Republic v Cabinet Secretary Ministry of Lands & Physical Planning & 3 others; Nkari (Exparte); Mugambi (Interested Party) (Miscellaneous Judicial Review E002 of 2022) [2022] KEELC 14653 (KLR) (9 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14653 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

MISCELLANEOUS JUDICIAL REVIEW E002 OF 2022

CK YANO, J

NOVEMBER 9, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT . 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

ATTORNEY GENERAL OF KENYA ..... 4TH RESPONDENT

AND

RAUNI NKARI ..... EXPARTE

AND

PHARES MUGAMBI ..... INTERESTED PARTY

RULING

1. There are two separate notice of preliminary objection filed by the interested party and the respondents on different points of Law that I wish to dispose of concurrently.

2. The respondents Notice of preliminary objection is dated 13th of April 2022 objecting the application dated 21st February 2022 and seek to have it struck out with costs to the Respondent's on the grounds that;

a. That the Application is fatally defective, misconceived, mischievous or otherwise an abuse of the court process and therefore, are unsustainable in the obtaining circumstances.

b. That the decision of the minister is final and not subject to challenge.

c. That the application offends the provisions of section 29 of the Land Adjudication Act.

d. That the application offends the provisions of Section 8 and 9 of the Law Reform Act and Order 53 (2) of the *Civil Procedure Rules* as the board decision annexed to the application was made over 10 years ago.

e. That the Application has not established the basis for the orders sought.

f. That further, it is an established principle of law that where there is an alternative remedy and especially where parliament has provided a Statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by Courts and the applicant herein has not established the existence of any exceptional circumstances.

g. That the Application is bad in law only meant to defeat the cause of justice

h. That the petition (sic) is otherwise frivolous vexatious and an abuse of the court process.

3. The interested party's Notice of preliminary objection is dated 6th of May 2022 and is on the following 4 grounds;

a. That the suit herein is res judicata as the same has been heard to completion and judgement issued in Judicial Review No. E002 of 2020 at the E.L.C court in Chuka between the same parties and concerning the same subject matter.

b. That this court is *Functus Officio* as a consequence its jurisdiction concerning the said matter lies exhausted.

c. That the Application herein is an abuse of the court process as the same lacks *bona fides* and amounts to inviting the Honourable court to sit on its own appeal.

d. That the exparte applicant Application offends the mandatory provisions of Order 53 (7) which provides for an order of *Certiorari* to issue a copy of the decision has to be lodged with the registrar and verified by an affidavit.

4. The parties agreed to dispose both preliminary objections by way of written submissions. The interested party filed his submissions dated 20th June 2022 and filed on 21st June, 2022, the exparte applicant's submission are dated and filed on 4th July, 2022 while the respondents filed theirs dated on 28th June 2022 on 12th July 2022.

The Interested Party's Submissions.

5. The interested party submitted that a Preliminary Objection is in the nature of what used to be a demurrer, it raises a pure Point of Law which has been pleaded or which arises by clear implication. That the circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd*.

6. The interested party submitted on four issue issues before the court for determination on. Firstly, whether the suit herein is res Judicata as the same has been heard to completion and judgement issued in Judicial Review No. E002 of 2020 at the E.L.C Court In Chuka between the same parties and concerning the same subject matter. Secondly, whether the Court is *Functus Officio* as a consequence

that its jurisdiction concerning the said matter lies exhausted. Thirdly, that the application herein is an abuse of the court Process as the same lacks bona fides and amounts to inviting the Honourable court to sit on its own Appeal, and fourthly, that the Ex-parte Applicant's Application offends the mandatory provisions of Order 53(7) which provides for an Order of *certiorari* to issue a copy of the decision has to be lodged with the registrar and verified by an Affidavit.

7. The interested party submitted that the suit is *Res Judicata* as the matter was heard and determined in Judicial Review No E002 of 2020 in this court and concerning the same subject matter land parcel, No 106/marembo/rianthiga between the same parties. That is trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgement or a ruling which in its nature is final and conclusive, the judgement or ruling is res judicata.

