



**Republic v Land Registrar Kwale; Kabila & another (Interested Parties) (Judicial Review Cause E001 of 2024) [2025] KEELC 1261 (KLR) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1261 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
JUDICIAL REVIEW CAUSE E001 OF 2024**

**AE DENA, J**

**MARCH 17, 2025**

**IN THE MATTER OF AN APPLICATION BY PATRICK HAWKES KARANJA KINYANJUI**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAND REGISTRAR KWALE ..... RESPONDENT**

**AND**

**SWALEHE SALIMU KABILA ..... INTERESTED PARTY**

**PATRICK HAWKES KARANJA KINYANJUI ..... INTERESTED PARTY**

**JUDGMENT**

1. Through the Notice of Motion dated 9<sup>th</sup> April 2024 filed with leave of the court granted on even date, the exparte applicant seeks the following verbatim orders
  - a. The exparte applicant Patrick Hawkes Karanja Kinyanjui, the owner of Land Parcel No.Kwale/ Galu Kinondo/416 be granted an order of certiorari to bring into this Honourable court for purpose of being quashed the decision of the respondent , the Land Registrar Kwale made on the 9<sup>th</sup> of November 2023 to register one Swalehe Salimu Kabila as the owner of the said Kwale/Galu Kinondo/416
  - b. The exparte applicant Patrick Hawkes Karanja Kinyanjui, the owner of Land Parcel No.Kwale/ Galu Kinondo/416 be granted an order of certiorari to bring into this Honourable court for purpose of being quashed the title deed for Land Parcel No.Kwale/Galu Kinondo/416 to Swalehe Salimu Kabila.



- c. The ex parte applicant Patrick Hawkes Karanja Kinyanjui, the owner of Land Parcel No.Kwale/ Galu Kinondo/416 be granted an order of prohibition to prohibit the respondent, the Land Registrar Kwale from illegally registering or issuing title deeds with respect to Kwale/Galu Kinondo/416 to Swalehe Salimu Kabila or any other person without the express concurrence of the legitimate owner of the land, ie, the ex parte applicant Patrick Hawkes Karanja Kinyanjui.
  - d. Costs of this application be provided for.
2. The Notice of Motion is premised on the grounds that the ex parte applicant was duly registered as the owner of Parcel No.Kwale/Galu Kinondo/416 (suit property) on 24/04/1974 and issued with a title the same day. This is after purchasing the suit property from Salim Abdalla Mwachatamu (herein the deceased). The ex parte applicant has since then enjoyed the use of the suit property without any incidents by charging it as security for a loan in the same year which was subsequently discharged in 2016 on successful repayment and Paying Land Rates. That before payment of the Land rates he conducted searches in 2016,2021,2023 which showed him as the registered owner of the suit property and has for the year 2024 been cleared by the respondent to pay rates for the same.
  3. That in 2023 the ex parte applicant was informed by the respondent that the suit property had two green cards. Apprehensive of fraudulent dealings the ex parte applicant wrote to the respondent for a restriction to be placed against the suit property and also published a caveat emptor in the Daily Nation of 18/11/2023. He also wrote to the Directorate of criminal investigations notifying them of the issue. That in the company of one Abraham Kambi Masha the ex parte applicant handed over to the respondent copies of certificate of title, green card issued in 2016 and the caveat. That he conducted a fourth search when he found that Swalehe Salim Kabila was registered as the owner of the suit property. The ex parte applicant terms this registration and attendant title as fraudulent. Upon this discovery he wrote to the Cabinet Secretary Ministry of Lands detailing the fraud.
  4. It is stated that the registration of the said Swalehe Salim Kabila without reference to the ex parte applicant is in contravention of his right to natural justice particularly the right to be heard. That the respondents actions were prima facie fraudulent for the reason that while both titles show the parcel file was opened on 15/11/1974, Swalehe Salim Kabila title does not show the transactions that occurred on 24/04/1978, 4/11/1978 and 11/02/2016. That the title allegedly issued on 6/01/1981 to Swalehe Salim Mwachatamu (the deceased) is not supported by any green card. It is further stated that the respondents action of registering Swalehe Salim Kabila as owner of the suit property were in contravention of article 40 of the Constitution, section 24 of the Land Registration Act 2012 as well as the ex parte applicants legitimate expectation under the Wednesbury Rules.

The above grounds are reiterated and verified by the affidavit of Patrick Hawkes Karanja Kinyanjui.

### **Respondent response to the Application**

The Notice of Motion is opposed by the respondent vide the replying affidavit of Steve Mokaya sworn on 11<sup>th</sup> October 2024 the County Land Registrar.

