



**Republic v National Land Commission; African Inland Church & 4 others  
(Interested Parties); Mbindyo (Exparte Applicant) (Environment and Land Judicial  
Review Case 30 of 2020) [2024] KEELC 5262 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5262 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 30 OF 2020  
A NYUKURI, J  
JULY 10, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**AND**

**AFRICAN INLAND CHURCH ..... INTERESTED PARTY**

**AGRICULTURAL DEVELOPMENT CORPORATION ..... INTERESTED PARTY**

**STONY ATHI MEMBERS ASSOCIATION ..... INTERESTED PARTY**

**THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**DIRECTOR OF SURVEYS ..... INTERESTED PARTY**

**AND**

**CHARLES STEVEN MBINDYO ..... EXPARTE APPLICANT**

**JUDGMENT**

**Introduction**

1. Pursuant to leave to seek judicial review orders granted by this court on 22<sup>nd</sup> September 2016, the exparte applicant filed a substantive notice of motion dated 5<sup>th</sup> October 2016 and filed on 10<sup>th</sup> October 2016 seeking the following orders;
  - a. That an order of certiorari does issue to quash the decision of the respondent contained in its letter dated 9<sup>th</sup> August 2016 to conduct the title review hearing scheduled for 2<sup>nd</sup> September



2016 at Nairobi in respect of the subject property being title Number L.R. Number 9919/4 registered as I.R. 47655.

- b. That an order of prohibition does issue to prohibit the respondent where acting by itself, its agents, officers, servants or whosoever from conducting the review hearing scheduled for 2<sup>nd</sup> September 2016 at Nairobi or at all in respect of the applicant's title Number L.R. Number 9919/4 registered as I.R. 47655.
  - c. That the costs of this application be provided for.
2. The applicant relied on the application for leave, the annexed verifying affidavit of Jane Nyaboke Mbindyo, and the statement of facts. The applicant's case is that he is the registered proprietor of the parcel of land known as L.R. No. 9917/4 registered as I.R. No. 47655 measuring 4,224 hectares, situated in Konza area in Machakos County (herein after referred to as the suit property). Further that he purchased from Lands Limited, a subsidiary of the Agricultural Development Corporation (a state corporation) in 1989 and that the was transferred to him on 4<sup>th</sup> July 1989.
  3. He stated that in the 1990's, he received attempts to coerce him to surrender a portion of the suit property in dubious circumstances and that he resisted the coercion and declined to execute a deed of surrender and to subdivide the suit property. He also stated that since the purchase of the suit property, he had been in possession thereof until 2015 when the same was invaded by unknown persons. That this prompted him to report the invasion to the Directorate of Criminal Investigations, whereof the latter found that one Justus Wainaina had allegedly attempted to secure registration of some fraudulent subdivisions of the suit property being L.R. Nos 9917/5 – 13.
  4. The applicant asserted that Justus Wainaina who claimed to be acting under instructions of Mr. Cheptumo of Cheptumo & Company Advocates, is facing several criminal charges related to the purported subdivisions among them Criminal Case Number 539 of 2015 at Milimani Law Courts. He stated that in their letter dated 21<sup>st</sup> April 2016, Cheptumo & Company Advocates while acting on instructions of the 1<sup>st</sup> Interested Party herein, wrote to the respondent seeking to have the applicant's title renamed and cancelled under Section 14 of the *National Land Commission Act*.
  5. It was claimed by the applicant that the sought review was to give effect to a purported "mutual understanding" between the 2<sup>nd</sup> interested party, the Commissioner of Lands and the applicant so as to transfer L.R. No. 9917/8 measuring 1588.4 Hectares in favour of the 1<sup>st</sup> interested party. The applicant stated that he responded to the 1<sup>st</sup> interested party's letter vide his letter dated 15<sup>th</sup> June 2016 stating that he was not privy to any understanding alleged by the 1<sup>st</sup> interested party and challenging the respondent's jurisdiction to review his title. That despite the applicant's response, the respondent vide its letter dated 9<sup>th</sup> August 2016 invited the applicant for a review hearing scheduled for 2<sup>nd</sup> September 2016.
  6. The applicant contended that the complaint contained in the 1<sup>st</sup> interested party's letter dated 21<sup>st</sup> April 2016, is of a private nature, being premised on purported understanding between the applicant, Commissioner of Lands and the 2<sup>nd</sup> interested party to surrender a portion of the suit property to the 1<sup>st</sup> interested party. On that basis, the applicant argued that the respondent lacks jurisdiction to adjudicate and determine private disputes relating to agreements and or mutual understandings stated herein.
  7. It was maintained by the applicant that as there was no challenge on the manner he acquired the suit property, a position conceded by the parties, what is in dispute is the propriety, probity and enforceability of some purported agreements between the parties herein, which matters are subject of a criminal trial, hence the respondent has no jurisdiction. The applicant argued that the intended review



hearing smacks of impropriety untoward, is in error of jurisdiction, unjust, unwarranted, is ultra vires and prejudicial not only to him, but also to the outcome of the criminal trial.

