Republic v Naivasha District Land Registrar & 2 others; Nganga (Suing as trustees of the Members Naivasha Uiguano Group) & 2 others (Exparte); Muneria & another (Applicant) (Suing as trustees on behalf of 94 other Members of Naivasha Uiguano Group) (Environment and Land Judicial Review Case 2 of 2021) [2022] KEELC 14790 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14790 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2021

FM NJOROGE, J

NOVEMBER 16, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

NAIVASHA DISTRICT LAND REGISTRAR ..... 1ST RESPONDENT

RIFT VALLEY REGIONAL SURVEYOR ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

GRACE WANJIRU NGANGA (SUING AS TRUSTEES OF THE MEMBERS NAIVASHA UIGUANO GROUP) ..... EXPARTE

JENNIFER WARINGA MIARAHO (SUING AS TRUSTEES OF THE MEMBERS NAIVASHA UIGUANO GROUP) ..... EXPARTE

JECINTER WANGARE NYOIKE (SUING AS TRUSTEES OF THE MEMBERS NAIVASHA UIGUANO GROUP) ..... EXPARTE

AND

JOSEPH LOSHORUA MUNERIA ..... APPLICANT

FRANCIS MWAURA THIONG'O ..... APPLICANT

SUING AS TRUSTEES ON BEHALF OF 94 OTHER MEMBERS OF NAIVASHA UIGUANO GROUP

RULING

1. The Applicants filed a Notice of Motion dated April 19, 2022 seeking the following orders:

    1. spent.

    2. spent

    3. That the applicant be enjoined in this suit as an Interested party.

    4. That this honourable court be pleased to set aside its judgment delivered on February 28, 2022 and order denovo hearing.

    5. That this honourable court be pleased to review its judgment delivered on February 28, 2022.

    6. That costs of this application be provided for.

2. The grounds on which the application is made appear on its face and are also in the supporting affidavit of Francis Mwaura Thiongo sworn on April 19, 2022. They are that the applicants are trustees of the Naivasha Uiguano Group who together with 93 other members were issued with title deeds upon payment of the requisite charges to the group; that their titles resulted from the subdivision of LR Number Gilgil /Gilgil Block 1 /7413 (Kekopey); that they had no knowledge of the instant suit yet the orders issued in the judgment affect them whereas they were not accorded a hearing; that the ex parte applicants were bound to serve them with the judicial review notice of motion or the court should have moved suo motu to order service of every person affected by the suit. The applicants allege that the ex parte applicants concealed the suit from them with ill motive, to deprive them of their land; that the applicants would irreparably suffer if the orders sought are not granted and that this court has jurisdiction to issue the orders sought.

3. Grace Wanjiru Nganga the 1st ex parte applicant with authority of the rest of the ex parte applicants, who are described as trustees of the Naivasha Uiguano Group, swore the affidavit in response to the instant application on May 4, 2022. The response is that the appointment of the applicants as trustees of the Naivasha Uiguano Group is illegal null and void; that upon filing the judicial review proceedings in JR No E003 of 2020 on November 30, 2021, the court gave a stay order prohibiting any entries in the register of the parcel number Gilgil/Gilgil Block1/7413 (Kekopey) which they served on the 1st respondent who nevertheless violated it by making an entry subdividing the suit land into the sub-plots now claimed by the applicants. There is an affidavit of service attached to the deponent's affidavit. The ex parte applicants maintain that the applicant's titles were not in the register by the time the instant judicial review application was filed, and neither they nor the court could have known of the existence of any claim by or interest of the applicants; The ex parte applicants maintain that for the foregoing reasons the titles of the applicants processed in violation of a court order are illegal and incapable of conferring any proprietary interest on the persons named on their face. The ex parte applicants aver that their case was purely about the impropriety of the process by which the respondents cancelled their title deeds and registry index map which is a matter that in their view does not concern the applicants, against whom no orders had been sought. It is therefore the position, state the ex parte applicants, that the instant application evinces no case for joinder, and the applicants have not demonstrated how they, perchance they had been joined, could have assisted the court to effectively determine the issues involved. Finally, the ex parte applicants state that the judgment has already been executed and this court is now functus officio, that it is not possible to be joined in a finalized judicial review case. The ex parte applicants also fault the grounds relied on as not legally befitting an application for review.

4. Alongside their replying affidavit the ex parte applicants also filed a notice of preliminary objection which they subsequently amended on June 22, 2022. They also filed on May 9, 2022 grounds of objection to the proposed prayer for stay of execution.

5. It is clear that the only principal issues relevant to the application at hand, and which arise from the application, the notice of preliminary objection and the replying affidavit cumulatively are as follows:

    a. Whether the applicants can be joined to the suit while the judgment has already been delivered and executed in the matter;

    b. Whether a judgment in a judicial review application can reviewed or set aside under the Civil Procedure Rules or the only remedy is an appeal;

Submissions of the parties.

6. The applicants filed their submissions on October 12, 2022. They addressed the merits of both the application and the preliminary objection. They aver that the notice of preliminary objection is misconceived baseless and an abuse of the court process.

7. After giving a background of the case and setting out verbatim the orders issued in the judgment in the instant suit, they addressed the notice of preliminary objection.

8. They aver that the present applicants have been directly affected by the judgment issued in the matter in that their green cards have been deleted thus rendering the titles that they hold to be useless; that the decree that yielded the said results was issued without their participation in the suit; that that infringed on their constitutional rights to be heard as guaranteed by Article 50 of the *Constitution*. They aver that the orders issued removed the boundaries that define their portions of land with the consequence of rendering them unable to transact using their titles.

