Republic v Assistant Sub-County Commissioner Trans Nzoia East Sub-County & 4 others; Maritim & another (Exparte Applicants) (Environment and Land Judicial Review Case 1 of 2021) [2023] KEELC 15836 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15836 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2021

FO NYAGAKA, J

MARCH 1, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE ASSISTANT SUB-COUNTY COMMISSIONER TRANS NZOIA EAST SUB-COUNTY ..... 1ST RESPONDENT

CHERANG'ANY LAND CONTROL BOARD ..... 2ND RESPONDENT

VIVIAN JEPKEMBOI ARUSEI ..... 3RD RESPONDENT

THE LAND REGISTRAR TRANS NZOIA COUNTY ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

AND

KISPEREM ARUSEI MARITIM ..... EXPARTE APPLICANT

SAUL KIPENY RUTTO ..... EXPARTE APPLICANT

JUDGMENT

The Pleadings

1. Invoking article 165 (6) and (7) of the *Constitution*, section 8 and 9 of the *Law Reform Act* and order 53, rule 3 of the *Civil Procedure Rules*, the *ex parte* Applicants brought this Application by way of Notice of Motion praying for:

1) An order of mandamus to compel the 1st, 2nd and 4th Respondents to approve the Applicant's application for letter of consent and to proceed to issue a letter of consent for the transfer of LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/141 to the 2nd ex parte Applicant;

2) An order of mandamus to compel the 3rd Respondent to surrender the original title deed of LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/141 to the 4th Respondent for the purposes of processing and re-issuing of a title deed to the 2nd Applicant;

3) The costs of this Application.

2. The Notice of Motion is dated July 2, 2021 and was filed on July 5, 2021. It was supported by the grounds on its body, the 1st *ex parte* Applicant's statutory statement together with his Supporting Affidavit and annexures thereto both dated July 2, 2021.

3. The 3rd Respondent came on record on October 27, 2021 through a Notice of Appointment of Advocates dated October 26, 2021. She then filed her Replying Affidavit sworn on November 16, 2021 on October 25, 2021.

4. The Attorney General entered appearance on July 12, 2021 on behalf of 1st, 2nd, 4th and 5th Respondents. He then filed a joint Replying Affidavit on November 18, 2021 sworn by one Nelson Odhiambo, the County Land Registrar on November 17, 2021.

5. In a rejoinder, the 1st *ex parte* Applicant swore a Further Affidavit on November 29, 2021. It was filed the following day.

6. The matter was originally reserved for judgment on February 2, 2023. However, after this Court had retired to write it, it observed that some documents annexed to the Affidavits were not legible. Additionally, there were cross-references made to Kitale ELC 19 of 2016 which needed clarification and detailed information since the available information was scanty. The Court thus postponed the preparation of the judgment pending the filing of clearer documents. It also invited parties to virtually appear on February 8, 2023 to take further directions. On that day, respective parties were directed to file further Affidavits attaching legible documents together with the proceedings and pleadings in Kitale ELC No 19 of 2016.

7. In light of the above, the 3rd Respondent filed her Further Affidavit dated February 10, 2023 on that day while the 1st *ex parte* applicant filed a Supplementary one in their behalf February 10, 2023.

Written Submissions

8. At the close of pleadings, parties were invited to canvass the substantive motion by way of both written and oral submissions on February 13, 2023. On the part of the *ex parte* applicants, written submissions were filed on their behalf on November 30, 2021 while the 3rd Respondent filed hers on February 8, 2023.

The ex parte Applicants' Case

9. The facts giving rise to the Notice of Motion as espoused by the *ex parte* applicants is that the 1st ex parte applicant was the registered owner of all those parcels of land namely LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/141 (herein referred to as "parcel No 141"); intended to be transferred to the 2nd *ex parte* Applicant and LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/140 (herein referred to as "parcel No 140"); intended to be registered in his name. The parcels arose from a subdivision of the original parcel of land namely LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52 (herein referred

to as "parcel No 52"). The copy of the register to this parcel was marked as annexure KAM1 (b) to the Affidavit of the 1st *ex parte* Applicant.

10. The 1st ex parte Applicant deponed that he obtained LR No Chepsiro/Kibuswa Block 1/ Kapcheplanget/52 by way of a charge registered in favor of Agricultural Finance Corporation (AFC) on March 1, 2007. He evidenced this by an attachment of the notification of charge marked KAM2. Overtime, he was unable to meet his financial obligations owing to the expenses incurred towards footing hospital and funeral related expenses when his sick wife, the 3rd Respondent passed away in 2008. He then stood in arrears of about Kshs 419,000.00 as at December 31, 2010.

11. Since the chargee opted to exercise its statutory power of sale, the 1st ex parte Applicant advertised for sale of his property. It is this advertisement that led him to the 2nd *ex parte* applicant. On March 28, 2011, the *ex parte* applicants entered into a sale agreement (KAM3) wherein the 1st *ex parte* Applicant sold five (5) acres of land parcel No 52 to the 2nd *ex parte* Applicant. The proceeds *inter alia*, discharged the 1st *ex parte* Applicant from his financial obligations to the chargee. He produced a copy of the discharge voucher he marked as KAM4. In the meantime, the 2nd *ex parte* Applicant took possession of the suit land. He developed the property, fenced it and ploughed for planting maize. He annexed photographs marked KAM16 (a), (b), (c) and (d) to demonstrate that as at February 10, 2023, the 2nd *ex parte* Applicant was on the suit land.

12. The 1st ex parte Applicant commenced subdivision process to transfer the property sold to the 2nd *ex parte* applicant. He attached the letter from his area chief giving the go-ahead for subdivision marked KAM5 (a). He also produced the letter of consent dated August 19, 2015 issued by the L.C.B and marked it as KAM5 (b). It appears that the consent was presented to the lands office, effected and subdivided LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52 into two portions measuring approximately 2.0 Hectares and 6.53 hectares. During this process, the 3rd Respondent who was his daughter, lodged a caution against the titles. Meanwhile, the 2nd *ex parte* Applicant sued him in Kitale ELC 19 of 2016.