8. He stated that he has been in occupation of the suit property for over 26 years and none of the parties herein have sought to enforce the alleged agreement and that proceeding with the review hearing is intended to give the 1<sup>st</sup> interested party a cause of action which it does not have.
9. The applicant annexed the power of attorney for the deponent; copy of title; transfer instrument; applicant's statement dated 5<sup>th</sup> February 2015 and a charge sheet; letter dated 21<sup>st</sup> April 2016 from Cheptumo & Cheptumo advocates; respondent's letter dated 9<sup>th</sup> August 2016; applicant's letter dated 16<sup>th</sup> August 2016; and the respondent's letter dated 15<sup>th</sup> August 2015.
10. The application was opposed. Although no response was filed by the respondent, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties filed replying affidavits opposing the application. Bishop Abraham Mulwa the 1<sup>st</sup> interested party's Presiding Bishop swore a replying affidavit on behalf of the 1<sup>st</sup> interested party dated 27<sup>th</sup> June 2022.
11. It was the 1<sup>st</sup> interested party's case that the dispute herein is about ownership of the suit property, between the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to the exclusion of the 3<sup>rd</sup> interested party. The deponent stated that the 1<sup>st</sup> interested party lays claim on the proposed L.R. No. 9917/8 which was to be excised from L.R. No. 9917/4. He asserted further that the 2<sup>nd</sup> interested party owned Parcel L.R. No. 9917/4 measuring 4221 Ha and that it allocated the applicant unsurveyed property measuring approximately 2428 Ha.
12. Bishop Abraham Mulwa deposed that the applicant acquired proprietary rights over the whole of L.R. No. 9917/4 measuring 4225 Ha contrary to express terms of the allotment letter which allotted him approximately 2428 Ha. According to him, the applicant was to hold the remainder of the property measuring 1559 Ha as custodian on behalf of the 2<sup>nd</sup> respondent until further notice.
13. He further stated that upon due consultations between the government and the applicant, it was mutually agreed that the applicant surrenders 1559.4 Hectares and that the applicant wrote a letter to the 2<sup>nd</sup> interested party confirming that he will surrender the land he held as custodian. That that led to the Commissioner of Lands preparing a surrender instrument for the applicant's execution which the applicant declined.
14. According to him, the applicant was to surrender 1559 Ha to the 2<sup>nd</sup> interested party for the same to be transferred to the 1<sup>st</sup> interested party. He stated that after the resurvey of the applicant's land, property L.R. No. 9917/8 which was to be surrendered by the applicant, was allocated to the 1<sup>st</sup> interested party. That the purpose of the 1<sup>st</sup> interested party's purchase of the said property was for construction of a Teachers' Training College. He also stated that the allocation of land to the 1<sup>st</sup> interested party was by donation and the latter were required to pay stamp duty, survey and conveyance fees in the sum of Kshs. 265,673/- which they paid.
15. It was also his assertion that the process of transferring L.R. 9917/8 to the 1<sup>st</sup> interested party commenced by obtaining the requisite Land Control Board consent. That the 2<sup>nd</sup> interested party called for the surrender instrument and deed plan for the said property to facilitate transfer to the 1<sup>st</sup> interested party. Further that the surrender documents were sent to the applicant for execution which he declined. He stated that it is on the strength of the above position that the 1<sup>st</sup> interested party wrote to the respondent asking the latter to effect the mutual understanding between the 2<sup>nd</sup> interested party, the respondent, and the applicant. Further that the respondent intended to conduct a review of title and that the 2<sup>nd</sup> interested party in response to this suit confirmed the claim of the 1<sup>st</sup> interested party.