9. They rely on Order 1 Rule 10 of the *Civil Procedure Rules* on substitution and addition of parties. They state that that order implies that a party can only be joined to proceedings only when the same are ongoing. They state that the application before court is brought under Order 45 of the Civil Procedure Rules and therefore the provisions of Order 1 Rule 10 are inapplicable as the application seeks to review a judgment already delivered. In addition, they refer to Section 80 whose letter is given flesh by the rules in Order 45. They stress that 'any person', including persons not involved in the suit, who considers himself aggrieved by a decree or order may apply for review to the court which passed the decree or made the order; that these provisions give locus standi even to a non-party to apply. They cite the cases of *Accredo Ag & 3 Others v Steffano Uccelli & Another 2017 eKLR*; *JMK v MKM & another 2015 eKLR* for that proposition.

10. Regarding the second ground in the amended notice of preliminary objection, the proposed interested parties who are the applicants corrected the ex parte applicants' objection to the application for review on the ground that it is incurably defective for not being based on any of the grounds prescribed for review and that it offends the provisions of section 8(5) of the *Law Reform Act* and that the judgment can only be subject to an appeal. The applicants stress that they applied to the court under section 80 of the *Civil Procedure Act* and Order 45 of the Rules. They emphasize that the two provisions grant both aggrieved parties and aggrieved non-parties an opportunity to approach the court through a review application, and add that in the present case the applicants have demonstrated that they have been adversely affected and their rights violated by the decision of the court, and that realization should compel the court to hear them as per the *Constitution*. They cite the case of *Republic Vs Chief Land Registrar & 2 Others Ex Parte Michael Njenga Waweru 2017 eKLR*.

11. Regarding the 3rd ground of the amended preliminary objection, the applicants state that the objection based on the locus to represent the members of the Naivasha Uiguano Group is baseless. They state that there is no law enacted governing the incorporation or operations of self-help groups, but only rules of registration provided by the Ministry of Labour Social Security Services. They also aver the groups are governed by constitutions made by the respective self-help groups, or by laws made in meetings which are documented through minutes. These, they state, govern who occupies what office in the groups. They aver that the provisions of the Trustees Act and the *Societies Act* do not govern self-help groups. They state that the applicants were elected as required and cite minutes attached to their affidavit in support of the motion. They aver that the ex parte applicants have no business deciding who is or is not properly elected.

12. Regarding the 4th ground that the subdivision of the suit land was done in violation of court orders, the applicants submit that it is not a point of law that can be deemed a proper preliminary objection; that in any event the orders issued in the JR No 003 of 2020 which was later withdrawn, and register entries regarding new titles were made two days after the said withdrawal and therefore were not barred by any litigation.

13. Regarding the 5th ground, namely, that the applicants are introducing new issues that can not be determined in a judicial review application, it is submitted that it is also not a point of law as perceived by *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors [1969] EA 696.*

14. As to the merits of the application the applicants submitted that they seek to be made parties, that the judgment be reviewed and set aside and that the matter be heard de novo. They aver that they seek the court's intervention in respect of a matter that was heard to their exclusion, and that they are aggrieved. They state that their mutation was expunged, a restriction registered against the titles removed, and the entry establishing their titles removed while the court order never authorized such. They are therefore rightly before the court, they state, and that the court has jurisdiction to grant the orders sought. They rely on the cases of *Nakumatt Holdings Limited Vs Commissioner of Value Added Tax [2011] eKLR* where the Court of Appeal stated that the superior court has residual power to correct its own mistakes. They therefore invite this court to exercise its inherent power to review its own judgment as it has aggrieved them. They aver that they have demonstrated their interest in the suit land and that this court has a duty to protect their interest therein under Article 40 of the *Constitution*.

15. Citing the decision in *Daniel Nganga Kamande Vs Ngucanirio Famers Company Ltd [2012] eKLR*, the applicants aver that judicial review is a special procedure that is neither criminal nor civil and which not subject to most of the laws in civil matters, but aver that nevertheless, this court can still exercise its inherent powers provided by the *Constitution* and the *Environment and Land Court Act* as it is expected to perform justice.

16. Citing Section 80(2) of the *Land Registration Act* and JMK vs MWM [2015] eKLR, the applicants aver that the decree and judgment are in violation of the rules of natural justice. They state that even a court order should not effect any rectification of the register if that action would affect the title of a proprietor in possession who had acquired title by way of valuable consideration. Citing Republic Vs Chief Land Registrar & 2 Others Ex Parte Michael Njenga Waweru 2017 eKLR, they stress that the court would be abdicating its duties to perform justice even where it have been established that the rules of natural justice have been violated, that allowing the judgment in place to stand would occasion a great miscarriage of justice.

Submissions of the Ex-Parte Applicants/Respondents

17. I will refer to the ex-parte applicant's alternately as 'respondents' in this ruling.

18. The respondents filed their submissions on October 21, 2022 responding to the merits of the application and the preliminary objection. In their submissions they addressed the registration status of parcel numbers Gilgil/Gilgil Block 1/9563 to 9570. They stated that they are registered in the names of Elias Ngugi Maina and Grace Nduta Theuri as proprietors in trust of Naivasha Uiguano group as admitted by the applicants and confirmed by the District Land Registrar in his gazette notice dated December 4, 2008. The original title deed is said to have been surrendered for subdivision on June 2009 and is thus unavailable. They contest the validity of the title deed issued to the applicant's faction on April 7, 2009 and state that when that latter title was issued, their title was still inexistence until July 2009 when it was surrendered for subdivision. They relied on the case of *Wamboi v Mwangi & 3 others [2021] KECA 144 KLR (CIV) (19/11/2021)* for the proposition that the earlier title they hold prevails over the applicant's title. They asserted that Elias Ngugi Nganga and Grace Nduta Theuri are the proper trustees of the group; citing *National Bank of Kenya Vs Wilson Ndolo Ayah [2009] eKLR* that the procedure followed by the applicants to revoke the appointment of the same trustees was ineffective in law. They averred that they were appointed as trustees by court in the case *Grace Wanjiru Nganga & 2 others v Elias Ngugi Nganga & another [2018] eKLR* and that therefore the applicants' joinder to this suit after final judgment regarding the lawful trustees of the group would be embarrassing in law. They cite E*lizabeth O Odhiambo Vs South Nyanza Sugar Company Limited [2019] eKLR* and submit that the applicants are bound by their pleadings and that the applicants desire to be joined to this this suit as trustees of the group without demonstrating any other capacity other than as trustees to support their application. They submit that the court should not recognize the replacement of the group's trustees by the applicants as it was in violation of the law and rely on *Daniel K Yego & 3 others v Paulina Nekesa Kode [2016] eKLR*. They aver that if the applicants' response is that they were not bound by the law in the *Societies Act* and Trustees Act, then they must be held to have successfully changed trustees through the resolution of an unlawful assembly, and thus they lack locus standi; that the applicants have to comply with the law on representative suits yet the present application is not a representative suit. They state that for the application to qualify as representative proceedings, they ought to have expressed to have brought it on their own behalf and on behalf of the other members with written authority from all of them which should have been filed with the application