8. Learned counsel for the interested party cited Section 7 of the *Civil Procedure Act* which is in the following terms;

> ''No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court''

9. The interested party's advocate quoted Somervell L.J who stated that, res-judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. That a litigant will not be allowed to litigate a matter all over again once a final determination has been made.

10. The interested party submitted that the matter should not be entertained by the court and pleaded the said Judgement as an Estoppel in this instant Matter.

11. The interested party further submitted that the requirements for *res judicata* are that the same cause of action, for the same relief involving the same parties was determined by a court previously. That in assessing whether the matter raises the same cause of action, the question is whether the previous judgement that involved the determination of questions that are necessary for determination of the present case and substantially determine the outcome of the case. That *Res judicata* is one of the factors limiting the jurisdiction of a court. That this doctrine requires that there should be an end to litigation or conclusiveness of judgement where a court has decided and issued judgement and therefore parties should not be allowed to litigate over the same issues again. That this decision requires one suit one decision is enough and there should not be many decisions in regard of the same suit and it applies both as a question of fact and law.

12. The interested party contends that Res Judicata halts the Jurisdiction of the court and that is why a court is prevented from trying the matter in Limine. Consequently, he submitted that the Court has no Jurisdiction to entertain this frivolous and vexatious suit. The interested party relied on the case of *Owners of motor vessel 'Lillian S' V Caltex Oil (Kenya) Ltd* (1989) KLR1.

13. The interested party submitted that the issue as to whether a court has Jurisdiction is beyond technicalities and Procedure as it goes to the heart of the matter and that the mere addition of parties in a subsequent suit or omission of a party or introduction of new grounds or prayers does not mean the matter is new.

14. The interested party submitted on Ground 2 & 3 of the Preliminary Objection that a court is deemed to be *Functus Officio* after delivery of a judgement and he relied on the case of *Menginya Salim Murgani*

V Kenya Revenue Authority (2014) eKLR where it was stated functus Officio is an enduring Principle of law that prevents re-opening of a matter before a court that rendered the final decision thereon as Jurisdiction is exhausted.

15. On ground 4 of the Preliminary Objection which is failure to comply with the provisions of Order 53(7) of the *Civil Procedure Rules* the interested party submitted that failure to file the decision subject matter of the Application for judicial Review renders the Application incompetent following the provisions of Order 53(7) *Civil Procedure Rules* which provides that:

> "In the case of an application for an order of Certiorari to remove any proceedings for the purpose of their being quashed, the Applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court (2) where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court."

16. The interested party argued that the said Provision is Mandatory and failure to comply renders the proceedings incompetent and relied on the case of *Republic v Ruiru District Land Disputes Tribunal & Amp; Another Exparte Lucia Waithira Muiruri & amp; Another* (2014) eKLR. The interested party submitted that the court cannot be in a position to find whether there is in fact an order capable of being quashed and if it exists whether the application was made within the stipulated time.

17. The interested party further submitted that the rationale behind Order 53 Rule 7 is to enable the court satisfy itself of the existence, nature and contents of the Order and avoid acting in vain or giving an order that may end up being contradictory and an embarrassment to the court as stated in *Waweru v District Veterinary Office, Maragua & Another* (2006) 1 KLR (E & l).

18. The interested party relied on the Court of Appeal case in *Republic v Mwangi. S. Kimenyi EX-Parte Kenya Institute for public Policy and Research Analysis (KIPPRA)* (2013) e KLR which determined of the need for a Court to ascertain for itself of the existence of orders before granting an order of certiorari. This being the Rationale for calling and removing into court a decision to be quashed.He submitted that the interested Party Preliminary Objection has merit and should be allowed as prayed.

Respondents' Submission

19. The respondents framed two issues for determination: whether the Preliminary Objection has merit and whether the Application dated 21st February, 2022 should be allowed. On whether the Application dated 21st February, 2022 should be allowed the respondents submitted that the Notice of Motion Application dated 21st February, 2022 offends the mandatory provisions of Section 9(3), (2) of the *Law Reform Act*, CAP 26 and Order 53 Rule 2 of the *Civil Procedure Rules*, 2010.

20. The respondents cited Section 9(3) which provides as follows: -

> "In the case of an application for an order of *Certiorari* to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application is made not later than six months after the date of that judgment, order, decree, conviction."