5. It is deponed that despite the ex parte applicants allegations of his purchase and registration as proprietor the records at the land registry do not bear such transaction save for a green card opened under section 79 of the Land Registration Act. The same was used by the ex parte applicant to charge the suit property in 1978. That the records show that Salim Abdalla Mwachatamu (deceased) was issued with a land certificate on 6/01/81. The green card is attached as SNM-1.
6. That adjudication record available indicates the said Salim Abdalla Mwachatamu was the owner of the suit as at May 1974. A copy of the adjudication record is attached as SNM-2. That the court in



Msambweni Succession Cause Number E331 of 2023 in the matter of Salim Abdalla Mwachatamu ordered that the suit property be vested in Swalehe Salim Kabila as trustee and the land registrar to effect transmission of the estate to the heirs thus the entry number 3 in the green card. Attached as SN3 (a),(b) and (c) are copies of Identity Card, PIN Certificate and Court Order. That upon the order the Swalehe applied to be registered. The Application is SNM4.

7. It is deponed that the Respondent did not abdicate his duties neither did it exceed its powers in performing its duties herein. That the allegations of fraud are unsubstantiated by any evidence. That the exparte applicant should seek to nullify the orders of the Kadhis court and then prove how he obtained the suit property. That in judicial review the court is concerned with the decision making process and not merit. The deponent states he has demonstrated he has was not involved in fraud and the application should be dismissed.

### **Exparte Applicants further Affidavit**

8. The exparte applicant responded to the Land registrar vide a further affidavit sworn on 17/11/24. It is averred that the respondent admits a green card was opened under the provisions of section 79 of the Land Registration Act and that it was used to charge the suit property. That in view of the admission the respondent is estopped from disputing the facts he has admitted. That consequently the opening of another green card in 1981 would be a violation of section 79 of the repealed constitution and article 40 to the extent that the exparte applicant was deprived of his property without due process.
9. Exparte applicant believes the green card SNM1 is a forgery on the grounds that the title deed of the Interested Party is not accompanied by a green card. SNM1 relates to land measuring approximately 2.2Ha which does not tally with the adjudication record 1.8Ha. That the exparte applicants green card tally's with the adjudication record in terms of size. The discrepancy in SNM1 and SNM2 can only be explained as forgery on the part of the respondent. It is deponed that Registry Map Sheets obtained from Land Survey Department are contrary to the green card SNM1 and the title SSK5. That Galu/Kinindo/416 is not contained in the map sheet No.2 but in Map Sheet No.4. The map sheets are attached as PHKK2 and PHKK3.
10. Additionally it is deponed that in the unlikely event that the respondent did not forge the green card SNM1, the respondents failure to undertake due diligence on discrepancy in size and map sheets which the exparte applicant was able to do in 7 days smirked of fraud on the part of the respondent. Further that the Interested Party decision to move the Kadhis court knowing very well the exparte applicant did not profess the Muslim faith and the production of forged documents thereof was perjury and fraud. The deponent alleges the offence of perjury has been committed by the respondent, his advocate and Interested party contrary to the provisions of Section 108 (1) and (2) of the Penal Code Cap 63. That the exparte applicant has made complaints in this regard to the DCIO and the correspondence is attached as PHKK 4 and 5.
11. The exparte applicant reiterates that forgery has been committed, that the respondent abdicated his duties and the exparte applicants ownership rights deprived without a hearing. That the court has powers to grant the orders sought.

### **Respondents further replying affidavit**

12. The respondents in further reply to the above swore a further Replying Affidavit on 11/11/2024. I note that objections were raised by Counsel for the exparte applicant on 12<sup>th</sup> November 2024 to strike out the same on the basis it had been filed without leave of the court. The court agreed with counsel and expunged it from the record.