19. Regarding joinder, the respondents aver that Order 1 Rule 10 of the Civil Procedure Rules is not applicable as judgment has issued; that they are strangers to the case citing *Mukoma Wa Njiri v National Land Commission & another [2021] eKLR*, they submitted that prior leave of the court must be secured by any non-party seeking joinder in order to accrue the requisite locus standi to found the application for review. They submit that since the applicants have abandoned the application for leave, the entire application ought to fail.

20. Regarding whether the judgment in this matter should be reviewed, the respondents, citing Biren Amritlal Shah & another v Republic & 3 others [2013]eKLR and *Republic v Land Registrar Trans Nzoia County & another Ex-Parte Turbo Munyaka Cooperative Society Limited & 4 others [2017] eKLR*, the case of Annabella Kiriinya & Batram Muthoka (sued as Chairman and Chief Executive Officer of the Agricultural Society of Kenya Nairobi) Judicial Review Application No 55/2020 and the provisions of Sections 8(3) and (5) of the *Law Reform Act* and urged that a judicial review judgment is final and only subject to a single return and any dissatisfied parties' only recourse is an appeal as provided by Section 8(5).

21. Besides the above argument, the respondents submitted that even if Order 45 CPR was applicable, the applicants have not brought themselves within the purview of the said rules which prescribe grounds of review. They stated that the grounds proffered by the applicants to wit that they are purchasers of the subject land, that the judicial review was filed without their

knowledge and that the court or the Ex-parte applicants should have notified them of the case do not qualify as grounds under Order 45. They rely on *Nakuru Industries Limited v Sirbrook Kenya Limited [2017] eKLR* where review was sought without the applicant bringing itself under the parameters in Order 45 Rule 1 (1). They also submit that there is no mistake of law and therefore the exercise of review under inherent jurisdiction of the court as proposed by the applicants does not apply; besides they aver that the inherent powers of the court were not invoked on the face of the application. Nevertheless, they also argued that under inherent jurisdiction of the court the proper grounds as enumerated in *Robert Tom Martins Kibisu v Republic [2018] eKLR* that is, fraud and deceit in the obtainance of the judgment, nullity of the judgment, judgment obtained by a misconceived consent between the parties and judgment based on repealed law do not apply to the instant case.

22. Turning to the merits of the application, the respondents submit that they were not aware of the applicants' subdivisions and so could not bring the applicants on board in the suit and that in any event the information sought to be brought to the attention of the court would not change the outcome of the case in a review and therefore the dispute ought to be taken to an ordinary court; that there is no evidence provided by the applicants that the respondents concealed knowledge of those subdivisions; that the subdivisions were registered a day after the suit was filed and the respondents could not have known of the applicants' intentions. The respondents aver that they learned of the subdivisions from the replying affidavit filed in JR No 3 of 2020 when the Naivasha District Land Registrar furnished a certified copy of the register and the relevant information on the cancellation of the 8 title deeds. They aver that there is no proof that a meeting was held in the Land Registrar's office on the November 26, 2020 in which all the parties to the dispute are said to have attended, and add that it has not been proved that there was a relationship between the respondents and the attendees. Further he stated that the ex-parte applicants were appointed trustees in February 2020 in Nakuru ELC 407/2017 in which notice was published in the local newspaper inviting parties to join but the applicants never joined in the suit and the judgment is therefore binding on them.

23. Citing *Merry Beach Limited v Attorney General & 18 others [2018] eKLR* for the proposition that every man is presumed to attentive to what passes in the courts of justice, the applicants refer to the 1st respondent's response in Nakuru JR 3/2020 attaching numerous letters and documents from the applicants which allegedly proves that the applicants were aware of the present suit and chose to advance their defence through the Land Registrar by providing him with such documents for filing in court.

24. Lastly on the merits, they aver that the applicants who claim to be members of the group must be presumed to have been represented by the legal trustees of the group and did not need to join in the proceedings.

25. Finally, the respondents addressed the doctrine of lis pendens stating that the subdivisions of the applicants came about while this suit was pending in court and rely again on the Merry Beach case (supra) and *Grace Kamene v Joyce Rigiri W/O David Mbogori, Ashford Gerrard Riungu & Another [2022] eKLR* and *Moonlow Assets Limited Vs National Land Commission & 4 Others Ralph Edward Nzwii & Another [2021] eKLR*.

26. The respondents wound up their submissions by urging that the appropriate relief regarding the dispute over ownership of land and whether there was fraud can only be addressed in an ordinary suit and not in a judicial review application and relied on *Republic v District Land Registrar Nakuru Ex-Parte Lawi Kigen Kiplagat; Lee Maiyani Kinyanjui (Interested Party)*

[2021] eKLR for that proposition and applied for the application dated April 19, 2022 to be dismissed with costs.

