



Republic v Resident Magistrate - Honourable IG Ruhu, Mwingi Law Cour & 3 others; Kalungu (Exparte); Officer Commanding Police Station Mwingi Police Station & another (Interested Parties) (Environment and Land Judicial Review Case E008 of 2022) [2023] KEELC 16229 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16229 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E008 OF 2022

LG KIMANI, J

MARCH 8, 2023

IN THE MATTER OF MISCELLANEOUS APPLICATION NO.5 OF 2022 AT CHIEF MAGISTRATE’S COURT AT MWINGI LAW COURTS- MWINGI SAND HARVESTING CO-OPERATIVE SOCIETY LTD-VS-PETER KALUNGU

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, AND PROHIBITION AGAINST THE ORDERS OF RESIDENT MAGISTRATE-MWINGI SAND HARVESTING CO-OPERATIVE CO-OPERATIVE SOCIETY LTD-VS PETER KALUNGU

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE ORDERS OF RESIDENT MAGISTRATE-MWINGI HONOURABLE I.G RUHU DATED 16TH JUNE 2022, OFFICER COMMANDING MWINGI POLICE STATION AND MWINGI SAND HARVESTING CO-OPERATIVE SOCIETY LTD.

BETWEEN

REPUBLIC APPLICANT

AND

RESIDENT MAGISTRATE - HONOURABLE IG RUHU, MWINGI LAW COURTS 1ST RESPONDENT

MWINGI SAND HARVESTING CO-OPERATIVE SOCIETY LTD 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

SAND TRANSPORTERS AND ENVIRONMENTAL CONSERVATION GROUP 4TH RESPONDENT



AND

PETER KALUNGU EXPARTE

AND

OFFICER COMMANDING POLICE STATION MWINGI POLICE
STATION INTERESTED PARTY

SAND TRANSPORTERS AND ENVIRONMENTAL CONSERVATION
GROUP INTERESTED PARTY

JUDGMENT

1. Before this Honourable Court is a judicial review Application under Notice of Motion dated August 8, 2022 by the *Ex parte* Applicant seeking the following orders:
 1. That this Honourable Court be pleased to issue orders of *Certiorari* to call for and remove to the High Court the proceedings, records and orders of the Resident Magistrate-Mwingi Law Courts dated June 16, 2022 issued by Honourable I.G Ruhu to quash and set aside for being null and void.
 2. That this Honourable Court be pleased to issue orders of prohibition against the Resident Magistrate-Mwingi Law Courts, the Officer Commanding Station-Mwingi Police Station and Mwingi Sand Harvesting Co-operative Society Ltd. from implementing and/or enforcing the orders issued by the Resident Magistrate-Mwingi Law Courts Honourable L.G Ruhu dated June 16, 2022.
 3. That costs of this notice of motion be provided for.
2. The *Ex-parte* Applicant claims that he is a member of the second interested party who has the permit or authority of the County Government to desilt, harvest and transport sand within Mwingi areas among other regions in the County. He stated that sand harvesting and transportation is a devolved activity and it is only the county government that has the mandate to permit or authorize the activity and also collect revenue. The *Ex parte* Applicant claims that it is only the permitted people, and listed Lorries or motor vehicles that can be involved in the aforesaid activities and any other are doing illegal businesses.
3. The *Ex parte* Applicant states that he was summoned by the Officer Commanding Police Division (OCPD) Mwingi and was confronted with an order from Mwingi Law Courts in a case which he claims to have been unaware of as he was never served with court documents in order to defend himself.
4. According to the *Ex parte* Applicant, the 2nd Respondents who were the Applicant before the 1st Respondent are not permitted or authorized by the County Government to do sand harvesting or transportation business even though they have a document from NEMA, the natural resource that is sand is devolved, therefore the mandate of the County Government.
5. The *Ex parte* Applicant states that he was isolated and sued as an individual even though he does not own any motor vehicle or operate any sand harvesting business in his name. It was his statement that the 2nd Respondent and the 2nd Interested Party are two different groups that are rivals in sand harvesting and transportation business, hence the dispute. He claims that the 2nd Respondent collects, harvests, loads and transports sand from areas assigned to the 2nd Interested Party without paying any charges yet the County Government has issued a list of lorries authorized to operate in the designated areas. It



is his statement that by barring the ex parte applicant as the chairman of the 2nd Interested Party from collecting proceeds from sand harvesting is to allow the 2nd Respondent to invade their designated areas and that these monies are applied in taking care of environmental issues like planting more trees and nurseries among other activities as per the county by-laws. He also contends that the 2nd Respondent is not permitted or authorized to harvest and transport sand within the County Government and if they are doing so, that it is an illegal business.

6. The *Ex parte* Applicant contends that the 1st Respondent acted ultra vires his jurisdiction and in a manner in violation of the rules of natural justice, the rule of law and due process. He further stated that the subject matter of the suit at the Mwingi Law Courts is sand harvesting which is a natural resource and only the Environment and Land Court has jurisdiction to deal with the matter.
7. Finally, the *Ex parte*/Applicant stated that they the Mwingi Law courts dispute could not have been settled in a summary manner without calling evidence and that filing the suit as a miscellaneous application was an incompetent process and the court had no jurisdiction to entertain the application.

1st and 3rd Respondents' case

8. The 1st Respondent filed their Grounds of Opposition to the application dated September 29, 2022, on the following grounds:
 1. That the Applicant has not exhausted the alternative remedies available to it through the national courts such as Appeal or Review of the impugned decision. The instant application is an Appeal masquerading as a Judicial review Application, which is an abuse of the court process.
 2. That the Notice of Motion lacks a cause of action, it's premature and unmerited and fatally defective.
 3. That the Notice of Motion does not meet the laid down threshold for Judicial Review proceedings and it is largely ill-advised.
 4. That the applicant has failed to provide evidence to support its claim as against the 1st Respondent.
 5. That the Applicant's Notice of motion dated August 8, 2022 is not merited and the same should be dismissed with costs.

2nd Respondent's Replying Affidavit

9. Harrison Salim Kisee, the chair of the 2nd Respondent Mwingi Sand Co-operative Society Limited swore a Replying Affidavit deposing that on June 20, 2022, they filed an application under certificate of urgency to the court seeking orders against the ex parte applicant. He stated that the 1st Respondent issued the orders procedurally and they had served the court papers to the ex-parte applicant who failed to oppose the application.
10. He deposed that it is true that sand harvesting and transportation is a devolved activity managed by the County Government and that the 2nd Respondent and the 2nd interested party are two different groups and entities under different management focused on sand harvesting and transportation business.
11. However, according to the 2nd Respondent's chairman, it is not true that the 2nd interested party has permit or authority of Kitui County Government to desilt, harvest and transport sand within Mwingi. He claims that the 2nd interested party has not complied with National Environment Management



Authority (NEMA) requirements and contended that the letter produced titled authorization to desilt and harvest sand is not a permit but an ordinary letter given with collusion of some county government officer. He further stated that it was actually the 2nd Respondent who has the legal mandate to harvest and control sand harvesting and as per the attached Environment Impact Summary Assessment Project report.

12. He claims that the activities of the ex parte applicant of sand harvesting and collecting levies were declared illegal by the county director of environment Kitui County since an individual cannot be allowed to collect levy on behalf of the county government as alleged by the ex-parte applicant.
13. The 2nd Respondents case therefore is that the ex-parte applicant is not following the regulations governing sand harvesting and is operating without a license of authority from NEMA and is engaged in levying charges to people who carry out the business of harvesting and transportation of sand within Kitui County without protecting and taking care of the environment like the 2nd Respondent and that he was taking advantage of the corrupt county officials and prayed that the application be dismissed with costs.

Ex-parte Applicant's supplementary affidavit

14. The Ex-parte applicant filed a supplementary affidavit in response to the 2nd Respondent deposing that it is clear from their affidavit that the issue at hand was sand harvesting, which is a natural resource hence the dispute relates to Environment and Land.
15. He noted that as per the Kenya Gazette Vol. CXXIV-No.166 dated August 19, 2022, the 1st Respondent was gazetted as one of the magistrates allowed to preside over disputes involving Environment and land but contends that at the time the 1st Respondent was entertaining the impugned proceedings, he did not have the jurisdiction to do so.
16. He therefore states that his application has merit and that the case should be accorded a full and fair hearing.

