Republic v Cabinet Secretary Ministry of Lands and Physical Planning & 3 others; Mugambi (Interested Party); Nkari (Exparte Applicant) (Judicial Review E002 of 2022) [2023] KEELC 18954 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18954 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

JUDICIAL REVIEW E002 OF 2022

CK YANO, J

JULY 26, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICAITON AND SETTLEMENT .... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

PHARES MUGAMBI ..... INTERESTED PARTY

AND

RAUNI NKARI ..... EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on the 14th February, 2022, the ex-parte applicant filed the notice of motion application dated 21st February, 2022 seeking orders that:-

    a. An order of certiorari be issued to remove to the honourable court for the purpose of it being quashed a decision made by and or award by the 1st respondent in respect of land Parcel 105 MAREMBO RIANTHIGA ADJUDICATION SECTION in minister appeal case No. 24

of 2018 dated 13th January,2022 between the interested party appellant and ex-parte applicant (respondent)

b. An order of prohibition be issued prohibiting the 2nd and 3rd respondents from implementing the decision of the 1st respondent judgment, award or decision which is dated 13th January, 2022 in regard to land parcel 106 Marembo Rianthiga Adjudication Section in the minister's appeal No. 24 of 2018 between the interested party appellant and ex-parte applicant (respondent)

c. The costs of this application be provided for.

2. The application is based on the grounds thereon and supported by the affidavit of Rauni Nkari, the ex-parte applicant sworn on 21st February, 2022.

The Applicnat's Case.

3. The ex-parte applicant's case is that the proceedings intended to challenge the decision of the 1st respondent which condemned the applicant to lose his ancestral and or family land 106 Marembo/ rianthiga Adjudication Section as it was then and annexed a copy of the award/ruling.

4. The applicant avers that the minister's judgment or determination was against the policy spirit and the word of the *Land adjudication Act* Cap 284 which requires that an individual should not be removed from the land one has occupied from time immemorial. That the judgment was in flagrant breach of Cap 284 and therefore erroneous. That the minister conducted a fresh hearing instead of analyzing the evidence already adduced during the A/R proceedings in objection No. 99 which have also been annexed.

5. The applicant states that the minister denied two of the applicant's witnesses from testifying and limited time within which witnesses were to testify therefore arriving at a verdict that was not fully informed and thereby injuring the interest of the applicant over the suit land.

6. It is also the applicant's case that the minister allowed witnesses who are not knowledgeable of occupation and settlement and use of the suit land thereby making the minister to arrive at an erroneous decision.

7. The applicant further avers that the minister failed to be guided by letters by the adjudication officer that stopped any developments as a result of which the minister fell into error by holding that the interested party had permanent house, mature mango trees, bananas, miraa and barbed wire which properties were made by the interested party in breach of a clear order to maintain status quo by the adjudication officer. Copies of the letters are annexed.

8. The applicant contended that the minister equally fell into error by failing to note that the applicant's houses on the suit land were demolished by the interested party and on the spot, the interested party constructed a permanent house, which made the minister reach an erroneous decision and which was injurious to the interest of the ex-parte applicant. Photographs are annexed.

The Respondents' Case

9. The respondents opposed the application and filed grounds of opposition dated 23rd February, 2023 in the following grounds-;

1. That the application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore are unsustainable in the obtaining circumstances.

2. That the application has failed to meet the threshold for grant of the orders sought for the following reasons-;

    a. The applicant has not demonstrated that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

    b. That Judicial review proceedings purely deal with the procedure and process of decision making and not the merits and or substance of the case. However, the applicant is seeking that this Honourable court decides on the merits and substance of the case.

    c. Section 29 (1) of the *Land Adjudication Act* provides that the minister has the mandate to determine the appeal and make such order thereon as he thinks just. The minister thus has the discretion to determine the procedure of the appeal as he thinks just.

3. That the plaintiff's application is bad in law only meant to defeat the cause of justice hence it ought to be dismissed with costs to the respondent.

