



**Republic v CEC Land, Environment Natural Resources & Climate Change
Nandi County & 2 others (Environment and Land Judicial Review Case
6 of 2021) [2022] KEELC 4869 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4869 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 6 OF 2021
MN MWANYALE, J
SEPTEMBER 19, 2022
(FORMERLY ELDORET ELC CASE NO 3 OF 2019)**

BETWEEN

REPUBLIC APPLICANT

AND

**CEC LAND, ENVIRONMENT NATURAL RESOURCES & CLIMATE CHANGE
NANDI COUNTY 1ST RESPONDENT**

COUNTY LANDS REGISTRAR NANDI 2ND RESPONDENT

COUNTY GOVERNMENT OF NANDI 3RD RESPONDENT

JUDGMENT

1. The 32 exparte applicants having obtained leave to file judicial review proceedings against the 3 respondents filed their substantive notice of motion dated August 19, 2019 and sought therein 5 substantive orders as here follows;
 - i) That an order of certiorari do issue to bring before this court and to quash the Nandi County Executive Committee resolution of June 7, 2019 – minute number CEC/EC/Min/41/2019 which seeks to reposs for public interest/use the following parcels or properties without following due process.
 - a) Nandi/Chepkunyuk/590
 - b) Nandi/Kamobo/878/part
 - c) Kapsabet/Municipality/417
 - d) Kapsabet/Municipality/176



- e) Kapsabet/Municipality/177
- f) Open space next to veterinary clinic
- g) Kapsabet/Municipality/365
- h) Kapsabet/Municipality/81 – part
- i) Kapsabet/Municipality/56
- j) Kapsabet/Municipality/82
- k) Kapsabet/Municipality/83
- l) Kapsabet/Municipality/84
- m) Kapsabet/Municipality/85
- n) Kapsabet/Municipality/86
- o) Kapsabet/Municipality/87
- p) Kapsabet/Municipality/88
- q) Kapsabet/Municipality/89
- r) Kapsabet/Municipality/90
- s) Kapsabet/Municipality/91
- t) Kapsabet/Municipality/92
- u) Open space adjacent to Kapsabet/Municipality 55 and 535
- v) Open space next to CITC and opposite police station
- w) County Commissioners residence – part
- x) Kapsabet Municipality 292
- y) Kapsabet Municipality 293
- z) Kapsabet Municipality 294
- aa. Kapsabet Municipality 295
- bb. Low Density Residential – Between Kapsabet Town offices and Kapsabet Boys
- cc. Kapsabet/Municipality/424
- dd. Kapsabet/Municipality/397
- ee. Kapsabet/Municipality/299
- ff. Kapsabet/Municipality/309
- gg. Kapsabet/Municipality/302
- hh. Kapsabet/Municipality/345
- ii. Kapsabet/Municipality/344



- jj. Land next to proposed Kapsabet Judiciary
- kk. Staff housing next to lake basin
- ll. Zone 8
- mm. Wetland in Mugundoi
- nn. Kapngorium Swamp
- ao. Kingwal wetland
- pp. Koyo Hill
- qq. Part of Riparian Reserve 3 – Nandi Hills
- rr. Government Housing 0 – Nandi Hills
- ss. Proposed primary school
- tt. 6, Existing water tank – Nandi Hills
- uu. 3 open space – Nandi Hills
- vv. 4 special purposes plot

(All the above properties shall herein after be referred to jointly as the suit properties).

- ii) That an order of prohibition do issue to prohibit the 1st, 2nd, and 3rd respondent from doing any or thing that will give effect to the Nandi County Executive Committee resolution of June 7, 2019 – minute number CEC/EX/MIN/41/2019.
 - iii) That an order of prohibition do issue to prohibit the 2nd respondent from open in any register, new green card/and or issuing any new title and/or certificate of lease within Nandi County based on the Nandi/County Executive Committee resolution of June 7, 2019 – minute number CEC/EX/MIN/41/2019.
 - iv) That an order of mandamus do issue to compel the 1st, 2nd, and 3rd respondents to supply to the ex – parte applicants all documents in their possession which they have refused to release in relation to the following parcels or properties and/to engage the current registered owners of the lands and further to undertake public participation on the issue of repossession of any parcel as advertised in the local daily which is the subject of the Nandi County Executive Committee resolution of June 7, 2019 minutes number CEC/EX/MIN 412019, in respect of the suit properties.
 - v) Costs of this application be awarded to the *exparte* applicants.
2. The motion is founded on the provisions of the [Environment and Land Court Act](#), [Land Registration Act](#), [County Government Act](#), [Urban Areas and Cities Act](#) (No 12/2012). In the matter the [Registered Land Act](#) (now repealed), [Registration of Tittles Act](#), [Civil Procedure Rules](#) and the [Law Reform Act](#).

Exparte Applicant’s Case: -

It is the *exparte* applicant’s case as can be garnered from the grounds in support of the application, that

- i) The 1st respondent has published in the local dailies and advertisement suggesting that the *exparte* applicants properties were acquired unprocedurally and are thus to be repossessed for public interest and/or use.



- ii) The 1st respondent overlooked the legal requirements of public participation under the second schedule of the [Urban Areas And Cities Act](#).
- iii) The 1st respondent did not involve the National Lands Commissions either directly and/or through the County Land Management Boards.
- iv) The 1st respondent arrived at a decision that was without basis and was made without involving the affected parties.
- v) The 1st respondent overlooked section 14 of the [National Land Commissions Act](#) which provide that the review of all grants and dispositions to public land as the preserve of the National Land Commissions.
- vi) The 1st respondent overlooked article 67 (2) a) of the [Constitution of Kenya 2010](#), which stipulates that the functions of the National Land Commission included the management of public land on behalf of the National and County Governments.
- vii) The 1st respondent overlooked the requirement that any action that involves be looked into with the direct involvement of the National Land Commission.
- viii) The 1st respondent overlooked the interests conferred by registration, the rights of a proprietor and the evidentiary value of a certificate of titles as provided for under sections 24, 25 and 26 of the [Land Registration Act](#) respectively.
- ix) The *ex parte* applicants complied with all formalities required before they acquired their properties that are now under immediate threat of being reposed.
- x) The *ex parte* applicants have been in quiet possession and occupation of their respective parcels and have heavily invested in them through banks loans or any other source of income.
- xi) The *ex parte* applicants have tried to engage the 1st and 2nd the 3rd respondents but all in vain.
- xii) The 1st and 3rd respondents are in actual possession of all submitted documentary material which included the minutes signifying the necessary approvals and have neglected and/or refused to release them to the *ex parte* applicants.
- xiii) The 1st and 3rd respondents are acting in an opaque manner outside of the law and the *ex parte* applicants are apprehensive of their motive.
- xiv) The documentation showing the approval of the various parcels have not been forthcoming from the 1st and 3rd respondents to date and no valid reasons have been given by the 1st and 3rd respondent fir such indifference.
- xv) Most of the *ex parte* applicants properties appearing in the published list were acquired before the [2010 Constitution](#) was promulgated and the new laws came into effect.
- xvi) The *ex parte* applicants have not been accorded ample time to prove their ownership of their respective properties that have been listed in the published lest and are also disadvantages as the body seeking verification is also the someone in possession of the certified and signed minutes of the approvals to the various transactions.
- xvii) The 2nd respondent should be prohibited from opening any register new green card and/or issuing any new title and/or certificate of lease and/ or cancelling any register, green card and/or title and/or certificate of lease within Nandi County based on the Nandi County Executive Committee resolution of June 7, 2019 – minute number CEC/EX/MIN/41/20K.



- xviii) The *ex parte* applicants stand to suffer irreparable loss and damage if the orders sought are not granted.
3. 31 *ex parte* applicant did authorize Mr Mark Kogo to swear a verifying affidavit, the deponent reiterates the grounds mentioned above and has annexed documents relevant to the application including copies of green cards, copies of titles, head leases, building plans, minutes of approval/FR from survey departments.

The 2nd Respondent's Case: -

4. The 2nd respondent represented by the office of the Honourable Attorney General filed grounds of opposition. It is the 2nd respondent's case in the said grounds that;
- i) That the judicial review application is incompetent, unmerited and an abuse of court process.
 - ii) That the applicants have not met the threshold for the grant of the orders they are seeking in the judicial review application
 - iii) There is no specific legal duty owed by the 2nd respondent to the applicants and as such an order of mandamus cannot issue in the circumstances.
 - iv) The 2nd respondent cannot be compelled to issue applicants with any alleged documents unless issues of ownership arising are determined
 - v) The prayer sought by the applicants is too general and vague as it fails to disclose to the court what end the judicial review remedies of mandamus would be applied
 - vi) The 2nd respondents action are within the provisions of the law
 - vii) The application is otherwise incompetent misconceived, misplaced and is an abuse of the process of this honorable court and it ought to be dismissed.
 - viii) The applicants have failed to demonstrate sufficient ground to warrant the issuance of the orders/reliefs being sought and the application ought to be dismissed and/or struck out with costs.
5. The above grounds of opposition as drawn and filed by Miss Ghati Learned State Counsel form the basis of the 2nd respondent's case, having not filed a replying affidavit.

The 1st And 3rd Respondent's Case: -

The 1st Respondent is an officer of the 3rd Respondents. Both the CEC, Lands, Environment, natural Resources and Climate Change, Nandi County as well as the County Government of Nandi did not file any responses.

This matter was initially filed at the Eldoret ELC Court but was transferred to Kapsabet ELC upon established of the Court in September 2021. When the matter was first mentioned before the Court in Kapsabet on 2/9/2021, the Court directed the 2nd Respondent to file their responses the 1st and 3rd Respondent were not represented in Court.

6. On November 10, 2021, the 1st and 3rd Respondents were again given 21 days to file their Responses. On December 2, 2021, an order was made directing the *Ex parte* Applicant to serve the 1st and 3rd Respondents a fresh. When the matter was mentioned again on January 17, 2022 there was no affidavit of service in respect of service to the 1st and 3rd Respondents and a further mention to confirm service was slated for February 10, 2022.



7. Once again the matter was mentioned on 10/2/2022. On the said date Mr C F Otieno for the Exparte Applicant sought to file the Affidavit of service before close of business the said date; a mention was given for 16/2/2022.
8. On February 16, 2022 an affidavit of service was on record and the Court delivered a ruling deeming the Notice of Motion as unopposed as against the 1st and 3rd Respondents. The Exparte Applicant and the 2nd Respondent were directed to file their respective submissions in respect of the judicial review application.

Ex Parte Applicants Submissions: -

9. The Exparte Applicants submit that the 1st and 3rd Respondents caused to be published in the local dailies an advertisement which was to give effect to Nandi County Executive Committee Resolution of June 7, 2019 Minute Number CEC/EX/MIN 41/2019 which minutes they are aggrieved with as it suggests that the suit properties were acquired unprocedurally and were thus to be repossessed for public interest and/or use.
10. The Exparte Applicant submits that the said minutes overlooked the legal requirements of mandatory public participation as stipulated under Section 22 as read together with second schedule of the [Urban Areas and Cities Act](#) (No 12 of 2012).
11. That in arriving at the decision conveyed as minted CEC/EX/MIN 41/2019, the 1st and 3rd Respondents, did not involve the National Land Commission either directly and/or through the County Land Management Boards as provided under Section 14 of the [National Land Commissions Act](#).
12. In their submission, the Exparte Applicant has reiterated the grounds in support of the application. The Exparte Applicants submit that Registration, the Rights of a proprietor and evidentiary value of a certificate of title as provided for under section 24, 25 and 26 have been overlooked.
13. In support of their submissions, and for the orders sought the Exparte Applicants have cited the decision in the case of [Kenya National Examination Council v Republic – Exparte Gathenji Njoroge](#) (Nairobi Civil Appeal No 266 of 1996; as well as the [Uganda Electricity Board v Electricity Board Workers Union](#).
14. For the above reasons, the Exparte Applicants pray that the motion be allowed.

The 2nd Respondents Submissions:

15. The 2nd Respondent submits on whether or not an order of mandamus as expressed in the Notice of Motion ought to be granted as against the 2nd Respondent.
16. The 2nd Respondents further submits that at paragraphs 12 and 13 of the Notice of Motion, the Exparte Applicants have alleged as follows;
 - “ 12. The 1st and 3rd Respondents are in actual possession of all submitted documentary material which included the minutes signifying the necessary approvals and have neglected and/or refused to release them to the Exparte Applicants.



13. The documentation showing the approvals of the various parcels have not been forthcoming from the 1st and 3rd Respondents to date and no valid reasons have been given by the 1st and 3rd Respondents for such indifference.”
17. The 2nd Respondent further submits that there is no specific duty owed by its office to the Exparte Applicants and as such an order of Mandamus cannot issue against the 2nd Respondent.
18. In support of that line of submissions the 2nd Respondent submits that the Exparte Applicants has not demonstrated that the 2nd Respondent is in custody of any documentation in relation to the suit properties so as to have a statutory duty towards them.
19. In further support of this position the 2nd Respondents has cited the decision in *Republic vs Attorney General and Another – Exparte Jackson Musyoka Munyalo* (2015) eKLR, where the Court held inter alia
- “It is important to note than an order of mandamus is not an order of specific performance, like in a contract situation. A party in a judicial review seeking an order must show the existence of a statutory duty conferred or invested by statute upon some person, body or persons, or tribunal which such person, body of person or tribunal has failed to perform.”
20. The 2nd Respondent further submits that the Exparte Applicants have not demonstrated that they ever requested the 2nd Respondent to supply them with any documents, and that the 2nd Respondent failed and/or neglected to do so necessitating prayer for an order of mandamus against the 2nd Respondent.
21. In support of this limb of submissions the 2nd Respondent places reliance on the *Jackson Musyoka Munyalo* Case (*supra*) where the Court further observed;- where the Court further observed;-
- “However, as expressed hereinabove, the Applicant has to show that there is a duty imposed on the Respondent to act and the Respondent as failed to act in accordance with that duty. It has therefore been held that generally a demand for the actions to be taken is a prerequisite to the grant of an order of mandamus. (See the District Commissioner Kimabu v Republic and Others Exparte Ethan Njau (Civil Appeal No 2 of 1960) 1960 E A 109.”
22. Lastly the 2nd Respondent submits that if at all there are issues of disputes as to ownership, in respect of the suit parcels, it would not be ideal to issue the Exparte Applicants with any alleged documents, as doing so would amount to the 2nd Respondent occasioning a breach of law.
23. In support of this limb of submissions the 2nd Respondent relies on the decision in the *District Commissioner Kianabu - Republic and others (supra)* where the Court held inter alia. “Mandamus will not be granted if the performance of the act involved a breach of the law.”
24. The 1st and 3rd Respondent did not enter appearance nor file a Replying Affidavit. They did not participate in the proceedings, hence did not file submissions.

Issues for Determination: -

25. The Exparte Applicant did not identify any issues for determination while the 2nd Respondent identified a sole issue as to whether or not an order of mandamus could issue against the 2nd Respondent.
26. The Court frames the following as the issues for determination in this proceedings.



1.

- (a) Whether the Exparte Applicants have made out a case for grant of Judicial Review Orders sought?
- (b) Whether the orders sought can issue against the Respondents as prayed.
- (c) Who bears the costs of the proceedings?

Analysis and Determination:

27. The Judicial Review proceedings before Court for determination have brought under the provisions of the law cited in paragraph 2 of this judgment. The Exparte Applicant did not invoke the provision of *Fair Administration Act* and Article 47 of the *Constitution*.
28. It follows therefrom that having not invoked the *Fair Administrative Act*, and Article 47 of the *Constitution*, the Courts jurisdiction is limited to interrogating the decision making process and does not extend to consider and analysis so as to give a merit decision.
29. The Court shall therefore determine the matter based on the decision making processes only. The Exparte Applicants are aggrieved by Minute No CEC/EX/MIN/41/2019, which minute gave rise to the advert in the local dailies that the suit properties are to be repossessed for public interest and use.
30. From the Judicial Review pleadings, the gravamen of the Exparte Applicants grievances are against the 1st and 3rd Respondents. At paragraph 12 and 13 of the motion, as well as paragraphs 19 and 20 of the verifying affidavit, the grievances giving rise to the suit, seem to have been committed by the 1st and 3rd Respondents, who unfortunately did not defend this suit.
31. As against the 1st and 3rd Respondents the proceedings remain undefended. Although the suit against the 1st and 3rd Respondents was undefended and the depositions are unconverted at all. The Exparte Applicants are still required to discharge their burden of proof, to be entitled to the relief's sought as against the 1st and 3rd Respondents, as was held in the case of *Karugi and Others v Kabiya and 3 others* [1983] eKLR where the Court of Appeal held:-

“The burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended. The burden of proof is no way lessened because this is heard by way of a formal proof.”
32. In their application before Court the Exparte Applicant are aggrieved by a decision of the 1st and 3rd Respondents. They cite that the decision was arrived at without input from the National Land Commission as required under Section 14 of the *National Land Commission Act*. And further that under section 22 of the *Urban Areas and Cities Act* which requires public participation.
33. With regard to the above submissions whereas under Section 14 of the *National Land Commission Act* granted the National Land Commission the right to review grants, the said provision granted a time frame of 5 years from the enactment of the Act, hence the said provision no longer applies and is irrelevant in this case. The said section does not aid the Exparte Applicant's case, herein.
34. With regard to the submission that the decision as conveyed in minute CEC/EX/MIN41/2019 to repossess the suit properties was reached at without public participation as required under Section participation as required under Section 22 of the urban cities Act.



Indeed Section 22 of the urban areas and cities Act requires public participation in instances including, section 22 (1) (a) (v) “.....proposed development plans in the County and the National Government.”

35. In annexure MK1 the advert in the local newspaper, the decision was to repossess the suit properties for public interest/use.

It follows therefrom that the public use by the Respondent 1st and 3rd Respondent would fall under paragraph (v) of Section 22 (1) (a) of the Urban Areas and Cities Act noting that Kapsabet Municipality falls within the jurisdiction of the Urban Areas and cities Act, and therefore required public participation.

36. In so far as the notice exhibited as Annexure MK1 conveyed the decision to repossess the Exparte Applicants properties without their participation, there was failure to comply with the statutory provision.

37. The Exparte Applicant argue that their rights as title holder have been infringed by the decision to repossess their suit properties; contrary to sections 24,25 and 26 of the Land Registration Act. Annexure MK2 are copies of certificate of leases in respective of Kapsabet/Township 177, Annexure MK3 copy of green card in respect of Kapsabet/Municipality/365, and minutes for allocation of the properties Annexure MK4 – relates to grant No RN 5041 – Nandi Hills;

Annexure MK – Green card, Kapsabet Municipality/83. From the above samples it is apparent that most of the suit properties had been titled.

38. It follows that the suit properties were registered in the name of the Exparte Applicants and the Exparte Applicants enjoy protection of their titles under Section 24, 25 and 26 of the Land Registration Act. The 1st and 3rd Respondents have not taken out proceedings seeking cancellation of the titles, neither were the Grants reviewed by the National Land Commission since the mandate to review the Grants under Section 14 of the National Land Commission Act has lapsed by the time the decision was made; in 2019.

39. It follows therefore that the decision to repossess the suit properties was not sanctioned by any law and out rightly offends the protection of the titles provided under Section 26 of Land Registration Act in absence of proceedings and decision of a competent Court of law to cancel the said titles.

40. Accordingly the Court finds that the Nandi County Executive Committee Resolution of 07.06.2019 – Minute number CEC/EX/MIN 41/2019 that provides for the repossession of the suit properties to belonging to the Exparte Applicants in contravention of Sections 24, 25 and 26 of Land Registration Act, the Exparte Applicant have thus made out a case for issuance of Judicial Review Orders.

41. On the second issue as to whether the Judicial Review orders sought can be issued as prayed. The 2nd Respondent submits that their office had no statutory duty that it breached as against the Exparte Applicant hence the orders of mandamus against it cannot issue.

42. The Exparte Applicants have vide paragraphs 12 and 13 of the motion as well as paragraph 19 and 20 of the verifying affidavit as summed up in paragraph 30 of this judgment laid blame to the 1st and 3rd Respondents, as the ones who are in actual possession of their documents.

43. I agree with the 2nd Respondents submissions that an order of mandamus against them while they are not in possession of the documents would cause hardship to them, hence as drawn prayer No 4 of the Motion cannot issue against the 2nd Respondent.



44. Prayer 4 of the Motion has equally be drawn in generality and it were to be granted as prayed, it can be misconstrued as having conferred legitimacy to titles that the 1st and 3rd Respondents contend were illegally acquired. Consequently the Court shall not grant prayer No 4 as drawn.

Disposition:

45. Having found that the Nandi County Executive Committee Resolution of June 7, 2019 Minute Number CEC/EX/MIN/41/2019 to be illegal, the Court proceeds to enter judgment for the Exparte Applicant in the following terms.

- i. The decision of the 1st and 3rd Respondent known as Nandi County Executive Committee Resolution of 07/06/2019 Minute Number CEC/EX/MIN 41/2019 is called into this Court and an order of certiorari is hereby issued quashing that decision, in terms of prayer No 1 of the Notice of Motion dated August 19, 2019.
- ii. The 1st, 2nd and 3rd Respondent are hereby prohibited from doing any act that will give effect to the Nandi County Executive Committee Resolution of June 7, 2019 minute Number CEC/EX/MIN 41/2019 including opening any Register, new green card and/or issuing any new title or certificate of lease and/or cancelling any Register, green card and/or title.
- iii. An order of mandamus hereby issues to the 1st and 3rd Respondents to return all the documents they received as part of the verification process from the 32 exparte Applicants in relation to the suit properties.
- iv. Costs of the suit is awarded to the exparte Applicants.
- v. Judgment accordingly.

DATED AT KAPSABET THIS 19TH SEPTEMBER 2022.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. C.F. Otieno for ExParte Applicant

Ms Jepkemei holding brief for Ms. Ghati for 2nd Respondent.

No appearance for 1st and 3rd Respondents.

