



**Nabea v Tigania East District Land Adjudication and Settlement Officer  
& another; Muriungi (Interested Party) (Judicial Review E008 of 2022)  
[2023] KEELC 20160 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20160 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
JUDICIAL REVIEW E008 OF 2022  
CK YANO, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**SIMON MUGAMBI NABEA ..... EXPARTE APPLICANT**

**AND**

**THE TIGANIA EAST DISTRICT LAND ADJUDICATION AND SETTLEMENT  
OFFICER ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JANET KANANU MURIUNGI ..... INTERESTED PARTY**

**JUDGMENT**

1. Pursuant to leave granted by the court on 15<sup>th</sup> February, 2023, the exparte applicant filed a notice of motion application dated 2<sup>nd</sup> March, 2023 seeking the following orders-;
  1. That this Honourable court is pleased to issue an order of certiorari to quash the proceedings, findings and decision made by the 1<sup>st</sup> respondent on 05/07/2022 in objection No. 42 over the land parcel No. 9957 situated in Karama Adjudication Section within Tigania East District.
  2. That the costs of this application be provided for.
  3. That the Honourable court is pleased to issue and or grant any other relief as the court may deem fit.
2. The application is supported by the affidavit of Simon Mugambi Nabea the applicant sworn on 2<sup>nd</sup> March 2023 and the statutory statement of facts and is premised on the following grounds-:



- a. That the Environment and Land Court vide its Judgment in MERU ELC JR Application No. 22 OF 2017 and dated 28<sup>th</sup> July, 2021 quashed the decision of the Land Adjudication Officer, Tigania East District and directed that the matter is remitted back to the Land Adjudication officer for a fresh hearing and determination of the matter.
- b. That the 1<sup>st</sup> respondent called for a hearing on the 18<sup>th</sup> May 2022 whereby the ex-parte applicant appeared and called 3 witnesses while the interested party called one witness.
- c. That the 1<sup>st</sup> respondent in his determination failed to appreciate the evidence adduced during the said hearing which lead to an irregular decision tainted with inconsistencies.
- d. That the 1<sup>st</sup> respondent did not appreciate/understand the applicable customary law and the basic rules of evidence since the said decision is a clear evidence of biasness as it is completely inconsistent with the evidence on record.
- e. That as a result of the said decision the applicant herein stands to suffer irreparable loss since that land parcel is where he resides with his children.
- f. That the impugned decision is ab initio, against the relevant statute and ipso fact illegal en masse.

### **Ex-parte Applicant's Case**

3. Ex-parte applicant's case is that he is the owner of land parcel No. 9957 having been allocated the same by his clan elders in or about the year 1970. That shortly thereafter the husband to the interested party one Geoffrey Kayoi filed an objection against Ekotha Ngithuru whereby the committee awarded him 2 acres out of the 5.50 acres. That dissatisfied with the decision, the ex-parte applicant moved to the adjudication committee against Alexander Meme Kajoi under objection No. 42. That the matter was heard though tainted with numerous irregularities that prompted the ex-parte applicant to file Judicial review seeking to quash the decision of the adjudication officer in Meru ELC JR. Application No. 22 of 2017 which was heard and subsequently the court remitted the matter to the Land Adjudication and Settlement Officer, Tigania East District vide its judgment dated 1<sup>st</sup> February, 2022 to be heard afresh. That during the pendency of the said Judicial Review application, the interested party's late husband in collusion with the Tigania Land Adjudication Officer colluded to subdivide the suit land before the suit was heard and conclusively determined and with a view of defeating the applicant's rights over the same.
4. The ex-parte applicant stated that he instructed the firm of M/S Maitai Rimita & Co. Advocates who were representing him in the Judicial Review to write to the Adjudication Officer in a bid to stop the planned subdivision. That the interested party's husband further used his influence as a senior officer in the office of the Attorney General and used police to persistently harass and persecute the applicant through unexplained and arbitrary arrest over alleged claims of trespass which prompted the applicant to write to the OCS Muthara Police Station over the same.
5. The ex-parte applicant deponed that the matter was remitted back to the Tigania Land Adjudication Officer for hearing whereby he was invited and he called two witnesses in support of his case while the interested party was represented by one Thiane Kajoi. That the matter was heard and concluded in favour of the interested party vide the decision dated 5<sup>th</sup> July, 2022 whereby it was ordered that the interested party would remain on the adjudication registered in the name of her late husband Alexander Meeme Kajoi and further that the applicant be paid compensation for his crops on the suit land as would be assessed by the Agricultural Officer.