13. The 1st ex parte Applicant contended that this was a willing seller - willing buyer transaction. As such, the proceedings in Kitale ELC 19 of 2016 were compromised by way of a consent on July 21, 2016. Under the terms of agreement, the said five (5) acres were transferred to the 2nd *ex parte* Applicant. The consent court order was annexed and marked KAM6. It was positively authenticated by the Deputy Registrar on April 6, 2021 following a request from the Land Registrar Trans Nzoia County Nelson Odhiambo dated March 31, 2021. The aforementioned letters were marked KAM12.

14. He reminded the Court that this consent order reviewed an earlier one filed in the same cause on March 1, 2016. He stated further that the latter consent reviewed the earlier one out of necessity. It arose as a result of the realization that as at the time of filing suit, LR No Chepsiro/Kibuswa Block 1/ Kapcheplanget/52 did not exist as at the time of filing the suit.

15. The 1st *ex parte* Applicant subsequently lodged a complaint before the Land Registrar against the subsisting caution impeding the transfer on February 20, 2018. The Land Registrar purportedly acted under the aegis of section 73 (4) of the *Registered Land Act* Cap 300 Laws of Kenya (now repealed). The proceedings and outcome were marked KAM7.

16. Ultimately, the Land Registrar registered the mutation for subdivision and issued two (2) titles; LR No Chepsiro/Kibuswa Block1/Kapcheplanget/141 and LR No Chepsiro/Kibuswa Block1/ Kapcheplanget/140 mutating from LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52. Upon subdivision, the register in LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52 was marked as closed as seen in KAM1 (b) on November 10, 2015.

17. Unbeknownst to the 1st ex parte Applicant, the 3rd Respondent deceptively collected these title deeds. She then wrote him a letter through the firm of G. Wambura Advocates annexed KAM8 on January 16, 2017 cautioning against his intended actions to dispossess the family where she resided with her siblings. She warned that if need be, the same would be resisted in all available fora. The 1st ex parte Applicant responded on February 1, 2017 through his Advocates Messrs. Bungei & Murgor via letter marked KAM9 justifying that the process was lawful.

18. He lamented that he had on several occasions unsuccessfully applied for consent to transfer land at the 2nd Respondent's offices, the latest one rejected on February 16, 2021. He produced a receipt in support of payment of the application dated January 27, 2021 marked KAM10.

19. He faulted the 2nd Respondent for stating that its decision to reject and not defer was pegged on the pending objections and/or complaints lodged by the 3rd Respondent. In that regard, the *ex parte* applicant faulted the 2nd Respondent for failing to execute its statutory mandate thus acting ultra vires in spite of the subsistence of a lawful court order issued in Kitale ELC No 19 of 2016.

20. On March 11, 2021, the *ex parte* applicants jointly wrote a letter to the 1st Respondent, herein annexed as KAM11. It demanded for approval of the controlled transaction and/or the issuance of minutes of the meeting held on February 16, 2021 denying their application for consent. He was then furnished with minutes for the meeting held on April 20, 2017 which he marked as KAM17 where the Board requested be furnished with court proceedings the Application for consent made reference to. It was this request that prompted their filing of the present suit since they contended that the Land Control Board was not party to the suit in Kitale ELC No 19 of 2016.

21. The *ex parte* applicants tabled another reason for filing the present Notice of Motion. They observed that according to the relevant statute, any refusal to issue consent by the Land Control Board was appealable to the Provincial Land Control Appeals Board. Since there was no written decision furnished to the *ex parte* applicants, it was their submission that they could not appeal in that forum.

22. He opined that the 3rd Respondent had no legal right to object to the transaction as that was the preserve of his deceased spouse. He pointed out that out of all his children, it is only the 3rd Respondent who remained intent on frustrating dealings on the property. He accused her of ignoring (sic) the Court orders issued in Kitale ELC No 19 of 2016 while the 4th Respondent was accused of unlawfully furnishing the 3rd Respondent with the title deeds.

23. When cross referenced to Kitale ELC No 19 of 2016, it was deposed that from the proceedings produced and marked KAM15 (a) the matter was finalized on March 1, 2016 and no application was made to revive the suit. The ex parte Applicants distinguished the present suit from the antecedent one as the reliefs sought, the issues therein and parties remain different from the instant Motion. Their conclusion was that present proceedings were not *res judicata*.

24. Turning to the parties' Responses, the ex parte applicants denied that the 3rd Respondent and her siblings had been left destitute as they all reside on LR No Chepsiro/Kibuswa Block 1/ Kapcheplanget/140. They cited the 3rd Respondent for laches as she failed to set aside the orders in Kitale ELC No 19 of 2016 in spite of her knowledge of the same.

25. The 1st *ex parte* applicant denied that the dispute was before the National Land Commission thus disputing annexure VJA2 produced by the 3rd Respondent. He stated that they were only written at her instance. He questioned why the 3rd Respondent couldn't buy alternative land as she expressed her ability to refund a sum of Kshs 12,000,000.00. Continuing, they urged that the 3rd Respondent's claims were baseless since she never contributed to the acquisition of the property *ab initio*.

26. During the hearing of the Motion, Mr Murgor, learned Counsel for the ex parte Applicants, in addition to the above facts, set out the procedure for application for a Land Control Board (LCB) consent as provide in the *Land Control Act*. He submitted that while the original title document was requested for by the LCB, Section 17 (b) and (c) of the Act gave the LCB wide discretionary powers to obtain alternatives from the Applicant. He thus faulted the LCB for not injecting this provision. He defended that the failure on the part of his clients to produce the document was not a scenario contemplated in Section 9 (a), (b) and (c). Be that as it may, they could not produce what they did not have. He submitted that the LCB further disobeyed the law by refusing to furnish him with a copy of the decision requested for.

27. Learned Counsel justified that the prayer set out in the Notice of Motion against the 3rd Respondent was proper because she unlawfully refused to release the titles for his clients' further actions. He also mooted that she could not represent her siblings without first obtaining a grant of letters of administration.