## Interested Party Response to application

13. The Interested party responded to the substantive Notice of Motion vide a replying affidavit sworn in May 2024 and Grounds of opposition dated 24<sup>th</sup> May 2024. The grounds of opposition are reiterated in the replying affidavit except the contention that the application contravenes chapter 23 chapter 302 and the repealed land registration Act cap 300.
14. It is deponed that the Interested Party father (deceased) was registered as the proprietor of the suit property during adjudication in 1974 and issued with a title on 6/1/1981. A copy of the adjudication register and title are attached as SSK1 and SSK2. That he is the only son who lived with his father who died on 11/11/1990. That the Interested Party held the title with no intention to sell until the year 1923 when he suffered a stroke. He instructed his son Said Swalehe Kabila to look for a buyer to raise money for treatment which buyer he identified through the firm of Nyameta Mogaka Advocates. When the buyer went to the land in February 2024, they were confronted by goons from a nearby plot alleging that someone else was the owner of the property.
15. That after the death of his father he successfully applied at the Msambweni Kadhis court to inherit the land. The order is attached as SSK4 which he presented at Kwale land registry with the original title deed on 9/11/23. That prior to the succession he conducted a search (SSK6) which did confirm the deceased as owner. That at no given time did the Land Registrar inform him the exparte applicant was claiming the land or that he also held a title deed. The register was quite clear and there were no documents relating to the applicant. That throughout the deceased life no one came for purposes of buying the land and he has been using the land for cultivation. That he has never seen the exparte applicant. That the deponent used to live on the land before he moved to Mwabungo. That his father was still recorded as the owner at the land adjudication office.
16. It is deponed that the records produced by the exparte applicants must have been secretly sneaked into the file and are forgeries meant to hoodwink the court. There were no transfer documents signed by the deceased. That though the green card relating to the exparte applicant was opened for purposes of a loan the charge document, the bank statement or offer letter from the bank have not been availed before court. The deponent states he has never received a demand notice for rates from the Kwale County.
17. The exparte applicant filed a further affidavit sworn on 8<sup>th</sup> August 2024 in reply to the Interested party replying affidavit sworn in May 2024. It is deponed that the title deed marked SSK2 is fraudulent for having been issued three years after the exparte applicant title and that the signatures thereof are fraudulent. That allegations that there were goons on the property are denied. That the exparte applicants cousin Anthony Kinyanjui was in situ overseeing the land and no one visited the land. That the Kadhis court has no jurisdiction over ownership of land and more so the exparte applicant who has never professed Islamic law. That the Interested party has no capacity to comment on whether his father sold the land since he was not present during the transaction. That vide a letter dated 28/06/2024 the LSK confirmed Fatuma Wanjiku was a practicing advocate in 2010. That the discharge of charge is drawn by the said advocate.

## Submissions

18. The suit was heard by way of written submissions which parties filed and exchanged. The exparte applicant filed submissions dated 15/10/2024 and 12/11/2024. The Respondent submissions are dated 18/10/24. The Interested party's submissions are dated 23<sup>rd</sup> October 2024



## Exparte Applicants submissions

19. It is noteworthy at the time of filing the submissions dated 15/10/2024 the Respondent had not filed any documents in response to the application and the court was moved to deem the application as unopposed by the Respondent. Subsequently the respondent responded to the petition and I allowed the exparte applicant a right of response since they did not have the benefit of the submissions from the respondent and Interested party having been filed way later. This explains the two sets of submissions on record by the exparte applicant.
20. The exparte applicant faults the affidavit sworn on 21/06/2024 by counsel for the Interested party on two grounds. For being filed without leave contrary to order 53 of the Civil procedure rules. Secondly the depositions on are on facts which the advocate cannot be cross examined upon. Reliance is placed upon Copana Ltd Vs. Panafrika Insurance Co. Ltd (2019)eKLR. The court is invited to strike it out.
21. Rehashing the facts as deponed by the Exparte applicant and the Interested Party's case it is submitted that the Interested party cannot attest to how his father was registered proprietor of the suit property three years after the exparte applicant, since he was not involved in the land transaction.
22. Referring to article 47 of *the Constitution* on the right to fair administrative action it is submitted the respondent acted contrary to the rules of natural justice and the Wednsbury rules. That the respondent purported to divest the exparte applicant of his property contrary to article 40 of *the Constitution*. That before a state can deprive one of their property there must have been acquisition or where the suit was required for a public purpose in accordance to Chapter Five of *the Constitution*.
23. Referring to the Land certificate issued on 28/4/1978 in favor of the exparte applicant and the green card thereto, the provisions of section 24 of the Registration of *Land Act* on absolute proprietorship , it is submitted that the exparte applicant is the absolute owner of the suit property. That there was no proof in support of the Interested party's claim that his father never sold the land against the agreement produced.
24. Enumerating the circumstances under which orders of certiorari may issue, It is submitted that for the respondent to purportedly use a null and void and fraudulent title as a basis to illegally disposes the exparte applicant of the suit property and in the process purport to follow the decision of the Kadhis court which court the respondent knew or ought reasonably to have known had no jurisdiction under article 40 and section 24 of the Registration of *Land Act* , was a decision which is so outrageous in its defiance of logic or of accepted moral standards that no person who would have applied his mind to the question to be decided could have arrived at such decision. The decision to register the Interested party as owner is termed as irrational. Counsel cited Kenya National Examination Council Vs Republic ex parte Geoffrey Gathenji Njoroge and 9 Others (1997) eKLR and Republic Vs Attorney General *ex parte Law Society of Kenya Nairobi Branch (Application E010 of 2020)* (2023) KEHC 27503 (KLR) on orders of certiorari and on traditional grounds of judicial review.
25. On orders for prohibition the exparte applicant highlights the rationale meaning and when an order of prohibition may issue and submits that the present case meets the criteria for this court to forbid the respondent from continuing to act in contravention of the law and in absence of or departure from the rules of natural justice.



## Respondents Submissions

26. Highlighting the ex parte applicants claim as pleaded and the contents of the respondents replying affidavit setting what is in the records at the land registry and the events leading to the registration of the Interested Party it is submitted as follows:-
27. That the registration of the Interested party as proprietor was effected pursuant to a court order. Had the respondent failed to obey the court order he would be held in contempt. The respondent did not exceed his powers in any way. That the respondents records do not bear the documents alleged by the ex parte applicant. The respondent is guided by statute when performing their duties.
28. It is submitted that this court lacks jurisdiction to determine fraud, illegalities allegedly conducted herein or merit review. That judicial review does not concern itself with the merits of the decision but focuses on the process through which decisions were made. Reliance is placed on the holding in Republic Vs. District Land Adjudication and Settlement Officer Maara Sub County & 3 Others Ex parte Applicant M'nyiri Ragwa;Njeru Kiririka (Interested Party) (2021)eKLR. That the right step is for the ex parte applicant to apply for nullification of the orders issued in the succession proceedings and prove how he obtained the suit land. The court is invited to dismiss the suit with costs to the Respondent.

## Interested Party Submissions

29. It is submitted that the ex parte applicant has not proved that he bought the land from the deceased Salimu Abdalla Mwachatamu. The applicant failed to produce Sale agreement between himself and the late Mwachatamu, Consent from Msambweni Land Control Board, Consent application forms, Transfer duly signed by the late Salimu Abdalla Mwachatamu and registered at the Kwale Lands Office, The amount of consideration paid by the applicant, Bank transaction evidencing payment of any purchase price and Names of witnesses who were present when he bought the land or the advocate who handled the transaction. The court was referred to the case of Leo Investment Ltd Vs. Estuarine Estate Ltd (2017)eKLR on where a vendor has not signed the sale agreement and Daudi Ledama Mirintat Vs. Mary Christine Karie & 2 Others (2017)eKLR on the provisions of section 3(3) of the [Law of Contract Act](#).
30. It is the Interested party's submission that if the green card was opened, then it must have been opened in 1978 when the loan was taken. Referring to the registration system under section 14(d) of the Repealed Registered [Land Act](#), it is contended that the 2<sup>nd</sup> entry would be issuance of title deed to the registered owner yet the ex parte applicant had not produced a green card showing the date the deceased was issued with a title deed. That entry No 2 would be dated before 24/4/1978 if the court were to go by the ex parte applicants contention that he bought the land in the year 1978. That there was no official search before 24/4/1978. The applicants documents are termed as forgeries. That if indeed the applicant was issued with a title deed in 1978 the land registry could not have issued the deceased with a title in 1981.
31. On the charge to Barclays Bank International it is submitted that there was no such charge over the property and the purported charge is just but part of the applicant's forgeries. That it is strange that it took thirty-eight years from 1978 to 2016 for the charge to be discharged. That the applicants failed to provide Loan request application, Loan approval, the purported charge document, the branch of Barclays Bank where the loan was applied from, Consent to charge, Name of advocate who prepared the charge, Stamp duty payment for the charge, Genuine discharge of the charge duly registered and Loan statement from Barclays Bank.



It was noted that the green card reads ‘CARD OPENED V/SECTION 79 SUBSECTION 2 & 3 OF LR NO.3 OF 2012’.

32. Rehashing the provisions of Section 79 of the repealed Registered *Land Act* it is averred that the same were irrelevant to the entry above, meaning there was no charge. That whatever Act or Statute referred to on the green card could be argued that the reference to 2012 means that the purported charge was not obtained in 1978.
33. That it would not be prudent to open a green card solely for purposes of registering a charge. The green card should go hand in hand with the title deed. The applicant cannot allege that he obtained the loan in 1978 yet the green card was opened in 2012 under section 79 above. It was observed inter alia that discharge was prepared in 2010 but registered in 2016.
34. On rates paid by the exparte applicant on 5/07/2016, it was pointed that the applicant instructed his bank HFC limited, Rehani Branch to transfer Ksh. 40,500 to Kwale County Government’s account at KCB KWALE VIA RTGS for Rates payment. That amount was allegedly received by the Kwale County Government on 16/2/2023 (KS. 29,430) seven years later. That there is no bank statement by the Applicant proving that money was indeed deducted from his account in 2016 and sent to the Kwale County Government. The purported RTGS form does not have the stamp of Housing Finance Bank. There is no receipt from Kwale County Government for the year 2016 when the purported RTGS was done. There was need to align the purported RTGS of 2016 with a receipt of the same year of similar amount of Ksh. 40,500.
35. The purported handwritten document dated 29/4/1978 allegedly indicating that the payments to late SALIM ABDALLA MWACHATAMU was impugned as most payments were post the issue of the exparte applicant title on 24/4/1978. That it was not clear why the deceased would receive Ksh. 100 or 55 for the sale of his land yet going by the letter from Rugaita Advocates and the documents dated 29/4/1978 annexed by the claimant, the purported payments by the Applicant were Kshs 4,375.
36. It is submitted that the exparte applicant worked at the Kwale Lands office as a physical planner and prepared a fake title.
37. It is submitted that the orders of mandamus, certiorari and prohibition cannot be granted as the application is grounded on fake documents. That judicial review cannot be granted in a vacuum. There was no administrative action taken by the respondent against the exparte applicant to order certiorari.
38. It is further submitted the Kadhis orders were duly issued based on a search from the lands office showing the deceased as the registered owner. The land registrar could not summon someone who was not part of the record since the exparte applicant has admitted in its pleadings handed over the his certificate of title, copy of green card issued in 2016 and Daily Nation cutting to the respondent meaning they were not part of the record. Further that the claimant cannot hide under article 40 and 47 to defeat the other title and provisions of section 26(1) of the *Land Registration Act*.

### **Exparte applicant Supplementary Submissions**

39. The exparte applicant responded to the respondent and Interested party’s submissions by submissions dated 12/11/2024. The Exparte applicant reiterates that the respondent is estopped from disputing facts it had admitted. That the opening of a green card in 1981 against the admission of the green card opened in 1978 affirmed the violation of section 75 of the repealed constitution and article 40 on the right to property as a fundamental right. To the extent that these legal provisions were violated the court has power to step in the decision of the respondent having been procured by an illegality.



40. It is submitted in response to the position that the respondent risked contempt of court had he violated the Kadhi court orders, it is urged that both the repealed and current constitutions were the supreme law and any fundamental rights therein were impeachable by an ex parte court order in which the ex parte applicant being a non muslim cannot have any audience. Further that the violation of section 75 of the repealed constitution and article 40 were errors of law that are clear on the record and the court can issue orders of certiorari, mandamus and prohibition as stated in Kenya National Examination Council Vs Republic ex parte Geoffrey Gathenji Njoroge and 9 Other (supra).
41. Citing Halsbury laws of England 4<sup>th</sup> Edition volume 1 page 202 it is submitted that certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury.
42. In response to the legal issues raised by the Interested party it is submitted that the green card produced by the ex parte applicant is in the prescribed form envisaged under section 16 of Registered *land Act* (now repealed) and only showing subsisting entries and thus the entries starting at entry No. 3. That section 3 of the *law of Contract Act* relates to a suit brought on an agreement of land which is not the case in the present proceedings for prerogative orders. That in light of the admission herein the respondents submission on LCB consent related issues as well as the charge are rendered otiose.

### **Analysis And Determination**

43. I have considered the ex parte applicants case , the responses thereto by the respondent and Interested party and the submissions filed as well as the authorities cited. The issues that commend determination are;-
  - a. Whether the orders sought by the ex parte applicant can be issued under Judicial review proceedings.
  - b. Whether the Judicial review in form of the prerogative orders of Certiorari and Prohibition are available to the Ex – parte Applicant
  - c. Who bears costs of these proceedings
44. Before I delve into the analysis and discussion I will discuss the nature of judicial review and how it has evolved over time.
45. The traditional view of Judicial review is that it is concerned with the decision making process and not merits and which has been emphasised by Counsel for the respondent. In Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002)eKLR the Court Appeal stated thus :-

That is the effect of this Court’s decision in the Kenya National Examination Council case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the



merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.’

46. Recently in the case of *Dande & 3 Others Vs. Inspector General National Police Service & 5 Others* (Petition 6 E007), 4 )E005) & 8(E010) of 2022 (Consolidated) (2023)KESC 40 KLR, the Supreme Court Kenya aptly enumerates the evolution of judicial review thus:-
81. The entrenchment of judicial review in *the Constitution* has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.
82. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* SC Petition No 14 Conso lidated with 14A, 14B, & 14C of 2014 [2014] eKLR this court in resolving the controversy stated as follows: '[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of *the Constitution*.
83. Also, this Court in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* SC Petition No 2 of 2019 [2020] Eklr observed as follows: '[40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.' We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1<sup>st</sup> respondent did not owe any delimited statutory duty to the petitioner.
84. More recently in *Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Praxedes Saisi case this court stated that: 'It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'
85. It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in *SGS Kenya Ltd* and not the merits of the decision per se.



