



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

MISC. JUDICIAL REVIEW APPLICATION NO. E001 OF 2020

IN THE MATTER OF AN APPLICATION BY DAGLAS KANGA SHADRACK

MBUNGU NKARI, M'KEA M'KEA M'IBURURA & JEDIEL RWANDA NJUE TO APPLY FOR

JUDICIAL REVIEW SEEKING ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 23 (3) (F), 40, 48 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF LAND PARCEL NO'S P/NO. 1413,P/NO.1414, P/NO/1418 & P/NO./1412 KAMWIMBI "A"
ADJUDICATION SECTION**

AND

**IN THE MATTER OF AN APPEAL TO THE MINISTER IN CHARGE OF LANDS AND PHYSICAL PLANNING CASE NO. 95
OF 2015**

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA.

BETWEEN

REPUBLIC.....APPLICANT

VS.

CABINET SECRETARY IN CHARGE OF LANDS AND PHYSICAL

PLANNING.....1ST RESPONENT

THE DIRECTOR OF ADJUDICATION.....2ND RESPONENT

CHIEF LAND REGISTRAR.....3RD RESPONENT

THE ATTORNEY GENERAL.....4TH RESPONENT

AND

NJERU KIRIRIKA.....INTERESTED PARTY

AND

DAGLAS KANGA SHADRACK

MBUNGU NKARI

M'KEA M'IBURURA

JEDIEL RWANDA NJUE.....EX-PARTE APPLICANTS

JUDGMENT

1. The Notice of Motion in these Judicial proceedings is dated **9th December, 2020** and seeks the following orders:

1. An order of certiorari be issued to remove into the High Court for the purpose of its being quashed a decision made by and/or award by the 1st Respondent (The Cabinet Secretary Ministry of Lands & Physical Planning) in respect of land parcel Nos. 1413, P/No.1414, P/No.1418 & P/No.1412 Kamwimbi "A" Adjudication Section in minister Appeal Case No. 95 of 2015 between Njeru Kiririka and Daglas Kanga Shadrack, Mbungu Nkari, M'Kea M'Iburura & Jediel Rwanda Njue. Contained in the ruling dated 3.9.2020 and issued on 9.10.2020 awarding to Njeru Kiririka the Interested Party all the parcels herein constituting the disputed land and further amalgamate them into former parcel No. 534.

2. An order of prohibition be issued prohibiting the 2nd and 3rd Respondents from: altering the duplicate adjudication register to conform with the decision of the 1st Respondent, nor certify on the duplicate adjudication register that it has become final in all respects, nor send details of the alterations and a copy of the certificate to the 3rd Respondent for alteration of the adjudication register and or in any manner whatsoever effect the decision contained in the ruling dated 03.09.2020.

3. That costs be provided for.

4. Such further and other relief be granted to the applicant as this court deems fit.

2. The application has the following grounds:

a) That the decision by the 1st Respondent did not observe Rules of natural justice.

b) That the decision made to amalgamate the ex-parte applicants parcels of land and hand them over to the interested party for ostensible subdivision amongst unnamed clan members was not only irrational, but grossly unreasonable.

c) That the 1st Respondent failed by unfair administrative practices wherefore the Deputy County Commissioner purported to anchor the decision on the inability and or wilful failure to transfer the Adjudication Officer despite complaints.

d) That the decision of the 1st Respondent is illegal since it totally disregarded the constitution more so Article 40 on right to property and the principles of the Adjudication Act.

e) That the failure by the 1st Respondent to consider the occupation and husbandry by the ex-parte applicants on the disputed land amounted to unfair administrative practice.

f) That wilful failure by the 1st Respondent to consider reason by the ex-parte applicants why they objected at AR against the Interested Party continued holding onto P/534 amounted to unfair administrative action.