Determination

Issues for determination

27. I have set out hereinabove the contents of the application and the response with as much fidelity to the record for clarity as to the exact nature of the dispute leading to the present application. On a preliminary basis I must note that the ex parte applicant's objections to the locus of the applicants to apply for review based on allegations that they are not the trustees of the Naivasha Uiguano Group can not be allowed to stand. Any person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. I am echoing the provisions of Article 50(1) of the *Constitution*. It is also evident from the provisions of Order 53 rule 4 that any person whom the court considers ought to be served should be served with the judicial review notice of motion.

28. Indeed, it is under that rule and Order 53 rules (2) and (3) under which the applicants have submitted that that the ex parte applicants were bound to serve them with the judicial review notice of motion, or the court should have moved suo motu to order service of every person affected by the suit.

29. Order 53 Rules (2) and (3) provide as follows respectively:

    (2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

    (3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

30. The applicants state that they were unaware of the proceedings which claim the ex parte applicants have disputed; the case of the ex parte applicants on this point is that the applicants were aware of the judicial review proceedings and that they chose to remain in the background as the Land Registrar, whom they surreptitiously armed with copies of their documents, fought their battle for them in court. In other words, the ex parte applicants allege that the present applicants participated through proxy in the proceedings that gave rise to the impugned judgment. This court grappled with the issue of non-service of a judicial review notice of motion in the case of Republic v Land Registrar Trans Nzoia County & another Ex-Parte Turbo Munyaka Cooperative Society Limited & 4 others [2017] eKLR. It observed as follows while addressing the issue:

> ' The instant case presents a peculiar situation in the sense that there is no evidence on record to demonstrate that the parties, that is the applicants, herein that are adversely affected by the order of mandamus issued by this Honourable court were notified and or served with the instant proceedings in accordance with the provisions of Order 53 Rule 3(2) of the Civil Procedure Rules. The question that follows therefore is whether this Honourable Court should turn a blind eye on failure on part of the Ex-Parte Applicant to notify all the affected parties and condemn the Intended Interested Parties/Applicants unheard. The Ex-

Parte Applicant had a duty to serve upon and/or notify the members of the Co-Operative Societies herein the applicants included, of these proceedings.'

31. It is noteworthy that though the ex parte applicants dispute the trustee status of the applicants, they do not dispute the fact that the applicants are members of the Naivasha Uiguano Group, and in this court's view, that membership could have granted them an opportunity, had they applied, to be joined to the judicial review application and be heard. In the Turbo Munyaka case (Supra) this court declined to be drawn into the issues of the internal disputes within the management of the society and redirected that dispute to another forum by stating as follows:

> ' 35. It follows therefore that the members herein appear to have internal disputes within the management of their societies. This is so because the Applicants are accusing the said Onesmus Gichiri Njoroge, of not being the chairman of a defunct Turbo Munyaka Cooperative Society Limited and of concealing information from the court. It follows therefore that if the members are not agreeable on the membership and / or ownership of the plots secured by their respective Co-operative Societies then it is the mandate of the Co-operative Societies Tribunal as established under Sections 76 and 77 of the *Co-operative Societies Act* Cap 490 Laws of Kenya to deliberate on their dispute. Section 76 states as follows: -
>
> '76. Disputes
>
> (1) If any dispute concerning the business of a co-operative society arises: -
>
> (a) Among members, past members and persons claiming through members, past members and deceased members; or
>
> (b) Between members, past members or deceased members, and the society, its Committee or any officer of the society; or
>
> (c) Between the society and any other co- operative society.
>
> It shall be referred to the Tribunal.
>
> (2) A dispute for the purpose of this Section shall include
>
> (a) A claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
>
> (b) A claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) A claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.'

32. The dispute as to who is the proper trustee of the Naivasha Uiguano Group is not therefore an issue that should be validly placed at the doorstep of this court for determination or even for consideration as a ground for review or setting aside the judgment of the court issued earlier in this matter.

33. It is on the basis of the foregoing argument that this court declines to grant the ex parte applicants' plea that this court should deny the applicants a hearing on the basis that they are not the valid trustees of the Naivasha Uiguano Group.

34. Notwithstanding the length and breadth of the submissions of the parties, and I must admit that they are quite detailed, the only task before this court is to establish if the judgment delivered in this judicial review application is amenable to review or setting aside either under the Civil Procedure Rules cited by the applicants or under the inherent jurisdiction of the court, or whether it can only be appealed to the Court of Appeal. It would appear that there is that ubiquitous temptation for parties to address the court on contested factual matters in applications for review or setting aside of judicial review judgments which, while counsel for parties have blissfully immersed and gorged themselves to their full in submissions, the courts have consistently avoided. To delve into any contested factual matters raised in the application and the parties' affidavits other than the legal issues distilled herein above for determination would in the circumstances be improper, and may amount to usurpation of a civil court's jurisdiction.

35. In the case of *Republic v The Chief Land Registrar & Another Ex parte James Njoroge Njuguna [2012] eKLR* the court observed as follows in an application for review and setting aside a judicial review judgment:

> ' I take the position that it would be improper for me to make specific findings on matters which may well be the subject of full determination at a later stage. My conclusion is that the issue of jurisdiction and service of the motion for judicial review are decisive in the matter and those are the issues I will deal with.'

36. In the case of Republic v Land Registrar Trans Nzoia County & another Ex-Parte Turbo Munyaka Cooperative Society Limited & 4 others [2017] eKLR whose facts are not very different from those of the present case, it was submitted that the court was mistaken on the correct position on the ground after being misled by the Ex-Parte Applicant. It was further submitted that if the judgment of this Honourable Court made on March 17, 2017 in that matter was not reviewed, the applicants who are among the original members of Munyaka Trading Centre would be adversely affected by the order of Mandamus issued therein since the implementation of the said order would make the applicants and other original members of Munyaka Trading Centre to lose their plots. This court observed as follows in the Turbo Munyaka case, (Supra):

> ' For now I am persuaded that this court can not look into the merits of the applicant's claim to the parcels of land subject matter of the dispute. Can this court determine in these proceedings whether the said Gichiri was or was not the chairman, or whether the plots are owned by the applicant or by the respondent? The answer is 'no'. This court is ill equipped to do that, given the restrictive parameters within which judicial review applications should

be considered and determined. Granting the applicants' application may raise questions as to whether this court has not gone beyond the mandate granted it in matters judicial review.'