Ex-parte Applicant's submissions

17. Counsel for the Ex-parte Applicant first submitted on the jurisdiction of the 1st Respondent and stated that Article 162(2)(b) of the Constitution provides for the mandate of the Environment and Land Court to hear and determine disputes relating to the use and occupation of and title to land. Further, he submitted on Section 13 of the *Environment and Land Court Act*, noting that magistrates who the Chief Justice gazettes can hear and preside over matters involving environment and land matters. However, counsel for the ex-parte applicant submits that the 1st Respondent did not have jurisdiction at the time because he had not yet been gazetted and should therefore have downed his tools.
18. Counsel relied on the cases of Samuel Kamau Macharia v Kenya Commercial Bank & 2 others Civil Appeal No.2 of 2022 and Owners of the Motor Vessel Lilian 'S' v Caltex Oil Ltd (1989) KLR 1 as well as Lisa Kristine Christofferson v Kavneet Kaur Sehmi t/a The Random Shop submitting that the decision was made without jurisdiction and is therefore ultra vires. He also cited the case of Republic v Chairman Meru Central District Land Dispute & 6 others (2018) eKLR where an order of certiorari was issued to quash an award for lack of proper jurisdiction.
19. Secondly, counsel for the Ex parte Applicant submitted on whether the application should have been dispensed with summarily and quoted from Order 36(1) of the Civil Procedure Rules, stating that the matter in question does not fall under Order 36, and that the ex parte applicant should have been accorded an opportunity to defend his cause as a right to natural justice.



20. The third issue addressed is whether proper service was effected as mandated by law and submitted that he was never served with any court papers and was only confronted by the impugned order upon being summoned to the office of the commanding officer, Mwingi and pointed out that no evidence was adduced before the court to show that he was properly served with the documents as he relied on the holding in the case of Kenya v Martin Day & 3 others (2015) eKLR.

1st and 3rd Respondents' written submissions

21. State counsel for the 1st and 3rd Respondents submitted that the ex-parte applicant was given an opportunity to be heard before the decision was reached and submitted that he was afforded fair administrative action under Article 47 of the Constitution.
22. Secondly, they submitted that all the alternative remedies were not pursued as they relied on the cases of: Speaker of the National Assembly v Karume Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others Republic v Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Aly Khan Satchu v Capital Markets Authority (2019) eKLR stating that they should have first exhausted the prescribed mechanisms before filing this judicial review application.
23. On the third issue, state counsel submitted that the ex parte applicant has not established that the Respondent acted unreasonably, irrationally or with misapprehension of the law and also that the courts have held that judicial review should not act like an appeal. They relied on the cases of Republic v Director of Immigration Services & another ex-part Planet Motors Company Ltd & another (2017) eKLR and Ransa Company Ltd v Mania Francesco & 2 others (2015) eKLR.
24. In their final submission, state counsel submitted that the claimant is not entitled to the reliefs sought as he has not established a case for the grant of the judicial review orders sought and relied on the case of Pastoli v Kabale District Local Government Council & others (2008) 2 E.A 300 and the case of Republic v Parliamentary Service Commission & others; Morris Kimuli & another (interested parties) (2021) eKLR. The 1st -3rd Respondents submitted that the 1st Respondent Court is a court of competent jurisdiction and sought that the case should be dismissed with costs to the respondents.

2nd Respondent's written submissions

25. The 2nd Respondent reiterated that the ex-parte applicant's activities are illegal and have not been sanctioned by any law or relevant authority as evidenced by the letter from the County director on environment restoration. They therefore submit that the applicant is challenging the decision to legitimize his illegal activities.
26. Secondly, they stated that the orders were served directly to the parties involved and that the 2nd Respondent is a court of competent jurisdiction. Further, the 2nd Respondent submitted that the ex parte applicant has not filed his NEMA report to prove that they are in compliance of the strict rules of sand harvesting and is collecting levies, cess without the report.
27. The 2nd Respondent therefore submits that the Ex parte Applicant has not approached the court with clean hands and is in violation of the principles of equity and that the proceedings and orders being challenged are lawful and urged the court to dismiss the application with costs.

Analysis and Determination

28. I have considered the application herein, the replying affidavit and the grounds of objection filed. I have also considered the submissions by Counsel and the legal authorities cited. I am of the opinion that the following issues arise for determination:



1. Whether the 1st Respondent issued the impugned order ultra vires in excess of jurisdiction?
2. Whether the Ex-parte Applicant's right to fair administrative action was infringed upon under Article 47 of the Constitution of Kenya, 2010?
3. Whether the court ought to grant the orders sought.

Whether the 1st Respondent issued the impugned order in ultra vires in excess of jurisdiction and powers?

29. The impugned order was issued on the 16th June 2022 by the 1st Respondent, Honourable I.G Ruhu, Resident Magistrate in the Mwingi Chief Magistrate's Court at Mwingi Miscellaneous Application 5 of 2022 where the 2nd respondent was the applicant and the ex parte applicant was the respondent. The order reads as follows:

“UPON THIS MATTER coming up for hearing of the application dated 9th June 2022 filed on 9th June 2022 inter-party hearing and being unopposed it is of merit.

IT IS HEREBY ORDERED THAT

1. That a permanent injunction be and is hereby issued against the respondent restraining/barring him through himself, his servants/agents, employees or employees or anyone acting on his behalf from collecting any proceeds from MWINGI SAND HARVESTING COOPERATIVE SOCIETY LTD within Mwingi jurisdiction.
 2. That OCS Mwingi police station do enforce the orders”
30. The documents in Mwingi Chief Magistrate's Court at Mwingi Miscellaneous Application 5 of 2022 attached to the exparte applicant's supporting affidavit are faded and are difficult to read. However, after great struggle it is possible to glean the nature of the dispute before the 1st Respondent. The Applicant in that case accused the ex parte applicant of collecting proceeds from Mwingi Sand Harvesting Co-operative Society without the members' consent and without any right to do so. They claimed that the dues were being collected within the jurisdiction of Mwingi Sand Harvesting Society. They claim that the collection of proceeds for sand harvesting and transporting is the duty of the County government and not the Ex parte applicant herein. They further claim that they have Environment Impact Assessment licenses from NEMA for sand harvesting within Kanginga River and Kivou River in Mwingi and to collect SACCO fees.
31. The Ex parte Applicant claims that the issues before the 1st Respondent relate to sand harvesting which falls under the jurisdiction of the Environment and Land Court. He contends that the 1st Respondent was gazetted as one of the magistrates with the mandate to preside over cases relating to Environment and Land on the 19th August, 2022 while he issued the impugned order on the 16th June, 2022 when he did not have the requisite jurisdiction to preside over such a case.
32. Jurisdiction is a matter of essence as the court cannot make any further step without it and any proceedings before a court without the requisite jurisdiction are considered a nullity. In the words of the famous case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending



other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

33. In the case of *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others* (2012) eKLR it was held that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that jurisdiction is not a mere technicality but goes to the very heart of the matter. The court pronounced itself 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.”

34. Article 162(2)(b) of the Constitution of Kenya 2010 confers the Environment and Land Court with the original jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, Article 169(2) of the [Environment and Land Court Act](#) provides that:

“Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).”

35. The jurisdiction of the Environment and Land Court is not exclusive. The Court of Appeal held that: *Civil Appeal 287 of 2016 (Nairobi) Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR;

“By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrate’s courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases. We think we have said enough to demonstrate that we are unable, respectfully, to agree with the interpretation accorded by the High Court to Articles 162(2) and 169 in relation to the power of Parliament to enact legislation conferring jurisdiction on magistrates’ courts with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.” The subordinate courts now have jurisdiction to hear matters relating to the use and occupation of land.

36. Section 26 of the Environment & [Land Act](#) provides;

- “(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- (4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —



- a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
- b) Matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.”

37. Considering the application herein and the dispute before the Mwingi law courts it is clear that the substance of the dispute is who between the ex parte applicant and the 2nd Respondent has the legal right to sand harvesting, transportation and collection of proceeds from the said activities within Mwingi. The protagonists in the dispute claim to have the relevant permits and licenses to carry out the said activities and to be entitled to collect proceeds of the trade in sand.

38. Sand is a natural resource and the power to hear and determine disputes over natural resources is given to the Environment and Land Court under Section 13 (2) (a) of the *Environment and Land Court Act* No. 19 of 2011 which states that;

“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.”

39. The applicant and the 2nd Respondent agree that the Environment and land Court is the court with jurisdiction to hear and determine the matters in dispute in this case. However, the 1st Respondent was gazetted through Kenya Gazette Vol. CXXIV-No.166 dated 19th August 2022 as one of the magistrates authorized to preside over disputes involving Environment and land but he delivered the impugned order on the 16th of June 2022. Jurisdiction of the 1st Respondent to hear and determine matters of environment and land is conferred under the provisions of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015, and if not so appointed the court has no jurisdiction.

40. It is thus clear that the 1st Respondent presided over the dispute and made orders on a date before the Chief Justice by notice in the Gazette appointed him to preside over cases involving environment and land. I therefore find that the 1st Respondent did not have the requisite jurisdiction to issue the orders dated 16th June 2022.

41. The ex parte applicant further challenged the orders made on the ground that the same were premised on a miscellaneous application without a pending substantive suit. The application before the 1st respondent was brought under Order 40 Rule 1 and 4 and Order 50 Rule 10 of the Civil Procedure Rules. Order 40 Rule 1 and 2 state;

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be



obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Rule 2 provides

“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

42. From the above provisions it is clear that an order of injunction can only be granted where there is a suit pending before court and can only last until the disposal of the suit or until further orders. In the present case the 1st Respondent made final orders of injunction in a miscellaneous application where there was no pending suit. I do find that the court had no powers to do so and thus contravened the provisions of the Section 7 (2) (b) of the *Fair Administrative Action Act* No 4 of 2015 which provides;

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

- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action or decision was procedurally unfair;

Whether the Ex-parte Applicant’s right to fair administrative action infringed upon under Article 47 of the Constitution of Kenya, 2010?

43. The Ex-parte Applicant claims that he was not afforded an opportunity to be heard before the Chief Magistrate’s Court at Mwingi Miscellaneous Application 5 of 2022 was heard and determined. He stated that he was only served with the court order when the suit had already been determined. The 2nd Respondent on the other hand, claimed that the ex parte applicant was served with court documents but he chose not to defend himself. In my evidence of service of the court documents was not provided to this Court. The said evidence by way of an affidavit of service was in the possession of the 1st and 2nd respondents and must have been filed in court. In absence of a rebuttal from the Respondents on the claim by the Ex parte Applicant that he was not served, I am persuaded that he was indeed not served with court documents and thus he was denied his right to a fair hearing.
44. The Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR stated as follows while commenting on burden of proof in the Kenyan context and noted that:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:-



“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.”

The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:-

“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.”

45. In the present case I am of the view that once the applicant asserted that he was not served the burden of proof lay upon the Respondents who assert the affirmative of the issue that the ex parte applicant was served. As stated, section 109 of the Evidence Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.

46. Article 50 of the Constitution of Kenya grants everyone a right to fair hearing in a public place and Article 47 grants everyone a right to fair administrative action. Section 4 (3)(b) of the Fair Administrative Action Act No.4 of 2015 provides that:

“(3) Where an administrative action is likely to adversely affect the right or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(b) an opportunity to be heard and to make representations in that regard;”

47. In the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal stated that natural justice comprises the duty to act fairly:

“Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to the right to fair administrative action....Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights.

In my view failure to accord the ex parte applicant an opportunity to be heard was an infringement of their right to fair hearing under Article 25, 47 and 50 of the Constitution.”

Whether the court ought to grant the orders sought?

48. In light of the findings made above on issues of excess of jurisdiction and denial of a fair hearing and failure to follow the laid down procedure in filing, hearing and determination of Mwingi Miscellaneous Application 5 of 2022, I am of the opinion that the Ex parte Applicant’s Application for judicial review is merited. Contrary to what the 1st – 3rd Respondents have submitted the remedy of judicial review is, in the circumstances of this case, still available to the Ex-parte Applicant as a fundamental right under Article 47 of the Constitution of Kenya 2010 and section 7 of the Fair Administrative Action Act No. 4 of 2015.



49. The final order of the court is that the application dated 8th August 2022 is hereby allowed in the following terms;

1. An order of Certiorari be and is hereby issued to call for and remove to this Court the proceedings, records and orders of the Resident Magistrate-Mwingi Law Courts dated 16.6.2022 issued by Honourable I.G Ruhu in Chief Magistrate's Court at Mwingi Miscellaneous Application 5 of 2022 and the same are hereby quashed and set aside for being null and void.
2. An order of prohibition be and is hereby issued against the Resident Magistrate-Mwingi Law Courts, the Officer Commanding Station-Mwingi Police Station and Mwingi Sand Harvesting Co-operative Society Ltd. from implementing and/or enforcing the orders issued by the Resident Magistrate-Mwingi Law Courts Honourable L.G Ruhu dated 16.6.2022.
3. Costs of this notice of motion are hereby awarded to the ex parte applicant against the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 8TH DAY OF MARCH, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read virtually and in open court in the presence of-

Musyoki: Court Assistant

Kilonzi for the Ex parte Applicant

N/A for the 1st and 3rd Respondents & 1st Interested Party

Wambui holding brief for Mbaluka for 2nd Respondent

N/A for the 2nd Interested Party

