REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC JR MISC APPLICATION NO. E001 OF 2020

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

IN THE MATTER OF AN APPLICATION BY ELIJAH KIMELY KESHIO, DAVID KIPTOO BUSIENEI AND CHERUIYOT A. LIMO (SUING AS TRUSTEES OF NYANDO VALLEY ASSOCIATION) FOR JUFICIAL REVIEW ORDERS OF CERTIORARI &PROHIBITION

AND

IN THE MATTER OF A DECISION BY AGRICULTURE AND FOOD AUTHORITY DATED 15TH JULY 2020 REFERENCE AFA/SCM/11/326

AND

IN THE MATTER OF LAND KNOWN AS ORIGINAL L.R. NO. 11840 (6086,1586/1,1586/2,1586/3)

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTEROF THE LAND REGISTRATION ACT,2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,2015

AND

IN THE MATTER OF ARTICLES 10,40,47,60 OF CONSTITUTION OF KENYA ,2010

BETWEEN

REBUBLIC……...…… APPLICANT

VERSUS

AGRICULTURE AND FOOD AUTHORITY……RESPONDENT

AND

ELIJAH KIMELY KESHIO

DAVID KIPTOO BUSIENEI

CHERUIYOT A. LIMO (Suing as trustees of

Nyando Valley Association)……EX- PARTE APPLICANTS

AND

THE NATIONAL LAND COMMISSION……1ST INTERESTED PARTY

COUNTY GOVERNMENT OF KISUMU……..……2ND INTERESTED PARTY

COUNTY GOVERNMENT OF NANDI……..……3RD INTERESTED PARTY

JUDGMENT

Elijah Kimely Keshio, David Kiptoo Busienei, Cheruiyot A. Limo (Suing as trustees of Nyando Valley Association) hereinafter referred to as Ex- Parte Applicants came to this court with an

application for Judicial Review that was properly commenced by way of Chamber Summons dated 30th September 2020 and filed on 1st October 2020 by Ex-parte Applicants seeking leave to apply for an order of Certiorari removing to this Honourable Court the decision of the Respondent in respect of Agriculture and Food Authority Reference AFA/SCM/11/326 dated 15th July 2020 in reference to land known as L.R. NO. 11840 upon which Chemelil Sugar Factory is erected, an order for Prohibition against the Respondent restraining them, their agents and/or representatives from implementing , acting upon and/or enforcing the decision to advertise by way of expression of interest on the 15th July 2020, L.R. NO. 11840 for lease to private investors depriving and/or with intention to deprive the ex-parte Applicants of their right to own and enjoy quiet possession of land parcel L.R. NO. 11840, an order of prohibition against the Respondent from leasing or otherwise disposing proprietary interests in L.R. NO. 11840 to private investors by way of tender or any other manner whatsoever with the ex parte Applicants , quiet possession of the property known as L.R NO. 11840 and that an order for leave be granted to operate as stay of the decision of the Respondent issued on 15th July 2020.

On 1st February 2021, the matter came up for hearing and the Ex-parte Applicants were granted leave as prayed in the Chamber Summons Application and an order that the substantive Notice of Motion be filed within 20 days.

The Ex-parte Applicants filed the Notice of Motion on 9th March 2021 where they sought for orders of:

> **1. Certiorari to remove into this Honourable Court for the purposes of its being quashed the decision of the Respondent in respect Agriculture and Food Authority Reference AFA/SCM/11/326 dated 15th July 2020 with respect to land known as Original L.R. NO. 11840 (6086,1586/1,1586/2,1586/3).**
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> **2. Prohibition against the Respondent restraining them, their agents and/or representatives from implementing, acting upon and/or enforcing the decision dated 15th July 2020 in any manner whatsoever depriving and/or with intention to deprive the Applicants of their right to own and enjoy quiet possession of land parcel Original L.R. NO. 11840 (6086,1586/1,1586/2,1586/3) as recommended by the 1st Respondent Gazette on 1st March 2019.**
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> **3. Prohibition against the Respondent from awarding tender to any private interest or if already awarded, against such private interest from trespassing, occupying, invading and/or dealing in any manner whatsoever with the Applicants' quiet possession of the property known as Original L.R. NO. 11840 (6086,1586/1,1586/2,1586/3).**
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> **4. Costs of this Application.**

The Application was supported by the Affidavit of Elijah Kemely Keshio who deposed and stated that Nyando Valley Association vide Gazette Notice No. 1995 published in the Kenya Gazette Vol. C XXI- NO. 27, was allocated a portion of the land from Chemelil Sugar Company L.R. NO. 11840 by the 1st Interested Party. That the 2nd Interested Party successfully petitioned the High Court in Kisumu Petition No. 4 of 2019 seeking to quash the aforementioned decision of the 1st Interested Party.