28. Learned Counsel cited several provisions in several statutes to conclude that the Application was properly filed and this Court was vested with jurisdiction to determine it. The *ex parte* Applicants urged this Court to allow the Application as prayed.

The 1st, 2nd, 4th and 5th Respondents' Case

29. The said parties opposed the motion. They chronologized that the 1st *ex parte* Applicant was the registered owner of LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52. Following the registration of a mutation for sub-division of the parcel of land, its register was closed and in its place two (2) new titles issued namely LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/141 and LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/140.

30. They continued the contention that once the Court orders of July 21, 2016 were authenticated, the County Land Registrar issued titles in the name of the 1st ex parte Applicant. Thereafter, the 3rd Respondent collected the title deeds on his behalf.

31. The Respondents opined that since the suit land was agricultural land, the 1st ex parte Applicant was obligated by the provisions of the *Land Control Act* cap 302 Laws of Kenya to obtain consent from the LCB to transfer land to the 2nd ex parte Applicant. When asked to furnish the same, the 1st *ex parte* Applicant repeatedly stated the title was in the 3rd Respondent's possession. They argued that without an original title, a consent to transfer land could not be processed in line with the law. They annexed a copy of letters of objection by the 3rd Respondent to the grant of the consent.

32. They argued that 1st ex parte Applicant's case was deferred several times due to his non-compliance in availing the original title. The Respondents annexed and marked as NO1, letter dated November 5, 2021 disclosing these facts. As such, the orders sought were untenable as the *ex parte* Applicants had failed to demonstrate that they fulfilled the statutory dictates to authorize transfer.

33. When submitting before me learned counsel for the State, Mr Odongo, stated that under the relevant Act, an aggrieved party's recourse, when dissatisfied with the decision of the LCB lay in filing an appeal before the internal dispute resolution mechanism laid therein; the Provincial Land Control Appeals Board. He pointed out that an appeal could challenge the LCB decision to either grant, refuse or, as in the present case, defer the Application.

34. He argued that as such, this Court lacked the jurisdiction to hear and determine the dispute filed inchoately without exploring the available remedies as provided by Act of Parliament. He relied on

Section 9 (4) of the Fair Administrative Act for this holding and to add that since the Applicants sought no exemption, in the interest of justice, to explore all avenues donated in the *Land Control Act*, the proceedings were a nullity. He continued that on account of Section 9 (2) of the Fair Administrative Act, this Court's jurisdiction is ousted because it cannot review an administrative act.

35. Be that as it may, Mr Odongo submitted that if the Court found that it was vested with jurisdiction, the Application was unmerited. To the Respondents, according to the contention of the *ex parte* Applicants, the reason their Application was deferred was attributed to the 3rd Respondent's action of withholding the title deeds. He was of the view that the 3rd Respondent's actions sought to protect the overriding interests in the nature of customary trust arising from the facts as governed and protected by Section 28 (b) of the *Land Registration Act*. He argued as such that the LCB could rightly refuse to grant consent with a view to safeguarding those overriding interest subsuming.

36. Next, the Respondents submitted that this Court could not compel the LCB to exercise its statutory discretion to perform in a particular way. That was contrary to the law since the process is set out within the salient mechanisms in the Act. This submission was fortified by the case of *KNEC v Republic* [1997] eKLR. As such, this court's concern was only limited to answering whether the discretion was exercised judiciously.

37. Seeing that one of the reliefs sought was a prerogative writ against the 3rd Respondent, Mr. Odongo opposed the substantive motion arguing that judicial review orders could not lie against private citizens. He added that Judicial Review proceedings apply vertically against public organs and not horizontally against citizens.

38. Additionally, it was summarized that the kernel of the dispute revolved around the *ex parte* Applicants and the 3rd Respondent. Consequently, any relief lay in civil proceedings best determined by way of evidentiary proof and not in a Judicial Review process. The Notice of Motion was thus a non-starter.

39. Finally, Mr Odongo pointed several discrepancies on the actions and conduct of the ex parte Applicants in Kitale ELC No 19 of 2016. Firstly, it was his stance that the said matter was concluded on 01/03/2016 when the proceedings were withdrawn by consent. The suit was never reinstated for hearing. Secondly, the subject matter in the suit was in respect to LR No Chepsiro/Kibuswa Block1/ Kapcheplanget/52. At no point in the proceedings were the pleadings amended to reflect the said land parcel numbers in respect to the suit lands. Thirdly, the resultant orders after March 1, 2016 were unenforceable and could not be implemented. He urged dismissal with costs.

The 3rd Respondent's Case

40. The 3rd Respondent opposed the Application. She commenced by stating that the Application was misconceived as it was rooted on the ex parte Applicants' illegal activities.

41. She disclosed that the 1st *ex parte* Applicant is her father and the 2nd ex parte Applicant her cousin. She deponed that her mother passed away on December 15, 2008 and buried on the suit land. Following her demise, the 2nd ex parte Applicant's son sought to purchase her father's parcel of land to offset a loan with AFC.

42. To establish the veracity of the allegations, the 3rd Respondent approached AFC on March 7, 2011 for inquires. She sought an extension of up to March 21, 2011 to discuss with family members on the way forward. Although granted, the loan was eventually repaid on March 31, 2011 and the security title discharged and released on November 3, 2011. These facts were captured in a letter dated February 27, 2017 annexed and marked VJA1.

43. After establishing the true position, the 3rd Respondent set up a family meeting with the area chief. However, it was resisted by the *ex parte* Applicants. It was after that resistance that the ex parte Applicants entered into the sale agreement against their wishes.

44. The 3rd Respondent deposed that the suit land was acquired by joint efforts of her deceased mother and father. They had since resided on that land together with her thirteen (13) siblings to date. She urged that this property be retained for them as her young siblings lack sources of income. She expressed willingness to refund the 2nd ex parte Applicant as long as they retained their family land.

45. The 3rd Respondent accused the 2nd *ex parte* Applicant of colluding with his children to take away the 1st *ex parte* Applicant's property to include a centre plot and tractor. She deponed further that in the recent past, he incited her father who burnt their house to silence them.