37. Judicial review applications are neither criminal nor civil in nature. See *Commissioner of Lands v Kunste Hotels Ltd (1995-1998) 1 EA 1*. The *Civil Procedure Act* in its preamble states that the Act is 'An Act of Parliament to make provision for procedure in civil courts'. The present application has been brought under the provisions of inter alia Order 45 Rule 2 and Order 22 Rule 22 of the Civil Procedure Rules. The chamber summons for leave filed by the ex parte applicants on March 18, 2021 was brought under inter alia Order 53 (1) And (4) of the Civil Procedure Rules, and Section 7 and Section 8 of the *Fair Administrative Action Act* No 4 Of 2015.

38. Sections 7 and 8 of the FAA provide as follows:

7. Institution of proceedings

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–

(a) A court in accordance with section 8; or

(b) A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if–

(a) The person who made the decision–

(i) Was not authorized to do so by the empowering provision;

(ii) Acted in excess of jurisdiction or power conferred under any written law;

(iii) Acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) Was biased or may reasonably be suspected of bias; or

(v) Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) The action or decision was procedurally unfair;

(d) The action or decision was materially influenced by an error of law;

(e) The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) The administrator failed to take into account relevant considerations;

(g) The administrator acted on the direction of a person or body not authorized or empowered by any written law to give such directions;

(h) The administrative action or decision was made in bad faith;

(i) The administrative action or decision is not rationally connected to–

(i) The purpose for which it was taken;

(ii) The purpose of the empowering provision;

(iii) The information before the administrator; or

(iv) The reasons given for it by the administrator;

(j) There was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) The administrative action or decision is unreasonable;

(l) The administrative action or decision is not proportionate to the interests or rights affected;

(m) The administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) The administrative action or decision is unfair; or

(o) The administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that–

(a) The administrator is under duty to act in relation to the matter in issue;

(b) The action is required to be undertaken within a period specified under such law;

(c) The administrator has refused, failed or neglected to take action within the prescribed period.

8. Period for determination of applications and appeals

An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.

39. The notice of motion itself was brought under Order 53 (3) and (4) of the Civil Procedure Rules unlike the chamber summons for leave which is expressed to have been brought under Order 53 (1) and (4) of the Civil Procedure Rules, and Section 7 and Section 8 of the *Fair Administrative Action Act* No 4 Of 2015. It can only be presumed, it not having been expressly stated, that the substantive motion was brought under Section 7(2)(v) of the Fair Administrative Act. That notwithstanding, that FAA does not make provisions similar to those of Sections 8(3) and 8(5) of the LRA and this court hence has to look up to only the LRA and Order 53 of the Civil Procedure Rules on the issue of whether a decision in judicial review proceedings can be reviewed or set aside. And those provisions clearly state as follows:

' 8. Orders of mandamus, prohibition and certiorari substituted for writs

(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo 6, c 63) of the United Kingdom empowered to make an

order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.'

40. In the case of Biren Amritral Shah and Anor vs Republic & 3 Others 2013 eKLR it was held by the Court of Appeal, in reliance on the provisions of Section 8 of the *Law Reform Act*, that with respect to judicial review a court is exercising its powers under Order 53 of the Civil Procedure Rules where no provision for review of its own decisions has been made, and therefore the court has no jurisdiction to review its own orders. In the Biren Case (supra,) the Court of Appeal observed as follows:

' Section 80 of the CPA is clear. It stipulates, that a review is allowed from an order or a decree from which an appeal is allowed or not allowed by the Act. It therefore follows that, the High Court can review its own orders or decrees in suits where the court is exercising its ordinary jurisdiction.

With respect of judicial review are set out. It is noteworthy that, there is no provision for preview by the superior court of its own decisions in judicial review, once rendered.

Section 8(5) of the *Law Reform Act* does however specify that:

'Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.'

It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the *Law Reform Act*, the High Court had no jurisdiction to review previous order.'

41. In the case of Republic v Chief Land Registrar & 2 others ex parte Michael Njenga Waweru [2017] eKLR the court stated as follows:

' 23. It is therefore my view that whereas the Court has no power to review a decision made on judicial review pursuant to section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, it has a residual jurisdiction pursuant to its inherent powers to correct its mistakes and this may, where merited, include granting orders whose effect may amount to a review. That the Court may not review its decisions under the *Civil Procedure Act* is in my view informed by the provisions of section 3 of the *Civil Procedure Act* which provides:

'In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.'

24. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the *Civil Procedure Act* are inapplicable. It must be remembered that apart from Order 53 of the Civil Procedure Rules, the provisions of the *Civil Procedure Act* and the Rules made thereunder do not apply to judicial review proceedings. Accordingly Order 45 of the Civil Procedure Rules would similarly not apply to these type of proceedings.'

42. The decision of the Court of Appeal in the Biren Case (supra) is therefore clear that no order or rule outside Order 53 which deals with judicial review, including rules under Order 45, is applicable to facilitate the setting aside of a judgment made in judicial review proceedings. For that reason, I need not therefore consider whether the applicant's application has satisfied the conditions set down for review under Order 45 of the Civil Procedure Rules or not.