It is stated that being aggrieved by the decision of the High Court, members of the Nyando Valley Association wrote to the 1st Interested Party inquiring whether the 1st Interested Party would be filing an appeal against the decision of the High Court at Kisumu and since there was no response from the 1st Interested Party, they decided to lodge an Appeal in the Court of Appeal at Kisumu. They were out of time to file the Appeal and they therefore sought leave of the court through Civil Application No. 105 of 2020 and the said Application is pending before the Court of Appeal.

That on or about 15th September 2020 they learnt that the Respondent had advertised in one of the daily newspapers on 10th July 2020 that it intended to engage private investors to redevelop the factories into large sugar complexes and manage them over a leasehold of 25 years. That as per the advertisement, one of the sugar factories being offered for private engagement is Chemelil Sugar Company, which sits on L.R. NO. 11840. It is stated that the suit property is the subject of the Intended Appeal and still the subject of re-adjudication bt the 1st Interested Party following directions of High Court in Kisumu Petition 4 of 2019.

He stated that the expressions of interest by prospective private investors were to be received by the Respondent by 4th August 2020 when they would be opened for evaluation and eventual award. That they are apprehensive that the Respondent will lease the suit property to a private investor occasioning grave difficulty on the prosecution of the Intended Appeal.

It is further stated that any transfer of interest in the said property will render the determination of both the complaint with the 1st Interested Party and the intended Appeal nugatory. That they seek the orders of this court to quash the decision of the Respondent to advertise the aforementioned parcel of land for lease. They are further seeking the court to prohibit the Respondent from making any decision regarding the advertised Expression of Interest and to further prohibit the Respondent from transferring any interest of the suit property in any manner that would be prejudicial to our complaint with the 1st Interested Party and their intended Appeal.

That the Respondent's actions to advertise the suit property for lease is improper, prejudicial and perilous on account that the said property is the subject of the two pending disputes.

The Respondent herein filed its Replying Affidavit on 16th July 2021 where ROSEMARY OWINO deposed and stated that she is the Director Sugar Directorate of the Respondent and is duly authorized to swear the Affidavit. She stated that the Respondent is a Body Corporate established under section 3 of the Agriculture and Food Authority Act (No.13 of 2013) as a successor to the former institutions existing immediately before the commencement of the Crops Act (No. 16 of 2013) which consolidated statutes relating to crops, sugar being a crop.

That the National Government is responsible for Agricultural Policy, National Economic Policy, Public Investment Policy and General Principles of Land Planning and Policy Implementation Nationwide the benefit of the Sugar Industry and Kenya citizens at large as more particularly provided under Article 186 of the Constitution of Kenya 2010 and the Fourth Schedule thereof. She stated that under Article 2(5) and (6) of the Constitution of Kenya 2010 General Rules of International Law form part of the Laws of Kenya and these provisions are to be read with the COMESA treaty which obligates Kenya to allow importation of sugar into Kenya from member states in the COMESA free trade area.

That the Government recognizes that sugar production in Kenya is uncompetitive and cannot sustain competition and sugar industry plays a significant role in the Country's Socio -Economic Development including Food Security, Employment creation , Rural Development and is a source of livelihood and it is for this reason that the government applied for safeguards to protect local sugar under Article 61 of the COMESA treaty as read with Article 10 (1) of the same treaty to cushion the sugar industry from potential negative effects of importation of cheaper duty-free sugar from COMESA free trade area.

It was stated that Kenya cannot live on safeguards perpetually without bringing into question its commitment to its obligations under the COMESA treaty. That when the current Safeguards expire in February 2021, Kenya will be compelled to allow importation of duty-free sugar from COMESA member states in competition with locally produced sugar. The Government established a Task Force of Sugar Industry Stakeholders under Gazette Notice No.11711 of 9th November 2018 where the task force invited members of the public to submit memoranda, considered views from expert presentation and extensively reviewed other successful sugar models from countries in COMESA region and internationally. The taskforce also held public participation meetings in all areas of sugar cultivation and was extensively involved before taking opinions of interested parties in its reports.

That the taskforce recommended was that most stakeholders supported the privatization of the state sugar mills after the cancellation of the debt and they supported the identification of strategic investors with proven track record to take over the state-owned sugar mills through leasing on the condition that the land is used solely for cane development and that even KEPSA has welcomed the Government's move to lease five state-owned Sugar Mills.

It is stated that the Cabinet adopted the report of the Task Force and recommended that the long-term lease privatization model be adopted after restructuring the balance sheets of the five- state owned sugar companies by cancelling the debts contracted with the Government through the Kenya Sugar Board/Commodities Fund as December 31,2019 and amortization of tax penalties and interest as of June 30,2009 and additional interests that have accrued since then. She further stated that the National Government made strategic decision to lease its five State Factories through a long-term lease model that would transfer the right of use of each factory to the lessee "as is" for remodeling and operation and that the private sector was to mobilize resources to rehabilitate and modernize existing facilities, improve financial, technical, and operational expertise, add efficiency and return plants to profitability.

That the Respondent was assigned the task of implementing the policy and the government's decision and therefore the National Government commenced a program with the objective of facilitating the turnaround of the five state owned sugar companies by engaging investors with world-class experience to redevelop the factories into large sugar complexes and manage them over a period of 25 years. She stated that the Respondent invited interested investors both local and international who are familiar with the industry to express their interest in providing the services by submitting information on their commercial and technical capability.

That an International Expression of Interest (IEOI) for leasing and operating each of the five state owned sugar factories in Kenya was advertised on 10thJuly 2020 with an opening date of 4th August 2020 at 1400 hours. It was further stated that the objectives of the Lease was to facilitate turnaround of five millers to profitability through modernization and efficient management that will enhance competitiveness.

It was stated that the ex-parte applicants filed this Judicial Review Application contending that the advertised property was in dispute in Kisumu Petition No.4 of 2019 which was filed by Kisumu County Government to quash a Gazette Notice published by the National Land Commission involving a piece of land in one of the five factories to be leased and the High Court allowed the Petition and quashed the gazette notice. That it is the ex-parte Applicant's contention that they have filed an Appeal from the judgment of F.A Ochieng J. in County Government of Kisumu vs National Land Commission, Elijah Kimely Keshio & 2 Others (Interested Parties) (2020).

That the ex parte Applicants neither filed a Notice of Appeal nor a Memorandum of Appeal in the said proceedings and they have not obtained a stay of the decision of the Learned Judge delivered on 26th February 2020.That there are no orders barring the Respondent from proceeding with the leasing of the suit property. It was further stated tat the Judicial Review Application filed by the Applicant is unwarranted and an abuse of the court process and there are multiple suits across the Country concerning the suit property.

It is the Respondent's prayer that this Application should be dismissed.

The Ex-Parte Applicants herein filed a Further Affidavit where ELIJAH KIMELY KESHIO on behalf of Nyando Association deposed and stated that on the question of Government past or current policies for the revival of the sugar sector as addressed by the Respondent at paragraphs 5 to 17 of the Replying Affidavit, the same cannot bind the interests of the ex-parte applicant in petitioning the 1st Interested Party, presenting its case and getting a positive determination.

That the advertisement of International Expression of Interest by the Respondent was in blatant disregard and runs afoul of the decision of the 1st Interested Party properly exercising its Constitutional and Statutory mandate rendered its determination in favor of the applicants and published the decision in the Kenya Gazette vide Gazette Notice No. 1995 published on 1st March 2019.

That the decision of the **County Government of Kisumu vs National Land Commission; Elijah Kimely Keshio &2 Others (Interested Parties) (2020) eKLR** never quashed the said Gazette Notice No. 1995 of 2019.That they have filed a Record of Appeal which awaits directions on the hearing. Prior to filing of the record of Appeal, they were granted leave to file their record of Appeal by the Court of Appeal Ruling on 12th February 2021.

That on 9th March 2021, they were granted stay orders to the decision of the Respondent dated 15th July 2020 and therefore the stay orders issued bars the Respondent from proceeding with leasing the suit property. That the Respondent was duly served with the stay orders.

Ex-Parte Applicants' Submissions

The Ex-parte Applicants filed their submission on 22nd September 20221 and raised a number of issues to be determined as discussed below;

On the issue of whether the decision of the Respondent is amenable to Judicial Review; it was submitted that the Interested Parties herein were moved by the Applicants on behalf of Nyando Valley Association vide a Petition for historical injustices meted against them during the colonial period in NLC/HLI//010/2017 where the applicants sought to reclaim their ancestral land comprised in Land LR No. 11840.That the National Land Commission ruled in favour of the Applicants.

That the impugned decision of the Respondent effectively overturns the decision of the Interested Party and it was unfair and wrong exercise of administrative action to overturn the decision of a Constitutional quasi-judicial commission and therefore the Respondent's decision to advertise Chemelil Sugar Company which partly sits on the suit land was not fair.

On whether the grounds of Judicial Review remedies of certiorari and prohibition have been satisfied; the Ex-parte Applicants relied in the case of **Republic vs Kenya Airports Authority Ex-parte Seo & Sons Limited (2018) eKLR** where the court noted as follows:

> ***"It is now clear that judicial review remedies can be granted on grounds of ultra vires, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision."***

Reliance was also placed in the case of **Republic vs Commissioner for Higher Education ex parte Peter Shoita Sitanda (2013) eKLR** and the Ugandan case of **Patsoli vs Kabale District Local Government Council & Others (2008) 2 EA 300** where the court held as follows:

> ***"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."*** It is the ex-parte Applicants' submissions that the decision of the Respondent has to be tainted with illegality as they acted ultra vires. That the impugned decision of the Respondent is illegal and runs afoul of lis pendens and therefore relied in the case of **Naftali Ruth Kinyua vs Patrick Thuita Gachure &Another (2015) eKLR** where the court of Appeal observed that the doctrine lis pendens remains applicable as follows:

> **"The necessity of the doctrine of *lis pendens* in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of *section 52* of the *ITPA* by the *Land Registration Act (LRA) Number 3 of 2013,* the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of *Section 107 (1)* of the *LRA* which provides the saving and transitional provisions of this Act, and which stipulates,**

> ***"Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued,***

established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

On legitimate expectation, the ex-parte Applicants submitted that they have a legitimate expectation by virtue of the Rule of Law as no party had the power to and assume any authority over the suit property. Reliance was placed in the case of **Communications Commission of Kenya & 5 Others vs Royal Medial Services &5 Others (2014)** where the Supreme Court stated as follows:

"Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

It is stated that the Applicants have legitimate interest in the legal ownership of the suit property in light of the conclusive and determination on merit of the 1st Interested Party that allocated the Applicants the suit property and therefore the Respondent ought to wait the determination of the existing proceedings before making any further step to lease or transfer the suit property.

It was the Ex-parte Applicants prayer that this Application be allowed as it has merit.

Respondent's Submissions

The Respondent filed its submissions on 4th February 2022 where it raised the following issues for determination:

1. Whether the Ex-parte Applicants have established any grounds to warrant the court to grant the Judicial Review orders sought.

It was submitted that the decision of the Respondent to advertise for leasing of the Five Sugar Factories has brought a multiplicity of suits across the country and the multiplicity of these suits ignores the basic principles of res judicata and sub judice and therefore the Ex-parte Applicants need not to apply to this court for Judicial Review orders .The Respondent relied in the case of **Republic vs District Land Registrar Kisii County & 2 Others Ex-Parte Richard Nyabando, Elijah Nyagami Gai (Interested Part) (2021) eKLR** where the court in dismissing the Application held as follows:

"Learned counsel for the Ex-parte Applicant contends that the matter is not res judicata as the acts complained of in the instant application only arose on 17th July 2020. However, in the same breath he admits that there is a matter touching on the same subject matter in which this court held that the suit was res judicata and the same is pending before the Court of Appeal at Kisumu. It is not in dispute that the Ex-parte Applicant has been litigating over land parcel no. CENTRAL KITUTU/MWAMANWA/557 since 2004. There is also no doubt the High Court and this court have rendered decisions in respect of this subject matter and that the Ex-parte Applicant and the Interested Party have been at the centre of this litigation. By the Ex-parte Applicant's own admission, the matter is pending in the Court of Appeal vide Civil Appeal No. 90 of 2020. It is therefore not clear why the Ex-parte Applicant instituted another application for Judicial Review touching on the matter before the Court of Appeal. As I understand it, the Ex-parte Applicant is now complaining about the actions of the Land Registrar who was implementing the judgment that was delivered by Justice Makhandia on 17th June 2010. Is this a proper use of the court process? My analysis leads me to the conclusion that it is not."

It is the Respondent's submissions that Judicial Review proceedings are meant to protect parties from public bodies who make decisions tainted with procedural impropriety and that Judicial Review Orders are meant to look at the decision-making process and not the decision that was made. That the Ex-parte Applicants Application does not touch on the decision-making process and the only issue is the decision to lease out the sugar factory which will have an impact on a piece of land which is contention at the Appellate court. That an administrative or quasi- judicial decision can only be challenged for illegality, irrationality and procedural impropriety.

The Respondent relied in the case of **Republic vs National Employment Authority & 3 Others Ex-Parte Middle East Consultancy Services Limited (2018) eKLR** where the court stated as follows:

"In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set aside only if that process was flawed in certain defined and limited respects. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is about the decision making process-not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a Judge of the High Court of a decision to determine whether that decision or action is unauthorized or invalid. It is referred to a supervisory jurisdiction reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised."

