REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JUDICIAL REVIEW APPLICATION NO.1 OF 2015

IN THE MATTER OF THE APPLICATION BY MAILUA GROUP RANCH FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

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

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 20110

IN THE MATTER OF ELECTIONS OF MAILUA GROUP RANCH FOR 2015

BETWEEN

1. NKAITOLE MOROR

2. NTUIYOTO MARASWA

3. MOKARE SERINA

4. NKUKAT KAKURO

5. TARAIY AMPAPA

6. JOSEPH KARANTEI

7. KOLELE LESIANGAU

8. JOSHUA PARMERE

9. RAINGPT PLEMGA

10. JEREMIS MORORO

11. MAILUA GROUP RANCH

AND

1. CHAIRMAN, KAJIADO COUNTY LAND BOARD…….....1ST RESPONDENT

2. COUNTY LAND ADJUDICATION OFFICER…….....2ND RESPONDENT

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

4. THE ATTORNEY GENERAL……..……..…..4TH RESPONDENT

AND

1. DANIEL KOIKAI KIRONUA…….....……1ST INTERESTED PARTY

2. CHRISTOPHER K SAIGOL…..…….....2ND INTERESTED PARTY

3. SHAPAPAMPAPA ……...……..……...…….....3RD INTERESTED PARTY

4. JOSHUA LENGETESARBABI……..…….....…….....4TH INTERESTED PARTY

5. KOILENKESEMPETA……...…….....……..5TH INTERESTED PARTY

6. PARMERES NINA……...…….....…...6TH INTERESTED PARTY

7. MEIBUKO MESHILA……...…….....7TH INTERESTED PARTY

8. TONIKONKULANA….....…….....….....8TH INTERESTED PARTY

9. MASHIPEITIRATI….…….....…….....….....9TH INTERESTED PARTY

10. SINJALE OLE KANORE……...…….....10TH INTERESTED PARTY

JUDGMENT

The Applicant's Case

1. Through an application dated 29th October 2015 and allowed on the same day, the applicants were granted leave to commence judicial review proceedings against the respondents. Together with the leave, stay of change of officials of the 11th Applicant was granted. The main motion for judicial review is dated 20th November 2016. In it, the applicants have sought the following orders :-

1. That the elections intended for the 27th October 2015 were a sham, irregular, unlawful and a nullity *ab ibitio* as the election preparations and the Respondents conduct of the day did not follow the lawful procedure.

2. That the Respondents be jointly and severally compelled to surrender to this Honourable court the election documents and reports and results of any kind and nature related to the elections of 27th October 2015.

3. That the respondents be and are hereby ordered to deposit in court all incorporation certificate of the 11th Applicant since 2012.

4. That this Honourable Court be pleased to direct and order for fresh elections of the Mailua Group Ranch of the 11th Applicant herein following sham elections conducted by the 1st and 2nd

Respondents on 27th October 2015.

5. That this Honourable court be and is hereby pleased to issue status squo orders obtaining before the disputed elections of 27th October 2015.

6. That the cost of this application be provided for.

2. The main motion did not however specifically pray for orders of certiorari, mandamus and prohibition as was contemplated in the leave for application of Judicial Review.

3. The Motion was supported by Affidavits sworn by Joseph Moiserogu Moisaru (a member of the 11th Applicant and an agent for the minority grouping) and Ntuyoiyoto Maraswa(secretary of the 11th Applicant).In a nutshell, the deponemts asset that prior to 27th, the minority group had nominated Leshoko Nkonere while the majority group nominated Daniel Kirongua as is custom for the members to nominate their own people to vie for the various posts.

4. The Deponents assert that the 1st respondent interfered with the elections and that by passers were allowed to participate in the elections; that the elections were not announced and that the former office bearers were never disbanded neither was a handing over ceremony done for the incoming officials.

5. The deponents aver that the 1st Respondent tore the tallying slips and in effect the members reacted to this and a pandemonium broke up and several people were injured.

6. In support of their case, the applicants called in three (3) witnesses. PW1, Ntuyoto Maraswa, secretary to the Mailua group ranch. He testified that there was a dispute as to the actual membership in the register as it had never been updated since 1989. He further testified that there was a dispute during the elections, that the method of election was not agreed upon and that the agenda was by passed as the Chairman's and treasurer's report were not tabled to the members.

7. PW2, Joseph Mesorogu Moisari, who claimed to be a member of Mailua Group ranch by virtue of the fact that his father(deceased) is a registered member. He testified that there are 8 clans in the Maa community and the each clan is expected to nominate a person to represent their interests and that the members are allowed to vote for any officials whether from the majority or minority clan. He testified that on the day of the elections, the government officials came in at 3:00pm, members were asked to confirm quorum and then asked to queue to vote. He testified that no elections were held as there was no congratulatory message to the elected officials.

8. PW3 Keen Kisanpei Taintai Mupie, a civil servant and a member of Mailua group ranch who was appointed as an agent for the elections stated that the 1st Respondent was biased as he advocated for his clans man Daniel Kironua to win. Keen alleged that the 1st respondent kept on sending his people to the line belonging to Daniel so as to influence the votes. He testified that the quorum was not ascertained as when he had counted up to 327 members, there was a commotion and people parted ways. The incident was reported at Namanga police station. It is Keen's testimony that the process of ascertaining quorum turned out to be an election; that there was no returning officer and that the laid down procedure was not followed.