3. The application is buttressed by a Statutory Statement dated 2nd November, 2020 which reads as follows:

STATUTORY STATEMENT

(Pursuant to Order 53 rules 1 and 2 of the Civil Procedure Rules 2010)

NAMES AND DESCRIPTION OF PARTIES

1. The Applicants are **DAGLAS KANGA SHADRACK, MBUNGU NKARI, M'KEA M'IBURURA AND JEDIEL RWANDA NJUE**. The applicants are Kenyan adults of sound mind residing and working for gain in Chuka town within Tharaka Nithi County. The Applicants address for purposes of this suit shall be in the care of **M/S WINNIE NGIGI & ASSOCIATES ADVOCATES**

2. RELIEFS SOUGHT

1. **THAT** leave do issue for the Applicants to apply for

a) AN ORDER OF CERTIORARI to remove into the Honourable Court and quash the decision of the 1ST Respondent contained in the ruling issued on 9/10/2020

b) AN ORDER OF PROHIBITION directed towards the 2ND & 3RD respondents prohibiting the respondents from relying on and or effecting the decision contained in the ruling made by the Minister on 3/9/2020 and issued on 9/10/2020

c) The Leave so granted do operate as a stay of the Minister's decision until the determination of the substantive application or until such further orders are issued by the Honourable Court

2 **THAT** The court grants all the necessary and consequential orders/directions thereof.

3 **THAT** Costs of this application be provided for.

3. GROUNDS UPON WHICH THE RELIEFS ARE SOUGHT

1. THAT the Ruling by the 1st Respondent has effectively rendered the Entire Adjudication Process for KAMWIMBI 'A' Adjudication Section Null and Void by placing the land into the hands of the Interested Party which situation was pre -Demarcation in the Early 1990's.

2. THAT the decision of the 1st Respondent's to change Ownership was biased as it failed to consider relevant facts adduced by the Applicants and their witnesses. Such facts included the fact that the property has been a family property and thereby arose intergenerational Equity.

3. THAT the Interested party Formerly held it in trust and on behalf of the Applicants and their dependants only, but was sued by the Applicants when he claimed that he was not ready to subdivide the land amongst the dependants who are people older than him and on further claims that the land belonged to the Interested party and his family.

4. The decision to grant to the Interested party Ownership and Possession of the Property in question is flawed in law as the 1ST Respondent failed to pay due regard to issues stated by the Applicants that they had for years developed the husbandry thereon and the interested Party would in all probability give their shares to unknown parties

5. The 1st Respondent considered irrelevant factors on arriving at the decision contained in the ruling issued. Statements produced by the Interested party held no basis at all to warrant challenging the possession of the Applicants of the suit property.

6. The 1st Respondent relied on the statements of the Interested party despite failure to provide evidence of whom the Clan members that he would hold the land in trust for were.

7. The 1st Respondent has acted in bad faith in his ruling by stating that the Interested party had absolute ownership and possession of the suit property despite the Property measuring well over 1500 Acres.

8. The 1st respondent in totality disregarded the law by issuing the ruling stating that the interested party is the absolute owner of the property and that the Applicants have no legitimate claim of ownership of the property, this is despite the fact issues of ownership were canvassed through the various forums including COMMITTEE OBJECTIONS, BOARD OBJECTIONS & AR OBJECTIONS.

9. The 1st Respondent abused his powers by issuing the ruling stating that the interested party is the absolute owner of the property without any compelling evidence supporting the said ruling.

10. The 1st Respondent Ruling was biased as it failed to Consider the humanitarian crisis so created by the Ruling as the Applicants held their various parcels in trust for their respective extended families on the basis of intergenerational equity, thus all have been rendered destitute in one fell swoop.

11. The 1st Respondent Ruling was biased as it failed to explicitly provide a list of beneficiaries nor did it indicate the time frame the Interested party was to hold the land in Trust nor did it consider the Applicants objections to the effect the Interested party was untrustworthy as he had sold off parcels thereon.

12. The 1st Respondent violated the principles of natural justice by proceeding to cancel the Applicants various parcels of land and amalgamate them into the former p/no 534 thus rendering the applicants developments and husbandry open to seizure and waste by strangers.

DATED at Embu this.....2ndday of.....November,2020

WINNIE NGIGI & ASSOCIATES

ADVOCATES FOR THE APPLICANTS

4. The application is verified by the affidavit of Jediel Rwanda Njue, the applicant, sworn on 2nd November, 2020.

5. The application was canvassed by way of written submissions. Lest the court be accused of not considered all apposite issues, I have decided to reproduce all the written submissions here-below.

