



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**JUDICIAL REVIEW APPLICATION NO. 88 OF 2015**

**IN THE MATTER OF THE LAND (GROUP REPRESENTATIVES) ACT CAP 287 OF THE LAWS OF KENYA**

**IN THE MATTER OF AN APPLICATION BY JOSEPH SAPATI SAKAYA , JAMES SANKAIRE AND ELIUD PUSSAREN NTOMPO FOR ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF DECISION OF THE REGISTRAR OF GROUP REPRESENTATIVES DATED 14TH APRIL, 2015 AND THE PROCEEDINGS AND RESOLUTIONS PASSED PURSUANT THERETO ON 21ST APRIL 2015 AND THE CERTIFICATE OF INCORPORATION DATED 27TH APRIL 2015 IN RESPECT OF OLDONYONYOIKIE GROUP RANCH**

**BETWEEN**

**REPUBLIC OF KENYA .....APPLICANT**

**AND**

**REGISTRAR OF GROUP REPRESENTATIVES.....RESPONDENT**

- 1. DANIEL NG'OTIEK NJUI**
- 2. NG'OTIEK MESHOLOLO**
- 3. DAVID SELELA RAKUA**
- 4. JULIUS MATIILONG KAREI**
- 5. KOINATA OLE TIGES**
- 6. BRIAN SHAPASHINA KERETO**
- 7. JOSEPH LENG'EN NKODUPOI**
- 8. LOISHOO LOLAMAL**
- 9. RAPAIYO KERTELA**

## 10. SAMPERU MARITET ..... INTERESTED PARTIES

### EX-PARTE

- 1) JOSEPH SAPATI SAKAYA
- 2) JAMES SANKAIRE
- 3) ELIUD PU SSAR EN NT OMPO

### JUDGMENT

#### The Application

The *ex parte* Applicants herein (herein referred to as “the Applicants”) have filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 26<sup>th</sup> March 2016, in which they are seeking the following orders:

1. THAT this court be pleased to order that the *ex-parte* Applicants, being the outgoing officials of Oldonyonyokie Group Ranch, do hand over all the records, files and documents pertaining to the aforesaid Group Ranch to the Interested Parties herein being the incoming officials.
2. THAT the handing over process to be done at the offices of the Respondent in Nairobi. and in the presence of the Respondent or an official designated by the Registrar of Group Ranches within twenty one (21) days of the order of the court or within such time as this Court may deem fit.
3. THAT upon such handing over this suit be marked as settled.
4. THAT the costs of this application be in the cause.

The 1<sup>st</sup> to 3<sup>rd</sup> *ex parte* Applicants are the outgoing Chairman, Secretary and Treasurer respectively of Oldonyonyokie Group Ranch. They explained in the said Notice of Motion and supporting affidavit sworn on 23<sup>rd</sup> March 2016 by the 1<sup>st</sup> *ex parte* Applicant, that they filed a suit to challenge the conduct of elections undertaken on 21<sup>st</sup> April 2015 during the Annual General Meeting of the members of the Oldonyonyokie Group Ranch, which meeting was called by the Respondent. Further, that in the course of these proceedings, a consent order was entered by the Court on 28<sup>th</sup> October 2015 directing that fresh elections for the officials of Oldonyonyokie Group Ranch be held, which elections were duly held on the 14<sup>th</sup> December 2015 when new officials were elected into office.

The Applicants state that they are in the process of preparing the pertinent records, documents and files for purposes of handing over to the incoming officials of the group, and that due to the nature and history of this matter, a formal handing over of the records, documents and files should be officially done before the Respondent herein, who is the Registrar of Group Representatives. Further, that the said event should take place at the Respondent's offices in Nairobi under the Respondent's supervision to facilitate and ensure an orderly and structured handing over, and guarantee openness so that all legitimate questions are addressed in a free atmosphere.

#### The Response

The 3<sup>rd</sup> Interested party, who is the current secretary of Oldonyonyokie Group Ranch filed a replying affidavit sworn on 9<sup>th</sup> April 2016 on behalf of the Interested Parties, wherein he stated that the Application herein is vexatious, scandalous and a frivolous abuse of the Court process, and is merely intended to cause unnecessary delay and frustration in the finalization of the matter in that :

- a) The Applicants lack proper *locus standi* to file this case in Court.

b) The prayers sought to the effect that the outgoing officials of the Group Ranch be allowed to hand over all records, files and documents to the incoming officials is a forgone conclusion guided by law.

c) To ask the Court to order and/or direct that the hand-over be done at Nairobi at the offices of the Registrar of the Group Ranch and in the presence of the Respondent within 21 days is overstretching the powers of this Court, as indeed these are powers of the Registrar of Group Representatives.

d) The Applicants wish to continue holding the documents illegally, irregularly and wrongfully to the chagrin of the Respondents who are legally in office.

e) There is enough evidence that the Applicants are in the process of sub dividing the land illegally, irregularly so as to wrongfully transfer the parcels of land as they wish.