6. The Ex-parte applicant stated that he believes that the decision by the committee was biased for the following reasons:
  - I. it was held that the ex-parte applicant owned two other parcels of land Nos 10123 and 10124 yet there was no proof tendered in support of the same.
  - II. The committee retained the name of Geoffrey Meeme Kajoi on the register for the whole parcel of land measuring 5.50 acres yet he had only been awarded 2.0 acres by the initial committee.
  - III. The committee failed to take in the applicant's evidence and that of his witnesses over the fact that he was in possession and only claimed 3.20 acres of the suit property.
  - IV. The adjudication committee failed to appreciate that the applicant was in the objection No. 7 as a party representing his interest though under Geoffrey Meeme Kajoi since they shared a grandfather.
7. The ex-parte applicant stated that the plain reading of the proceedings and decision of the committee clearly revealed a complete variance as to the evidence tendered and the decision reached suggesting collusion between the 1<sup>st</sup> respondent and the interested party. That the collusion was clearly revealed after his former advocate M/S Maitai Rimita & Co. Advocates vide the letter dated 7<sup>th</sup> July, 2022 purporting to be representing the interested party and demanding that the applicant vacates the suit land within 7 days.
8. The applicant further stated that he was served with a valuation report dated 7<sup>th</sup> July, 2022 addressed to the interested party containing an alleged tabulation of the crops on the suit property and the approximate value yet he was never involved in the said valuation process which has left out most of the crops thereon. The ex-parte applicant states that he instructed his advocate on record to respond to the letter dated 7<sup>th</sup> July 2022 which was done through the letter dated 13<sup>th</sup> July, 2022. That two days after the decision of the Land Adjudication Officer, he visited his office in a bid to register his complaint with the executive officer of the Adjudication committee so that he would appeal to the arbitration board as is required by law, but was not received and as such he chose to write a letter detailing his complaint and intentions to appeal to the arbitration board and left a copy at the 1<sup>st</sup> respondent's office. That thereafter he sought the leave of the court to file the application for Judicial review herein.
9. In the supporting affidavit, the ex-parte applicant has annexed copies of proceedings before the committee and in objection No. 42, Judgment and decree in Meru ELC JR APPL. NO. 2 of 2017, various letters, and proceedings and decision dated 5<sup>th</sup> July, 2022, and argued that the 1<sup>st</sup> respondent's decision was biased, unreasonable, bad in law and a clear violation of the applicant's constitutional rights.

### **The Interested Party's Case**

10. The interested party opposed the application vide a replying affidavit dated 5<sup>th</sup> June 2023 in which she avers that land parcel Number 9957 Karama Adjudication Section is recorded in the name of her late husband Alexander Meeme Kajoi. That the said land was gathered by Geoffrey Kajoi her late father in law who later transferred it to the interested party's late husband. That the ex-parte applicant filed an objection against the interested party with the District Land Adjudication and settlement Officer Tigania East and after hearing his evidence and hers determined that the applicant does vacate the interested party's late husband's land.
11. The interested party averred that the applicant does not live on the land and has only been cultivating on a portion of it with the consent and authority of the interested party's late father in law as evidenced



in annexure “SMN – 06”. That the decision by the Land Adjudication and Settlement Officer assisted by the committee is well founded and fair.

12. The interested party further averred that she is advised by her advocate on record that Judicial review is concerned with the decision making process and not with the merits of the decision itself, and that the application challenges the merits of the decision of the Land Adjudication Officer and his committee and not the process that arrived at the decision and is therefore bad in law. That it has not been established that the challenged decision is irrational, illegal or procedurally defective and the court should therefore not grant the orders sought. That the alleged bias has not been demonstrated. The interested party contended that the applicant is asking the court to sit on appeal of the challenged decision and substitute it with its own decision on the merits which this court has no jurisdiction to do. She therefore urged the court to find the notice of motion dated 2<sup>nd</sup> March, 2023 lacks merit and dismiss it with costs.
13. The respondents did not respond to the application.
14. The court directed the application be canvassed by way of written submissions which were duly filed.

### **The Ex-parte Applicant’s Submissions**

15. Learned counsel for the ex-parte applicant relied on the case of *Patoli Vs Kabale District Local Government Council & others* (2008) 2 EA 300 in which it was held-;

“In order to succeed in an application for Judicial Review the applicant has to show that the decision or act complained is tainted with illegality, irrationality and procedural impropriety ... illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of law or its principles are instances of illegality.”

16. The ex-parte applicant’s counsel identified the following issues for determination. Whether the decision by the 1<sup>st</sup> respondent adhered to the provisions of Section 26 of the *Land Consolidation Act* Cap 283; whether the decision by the 1<sup>st</sup> respondent is biased and varies with the evidence tabled by the parties, and whether the ex-parte applicant is deserving of the orders sought.
17. The ex-parte applicant cited section 26 (1) of the *Land Consolidation Act* Cap 283 and submitted that save for the inclusion of the names of the committee members on the proceedings and decision delivered by the 1<sup>st</sup> respondent, the committee members did not participate in any other way in the hearing and neither sought any clarifications nor did they sign the decision delivered by the 1<sup>st</sup> respondent. The ex-parte applicant stated that it is the 1<sup>st</sup> respondent that solely conducted the hearing by himself without involving the committee members. That the proceedings and decision produced herein and marked as “SMN – 06” is proof enough that the members of the committee did not actively participate in the hearing as nowhere in the proceedings are they seen to participate in the proceedings or the decision and that to that extent, it is the ex-parte applicant’s submissions that the hearing fell short of complying with the legal provisions and thus the decision is null and void.
18. The ex-parte applicant also cited Article 47 of *the Constitution* of Kenya 2010 which grants a person a right to Administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair, including the right to be given written reasons for the decision and invited the court to find that the decision by the 1<sup>st</sup> respondent is unlawful, null and void for failing to comply with the provisions of the law.



19. The ex-parte applicant relied in the holding in the case of Nkonyai (suing as the legal representative of the estate of M'Thiringi M'anampiu ( deceased & 2 others Vs District Land Adjudication and Settlement Officer Karama Adjudication Section & another, Munya & another ( Interested parties) Environment and Land Judicial Review case no. E010 of 2021 (2022) KEELC 2614 (KLR).
20. The ex-parte applicant also cited Section 7 of the *Fair Administrative Action Act* which enjoins the court while exercising judicial review powers to establish if the decision maker had the authority to decide, acted in excess of Jurisdiction or powers contravened any law, was biased, denied a party an opportunity to be heard, failed to follow mandatory and material procedure, was unfair, erred in law, was being directed by an unauthorized person, made the decision in bad faith, was irrational, abused discretion, was unreasonable or disproportionate, abused power and violated legitimate expectation of the parties, and submitted that post 2010 the court has wider powers and is merely not restricted to the decision making process. That the court has to look at the merits and demerits of the decision as well as the legitimacy of the process.
21. The ex-parte applicant submitted that he has demonstrated by way of evidence that the decision reached by the 1<sup>st</sup> respondent was not only unprocedural but also biased as it does not rightly sit with the evidence of the ex-parte applicant or that of his witnesses as recorded in the proceedings.
22. The ex-parte applicant submitted that the collusion was clearly revealed after the ex-parte applicant's former advocate (M/S Maitai Rimita & co. advocates) wrote to him vide the letter dated 7<sup>th</sup> July, 2022 purporting to be representing the interested party and demanded that he vacate the suit land within 7 days.
23. The ex-parte applicant further submitted that in addition, he was also served with a valuation for compensation report dated 7<sup>th</sup> July, 2022 addressed to the interested party containing an alleged tabulation of the crops on the suit property and their approximate value, yet he was never involved in the said valuation process which has left out most of his developments of the suit land.
24. The ex-parte applicant further submitted that the interested party has continued harassing the ex-parte applicant using the police like was the case with her late husband who he alleged used his influence as a senior officer in the office of the Attorney General and caused the police to persistently harass and persecute the applicant through unexplained and arbitrary arrests over the alleged claim of trespass.
25. In light of the foregoing, it is the ex-parte applicant's submissions that he has clearly demonstrated that the interested party has been in collusion with the 1<sup>st</sup> respondent and as such the decision of the 1<sup>st</sup> respondent cannot be impartial or just and the same should be set aside entirely. That the decision of the 1<sup>st</sup> respondent has the tragic effect of evicting him from his own land on which he resides with the family and cultivates as their only source of income
26. The ex-parte applicant invited the court to find that the 1<sup>st</sup> respondent's decision is a clear illustration that he was biased and as such the decision is unreasonable, bad in law and clear violation of the ex-parte applicant's constitutional rights.
27. On whether the ex-parte applicant is deserving the orders sought, the applicant cited section 26(3) of the *Land Consolidation Act* that provides that no appeal shall lie against the decision by the Adjudication Officer to dismiss an objection or an order for rectification or award compensation except on the issue of the amount of compensation given, before a subordinate court and submitted that it follows therefore that the only recourse for the ex-parte applicant having been dissatisfied and prejudiced by the decision of the 1<sup>st</sup> respondent is before this court.



28. The ex-parte applicant urged the court to be persuaded by his pleadings and submissions and find that he has proved his case and grant the orders sought.

### **The Respondents' Submissions**

29. The respondents narrowed down the issue for determination to whether the applicant has established any grounds to warrant the Judicial Review order and whether the applicant is entitled to the relief sought. The respondents submitted that Judicial Review proceedings are anchored under Article 47 of *the Constitution* and the *Fair Administrative Action Act* 2015. That Section 7 of the Fair Administrative Act 2015 provides that any person aggrieved by an Administrative Action or decision may apply for a review of the Administrative Action or decision and that the court may review the said action if the person who made the decision was biased, failed to take into account relevant consideration, or did not comply with a mandatory procedure.
30. The respondents submitted that it is trite law that Judicial Review is concerned with the decision making process and not the decision itself as held in *Republic Vs Anti-counterfeit Agency Exparte Caroline Mangala t/a Hair works Saloon* [2019] eKLR.
31. The respondents also placed reliance on *Republic Vs Public Procurement Administrative Review Board & 3 others Ex-parte Saracean Media Limited* (2018) eKLR.
32. It is the respondent's submissions that the process followed by the 1<sup>st</sup> respondent was proper and within the confines of Section 26 of the *Land Consolidation Act* and that both parties were accorded a fair hearing with the committee present during the hearing and upon which the 1<sup>st</sup> respondent arrived at a decision based on the evidence produced and consequently the 1<sup>st</sup> respondent considered the relevant consideration in coming up with the determination.
33. The respondent faulted the applicant for introducing the issue that the 1<sup>st</sup> respondent did not comply with Section 26 of the Act by excluding the committee in the objection hearing only through submissions. The respondents submitted that contrary to the assertion by the applicant the committee was involved in the proceedings as evident from the proceedings of the objection.
34. The respondents submitted that the assertion that the committee did not actively participate in the hearing is rebuttable and that the same would call for a full hearing and proof before the trial court. The respondents relied on the case of *Republic Vs National Transport & Safety Authority & 10 others ex-parte James Maina Muga* (2015) eKLR.
35. Regarding the applicant's contention that the 1<sup>st</sup> respondent in his determination failed to appreciate the evidence adduced during the objection hearing leading to an irregular decision tainted with inconsistencies and further that the 1<sup>st</sup> respondent did not appreciate the applicable customary law and the basic rules of evidence and as such his decision was biased, the respondents submitted that the basic rule of evidence dictate that he who alleges must prove and the onus of proof that indeed the 1<sup>st</sup> respondents decision is biased and inconsistent with the evidence on the record is on the applicant.
36. The respondents further submitted that the allegations that there was collusion between the 1<sup>st</sup> respondent and the interested party is a serious allegation that merits the production of evidence in support of the same and in the absence of such evidence these allegations remain speculative and mere allegations. The respondents submitted that the applicant has not established any ground warranting the grant of Judicial review orders.