43. In the case of Republic v Land Registrar Trans Nzoia County & another Ex-Parte Turbo Munyaka Cooperative Society Limited & 4 others [2017] eKLR this court was faced with a similar situation as in this case, where some applicants had not been heard in judicial review proceedings that ended up with an order directing the Land Registrar to issue titles to their adversary, the ex parte applicant. The ex-parte applicant was a body that according to the applicants was non–existent, its name having been changed. This court adopted the course taken by the Court of Appeal in the Biren Case (supra) and applied the provisions of Section 8 of the *Law Reform Act* and declined to grant orders of review and/or setting aside. That was the earlier position also taken by the court in the *Kuria Mbae v The Land Adjudication Officer – Chuka and Another Nairobi HC Misc Appl No 257 of 1983* (Mbito and Mango JJ) as follows:

' There is no doubt or dispute that a party aggrieved by the decisions of this court in granting or refusing an order of certiorari is entitled to appeal to the Court of Appeal. However, according to section 8(3) of the Act, this court's order on such application is final and cannot be subject of pleadings or prohibition. There is also no provision in the said Act or any other law making such a prerogative order of this court subject to the usual pleadings available in proceedings under the *Civil Procedure Act*.'

44. In the present case too, I hold that under Order 53 of Civil Procedure Rules and Section 8(3) and Section 8(5) of the *Law Reform Act*, no orders of review may issue on a judgment made in a judicial review application.

45. What about the inherent jurisdiction of the court? Can it enable a setting aside of the same judgment? First it must be observed that the inherent jurisdiction of the court is also provided for in the *Civil Procedure Act* at Section 3A as follows:

' 3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

46. In addressing the issue of inherent jurisdiction of the court, Majanja J in the case of James Njuguna Njoroge (supra) distinguished the applicability of the decision in *Republic v Municipal Council of Mombasa and Others ex-parte Adopt-A-Light Limited Nairobi CA Civil Appl No 15 of 2007 (Unreported) [2008] eKLR* for the proposition that prerogative orders were final in nature and this court lacks jurisdiction to set them aside and stated that the decision was made while the Court of Appeal was simply considering whether a judicial review decree or order could be stayed. He stated as follows:

> ' 29. I take the position that the case cited is not authority for the proposition that the High Court lacks jurisdiction to set aside prerogative orders but rather as I have quoted, the Court of Appeal was dealing with an application for stay pending appeal and its decision should be read as deciding that the Court of Appeal will only reverse an order of certiorari upon hearing the appeal. The case is therefore not applicable to the circumstances of this case as an application to set aside judgment is not interlocutory or interim in nature, its effect is final and after the judgment has been set aside, the matter is to be reheard afresh. My view is fortified by the decision in the case of Republic v Public Procurement Administrative Review Board ex-parte Kenya Electricity Generating Company Limited CA Civil Appl No 63 of 2010 (Unreported) [2010] eKLR where the Court of Appeal noted that, '[F]rom its nature, an order of certiorari cannot be stayed pending appeal by interlocutory proceedings. Rather it can only be set aside in the appeal itself.' For this court it suffices to state that there is no claim that the impugned judgment was obtained by way of a misconceived consent or based on a repealed law; the issues of whether the judgment was obtained by fraud or deceit and is it amounts to a nullity are, consequent upon the prior finding of this court that it can not review its own judicial review judgment, for the Court of Appeal to determine.'

47. In the present case, the ex parte applicants submit that the applicants resorted to an argument under the inherent jurisdiction of the court after realizing that reliance on Order 45 could not save their application. They cite the cases of Robert Tom Martins Kibisu v Republic [2018] eKLR to state that fraud and deceit in the obtainance of the judgment, nullity of the judgment, judgment obtained by a misconceived consent between the parties and judgment based on repealed law, which are the parameters set by the Supreme court in that case for the exercise of inherent power by a court to set aside own judgment, do not apply to the instant case. They also rely on Annabella Kiriinya & Batram Muthoka (sued as Chairman and Chief Executive Officer of the Agricultural Society of Kenya Nairobi) Judicial Review Application No 55/2020.

48. In the James Njuguna Njoroge case, (supra) the court (Majanja J) also recognized the fact that the Kuria Mbae case (supra) was an appeal against the review of a substantive judicial review judgment but differed from it and held that a review or setting aside order could issue and stated as follows:

> ' 30. I also take a contrary from their lordships in the Kuria Mbae case (Supra) for several reasons. First, section 8(3) and (5) or the *Law Reform Act* does not specifically exclude either the inherent power of the court to do justice and prevent an abuse of its process. Secondly, Order 53 rule 2 of the Civil Procedure Rules which gives practical effect to prerogative orders requires that all persons directly affected be served with the motion. In the event a party is not served,

is the court to remain powerless to act? In my view, the rules of natural justice are so well entrenched in our jurisprudence and cannot be ignored. Apart from their constitutional underpinnings, various decisions of our courts are testimony to this position. Thirdly, the applications before the court seek to set aside proceedings for want of service. I do not think that the law intended the Court of Appeal to exercise original jurisdiction to set aside what are in essence ex-parte proceedings. The jurisdiction of the appellate court is to hear appeals from the High Court and not applications for aside ex-parte proceedings.

31. The court exercising judicial review jurisdiction has inherent jurisdiction to set aside a judgment wrongly entered. (See generally Magon v Ottoman Bank [1967] EA 609, Mulira v Dass [1971] EA 227, Ali Bin Khamis v Salim Kirobe [1956] EACA 1956]. I would also adopt the words of Justice Nyamu in *Kenya Bus Service Ltd and Others v Attorney General and the Minister for Transport and Others Nairobi HC Misc 413 of 2005* where he stated that, 'Where there is no specific provision to set aside, the courts power or jurisdiction would spring from inherent powers of the court. Whereas ordinary jurisdiction stems from Acts of Parliament or statutes, the inherent powers stem from the character and the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations.'

32. The courts have not remained powerless and in many cases have acted to do justice to parties. In the case of *Republic v Registrar of Titles and Another ex parte Saida Twahir Mohamed Hatimy Mombasa HC Misc Appl No 46 of 2005 (Unreported) [2005] eKLR* the court dealt with the issue of the effect of non-service. Justice Mwera stated that, 'the duty is on the applicant to serve such affected parties if the applicant omits or fails to serve such persons directly affected, then, they are entitled to come before the court and seek that the orders obtained without due service be set aside as being a nullity.'