1st, 2nd and 3rd Respondents Case

9. The Interested parties filed their replying Affidavit on 14th June 2016. Through an affidavit sworn by the Kajiado county adjudication and settlement officer, Consolata K Mbui **(herein referred to as the Registrar of group representatives).**

10. The Respondents claimed that the Applicants supporting Affidavit is based on factual errors, omissions and distortion of the truth.

11. It is the respondent's case that they received a letter of resignation from the chairman Mr. Masikonte O. Laisa on 24/07/2015 and that on 01/10/2015 they wrote through the Vice chairperson inviting the members of Mailua group ranch for a meeting on 7/10/2015. That during the said meeting on 7/10/2015, the group representatives agreed to hold the AGM on 27/10/2015 and agreed on the agenda and among the agenda items was election of a chairperson. That once a chairman is elected, he assumes offices together with his chosen team of 10 officials and that they assume office upon election of the chairman.

12. The respondent avers that in a meeting held on 26/10/2015, the aspirants could not agree on the mode of election. However on the day of the election the aspirants agreed on the mlolongo mode of election and appended their signatures on the agreement. That the chairman was not around and therefore the report could not be read. The treasurer's report could not be read as well and therefore they proceeded to hold the elections.

13. The Respondent avers that the elections were then held, and Mr. Daniel Kaoikai emerged the winner together with his team. That she announced the results. That on 28/10/2015 the minutes of the AGM were forwarded to the National Lland commission and the certificates of incorporation were forwarded to the relevant offices on 29/10/2015.

14. It is the Respondent's case that the elections were conducted fairly, regularly and lawfully without any fraud or rigging.

15. In support of their case, the respondents called in two (2) witnesses. DW1 was Noah Kerika Ndere a member of Kajiado Land Management Board(a devolved unit of the National Land Commission) who resigned on 27/01/2016 because of pressure of work. He testified that he was involved in the Mailua Ranch elections held on 27/10/2015 as an observer. He testified that the members, by a show of hands agreed to conducting the elections by way of an open ballot. That the quorum was ascertained, it was confirmed that 53 members were deceased and 70 of them had been replaced; that there were 566 voters while the membership was 903. The voting was peaceful and ended between 4:30-5:00 PM.

16. DW 2 was Consolata Kanana Mbui, the assistant Registrar in charge of group ranches. She testified that Mailua group ranch lacks a constitution and that they resolve their matters by way of an AGM. The Registrar testified that the chairperson who had served for 13 years had tendered his letter of resignation on medical grounds. She further testified that it is custom in Kajiado County that when a chairman resigns, then the entire team is dissolved. She testified that on the day of elections, the quorum was ascertained, members voted via open ballot and that she announced the results as follows; Daniel Kinunua-287 votes while Leshoko Nkonere had 277 votes. She testified that the members then left the venue and that there was no violence at all. The Assistant Registrar testified that she prepared the minutes on 28/10/2015 and forwarded the same to the Registrar of Group Ranches and that a certificate of Incorporation was prepared. She further testified that she did not receive any complaint or protest regarding the elections held on 27/10/2015.

Interested parties' Case

17. The Interested parties filed their replying Affidavit on 3rd February 2016. Through an Affidavit sworn by Daniel Koikai Kironua, it is their case that the Applicant's application has no merit and that the same should be dismissed with costs as no Judicial Review orders have been prayed for in the body of the Motion. It is also the Respondents contention that there are glaring disparities on the Applicants' Supporting Affidavit and that they should be cited for perjury.

18. The interested Party concedes that during the meeting held on 26/10/205, the parties did not agree on the mode of election but on 27/10/205, it was agreed that the mlolongo system would be used.

19. In a nutshell, the interested parties claim that the elections held on 27/10/2015 were free and fair.

20. The interested parties called in two witnesses. DW1 was Daniel Koikoi Kiranua while DW 2 was Ntaraiya Mpapa both of whom were seeking elective posts as officials of Mailua group ranch, In

summary, it was the witnesses' testimony that pursuant to the elections held on 27/10/2015 and the certificate of incorporation issued thereafter, the interested parties are the officials of Mailua Group Ranch. That due process was followed and that the elections were free and fair.

Applicant's submissions

21. The Applicants through their counsel Ishmael Nyaribo submitted and framed five issues for determination. First is whether the 11th Applicant elections (should be and if they) were conducted with or without clan representation and who should determine the clan representatives, second is whether the respondents interfered with the peaceful elections and election procedures of the 11th Applicant in accordance with the law; third is whether the certificate of incorporation issued by the registrar of group representatives **(herein referred to as the registrar)** was properly issued and if it properly lies within the law, fourth is whether the embattled Mailua group ranch elections were conducted according to the law governing the group ranches in Kenya and the constitution. Lastly is who should bear the cost of this suit.

22. Counsel submitted that the mode of Management and Administration as well the election of officials of the Group ranches in Kenya is spelt out in the following statutes.