6. The applicant's written submissions state as follows:

EX-PARTE APPLICANTS SUBMISSIONS

My lord, herein are our humble submissions with respect to the application dated 9th December 2020. The submissions shall be divided as follows:

1. Background
2. Legal argument

A. BACKGROUND

December 2020. The applicants had earlier filed chamber summons dated 2nd November 2020 seeking leave to apply for orders of

- a. Certiorari to move the court to quash the decision of the 1st Respondent issued on 3rd of September 2020
- b. Prohibition directed towards the 2nd and 3rd respondent prohibiting them from relying and or effecting the decision contained in the ruling dated 3rd November 2020 and issued on the 9th of October 2020.

The leave to apply for orders above stated was granted on the(sic)

LEGAL ARGUMENT

1. Whether the Applicants fall under the purview of judicial review.

Judicial review is a process by which exercise of powers by statutory bodies are checked, reviewed or looked at by the High court. The term has further been defined in the Blacks law dictionary, as

,A proceeding undertaken to have a decision reconsidered by a higher authority; especially, the submission of a lower court's or agency's decision to a higher court for review and possible reversal.?

It is on this premise and the consequent, irrationality and procedural impropriety that the Applicant filed for judicial review of the 1st respondent's decision. As the counsel for the 1st to 4th Respondent has stated, it is trite law that judicial review is concerned with the decision making process, not with the merits of the decision itself.

In the case of **Municipal Council of Mombasa vs Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No. 185 of 2007(2002) Eklr**, the court stated therein that **,the court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power, i.e. the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. There are the king of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a court of appeal over the decider. Acting as an appeal court over the decider would involve going to the merits of the decision itself – such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.?**

To buttress our argument we further cite the case **of Republic vs National Land commission & Another Ex parte Farmers Choice Limited** in which the court stated that. **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 complainant. 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. Such a decision is usually in defiance of logic and acceptable moral standards. Irrationality is aptly pointed out by the Ex-parte applicant wherefore the minister decision based on his findings sought to pass blame on the ex-parte applicant whereby the 1st respondent in his findings no 6, states; 'the adjudication officer during the objection to the AR who was handling the case, was advised to step aside due to being biased and let another officer handle the case but went ahead, heard and determined the case'. My lord in our verifying affidavit, More so paragraph No 6, we adduced the letter of complaint by the interested party marked as JNR4 Ref no COMP/2/38 VOL IX/85 and Response dated 10th October 2013 allowing the said officer to continue hearing and determining the said objections.

Procedural Impropriety, is when there is failure to act fairly on 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 to 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 exercised jurisdiction to make a decision.? The 1st Respondent willful failure to name and openly state the said clan and its members to whom the almagated parcel of land would be subdivided culminated in the Exparte applicants seeking review of the said decision as it contravenes the rules of natural Justice.

The applicants, through the filed applications, have incessantly stated that they challenged the manner in which the decision by the 1st Respondent was made. They have challenged the process through which the decision was arrived at. They have stated that the 1st respondent failed to pay due regard to facts that were well known and had been well presented and laid down before the 1st Respondent. The same were the grounds IN THE STATUTORY STATEMENT in support of the chamber Summons dated 2nd November 2020 upon which the applicants instituted these judicial review proceedings. The court is well aware of the said grounds.

In light of the above my lord it is our contention that the process by which the decision was arrived at by the 1st respondent was flawed as he failed to take into account relevant matters adduced before him thus rendering the whole decision making process flawed. That would simply qualify as **Procedural Impropriety**. Based on the aforesaid the decision by the 1st respondent therefore would be considered as **illegal and irrational**.

It is thus our humble submission my lord that the procedure carried out by the 1st respondent was improper and thus subsequently rendered his decision illegal and irrational. Based on the same the court is inclined to grant orders as prayed in the application.

2. The Discretionary nature of judicial review remedies

Discretion vested in the court is dependent upon various circumstances which the court has to consider among them the need to do real and substantial justice to the parties of the suit. Discretion must be exercised in accordance with sound and reasonable judicial principles. The *Republic vs Kenya Revenue Authority, Exparte Applicant Stanley Mombo Amuti*, the court stated that **Discretion is a science, not to act arbitrarily according to men's will and private affection; so the discretion which is exercised here, is to be governed by rules of law and equity.....?** the court further stated that **in addition, the discretionary powers of the court are constrained by the objectives of the constitution to grant access to justice.?**