The Respondent further submitted that the Application does not satisfy the threshold set for granting of certiorari and prohibitory orders as the Applicants have not delved in the merits of the decision making process in their application as they have only stated that they want the advertisement for the leasing of the sugar factory quashed.

2. Whether the Applicants have become indolent in prosecuting the Appellate matter.

It was submitted that the Applicants being affected by the High Court decision have delayed and become indolent in prosecuting the suit at the Appellate court as Judgment was delivered on 26th February 2020.That they failed to file a Notice of Appeal within the requisite period and had to seek leave to file it out of time and also sought leave to file their substantive appeal.

Honourable Justice Kantai delivered a ruling on 12th February 2021where he granted them 21 days to file their substantive appeal which they have failed to comply. The Respondent stated that the Applicants have no intention of prosecuting the Appellate matter and are dragging their feet to delay processes that are meant to improve the economy and welfare of the citizens. The Respondents relied in the case of **Wayua Waita vs James Ngui Ndambuki (2021) eKLR.**

The Respondent therefore submitted that the Applicants have no case against the Respondent and the suit should be dismissed with costs.

ANALYSIS AND DETERMINATION

It is the Ex-Parte Applicants case that on 15th September 2020, the Respondent had advertised in one of the daily newspapers that it intended to engage private investors to redevelop the factories into large sugar complexes and manage them over a leasehold of 25 years. As per the advertisement Chemelil Sugar Company which partly sits on LR No. 11840 was being offered for private engagements yet the property was subject of Kisumu Court of Appeal No.105 of 2020 and still subject of re-adjudication by the 1st Interested Party following directions of the High Court in Kisumu Petition No. 4 of 2019.The Ex-Parte Applicants contend that the expressions of interests by prospective investors were to be received by the Respondent by 4th August 2020 and they are apprehensive that the Respondent would lease the suit property to a private investor occasioning grave difficulty on the prosecution of the intended Appeal.

It is the Respondent's case that the Ex-parte Applicants herein filed this Judicial Review Application alleging that the advertised property was in dispute in Kisumu Petition No. 4 of 2019 which was filed by Kisumu County Government to quash Gazette Notice published by the 1st Interested Party herein involving land in one of the five factories to be leased. The High Court allowed the Petition and quashed the gazette notice. The Ex-parte Applicants appealed the decision of the High Court and have since failed to pursue the Appeal to conclusion.

The Ex -parte Applicants filed a further Affidavit in response to the Respondent's Replying Affidavit where they contended that the advertisement of Expression of Interest by the Respondent was in blatant disregard of the 1st Interested Party's decision where vide Gazette Notice No.1995 of 2019 awarding the suit property to the Applicants and that vide Petition 4 of 2019, the High Court never quashed the decision of the 1st Interested Party.

In the case of ***Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR*** *the court stated as follows:*

> ***"Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."***

It is this court's view that the Applicants have not satisfied the grounds for an award of Judicial Review Orders in the sense that the Respondent had advertised that it intended to redevelop the factories into large sugar complexes and manage them over a leasehold of 25 years. The expressions of Interests by the private investors were to be received and be opened for evaluation and eventual award. It is evident that the Applicants have not challenged the process of advertisement for the leasing of the sugar factories as they are only apprehensive that the Respondent will go ahead and lease the suit property to a private investor occasioning grave difficulty on the prosecution of the intended appeal.

This Court has looked into the Judgment of **Petition 4 of 2019 between County Government of Kisumu vs National Land Commission; Elijah Kimely Keshio & 2 Others (Interested Parties)** and confirm that the matter involves the same parties, the same subject matter and is still pending at the court of Appeal. In the case of **Joshua Ngartu v Jane Mpinda & 3 Others (2019) eKLR where** Lucy Mbugua J relying on the case of **Attorney General & Another v ET (2012) eKLR** held as follows:

> ***"The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way an in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit" In that case the court quoted Kuloba J (as he then was) in the case of Njanju v Wambugu & Another HCCC No. 2430 of 1991 (unreported) where he stated : " If parties are allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion when he comes to court then I don't see the use of the doctrine of res judicata…"***

I agree with the submissions of the Respondent that the Applicants have failed to prosecute their case at the Court of Appeal and are using delay tactics yet they have an opportunity to prosecute their case at the Court of Appeal instead of instituting multiple proceedings in various courts which amounts to an abuse of the court process. This court finds the applicants have not met the threshold of the orders sought and the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24th DAY OF FEBRUARY, 2022.

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.