- The Constitution of Kenya, 2010
- The Land (Group Representatives Act) CAP 287
- The Fair Administration Act of 2015
- The Laws (Principles) of natural justice
- Constitution of the group ranch

23. Counsel submitted that the government through the Respondents is in charge of ensuring that the law is followed but to the contrary, they failed to meet the threshold provided in the statutes in conducting the group management affairs and more so the group ranch elections held on 27th October 2015. It is the counsel's submission that no elections were held but a forceful take over at Mailua's Group ranch on the day of the intended elections on 27th October 2015.

24. Counsel submitted that from the evidence produced in court, the procedure as provided in the Land (Group Representatives Act) CAP 287 was not adhered to. Section 19 which requires the leaders to account to the members about their monetary investments was not adhered to. Further, the counsel submitted that Section 10 which addresses the steps to be taken incase of a dispute is reconciliatory in nature and that the respondents did not take any measures to resolve the dispute but they hurriedly rushed to prepare the minutes and a certificate of incorporation.

25. Further, counsel submitted that under S 7, the preparation of the certificate of incorporation is conditional to an application by the new officers based on a successful election and all other steps being followed after considering any disputes.(S 10)

26. On the issue of clan representation, counsel submitted that the process of clan nominations or public acclaim was not done. Further he stressed that in cases where clan nominations is followed, the aspect of elections becomes a mere confirmatory exercise unless there are two persons from the same clan contesting and in such instances, the two would be voted for either by open ballot or secret ballot.

1st, 2nd and 3rd Respondents submissions

27. The 1st , 2nd and 3rd respondents through their counsel L Odhiambo submitted that there are three issues for determination; First is whether the Application should be a Judicial Review matter, second is whether the respondents interfered with the elections of Mailua group ranch and lastly is an order as to the costs.

28. The respondents submitted that the Applicants did not seek any Judicial Review remedies against the Respondents in their application dated 20th November 2016; That the Respondents acted within the law,

with proper jurisdiction and within their power and that the Applicant has not demonstrated why an order of mandamus should be issued against the 1st, 2nd and 3rd Respondents. Citing several authorities, counsel also submitted that Judicial Review orders are discretionary in nature and are not guaranteed.

29. It was also submitted that this matter is not within the purview of Judicial review and that it does not meet the basic tenants of Judicial Review. ***R Vs Kenya Power and Lightning Company LTD & another [2013]eKLR and Pastoli V Kabale District Local Government Council and others [2008] 2 EA 300*** were cited to support this position. Additionally, counsel submitted that grant of orders of prohibition would under ordinary circumstances lead to curtailing of the statutory powers of Respondents in accordance with the law.

Interested parties submissions

30. The interested parties through their counsel Namada Simoni submitted that consequent to the elections held on 27th October 2015, they are the valid representatives of Mailua Group ranch and as such, the Certificate of Incorporation was issued to them.

31. The interested parties framed three issues for determination. First was whether the substantive Notice of Motion is validly before the court as an action in judicial review, second is whether the elections of Mailua group ranch held on 27th October 2015 were a sham and should be annulled and lastly who bears the costs of the proceedings.

32. The interested parties submit that the Applicants after approaching the court on 29th October 2015 through the Notice of Motion, they were granted leave to apply for reliefs in the nature of Judicial review for mandamus, Prohibition and Certiorari. It is the interested parties' submission that even after leave was granted, none of these orders were sought in the substantive motion dated 20th November 2016 and that the motion lacks legs to stand and must be dismissed.

33. Additionally, the interested parties submitted that a Judicial Review action must be brought in the name of the name of the state as the applicant. Counsel relied on the authority in ***Machakos HC Misc Application No. 46/12 Merdick Nenkalash Vs Kajiado Dispute Tribunal and another*** to state that this is not a procedural or technical regard but a legal requirement.

34. The interested parties proceeded to submit that Judicial Review action is only meant to challenge Administrative decisions/actions and that in the present case there is no government decision to be challenged as Mailua Group Ranch is a private entity; and what transpired was an AGM and elections held by members of the group ranch. Counsel pointed out three authorities to support this position as follows; ***R Vs the Prsident & 7 others Ex Parte Wilfrida Itolondo& 4 others [2014]Eklr; Peris Wambogo Nyaga Vs Kenyatta University[2014]Eklr and Medrick Nenkalash V Kajiado Land Dispute Tribunal & Another***

35. The Interested parties further submitted that indeed an election was held on 27th October 2015 and stated that if indeed the procedure for the election was breached, the applicants should not have gone through with the entire election procedure to its logical conclusion and that they should have protested the elections.

36. The interested parties further submitted that the applicants did not produce any evidence to show that indeed the government officers interfered with the elections and that the allegation of violence during the elections was not proved.

Analysis and Determination

37. First I will seek to deal with the issue of the competency of this application. The interested parties' counsel contented that there is no government decision to be challenged as Mailua Group Ranch is a private entity.

38. That brings into question the issue of who is competent to apply for judicial review remedies. The jurisdiction of the High Court to grant judicial review remedies is underpinned by Article 165(6) and (7) of the Constitution which provides as follows:

> ***(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration.***

39. Article 47(1) and (2) of the Constitution, on the other hand 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.***

40. Article 260, however defines a person as i**ncluding *"a company, association or other body of persons whether incorporated or unincorporated."***

41. In addressing a similar issue *in Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Assocation of Kenya (PERAK) [2014] eKLR Odunga stated as follows;*

> **Long before the promulgation of the current Constitution, it was held on 11th March, 1970, in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289 that:**
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> **"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."**

42. Looking at Section 7 of the Land (Group representatives Act), the section provides for incorporation of the group representatives and further provides that the persons named in the certificate of incorporation shall become a body corporate with the name specified in the certificate and shall have perpetual succession. In application of the provisions of the constitution 2010, and the above precedent it therefore follows that group ranches fall squarely under the provisions of Article 260 of the constitution and therefore have the standing under Judicial review.

43. In unlocking the issue of standing, **Nyamu, J** (as he then was) dealt with this issue in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

> **"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others…… Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…..The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"……..Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…….In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them……..The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there**

cannot be a better challenger than members of the affected clan."

44. The 11th applicant herein describes itself as a group ranch under the Land (Group Representatives) Act CAP 287 incorporated in the names of the group ranch officials with a representation of more than one thousand members. If I may apply Justice Nyamu's mind in his approach on the standing for judicial review above, then the Applicants herein ought to be given an audience by this judicial review court. From the forgoing, if the test of locus standi is that a person is aggrieved and that the applicant has sufficient interest in the matter to which the application relates, In my view, under the aforesaid provisions of the Constitution, the statutes and the facts adduced before this court with regard to the conduct of the elections of Mailua group ranch, then I have no doubt that the applicants and their members are sufficiently aggrieved since they claim an interest in Mailua group ranch and have picked an issue with regard to the succession of the administration of the ranch. The applicants therefore have the required standing to bring this matter under this court. The assertion therefore that a group ranch is a private entity is a sham.

45. Additionally, the second respondent has statutory duties concerning the management of group ranches as conferred to him by the Land (Group Representatives) Act CAP 287. The registrar is tasked with ensuring that principles of good governance are adhered to in administration of group ranches. As such, the application is therefore correctly instituted by the Applicants against the respondents as it is claimed that the Respondents' actions or inactions have adversely affected the applicants or are likely to adversely affect them.

46. **The second issue for determination is whether the Applicant's motion collapses by virtue of the fact that it is not brought in the name of the state as the applicant.** Counsel for the interested parties relied on the authority by Mutende J to assert this position. I wish to refer to the case of ***SANGHANI INVESTMENT LIMITED v OFFICER IN CHARGE NAIROBI REMAND & ALLOCATION PRISON [2007] eKLR, Wendoh J stated that;***

> **The leading case on this issue is the case of *FARMERS BUS SERVICE & OTHERS V TRANSPORT LICENSING APPEAL TRIBUNAL (1959) EA 719* where the Court of Appeal of Eastern Africa held that Judicial Review Applications should be brought in the name of the crown. By the time of that decision in 1959, prerogative writs (now judicial review orders) were issued in the name of the crown. On 12th December 1964, upon Kenya's assumption of Republican status, the place of the crown was taken over by the Republic and the Judicial Review orders are now made in the name of the Republic. Why are these orders issued in the name of the Republic (Crown)? The intention was to ensure that public authorities, officials and tribunals treat individuals who come before them fairly and adhere to the law and the power conferred upon them.**

47. Recently, Ongaya J demystified the issue of bringing applications under the name of the state in ***Margaret Nyaruai Theuri v National Police Service Commission [2016] eKLR*** and held as follows.;

> **…The Court has carefully considered the claimant's submissions. First, the court observes that the applicant is seeking judicial review orders of certiorari and mandamus as opposed to the historically relevant and related prerogative orders. Second, in the present constitutional order, the grant of judicial review orders is founded upon Article 23 (3) (f) of the Constitution. Third, under the constitutional provisions and in particular Articles 22 and 23, every person is entitled to seek judicial review orders. Thus, the court returns that applicants or parties seeking judicial review orders need not move the court in the name of the Republic. Needless to state, the current constitutional order does not envisage a crown and the related concept of prerogative orders. Fourthly, the Court has considered the provisions of Article 159 (2) (d) that justice shall be administered without undue regard to procedural technicalities and the Court considers that for the applicant's case to collapse solely upon the manner she titled her pleadings would amount to unreasonable regard to a procedural technicality; a technicality which in the present case the Court has found to lack constitutional or even statutory or other relevant basis.**

48. Looking at the above leading case by the Court of Appeal of Eastern Africa and the rationale behind instituting Judicial Review applications in the name of the state as brought out by Wendoh J and the provisions of Article 22, 23 and 159 of the Kenyan Constitution 2010, both the letter of the law in the constitution and the spirit behind the rationale of instituting these applications in the name of the Republic, I would come to a conclusion that these two are in harmony. The whole point is to ensure that parties are entitled to a fair administrative action. Institution of a Judicial Review application under the name of the state is not therefore a Legal requirement and therefore failure to do so simply amounts to a procedural technicality.

49. I strongly agree with Ongaya J that allowing the applicant's case to collapse solely upon the manner in which the pleadings were titled would amount to unreasonable regard to a procedural technicality. In this regard therefore, the Applicant's motion does not fail by the mere fact that it is not instituted in the name of the state.

50. The third issue for consideration is whether the remedies sought may be granted. In an attempt to deal with this issue, I will look at the scope/ purview of Judicial review. In ***Republic v Commissioner of Customs Services Ex parte Imperial Bank Limited [2015] eKLR Odunga J stated that;***

> **The grounds upon which the Court grants judicial review orders are now fairly well settled though the known grounds have been recognized not to be exhaustive….The purpose of judicial review proceedings as opposed to the normal civil proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected rather than the merits of the decision in question. It is therefore concerned not with private rights or the merits of the decision being challenged but with the decision making process and its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**
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> **The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.**
>
> **Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may**

not set about forming its own preferred view of the evidence. See Reid vs. Secretary of State for Scotland [1999] 2 AC 512.

51. He proceeded to state that;

The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

52. In **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998** ***Nyamu J appreciated that***

> **"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.**

53. Odunga J in James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] e KLR opined that;

> **In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their**

jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen individual governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualized discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

54. At this point, I wish to consider the relevant provisions of the law that I will rely upon.

55. Provisions in the Land (Group Representatives) Act CAP 287

5. Meeting to elect group representatives

(1) (Upon being notified under section 23(5)(c) of the Land Adjudication Act, (Cap. 284) that a group has been advised to apply for group representatives to be incorporated under this Act, the registrar shall convene a meeting of the members of the group, at a specified time and place, to—

(a) adopt a constitution;

(b) elect not more than ten and not less than three persons to be group representatives of the group; and

(c) elect persons to be the officers of the group in accordance with the constitution.

(2) The registrar or a public officer appointed by him in writing for the purpose shall preside at the meeting to be held under section 5 of this Act.

7. Incorporation of group representatives

(1) Where at a meeting held under section 5 of this Act the members of a group resolve that group representatives shall be incorporated, and elect not more than ten and not less than three persons to be group representatives, the persons so elected shall make application to the registrar in the prescribed manner for their incorporation under this Act.

(2) On receiving an application under subsection (1) of this section, the registrar, if he is satisfied that—

(a) the requirements of this Act and of any regulations made under it have been complied with; and

(b) the constitution of the group is acceptable in substance and in form, may issue a certificate of incorporation of the group representatives, subject to any conditions, limitations or exemptions which he considers appropriate.

(3) Upon the issue of the certificate of incorporation, the persons named in it as the group representatives shall thereupon become the group representatives of the group and a body corporate with the name specified in the certificate, and shall have

perpetual succession, and the persons elected to be the officers of the group shall become the officers of the group.

(4) Any conditions or limitations in a certificate of incorporation constitute a binding obligation upon the group representatives to observe them, so far as they are applicable to the group representatives.

15. Meetings

(1) The registrar may convene a meeting of a group at any time.

(2) An annual general meeting of a group shall be held every year in the month prescribed for the annual general meeting in the group's constitution.

(3) If—

(a) the group representatives; or

(b) a number of members of a group who together own assets registered in the group's register whose value exceeds one-half of the value of the assets registered in respect of all the group's members; or

(c) the District Agricultural Committee, so request the chairman (or in his absence the vice-chairman) shall convene a meeting of the group within twenty-one days after the date of the request.

(4) The registrar or a public officer appointed by him in writing for the purpose may attend any meeting of a group and speak at it, but may not vote.

(5) All members of a group shall be entitled to attend a meeting of the group and to vote.

(6) No business shall be transacted at a meeting of a group unless at least sixty per cent of the members of the group are present at the meeting.

(7) A resolution at a meeting of a group supported by the votes of not less than sixty per cent of the members of the group present at the meeting shall be treated as the decision of the group.

19. Accounts

(1) Subject to the constitution or rules of the group, the treasurer, and every other officer of a group who is responsible for the accounts of the group or for the collection, disbursement, custody or control of its property, shall—

(a) at least once in every year at the time specified in the group's constitution or rules; and

(b) at any other times when he is required to do so by resolution of the members of the group or by the rules thereof; and

(c) upon vacating office, render to the group and its members a full and true account of all moneys received and paid by him since he assumed office or, if he has previously rendered an account, since he had rendered an account, and of the moneys remaining in his hand at the time of rendering the account, and of all bonds, securities and other property of the group in his custody or under his control.

56. The **first Schedule of the Land (Group Representatives) rules** provides for, matters that must be included in the constitution of every Group Ranch. Among the matters stated are;

> **7. ….The authority for and the method of filling vacancies occurring amongst the officers of the group, and on committees.**
>
> **8. The frequency of, quorums for, method of calling and dates of the annual general meeting referred to in section 15 of the Act.**

57. The **third Schedule of the Land (Group Representative) rules** also provides for provisions that are deemed to be provided in the constitution of every group ranch. I will quote some of the relevant provisions in these rules.

> **There shall be not more than ten and not less than three group representatives, elected from among the members of the group in general meeting by a majority representing not less that sixty per cent of the votes of all the members present at the meeting.**
>
> **If at any time there are less than three group representatives those remaining shall call a general meeting for the purpose of holding new elections.**
>
> **The group shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year, and shall specify the meeting as such in the notices calling it.**
>
> **At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless not less than sixty per cent of the members present agree to a demand for a ballot.**
>
> **Unless a ballot be demanded, a declaration by the chairman of the meeting that a resolution has on a show of hands been carried, or lost, and an entry to that effect in the book containing the minutes of the proceedings shall be conclusive evidence of the fact.**
>
> **Any vacancy arising in the membership of the committee whether by reason of the suspension of a member or otherwise may be filled by a nominee appointed by the committee until such time as the office is filled by election at a general meeting.**
>
> **Where two or more temporary appointments have been made the committee shall convene a general meeting of the group for the filling of those posts by election unless the annual general meeting is due to be held within three months.**
>
> **The provision of this constitution, other than this provision and those which may from time to time be prescribed, may be altered, repealed or added to by a resolution passed by a sixty per cent majority of the members of the group present in person or by proxy at a special general meeting convened for that purpose and of which due notice has been given.**

58. I Must bring to the attention of the counsel representing all parties of the enactment of the **Community Land Act No. 27 of 2016** that came into force on 21st September 2016 and which repealed the Land(Group Representatives) Act and the Trust Lands Act (CAP 288). In this case we are concerned with the repeal of the former statute.

59. The relevant transitional provisions set out in the Community land Act No. 27 of 2016 provide as follows;

> **4. Legal proceedings**

On or after the appointed day, all actions, suits or legal proceedings whatsoever pending by or against the former institution shall be carried on or prosecuted by or against the registered community, and no such action, suit or legal proceedings shall in any manner abate or be prejudicially affected by the enactment of this Act.

6. Reference to written laws

Any reference to a former institution in any written law or in any contract, document or instrument of whatever nature shall, on the commencement of this Act, be read and construed as a reference to the registered community.

7. Directions, orders, etc of former institution

All directions, orders and authorizations given, or licenses or permits issued, or registrations made by a former institution and subsisting or valid immediately before the appointed day, shall be deemed to have been given, issued or made by the registered community under this Act.

60. Having demystified the scope of judicial review remedies and quoted the relevant sections of the law, the question whether there were actions or inactions of illegality, irrationality and impropriety of procedures comes into play. I will therefore proceed to consider the conduct of the elections of Mailua group ranch as was held on 27th October 2015 in a bid to answer the above question.

61. The Registrar of Group Representatives draws powers from the statute and is mandated with oversight authority in the Administration of Group Ranches in Kenya. It is the court's opinion that the genesis of the dispute that led to this application is the failure by the Registrar of the group Representatives, (**hereinafter referred to as the Registrar)** to observe procedural rules that are laid down in the statute in which Registrar's jurisdiction is conferred. The court in the course of the proceedings took notice that there were no elections held for the group ranch since 2012. And in fact, in the Notice of Motion dated 9/11/2015 filed by the interested parties and supported by an Affidavit sworn by Daniel Koikai Kironua, the Deponent states that the group ranch has maintained the same officials for over 30 years. This court was not presented with evidence to the effect that annual general elections were ever conducted in those years to re-elect the officials of Mailua group ranch.

62. The court also took notice that Mailua group ranch had been operating without a constitution. If at all there existed any constitution, it was never presented before this court. Section 5 of the Land (Group Representatives Act) imposes a duty upon the registrar to convene a meeting for purposes of adoption of a constitution of the group ranch. This court was not presented with any evidence to the effect that there ever existed any constitution for this group ranch. Had a constitution been in existence, as required by Land (Group Representative) Act and as prescribed the first schedule of the rules, then this matter would not be before this court for determination.

63. Section 7 of the Land (Group Representatives Act) requires the elected members of a group ranch to make an application to the registrar for incorporation. However, there are conditions imposed upon the Registrar of group representatives before preparation of a certificate of Incorporation. One of these conditions is that the requirements of the Act and any of the regulations made under it must be complied with. Section 19 for example requires that the treasurer gives a full report of the monies received and paid by him since assumption office. The treasurer's report was not tabled during the AGM held on 27/10/2015.

64. S 10 provides for the procedure that the Registrar is required to follow in the event that there is a dispute as to the officials of the group ranch. It is not in doubt that there was a disagreement as to the general conduct of elections on 27/10/2015. There is therefore a legitimate expectation that the Registrar should have stepped in to try and resolve the issue as required by section 10 of the Act before preparation of the certificate of incorporation. However, in the course of the proceedings, it did not emerge whether the Applicants tried to seek an audience with the Registrar.

65. Section 15(6) provides that no business shall be transacted unless 60% of the members of the group are present at the meeting. The Respondents gave Prima Facie evidence that the quorum was ascertained by calling out the names of the members from the primary register with a view of striking out the deceased members and that a list of the deceased members that were substituted and those that were not substituted was produced and annexed to the minutes of the AGM.

66. Article 35 of the constitution provides;

> **(1) Every citizen has the right of access to—**
>
> **(a) information held by the State; and**
>
> **(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**
>
> **(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
>
> **(3) The State shall publish and publicise any important information affecting the nation. Access to information**

67. Article 43 of the Constitution 2010 states as follows;

> **43. (1) Every person has the right—**
>
> **(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**
>
> **(b) to accessible and adequate housing, and to reasonable standards of sanitation;**
>
> **(c) to be free from hunger, and to have adequate food of acceptable quality;**
>
> **(d) to clean and safe water in adequate quantities;**
>
> **(e) to social security; and**
>
> **(f) to education.**
>
> **(2) A person shall not be denied emergency medical treatment.**
>
> **(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.**

68. Article 10 of the Constitution 2010 provides

> **10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**
>
> **(a) applies or interprets this Constitution;**
>
> **(b) enacts, applies or interprets any law; or**
>
> **(c) makes or implements public policy decisions.**
>
> **(2) The national values and principles of governance include—**

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development

69. Reading into Article 35 and 43 of the constitution above, it is clear that the members of Mailua Group ranch had a right to know the status of Mailua group ranch before the elections were held as this directly affects their social-economic rights which are guaranteed by the Kenyan Constitution 2010. The shares held by each member of the group in Mailua group ranch is a source of livelihood for the individual members. There was therefore a legitimate expectation that the Registrar would facilitate tabling of the Chairman's and secretary's reports in addition to the Treasurer's report as required by S 19 of the Group (Land Representatives) Act. It is not the Registrar's prerogative to do away with the reports. The treasurer's report is read so as give the members an update on the position of the ranch's assets and liabilities. Only the members can do away with this as provided by passing a resolution to defer the tabling of reports and rescheduling the same to be tabled on a specified date.

70. Article 10 of the constitution provides for values and Principles of good governance. The principles of transparency, accountability and integrity demand that during transition management, handing over reports are prepared and presented to both the members and the incoming officials. The registrar did not bother to ensure that this documentation was availed but instead rushed to prepare the certificate of incorporation.

71. Turning to the relief of certiorari, it was set out in prayer 1 of the substantive Notice of Motion dated 20th October 2015. It read:-

''THAT the elections intended for the 27th October 2015 were a sham, irregular, unlawful and a nullity ab initio as the election preparations & the Respondents' conduct of the day did not follow the lawful procedure''

72. In ***Kenya Anti-Corruption Commission v Republic & 4 others [2013] eKLR the Court of Appeal stated that:-***

''**The question we have to ask ourselves is whether the learned Judge's observations and findings reflected above are within the parameters set by applicable principles of law for the issuance of the relief of "certiorari". As observed above, from the content of extracts of Hallisburrys Laws of England (Supra) "certiorari lies to bring a decision of an inferior Court, Public Tribunal, Public Authority or any other body of persons before the High Court for review, so that the Court may determine whether they should be quashed or to quash such a decision…. Certiorari is concerned with decisions in the past….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. See also the cited authority of *Kenya National Examination Council versus Exparte Republic exparte Geoffrey Gathanji Njoroge & 9 others* (Supra).where it was held, inter alia, that:-**

> **"Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reason"**

73. Although the order of certiorari was not expressly prayed, I will not delve into this issue as I had earlier discussed a matter with regard to procedural technicalities and held that such matters should not

bar dispensation of justice.

74. This court has established that the Registrar has an oversight role in management of Group ranches and in particular ensuring that the ranches comply with the provisions of the law. It emerged that during these judicial review proceedings that there has been an omission by the Registrar to ensure accountability and transparency of the group ranch. It must however be noted that this oversight role does not require the Registrar to meddle with the day to day administration of the group ranches. In fact, we must take cognizance of the fact that the Applicants were the officials in power and they worked closely with the Registrar in calling for the AGM and preparation for the same.

75. The above omissions by the Registrar do not constitute an abuse of power and the registrar did not in any way act in excess of her jurisdiction. Additionally, these omissions do not go to the root of the processes that were to be adhered to in conducting the elections. The omissions are not even subject of these Judicial Review Proceedings. These Judicial Review proceedings are based on grounds that the elections were called through an irregular notice; that the Respondents did not follow the laid down procedure in conducting the election; that strangers were allowed to participate in the elections; that the elections were not announced; that the 1st respondent interfered with the elections by purporting to count the members; that the tallying slips were snatched and torn and that the minutes of the AGM were a forgery. These grounds would require the court to interrogate facts to determine this case. I must remind the Applicants that this court is concerned with the decision making process and not the merits of the case. These facts can be canvassed in a civil court.

76. The Applicants did not in any way convince this court that the elections were called through an irregular Notice. If anything, the Applicants participated in the preparation of this election. They were the de facto officials at the time of calling the elections and worked hand in hand with the Registrar. The Applicant's point of departure was on the event and outcome of the Annual General Meeting held on 27/10/2015 and in particular the elections.

77. The second issue that the Applicants picked up with the Respondents was the quorum of the members who voted. However, this court was not presented with any evidence from an independent voter who participated in this election to the fact that due process was not followed. Need I remind the Applicants that the election was meant for the members and not for them? On the part of the Respondent, this assertion was countered by producing the primary Register that was used to ascertain quorum, the Applicants did not object to using this register and calling names during the meeting in order to ascertain the quorum.