21. The respondents averred that in the instant Application, the decision of the Respondent sought to be quashed was made on 3rd December, 2010 in Objection No.65/2010 involving Land Parcel No. 106 and a quick arithmetic shows that the decision is more than 10 years old.

22. The Respondent cited Order 53 Rule 2 which provides that:

> "Leave shall not be granted to apply for an order of Certiorari to remove any judgement, order, decree, conviction or other proceedings, for the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceedings or such shorter period as may be prescribed by any act."

23. The respondents submitted that the above rule is derived from Section 9(3) of the *Law Reform Act* and has the same force in terms of the period within which an order of *Certiorari* must be made and it is a replica of the provision.

24. The respondents contend that the Ex-parte Applicant's Application offends the mandatory provisions set out in both provisions and that the use of the word "shall" further augments the peremptory nature of the law and leaves no room for discretion and that it is trite that the word "shall" when used in a statutory provision imports a form of command or mandate. Further, the word "shall" indicates that a provision has been couched in preemptory terms with no discretion left to a party.

25. The respondents submitted that in the instant case there was no compliance with that provision which leaves no room for the grant of the orders sought in the Ex-parte Applicant's Notice of Motion Application.

26. The respondents submitted that Section 9(3) of the *Law Reform Act* and Order 53 rule 2 of the *Civil Procedure Rules*, 2010 are couched in mandatory terms rendering the Application a non-starter to be dismissed with costs. Further, the respondents further submitted in filing the instant Application, the Ex-Parte Applicant has not attached the decision being challenged which is fatal as without it there is no evidence that such a decision actually existed. That without a copy of the impugned decision annexed to the application it would be impossible for this court to make a determination on it.

27. The respondents contend that this provision of the *Civil Procedure Rules* requires that any party seeking an order of *certiorari* must annex to his application a copy of the order he seeks to challenge or if he does not, he must give the court a satisfactory reason for that failure. That this provision is mandatory and failure to comply with Order 53 Rule 7(1) renders the proceedings incompetent.

28. The respondents further contend that the Ex-Parte Applicant seeks to challenge the decision of the 1st Respondent on the ground that the same was made without following due process but did not annex a copy of that decision.

29. The respondents submitted that the rationale behind Order 53 Rule 7 is to enable the court satisfy itself of the existence of the decision and its contents and whether the application was filed in time. The respondents cited Wendoh, J in *Waweru v District Veterinary Office, Maragua & Another* [2006] 1 Klr (E & L).

30. The respondents also cited the Court of Appeal in R*epublic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)* [2013] eKLR.

31. The respondents submitted that in this case the Ex parte Applicant has not shown that the decision he is challenging was made in contravention of one of the grounds upon which judicial review orders of certiorari may issue, and he has also failed to show that the Application has been made within six months from the date when the challenged decision was made. The respondents submitted that failure

to annex the decision to be challenged in this case is fatal as it remains uncertain whether there actually exists a decision which can be called into court for purposes of quashing and therefore, if this court were to proceed to grant the orders of leave, it would be acting on the basis of speculation and would be acting on facts which have not yet materialized.

32. The respondents also cited the case of Samson Kirerea M'ruchu v Minister for Lands & Settlement CA 21 Of 1999, which was cited with approval in *Musa Kingori Gaita v Kenya Wildlife Service* [2006] eKLR where the Court of Appeal held-

> " Compliance with the above provision is a precondition to seeking an order or certiorari. An applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of his Motion under Order 53 Rule 3 of the *Civil Procedure Rules*. It would appear to us that the failure to comply with Rule 7 (1) above, does not render the application incompetent ab initio but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the Motion for an order of certiorari".

33. The respondents also quoted the case of *Republic v Ruiru District Land Disputes Tribunal & Another Ex Parte Lucia Waithira Muiruri & Another* [2014] eKLR where the court also held that failure to comply rendered the entire application incompetent since the court was not in a position to determine whether there in fact existed an order capable of being quashed. The respondents submitted that from the foregoing it is clear that the Notice of Motion Application by the Ex-Parte Applicant is fatally defective and should not be allowed.

