



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 12 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDERS OF *CERTIORARI* &  
*PROHIBITION*

AND

IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF INQUIRIES & HEARING BY THE NATIONAL LAND COMMISSION ACT

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

AND

EPHRAHIM MURIUKI WILSON.....1<sup>ST</sup>EX-PARTE APPLICANT

WILSON KARUNGARU.....2<sup>ND</sup>EX-PARTE APPLICANT

SIMON KABURU.....3<sup>RD</sup>EX-PARTE APPLICANT

LUCK BASE LIMITED.....4<sup>TH</sup> EX-PARTE APPLICANT

JOSEPH MUCHIRA.....5<sup>TH</sup> EX-PARTE APPLICANT

AND

THE COUNTY GOVERNMENT OF NYERI....1<sup>ST</sup> INTERESTED PARTY  
FREDRICK MURAGE.....2<sup>ND</sup> INTERESTED PARTY  
IBRAHIM NDAMBI.....3<sup>RD</sup> INTERESTED PARTY  
MUNDIA KARUMU.....4<sup>TH</sup> INTERESTED PARTY  
THUMBI WERU.....5<sup>TH</sup> INTERESTED PARTY  
KIANA GIKUHL.....6<sup>TH</sup> INTERESTED PARTY  
GEOFFREY NGUNYI.....7<sup>TH</sup> INTERESTED PARTY  
SAMUEL KIONGO KAMAU.....8<sup>TH</sup> INTERESTED PARTY  
SAMUEL MUNGA.....9<sup>TH</sup> INTERESTED PARTY

### JUDGMENT

#### ***Ex parte applicant's case.***

1. Pursuant to the leave of this Court granted on 18<sup>th</sup> January 2017, the *ex parte* applicant filed the substantive application seeking:- (a) An order of Certiorari directed to the Respondent, by itself, its servants and or agents or any other officer acting under its authority to bring to the Court for the purpose of being quashed the decision by them made on or about 18<sup>th</sup> November 2016 to continue with the hearing in the matter of the Plot No. S E.1 to E.18 (Now Block 1/422-450, Sofia Area, Karatina, Nyeri County; and (b) An order of prohibition directed to the Respondent, by itself, its servants and or agents or any other officer acting under its authority to bring to the Court for the purpose of prohibiting it from hearing the complaint in the matter of the Plot No. S E. 1 to E. 18 (Now Block 1/422-450, Sofia Area, Karatina, Nyeri County; (c) Costs of the application.

2. The grounds relied upon are:- (i) that the matter is sub-judice as it is currently before Nyeri ELC No. 256 of 2015, Ephrahim Wahome Muriuki & Others vs Kanyagia Allias Mundia Mutahi & Others which was scheduled for hearing on 13<sup>th</sup> February 2017; (ii) that the Respondent decided to proceed with the matter despite the above case; (iii) that the matter is *res judicata* as it has also been concluded in Nyeri HCC No. 68 of 1978, Magu Waicua and Others vs Karatina Town Council, Nairobi Civil Appeal No. 426 of 2001, Magu Waicua & 7 Others vs Karatina Town Council & Nyeri Town Council, Nyeri HC Petition No. 2 of 2013, Mundia Karumu vs Municipal Council of Karatina.

3. In support of the *ex parte* applicant's application is the affidavit of **Simon Muriuki Kaburu** annexed thereto. He avers that the second to ninth Interested Parties made a complaint to the Respondent in relation to matters which are subject to ongoing proceedings in Court. Further, he avers that the land in question is Trust Land and that the Respondent has no jurisdiction over it, and to allow the Respondent to hear and determine a matter which is also pending in Court is an abuse of judicial processes and would lead to parallel and multiple proceedings that would pollute the streams of justice. He also averred that the matter is both *sub-judice* and *res judicata*.

4. The Respondent despite being served did not file a Reply or submissions.

#### **Interested Party's Replying Affidavit.**

5. **Fredrick Murage**, the second Interested Party and the Chairman of the Nyeri County Resident's Association and Sofia Area Temporary Occupation Licensees Committee swore the Replying Affidavit dated 14<sup>th</sup> March 2017 on behalf of the interested Parties. He averred that the second Interested Party lodged a complaint with the Respondent relating to Sofia Area Public Land in Karatina Town in Mathira East Sub-County, Nyeri County on 1<sup>st</sup> October 2014, through the Nyeri County Residents Association. He averred that the matter involves issues within the mandate of the Respondent, that the Interested Parties are the current users of the land, and that the Land is not Trust Land, but Public Land, hence a case of illegal and irregular allocation of public land.