46. The 3rd Respondent challenged the validity of Court order marked KAM6 urging that it was obtained by means of fraud and mischief. She alleged that she had since commenced the process of filing an objection to those proceedings. However, they have been stalled due to challenges in obtaining a grant of letters of administration on behalf of her mother's estate.

47. Speaking to the LCB consent, the 3rd Respondent lauded the Board's decision not to issue consent stating that the dispute was before the National Land Commission for further arbitration. She annexed VJA2 (a) and VJA2 (b) demonstrating this averment. She was suspicious as to why she wasn't enjoined as a party to the proceedings in Kitale ELC No. 19 of 2016 yet she was a cautioner at the time. She remained apprehensive that the present dispute will stir further enmity between the ex parte Applicants' families.

48. On the proceedings and pleadings in Kitale ELC No 19 of 2016, the 3rd Respondent opined that suit was concluded and marked as withdrawn on March 1, 2016. In that respect, there was no case alive after March 1, 2016. She urged that in the circumstance, no consent could be recorded on July 21, 2016.

49. During the LCB meeting of February 16, 2021, the 3rd Respondent observed, the Board rightfully declined to issue a consent and requested parties to resolve the dispute amicably. She urged that the suit be found not only premature but incompetent, fatally defective and bad in law.

50. In submissions, the 3rd Respondent through her learned counsel Ms. Ledishah qualified the deposition in her client's Affidavit. Learned Counsel submitted that the ex parte Applicants had not demonstrated any actions of abuse by the LCB denying the consent. As such, the prayers enumerated could not be granted. She added that the ex parte Applicants' recourse lay in appeal and not the present Application. Comparing to Kitale ELC No. 19 of 2016, the 3rd Respondent's Counsel submitted that the present Application was an abuse of the process of the court. Ultimately, the 3rd Respondent urged this Court to dismiss the Notice of Motion with costs.

Analysis and Determination

51. I have given due consideration the Motion, the pleadings and annexures in support thereof as well as the respective responses. I have also considered the oral and written submissions by all parties. I postulate that to determine the present Application, I am called to question whether this Court has jurisdiction to entertain the present dispute on two (2) grounds; firstly, on account of *res judicata* while analyzing the proceedings in Kitale ELC No. 19 of 2016 and secondly whether the present dispute is inchoately filed. If I hold in the negative, this Court shall outline the nature of Judicial Review Proceedings to include if they lie against private citizens, the effect of the consent order in the said proceedings, the mandate of the Land Control Board, the Application(s) before the said Board and ultimately whether the suit is merited.

(a)Whether by comparison to Kitale ELC No. 19 of 2016, the present proceedings amount to res judicata

52. My first calling is to ascertain whether the proceedings herein amount to *res judicata* since if the same is affirmatively so, I must down my tools as I will not be vested with jurisdiction to hear and determine the dispute.

53. The principle of *res judicata* has been enshrined in statute to estop a Court from re-litigating on an issue previously determined. It embodies the doctrine of finality in that litigation must come to an end. For a matter to qualify as *res judicata*, it must be demonstrated that the dispute meets the parameters set out in Section 7 of the *Civil Procedure Act* as follows: the parties in the former and present suit are the same, the parties are litigating under the same title, the issues are the same and that the former issue had been heard and finally decided by such court.

54. Looking at Kitale ELC No 19 of 2016 in comparison to the present dispute, I observe that the *ex parte* Applicants were the only the parties in the former suit. I also note that the dispute in question in the former suit sought to be resolved by urging this court to transfer an agreed portion of land from the Defendant's parcel of land to the Plaintiff following a sale agreement. Thirdly, the ex parte Applicants were on different sets of divide in the former suit. Lastly, the former suit was not heard and determined in the sense of those words since the dispute was compromised by way of a consent even before the suit was heard. It is thus based on the above that I hold that the present dispute does not meet the prerequisites set out in Section 7 of the *Civil Procedure Act*; the present dispute is not *res judicata*.

55. The 1st ex parte Applicant also deponed, and submitted, that Kitale ELC No. 19 of 2016 was compromised by way of a consent on July 21, 2016. But from the proceedings and record in Kitale ELC No. 19 of 2016, the consent was dated, signed and filed on March 1, 2016. This Court has found as much by indicating that the withdrawal of the suit by consent having been made on March 1, 2016, the proceedings only terminated then. In its Ruling delivered on March 1, 2023 in Kitale ELC No. 19 of 2016, this Court found that the consent order was null and void or of no legal effect since it was extracted on a non-existent suit.

56. Be that as it may, what is puzzling is that the *ex parte* Applicants were in different divides in Kitale ELC. No. 19 of 2016. They have now found it 'natural' to urge the same prayers in the instant Application. If that is not collusion, there must be something else that can be defined by that term. Again, and more worryingly to the legal practice, Learned Counsel who drew the agreement for the parties in respect to parcel No. 52 which formed the basis of the former earlier suit filed on behalf of the Plaintiff against his other client. Could it be that he must have misled one of the parties?

57. It was deponed that the 1st *ex parte* Applicant commenced the subdivision process to transfer the property sold to the 2nd ex parte Applicant soon thereafter. However, as noted from the consent to sub-divide, the process was only commenced and obtained about two and half-years after the date of agreement.

58. Even more puzzling is that Learned Counsel drew an Application for review of the orders withdrawing the suit annexing in support of the Application two (2) Affidavits deposed by the Plaintiff and Defendant. What may have been happening there? Lastly, of the greatest puzzle is that the same Counsel now acts for both ex parte Applicants in this matter who were protagonists in the former suit. Is this greatly unethical? In my view the conduct of Counsel is absolutely unethical and wholly questionable. It portends a complete breakdown of law and order especially when it is clearly prohibited to act in a matter where conflict of interest is likely to arise since he was in possession of information potentially damaging to the other party's case or where he is likely to be called as a witness.

This conduct does not demonstrate neutrality and good professional advice. That said, other issues remain outstanding herein and the Court proceeds to consider them.