47. In essence the Supreme Court’s decision broadens the scope of judicial review, allowing courts to delve into the merits of administrative decisions. This shift ensures that administrative actions are not only procedurally correct but also substantively just.
48. The court must now determine if the present case meets the above criteria to warrant expansion of the scope for the court to undertake a merit review of the decision of the respondent to register the suit property to Swalehe Salimu Kabila the Interested party herein. The exparte applicant has approached this court under the provisions of *the Constitution*. It is alleged that the opening of another green was undertaken without the exparte applicant being given a hearing and resulting into the deprivation of his land without justification. It is submitted on behalf of the Respondent that the proper procedure would be for the exparte applicant to challenge the decision of the Kadhis court and explain how they obtained the title. In my view only the alleged registration of another green card in favour of the Interested party can be remedied by judicial review.
49. However, the finality of the ownership of the suit property may not be resolved under these proceedings. From the facts highlighted both parties rely heavily on documentation produced. Both the Respondent and the Interested party allege the documents produced are forgeries. Each party has poked holes in the documents of the other terming them as forgeries and fraudulent. It has also emerged that the parties may be litigating over a different suit property as alleged by the exparte applicant in view of the different sizes of the suit property as seen in the green cards produced and the doubt raised on existence of the property in the map sheets as obtained from the office of the Director of survey which are alleged to be contrary to the green card SNM1 and title SSK5. Allegations of fraud have also been raised both against the exparte applicant, the Interested party and including the office of the Land Registrar. It is trite that fraud cannot be imputed. It must be proved on a standard slightly higher than that of a balance of probability see *Ratil Patel Vs Lalji Makanji EA 1957* and *Vijay Morjaria Vs Nansigh Darbar & Another (2000) eKLR*.
50. All the foregoing emerging issues are highly contentious and must be tested viva voce including the calling of witnesses from the relevant government agencies involved in land registration among others. This is a perfect case where the court cannot delve in a merit review. Justice will be best achieved in my view if both sides are heard on merit and the evidence weighed on the scales of justice.

**Whether the Judicial review in form of the prerogative orders of Certiorari and Prohibition are available to the Ex – parte Applicant**

51. The exparte applicant craves an order of certiorari quashing the decision of the respondent made on the 9<sup>th</sup> of November 2023 to register one Swalehe Salimu Kabila as the owner of the suit property. The exparte applicant alleges he is the registered owner of the suit property. I will now discuss the circumstances under which orders of certiorari can issue.
52. The Court of Appeal in *Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge (1997) eKLR* stated:-
- ‘Only an order of certiorari can 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 complied with or for such like reasons.’
53. In the case of *Pastoli ...Vs. Kabale District Local Government Canal & Others (2008)2EA 300* the court persuasively emphasised that for the orders of certiorari to issue the applicant must demonstrate that a decision has been made which is grossly unreasonable, careless, procedurally improper and demonstrated utter disregard for the principles of natural justice.



54. Applying the above caselaw, the court is called to interrogate the process of the respondents decision. But even before I commence the analysis there are certain other requirements that the court must bear in mind. In *Republic v Principal Kadhi, Mombasa Ex-parte Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party)* [2022] eKLR the court stated thus:-

‘25. Now turning to the analysis of the issue under this sub- heading. First and foremost, it is important to appreciate the meaning of Judicial Review. The concept is based on the fact that administrative excesses must be checked through Judicial intervention. Administrative law relates to decision of offices or organs of Central Government or Public Authorities which may affect the rights or liberties of the citizens and which are enforceable in or organized by the courts of law. Therefore judicial review is an integral component of administration law.’

It is not in dispute that the respondent is a public office under the Ministry of Lands and Physical Planning.

55. From the documentation presented by both the exparte applicant in respect of the impugned entry in the register of the suit property, it is not in dispute that the register of the suit property is currently registered in the name of Swalehe Salimu Kabila. This is evidenced by Certificate of Official search (PHKK8) confirming as at 9/11/2023 the suit property is registered to Swalehe Salimu Kabila. Annexure PHKK 9 is the attendant title deed issued on even date. The respondent confirms this position in paragraph 6 of his replying affidavit sworn on 11/10/2024. He also annexed a green card SNM1 in this regard.

56. But having confirmed that registration it was upon the exparte applicant to prove his interest on the suit property. The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya which states as follows:-

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

57. In relation to the ownership of the suit property the exparte applicant produced as (PHKK2) certificate of title and Green card. The Land certificate is issued on 26<sup>th</sup> April 1978 to Patrick Hawkes Kinyanjui the exparte applicant herein. The green card shows it was opened under the provisions of section 79 of the *Land Registration Act* 2012 and supports the exparte applicants title under entries 3 and 4. It is on the basis of these documentation and history that the exparte applicant actions are impugned. The exparte applicant states that its right to fair administrative action under Article 47 have been infringed since for procedural fairness he ought to have been heard before such registration to Swalehe Salimu Kabila.