The Interested Parties admitted that in line with a consent order entered in Court on 28<sup>th</sup> October 2015, elections were held on 14<sup>th</sup> December 2015 supervised by the office of the Registrar of Group Ranch Representatives and other Government officials, wherein they emerged victors in a free and fair election process. Further, that following the said elections, what should follow is handing over by the outgoing officials to the incoming ones, and that despite all efforts made by the Interested Parties the Applicants have now declined and/or neglected to hand over to the incoming officials and instead in an attempt to further delay the matter, have brought this Application. The Interested Parties annexed copies of summons and minutes in support of their averments.

According to the Interested Parties, the Applicants lack *locus standi* to bring the Application as the matter has already been finally determined, and the prayers spent, following the consent order and the fresh elections conducted, which elections have not been contested. Further, that no plausible reason has been given why the handing over ceremony should take place at the offices of the Registrar of Group Representatives in Nairobi as opposed to the ranch. In addition, that the elections conducted were peaceful, free and fair and therefore the notion that the handing over ceremony is likely to be marred by tension is unsupported and baseless and should not be taken as a reason to grant the orders sought in the application. Lastly, that the handing over ceremony is an administrative agenda following an election, and not a legal issue and therefore it is not a matter to be handled by this Court.

### **The Issues and Determination**

I have considered the pleadings and submissions by the Applicants and Respondents. There are two issues for determination. The first is whether this matter is within the jurisdiction of this Court, and if so whether the Applicants are entitled to the orders sought.

The Applicants on submitted on the said issues that their application is made with the best interest of the members of the Group ranch, and they wish to insulate the running of the affairs of the ranch from political interference and reduce any disputes through an orderly handing over process.

The Interested Parties on the other hand submitted that the consent entered herein compromised the entire suit and the matter ought to be marked as settled, the Court having adopted the said consent as a final order of the Court. Further, that once the consent was adopted as an Order of this Court, the *ex-parte* Applicants lacked *locus* to make any other or further applications.

It was also submitted by the Interested Parties that the application has no merit as the Applicants have refused to respect the outcome of the elections that were held by declining to hand over to the new officials, and the powers of handing over are not vested in this Court but with the Registrar of Group Representatives as stipulated in section 4(2) and 13(1) of the Land (Group Representatives) Act. Further that the said Registrar is the one responsible for the supervision and administration of the group ranch, which include supervision and administration of elections and the subsequent handing over. Therefore that what the Applicants are asking the Court to direct is a purely administrative function and

is not legal.

The Interested Parties urged that the only logical explanation for the Applicants' application is to cause delay and unnecessary frustration to the *bona fide*, duly elected officials of the Group Ranch, and that the Applicants have not demonstrated the prejudice they will suffer if the handing over is to be undertaken at the Oldonyonyokie Group Ranch .

In making my determination I have regard to the nature and scope of judicial review as was addressed in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001 as follows:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

Likewise, in Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

The purpose of the remedy of judicial review is therefore to ensure that the individual is given fair treatment by the authority to which he has been subjected, but not to substitute the opinion of a Court that is seized with judicial review proceedings for that of the authority constituted by law to decide the matter in question. The proper avenue for such a result is the appellate process and not judicial review proceedings.

In addition the nature of judicial review remedies of *certiorari*, *mandamus* and prohibition that can be issued by a Court were explained by the Court of Appeal in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR *inter alia* as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

In the present application, there is no decision that has been made or is contemplated to be made by the Respondents that can be the subject of an order for prohibition or *certiorari*. The Applicants want the Court to compel the Interested Parties and Respondent to receive the records and documents of the Oldonyonyokie Group Ranch at the Respondent's office in Nairobi. No provisions of the law has been cited and/or relied upon by the Applicants for this order to issue, or that show the existence of a legal duty

upon the Respondent to receive the said documents.

In the premises I agree with the Interested Parties that the application by the Applicants is not amenable to judicial review orders, and the Court is in addition not in a position to supervise the implementation of the orders sought. My view is that the Applicants' remedies lie in administrative processes that can be arranged outside the Court.

The Applicants' Notice of Motion dated 26<sup>th</sup> March 2016 is therefore denied for the foregoing reasons, with costs to the Interested Parties.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF JANUARY 2017**

**P. NYAMWEYA**

**JUDGE**