In the current case whether the orders are discretionary depends on the application of a very general standard as has been above stated. What is **'just and equitable'**. This calls for an assessment of the circumstances surrounding the decision made by the 1st respondent. The applicants have clearly demonstrated that the 1st respondent did not consider a lot of relevant factors in arriving at his decision. We do not dispute that judicial review orders are in nature, discretionary however we bring to light the fact that the discretionary nature of the orders sought are to be governed by rule of law and equity, by the objective of the constitution which is to grant access to justice. There is nothing arbitrary or capricious about exercising a discretion in order to give effect to a constitutional right. Thus it is our humble submission that the courts, guided by the rule of law and equity, and the key tenet of the constitution which is **'access to justice?'**, exercises its judicial discretion and grants the orders prayed by the applicants.

Conclusion

It is our humble submission that the 1st respondent acted unjustly and arrived at his decision grave with errors. We thus humbly pray that this Honourable court finds that the 1st respondents decision was unjust and grants the applicants prayers against the respondents stated in the substantive application dated 9th December, 2020 with costs to the Applicants.

We humbly pray.

Dated at Embu this.... 22ndday ofApril,2021

WINNIE NGUGI & ASSOCIATES

ADVOCATES FOR THE APPLICANTS.

7. The Respondents' written submissions state as follows:

1ST-4TH RESPONDENTS' SUBMISSIONS

May it please Your Lordship,

On behalf of the Respondents we wish to submit as hereunder.

These submissions are made in reply to and in opposition to the Ex-Parte Applicants' Application dated 9th December 2020.

The Notice of Motion Application seeks inter alia;

1. An order of certiorari be issued to remove into the High Court for the purpose of its being quashed a decision made by and/or award by the 1st Respondent (THE CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING)

in respect of land parcel no.s **1413, P/NO.1414, P/NO/1418 & P/NO/1412 KAMWIMBI 'A' ADJUDICATION SECTION** Adjudication Section in minister Appeal Case No 95 of 2015 between NJERU KIRIRIKA and DAGLAS KANGA SHADRACK, MBUNGU NKARI, M'KEA M'IBURURA & JEDIEL RWANDA NJUE. Contained in the ruling dated 3/9/2020 and issued on 9/10/2020 awarding to NJERU KIRIRIKA the INTERESTED PARTY All the parcels herein constituting the Disputed Land and further Amalgamate them into former Parcel No. 534.

2. An order of prohibition be issued prohibiting the 2nd & 3rd Respondents from; altering the duplicate adjudication register to conform with the decision of the 1st respondent, nor certify on the duplicate adjudication register that it has become final in all respects, nor send details of the alterations and a copy of the certificate to the 3rd Respondent for alteration of the Adjudication register and or in any manner whatsoever effect the decision contained in the ruling dated 03.09.2020.

3. THAT costs be provided for.

4. Such further and other relief be granted to the applicant as this court deems fit.

We have filed our Grounds of Opposition dated 11th February 2021 and wish to rely on the same.

Your Lordship, **Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya** provides inter alia that;

(1) 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 the determination, appeal against the determination to the Minister by-

(a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) Sending a copy of the appeal to the Director of the Land Adjudication,

And the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall-

(a) Alter the duplicate adjudicate register to conform with the determinations; and

(b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly."

Your Lordship, following the appeal by the interested party herein to the 1st Respondent and in line with section 29 of the Land Adjudication Act, the 1st Respondent through the Deputy County Commissioner conducted appeal proceedings and came to a decision while following proper procedure and in line with the law. There was therefore no irrationality in the 1st Respondent's decision in the appeal as pleaded by the Ex-Parte Applicants herein.

The Ex-Parte Applicants have merely cited issues of non-observance of the rules of natural justice and unfair administration action by the Respondents herein without demonstrating the exact manner in which the alleged misconduct was carried out.

Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya provide as follows:-

107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

We refer to the case of **M'Bitu Ntiro v Mbae Mwirichia & another [2018] eKLR**, where it was held;

"The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person."

In the case of **Republic vs Kenya Revenue Authority & another Ex-Parte Tradewise Agencies (2013) eKLR**, Justice J.V Odunga in quoting the case of **Pastoli vs Kabale District Local Government Council and Other (2008) 2 EA 300**, observed among other things that:

“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 or making the act, the subject of the complaint. Acting without jurisdiction or ultra-vires, or contrary to the provisions of a 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. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural impropriety are when there is a failure to act fairly on 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 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 exercise jurisdiction to make a decision.....”

We submit that the Ex-Parte Applicants have not provided any evidence in support of their allegations neither have they pleaded with specificity how the 1st Respondent’s actions were against the Rules of Natural Justice.

Your Lordship, the Ex-Parte Applicants have pleaded that the 1st Respondent’s decision was tainted with illegality and irrationality. Your Lordship, we wish to submit that Judicial Review does not concern itself with the merits of the decision. It is focused on the process through which the decisions were made and actions taken.

We refer to the case of *Republic v Director of Immigration Services & 2 others Exparte Olamilekan Gbenga Fasuyi & 2 others* [2018] eKLR where the Court stated inter alia that;

“It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of Judicial Review orders do apply. Judicial Review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the Court should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the Rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a Court will not interfere. “

The **Supreme Court practice of England 1997 vol. 53/1-14/6** provides inter alia that;

“**The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision – making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power.**”

We submit that the process followed by the 1st Respondent throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. The Ex-Parte Applicants Notice of Motion therefore lacks basis.

Your Lordship, on the issue of whether the Ex-Parte Applicant herein is entitled to the orders of certiorari and prohibition, we submit that Judicial Review orders are discretionary. They are not guaranteed and hence the Court may decline to grant them.

We refer to the case of **Republic v Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & another (2014) eKLR** it was held inter alia that;

“Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "**Judicial Remedies in Public Law**" by Clive Olive, it is noted that there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy.”

As stated in **Halsbury’s Laws of England 4th Edition Vol. II page 805 paragraph 1508**, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In the case of **Peris Wambogo Nyaga vs Kenyatta University (2014) eKLR**, where the learned Justice Odunga J, reiterated inter alia the following:-

“In **REPUBLIC VS JUDICIAL SERVICE COMMISSION EX-PARTE PARENO (2004) I KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a Judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfill its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized.”

Your Lordship, we submit that the Ex-Parte Applicant has failed to show why this court should exercise its discretion and that therefore the Application herein is misconceived, a non-starter and an abuse of the court process. We therefore pray that the Notice of Motion Application dated 9th December 2020 be dismissed with costs to the 1st -4th Respondents.

This is our humble submission and payer.

DATED AT MERU THIS.....5THDAY OF.....MARCH,2021

J.M KIONGO

SENIOR LITIGATION COUNSEL

FOR: HON. ATTORNEY GENERAL

& DEPARTMENT OF JUSTICE

8. The Interested Party’s written submissions state as follows:

INTERESTED PARTY’S WRITTEN SUBMISSIONS

1.0 Brief Facts

1. The 1st Respondent, through the Deputy County Commissioner, made a Ruling in the proceedings of appeal to the Minister case No. 95/2015. The appeal had been lodged by the Interested Party herein as against the Ex-parte Applicants herein. In the appeal, the Interested Party had sought to challenge the decision by the Adjudication Officer of Kamwimbi ‘A’ Adjudication Section.

2. In reaching a determination of the appeal, the 1st Respondent entered a finding in favour of Njeru Kiririka, the Interested Party herein, as against the Ex-parte Applicants.

3. The Ex-parte Applicants are aggrieved by the merits of the decision by the Minister arising out of the proceedings in Appeal case no. 15 OF 2015. Being aggrieved by the decision, the Ex-parte Applicants have sought for judicial review orders in the nature of certiorari and prohibition as set out in the Notice of Motion dated 9th December 2020.

4. The application is opposed by the 1st – 4th Respondents via the grounds of opposition dated 11th February 2021.

5. The application is also opposed by the Interested Party via his Replying Affidavit dated 19th January 2021 and filed in Court on the same date. The Replying Affidavit raises very substantial grounds in which we urge the Court to consider and bear in mind when determining the issues arising in this cause.