34. On whether the Preliminary Objection has merit the respondents submitted that since the suit land is under adjudication the applicable laws would be the *Land Adjudication Act* (CAP 284) and the *Land Consolidation Act* (CAP 283) which provide for dispute resolution mechanisms in such a scenario such as the one before this Honourable Court.

35. The respondents cited Section 26 of the *Land Adjudication Act* CAP 284 which states thus: -

> " (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect is published, the adjudication register to be incorrect or incomplete."

36. The respondents submitted that even it goes further and provides in Section 29 that any party dissatisfied with the decision of the Land Adjudication Officer can appeal to the Minister and cited Section 29 (1) of the *Land Adjudication Act* CAP 284.

37. The respondents submitted that under the *Land Adjudication Act*, any person who has an objection to the adjudication register ought to appeal within 60 days to the Minister, whose decision is final under Section 29 (1) of the Act. That the provisions of the aforementioned statutes were intended to limit unnecessary litigation resulting from the adjudication process.

38. The respondents submitted that the court lacks jurisdiction as the suit offends Sections 29 and 30 of the *Land Adjudication Act*, CAP 284 and that the suit is Res-judicata having been heard and determined by a competent quasi-judicial institution, and cited section 7 of the *Civil Procedure Act.*

39. The respondents submitted that there is no law that allows subordinate courts to overturn a decision of the Minister after the dispute has gone through the legally recognized land adjudication

dispute resolution process. Further that the determination of ownership and interests in land in an adjudication area is left to the Adjudication Officer and the powers are under section 10. That under Section 29 an appeal is allowed to the Minister and his decision is final.

40. The respondents relied on the case of *Speaker of the National Assembly v Karume*, [1992] KLR 22 and *Mutanga Tea and Coffee Company Ltd v Shikara Ltd and Another* [2015] eKLR where the Court of Appeal held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

41. The respondents further relied on the case of *Tobias Achola Osindi & 13 others v Cyprian Otieno Ogalo & 6 Others* (2013) eKLR where it was held that it is not the duty of this court to ascertain rights and interests in land in an adjudication section. That jurisdiction rests with the Land Adjudication officer and other officers and bodies set up under the Act. The Act has machinery for resolving any disputes that may arise in the process of adjudication.

42. The respondents submitted that the quasi-judicial institutions referred to are established under the Land Adjudication Act whose purpose is to provide for the ascertainment and recording of rights and interests in community land and for purposes connected therewith and purposes incidental thereto. That the dispute resolution mechanism provided under the said Act is elaborate and that Section 13 of the Act provides for commencement or institution of a claim. They cited sections 10 and 13 of the Act and submitted that, that position was reiterated by Okongo J in *Tobias Achola Osidi & 13 Others v Cyprianus Otieno Ogalo & 6 others* (2013) eKLR

43. The respondent submitted that in addition to that, Section 29 (3) of the *Land Adjudication Act* provides that after the decision in the appeal to the Minister is made, the register will become final in all respects. That meant that one cannot re-open an adjudication process that has been completed. The respondent cited the case of Nyeri Civil Appeal 340 of 2002 *Julia Kaburia v Kabeera & 5 Others*.

44. The respondents contend that in ascertaining the rights and interest in land the Land Adjudication Officer has been given powers to determine any disputes that arise as a result of the adjudication register and his powers are enshrined in Section 26 (1) of the Land *Adjudication Act* (CAP 284). The respondent further contends If Parliament intended for the courts to deal with disputes arising out of land under adjudication it would not have set up the land adjudication office. That the adjudication office is not an optional forum for determining disputes and is the right forum to determine disputes and the court only has a supervisory role to play in as person aggrieved with the manner in which the decision was arrived at is at liberty to file a judicial review application to quash the said decision.

45. The respondents submitted that the Ex-Parte Applicant's Application before this Court contravenes the doctrine of exhaustion which was comprehensively dealt with by a 5 - Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The respondent submitted that the doctrine is now of esteemed juridical lineage in Kenya and it was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

> "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

46. The respondents also cited the Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine in *Geoffrey Muthiga Kabiru and others v Samuel Munga Henry and 1756 others* [2015] eKLR.

47. The respondents submitted that the Ex-parte Applicant in this case has not exhausted all the procedures laid down in the aforesaid statutes before coming to court for redress and that the court cannot take over the role of the land adjudication officer or the Minister as it does not even have the necessary machinery to enable it effectively resolve such dispute. The respondents submitted that the Ex-parte Applicant's Application is frivolous and a waste of the Honourable court's time.

48. The respondents submitted that by entertaining the Ex-parte Applicant's claim the court will not only be usurping the role of the land adjudication officer and the Minister but also duplicating its roles and that the court should not be subjected to this kind of claims otherwise by entertaining this dispute the court will in effect be rendering the said office useless.

49. The respondents submitted that the *Ex-Parte* Applicant having failed to exhaust all available mechanisms is precluded from pursuing any perceived interests in the suit land through this suit. The respondent submitted that the Application is an afterthought and an abuse of the Court process and as such the Respondents' Preliminary Objection should succeed. Consequently, they submitted that the court has no jurisdiction to entertain this frivolous and vexatious case.

50. The respondents submitted that the Application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore, are unsustainable in the obtaining circumstances. The respondents submitted further that it is an established principle of law that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by Courts and the Ex-parte Applicant herein has not established the existence of any exceptional circumstances. Further, the respondents submitted that the application offends Section 26 of the Land Registration Act which provides an avenue for the protection of the rights of a registered proprietor which are created once an adjudication register is declared final in all respects.

51. In conclusion the Respondents submitted that for the reasons outlined above, the Ex-parte Applicant's Application dated 21st February 2022, as well as the orders sought therein are unmeritorious and the same is an abuse of court process and as a consequence, the Respondents prayed that it be dismissed with costs and the Respondent's Preliminary Objection dated 13th April, 2022 be allowed

Exparte Applicants Submissions.

52. The exparte applicant submitted that the respondents' submission to the effect that the Application is fatally defective, misconceived, and mischievous or otherwise an abuse of the court process and therefore unsustainable in the obtaining circumstances is verbose and it is capable of having many meanings. The exparte applicant stated that the ground is ambiguous and anything and everything can be attached to it and it amounts to a statement which has not been explained by the respondents and that one cannot read mischievous or misconception on the part of the exparte applicant in the entire judicial review. The exparte applicant submitted that he is before court and the judicial review does not amount to abuse of court process. That more so, the ground does not raise a pure point of law as required in all preliminary objections.

53. The second ground of the preliminary objection by the attorney general that the decision of the minister in adjudication process is final and not challengeable, the exparte applicant submits that that is far from the truth and it is common knowledge and the court can take judicial notice of the fact that

a minister's decision is an administrative action that is subject to judicial review. That many decisions by the minister in an adjudication process have been subjected to judicial review proceedings without any legal or technical hitch barring the court to adjudicate in the matter and the current judicial review by the current exparte applicant is not exceptional.

54. Regarding the objection to the effect that the judicial review case offends the provisions of section 29 of cap 284, the exparte applicant submitted that their understanding of that section is that as far as the adjudication process is concerned a decision of the minister is final and that, that section does not preclude an aggrieved party by the decision of the minister to revert to court for redress usually by way of a judicial review and that this has been the trend and the procedure followed, and the only caveat by an aggrieved party by a ministers' decisions is such that a party can only complain over the impropriety over the minister's decision and not the merit or demerit of the ministers' decisions. The exparte applicant submitted that that ground lacks merit and should be disallowed.

55. Regarding the objection by the attorney general that the judicial review process offends section 8 and 9 of the reform law act and Order 53 (2) of the *Civil Procedure Rules* because there is objection attached to the judicial review that was rendered about ten years ago, the exparte applicant submitted that the current judicial review is not about the AR objections rendered about 10 years ago. That the current judicial review is about an order of certiorari to be issued to remove to the honorable court for the purpose of it, being quashed a decision made by and / or award by the 1st respondent in respect of land parcel 106 Marembo Rianthiga Adjudication section in minister appeal case no.24 of 2018 dated 13th January 2022 between the interested party/ the appellant and exparte applicant. That AR objections referred to the objection are only supporting documents to the Judicial review and that that ground cannot pass the acid test of meritocracy and the same should fail.

56. The exparte applicant submitted that the respondents contention that the exparte applicant has not established the basis of the application is not on a pure point of law. That it is trite law that preliminary objection must be on a pure point of law and must be such that the court shall not be enjoined to exercise its discretion in determining the issue raised on the preliminary objection.

57. The exparte applicant submitted that he has set out various grounds on the face of the notice of motion that the court will consider and make a determination whether they are meritorious or not. That the supporting affidavit in support of motion has deposed matters that require the court to consider in allowing or not allowing the Judicial review.

58. The exparte applicant submitted that the objection on that ground is not a pure point of law and relied on the case of *Mukisa Biscuit Manufacturing Co Limited versus West End Distributors Limited* (1969) EA 696.

59. The exparte applicant submitted that the observations by the respondents in ground no.6 is a correct observation, but the principle does not apply to the instant Judicial review. The *exparte* applicant submitted that judicial review does not dwell on the merit or demerits of a decision/ruling or order or judgment or even a word and that the concern of the court in judicial review is to adjudicate over any impropriety in arriving at an award, ruling or judgment.

60. The *exparte* applicant contends that ground 7 of the respondents preliminary objection is yet another ground that cannot pass the test of entertaining the objection by the court and that there is no particular law that the exparte applicant has breached and that the court in that ground is enjoined to exercise its discretion and make a finding as to whether the Judicial Review is bad in law and meant to defeat justice. The exparte applicant submitted that that ground is wanting in merit and it should be disallowed.

61. The *exparte* applicant submitted that the respondent has described the current Judicial Review in ground no.8 as being frivolous, vexatious and an abuse of the court process, and submitted that unless the respondents are able to cite a provision of law that the Judicial Review offend, it follows that it is the respondent preliminary objection that is frivolous vexatious and an abuse of the court process.

62. The exparte applicant averred that there is no single provision of the law that the exparte applicant has breached to make the current Judicial Review frivolous vexatious and abuse of the court process.

63. In response to the interested party's submission that the matter is res judicata and offends the provisions of section 7 of the *Civil Procedure Act*, the exparte applicant submitted that in a judicial review case the court interrogates improprieties by a decision maker in an administrative action. That there are no set improprieties that must be investigated and judicial review interrogates each and every administrative action and if there is impropriety the court should allow the judicial review in favor of the exparte applicant.

64. The exparte applicant averred that the interested party applied for a judicial review case against the exparte applicant and the 4 respondents to wit judicial review case No. E 002 OF 2020 and the court in its wisdom allowed the judicial review and pronounced itself that the decision of the minister in appeal No.24 of 2018 dated 1st September 2020 had improprieties. The exparte applicant submitted that the court ordered the matter to be reheard by the respondents afresh.

65. The exparte applicant submitted that the matter was heard and another judgment was rendered by the minister dated 13th January 2022. The exparte applicant submitted that in principle judicial review No.002 of 2020 was raising the issues of impropriety regarding the minister's decision rendered on 1st September 2020 while the current judicial review application is in respect of the minister's decision rendered on 13th January 2022. That the two judicial cases refer to different decisions by the minister.

66. The exparte applicant admitted that the parties are the same and the land under reference is the same but submitted that this does not render the matter res judicata because the court is enjoined to address itself on the improprieties which are in the opinion of exparte applicant have tainted the minister's decision /award in the minister's decision dated 13th January 2022.

67. The exparte applicant submitted inter alia that he entirely agrees with the observation by counsel for the interested party that a preliminary objection must be purely on appoint of law where the court is not expected to excise its discretion to determine the matter. The exparte applicant relied on the case *Mukisa Biscuit Manufacturing Co Limited versus West End Distributors Limited* (*supra*).

68. The exparte applicant submitted that going by the jurisprudence and the law established under the above case the issue raised of res judicata is not a clear point of law in the sense that the court has to exercise its discretion and determine whether the issues dealt with in the minister's decision rendered on 1st September 2020 are the same issues in the minister's decision rendered on 13th January 2022.

69. The *exparte* applicant submitted further that the court will also have to determine whether a party is precluded from complaining over administrative action by a decision maker because simply the same improprieties had been raised in a different administrative action. That the preliminary objection on *res judicata* is therefore not a good material for a preliminary objection.

70. With regard with the interested party's submission that the court is functus officio, the Exparte submitted that that is not the case since the application is about improprieties which can range from one area to another.

71. The *exparte* applicant submitted that the fact that the minister was found to have committed improprieties in the decision dated 1st September 2020 was not an open cheque for the minister to commit further improprieties after the minister was directed by court to conduct a fresh hearing.

72. The exparte applicant submitted that the decision by the minister rendered on 13th January 2022 was marred by improprieties and that he is before court for the court to consider it and that this court is not *Functus Officio*.

73. The exparte applicant submitted that the interested party submission that the instant judicial review case is an abuse of the court process is amorphous and that a preliminary objection must be purely on a point of law, and that it is difficult on the part of the interested party to point out which law has been breached so that Judicial review becomes an abuse of the court process.

74. The exparte applicant submitted that the interested party's submission on the ground that the current judicial review is an abuse of the court process is un substantiated, and that the court is not sitting on its own appeal if it proceeds to hear and determine the minister's decision rendered on 13th January 2022.

75. The exparte applicant submitted that the minister's decision being subjected to the judicial review in the current Judicial Review is not an appeal from the decision of the minister rendered on 1st September 2020 adding that the two are separate suits.

76. The exparte applicant submitted on the last ground of the preliminary objection by the interested party that it amounts to a technicality that can be cured by article 159 of the constitution, that the court should not have its hands tied on technicalities when serving substantive justice and prayed that the two Preliminary objections by the respondents and the interested party be disallowed.

Legal Analysis and Determination

77. I have considered the two preliminary objections, the submissions in support and the submissions opposing the same and the issue to determine is whether the issues raised in the two preliminary objections are merited.

78. The law on preliminary objections is now settled by then Court of Appeal for East Africa, in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where it was held that:

> " A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...A preliminary Objection is the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

79. Much more recently, the Supreme court pronounced itself on the use of preliminary objection as follows in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* (2015) eKLR

> ''The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objects. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection-against profligate deployment of time and other resources. And secondly, it serves the public

cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially and on merits."

80. Since a preliminary objection may only be raised on a pure point of law, the supreme court in *Aviation &Allied Workers Union Kenya v. Kenya Airways Ltd &3 others*, Application No. 50 of 2014 (2015) eKLR, had this to say:

> ''Thus a preliminary objection may only be raised on a pure question of law'. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

81. On this basis, the questions that emerge are what points of law are the interested party and the respondents raising in their preliminary objections and are they settled?

82. At the outset, I find that these two Preliminary Objections do not raise points of law. The respondents have raised eight grounds while the interested party has raised 4 grounds which I will address as hereunder.

83. The second ground raised by the Honourable Attorney General is that the decision of the minister in adjudication process is final. The same is true. However, the decision can be challenged not on the merits but on whether the process is irrational, illegal and if there was impropriety by the adjudication officer in regards to the process and nothing stops the *exparte* applicant from filing the instant application in court in a judicial review.

84. The court notes the other grounds that the respondents allege is that the application offends the mandatory provisions of Section 9(3), (2) of the *Law Reform Act*, CAP 26 and Order 53 Rule 2 of the *Civil Procedure Rules*, 2010. Section 9(3) provides as follows: -

> " In the case of an application for an order of Certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application is made not later than six months after the date of that judgment, order, decree, conviction."

85. Order 53 Rule 2 provides that:

> " Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding. For the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceeding or such shorter period as may be prescribed by any act;"

86. The above rule is derived from Section 9(3) of the *Law Reform Act* and has the same force in terms of the period within which an order of *Certiorari* must be made.

87. In the instant application, the decision of the Respondents sought to be quashed was made on 13th January, 2022 and the application was filed on 25th February, 2022. Therefore, the Ex-parte Applicant's Application does not offend the mandatory provisions set out in both provisions, since the same was filed within 6 weeks.

88. The instant application is seeking for order of certiorari to remove to the court for the purpose of quashing a decision made in respect of land parcel 106 Marembo Rianthiga adjudication section in

minister appeal case no.24 of 2018 dated the 13th of January 2022.The above ground has no merit and it fails.

89. The second ground raised by the respondents in their preliminary objection is that the application offends the provisions of section 29 of the Land Adjudication Act. I note that the suit land is under adjudication and the applicable laws is the Land Adjudication Act (CAP 284) and the Land Consolidation Act (CAP 283) which provide for dispute resolution mechanisms. Section 26 of the *Land Adjudication Act* CAP 284 provides:

> "(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect is published, the adjudication register to be incorrect or incomplete."

90. Section 29 stipulates that any party dissatisfied with the decision of the Land Adjudication Officer can appeal to the Minister and Section 29 (1) of the Land Adjudication Act CAP 284 states thus: -

> " Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of determination, appeal against the determination to the Minister by-
>
> (c) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and
>
> (d) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."

91. Those sections however do not stop an aggrieved party from seeking redress to court through judicial review where there is impropriety in the procedure used. Therefore, the ground lacks merit. Under the Land Adjudication Act, any person who has an objection to the adjudication register ought to appeal within 60 days to the Minister, whose decision is final under Section 29 (1) of the Act. However, where the decision process was contravened, an aggrieved party can come to court by way of judicial review.

92. That other objection by the interested party is that the application is res judicata.

93. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

> "(a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

94. Similarly, in the case of Attorney General & another ET v (2012) eKLR it was held that;

> "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction."

95. In the case of *Omondi s NBK & Others* (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another* Nairobi HCC No. 2340 of 1991 (unreported) where he stated: "If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

96. Expounding further on the essence of the doctrine the Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows:

> " The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

97. In the present case, it is not disputed that Chuka ELC Judicial review case no E002 of 2020 was heard and determined by P.M. Njoroge on the 23rd of June 2021. However, another judgment was rendered by the minister dated 13th January 2022. Judicial review No.002 of 2020 was raising the issues of impropriety regarding the minister's decision rendered on 1st September 2020 while the current judicial review application is in respect of the minister's decision rendered on 13th January 2022. The two judicial cases refer to different decisions by the minister.

98. The court observes that in the exparte applicant's submissions he admitted the parties are the same and the land under reference is the same but averred that that does not render the matter res judicata because the court is enjoined to address itself on the improprieties which are in the opinion of exparte applicant have tainted the minister's decision /award in the minister's decision dated 13th January 2022 on a different suit.

99. This court cannot *prima facie* from the interested party objection come to a conclusion that the plaintiff's suit is res judicata. The court needs to consider factual evidence to determine if the requirements for res judicata have been meet. Once a court needs to refer to facts and evidence to establish a preliminary objection it ceases to be a point of law.

100. The other issue is whether the court is functus officio. The *Black's Law Dictionary*, Ninth Edition defines the describes functus officio as: -

> " [having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

101. Similarly in *Raila Odinga –Vs- IEBC & 3 Others* Petition No. 5 of 2013 the Supreme Court of Kenya cited with approval the following passage from "The Origins of the *Functus Officio* Doctrine with Specific Reference to its Application in Administrative Law" by Daniel Malan Pretorious:-

> ..."The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

102. In addition, the Supreme court also referred to the case of *Jersey Evening Post Limited –Vs- A. Thani* [2002] JLR 542 at pg. 550 where the Court stated: -

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

103. In the instant case, the court has found that the application before court relates to a different judgment by the minister. Therefore, it cannot be said the court is functus officio because this is a different suit and the courts hands cannot be tied.

104. Accordingly, the court finds that the elements set herein above which give rise to the application of the doctrine of res-judicata could not be discerned from the record.

105. I find that the preliminary Objections dated 13th April 2022 and 6th May 2022 filed by the respondents and the interested party respectively have no merit and I disallow them. Cost shall be in the cause.

106. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF NOVEMBER 2022 IN THE PRESENCE OF:

CA: Martha

N/A for Applicant

Ms. Kendi for Respondents

N/A for Interested Party

C. K. YANO,

JUDGE.