58. I will set out the legal provisions on administrative actions.

Article 47 of *the Constitution* is on Fair Administrative Action and provides that;

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the right in clause (1) and that legislation shall —



- a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- b. Promote efficient administration.

59. Indeed, pursuant to (3) above Parliament enacted The *Fair Administrative Action Act* 2015 Section 4(3) of the *Fair Administrative Action Act* lays down the procedure to be adopted by the administrator as follows:-

‘Where an administrative action is likely to adversely affect the rights of fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and to make representations in that regard;
- c. Notice of a right to a review or internal appeal against an administrative decision where applicable;
- d. A statement of reasons pursuant to Section 6
- e. Notice of the right to legal representation, where applicable;
- f. Notice of the right to cross examine or where applicable; or
- g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

60. The Respondents defence is that he was served with a court order from the Kadhis court and attendant application by the Interested party to be registered pursuant to the said order. He had to obey the court order.

61. Firstly, and which would go without say would have been for the respondent to review the parcel file vis a vis the application placed before it for any issues that could raise queries that would require to be interrogated. One issue that would ordinarily be required is to find out if the deceased was the immediate owner of the suit property. The Respondent states at paragraph 3 of its replying affidavit thus:-

‘.....From our records, I contend that there are no such transactions save for a green card which was opened vide section 79 of the *Land Registration Act* Cap 300. The same was used by the Ex-Parte Applicant to charge the suit land in the year 1978.’ Emphasis is mine

62. My review of the above deposition clearly indicates an affirmation by the Land Registrar that there was another green card in respect of the suit property and that the same was opened in favor of the exparte applicant. The respondent further depones the records at the land registry also bore a green card (SNM1) in favor of the deceased. This is not a matter that the respondent would ordinarily be expected to close his eyes to and proceed with registration made pursuant to the Kadhis order (SNM3c ). For me the presence of the green card the respondent has admitted to being in their record is a basis upon which the respondent ought to have notified the exparte applicant of the application and orders presented before it for registration. The action that the registrar was going to take was definitely going to affect the interest of the person in the former green card by transmitting the suit property to the Interested party.



63. The right to property is protected and entrenched in Article 40 of the Kenyan Constitution as part of the Bill of Rights. It protects the right to property, ensuring that individuals can acquire and own property of any description and in any part of Kenya, and that the state cannot arbitrarily deprive someone of property except by law permitted.
64. What about the Wednesbury principles referred to by the *ex parte* applicant? The Wednesbury case, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1 KB 223, cited by the *ex parte* applicant established the "Wednesbury unreasonableness" principle. It is a standard for judicial review of public body decisions, where a decision is only quashed if so unreasonable that no reasonable authority would have made it. Indeed Kenyan courts have adopted this principle when reviewing administrative actions, ensuring that decisions are not arbitrary or irrational.
65. Having noted the test of unreasonableness I sought to understand it better for the reason that the test I recalled with nostalgia as taught in law school was that of the proverbial reasonable man. I came across the following dictum in the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited* [2018] eKLR which I found persuasive and instructive

‘Reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. So, as stated in the case *R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd*,<sup>[29]</sup> it is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking in to account of irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable.

As Cooke J pointed out in the case *Ashby v. Minister of Immigration*<sup>[30]</sup> considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Tribunal to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be.<sup>[31]</sup> Where the decision-maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule.

All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account...

Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.’ (Emphasis is mine).



66. Persuaded and guided by the above dictum, to me the fact that there was another green card which the respondent was aware of as admitted in the replying affidavit herein that the same was in their records was a relevant consideration to take into account. And this is the sin the respondent committed. The respondent failed by only focusing on obeying a court order as if he were but just a robot. Which I would say is the unwarranted adherence to a fixed principle which fixed principle is that court orders must be obeyed. He ignored the existence of two green cards. I'm aware that time and again courts have held that orders must be obeyed. But I would not imagine of any circumstances where a land registrar bringing to the attention of the court issuing the orders, of the state of the parcel register for further directions of the court would be condemned by the said court.
67. Additionally, this court agrees with the exparte applicant that the Land Registrar should have made efforts to ensure the application made pursuant to the orders of the Kadhis court were brought to the attention of the exparte applicant. This would have happened in the notice envisaged under the provisions of section Section 4(3) (a) of the *Fair Administrative Action Act*. Who knows things would have been different and we would not have found ourselves in this litigation.
68. I think I have said enough to warrant a finding that the exparte applicant was denied administrative action that is reasonable and procedurally fair and which violates article 47 of *the Constitution* and the right to be heard. This is the finding of the court.
69. The court is further emboldened and persuaded by the following dictum of Justice Mutungi in Kenya Agricultural and Livestock Research Organization Vs. Kisii County & Ano.(2019)eKLR where the judge expressed himself thus; -
- 26 The *Fair Administrative Action Act* 2015 under Section 4 underscores what a party carrying out an administrative action likely to be prejudicial to an interested party is required to do to ensure that the action taken is arrived at through a process that is procedurally fair. Section 4(1), (2) and (3) of the *Fair Administrative Action Act* provides as follows: -
- .....
27. It is imperative having regard to the above provisions that before an authority charged with taking administrative action against a party who stands to be adversely affected by any action that may be taken must subject such a party to a fair process by ensuring due process is followed before the action is taken. The party must be given notice and must be afforded an opportunity to be heard in adherence to the rules of natural justice. No party should be condemned without being heard.'
70. The upshot of the foregoing findings is that the orders of certiorari are available to the exparte applicant and the decision of the respondent to register the Interested party as the proprietor of the suit property by transmission must be quashed. The Court of Appeal in Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge (1997) eKLR court stated:-Only an order of certiorari can 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 complied with or for such like reasons.
71. Moreover, nothing comes out of an illegality - see the position taken by Lord Denning in Macfoy Vs. United Africa Limited (1961) ALL FR 1169 and which has been adopted in many judicial decisions in our courts. On this ground alone the registration of the Interested party as the proprietor of the suit property would be rendered a nullity for purposes of the application before the court. I state for purposes of the application before court because I have already made a finding that the final



determination of the ownership of the suit property should be determined on merit for the reasons enumerated earlier.

72. The ex parte applicant also craves an order of prohibition to prohibit the respondent, the Land Registrar Kwale from illegally registering or issuing title deeds with respect to Kwale/Galu Kinondo/416 to Swalehe Salimu Kabila or any other person without the express concurrence of the legitimate owner of the land, ie, the ex parte applicant Patrick Hawkes Karanja Kinyanjui. I have a problem with this prayer as couched because the court has not declared the ex parte applicant the legitimate owner of the suit property. The court has only quashed the decision of the Land Registrar for the reasons cited.
  73. However, having made a finding that the orders of certiorari are available to the ex parte applicant then there is need to issue a prohibition order that would preserve the suit property until a determination in finality of the ownership of the suit property. As it is there still exists the decision of the Kadhis court pursuant to the succession proceedings, the title deed allegedly registered in the name of the ex parte applicant in the year 1978 and the title registered in the name of the of the deceased in 1981 pursuant to which the orders of the Kadhis court were issued under which the Interested party has a stake.
  74. The upshot of the foregoing therefore is this court finds that the ex parte applicant has on a balance of probabilities demonstrated to the court that his rights to fair administrative action were violated by the respondents failure to accord the ex parte applicant a right to be heard before the registration of the Interested party as the proprietor of the suit property contrary to article 47 of the constitution.
  75. The following orders hereby issue to dispose of the Notice of Motion application dated 9<sup>th</sup> April 2024
    - a. The ex parte applicant Patrick Hawkes Karanja Kinyanjui, be granted an order of certiorari to bring into this Honourable court for purpose of being quashed the decision of the respondent, the Land Registrar Kwale made on the 9<sup>th</sup> of November 2023 to register one Swalehe Salimu Kabila as the owner of Kwale/Galu Kinondo/416
    - b. The ex parte applicant Patrick Hawkes Karanja Kinyanjui, be granted an order of certiorari to bring into this Honourable court for purpose of being quashed the title deed for Land Parcel No.Kwale/Galu Kinondo/416 to Swalehe Salimu Kabila.
    - c. That parties to take the dispute to an appropriate forum where issues touching on the legitimate owner of Land Parcel No.Kwale/Galu Kinondo/416 can be determined with finality.
    - d. The fact that such proceedings in ( c ) above would have been filed pursuant to the courts direction shall not take away any defence a party may have against the same.
    - e. That pending the determination in (c) an order of prohibition to prohibit the respondent, the Land Registrar Kwale from registering any transactions with respect to Kwale/Galu Kinondo/416 hereby issues until the determination in (c) above.
    - f. Each party to bear its own costs.
    - g. Leave to appeal this judgement is granted if required.
- It is so ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS . THIS 17<sup>TH</sup> DAY OF MARCH 2025.**

.....



**HON. A.E DENA**

**JUDGE**

**17/3/2025**