6. Among the substantial issues raised in the Replying Affidavit, the Interested Party states as follows:-

i. The 1st Respondent clearly evaluated the evidence and made specific findings which informed his decision as contained in the ruling.

ii. The 1st Respondent lawfully and procedurally arrived at the decision as he did and there is nothing to show that he considered irrelevant facts or that he acted in bad faith or that he was biased or that he violated the principles of natural justice as alleged by the Ex-parte Applicants or at all.

iii. Judicial review proceedings are concerned with the decision making process and not the merits of the decision made.

iv. Nothing has been pointed out by the Ex-parte Applicants to prove that the decision making process was flawed to warrant issuance of Judicial review orders by this court. What is clear is that the 1st Respondent granted all parties an opportunity to be heard, adduce evidence and rebut evidence of the opposite party before arriving at the findings and the decision as he did.

v. What comes out clearly from the ex-parte Applicants’ case is that they are challenging the merits of the decision by the

1st Respondent which is beyond the scope of judicial review proceedings.

7. We urge this Honourable Court to consider the substantial grounds raised in the Interested Party's Replying Affidavit, be convinced and thereby proceed to dismiss the ex-parte Applicant's motion.

2.0. Issues for determination

8. The main issues for determination in this case can be outlined as follows:-

- i. Whether the ex-parte Applicants were accorded a fair hearing?
- ii. Whether the ex-parte Applicants have established any sufficient grounds for the issuance of the judicial review orders sought in the Notice of Motion dated 9th December 2020.

3.0. Whether the ex-parte Applicants were accorded a fair hearing?

9. In determining whether there was a fair hearing in this matter, we urge the Court to be bound by the findings in **David Kenya Adie V District Commissioner, Kisumu District & Another (2012) eKLR** where the Court of Appeal stated as follows:-

“In other words, where the court is satisfied that the proper procedures were followed; where no impropriety of whatever nature is present; where there is no illegality or irregularity; where Rules of natural justice are observed to the letter; where the court or tribunal has considered the relevant law; and where the said court or tribunal has acted within its jurisdiction, then the Superior Court cannot interfere with the decision of that court or tribunal by way of quashing it.

This is of course on the assumption that the court or tribunal has jurisdiction to deal with the subject matter before it in the first place because jurisdiction is the foundation from which all courts and tribunals draw their judicial authority.”

10. Among the grounds raised in support of the motion, the ex-parte Applicants have stated that the 1st Respondent did not observe the Rules of Natural Justice.

11. Contrary to the averments by the ex-parte Applicants, it is clearly shown that the 1st Respondent observed the rules of natural justice when hearing the Appeal Case No. 15 OF 2015. This is depicted from the proceedings as recorded in the appeal case before the 1st Respondent. The proceedings have been produced and marked **“JK1”** as an annexure to the Interested Party's Replying Affidavit.

12. At a cursory perusal of the proceedings leading to the decision by the 1st Respondent, it clearly shows that :-

- i. The ex-parte Applicants fully participated during the hearing of the appeal.
- ii. The ex-parte Applicants were granted an opportunity to adduce their evidence during the hearing.
- iii. The ex-parte Applicants were granted an opportunity to cross-examine the interested party and his two witnesses.
- iv. The ex-parte Applicants were granted an opportunity to call witnesses in support of their cases.

13. It is our humble submissions that the ex-parte Applicants were granted a fair hearing by the 1st Respondent. The 1st Respondent also followed the proper procedures required in the matter and as well observed the Rules of natural justice to the letter.

14. From the pleadings filed by the ex-parte Applicants and the Interested Party, we contend that the ex-parte Applicants were given a fair hearing where all the parties together with their witnesses were given a chance to ventilate their issues. This is depicted from the proceedings as recorded in the appeal case before the 1st Respondent. The proceedings have been produced and marked **“JK1”** as an annexure to the Interested Party's Replying Affidavit.

15. We urge the Honourable Court to find that the ex-parte Applicants were given a fair hearing and no rules of natural justice were flouted.

4.0. Whether the ex-parte Applicants have established any sufficient grounds for the issuance of the judicial review orders sought in the Notice of Motion dated 9th December 2020.

16. In the case of **Municipal Council of Mombasa v Republic & another [2002] eKLR**, the Court of Appeal outlined the nature of judicial review orders as follows:-

“Judicial review is only concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself such as whether there

was or there was not sufficient evidence to support the decision.”

17. It is our humble submissions that the ex-parte Applicants have not made a proper case for the issuance of the Judicial Review orders sought in the Notice of Motion dated 9th December 2020.

18. The ex-parte Applicants’ are only aggrieved by the merits of the decision by the 1st Respondent. The main claim by the ex-parte Applicants is that the Interested Party should hold the suit land in trust for them and their dependants.

19. It is our humble submissions that the claim by the ex-parte Applicants is beyond the scope of Judicial review proceedings. In the case of **Republic v District Commissioner, Mbeere District & 2 others; Ex Parte Applicant Njiru Kugariura (On Behalf of Ikambi Clan); Abiud Wilson Njue (Interested Party) eKLR** the Court while dismissing an application for Judicial Review orders held as follows:-

“[11]. Similarly, in **Republic V Secretary of the Firearms Licensing Board & 2 Others ex parte Senator Johnstone Muthama [2018] eKLR** it was held, inter alia, that:

“The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question.

*As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR, “the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.”***

20. It is clear from the facts of this case that, the ex-parte Applicants are only aggrieved with the merits of the decision by the 1st Respondent in Appeal Case No. 15 OF 2015.

21. The ex-parte Applicants are in abuse of the court process and their application is not based on any legitimate grounds. The ex-parte Applicants have failed to demonstrate any of the grounds for judicial review hence they are not entitled to the orders sought or any one of them.

22. To further illustrate the mala fides on the part of the ex-parte Applicants, we urge the Honourable Court to consider the facts as outlined in the Interested Party’s Replying Affidavit dated 19th January 2021. In specific, the ex-parte Applicants seek to benefit from the illegal decision and proceedings; and unlawful conduct by an Adjudication Officer, one M/S Sarah Gachine.

23. Notably, the Adjudication Officer acted in disdain and total disregard of the court order issued in Meru High Court Judicial Review case No. 35 of 2013 which stayed the implementation of the decision awarding the ex-parte Applicants portions of the land belonging to the Interested Party. The Court order dated 14/11/2013 has been annexed to the Interested Party’s Replying Affidavit and marked as **“JK4”**.

24. To further illustrate the mala fides by the ex-parte Applicants and the illegal conduct of the Adjudication Officer, despite the existence of the stay orders in Meru High Court Judicial Review case No. 35 of 2013, the ex-parte Applicants were awarded portions of the suit land and the Adjudication Officer proceeded to sub-divide the land in the register but not on the ground and further assisted the ex-parte Applicants to obtain titles to some of the portions while the appeal to the minister was still pending.

5.0. Conclusion

25. We pray that the Honourable Court be persuaded by the submissions of the Interested Party by finding that the Ex-Parte Applicants’ motion is fatally defective, unmerited and should be dismissed with costs.

26. And for this, we do humbly pray.

DATED AT MERU THIS.....19THDAY OF.....APRIL.....2021

.....MKK.....

FOR MITHEGA & KARIUKI,

ADVOCATES FOR THE INTERESTED PARTY

9. The Attorney General, through Senior Litigation Counsel J. M. Kiongo filed Grounds of opposition dated 11th February, 2021 which read as follows:

1ST – 4TH RESPONDENTS’ GROUNDS OF OPPOSITION

TAKE NOTICE the 1st, 2nd, 3rd and 4th Respondents shall at the hearing of the Notice of Motion Application dated 9th December, 2020 oppose the same on the following grounds:

1.That the application does not demonstrate with sufficient clarity the nature of misconduct in the actions of the 1st, 2nd and 3rd respondents in the exercise of their statutory duties.

2.That Judicial Review deals with procedure and not the results.

3.That the orders sought are discretionary and can be denied even when warranted.

4.That the application is misconceived and a non-starter.

5.That the application is vexatious, frivolous, scandalous and an abuse of court process.

Reasons wherefore the Respondents pray that this application be dismissed with costs to the Respondents.

Dated at Meru this11thday ofFebruary,2021.

J. M. KIONGO,

SENIOR LITIGATION COUNSEL,

FOR: HON. ATTORNEY GENERAL,

& DEPARTMENT OF JUSTICE.

10. In terms of the requirements of Order 21 Rule 4 of the Civil Procedure Rules, a concise statement of the applicant's case is contained in the written submissions of the applicant which have been reproduced in full in an earlier part of this judgment. I frame the points for determination to be:

a) Did the minister have jurisdiction to hear the appeal filed before him?

b) Were the rules of natural justice violated to the detriment of the applicant and was the propriety of the apposite proceedings impeached by the actions of the 1st Respondent during the proceedings which spawned the impugned decision?

11. I have considered the pleadings, the submissions and the authorities submitted by the parties to buttress their diametrically divergent assertions. At the outset, I do opine that all the authorities submitted by the parties are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. The totality of the circumstances of every case must be taken into account before a court arrives at its decision.

12. The applicant has argued that there were breaches by the 1st and 2nd Respondents in the following areas:-

a) There was illegality. The applicant states that there is illegality when the decision making authority commits an error in the process of taking the impugned decision and when such authority acts without jurisdiction or ultra vires the applicable law.

b)There was irrationality in the decision making process.

c) There was procedural impropriety, that the authority failed to take into account relevant evidence adduced during the proceedings.

13. Regarding the discretionary nature of Judicial Review remedies, the applicant has argued that such remedies must be anchored upon the rule of law and cannot be denied or granted capriciously. I do agree with this submission.

14. The 1st to 4th Respondents have submitted that the 1st and 2nd Respondents had the jurisdiction to handle this matter in terms of the provisions of the Land Adjudication Act. They add that the relevant appeal was filed in accordance with Section 29 of the Land Adjudication Act and that the 1st Respondent acted through the Deputy Commissioner. They further argue that the ex-parte applicants alleged issues of non-observance of the rules of natural justice without demonstrating the exact manner in which the alleged misconduct was carried out. They also argue that the applicants have not provided evidence with any specificity in support of their allegations that the 1st Respondent acted against the rules of natural justice.

15. The respondents submit that Judicial review concerns itself with the procedural propriety of the impugned decision and not on the merits of such decision. They argue that the respondents are attacking the merit of decisions made by the 1st and 2nd Respondents and not the propriety of the decision making process.

16. The respondents conclude that the applicants have failed to demonstrate why this court should exercise its discretion to grant the sought Judicial Review orders and urge that the Notice of Motion dated **9th December, 2020** be dismissed with costs to the 1st to 4th Respondents.

17. The Interested Party submits that the 1st Respondent clearly evaluated the evidence and made specific findings. He also submits that the 1st Respondent lawfully and procedurally arrived at his decision without taking into account irrelevant facts or being biased or in any other way violating the rules of natural justice.

18. The Interested Party submits that all parties in the suit were accorded an opportunity to be heard, adduce evidence and rebut evidence adduced by the opposing party. They also assert that the ex-parte applicants are challenging the merits of the decision by the 1st respondent which challenge is beyond the purview of Judicial Review Proceedings.

19. The Interested Party submits that the ex-parte applicants seek to benefit from an illegal decision and proceedings made through the unlawful conduct of a Land Officer, one M/s Sarah Gachine who had proceeded to award portions of the suit land in disobedience of stay orders issued in **Meru High Court Judicial Review No. 35 of 2013**. I do find that consideration of this fact was not an irrelevant and extraneous fact.

20. I am gratified that all the parties are in agreement that Judicial Review does not concern itself with the merits of the decision being challenged. Judicial Review proceedings are not an appeal against the impugned judgment. Judicial Review concerns itself with the propriety of the proceedings which spawn the impugned decision. For avoidance of doubt, I find that grounds 1, 2 and 3 of the Grounds of Opposition filed by the 1st to 4th Respondents have merit.

21. I have gone through all the pleadings and the proceedings at the ministerial level. I find that the parties robustly participated in the appeal to the minister's proceedings. I find that the proceedings are carefully recorded. I find that the decision of the Deputy Commissioner, who was acting for the Minister was based on his evaluation of the evidence proffered by the parties before him. I also find that this court will be delving into the merits of the minister's decision if it interferes with it. This court has no authority to do so. It is also clear that the Minister had the Jurisdiction to handle the impugned appeal and also handled procedural issues with diligence without breaching the rules of natural Justice.

22. In the circumstances, I enter Judgment for the Respondents against the applicants in the following terms:

a) **This** application is hereby dismissed.

b) **Costs** shall follow the event and are awarded to the Respondents.

DELIVERED IN OPEN COURT AT CHUKA THIS 28TH DAY OF APRIL, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Miss Ngigi for the ex-parte Applicant

Manasses Kariuki h/b Kiongo for 1st to 4th Respondents

Manasses Kariuki for the Interested Party

P. M. NJOROGI,

JUDGE.