37. The respondents submitted that based on the foregoing, the applicant has not proved illegality, irrationality, or procedural impropriety to the required threshold warranting the review and or quashing of the 1<sup>st</sup> respondent's decision.
38. It is the respondents' contention that the 1<sup>st</sup> respondent's decision was made after due consideration of the relevant information and based on the evidence produced and that there was no proof of bias in the said decision or that the 1<sup>st</sup> respondent did not appreciate the evidence on record. It is the respondents' submission that the grounds posited by the applicant in the application are geared towards challenging the merits of the 1<sup>st</sup> respondent's decision and findings which is not in the purview of the judicial review application. They submit that this is akin to the applicant inviting the court to determine contested issues of facts without hearing evidence. That the applicant seeks to circumvent the limitation set out in Section 26 (1) of the [Land Consolidation Act](#) that provides that no appeal shall lie against the decision by the Adjudication Officer to dismiss an objection or order rectification of the Adjudication register. That only an appeal on the amount awarded for compensation can lie in a court of law.
39. The respondents submitted that the applicant is not entitled to the writ of certiorari to quash the proceedings, findings and decision made by the 1<sup>st</sup> respondent over the land parcel No. 9957 situate in Karama Adjudication Section within Tigania East District.
40. The respondents submitted that the applicant has not met the grounds required for the grant of Judicial review orders having failed to prove illegality, irrationality, or impropriety on the part of the 1<sup>st</sup> respondent, in his decisions, findings or procedure adopted in the objection hearing.
41. The respondents urged the court to dismiss the application with costs to the respondents.

#### **The Interested Party's Submissions**

42. The interested party identified two issues for determination before the court-;
  - i. Whether the 1<sup>st</sup> respondent exercised his statutory duties as envisaged in the law.
  - ii. Whether the orders of Judicial review are available to the ex-parte applicant
43. The interested party pointed out that the ex-parte applicant comes to the court pursuant to Section 26 of the [Land Consolidation Act](#) which provides the procedure to be followed by a person who is aggrieved by [the constitution](#) of an adjudication register by reasons of its inaccuracy, incompleteness or allocation of land.
44. The interested party submitted that it is discernable from the proceedings that the procedure followed was according to that section. The interested party submitted that an applicant in Judicial Review proceedings must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. That the applicant alleged biasness and collusion but brings no evidence before the court to prove the same. It is the interested party's submission that these are not the grounds which a party can bring a claim for Judicial Review.
45. The interested party pointed out that the ex-parte applicant in his application stated that the 1<sup>st</sup> respondent failed to appreciate the evidence adduced during the said hearing which led to an irregular decision tainted with inconsistencies and also states that the 1<sup>st</sup> respondent did not appreciate/ understand the applicable customary law and the basic rules of evidence since the said decision is a clear evidence of biasness as it is inconsistent with the evidence on record. It is the interested party's submissions that from the material on record, it was evident that all the parties were granted an opportunity to present their respective cases and cross examine each other and the witnesses on the



testimonies adduced. That they were also granted an opportunity to call any number of witnesses they wanted and that it is also evident that while making its decision, the Land Adjudication Officer considered all testimonies and evidence that was presented to him during the proceedings and that there was no irregularity by the 1<sup>st</sup> respondent's decision that has been proven.

46. The interested party contended that the ex-parte applicant asserted that the number of witnesses called to testify in support of his case should have swayed the land adjudication Officer to rule in his favour.
47. The interested party submitted that the decision made by the 1<sup>st</sup> respondent clearly stated that the ex-parte applicant revealed during cross examination that he had land that was bordering the disputed land and therefore his claim of biasness is unfounded. It is the interested party's submission that the whole application by the ex-parte applicant addresses the merits of the decision and not the procedure followed. The interested party submitted that there was compliance with the law and relied on Republic Vs Tigania East District Land Adjudication and Settlement Officer and another, Joseph Mathita Ikirima Exparte Solomon Mworio Samuel [2020] eKLR. It is submitted that the procedure followed by the 1<sup>st</sup> respondent was fair, objective and procedural.
48. Regarding the issue as to whether the orders of Judicial review are available the interested party urged the court to be persuaded by the views of the supreme Court in the case of John Florence Maritime Services Limited & another Vs Cabinet Secretary Transport and infrastructure & 3 others (Petition 17 of 2015 ( 2021) KESC 39 (KLR) CIV (6<sup>th</sup> August 2021 (Judgment) and Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd, Civil appeal No. 185 of 2001 and submitted that Judicial review remedy is concerned with reviewing not the merits of the decision in respect of which the application for Judicial review is made but the decision making process itself. That role of the court in Judicial Review is supervisory, not an appeal.
49. The interested party submitted that 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. That the applicant has levelled various allegations that go to the merits of the case and clearly spells out that the issue is the decision and not the procedure.
50. The interested party urged the court to find that the notice of motion application by the ex-parte applicant lacks merit, is made of baseless claims and full of mere innuendos.

