sup> August 2022.
66. Hearing of these claims by the Respondent is a statutory duty vested upon National Land Commission and it should be allowed to carry out its mandate as conferred by *the Constitution* and Statute. Indeed, on exercising its mandate, the Respondent summoned the Interested Parties for the status conference on 24<sup>th</sup> August 2022. The Court should not be seen to micro-managing the Respondent (National Land Commission) while in its attempt to carry on its given mandate. This Court will indeed give deference to National Land Commission(Respondent) as it carries on with its established mandate.
67. The Supreme Court in case of Albert Chaurembo Mumo’s case (Supra), emphasized the need for Court to restrain themselves in exercising their Jurisdiction conferred by *the Constitution* and must give first opportunity to dispute resolution bodies established by Statute to deal with disputes as provided by the parent Statutes and the Respondent herein is one such independent body which should be allowed to carry on with its mandate without interference or chaperone.
68. By rushing to Court before the Respondent had heard the parties in the status conference and failing to disclose on 24<sup>th</sup> August 2022, that they had filed an application for leave to file Judicial Review, the *ex parte* applicants were not acting in good faith and did not come to Court with clean hands. The *ex parte* applicants would want this Court to micromanage the Respondent, an independent statutory body while carrying its mandate, and that would not augur well in the administration of Justice and would amount to interference with the independence of such statutory body.
69. Indeed, Article 159 of *the Constitution* obligates Courts to encourage Alternative Dispute Resolutions Mechanisms. Therefore, the Court would encourage the parties herein to first make National Land Commission their first port of call before coming to Court. It would not be proper for every litigant to rush to Court every time a Statutory body with mandate to employ alternative method of disputes resolution delays in carrying out the said mandate. Unless the said body declines to carry the said mandate or delays inordinately, the Court would have no business interfering with the such mandate. Issues of independence of Constitutional Commissions and/ or Institutions was reiterated by the Court in *Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others* [2013] eKLR

“We note that *the Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as they comply with *the Constitution* and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing *the Constitution*, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”



70. The Court further considered the pronouncement in *International Centre for Policy and Conflict and 5 others -vs- The Hon. Attorney-General & 4 others* [2013] eKLR; where the Court held:

“ [109] An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of *the Constitution* in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of *the Constitution*. “

[110] Where there exist sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

71. Having found that the exparte applicants were quick to move to this Court before exhausting all the available mechanisms of disputes resolution available before the Respondent, the Court finds that indeed, the exparte applicants have breached the doctrine of exhaustion. The Court will rely on the case of *William Odhiambo Ramogi & 3 Others Vs AG & 4 Others* (2020) eKLR, where the Court held; -

“The question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency’s action seeks redress from a Court of Law on an action without pursuing available remedies before the agency itself”.

72. Since exhaustion doctrine serves to ensure that there is postponement of Judicial consideration of matters to ensure that a party is first of all diligent in the protection of its own interest, then this Court urges the exparte applicants herein to postpone the Judicial Review proceedings filed in this Court and pursue alternative disputes resolution before the Respondent. The exparte applicants should have waited for the decision of National Land Commission arising from the status conference held on 24<sup>th</sup> August 2022.

73. In answer to the question of whether the exparte applicants were in breach of doctrine of exhaustion, the Court finds and holds that they are indeed in breach of the said doctrine of exhaustion.

## **ii. Whether the current Judicial Review proceedings are subjudice to Nairobi JR ELC No. 4 of 2020 and the other National Land Commission claims?**

74. The Section 6 of the *Civil Procedure Act* provides that; -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

The doctrine of subjudice prevents a Court from proceedings with trial of any suit which the matter in issue is directly and substantially the same with the previous instituted suit, between the same parties pending before same or another Court with Jurisdiction to determine it.



75. From the above definition, it is important to point out that the rationale behind subjudice rule is to prevent a situation of having two or more different Courts dealing or deciding over the same subject matter. see the case of David Ndi & Others Vs AG & Others (2021) eKLR, where the Court held;-
- “The rationale behind this provision (Section 6) of the Civil Procedure Act is that it is vexatious and oppressive for a claimant to sue concurrently in two Courts. Where there are two Courts faced with substantially the same question or issues, that question or issue should be determined in only one of those Courts ....”
76. Having laid the background of what constitutes subjudice, the Court will now consider the issues herein and then determine whether they are subjudice as alleged by the 1<sup>st</sup> Interested Party Applicant.
77. It is evident that there are various litigations involving the 1<sup>st</sup> Interested Party’s leases, the Respondent and several other parties involving the extension of leases held by the 1<sup>st</sup> Interested Party. Of interest to note is Nairobi Judicial Review Misc No. 94 of 2019. The said Judicial Review proceedings was filed by 1<sup>st</sup> Interested Party herein and on 1<sup>st</sup> April 2019, the Court granted a stay of the implementation of the National Land Commission(Respondent) Gazette Notice that was issued on 1<sup>st</sup> March 2019.
78. It is also evident that in the said Judicial Review No. 4 of 2020, the 1<sup>st</sup> Interested Party had on 1<sup>st</sup> April 2019, sought for orders of Prohibition and Certiorari against the National Land Commission (Respondent herein), to the effect that; all leases held by the 1<sup>st</sup> interested party in Murang’a County should not be renewed until the Historical Land Injustice Claims is heard and determined.
79. It is also apparent that in the instant Judicial Review filed on 5<sup>th</sup> September 2022, the exparte applicants herein have sought for three prerogative Orders; - of Mandamus, Prohibition and Certiorari, to compel the Respondent to hear the Historical Land Injustices, to prohibit the Respondent from renewing the leases in respect of the 1<sup>st</sup> Interested Party and to quash the decision of the Respondent dated 3<sup>rd</sup> June 2022, of renewing the leases held by the 1<sup>st</sup> Interested Party.
80. From the above, it is clear that Nairobi Judicial Review No. 4 of 2020 and instant Judicial Review No. 3 of 2022, relates to the question of the renewal of the leases held by the 1<sup>st</sup> Interested Party. There is also the issue of pending determination of the historical Land Injustices Claims before the Respondent. These are same issues, same subject matter and the parties are essentially the same. The two Judicial Review proceedings deal with the same suit properties which are held by the 1<sup>st</sup> Interested Party. Therefore, the present Judicial Review proceedings deals with the same issues and subject matter that are pending in Court in Judicial Review No. 4 of 2020, and also are pending before the National Land Commission. This is the scenario that Section 6 of the Civil Procedure Act tries to prevent. Proceedings with the current Judicial Review proceedings means that same issues will be adjudicated by two different Courts posing a danger of having two conflicting decisions.
81. The Supreme Court in the case of KNCHR VS AG, IEBC & Others (Supra) Clearly bought out the purpose of Section 6 of the Civil Procedure Act and held as follows; -
- “The purpose of the subjudice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them, over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Court with competent Jurisdiction, issuing conflicting decisions over the same subject matter”.
82. The exparte applicants have alleged that the cause of action herein is new, since the Respondent has threatened to renew the leases through its letter dated 3<sup>rd</sup> June 2022. However, it is clear that there



was stay orders issued in Judicial Review No. 4 of 2020. If the Respondent went against the said stay order, the ex parte applicants should have gone back for relevant orders in the said Judicial Review No. 4 of 2020, instead of filing a new suit. Having two suits in separate Courts, which suits deal with the same issues and subject matter create a danger of having two Courts issuing conflicting decisions which would cause embarrassment to the Courts and the whole administration of Justice. Filing of the two different suits over the same issue is also an abuse of the Court process and waste of Judicial time. The ex parte applicants should allow only one Court to deal with the same issue as raised by themselves.

83. Further, there are historical land claims pending before National Land Commission(Respondent) and this Judicial Review proceedings is also subjudice to the said claims.
84. This Court has taken into account all the issues, pleading by the parties, the relevant provisions of Law and the cited authorities and the it arrives at a finding and holding that indeed this current Judicial Review proceedings are a breach of the doctrine of subjudice, as it has raised issues that are substantially the same with Nairobi Judicial Review No 4 of 2020 and claims pending before National Land Commission (Respondent herein).
85. Consequently, this Court finds and holds that this Judicial Review proceedings are an abuse of the Court process and should not be allowed to stand.

### **iii. Whether this Court has Jurisdiction to deal with this matter (Judicial Review proceedings herein)**

86. It is trite law that Jurisdiction is everything and without it, a Court has no option but to down its tools. See the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR where the Court held:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

87. The ex parte applicants herein filed this Judicial Review proceedings seeking prerogative Orders of Mandamus, Prohibition and Certiorari. This Court has Jurisdiction to grant the above stated orders as provided by Section 13(7)(b) of the [Environment and Land Court Act](#), which states;

- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
  - (a) .....
  - (b) prerogative orders;
  - (c) .....

88. However, the Court has held and found that the ex parte applicants are in breach of the doctrine of exhaustion; – thus the ex parte applicants should have exhausted all the alternative disputes resolution mechanisms available before the Respondent, before coming to this Court. Further the ex parte applicants are in breach of the doctrine of subjudice; thus this Judicial Review proceedings are indeed subjudice to Nairobi Judicial Review No. 4 of 2020 and therefore it is an abuse of the Court process. Since the doctrine of subjudice operates as a bar to the adjudication of suits by a Court with equal jurisdiction from entertaining a matter that is already at a different Court, these proceedings are thus barred and should not have been filed at all. The ex parte applicants should have pursued their grievances by filing relevant applications in Judicial Review No. 4 of 2020.



89. Having found that the ex parte applicants are in breach of the above two doctrines, this Court finds and holds that it has no Jurisdiction to deal with this Judicial Review proceedings.

**iv. Whether the 1<sup>st</sup> Interested Party's Notice of Motion Application dated 13<sup>th</sup> October 2022 is merited?**

90. This Court having found that the ex parte applicants are in breach of the doctrines of exhaustion and subjudice and having found that the Court has no Jurisdiction to deal with this Judicial Review proceedings, then the Court proceeds to find and hold that the Notice of Motion Application dated 13<sup>th</sup> October 2022, is merited and the same is allowed entirely in terms of prayers No. 2 and 3 of the said Application with costs to the 1<sup>st</sup> Interested Party herein.

91. In a nutshell, the instant Judicial Review proceedings by Murang'a ELC Judicial Review No. E003 of 2022 is struck out entirely with costs to the Respondent and 1<sup>st</sup> Interested Party.

92. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**

**L. GACHERU**

**JUDGE**

**8/6/2023**

Delivered online in the presence of; -

Mr. Malenya for 1<sup>st</sup> & 2<sup>nd</sup> ex parte applicants

Respondent: Absent

Interested Party 1: Mr. Barasa holding brief M/s Kinyenje

Interested Party 2 - 10: Absent