(b) Whether the Applicants were barred by the doctrine of exhaustion to institute the present suit

59. The doctrine of exhaustion serves as a complete bar to jurisdiction unless exceptions apply. The Court of Appeal emphasized on its role and purpose and laid out the exceptions therein as follows in the case of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR:

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.
>
> However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
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> > What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others".

60. The doctrine of exhaustion is further governed by the Fair Administrative Act. In governance of Judicial Review Proceedings and with a view to upholding the implementation of the use of alternative dispute resolution mechanisms as enshrined in Article 159 (2) (c) of the *Constitution*, Section 9 (2) of the said Act calls on parties to firstly exhaust the mechanisms, including internal mechanisms for appeal or review and all remedies available under any other written law before applying for judicial review orders. If, however, on Application the court finds that the interest of justice dictates the exemption of this rule, the court will exempt this person from the obligation. Presently, before delving on exceptions to the doctrine, I must first establish whether the doctrine of exhaustion is applicable in this case.

61. My answer lies in a holistic reading and interpretation of the statute governing controlled transactions.

62. Section 8 (2) of the *Land Control Act* states that the Land Control Board shall either give or refuse its consent to the controlled transaction. Such decision is final and conclusive and shall not be questioned in any court. However, there are appeal mechanisms donated within the said Act against such decisions.

63. My interpretation of Section 8 (2) is that only decisions to grant or refuse a consent are subject to appeal. This is further fortified by Section 11 of the said *Act* which provides that where a Land Control Board refuses to grant consent in respect of a controlled transaction, the Applicant may, within thirty days of the copy of the board's decision being delivered or posted under Section 16 (2) of this *Act*, appeal to the Provincial Land Control Appeals Board for the province in which the land in question is situated. A second appeal lies to the Central Land Control Appeals Board.

64. From the above, my general observations are that the decision the subject of challenge by an Applicant is limited only to the refusal to grant the consent. Secondly, a first Appeal lies to the Provincial Land Controls Appeals Board while a second one lies to the Central Land Controls Appeals Board.

65. Section 16 of the *Act* empowers the Board to make every decision within its mandate but must be reduced in writing. However, gathered from the above provisions, not every decision is subject to the avenues for appeal listed in the statute. I therefore find that an Applicant can only challenge by way of appeal the decision to refuse to grant a consent.

66. The crux of the dispute is to be found in the ex parte Applicants' narration of events. In particular, they lamented inter alia that they could only file the present proceedings because they were not furnished with the decision giving reasons to refuse to grant the consent. However, my finding above has also been impressed by annexure KAM17, a copy of the LCB minutes of the meeting held on April 20, 2017 attached to the ex parte Applicant's further Affidavit sworn and filed on October 2, 2023. Minute 16 at page 2 of the minutes resolved that the Applicant does furnish the Board with court proceedings that the Application for consent referred to. It was indicated "Remarks....Diferred (sic) to come with Court Proceedings Order". My understanding of those remarks is that for the Applicant to rely on the Court order issued on July 21, 2016, it ought to have substantiated the said Order. I find that the LCB acted perfectly within its discretion to do so. Those actions were lawful as shall be discerned further in this decision. From the proceedings, the LCB did not grants the consent. Similarly so, the Applicant failed to establish that he was granted an extension by this Court to apply for a Land Control Board consent. This was in blatant violation of the provisions set out in Section 8(1) of the *Land Control Act* mandating an Application to be made within six (6) months of the transaction. To the extent that the former was the directive of the board, the ex parte Applicants failed to comply.

67. The *ex parte* Applicants did not demonstrate the difficultly if any in complying with those directions as minuted. They did not in fact challenge those directions. In that regard, no decision could be made by the Board without the Applicants firstly complying with their orders. It thus brings me to conclude that the Applicant ought to have firstly complied with the directions of the LCB for him to challenge the said outcome. Otherwise, the decision to challenge was left in abeyance. Additionally, and importantly, they remained in breach of the *Act* and in particular Section 17 (3), which provides that:-

> " Any person who, without reasonable excuse, refuses or neglects to attend before a board or to produce, within the time allowed, any document or evidence, having been required to do so under subsection (1) of this section, shall be guilty of an offence and liable to a fine not exceeding five hundred shillings."

68. I have underlined the relevant part of the Section for emphasis. In my view the *ex parte* Applicants had no lawful excuse not to comply. As such, they stood to be charged with an offence. It is my grave suspicion that they were enviably aware of the actions bearing in mind that the proceedings they relied on were marred with irregularities and thus unreliable.

69. The *ex parte* Applicants led this Court to believe that the LCB illegally refused to grant consent in 2021. It is that decision, amongst others, that led the ex parte Applicants to file the present suit citing

that they were never furnished with the minutes of the meeting. They argued that it was a violation of their right to information.

70. Based on the above stated facts, I make the following observations; firstly, the ex parte Applicants were bound to obey the dictates of the law. They did not apply to be exempted from the general obligations to not exhaust all avenues donated in the Act. Although they sought for proceedings, I am in the humble view that no proceedings were furnished because there was no decision ever made on refusal or grant of the consent. I hold so because, in terms of Section 16(1) of the *Act*, written reasons are given when a decision has been made.

71. Secondly, if the proceedings in 2017 were anything to go by, they in their nature a deferment and not the subject of appeal proceedings. A challenge in reference to those proceedings would be premature since the Act did not envision an appeal against such scenario. Therefore, as to whether the Application before me was inchoate or not, I find that no decision was made by the LCB to warrant an appeal.

72. On the one hand, the *ex parte* Applicants could not move to the Provincial Land Control Appeals Board without a decision to challenge it. On the other hand, the LCB was judiciously discharged its mandate to obtain information relied on by the Applicants in order to make a just decision. To seek proceedings of the Court in support of the order which was being used to compel the Board to issue a consent was a laudable act of prudence on the Board's part. It painstakingly sought to establish the rationale as to why it was compelled to act on an order in proceedings in which it was not a party to. I must emphasis that the Board acted within the realms of statute and cannot be faulted. This now brings me to my next issue for determination.