### **Analysis And Determination**

51. The court has carefully considered the evidence on record, the submissions made and the relevant law. The issues that arise for determination are
  - i. Whether the respondents exercised their statutory duties as envisaged in the law?
  - ii. Whether the orders of Judicial Review are available?Whether the Respondents exercised their statutory duties as envisaged in the law?
52. The principles of judicial Review were set out in the landmark case of Republic Vs Kenya National Examination Council Ex- parte Gathenji and others Civil Appeal No. 266 of 1996 where 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 unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.”

53. In the case of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR*, the Court of Appeal held that-;

“Judicial review is 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 merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision.”

54. Section 29 of the *Land Adjudication Act* Cap 284 Laws of Kenya Provides as follows-;

1. Any person who is aggrieved by the determination of an objection under section 26 of the Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-;
  - a) Delivering to the Minister an appeal in writing specifying the grounds of appeal.
  - b) Sending a copy of the appeal to the Director of the Land Adjudication and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
2. The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the chief Land Registrar.
3. When the appeals have been determined, the director of Land Adjudication shall-;
  - a) Alter the duplicate adjudication register to conform with the determinations and
  - b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

55. In this case, there was a committee case between one Geoffrey Kayoi the interested party’s husband and Ekotha Nguthiru whereby the committee awarded the former 2 acres out of 5.50 acres. The ex-parte applicant was dissatisfied with the said decision and he filed objection No. 42 against one Alexander Meeme Kayoi. From the evidence on record, it is clear that the matter was heard and determined but the ex-parte applicant, again being dissatisfied, filed Meru ELC JR. No. 22 of 2017. Vide its Judgment delivered on 1<sup>st</sup> February, 2022, the court remitted the matter to the Land Adjudication and Settlement Officer for hearing afresh. The parties including the ex-parte applicant were invited and testified and called witnesses in support of their respective cases. By a decision dated 5<sup>th</sup> July, 2022, the matter was decided in favour of the interested party, hence this application.

56. In this case the ex-parte applicant’s main complaint is that the committee failed to consider the evidence tendered and reached a decision which suggests there was collusion between the 1<sup>st</sup> respondent and the interested party. According to the ex-parte applicant, the 1<sup>st</sup> respondent failed to appreciate the evidence adduced during the hearing and therefore the decision was irregular and tainted with inconsistencies. The applicant also accused the 1<sup>st</sup> respondent of not appreciating or understanding the applicable customary law and the basic rules of evidence.



57. As already stated, in this case the interested party appealed to the 1<sup>st</sup> respondent and in accordance to Section 29 of the [Land Adjudication Act](#), the 1<sup>st</sup> respondent conducted appeal proceedings and came to a decision which in my view followed due process. From the grounds relied on by the ex-parte applicant and the submissions, it is clear that the applicant is attacking the merits of the decision rendered by the 1<sup>st</sup> respondent and not the procedure. In the applicant's submissions there is an admission that the matter addresses the merits since post 2010, the court has wider power and is merely not restricted to the decision making process, but the court has to look at the merits and demerits of the decision as well as the legitimacy of the process which is erroneous.
58. While dealing with this issue, I am guided by the decision of the Court of Appeal in the case of Suchan Investment Limited Vs The Ministry of National Heritage & Culture & others (2016) eKLR, in which the court held as follows-;
- “ 55. An issue that was strenuously urged by the respondent is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while Judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, Judicial Review is not concerned with the merits of the case. However, Section 7(2) (1) of the Fair Administrative Acton Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of Judicial Review in R V Home Secretary; ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision: First proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations, thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of [the constitution](#) to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.”
59. The ratio decidendi of the above decision is that there is a shift towards merit consideration in Judicial Review Applications. According to the court, whether relevant consideration were taken into account in making the impugned decision invites aspects of merit review. However, while reviewing the merits of the impugned decision, the Court of Appeal held that “The reviewing court has no mandate to substitute its own decision for that of the administrator.” However, in this case, I find that the 1<sup>st</sup> respondent gave all parties a hearing and arrived at a decision in accordance with law. I see no reason to remit it back.
60. The ex-parte applicant has also alluded to elements of bias and collusion of which the same has not been substantiated with evidence.
61. Section 108 of the [Evidence Act](#) provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.



62. In the case of *M’Bita Ntiro V Mbae Mwirichia & another* [2018] eKLR, it was held-;

“The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence unless it is provided by any law that the proof of fact shall lie on any particular person.”

63. From the material on record, it is evident that all parties, including the *ex parte* applicant were afforded an opportunity by the 1<sup>st</sup> respondent to present their respective cases. In my considered view, the process followed by the 1<sup>st</sup> respondent throughout the proceedings as well as the making of the decision were fair, objective and procedural. There was no evidence of collusion and bias as submitted by the applicant. As already stated, Judicial Review remedy is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made but the decision making process itself. The role of the court in Judicial review is supervisory, not an appeal. It has been stated that the role of the court is not to substitute its decision with that of the administrator who made the decision. 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 to justify the court remit the matter to the 1<sup>st</sup> respondent. The court can only remit where sufficient cause has been shown. In this case there is none that I have seen.

#### **Whether the orders of jurisdiction review are available**

64. On the issue of whether the *ex-parte* applicant herein is entitled to the orders of certiorari, it should be noted that Judicial review orders are discretionary.

In *Zachariah Wagunza & another Vs Office of the Registrar, Academic Kenyatta University & 2 others* [2013] eKLR the court reiterated the broad grounds on which the court exercises its judicial review Jurisdiction as was stated in the Uganda case of *Postal Vs Kabale District Local Government Council and other* (2008) 2 EA 300, and observed among other things that-;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of law or its principles are instances of illegality...

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before would have made such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non -observance of the rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such Authority exercises jurisdiction to make a decision.”

65. The above position was taken up by the Court of Appeal in the case of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Limited* (*supra*). Similarly, in the case of *Republic Vs Director of*



Immigration Services & 2 others *Exparte 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 merit 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.”

66. According to Halsbury Law of England 4<sup>th</sup> EDN. Vol 1 (1) para 12 page 270;

“The remedies of quashing orders (formerly known as orders of certiorari) prohibiting orders (formerly known as orders of prohibition) mandatory orders (formerly known as orders of Mandamus)... are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”

67. The objective of Judicial review was observed in *Chief Constable of the North Wales Police Vs Evans* (1982) 1 WLR where at 1155 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”

68. In the instant case the applicant has levelled various allegations that go to the merits of the case. This clearly demonstrates that the issue is the decision and not the process.

69. In laying the scope of Judicial Review, the Court of Appeal in *Commissioner of Lands Vs Kunste Hotel Limited* [1997] eKLR observed:

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



70. In this case, the applicant has not sufficiently demonstrated that the 1<sup>st</sup> respondent in his decision failed to appreciate the evidence adduced during the hearing as to lead to an irregular decision tainted with inconsistencies as alleged. In my view, the applicant has simply made general accusations which is not supported by evidence. It is trite law that litigation must come to an end. Therefore, it cannot be said that every time a decision is made against one party and in favour of another, that there was bias. There must be prove by way of evidence that indeed there was bias. I must add that where there are sufficient grounds, a court cannot hesitate to exercise its power to remit the matter for reconsideration by the decision maker. In *Suchan Investments Ltd Vs Ministry of National Heritage & Culture* (case supra) the Court of Appeal was clear that “the power to remit means that decision making on merits is the preserve of the administrator and not the courts”.
71. Considering that the ex-parte applicant and his witnesses were heard by the 1<sup>st</sup> respondent who also gave reasons for his findings, which findings I find were not unreasonable or unproportional, it is my finding that due process was followed throughout the proceedings and the decision was fair, objective and procedural. It is my finding that the application herein has no merit.
72. Consequently, the notice of motion dated 2<sup>nd</sup> March 2023 is dismissed with costs to the respondents and the interested party.

**DATED, SIGNED AND DELIVERED AT MERU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**IN THE PRESENCE OF**

Court Assistant V. Kiragu/Lena M

Kiogora Nganga for ex-parte applicant

No appearance for Attorney General for respondent

No appearance for interested party

**C.K YANO**

**JUDGE**