78. The assertion that tallying slips were torn and that the election results were not announced as presented by the Applicants cannot stand. This is because there was no independent witness who is a member of the group ranch that participated in the elections that was called upon to give evidence to this effect.

79. Having established that there were certain omissions on the part of the Registrar and that these omissions do not in any way amount to abuse of power and that the Registrar did not act in excess of her authority, prayer one in the Notice of Motion dated 20th November 2015 is **NOT** granted. Consequently the elections held on 27th October 2015 stand and Prayer No. 4 in the Notice of Motion dated 20/11/2015 is therefore spent.

80. The decision by this court not to issue writs of certiorari and prohibition can be well illustrated by the statement in a persuasive authority in the case of **Hungsraz v Mahatma Gandhi Institute & Others (2008) MR 127**. The court pronounced itself as follows:

> **"Judicial review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at a decision; to ascertain that it is in uniformity with all the elements of fairness; reasonableness; and most of all its legality. It**

must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned, and it will not interfere with any way in the exercise of the discretionary power which the statute had granted to the body concerned. However, it will intervene when the body concerned had acted untra vires its powers; reached a decision which is manifestly unreasonable. In the Wednesbury sense; had acted in an unfairly manner, and the applicant was not given a fair treatment."

81. These propositions defines guiding legal principles to which competency of judicial review applications are to be determined post 2010 Constitution of Kenya. The applicants had a duty to discharge the burden to bring themselves within any of the grounds elucidated in this case law.

82. Prayers 2, 3, and 5 in the notice of motion dated 20/11/2015 although not expressly prayed seek for an order of mandamus.

83. With regard to the order of Mandamus as prayed by the applicants, the procedure was demystified in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself as follows:

"*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature… In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty…Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law…English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties…With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile… It seems to be an illogical argument

that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government….Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go… In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament…..In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and

> **the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice… The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."**

84. From the foregoing, an order of mandamus should be granted to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. The person or authority to whom it is issued must be either be under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature.

85. This Court is of the view that although impliedly, the Applicants sought for an order of mandamus for prayers 2, 3 and 5 the Applicants prayers do not meet the threshold that is required to seek for an order of mandamus.

86. However, this court has an inherent jurisdiction and in this instance it is called upon to invoke its inherent jurisdiction and grant orders that it deems fit.

87. On Inherent jurisdiction, **Ouko, J** (as he then was) in **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004,**expressed himself as follows:

> **"It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."**

88. Inherent power is not donated by legislation. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675 it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.**

89. Dealing the same issue it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006 that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.**

90. I will therefore proceed to first deal with prayer No. 5. This prayer was framed as follows;

> **That this Honourable court be and is hereby pleased to issue status quo orders obtaining before the disputed elections of 27th October 2015.**

91. Throughout the proceedings, there was no evidence produced to show how the Applicants were elected into office or that they were the legitimate officials of Mailua Group ranch. In the unlikely event that these officials had at some point been elected, then their purported existence in office was illegitimate as there were no elections conducted since the year 2013 to elect officials of the group ranch. The purported existence in office was therefore an illegality. For this reason, **the Applicant's prayer No. 5 is NOT granted.**

92. With regard to prayer No. 2 and 3 seeking for an order to compel the Respondents to deposit all the all incorporation certificate of the 11th Applicant since 2012 and the election documents and reports and results of any kind and nature related to the elections of 27th October 2015, the court will **NOT** grant this

order. However, the Court directs that all the documentation relating to the 11th Applicant be deposited with the 2nd Respondent within 14 days to facilitate a smooth transition and an inventory of the documentation be prepared and filed with the Deputy Registrar.

93. In the scenario at hand, this court is called upon to invoke its inherent jurisdiction and issue orders that will ensure that a governance structure is instilled in Mailua Group Ranch.

94. This court therefore directs the 2nd Respondent to convene a meeting for the purposes of adopting a constitution of Mailua Group Ranch as required by the law. The 2nd Respondent is also directed to oversee the process and ensure that all members of Mailua Group Ranch participate in this process.

95. All parties are directed to appear before this court within sixty (**60 days)** after the date of this order to confirm compliance.

96. Mailua Group ranch is directed to call for a special General meeting within the 60 days to table treasurer's report including the financial statement with a proper balance sheet constituting the financial statement on assets and liabilities of the ranch, the secretary's and chairman's reports before the members who will in turn adopt or make recommendations to the report. Parties to confirm compliance after 60 days from the date of this order.

97. The officials of Mailua group ranch are directed to familiarize themselves with the new Community Land Act No 27of 2016 and comply with the provisions in respect to reconstituting Community Land Management Committee under Section 15 of the Act.

98. The group ranch membership and management committee are encouraged to embrace alternative dispute resolution in conflict management as espoused by the Supreme Law, the Constitution of Kenya 2010 Article 159 and Section 39, 40, 41 of the Community Land Act No. 27 of 2016.

99. No orders as to costs.

100. It is so ordered.

Dated and delivered at Kajiado this 16th day of November, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Nyaribo for the applicants – present

Mr. Mulaku for the interested parties and also holding brief for Ms Odhiambo for the respondents - present

Mr. Mateli Court Assistant