4. That the application is otherwise frivolous, vexatious and an abuse of the court process.

10. The respondents also filed a replying affidavit sworn by C.K. Mbui, the Land Adjudication and Settlement Officer Meru South/Maara Sub-Counties on 22nd March 2023. The deponent avers that Marembo/Rianthiga was adjudicated under Cap 284 Laws of Kenya and was declared on 2nd December, 2022 and during demarcation, parcel No.106 was recorded jointly between Phares Mugambi Gilbert and M'Imiru. That M'Nyiri M'rinkuri filed land adjudication committee case No. 85/2010 and the same was dismissed by the committee on 10th February, 2010.

11. The deponent avers that the dispute went before the Arbitration Board (M'Rauni Nkari Vs Phares Mugambi) vide Arbitration Board case No. 65/2010 and the ruling of the Board was that the land be recorded jointly between Pharis Mugambi Gilbert and M'Miru Mutiga.

12. The deponent further avers that the land was also subject in another Arbitration Board case No. 51/2010 filed by M'Nyiri M'rinkuri and the Arbitration Board case No. 51/2010 dismissed the appeal filed by M'Nyiri Rinkuri and upheld the decision of the land adjudication.

13. The deponent contends that the adjudication register for Marembo/Rianthiga Adjudication Section was published on 31st May 2010 and M'Nyiri M'Nkuri filed A/R objection No. 99 against Phares Mugambi Gilbert which was dismissed by the Land Adjudication Officer on 3rd December, 2010. That M'Rauni M'Nkari and M'Miru Mutiga also filed objections No. 146 and 149 respectively and were awarded 3 acres to own jointly.

14. It was averred that Rauni Nkari later filed appeal to the minister case No. 24/2018 against Pharis Mugambi Gilbert for parcel No. 106 and the appeal to the minister case was heard and the whole land No. 106 Marembo/Rianthiga was awarded to Rauni Nkari. Copies of the proceedings have been annexed.

15. The interested party filed a replying affidavit sworn on 6th May 2022 in which he avers that the ex-parte applicant's application is based upon a perjured, false and misleading affidavit. That the ex-parte applicant's claim that the suit land is ancestral land is a lie as they are not related, adding that his claims appears to be an inversion of Misc. JR NO. E002/20 which suit the interested party alleged and proved that the said land was ancestral.

16. The interested party avers that the ex-parte applicant never filed an objection either at committee or Board but only at AR where he clearly stated that he was related to Karugi Mutiga who had been allowed to farm on the suit land by the interested party's deceased father, one Gilbert Mutegi Ndomba. That consequently, the said Karuga Mutiga was awarded 3 acres registered as Marembo/rianthiga/1239 and the ex-parte applicant told to benefit from Marembo/rianthiga/1239.

17. It is the interested party's contention that the matter was heard and determination between the parties herein over similar issues in the earlier suit Misc. JR. Application No. E.002/2020 at Chuka ELC Court which was heard and judgment delivered on 23rd June 2021 and avers that the application herein is res judicata and is tantamount to this court sitting on appeal on its own matter. A copy of the said judgment has been annexed.

18. It is the interested party's contention that the ex-parte applicant did not pursue an appeal against the judgment dated 23rd June 2021 and that the application herein is an abuse of the court process, adding that the court is functus officio and lacks jurisdiction to hear the application.

19. The interested party denied the ex-parte applicant's claim that he had a house on the suit land and argued that the photographs shown are not taken on the suit land. The interested party further states that Judicial review is about integrity of the process and not cooking up issues like the ex-parte applicant claim of witnesses being denied a hearing which the interested party argues the ex-parte applicant has not adduced proof thereof.

20. Relying on advise, the interested party believes that the application offends the mandatory provisions of Order 53 (7) which provides that for an order of certiorari to issue, a copy of the decision has to be lodged with the registrar and verified by an affidavit. The interested party has exhibited a copy of the impugned decision and argued that the application is an abuse of the court process, an afterthought, an exercise in futility, incurably defective and premised on material non-disclosure, is misconceived, without merit and an attempt to sabotage and frustrate the respondents' operations. The interested party states that it is in the wider interest of justice that the ex-parte applicant's application herein be dismissed.

Ex-parte Applicant's Submissions

21. The ex-parte applicant submitted that the first ground of the application is predicated on the overriding principle and that in adjudication process under Cap 284 the Minister as represented by the DCC overlooked that the ex-parte applicant and his family had occupied and made use of the suit land from time immemorial.

22. The ex-parte applicant argued that the entire family was in occupation and use of the suit land 106 Marembo Rianthiga Adjudication Section as it was then and that the minister did not consider that the interested party was a sojourner on the suit land and particularly during the adjudication process.

23. The ex-parte applicant submitted that the interested party in fact constructed houses on the suit land even after being served with a letter from DLASO to maintain the status quo and when the appeal to the minister was still pending. That failure of the minister to note this made him arrive at a wrong decision.

24. The ex-parte applicant submitted that in principle therefore the minister's decision was against the policy, spirit and the word of the *Land Adjudication Act* Cap 284 which requires that an individual should not be removed from the land one has occupied from time immemorial. That the judgment was in fragrant breach of Cap 284 which made the minister to reach a verdict that was erroneous and

which judgment left the applicant deprived of his land that he has called family and or ancestral land from time immemorial.

25. The ex-parte applicant further submitted that the minister in conduct of the appeal to the minister appeal No. 24 of 2018 in respect of land parcel LR. Marembo/rianthiga/106 conducted a fresh hearing instead of analyzing the evidence already adduced during the AR proceedings.

26. It is the exparte applicant's submission that when the minister is hearing an appeal to the minister under the *Land Adjudication Act* which is constituted as a quasi judicial body, he cannot run away from the general procedure of law unless it is clearly provided by statute that he is not bound by the rules or procedure. He argued that there is no known law or rule that indicate that the minister is not bound by rules of adducing evidence in a fresh hearing or appeal.

27. The ex-parte applicant cited the Black's Law Dictionary in which "appeal" is defined as "a proceeding undertaken to have a decision reconsidered by higher authority: especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal."

28. The ex-parte applicant relied on the High Court Of Kenya At Meru Civil Appeal No. 106 Of 2008 Meru Catholic Diocese (magundu Parish Priest) (appellant) Versus Lawrence Gitonga Njeru – (respondent) (unreported) which he stated is only persuasive to this court in which- Justice Mary Kasango pronounced herself as follows regarding an appeal from an award of the then Land Disputes Tribunal case that: "The appeals committee is not supposed in that case to subject the matter to fresh hearing as it happened here... the appeals committee therefore erred in subjecting the matter to fresh re-hearing" and argued that the minister fell into the same error as the appeals committee did in the foregoing cited judgment.

29. The ex-parte applicant submitted that the minister subjected the matter to a fresh hearing and argued that that was an impropriety enough to move the court to set aside and/or quash the judgment of the 1st respondent dated 20th December,2021 in appeal case No. 24 of 2018 in regard to land Parcel 105 Marembo Rainthiga Adjudication Section.

30. The ex-parte applicant further contended that there was impropriety on the part of the minister (DCC) by denying his two witnesses to testify and that the minister in his own motion decided to conduct a hearing where parties (interested party applicant) were at liberty to call witnesses, and that by so doing the minister had denied the ex-parte applicant the rights to a fair hearing which is against the principles of natural justice which requires that a person should not be condemned unheard. He submitted that the decision of the minister to deny the ex-parte applicant's witnesses a chance to testify was also an affront to *the constitution* which provided for a fair hearing and the right to be heard before being condemned and that it did not matter whether the result would have been the same whether or not the two witnesses testified.