(c)The nature of Judicial Review Proceedings

73. According to his book, Steve Ouma, *A commentary on the Civil Procedure Act Cap 21* (2nd Edn Law Africa 2013), judicial review is a mechanism and/or machinery set by the state purposed to check the excesses of its officers or authorities and are therefore sought in the name of the Republic at the instance of the affected party. Its purpose was outlined in *Republic v Permanent Secretary/Secretary to The Cabinet and Head of Public Service Office of the President & 2 others ex parte Stanley Kamanga Nganga* [2006] eKLR to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large.

74. In *Republic v Judicial Service Commission ex parte Pareno* [2004] KLR 203 at 204, the Court emphasized that decisions of persons or bodies performing public duties or functions will be liable to be quashed or otherwise by the issuance of appropriate orders by way of prerogative writs where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached its decision.

75. Importantly, it must be remembered that a court determining such a dispute is not invited to sit on Appeal but as held by the Court of Appeal in *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR to justiciability of the decision in the following manner:

> "Judicial review is 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."

76. What can be gathered from the foregoing paragraphs is that firstly, judicial review constitutes a process of checks and balance of institutional remedy against public bodies or public officers exercising their functions or mandate. Secondly, it is not intended by a court determining such a motion to interfere with statutory discretion unless that decision was exercised injudiciously in the following ways: illegally, irrationally and procedurally improper. [See the Ugandan case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300. Without belaboring further, a court is not invited to sit on Appeal and determine the merits of the decision at all.

77. Thirdly, the court in such a scenario is vested with supervisory jurisdiction to ensure that the rule of law is upheld. This was explicitly enunciated in the case of *Republic v Director of Immigration Services &2 others ex parte Olamilekan Gbenga Fasuyi & 2 others* [2018] eKLR as follows:

> "...The role of the court in judicial review is supervisory... 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 process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere."

78. This court shall abide by the above principles in the foregoing paragraphs. Before delving in the other issues postulated for determination I will, at this juncture, find and hold that given that the 3rd Respondent is not a public officer as sued in these proceedings, no such orders of judicial review can lie against her. Issues between citizens in their private capacity as such will always remain to be theirs, and courts shall not invoke judicial review procedure to remedy any problems that arise therefrom. They can only be a subject of proceedings of a different kind as provided by law.

(d) Whether the LCB acted illegally, irrationally and exercised its mandate with procedural impropriety

79. The Land Control Board is a creature of statute. Its function, under the Act, is to process Applications for consent in controlled transaction by either granting or refusing to grant the consent. Section 5 (1) of the *Land Control Act* establishes up a Land Control Board in every land control area.

80. A party is mandated to obtain consent to make any dealings on agricultural land from this Board. Under Section 8 (1), the Application to obtain consent must be done within six (6) months of the agreement. Where that statutory period is not observed, the High Court (and for that matter by virtue of Section 19 of the *Environment and Land Court Act*, the ELC may for good reason and by discretion extend the time for the Application. What is important to note is that the time for Application is limited to a six (6) month window.

81. In exercising its mandate, the board is required to make every decision in writing in the prescribed manner. Any decision to grant or refuse the issuance of consent must be done soon in writing with reasons. These reasons shall be made available by furnishing a copy to the Applicant.

82. Section 17 (1) (c) of the *Act* empowers the Board to require any person to produce any document or other evidence relating to the land. Any document, in the view of this Court, includes but is not limited to, the original title deed in respect of the transaction. This is the mandate that was exercised when the

Applicants were asked to furnish copies of the proceedings they made references to. No evidence was led before me to demonstrate that the *ex parte* Applicants took the necessary steps as directed.

83. Grounding the necessity of the substantive Motion, the *ex parte* Applicants firstly contended that they filed the present suit because they were not furnished with the reasons for the decision on February 16, 2021. Secondly, they stated that they filed suit because the Board sought copies of the court order the Applicants made reference to.

84. It is not rocket science that when asked to produce evidence of something one relies on, the party either takes the liberty to comply or demonstrates the difficulty in bringing or availing the document requested for. Instead of simply complying with unambiguous directions, the ex parte Applicants sought relief from the back door to compel the Board to grant the consent. If there was any procedural impropriety in my view, it would lie against the ex parte Applicants since they did not abide by the directions of the Board.

85. The 1st *ex parte* Applicant faulted the 2nd Respondent on its decision to reject and not defer owing to the pending objections and/or complaints lodged by the 3rd Respondent. He concluded that the 2nd Respondent failed to execute its statutory mandate thus acted ultra vires in the wake of a subsisting unchallenged lawful court order emanating from Kitale ELC No 19 of 2016. What is evident from the two (2) court orders in that suit is that although the latter one was held null and void and of no legal effect, it was directed to the Land Registry. As such the 2nd Respondent had no legal obligation to obey them whatsoever. Nowhere did any of the orders mentioned that the 2nd Respondent does grant a consent to transfer the land parcels in question herein or indeed any other within its mandate.

86. Additionally, the 1st ex parte Applicant deponed that on 20/02/2018, he lodged a complaint before the Land Registrar against the subsisting caution that was removed. From entry No. 4 of annexure KAM 1(b) was put on 11/11/2011. Surprisingly, and contrary to the law, no notice was issued in respect to the complaint. It was then heard and determined on the same date of complaint as seen under entry No. 5 of annexure KAM 1(b). The culmination of those proceedings ultimately removed the caution. According to the Applicant, the process was in line with Section 73 (4) of the Registered Land Act Cap 300 Laws of Kenya (now repealed).

87. This Court takes the view that these actions immediately preceded the 1st *ex parte* Applicant to occasion the Land Registrar to subdivide land parcel No. 52 pursuant to the letter of consent marked as annexure KAM5(b).

88. On the proceedings that allegedly took place on February 16, 2021, the ex parte Applicants contended that they wrote a letter on March 11, 2021 requesting for proceedings but have never been furnished. However, it must be remembered that the ex parte Applicants have now sought a mandatory order directing the Board to furnish a consent to transfer land. This is the kernel of the dispute. The fact of not being furnished with the proceedings justified this action.