16. That vide a memo dated 1<sup>st</sup> August 2017, the chairperson of the respondent purported to allocate property L.R. No. 9917/8 to Stoni Athi Members Association, the 3<sup>rd</sup> interested party herein, which led to the applicant's application for contempt dated 22<sup>nd</sup> January 2018. That the respondent denied allocation of the said property to the 3<sup>rd</sup> interested party in its response to the application for contempt.
17. He conceded that as the applicant is yet to execute the surrender L.R. No. 9917/4 is still intact save that the portion being L.R. No. 9917/8 was to be excised from it and allocated to the 1<sup>st</sup> interested party. He also stated that the applicant did not mention that the judgment delivered in ELC No. 460 of 2017 was set aside vide a ruling of the court dated 1<sup>st</sup> November 2021. That the applicant's attempt to subdivide the suit property is meant to defeat the 1<sup>st</sup> interested party's property rights and violates the orders of the court.
18. He maintained that the 3<sup>rd</sup> interested party is an unscrupulous body seeking to illegally acquire L.R. No. 9917/8 and is a stranger to the discourse of ownership of the suit property seeking to unjustly enrich itself. According to him, since the proposed L.R. No. 9917/8 was validly allocated to the 1<sup>st</sup> interested party making it a bona fide owner, the 1<sup>st</sup> interested party seeks orders quashing the applicant's decision to subdivide L.R. No. 9917/4 and the alleged allocation of the proposed L.R. No. 9917/8 to Stoni Athi Members Association by the respondent. He sought for orders to stop the applicant from subdividing and alienating L.R. No. 9917/4 and by extension L.R. No. 9917/8. He also sought orders directing the respondent to effect the mutual understanding between the 2<sup>nd</sup> interested party, Commissioner of Lands and the applicant by compelling parties to take steps to effect the transfer of the proposed L.R. No. 9917/8 in favour of the 1<sup>st</sup> interested party.
19. He annexed the 2<sup>nd</sup> interested party's letter dated 23<sup>rd</sup> September 1988; applicant's letter dated 21<sup>st</sup> November 1988; 2<sup>nd</sup> respondent's letter dated 3<sup>rd</sup> August 1990; applicant's letters dated 28<sup>th</sup> February 1991; and 18<sup>th</sup> November 1991; letters by Commissioner of Lands dated 22<sup>nd</sup> January 1992 and 19<sup>th</sup> June 1992; allotment letter dated 15<sup>th</sup> February 1993 and 2<sup>nd</sup> interested party's letter dated 15<sup>th</sup> February 1993, 29<sup>th</sup> June 1993 and 9<sup>th</sup> August 1993; payment receipt for stamp duty and survey fees for the 1<sup>st</sup> interested party; consent from the Land Control Board; letters of Commissioner of Lands dated 17<sup>th</sup> October 1994; letters by the 1<sup>st</sup> interested party dated 26<sup>th</sup> September 1995, 9<sup>th</sup> February 1996 and 21<sup>st</sup> April 2016; letter by Commissioner of Lands dated 11<sup>th</sup> December 1995, 1<sup>st</sup> interested party's replying affidavit dated 2<sup>nd</sup> September 2016; respondent's replying affidavit dated 20<sup>th</sup> April 2018, 1<sup>st</sup> interested party's replying affidavit dated 29<sup>th</sup> January 2018, and ruling dated 1<sup>st</sup> November 2021.
20. On behalf of the 2<sup>nd</sup> interested party, Nicholas Ayugi, the Administrator Lands Limited swore a replying affidavit dated 22<sup>nd</sup> February 2023 opposing the motion. He stated that Lands Limited, a wholly owned subsidiary of Agricultural Development Corporation acquired Astra Farm comprising of 15945.27 acres from Agricultural Settlement Trust (A.S.T) in 1970. That on 30<sup>th</sup> December 1970, a transfer was executed in favour of Lands Limited transferring L.R. No. 9917/2 (IR No. 24015) to Lands Limited. He stated that the title deed for L.R. No. 9917/2 (IR. No. 24015) was never processed and Lands Limited is still in possession of the mother title LR. No. 9917 (IR. No. 18019). He maintained that any title issued relating to LR. No. 9917/2 (IR. No. 2405) was issued irregularly, hence void; and that the 2<sup>nd</sup> interested party has never been in possession of it. That it is on that premise that the department of Survey cancelled all subdivisions arising from LR. No. 9917/2 (I.R. No. 24015).
21. It was his position that L.R. Numbers 9917/3; 9917/4; 9917/5; 9917/6; 9917/7; 9917/8; 9917/9; 9917/10; 9917/11; 9917/12 and 9917/13 do not exist because ownership documents relating to them were cancelled. He also stated that over the years, the interested parties approached ADC with



- intention of either purchasing or leasing the Astra Ranch but that was declined as the latter was keen in preserving the land as a Government National Ranch.
22. He stated that in 1988, there was a directive from the Office of the President instructing the 2<sup>nd</sup> interested party to sell a portion of the ranch to Professor Phillip Mbithi and the applicant. That Professor Mbithi was allocated 5,518.2 acres while the applicant was allocated 6,000 acres but that the applicant irregularly caused a purported transfer of 10,437.5 acres to himself whereof 4,000 acres were recalled by the 2<sup>nd</sup> interested party.
  23. Mr. Ayugi denied allegations of coercion claimed by the applicant and stated that the applicant committed to surrender 4,000 acres, but has not honoured his commitment. He claimed that records held show that the applicant only paid Kshs. 1,514,400/- out of a total of Kshs. 3,311,130/-. He stated that it was the willful refusal by the applicant to surrender the recalled parcel that led to the matter being referred to the respondent to conduct an enquiry regarding the contested 4,000 acres.
  24. He asserted that the applicant's challenge of the respondent's involvement in the matter by filing this suit, citing jurisdiction is an acknowledgement by the applicant of the existence of a dispute over ownership of the suit property. He attached copies of title and letter dated 28<sup>th</sup> February 1991 by the applicant.
  25. The 3<sup>rd</sup> interested party opposed the application through the replying affidavit sworn on 23<sup>rd</sup> May 2023 by one of its members, one David Makovu Muli who stated that the 3<sup>rd</sup> interested party was a registered society. He also claimed that he was aware that in 1988, the applicant purchased L.R. No. 9917/4 measuring 4224 from the 2<sup>nd</sup> respondent and that the same was transferred to the applicant. He stated that in 1990 and 1991, the 2<sup>nd</sup> interested party reclaimed 1558.60 ha of the suit property from the applicant and issued him a credit note of Kshs. 2,951,370/-. That on 20<sup>th</sup> July 1995, the suit property was surveyed and subdivided into L.R. No. 9917/8 and 9917/9.
  26. It was his contention that on 23<sup>rd</sup> August 2013, the 3<sup>rd</sup> interested party registered with the respondent, its interest in acquiring L.R. No. 9917/8 measuring 1558.60 Ha, the same having reverted to the 2<sup>nd</sup> interested party. According to him, the respondent invoked its powers under Article 67 (3) of *the Constitution* of Kenya and Section 5 of the *National Land Commission Act*, to review the grant by summoning the parties for a public hearing slated for 6<sup>th</sup>, 18<sup>th</sup> and 20<sup>th</sup> April 2017 and 18<sup>th</sup> May 2017 but that the parties failed to attend, save the 3<sup>rd</sup> interested party and a CEC Member of Machakos County Government. He claimed that the respondent having heard the 3<sup>rd</sup> interested party and the CEC Member of County Government of Machakos, allocated the 3<sup>rd</sup> interested party L.R. No. 9917/8 by way of a letter of allotment dated 22<sup>nd</sup> November 2017, for valuable consideration of Kshs. 2,050,294/-.
  27. He stated that at the hearing, there was no disclosure of the existence of stay orders granted in this suit. He maintained that although the applicant was aware of the 3<sup>rd</sup> interested party's claim, he failed to join it to these proceedings. He insisted that the 3<sup>rd</sup> interested party complied with the terms of the allocation. Further, that the applicant filed Machakos ELC Case No. 460 of 2017, wherein judgment was entered in favour of the applicant by granting a permanent injunction and a declaration that the applicant is the bona fide owner of the suit property, but that the said judgment was set aside and the 3<sup>rd</sup> interested party made a defendant therein although that suit was subsequently withdrawn. He maintained that therefore two proceedings were running concurrently, which is an abuse of the court process.
  28. He deposed that the 3<sup>rd</sup> interested party was the bona fide owner of the suit property. He maintained that the application for judicial review had been overtaken by events as LR. No. 9917/4 was extinguished in 1995. He annexed, a certificate of registration of the 3<sup>rd</sup> interested party; and list



of members; certificate of title; letters dated 20<sup>th</sup> and 28<sup>th</sup> February 1991, 18<sup>th</sup> November 1991, 26<sup>th</sup> May 2016 and 26<sup>th</sup> November 2018; unexecuted surrender document; letters of 12<sup>th</sup> June 2017; 26<sup>th</sup> November 2018 and 4<sup>th</sup> December 2018; letters dated 23<sup>rd</sup> August 2013, 1<sup>st</sup> August 2017 and summons from the respondent; letter of allotment; survey map; letter dated 3<sup>rd</sup> February 2021; judgment, application, defence, notice of withdrawal and ruling dated 17<sup>th</sup> November 2021 in Machakos ELC No. 460 of 2017; and certificate of title.

29. The application was canvassed by way of written submissions. On record are submissions filed by the 1<sup>st</sup> interested party on 19<sup>th</sup> October 2023 and the submissions filed by the 3<sup>rd</sup> interested party on 31<sup>st</sup> May 2023. The applicant did not file submissions in regard to the motion dated 5<sup>th</sup> October 2016, although he filed submissions in regard to his own two applications regarding injunction and contempt, which in my view are irrelevant in regard to the motion before court.

### **1<sup>st</sup> interested party's submissions**

30. Counsel for the 1<sup>st</sup> interested party submitted that the interested party has unequivocal, and unblemished claim to the suit property. Counsel argued that the letter of 21<sup>st</sup> November 1988 by the applicant confirmed that he held the suit property on behalf of the 2<sup>nd</sup> interested party. Counsel argued that notwithstanding non execution of the surrender by the applicant his undertaking to surrender prompted the government's allocation of the land to the 1<sup>st</sup> interested party. Counsel submitted that this court has jurisdiction to order a mandatory order compelling the parties to effect transfer of parcel L.R. No. 9917/8 in favour of the 1<sup>st</sup> interested party.
31. Reliance was placed on the case of *Dande & 3 Others v. Inspector General National Police Service & 5 Others* (Petition 6 (E007) 4 (E005) & 8 (E010) of 2022 (consolidated) [2023] KESC 40 (KLR) 16<sup>th</sup> June 2023 [Judgment], for the proposition that as judicial review was entrenched in *the Constitution* of Kenya 2010, the same is no longer a strict administrative law remedy but also a Constitutional fundamental right which envisages a merit based judicial review.
32. It was submitted for the 1<sup>st</sup> interested party that as the applicant invoked Article 40 of *the Constitution* and stated in his supporting affidavit that alienating the suit property will violate his Constitutional right to property, he did invoke this court to embark on a merit review.
33. On whether the respondent has jurisdiction to review the applicant's title, counsel relied on the case of *Mwangi Stephen Muriithi v. National Land Commission & 3 Others* [2018] and submitted that the National Land Commission has power to review and/or investigate private land that was previously public. Counsel submitted that it was uncontroverted that the applicant acquired that suit property from the 2<sup>nd</sup> respondent and that therefore it follows that the suit property was initially public land.
34. It was further contended for the 1<sup>st</sup> respondent that the applicant had not presented evidence of coercion as he willingly undertook to surrender a portion of the suit property to the 2<sup>nd</sup> respondent. Counsel also submitted that as the applicant's submissions dated 24<sup>th</sup> February 2023 only addressed his applications for injunction and contempt but failed to address the substantive application for judicial review orders, the same contravened the orders of this court that required submissions to be filed for all applications including the substantive notice of motion seeking judicial review orders. Counsel argued that the applicant has therefore relinquished his right to argue on the substantive and procedural merits of judicial review.
35. In response to the applicant's submissions dated 24<sup>th</sup> February 2023, counsel contended that the applicant had not approached court in good faith in his prayer for injunction as he had stated that he had sought to alienate the same to third parties notwithstanding existing legal challenges.



36. Counsel submitted that the 2<sup>nd</sup> interested party through its replying affidavit restates the position that the 1<sup>st</sup> interested party is the bona fide beneficiary of L.R. No. 9917/8 which was allocated by the Government pending the applicant's surrender. Further, that the 2<sup>nd</sup> interested party cannot disown its previous averments and the doctrine of estoppel applies. Reliance was placed on the case of Serah Njeri Mwobi v. John Kimani Njoroge [2013] eKLR to buttress the argument that the 2<sup>nd</sup> interested party is precluded from denying allocation of LR. No. 9917/8 to the 1<sup>st</sup> interested party and that the 1<sup>st</sup> interested party relied on its representation by paying stamp duty.
37. Counsel further submitted that the 2<sup>nd</sup> interested party was bound by the doctrine of conduct estoppel and cannot renege on its previous representation. Counsel referred to the case of Martin Imbusi v. Nyayo Tea Zones Development Corporation [2017] eKLR on the doctrine of promissory estoppel. It was contended for the 1<sup>st</sup> interested party that the 1<sup>st</sup> interested party is a beneficiary of legitimate expectation and the court was referred to the case of Savtri v. Gidoomal & 2 Others (as legal representatives of the Estate of V. H. Gidoomal) v. National Land Commissioner & 2 Others [2018] eKLR.
38. Regarding the 3<sup>rd</sup> interested party, counsel submitted that the same are an unscrupulous body seeking to illegally and irregularly acquire LR. No. 9917/8 and that it is questionable that the said entity is relying on two allotment letters which are dated 3<sup>rd</sup> February 2021 and 1<sup>st</sup> July 1991. Counsel submitted that although the chairman of the respondent in his memo dated 1<sup>st</sup> August 2017 purported to allocate LR. No. 9917/8 to the 3<sup>rd</sup> interested party, the respondent itself in its affidavit of 20<sup>th</sup> April 2018, confirmed that it had not allocated the suit property to any entity. Counsel relied on the case of Torino Enterprises v. The Honourable Attorney General SC Petition No. 5 (E006) of 2022 for the proposition that upon alienation of LR. No. 9917/4 to the applicant, the National Land Commission cannot purport to allocate it to the 3<sup>rd</sup> interested party. Further, that National Land Commission has no authority to confer LR. No. 9917/8 to the 3<sup>rd</sup> interested party. Counsel also argued that the 3<sup>rd</sup> interested party relied on forgeries and documents of questionable validity to back its case.

### **Submissions by the 3<sup>rd</sup> interested party**

39. Counsel for the 3<sup>rd</sup> interested party reiterated contents of the 3<sup>rd</sup> interested party's replying affidavit and submitted that in 1988, the applicant irregularly purchased parcel LR. No. 9917/4 and that on 20<sup>th</sup> July 1995, the suit property was surveyed and subdivided into LR. No. 9917/8 and 9917/9. Counsel argued that on 1<sup>st</sup> August 2017, the respondent heard the 3<sup>rd</sup> interested party and CEC member Machakos County and made a decision allocating LR. No. 9917/8 to the interested party. It was further argued for the 3<sup>rd</sup> interested party that no disclosure of the existence of the orders of 6<sup>th</sup> September 2016 and 10<sup>th</sup> October 2016 was made at the time of the hearing. Counsel therefore argued that there was no contempt on the part of the 3<sup>rd</sup> interested party and that the applicant failed to prove contempt. Reliance was placed on the case of North Tetu Farmers Co. Ltd v. Joseph Ndendu Wanjohi [2016] eKLR.
40. The court was referred to the case of Charter House Investment Limited v. Simon K. Sang & 3 Others [2012] eKLR. Counsel argued that withdrawal of Machakos ELC No. 460 of 2017 was meant to defeat the 3<sup>rd</sup> interested party's case.
41. Counsel maintained that the right legal procedure was followed in allocating LR. No. 9917/8 and argued that the 3<sup>rd</sup> interested party was the bona fide owner of the suit property.
42. It was further contended for the 3<sup>rd</sup> interested party that the application for judicial review orders had been overtaken by events as LR. No. 9917/4 was extinguished in 1995. Reliance was placed on the



case of *Giella v. Cassman Brown* [1973] EA 358, on the conditions for temporary injunction. Counsel also argued that this court has no power to grant injunction in a judicial review claim arguing that judicial review proceedings are *sui genesis* and not intended to deal with private rights. To buttress this position, counsel relied on the case of *Cortec Ministry Kenya Limited v. Cabinet Secretary, Attorney General* [2015] eKLR.

### **Analysis and determination**

43. The court has carefully considered the substantive motion seeking judicial review orders of certiorari and prohibition, together the replying affidavits and the parties' submissions. The issues that arise for determination are as follows;
- a. Whether a merit review is required in this matter.
  - b. Whether the 1<sup>st</sup> interested party is entitled to the substantive orders it sought from court
  - c. Whether the National Land Commission had jurisdiction to conduct a title review in respect of the suit property.
44. The applicant moved this court under the provisions of Order 53 of the Civil Procedure Rules. Order 53 Rule 1 of the Civil Procedure Rules provides as follows;

[Order 53, rule 1.] Applications for mandamus, prohibition and certiorari to be made only with leave.

1.

- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
- (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
- (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.



45. The jurisdiction to grant equitable remedies of judicial review under Order 53 of the Civil Procedure Rules is exercised to grant redress in cases where there is procedural impropriety, illegality, irrationality, unreasonableness, unfairness or want of jurisdiction in regard to administrative decisions. This jurisdiction is concerned with the decision making process and not the merits of the decision. In the case of *Zacharia Wagunza & Another v. Office of the Registrar, Academic Kenyatta University & 2 Others* [2013] eKLR, the court referred to the Ugandan decision of *Pastoli v. Kabale District Local Government Council & Others* [2008] 2EA 300 where the court stated as follows;

In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety; illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision, is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is failure to act fairly or the part of the decision making authority in the process of taking a decision. The unfairness may be in non observance of the rules of natural justice act or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

46. Similarly, in *Republic v. Kenya National Examinations Council Ex parte Gathenji & Others, Civil Appeal 266 of 1996*, the Court of Appeal held as follows;

An order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of judicial review is not concerned with the merits of the case but the decision making process. In order for an applicant to succeed in an application for judicial review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.

47. I take the view that in a case where a party invokes the provisions of Order 53 of the Civil Procedure Rules and not *the Constitution* of Kenya in seeking review of administrative decisions without raising questions of interpretations of *the Constitution* and or without raising Constitutional questions, requiring the court's interpretation of *the Constitution*, then the court's jurisdiction for judicial review will be exercised only for purposes of interrogating the decision making process and not the merits of the matter.

48. Under Article 23 of *the Constitution*, judicial review orders are among the remedies that the court may grant, which means that a merit review may be made in a judicial review application, made in a claim where Constitutional interpretation is involved. Therefore, where a party approaches the court substantively under the provisions of *the Constitution*, claiming violation of fundamental rights and freedoms under *the Constitution*, the court would have jurisdiction to undertake a merit review of the case.



49. In the case of *Dande & 3 Others v. Inspector General National Police Service & 5 Others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated) [2023] KESC 40 KLR (16 June 2023) (judgment) (paragraph 85), the Supreme Court of Kenya held as follows;

It is clear from the above decision that when a party approaches a court under the provisions of *the Constitution*, then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of right or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in *SGS Kenya Ltd* and not the merits of the decision per se.

50. For a merit review, it is not enough that a party has mentioned a Constitutional provision. *The Constitution* being the grundnorm and the basis of all other laws and statutes, it is expected that parties may in ordinary civil cases and even in judicial review cases, mention *the Constitution* even when such cases do not necessarily raise constitutional questions or call for constitutional interpretation. Therefore, to obtain a merit review in a judicial review case, a party must demonstrate that the core of their claim is a violation of constitutional provisions and their dispute raises a constitutional question.
51. In the instant case, the applicant raised the issue that the National Land Commission has no jurisdiction to conduct a title review of the suit property as the matters of enforcing an alleged agreement between the parties is private in nature. The 1<sup>st</sup> interested party insists that this court conducts a merit review of the dispute because the applicant invoked Article 40 of *the Constitution*, and that the 1<sup>st</sup> interested party sought for the orders compelling the parties to implement their agreement and transfer the proposed LR. No. 9917/8 in its favour, and for the court to quash the applicant's acts of seeking to subdivide the suit property.
52. I have considered both the applicant's claim for judicial review and the replying affidavits of the 1<sup>st</sup> interested party and there is nothing therein demonstrating that the applicant's and the 1<sup>st</sup> interested party's claims are based on violation of Constitutional provisions or seek constitutional interpretations. The mere fact that the applicant mentioned Article 40 of *the Constitution*, does not transform his claim, which is a challenge of jurisdiction, to a constitutional question requiring constitutional interpretation and therefore calling for a merit review of this matter. In the premises, I find and hold that the dispute herein does not raise interpretation of constitutional questions and therefore there is no basis for this court to conduct a merit review of this matter.
53. Regarding the 1<sup>st</sup> interested party's prayers for an order compelling parties to implement their alleged agreement and the applicant to stop subdividing the suit property, the place of an interested party is well defined in law. The Black's Law Dictionary 11<sup>th</sup> Edition defines an interested party as a party who has a recognizable stake (and therefore standing) in a matter. It is clear that the 1<sup>st</sup> interested party herein is neither the applicant nor the respondent and therefore is not a primary party in the suit clothed with capacity to make a substantive claim in this suit. In view of the fact that the 1<sup>st</sup> interested party is not a primary party in this suit and the fact that there is no basis for a merit based review in this matter, I find and hold that the 1<sup>st</sup> interested party's prayer cannot be granted in this suit. As the prayers sought is a claim of the suit property, they ought to file a fresh suit as their claim cannot be competently heard and determined in this matter.
54. On the question of whether the National Land Commission had jurisdiction to interrogate the propriety and legality of the applicant's title, it is trite that jurisdiction is the power to determine or



adjudicate over a matter. Jurisdiction is conferred by *the Constitution* or legislation or both, and a court, tribunal or administrative body cannot arrogate itself jurisdiction it does not have.

55. In the case of Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & Others [2012] eKLR, the Supreme Court held as follows;

A court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

56. The jurisdiction of the National Land Commission to review of grants and dispositions of public land is provided for in Article 68 (c) (v) of *the Constitution* as follows;

68. Parliament shall—

(c) enact legislation—

(v) to enable the review of all grants or dispositions of public land to establish their propriety or legality;

57. Section 14 (1) of the *National Land Commission Act* provides for the power of the National Land Commission to review grants and dispositions of public land as follows;

14.

(1) Subject to Article 68 (c)(v) of *the Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

58. Therefore, both *the Constitution* and the *National Land Commission Act* granted the National Land Commission the jurisdiction to review all grants and dispositions of public land to establish their propriety and or legality. However, this jurisdiction was only to be exercised within five years of the commencement of the *National Land Commission Act*. The date of commencement of that Act was on 2<sup>nd</sup> May 2012, meaning that the jurisdiction thereof lapsed on 1<sup>st</sup> May 2017.

59. As the impugned review hearing was scheduled for 2<sup>nd</sup> September 2016, it is clear that as at that point in time, the National Land Commission's jurisdiction to review grants and dispositions of public land had not lapsed, although the Commission had just about eight months to go.

60. Public land is defined in Article 62 (1) of *the Constitution* as follows;

62.

(1) Public land is—

a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

b. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

c. land transferred to the State by way of sale, reversion or surrender;

d. land in respect of which no individual or community ownership can be established by any legal process;



- e. land in respect of which no heir can be identified by any legal process;
- f. all minerals and mineral oils as defined by law;
- g. government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- h. all roads and thoroughfares provided for by an Act of Parliament;
- i. all rivers, lakes and other water bodies as defined by an Act of Parliament;
- j. the territorial sea, the exclusive economic zone and the sea bed;
- k. the continental shelf;
- l. all land between the high and low water marks;
- m. any land not classified as private or community land under this Constitution; and
- n. any other land declared to be public land by an Act of Parliament—
  - (i) in force at the effective date; or
  - (ii) enacted after the effective date.

61. Therefore, land lawfully held, used or occupied by any state organ, save where the same is occupied under a private lease, is public land.

62. I have considered the applicant's complaint. He argues that the decision to conduct a review hearing smacks of impropriety, untoward, arbitrary, ultra vires and in error of jurisdiction. The impugned letter from the National Land Commission is dated 9<sup>th</sup> August 2016. It is clear that the said letter was written pursuant to the joint complaint by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties vide their advocates' letter dated 21<sup>st</sup> April 2016. It is also clear that while their aforesaid complaint sought for three prayers; namely for review of grant in respect of LR. No. 9917/4; to actualize the alleged mutual understanding of the parties and compel the parties to transfer LR. No. 9917/8 to the 1<sup>st</sup> respondent, the National Land Commission in its letter of 9<sup>th</sup> August 2016 delineated the prayer of title review to determine the applicant's title's propriety and legality under the powers donated by Section 14 of the [National Land Commission Act](#), as what it intended to do. The Commission did not comment on the other two prayers by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, of actualizing the parties mutual agreement and compelling the transfer of LR. No. 9917/8 to the 1<sup>st</sup> interested party.

63. The powers of the National Land Commission under Section 14 of the [National Land Commission Act](#) was to review grants and dispositions of public land between 12<sup>th</sup> May 2012 and 1<sup>st</sup> May 2017. As the planned review hearing was scheduled for 2<sup>nd</sup> September 2016 and therefore within the statutory period, therefore, the issue that arises is whether the transfer of LR. No. 9917/4 to the applicant was as a result of a grant or disposition of public land and therefore capable of being reviewed to ascertain its propriety and legality.

64. The Agricultural Development Corporation (ADC) is a state corporation established under the Agricultural Development Corporation Cap 444 Laws of Kenya whose functions are stated in Section 12 of the Act as follows;

1. The functions of the Corporation shall be—



- a. to promote the production of Kenya’s essential agricultural inputs as the Corporation may decide from time to time, such as seeds and pedigree and high grade livestock including, hybrid seed maize, cereal seed, potato seed, pasture seed, vegetable seed, pedigree and high grade cattle, sheep, goats, pigs, poultry and bees;
  - b. to undertake such activities as the Corporation may decide from time to time for the purpose of developing agricultural production in specific areas or specific fields of production; and
  - c. to participate in activities in agricultural production which are related to the primary and secondary functions of the Corporation and which in the view of the Corporation are commercially viable.
2. In the performance of its functions under this Act the Corporation shall have proper regard to the economic and commercial merits of any undertakings it plans to initiate, assist or expand.
  3. If the Minister, after consultation with the Minister for the time being responsible for finance, instructs the Corporation to initiate, assist or expand any undertaking which it considers economically or otherwise unsound, the Corporation shall not be required to proceed with the initiation, assistance or expansion until the Government has undertaken to reimburse the Corporation with any losses incurred thereby.
65. As the Agricultural Development Corporation is a state corporation, all land held by the corporation and or registered in its name is public land. It is not disputed that the applicant purchased the suit property from Lands Limited, a subsidiary of the Agricultural Development Corporation, which is fully owned and controlled by the said state corporation and therefore that means that before the sale of LR. No. 9917/4 to the applicant, the suit property was public land, as it was held by a state organ. It is not disputed that the transfer to the applicant was on the basis of sale.
66. Section 14 of the *National Land Commission Act* grants power to the National Land Commission to review grants and dispositions. The Black’s Law Dictionary 11<sup>th</sup> Edition defines disposition as;
- The act of transferring something to another’s care or possession especially by deed or will; the relinquishing of property.
67. In the instant case, there was a transfer of the suit property from Lands Limited, a subsidiary of a state corporation to the applicant. Therefore, this amounted to disposition of public land to the applicant. Can this disposition be subject of title review by the National Land Commission under Section 14 of the *National Land Commission Act*? My view is that as the land in issue had been public land held by a subsidiary of a state corporation before transfer to the applicant, I find and hold that the same was a disposition of public land which disposition was subject to review by the National Land Commission which, as of September 2016 had jurisdiction to interrogate the legality and propriety of that disposition. Since a stay was made by the court on 22<sup>nd</sup> September 2016, seven months and nine days before the jurisdiction of the respondent lapsed, time stopped running specifically in regard to this matter and therefore, the National Land Commission has the liberty and the jurisdiction to review the applicant’s title, as long as the process is concluded within seven months and nine days of the date of this judgment. I will however hasten to add that the questions of whether there is a valid agreement between the applicant, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties and the Commissioner of lands, and whether the applicant should be compelled to transfer part of the suit property or the proposed LR. No. 9917/8 to the 1<sup>st</sup> interested party, did not in my view, fall within the purview of Section 14 of the *National Land Commission Act*.



68. Therefore, in the circumstances of this case, the National Land Commission had power to interrogate and review the propriety and legality of title No. 9917/4 by hearing the applicant, the Agricultural Development Corporation and Lands Limited, as the parties to the dispute. The 1<sup>st</sup> interested party is not a state organ and did not own the suit property prior to disposition of the same to the applicant and therefore had no role in the determination of the legality or propriety of the applicant's title.
69. In addition, the 3<sup>rd</sup> to 5<sup>th</sup> interested parties who were brought in this matter in regard to applications for contempt and injunction, had not been joined to this suit and therefore are not parties to the substantive motion seeking judicial review orders and therefore had no role in the National Land Commission's review of the applicant's title.
70. In the premises, I find no merit in the substantive motion dated 5<sup>th</sup> October 2016 seeking judicial review orders of certiorari and prohibition and the same is hereby dismissed. In view of the circumstances obtaining in this dispute, and the fact that the prayers sought by the parties herein have not been granted, I order each party to bear its own costs.
71. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10<sup>TH</sup> DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Kago for Ex-parte applicant

Mr. Mbuthia for 1<sup>st</sup> interested party

Ms. Kolum holding brief for Mr. Karumbu for 2<sup>nd</sup> interested party

Court assistant – Josephine