6. He also averred that the matter is neither *sub-judice* or *res judicata*, and that Nyeri ELC 256 of 2015 merely seeks eviction of tenants on Temporary occupational licenses. Further, he averred that the complaint before the Respondent was lodged before the said case and also, the *ex parte* applicant was not a party in HCCC No. 68 of 1978.

7. **Simon Muriithi Kaburu's** swore the further affidavit dated 22<sup>nd</sup> March 2017 in response to the above Replying Affidavit. He averred that the documents annexed to the Replying Affidavit of **Mr. Murage** are a forgery, and that it does not respond to the issues of *res judicata*, *sub judice* and want of jurisdiction, and that the Respondent has no jurisdiction over the land.

8. **Mr. Murage** swore a further affidavit in which he denied having been charged with a criminal offence and reiterated the contents of his earlier affidavit.

#### ***Ex parte Applicant's Advocates Submissions.***

9. Counsel argued that the Respondents decision should be quashed for being sub judice, that the Respondent lacks jurisdiction to hear the matter since the land in question is Trust land/community land<sup>[1]</sup> and that the matter is *res judicata* having been determined in High Court Civil Case No. 68 of 1978, Nyeri Court of Appeal Case Number 426 of 2001 and Petition No. 2 of 2013.

#### **Second to Ninth Respondent's Advocates submissions.**

10. Counsel submitted that the Respondent has jurisdiction to hear the matter under Article 67 of the constitution and section 14(1) of the Act, that the land in question was public land, and that there are no grounds to warrant the judicial review orders sought, that the matter is not sub-judice

#### **Determination.**

11. Before addressing what I consider to be the core issues in this case, I find it appropriate to address the question of this Court's jurisdiction to entertain this matter. Interestingly, none of the Parties addressed this pertinent question.

12. At the *ex parte* stage, the *ex parte* applicant was granted leave to institute these proceedings. The importance of obtaining leave in a Judicial review application:-<sup>[2]</sup>

*“ is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived..”(Emphasis added)*

13. At the leave stage an applicant must show that:- (i) he/she has '**sufficient interest**' in<sup>[3]</sup>the matter otherwise known as *locus standi*; (ii) the applicant must demonstrate that he/she is affected in some way by the decision being challenged; (iii) An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; (v) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

14. *The Judge hearing the application for leave may at the ex parte stage on his own motion raise the question of jurisdiction if it is clear that the issue of jurisdiction arises. The Court or any party to the proceedings can raise the question of jurisdiction at any stage if it becomes apparent that the Court lacks jurisdiction.*

15. *From the pleadings filed by the parties in this case, it is clear that this Judicial Review application raises a fundamental question of jurisdiction. In general a Court is bound to entertain proceedings that fall within its jurisdiction. Jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to the Court; *afortiori* the Court can *suo motu* raise it.*

16. By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.

17. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist.

18. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.<sup>[4]</sup>A Court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.<sup>[5]</sup>

19. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*<sup>[6]</sup> where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

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

20. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court*<sup>[7]</sup>had this to say:-

*"Jurisdiction is determined on the basis of the pleadings,<sup>[8]</sup>... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal*

basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

21. The *ex-parte* applicants sought to quash proceedings before the Respondent and to prohibit the Respondent from hearing the dispute. Even though the *ex parte* applicants have invoked the jurisdiction of this Court, a close examination of the crux of the applicant's case reveals that the behind this Judicial Review application is a land dispute.