89. Gathered from the above, I find that the *ex parte* Applicants were urging this Court to effectuate an illegality. The Court cannot through judicial review proceedings and issue an order directing a public body or official to make a decision requiring the exercise of discretion by that official in a particular manner. To do so would amount to interfering with decision-making process and place the Court in the shoes of the official or public body. That would be usurping the authority of the public bodies or officials. And where will aggrieved parties go to if Courts were to step in and act in that manner?

90. What the Court is stating is that if, as pointed out by the ex parte Applicants, the Board did indeed refuse to grant the consent, it would only be proper if those reasons were furnished first because that is how a court would ascertain allegations of injudiciousness where there is not evidentiary proof.

Even then, the party was governed by the Act to exhaust the internal dispute resolution mechanisms donated in the act for appeal. Otherwise there would be no basis for holding that without interrogating the decision itself. At this juncture, the reasons, if any, for refusal, if it indeed that took place since no such evidence was furnished, the ex parte Applicants appeared not interested in establishing those reasons. It does not form part of their reliefs and prayers sought. Theirs is mainly that this Court issues a mandatory order to obtain a consent to transfer the parcel of land in question. In any event, it is also their case that the filing of the present proceedings was necessitated by the board's demand to be furnished with court proceedings. The Board, in my view, however, directed them to file suit but furnish proceedings supporting their Application. A decision was not yet made on the application before it.

91. In *Pastoli v Kabale District Local Government Council and others* (*supra*), the court held 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 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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 is 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 exercises jurisdiction to make a decision."

92. Taking cue from the above holding, I do not hesitate to find that the *ex parte* Applicants have not proved the merits of this Application. I see no decision made by the Respondents to warrant this court to find impropriety, illegality or unreasonableness.

93. Had the dispute been merited, however, the Court was only obliged to issue certiorari orders quashing those proceedings and the outcome but not an order of mandamus as prayed herein, but only after the exhaustion of the Appellate procedures the law provides for. This Court doubts whether it would be lawful for the Land Control Board to grant a consent to transfer land without an agreement. From the agreement placed before me as annexure KAM 3 annexed to the Affidavit filed on July 2, 2022, the *ex parte* Applicants entered into an agreement over the sale of five (5) acres of part of land parcel No LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52. They never entered into agreement over parcel No 141. Thus, on what basis could the L.C.B have acted on to grant consent? Put differently, what basis justified the grant of the orders sought since the Application relied on did not capture the property in question?

94. As I finalize on that point, the Applicants complained that they came to this Court because their right to be furnished with the reasons for the decision of February 16, 2021. He stated that it was his right to be furnished with the reasons for the decision of that date. The 3rd Respondent on the other hand

argued that no decision was made then. She stated that the LCB only asked the parties to go home and try to sort out the matter amicably.

95. First, I find that there was no evidence at all that a decision was made on that date. There was no evidence of what type of application if any or indeed if there was a meeting held by the Board on the material date. Be that as it may, if I hear the Applicants well, their complaint on this issue was that they were not given the reasons for the determination of that date, if any. To the extent that there could have been a LCB meeting of February 16, 2021 and that the Applicants were not given the written reasons thereof as required under Section 16(1) of the *Land Control Act*, and based on Article 35(1) of the *Constitution* which provides for the citizen's right to access to information held by the state, as read with Section 4(1)(a) and (3) of the *Access to Information Act*, Act No 31 of 2016, the Applicants could have been entitled to it. However, this Court cannot issue orders not prayed for. This complaint was raised only as a support point that they were not given reasons. Had they prayed for an order compelling the Respondents, except the 3rd, to give the information, this Court could have granted it. But the prayers sought herein are for mandamus towards issuance of a consent to transfer and issuance of a title in favour of the 2nd ex parte Applicant besides the 3rd being compelled to surrender the original titles. Those, this Court cannot issue.

96. Again, and lastly, prayer No. 2 of the Application was couched in such a manner as to asking this Court to direct the 3rd Respondent to surrender the original title to the 4th Defendant for purposes of issuance of another one in favour of the 2nd *ex parte* Applicant. In essence the Applicants prayed for this Court, indirectly, to order the 4th Respondent to issue a title in favour of the 2nd *ex parte* Applicant. In my view that order cannot issue for the reasons given above.

97. The 1st *ex parte* Applicant also stated that the 3rd Respondent had no legal right to object to the transaction in question because that was the preserve of his deceased spouse. But he failed to note that the issue was a matter that lay squarely before the Land Control Board to decide depending on the material placed before it. Furthermore, he did not explain what becomes of the objection to the transaction if a spouse could have objected but dies and leaves children. In other words, he did not lay a basis for his argument.

98. Turning to the 3rd Respondent's purported action of withholding the titles, the ex parte Applicants failed to demonstrate how the 3rd Respondent was duty bound to comply with Court orders yet they were not directed at her. It my humble view, it is clear from the pleadings and proceedings in that case that the 3rd Respondent was not a party and that as alluded to above, the second order alleged to be for obedience was of no effect. Ultimately, she could comply with orders she was not a party to.

99. It is abundantly clear from the pleadings before me, particularly annexure KAM10 that although the Application for consent purportedly made in 27/1/2021 was not produced before me, the ex parte Applicants moved the Land Control Board for consent to transfer a whopping eleven 11 years after the agreement of sale was made. Their earliest Application of April 16, 2017, six years after the transaction was still illegal. Section 8 of the *Land Control Act* mandates that "An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:"

100. The Applicants did not furnish the LCB or indeed annex to the Affidavits before this Court a copy of an order of this Court to show that, having failed to apply for the consent to transfer the land in time, they sought and obtained an extension to apply for the land consent after that expired statutory mandatory period of six (6) months.

101. Does the Land Control Board have jurisdiction to extend time for application to it for consent? Put in another way, can the Board be said to have acted legally, and will the consent it issues be legal, if it considers an Application for consent made to it after the expiry of six (6) months, without an express extension of the order of the Court as provided in Section 8 (1) of the Act?

102. Jurisdiction is central and of paramount importance in every aspect of it. It plays an integral role in the administration of justice. In *Owners of The Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR Nyarangi JA held:

> "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."

103. Our apex court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated:

> "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."

104. From the above, it is plain and undisputable that a court cannot lawfully take up jurisdiction on an issue it has not been granted to do so. Public bodies are not courts but they exercise mandate donated to them by statute. While they are subject to oversight by courts through orders of judicial review, it should be clear to them that they cannot be flouting the law and be said to be exercising their mandate properly. Therefore, by the same token as is for courts, a public body or institution cannot arrogate authority, power or jurisdiction over anything unto itself impermissible by statute or regulation creating it. I find that no Land Control Board has any power, authority or jurisdiction to extend time to apply for consent to it.

105. For a long time this law has been flouted by Land Control Boards of various regions. It should now henceforth be made clear that no Land Control Board has the authority to hear and determine any application for consent to subdivide, sell, charge or otherwise deal with land in a controlled area where the Application is presented or made after the expiry of the six (6) month period. Not even a day should be overlooked in the count. Without an order for extension from the Court, a Land Control Board should down its tools where the Applicant is caught by limitation of time. It behooves on this court to declare anything done in contravention of that law illegal, a nullity and of no effect. That is not a consent known in law.

106. The above goes hand in hand with the state of Courts unable to grant themselves jurisdiction over matters they do not have such authority, including where under the *Limitation of Actions Act* it becomes apparent that leave had not been sought to file a matter of time where that period had expired.

107. Board are not mechanical public offices which cannot ask themselves if they have authority over the Application that is before them. They must do so. They are creatures of statute and must do only that which the law permits them to do: handle Applications for consent which are either brought within six months of the transaction or outside of the six months period, with leave of Court. It does not matter whether any of the parties object to the application or not as long as it is filed out of time, the Boards are under a legal duty and obligation to inquire into whether leave of the Court has been granted for the late application or not. Where it is not, they are under a duty to grant no audience to the parties with reasons that they have no power or authority to hear the Application. Thus, the Respondents

herein, except the 3rd, were under no obligation at all to consider the application without compliance with Section 8(1) of the Act.

(e) he effect of the orders of 01/03/2016 determined in Kitale ELC No. 19 of 2016?

108. I must ask whether this Court could have still directed the LCB to comply with the orders issued on Kitale ELC No. 19 of 2016. Pursuant to the directions of the Court as earlier stated in this judgment, parties were directed to furnish this Court with copies of the pleadings in ELC No. 19 of 2016. In the meantime, the court reserved to establish by way of Ruling, the validity of the actions after 01/03/2016 in that file.

109. I have considered the decision of the Court in that matter. I note that the Court rightly found that on 01/03/2016, a consent judgment was entered. And by the consent, the suit was compromised and further withdrawn after the consent being adopted it its terms. Since the withdrawal was effected, it marked an end to the proceedings. As such, the reopening of the case could only be done so by way of firstly reinstating suit, which I have found in that matter that it was not possible to do. Otherwise, the only recourse lay in Appeal from the orders of the parties, which was not done.

110. Extrapolating so, the proceedings in Kitale ELC No. 19 of 2016 were terminated on 01/03/2016. The consequential effect was that any action deviating from the law on the effect of the withdrawal was an illegality and void. Thus, the consent entered on 21/07/2016 purporting to review the earlier orders of 01/03/2016 were of no legal basis as they were illegal and void ab initio.

111. Secondly, the Applicant filed an application to review the orders of 01/03/2016. Looking at the body of the Application, I find that the same sought craftily to introduce new parcel numbers without regularizing the record by way of amendment the pleadings, which also could not be done in a withdrawn suit. The Applicant contended that the application was necessitated by the fact that as at the time the pleadings were being filed, subdivision had already taken place.

112. Interestingly, however, in this matter the Land Registrar in charge of Trans Nzoia County, one Nelson Odhiambo, deposed that following registration of mutation for sub-division LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52, the same was closed and two (2) new titles issued; LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/141 and LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/140. To him, that was done pursuant to the court orders of July 21, 2016. According to annexure marked as KAM 1(b) of the Applicant's Affidavit sworn on 2/07/2017, it is clear that the register was closed on November 10, 2015 when the subdivision of the parcel was effected and the titles for parcel Nos. 140 and 141 issued; way before the suit was instituted.

113. Whichever the case, this Court holds that any action that took place after March 1, 2016 relating to those orders were a nullity and of no legal or otherwise effect. This is because as at this time, there was no suit capable of giving rise to review of the orders as the Applicant therein purported to do.

114. A court will not assist a party whose case is based upon an immoral or illegal act. This common law principle is known as the principle of *ex turpi causa non oritur actio* translated to mean that no action can arise from an illegal act. As such, all decisions made, implemented or passed after March 1, 2016, including the order of July 21, 2016 relied upon to file an Application for consent before the LCB were and are invalid. I thus wholly adopt the holding of Lord Denning in the landmark decision *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 where he said:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every

proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

(f) Whether the Application before the LCB was proper?

115. The purported compulsion to have the Board grant the consent was premised on the orders of July 21, 2016 which I have already found to be of no legal value as they are void.

116. Secondly, Section 8 (1) of the *Land Control Act* provides that an application for consent shall be made within six (6) months of the making of the agreement provided that leave may be granted by the High Court to extent the period where sufficient reason is furnished. The import of those wordings is that the application must be made within six (6) months. An option to extend such period shall be entertained only at the instance of the court that shall only grant extension upon being furnished with sufficient reasons. From the facts gathered herein, the applicant for consent to transfer was not sought within the stipulated period couched in mandatory terms. As such, by dint of law, an application that fell outside the statutory period, was without leave, a nullity. Suffice to add that Application produced in evidence by the ex parte Applicants related to an application for consent to subdivision and not transfer. These words hold two (2) different meanings that cannot be interpreted to mean one and the same thing.

117. Ultimately so, I find that the Application(s) before the Land Control Board were improper and thus ineffectual.

Orders and Disposition

118. In view of the foregoing, I find that the substantive motion dated July 2, 2021 and filed on July 5, 2021 is without merit. It resultantly fails and it is hereby dismissed with costs to the respondents.

119. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 1ST DAY OF MARCH, 2023

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE