



Republic v Chief Magistrate's Court at Machakos; Kapiti Plains Estate Limited (Exparte Applicant); Mutua & 2 others (Sued on behalf of Kwa Mbau Society) & another (Interested Parties) (Environment and Land Judicial Review Miscellaneous Application 42 of 2019) [2025] KEELC 3535 (KLR) (6 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 42 OF 2019**

AY KOROSS, J

MAY 6, 2025

BETWEEN

REPUBLIC OF KENYA APPLICANT

AND

CHIEF MAGISTRATE'S COURT AT MACHAKOS RESPONDENT

AND

KAPITI PLAINS ESTATE LIMITED EXPARTE APPLICANT

AND

**JULIUS MUTIE MUTUA, JOSHUA MUEMA KANGELU JOSHUA
MUTISYA MUENDO (SUED ON BEHALF OF KWA MBAU
SOCIETY) INTERESTED PARTY**

DIRECTOR OF SURVEY OF KENYA INTERESTED PARTY

RULING

1. Pursuant to leave granted by this court on 17/09/2019, the ex parte applicant moved this court under the provisions of Order 53 Rule 3 of the Civil Procedure Rules and filed a notice of motion dated 8/10/2019 whereby it sought the following judicial review orders and other orders:
 - a. An order of certiorari to remove into this court and quash the order of the respondent issued on 29/08/2019 with respect to Machakos CMCC No. 34 of 2019 Julius Mutie Mutua & 2 Others (Suing on behalf of Kwa Mbau Society).



- b. An order of prohibition to prohibit the respondent from further hearing or conducting any further proceedings concerning Machakos CMCC No. 34 of 2029 Julius Mutie Mutua & 2 Others (Suing on behalf of Kwa Mbau Society).
 - c. The costs of and occasioned by these proceedings be provided for.
2. The motion was supported by the statutory statement and verifying affidavits of Ilona Gluecks, the ex parte applicant's research manager which was sworn on 10/09/2019 and that of a land surveyor Eric Mailu which he deposed on 12/09/2019. Reliance was also placed on several annexures to these affidavits.
 3. The motion was founded on grounds inter alia, Machakos CMCC No. 34 of 2029 Julius Mutie Mutua & 2 Others (Suing on behalf of Kwa Mbau Society) hereinafter referred to as "lower court case" assumed jurisdiction over a non-existent parcel of land; in the execution of the court order that ensued therefrom, the 1st interested party invaded the ex-parte applicant's parcel of land known as LR. No. 7374/4 (ex parte applicant's land); and,
 3. The respondent acted ultra vires its pecuniary jurisdiction as envisaged under Sections 7 and 9 of the Magistrates' Courts Act, as the subject matter was valued at ksh. 700,000,000/- and lastly, the respondent acted illegally and with procedural impropriety by entertaining proceedings in the lower court case without disclosures being made on who the respondents were.

1st interested party's (IP) case

3. The 1st respondent, who was represented by the law firm of Ms. E.M. Obonyo & Co. Advocates, opposed the motion by the replying affidavit of Julius Mutua filed on 25/03/2022.
3. He stated the IP was a duly registered society, and it owned land parcel no. LR. No. 7374/6 (1st IP's land), which he argued was a distinct parcel of land from the ex-parte applicant's parcel of land, which included LR. No. 1731.
3. He maintained the lower court case had nothing to do with the ex-parte applicant as it only sought police security to maintain peace during the process of replacing missing beacons by the 2nd IP over the 1st IP's land. He argued no other orders were sought in the lower court case apart from this.
3. Lastly, he maintained that the lower court case was spent as police security was provided as per the said order, and the matter herein was moot. Worth noting is that the other parties did not participate in these proceedings.

Submissions

3. The motion was canvassed through written submissions filed by the law firm of M/s. Oraro & Co. Advocates on record for the ex parte applicant, and they were dated 14/06/2024. The issues raised therein were whether the respondent acted ultra vires its jurisdiction and in so doing, acted with procedural impropriety and whether the ex parte applicant was entitled to the reliefs sought.
3. The 1st IP also filed its submissions, dated 17/03/2025, which made general arguments on whether the motion was meritorious. This court wishes to mention that it has considered the parties' arguments and is greatly indebted to counsels for their well-researched submissions.
3. Therefore, upon identifying and considering the issues for determination, this judgment shall, later on in its analysis and determination, consider the arguments contained in the submissions on the particular issue and also bear in mind the law and judicial precedents relied upon.



Issues for determination, Analysis and Determination

3. This court has meticulously gone through pleadings and submissions, and this court finds the following issues, which shall be addressed simultaneously fall for determination: -
 - a. Whether the judicial review proceedings are moot.
 - b. Whether the respondent acted ultra vires powers donated to it by Sections 7 and 9 of the [Magistrates' Courts Act](#).
 - c. Whether the respondent's proceedings were conducted with procedural impropriety.
 - d. What orders should this court issue?
- a. Whether the judicial review proceedings are moot.
13. The Black's Law Dictionary, 9th Edition defines mootness as:-

“having no practical significance; hypothetical or academic (the question on appeal became moot once the parties settled their case).”
13. This issue was not addressed by any of the parties in their respective submissions but as evidenced from both parties' affidavits, the orders of the lower court case were implemented when the police officers granted the 2nd IP security to survey the 1st IP's land.
13. The doctrine of mootness is not new and has been dealt with in a series of decisions of the Supreme Court, and this court will seek guidance from them in assessing whether the judicial review is moot.
13. After considering jurisprudence on mootness, the apex court in [Institute for Social Accountability & another v National Assembly & 5 others](#) [2022] KESC 39 (KLR) stated as follows on the doctrine: -

“66... The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.”
13. In this decision, the apex cited with approval Canada's Supreme Court's decision of [Borowski v Canada \(Attorney General\)](#) [1989] 1 SCR 342 which stated the process of determining if a decision is moot is a two-tier procedure whereby in the first instance, the court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.
13. Noting the above expressions of caselaw, at the time of instituting these proceedings, the 2nd IP and police security had fulfilled the conditions precedent towards enforcement of the court order of 29/08/2019 that was issued by the respondent in the lower court case.
13. Having so implemented, an entertainment of the judicial review process will merely be an academic exercise, and in this court's view, it became moot as the grounds in support of the judicial review proceedings are no longer a live controversy.



13. Thus, it is the finding of this court that there exists no live controversy between the parties as the modalities towards giving security by the police to the 2nd IP in the boundary identification and boundary marking exercise over the 1st IP's alleged land has already taken place.
13. Consequently, this court finds the judicial review proceedings are moot and hence, it is superfluous to deal with issues (b) and (c).
13. Before this court deals with the last issue, it is essential it mentions that though the ex parte applicant tendered copies of title documents to this court, it was constrained from considering the contents therein as they were illegible. Additionally, the 1st IP availed documents showing it owned its land.
13. In these judicial review proceedings, it appears the ex parte applicant is challenging the 1st IP's parcel of land on grounds of fraud, which is anchored in Section 26 of the Land Registration, which permits parties to approach this court.
13. In this court's humble opinion and in agreement with the 1st IP's submissions, the ex parte applicant should have approached this court using a different avenue in questioning the 1st IP's parcel of land and not in the manner it did.
13. In the end, and dealing with the last issue, the judicial review proceedings are deemed moot, and since it is trite law that costs follow the event, this court awards costs to the 1st IP. As the other parties did not participate in the proceedings, costs are not awarded to them. Therefore, the court hereby issues the following final disposal orders: -
 - a. The judicial review proceedings are deemed moot.
 - b. Costs are awarded to the 1st interested party.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 6TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

06.05.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

M/s Anne Kadima for applicant

Mr Maranga holding brief Mr Momanyi for 1st interested party

N/A for other parties

Ms Kanja- Court Assistant