49. It is evident from the dicta of the learned judge in the James Njuguna Njoroge case (supra) that he considered three main grounds as buttressing the proposition that the court had jurisdiction to review its own orders upon judicial review. First, Section 8(3) and (5) or the *Law Reform Act* does not specifically exclude either the inherent power of the court to do justice and prevent an abuse of its process; secondly, Order 53 Rule 2 of the Civil Procedure Rules which gives practical effect to prerogative orders requires that all persons directly affected be served with the motion; thirdly, the jurisdiction of the appellate court is to hear appeals from the High Court and not applications for aside ex-parte proceedings. On those grounds he concluded that The court exercising judicial review jurisdiction has inherent jurisdiction to set aside a judgment wrongly entered.

50. It is noteworthy however that not all cases bear similar facts and in this court's view, the court in the James Njuguna Njoroge case (supra) was dealing with a case in which James Njuguna filed the application for judicial review on the basis that he was the legal representative of the estate of his father having obtained a grant of letters of administration ad litem. In his judicial review notice of motion, he sought orders of mandamus to be issued compelling the respondents herein to cancel all entries and dealings made in the register pertaining to LR No 11916/2 after the death of Joseph Njuguna Njoroge, his deceased father. In the alternative, he sought orders of certiorari to remove to this Honourable Court for purposes of quashing all entries and fraudulent dealings made in the register pertaining to LR No 11916/2 after the death of Joseph Njuguna Njoroge. It was his case that Felistus Wanjiru, without his knowledge or consent unlawfully and fraudulently transferred LR No 11916/2 to her

name thereby creating LR No 11916/3 which was registered by the Chief Land Registrar in her favour. He also alleged that the transfer was a forgery having been executed by his deceased father six years after his death and in the circumstances the parties who had obtained title through her could not have obtained good title. Prerogative orders of certiorari and mandamus were granted as prayed and soon thereafter two applications seeking to set aside orders issued were lodged by interested parties who claimed non-service of the Judicial Review motion. Among the grounds proffered was one that the ex-parte applicant is not the personal representative of the estate of his father as Joseph Njuguna Njoroge left a valid will in which the only executors were the deceased's late wife Felista Wanjiru and Mr Mohamed Akram Khan, an advocate; also, contrary to the ex parte applicant's allegation that he had been disinherited, the ex-parte applicant in fact inherited LR No's 11916/13 and 14 (presumably through the same will) which he subsequently sold to Gabriel Kiarie and Eliud Gitumbi and Margaret Wambui Kenyatta and whose transfers were registered after the death of his father. Another ground was that some of the affected parcels of land were not subdivisions of LR 11916/3 and had nothing to do with the fraud alleged against the ex parte applicant's mother, and so the orders given by the court affecting them are nullity and should be set aside ex debito justitiae. The judge summed up the whole situation thus:

> ' 21. On the whole the applicants submit that the judgment of October 26, 2010 was obtained through a calculated and deliberate misrepresentation and fraudulent concealment of material facts.'

51. The judge concluded as follows:

> ' 50. Even if I were wrong on the ground of service of the applicants, I would nevertheless still set aside the judgment for the reason that when the ex-parte applicant moved the court he sought the, 'Cancellation of all entries made in the register of LR No 11916/2 after the death of his father.' These parcels include LR Nos 11916/9, 10, 11, 12, 13 and 14 which are not sub-divisions of LR No 11916/3 and which have nothing to do with the fraud allegedly committed by the ex-parte applicant's mother and which fraud forms the basis of the suit. The effect of the order was to disentitle Gabriel Kiarie and Eliud Gitumbi, Estate of PJ Kamau and Ephraim Njoroge Njuguna of their properties without affording them a hearing. There is also evidence that the representative of the 5th interested party, who is deceased, were not served with legal process.'

52. In the Joseph Njuguna Njoroge case (supra) it is therefore quite evident that impugned transfers were effected and the transferees in the purely commercial transactions went their own way and were quite unaware that proceedings that would affect their title were subsequently filed. Besides, the issue of a will under which the ex parte applicant had benefited by inheriting some of his late father's property featured prominently, for that also appears to have been the same will under which his mother had inherited the property said to be subject of forgery which was totally an absurd situation. Apparently the issue of the manifest injustice that emanated from this situation called for, in the opinion of the judge, and I do not for one moment doubt that that was the correct position, the exercise of the court's inherent jurisdiction to set aside the judgment, and he did so, citing the words of Nyamu J in Kenya

Bus Service Ltd and Others v Attorney General and the Minister for Transport and Others Nairobi HC Misc 413 of 2005 where he stated that:

> ' Where there is no specific provision to set aside, the courts power or jurisdiction would spring from inherent powers of the court. Whereas ordinary jurisdiction stems from Acts of Parliament or statutes, the inherent powers stem from the character and the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations.'

53. The context in which the Hon Justice Nyamu made the quoted dicta in the Kenya Bus Case (supra), is that by an application dated March 24, 2005 brought by way of a Notice of Motion expressed to be grounded on Section 84(1) and 2 of the then Constitution of Kenya and Rule 10(a) of the *Constitution* of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, the three plaintiffs namely, Kenya Bus Service Ltd, Bustrack Ltd and Msafiri Passenger Services Ltd claimed that their Constitutional rights had been violated by the two defendants namely the Attorney General and the Minister for Transport. The main ground relied on is that the plaintiff/ applicants in the Notice of Motion had expended unbudgeted funds to comply with an unlawful law and hence the applicant has been denied the fundamental right to protection of law guaranteed by Section 70(c) of the *Constitution* and the further fundamental right not to have their properties as guaranteed under Section 76 of the *Constitution* entered into. The applicants in the motion further contend that as a result of the enforced compliance with the new Traffic Regulations, the applicants' cash flows had been severely curtailed and they had been unable to service accounts with their creditors. The applicants had from inception joined the 221 creditors including the 1st, 2nd and 3rd interested parties (who subsequently made the setting aside applications before the Hon Justice Nyamu dated April 7, 2005, April 18, 2005 and May 29, 2005 respectively). Osiemo J granted some orders on the notice of motion without hearing the interested parties yet they had been joined to the suit from inception. Nyamu J summed up the consequences of Hon Osiemo's order as follows:

> ' Thus without any battle what appears to be final orders were granted ex-parte until the determination of the Originating Summons against 221 Interested parties many of whom I understand have not yet been served to date, special interest being taken on the Interested parties which had obtained judgments as creditors or those who were poised to execute the decrees or those about to petition for winding up.'