31. The ex-parte applicant relied on the case of Onyango Oloo Vs Attorney General [1986 -1989] EA 456 where the Court of Appeal expressed itself as follows" "The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ... denial of the right to be heard renders any decision made null and void ab initio."

32. With regard to the complaint that the minister allowed witnesses who are not knowledgeable of occupation and settlement and use of Marembo Rianthiga/106 thereby making the minister to arrive

at an erroneous decision, the applicant submitted that the DCC is not an expert regarding the occupation and use on land parcels forming subject matter of appeal to the minister. He argued that the DCC required guidance and information from persons with knowledge regarding the occupation, settlement and use of such land and that in the instant case, when the DCC conducted a hearing by allowing witnesses to testify, persons who were not knowledgeable to the subject matter were allowed to testify. The applicant submitted that those people could not have given the minister the right and correct information to make him arrive at a fair decision and that most of the original witnesses who had testified regarding the suit land during the adjudication process had passed on.

33. The ex-parte applicant further submitted that the minister did not visit the suit land and as such he could not ascertain the properties of the ex-parte applicant and the interested party on the suit land and that failure of the minister to visit the suit land made him to arrive at a wrong decision particularly when he made a finding that the ex-parte applicant had nothing on the suit land and when the ex-parte applicant had lived on the suit land from time immemorial and so were his ancestors.

34. The ex-parte applicant also submitted that the minister failed to be guided by letters by the adjudication officer that stopped any developments as a result of which the minister fell into error by holding that the interested party had a permanent house, mature mango trees, bananas, miraa and barbed wire which properties were made by the Adjudication Officer. That the Dlaso had ordered maintenance of status quo but the interested party ignored and continued to plant mangoes, trees, bananas and erected a barbed wire fence and stone and mortal house. That the minister misdirected himself by failing to take note that the development by the interested party were made in an affront to the letters by Dlaso for parties to maintain status quo.

35. The ex-parte applicant further submitted that the minister equally fell into error by failing to note that the applicant's houses on the suit land Marembo Rianthiga/105 were demolished by the interested party and on that spot, the interested party constructed a permanent house.

36. The ex-parte applicant submitted that the interested party was in total defiance of the directions by the DLASO during the Adjudication Section.

37. The ex-parte applicant submitted that the interested party demolished his developments and that the minister was lured by the interested party and his witnesses to believe that all the developments in the suit land belonged to the interested party when the contrary was the case.

38. The ex-parte applicant stated that had the minister visited the locus in quo, he would have satisfied himself that the ex-parte applicant had properties on the suit land and that the interested party had only bent to destroying the ex-parte applicant's properties on the suit land so that they could not be traced.

39. The ex-parte applicant urged the Honourable court to make a finding and hold that the minister did not conduct the appeal to the minister No. 4 of 2018 professionally and prayed that the court do make a finding that the appeal to the minister was not conducted properly and that the ex-parte applicant was deprived of his ancestral and family land unfairly and prayed that the application be allowed.

Respondents' Submissions

40. The respondents identified the following issues for determination:

    i. Whether the impugned decision was arrived at in the manner envisaged by the law, and

    ii. Whether the Judicial review remedies of certiorari and prohibition are available to the applicant.

41. On whether the impugned decision was arrived at in the manner envisaged by the law, that the respondents pointed out that in this matter the ex-parte applicant seeks for orders of judicial review in the nature of certiorari and prohibition against the decision of the proceedings to the minister appeal No.24 of 2018 in respect of land parcel Number 106/Marembo/Rianthiga adjudication made vide the ruling delivered on the 13th of January, 2022. The respondents submitted that as concerns the order of certiorari, it is now well established that the said order only issues if the decision being challenged was made without or in excess of jurisdiction or where the rules of natural justice were not complied with and relied on Kenya National Examination council Vs Republic Ex-parte Geoffrey Gathenji & 9 others, Nairobi Civil appeal No. 266 of 1996.

42. The respondents submitted that it is not in dispute that the *Land Adjudication Act* Cap 284 provides for the delegation of powers by the Cabinet Secretary in charge of lands to hear and determine appeals and cited Section 29(4) that stipulates:

> "... the minister may delegate by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the minister."

43. The respondents further submitted that it is equally not in contention that pursuant to the above referenced provision, the norm has been that the minister in charge of lands would delegate his powers and functions to hear appeals to the holders of office of the Deputy County Commissioner (henceforth, the D.C.C") and relied on the case of Republic Vs Cabinet Secretary, Ministry of Lands and Settlement & 2 others ex-parte Gerald Mbuuri Kabugu [2018]eKLR.

44. The respondents submitted that whereas in the instant case, the ex-parte applicant alleges that the impugned decision was marred by illegality and procedural impropriety, in contrast, it is their submission that Adjudication section that is subject of this suit, Marembo/Rianthiga Adjudication section underwent all the adjudication process in accordance with the provisions of the *Land Adjudication Act* which includes the publication of Marembo/Rianthiga Adjudication Section and the subsequent objection and appeals to the said objections in instances where affected persons were unsatisfied with the decisions.

45. The respondents submitted that the Land Adjudication Officer pursuant to Section 26 heard and determined the objection and ordered that Parcel No.106 land subject of this suit to remain in the name of Phares Mugambi, the interested party herein, and being dissatisfied with that decision, the ex-parte applicant was afforded an opportunity to challenge it which he did through minister case No. 24 of 2018.

46. The respondents contended that the appeal process was undertaken lawfully and submitted that the impugned decision in the appeal to the minister's case was arrived at after due consideration of evidence tabled before the decision makers and that the DCC was statutorily mandated to issue the impugned decision which was legal and procedurally proper.

47. Regarding the issue of whether the Rules of Natural Justice were observed, the Respondents made reference to the case of Republic Vs County Director of Education Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh [2018] EKLR where the court cited with approval the case of Msagha Vs Chief Justice & 7 others Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on

3/11/2016) HCK [2006] 2 KLR 553. In the latter case the ingredients of natural justice were discussed and it was stated thus-;

> " The ingredients of fairness or natural justice that must guide all administrative decisions are firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker, secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision, and thirdly, that an administrative decision must be based upon logical proof or evidence material."

48. The respondents submitted that the impugned ruling was compliant with the above stated rules.

49. The respondents further submitted that the ex-parte applicant was given an opportunity to participate in the appeal proceedings and that a cursory look at the copy of the minister appeal proceedings will reveal that the ex-parte applicant participated in the appeal process on the 22nd of November, 2021.

50. The respondents argued that in the present application, no evidence was brought by the ex-parte applicant of any interest, conduct or association of the respondents as the primary decision maker, which would lead to a likelihood of apprehension of bias in favour of the interested party.

51. The respondents submitted that the impugned decision was indeed based on material evidence and noted that it made reference to the testimonies issued by various participants during the minister appeal proceedings as well as the site visit. The respondents submitted that in light of the foregoing, the court do find that the rules of natural justice were adhered to and as such the ex-parte applicant's right to a fair hearing was never controverted. The respondents therefore invited the Honourable court to find that the respondents arrived at the impugned decision in a lawful and legal manner.

52. On the issue as to whether the judicial review remedies of certiorari and prohibition are available to the applicant, the respondents contended that judicial review proceedings purely deal with the procedure and process of decision making and not with the merits and or substance of the case, and relied on the position adopted in the case of Republic Vs Director of Immigration Services & 2 others ex-parte Olamilekan Gbenga Fasuyi & 2 others (2018) Eklr Where it was held that-;

> " ... It is common ground that the prayers sought are judicial review remedies and the rules governing grant of judicial review orders do apply. Judicial review is about the decision making process, not the decision itself. The rule of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial review is the review by a judge of the High Court of a decision, or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction – reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision maker are proper, and the decision is within the confines of the law, a court will not interfere."

53. The respondents submitted that in the instant suit, it is their contention that the ex-parte applicant being aggrieved by the decision of The Deputy County Commissioner through the Judicial Review proceedings intended that the Honourable court delves into the appeal proceedings and review the

evidence. The respondents argue that although the application purports to call into question the process adhered to in arriving at the decision, the same is a disguised attempt to revisit the merit of the decision. The respondents submitted that all parties, including the ex-parte applicant where afforded an opportunity to present their respective cases.

54. The respondents further argued that owing to the serious nature of Judicial review orders, it is not enough for the ex-parte applicant to claim that the Deputy County Commissioner acted illegally, unreasonably or in breach of Rules of Natural Justice. That the actual sins by the impugned office must be exhibited for judicial review remedies to be granted as demonstrated in the case of Republic Vs Kenya Power & Lighting Company Limited & another [2013] eKLR.

55. The respondents further relied on the case of East African Community Vs Railways African Union (Kenya and Others (No. 2) Civil Appeal No. 41 of 1974 (1974] EA 425, in which it was held that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. That judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly and should only be granted where there are concrete grounds for their issuance. That it is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

56. The respondents submitted that as a consequence, they respectfully urge the Honourable court in the exercise of its discretion to find that the ex-parte applicant has not provided sufficient grounds to warrant an award of Judicial Review remedies of certiorari and prohibition. It is their humble submission that the ex-parte applicant's application does not satisfy the requisite threshold to warrant this honourable court's exercise of its discretion in favor of the applicant and urged the court to find that the applicant's claim is a challenge on the merits of the decision of the 2nd respondent concealed as one against the procedure adopted. It is the respondents' submission that the application lacks merit and should be dismissed with costs to the respondents.

The Interested Party's Submissions

57. The interested party submitted that judicial review orders are discretionary since judicial review is not confined to reviewing the decisions of public bodies or public officials but that it is about the decision making process. Counsel for the interested party relied on the case of Republic Vs Kenya Revenue Authority ex-parte Yaya towers Limited [2008] eKLR Pastoli V Kabale District Local Government Council & others (2008) 2 EA 300 to 304 and Chief Constable of the North Wales Police Vs Evans (1982) I WLR 1155 and submitted that the instant suit, the ex-parte applicant has in the grounds of the substantive notice of motion levelled, without tendering evidence, various allegations inter alia that the minister fell into error by failing to note that the applicant's houses on the suit land were demolished by the interested party and on the spot the interested party constructed permanent houses, that the minister's decision was against the policy, spirit and word of cap 284 and that the minister was in flagrant breach of Cap 284 which made him reach an erroneous verdict thus enunciating merits of the case consequently failing spectacularly to demonstrate with sufficient clarity that the issue was the decision making process but rather demonstrating the issue was the decision. The interested party therefore submitted that the application is not merited and should be dismissed with costs.

Analysis And Determination

58. The court has carefully considered the material on record, the submissions made and the applicable law. The issues for determination in any view are-;

i. Whether or not the respondents exercised their statutory duties as envisaged in the law.

ii. Whether or not the judicial review remedies of certiorari and prohibition are available to the applicant.

59. In this case, the ex-parte applicant contended that the impugned judgment or determination of the minister was against the policy and spirit and the word of the *Land Adjudication Act* which requires that an individual should not be removed from land that he/she had occupied from time immemorial. That the decision was in breach of the said Act and therefore is erroneous since the minister conducted a fresh hearing instead of analyzing the evidence already adduced during the AR proceedings. The applicant also complained that two of his witnesses were denied from testifying and or given limited time within which to testify and thereby a verdict that was not fully informed was arrived at. The applicant also faulted the minister for allowing witnesses who are not knowledgeable of issues of occupation, use and settlement of the suit land and that he failed to be guided by the letters from the Adjudication Officer.

60. I have perused the *Land Adjudication Act*. In my view, there is no specific procedure which the minister is to conduct appeals. There is also no legal requirement for the minister to only review the proceedings and decisions made by the Land Adjudication Officer, the Arbitration Board or the Adjudication committee. Having perused the said Act there is nothing set out that bars the minister from taking evidence afresh.

61. In the case of Timothy Makenge Vs Manunga Ngochi [1979] Eklr, it was held that-;

> " But no such duty to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the minister. He is not bound to follow the prescribed procedure. His duty, by section 29 of the Act, is to determine the appeal and make such order thereon as he thinks just".

62. The above was also observed in the case of Republic vs Mwingi District Commissioner & 2 others ex-parte Mutindi Mwangangi [2014] eKLR.

63. It has also been held that judicial review does not concern itself with the merits of the decision, but focuses on the process through which the decisions were made.

64. In the case of Republic Vs Kenya National Examination council Ex-parte Gathenji and others Civil appeal No. 266 of 1996 the Court of Appeal stated:

> inter alia: "That an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of judicial review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for judicial review, he must satisfy the court that a public officer has acted uprocedurally, that his decision was unreasonable and that the impugned decision was illegal."

65. In the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 [2002] eKLR it was held:

> " Judicial Review is only concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before

it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a Court of Appeal over the decider which would involve going into the merit of the decision itself such as whether there was or there was not sufficient evidence to support the decision."

66. In this case, it is clear to me that the applicant's application dwelt on the merits of the decision rendered by the minister which clearly demonstrate that the applicant has an issue with the merits and not the procedure. The matters alleged by the ex-parte applicant go to the merits of the case.

67. Further from the material on record, it is evident that all parties, including the ex-parte applicant were afforded an opportunity to present their respective cases. In my considered view, the process followed by the respondents throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. Judicial Review remedy as already stated, 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. The role of the court is supervisory, not an appeal. It has not been shown that the impugned decision herein was made contrary to the law or that the rules of Natural Justice were violated. Similarly the argument that there was bias on the part of the respondents has not been proved. The complaint of bias in my view is a mere allegation not supported by any facts and I reject it.

68. In the case of Republic V Director of Immigration Services & 2 others Ex-parte Olamilekan Gbenga Fasuyi & 2 others (2018) eKLR it was held that:

"... It is common ground that the prayers sought are judicial review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial review is the review by a judge of the High Court of a decision, or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction – reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision maker are proper, and the decision is within the confines of the law, a court will not interfere."

69. The objective of judicial review was also observed in Chief Constable of the North Wales Police Vs Evans (1982 1 WLR where 155 Lord Brightman noted;

"Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power ... Judicial review as words imply, is not an appeal from a decision but a review of the manner in which the decision was made."

70. It has also been held that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is not part of that purpose to substitute the opinion of the judiciary or of the individual judge for that of the authority constituted by law to decide the matter in question. Accordingly, this court will only concern itself with the process

followed by the respondents in arriving at the impugned decision and therefore will not dwell on whether the decision arrived at was correct or otherwise. That is an issue which can only be resolved in a merit hearing before a court.

71. The application herein clearly challenges the merits of the impugned decision. I do find that there is no iota of evidence that indicates that the decision was illegal, unlawful, irrational and unreasonable and devoid of legal propriety. The allegation of bias on the part of the respondents or that they trampled upon the rules of natural justice has also not been proved. I also do not find any illegality in the process used by the respondents to arrive at the minister's decision. I find that the minister's decision was not arbitrary, irrational or in any way unreasonable. Accordingly, this judicial review application lacks merit.

72. Consequently, the notice of motion dated 21st February, 2022 is dismissed with costs to the respondents and the interested party.

73. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JULY 2023

IN THE PRESENCE OF

C/A: MARTHA

I.C. MUGO FOR EX-PARTE APPLICANT

MS. MBUGUA H/B FOR MOMANYI FOR INTERESTED PARTY

MS. KENDI FOR RESPONDENTS

C.K YANO

JUDGE