22. Its trite that a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. [9] **Article 165(1)** of the Constitution vests vast powers in the High Court including the power to *determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction to hear any question respecting the interpretation of the Constitution.* **Article 23 (1)** provides that *the High Court has jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*

23. The limitation of this courts vast powers conferred under Article **165** is to be found in Sub-Article **(5)** which states in mandatory terms that the high court **shall not** have jurisdiction in respect of matters:- **(a)** reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or **(b)** falling within the jurisdiction of the courts contemplated in Article **162 (2) (a) & (b)**. Clearly, this court has no jurisdiction to determine matters falling under Article 162 (2) (2) (a) & (b). But what are these matters? In my view, the answer can be found in the provisions of Section **13** of the Environment and Court Act, [10] an Act of Parliament enacted to give effect to Article **162(2)(b)** of the Constitution: to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

24. Section **13** of the Environment and Land Court Act [11] provides that:-

*(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

*(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.*

*(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

*(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

*(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—*

*(a) interim or permanent preservation orders including injunctions;*

*(b) prerogative orders;*

*(c) award of damages;*

*(d) compensation;*

*(e) specific performance;*

*(g) restitution;*

(h) declaration; or

(i) costs

25. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under **Article 162(2)(b)** of the Constitution and **Section 13** of the Act. In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction.

26. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters which fall within the ambit of the Environment and Land Court. This is clearly provided for under **Section 13 (3)** of the Act. Sub-section **7 (b)** above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application challenging the decision of the Respondent revoking its title to land and grant the prerogative reliefs sought.

27. Comparison can be drawn from the case of *United States International University (USIU) vs. Attorney General*.<sup>[12]</sup> Although the said case related to labour issues one of the issues in contention was whether or not the Employment and Labour Relations Court as created under **Article 162 (2)** of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under **Article 23** of the Constitution which remedies are clearly stated to be a sole preserve of the High Court. The court expressed himself on the said issues as follows:-

*"45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011."* (emphasis added).

28. It is instructive to note that the Court of Appeal has also had occasion to address itself on the issue in the case of *Daniel N. Mugendi vs. Kenyatta University & 3 others*<sup>[13]</sup> where allowing an appeal and setting aside an order dismissing a suit on the finding that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under **Article 23** of the Constitution settled the issue in *toto* in respect to such matters within the jurisdiction of both the Employment and Labour Relations Court as well as those before the Environment and Land Court. The Court of Appeal expressed itself in the following words:-

*"In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."* (emphasis added).

29. Confronted with similar issues, **Odunga J.** in *Republic vs National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others*<sup>[14]</sup> eloquently rendered as follows:-

62. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Justice Mohammed Ibrahim** in *Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others* <sup>[2014] eKLR</sup>:

64. Whereas this Court had in the past entertained disputes wherein the core issue was that of jurisdiction of the National Land Commission, since the determination of the Supreme Court in *Petition No. 5 of 2015- Republic vs. Karisa Chengo & 2 Others* it has become clear that such matters ought to be dealt with by the specialized courts, when the Court expressed itself *inter alia* as hereunder:-

**"it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation...Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."**

65. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant's contended right to be heard stem from their yet to be determined interest in the suit land.

66. In this case, I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in *Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012*, [para. 29-30] where it was held:

**"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other**

**Courts and tribunals...In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework”.**

67. Similar sentiments were expressed in *Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others* in which it was held that:

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

30. A High court may not determine matters falling squarely under the jurisdiction of the ‘status courts’ namely the Employment and Labour Relations Court (read Industrial Court) and the Land and Environment Court. But even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court.

31. It is not clear why the *ex parte* applicants did not file their application before the case pending in the ELC court at Nyeri which to me is the right forum.

32. While the Constitution guarantees right to access courts, the same Constitution neither operates in a vacuum nor does it automatically oust other constitutional and statutory provisions brought to life by the legislative arm of government such as the Environment and Land Court Act.<sup>[15]</sup> As such, where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction will be inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution. Consequently, I find and hold that the jurisdiction of this Court in this matter has been improperly invoked. The *ex parte* applicant ought to have filed this Judicial Review application in the Environment and Land Court.

33. Notwithstanding my finding on jurisdiction, I proceed to address what I consider to be the core issues in the application. First is the *Jurisdiction of the National Land Commission*.

34. The crux of the *ex parte* applicant's submissions is that the land in question is Trust land. On the other hand, the Interested Party's Advocates argued that the land is Public Land.

35. The functions of the National Land Commission under Article 67 (2) (e) of the Constitution include (e) *to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress*. Article 61 (2) of the constitution classifies land in Kenya as Public, Community or Private. Article 62 of the Constitution defines Public land consists of:-

**“62. (1) Public land is—**

**(a)land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;**

**(b)land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;**

**(c)land transferred to the State by way of sale, reversion or surrender;**

**(d) land in respect of which no individual or community ownership can be established by any legal process;**

**(e)land in respect of which no heir can be identified by any legal process;**

**(f)all minerals and mineral oils as defined by law;**

**(g)government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;**

**(h)all roads and thoroughfares provided for by an Act of Parliament;**

**(i)all rivers, lakes and other water bodies as defined by an Act of Parliament;**

- (j) *the territorial sea, the exclusive economic zone and the sea bed;*
- (k) *the continental shelf;*
- (l) *all land between the high and low water marks;*
- (m) *any land not classified as private or community land under this Constitution; and*
- (n) *any other land declared to be public land by an Act of Parliament—*
  - (i) *in force at the effective date; or*
  - (ii) *enacted after the effective date.”*

36. Article 64 of the Constitution defines private land as:-

- “64. Private land consists of —
- (a) *registered land held by any person under any freehold tenure;*
  - (b) *land held by any person under leasehold tenure; and*
  - (c) *any other land declared private land under an Act of Parliament.”*

37. Section 14 of the National Land Commission Act<sup>[16]</sup> provides that:-

(1) *Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of **public land to establish their propriety or legality.***

38. By dint of the above provisions, for the Respondent to invoke its jurisdiction, the land must be public land within the above definition, the land must have been public land that was converted to private land. I am unable to delve into the details on whether or not the land was public land of private or trust. If the land was originally public land which was converted to private land, then it falls within the constitutional and statutory mandate of the National Land Commission. Section 14 of the Act provides for review of grants and disposition of public land as per Article 68(c)(v) of the Constitution.

39. Under Section 14 of the Act the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of **public land to establish their propriety or legality.** In my view, the Respondent can only fulfill this responsibility by querying the process under which public land was converted to private land, if there is evidence that the land was once public land.

40. I now address the issue *whether or not there are grounds for this Court to review the decision of the National Land Commission.*

41. The *ex parte* applicant's Counsel cited *sub-judice and res judicata.* As for *sub-judice*, the issue can be raised in the active suit and the Court handling the matter will be well placed to deal with it. These are issues which can be disputed and rebutted by evidence. They are not grounds for Judicial Review. 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 should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed 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.

42. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*<sup>[17]</sup>:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”

43. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so;  
or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

44. An administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondent. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The applicant invites this Court to find to fault the Respondent for finding that the title belonged to the Interested Party. The context in which the decision was rendered leaves me with no doubt that the Respondent's decision was reasonable. Judicial Review is not an appeal and the Court is not concerned with the merits of the decision.

45. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand.

46. Perhaps I should add that the Respondent is vested with powers to entertain the proceedings. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved or even alleged that the Respondent acted outside its powers. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

47. The applicant also seeks an order of prohibition. The writ of prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

48. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the applicant ought to have instituted a suit in the Land Court or raise their objection before the Respondent.

49. The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. *First*, there is the question of jurisdiction discussed earlier. *Second*, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.

50. The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings.

Orders accordingly.

**Signed, Delivered, Dated at Nairobi this 27<sup>th</sup> day of June 2018**

**JOHN M. MATIVO**

**JUDGE.**

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[1] Counsel cited R vs National Land Commission ex parte Holborn Properties ltd. {2016} eKLR.

[2] In the words of **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others* Mombasa HCMISC APP No 384 of 1996.

[3] See R vs Panl for Takeovers and Mergers ex p Datafin {1987} I Q B 815.

[4] John Beecroft, Words and Phrases Legally Defined, Volume 3:1-N, at Page 113.

[5] The Supreme Court in the matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported).

[6] {1989} KLR 1.

[7] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[8] *Fraser vS ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[9] *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[10] Act No. 19 of 2011.

[11] Chapter 12A, Laws of Kenya.

[12] {2012} eKLR.

[13] {2013} eKLR.

[14]{2018} eKLR.

[15] Act No.19 of 2011.

[16] Act No. 5 of 2012.

[17] {2014} eKLR.