54. Again, the manifest injustice that appears to have occurred to persons with independent contracts executed between them and the applicants in that case, and who had already been made parties is evident in the Kenya Bus Service Case(supra). Denial of natural justice in that particular case occasioned the drastic remedy by the Hon Nyamu J of setting aside the orders made while no provisions for setting aside existed.

55. Nyamu J continued as follows in the Kenya Bus Service case (supra):

> ' It is trite law that an ex parte order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the *Constitution*. There is nothing inconsistent withthe *Constitution* in the act or principle of setting aside of ex parte orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy Where there is no specific provision to set aside the

courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the *Constitution* occupies an even higher level due to the supremacy of the *Constitution* and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore, the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside ex parte orders, which by their very nature are provisional.' See *The Reform of Civil Procedure Law and Other Essays in Civil Procedure* [1982] By Sir Isaac J H Jacob and WEA Records Limited v Visions Channel 4 Limited & Others [1983] 2 All ER 589; R vs Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No 1183 of 2004.'

56. Nevertheless, it is worthy of note that first, contrary to the situation in the present dispute, what was before Nyamu J were proceedings to set aside orders made ex parte in an interlocutory application in a constitutional petition and there were no provisions for setting aside; the present dispute is about reviewing or setting aside a final judgment and the hearing herein was certainly not conducted ex parte. In respect of the Kenya Bus Services case (supra), there were no provisions such as those in Section 8 of the LRA impliedly barring setting aside and providing for the sole remedy of an appeal.

57. Odunga J stated in the Republic v Chief Land Registrar & 2 Others Ex Parte Michael Njenga Waweru 2017 eKLR case as follows:

> ' 25. However, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the *Civil Procedure Act* which strictly speaking does not apply to judicial review proceedings. That section it has been held time and again does not confer inherent jurisdiction on the Court but only reserves the same. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice and inherent power is not donated by Section 3A of the *Civil Procedure Act*. 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.

26. Dealing with inherent powers of the Court it was held in Republic v 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.'

58. I have considered the cases cited by the applicants in support of their motion too and they are distinguishable; the cases of Accredo AG (supra) and JMK v MWM (supra) dealt with setting aside a consent judgment and the dispute therein was purely civil in nature which is clearly not the case herein. Daniel Nganga Kamande (supra) was a civil suit and the applications made therein were brought under the *Civil Procedure Act* and Rules. The Judicial review case of Republic Vs Chief Land Registrar & 2 Others Ex Parte Michael Njenga Waweru 2017 eKLR also dealt with a consent judgment between the parties to the exclusion of the interested parties who subsequently applied for their joinder. In that case the respondent relied on the Biren case (supra) but the court nevertheless allowed the review application, giving reasons contained in the earlier analysis herein.

59. The fact that the judgment was by consent in the Republic v Chief Land Registrar & 2 Others Ex Parte Michael Njenga Waweru 2017 eKLR made the court observe that 'whether an order is by consent or otherwise, this Court cannot countenance a situation where persons decide to make themselves parties to a suit with a view to recording consents thereat in order to deny a person whose interests are thereby affected an opportunity of being heard.' The misgivings regarding a collusive consent or potential fraud do not apply in the present case where the application was heard and the decision made on the basis of the affidavit evidence of the parties joined. I need not say much regarding the Court of Appeal decision in the 2011 Nakumatt Holdings (supra) which was made before the Court of Appeal decision in the 2013 Biren case and which was not analyzed in the latter decision.

60. Turning back again to the present case, this court does not find any such incidence of manifest injustice or mistake of the court characteristic in some of the decisions relied on by the applicant such as Republic v Chief Land Registrar & 2 Others Ex Parte Michael Njenga Waweru 2017 eKLR or Kenya Bus Service Ltd and Others v Attorney General and the Minister for Transport and Others Nairobi HC Misc 413 of 2005 as would be sufficient to occasion the issuance of a setting aside order at the exercise of the inherent jurisdiction of the court for several reasons. First, the applicants and the ex parte applicants were all members of the same organization which was involved in management wrangles and who were interested in the same land and in this court's view there is great likelihood that there was awareness on the part of the applicants by dint of their dealings with the Land Registrar's office that the present judicial review proceedings were underway in court. Indeed, I find no credible rebuttal to the ex parte applicant's assertion that the applicant's documents attached to the response by the Land Registrar must have been provided to the Land Registrar by the applicants so that he may fight a proxy battle on their behalf. Secondly, in view of the fact that only a leadership wrangle has escalated the case to the corridors of justice and the applicants have not been dispensed with as ordinary members of the Naivasha Uiguano Group, this court sees no manifest injustice as that in the James Njoroge and Kenya Bus Services Cases (supra) that would arise from the judgment of the court which necessitates this court to, in the absence of any law enabling a review and setting aside, step in and review or set aside the impugned judgment. Lastly, the substantive disputes regarding trusteeship and land ownership and distribution among members can be ventilated in other fora as this court lacks jurisdiction to

address the same in a judicial review application. The exercise of the court's inherent jurisdiction in the circumstances of the present application would be undesirable.

61. The upshot of the foregoing is that the Notice of Motion dated April 19, 2022 lacks merit and it is hereby dismissed with costs to the ex parte applicants.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 16TH DAY OF NOVEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU