Koinange Investment & Devetopment Ltd v Nairobi City County Government & another; Koinange & another (Interested Parties) (Environment and Land Judicial Review Case 19 of 2020) [2023] KEELC 18037 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18037 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 19 OF 2020

JO MBOYA, J

JUNE 7, 2023

BETWEEN

KOINANGE INVESTMENT & DEVETOPMENT LTD ... EXPARTE APPLICANT

AND

NAIROBI CITY COUNTY GOVERNMENT ..... 1ST RESPONDENT

NAIROBI COUNTY SECRETARY ..... 2ND RESPONDENT

AND

DAVID WAIGANJO KOINANGE ..... INTERESTED PARTY

LENNAH WANJIKU KOINANGE ..... INTERESTED PARTY

JUDGMENT

Background and Introduction.

1. The Ex-parte Applicant herein filed and/or took out Chamber Summons dated the 19th November 2015, wherein same sought for Leave of the Honorable court to commence Judicial Review Proceedings and which Application was duly placed before the Honorable Judge on the 20th November 2015, whereupon the Honorable Judge inter-alia, granted Leave in the manner sought.

2. Furthermore, the Learned Judge also directed the Leave so granted to operate as an Order of Stay of the impugned Decision of the 1st Respondent (sic) made on the 29th October 2015.

3. Subsequently and upon obtaining Leave of the Honorable court (details in terms of the preceding paragraphs) the Applicant (now Ex-parte Applicant) proceeded to and indeed filed the Substantive Notice of Motion dated the 23rd November 2015.

4. For good measure, the Ex-parte Applicant sought for the following Reliefs;

i. That by way of Judicial Review an order of certiorari do issue, to quash the Decision of the 1st Respondent made and effected on the 9th October 2015 to place the Ex-parte Applicant's Property L.R No. 209/9099, along Taifa Road, situate in the City of Nairobi within Nairobi City County under the 1st Respondent Nairobi City County Management.

ii. That by way of Judicial Review an order of Mandamus do issue to compel the Respondents to remove the Notice erected on the suit premises L.R No. 209/9099, along Taifa Road, situate in the City of Nairobi within Nairobi City County forthwith.

iii. That by way of Judicial Review for an order of Mandamus do issue to compel the 1st Respondent to provide an account of all revenue collected by it on the Ex-parte Applicant's suit premises L.R No. 209/9099, along Taifa Road, situate in the City of Nairobi within Nairobi City County from October 9th 2015 to the date of cessation of the management of the said premises by the 1st Respondent.

iv. By way of Judicial Review for an order of Prohibition do issue to prohibit the Respondent, their servants and/or agents, the interested party's herein, or otherwise howsoever, from placing under the Nairobi City County Government Management, selling, erecting notices on, dealing with, trespassing or in other way alienating or interfering with the Ex-parte Applicant's quiet and peaceful possession and enjoyment of the suit property L.R No. 209/9099, along Taifa Road, situate in the City of Nairobi within Nairobi City County.

v. The costs of this proceedings be borne by the Respondents.

5. Instructively, the substantive Notice of Motion Application herein was premised and anchored on, inter-alia, the Statement of Facts and the Affidavit in Verification of the Statement of Facts, which was sworn by one, Eddah W Mbiyu; and which for good measure were filed alongside the Chamber Summons Application dated the 19th November 2015.

6. It is imperative to point out at this juncture that when the Ex-parte Applicant filed the Chamber Summons and in respect of which same sought for and obtained Leave to commence Judicial Review proceedings, the Ex-parte Applicant alluded to and sought to challenge the decision of the 1st Respondent made on the 29th October 2015.

7. Furthermore, when the Application for Leave was placed before the Honorable Judge on the 20th November 2015, the Honorable Judge proceeded to and granted Leave to facilitate the filing of substantive Judicial Review proceedings seeking to challenge and impugn the order (sic) issued on the 29th October 2015.

8. First forward, upon being served with the substantive Notice of Motion Application, it appears that the Respondents herein neither filed nor served any Replying affidavit. Nevertheless, the Notice of Motion Application dated the 23rd November 2015 was thereafter fixed and scheduled for hearing on the 19th July 2016.

9. Moreover, when the Notice of Motion Application came up for hearing on the said 19th July 2016; same was indeed canvassed culminating into the issuance of an order of Judicial review in the nature of mandamus. Instructively, the order of mandamus directed the 1st Respondent to tender accounts as pertains to all revenue collected by same from the suit property.

10. On the other hand, the Honorable Judge who dealt with the substantive motion also ordered and directed that the accounts at the foot of the order of Mandamus be provided and availed within 7 days from the date of the order.

11. Other than the foregoing, it is worthy and imperative to state that on or about the 4th September 2020, the Respondents herein proceeded to and filed a Replying affidavit sworn by one Erick Odhiambo Abwao and wherein same purported to be responding to the Notice of Motion application for Judicial Review.

12. Having pointed out the foregoing issues, it is appropriate to now state that the subject matter came up for mention on various occasions, when the advocates for the Ex-parte Applicant and the Respondents intimated to the court that same were endeavoring to settle the dispute.

13. However, despite mentions exceeding 10 in number, no settlement was ever reached and thus the Honourable court was constrained to and directed the Parties to file and exchange written submissions on whatever issue that remained outstanding and pending determination.

14. Pursuant to and in compliance with the directions of the Honourable court, the Parties herein proceeded to and indeed filed and exchange their respective submissions. In this respect, the Ex-parte Applicant filed written submissions dated the 2nd May 2023, whereas the Respondents filed undated written submissions, but which were nevertheless availed to the Honourable court.

Submissions By The Parties:

a. Ex-parte Applicant Submissions:

15. The Ex-parte Applicant herein filed written submissions dated the 2nd May 2023; and in respect of which same have raised, highlighted and canvassed three issues for consideration by the court.

16. First and foremost, Learned counsel for the Applicant has submitted that on or about the 19th July 2016, the honorable court issued and/or granted an order of Judicial Review in the nature of Mandamus, whose import and tenor was to compel the 1st Respondent to provide and supply Accounts of all Revenue collected by herself from the Ex-parte Applicant's property, namely, L.R No. 209/9099.

17. In addition, Learned counsel has submitted that the 1st Respondent was ordered and directed to provide and supply the requisite Accounts within a circumscribed duration of 7 days from the date of the order.

18. Secondly, Learned counsel has submitted that pursuant to and in line with the order of mandamus, the 1st Respondent filed a Replying affidavit sworn by one P. M Muriithi, the Chief Accountant in charge of Rates and wherein the 1st Respondent gave a figure of Kes.2, 554, 400/= only, as (sic) the rate collected.

19. Nevertheless, Learned counsel for the Ex-parte Applicant has submitted that despite the provision of Accounts in the sum of kes.2, 554, 400/= only, as the rates collected, the deponent of the Replying affidavit (details in terms of the preceding paragraph) failed to provide a breakdown of how the figures was reached and/or arrived at. In any event, counsel for the Applicant has submitted that the 1st Respondent has failed to provide a breakdown of the account to date.

20. Thirdly, Learned counsel has submitted that insofar as the 1st Respondent has failed and/or neglected to comply with the terms of the court order issued on the 19th July 2016, it is imperative that the Honourable court be pleased to compel the 1st Respondent to provide and supply the requisite Accounts pertaining to the revenue collections for the months of November and December 2015.

21. Additionally, Learned counsel has also submitted that the Honourable court should proceed to and direct the 1st Respondent to waive the penalties and Interests levied on the Applicant owing to the fact that the 1st Respondent has failed and/or refused to provide Accounts, in the manner directed by the court.

b. Respondents' Submissions:

22. The Respondents filed an undated written submissions and in respect of which the Respondents has raised, canvassed and amplified three issues for consideration and determination by the court.

23. Firstly, Learned counsel for the Respondents has submitted that the Judicial Review proceedings before the Honorable court constitutes and amounts to an abuse of the Due process of the court. In particular, Learned counsel has contended that the instant proceedings are intended to curtail and restrain the 1st Respondent from performing and executing her Statutory/Constitutional mandate of collecting rates from the Ex-parte Applicant.

24. Furthermore, Learned counsel for the Respondents has submitted that even though the Ex-parte Applicant has approached the Honorable court, seeking the impugned orders, same (Ex-parte Applicant) has never been paying rates, either as required under the statute or at all.

25. Furthermore, Learned counsel has submitted that the Ex-parte Applicant herein is currently in arrears amounting to Kes.32, 338, 790/= only.

26. Based on the foregoing, Learned counsel for the Respondents has thus contended that the current proceedings are indeed meant to assist a defaulter to evade compliance of Statutory duty and/ or obligations.

27. Secondly, Learned counsel for the Respondents has also submitted that there is an established and statutorily circumscribed mechanism for challenging rates. In this respect, Learned counsel has added that where there is an established statutory mechanism provided under the law, then it behooves every litigants, the Ex-parte Applicant not excepted, to comply with and adhere to the established statutory mechanism.

28. Premised on the foregoing, Learned counsel for the Respondents has thus invited the Honourable Court to find and hold that the Judicial Review proceedings before the Honourable court are not only premature but misconceived.

29. Thirdly, Learned counsel for the Respondents has submitted that prior to and before an order of Judicial review for certiorari, mandamus and prohibition can issue, it is incumbent upon the Ex-parte Applicant to establish and demonstrate a prima facie case capable of being granted.

30. In this regard, Learned counsel has invited the court to take cognizance of and to apply the ratio decidendi in the case of Director of Public Prosecution versus Martin Maina & 4 Others (2017)eKLR, where it is stated that the Court of Appeal underscored the necessity to demonstrate a prima facie case.

31. Consequently and in view of the foregoing submissions, Learned counsel for the Respondents has therefore invited the Honourable court to find and hold that the entire Judicial Review proceedings before the court and in particular, the Application dated 23rd November 2015, is hopeless, misconceived and an abuse of the Due process of the court.

Issues For Determination:

32. Having reviewed the substantive Application vide Notice of Motion Application dated 23rd November 2015; and upon taking cognizance of the entire record of the court and upon considering the written submissions filed by/on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;

    i. Whether there are existing Judicial Review proceedings capable of ventilation and of being canvassed before the Honourable court anymore.

    ii. Whether this Honorable Court whilst dealing with Judicial Review proceedings can engage with and/or calibrate upon disputed Issues of Accounts or otherwise.

    iii. What Reliefs ought to be granted.

ANalysis And Determination

Issue Number 1

Whether there are existing Judicial Review proceedings capable of ventilation and of being canvassed before the Honourable court anymore.

33. It is common ground that the Ex-parte Applicant herein approached the Honorable court vide Chamber summons Application dated the 19th November 2015; and in respect of which same sought for and obtained Leave to commence Judicial Review proceedings in the nature of certiorari, mandamus and prohibition, respectively.

34. Moreover, upon procuring and obtaining the Leave, the Ex-parte Applicant took out and filed Judicial Review proceedings vide Notice of Motion Application dated the 23rd November 2015; which was thereafter canvassed and disposed of vide the decision rendered on the 19th July 2016.

35. For good measure, upon hearing the Notice of Motion application dated 23rd November 2015, Hon Justice G. V Odunga, Judge (as he then was) granted orders in the following terms;

    i. That by way of judicial review for an order of mandamus be and is hereby issued to compel the 1st Respondent to provide an account of all revenue collected by it on the ex-party's Applicant suit premises on L.R No 209/9099, along Taifa Road, situate in the City of Nairobi within Nairobi City County from the 9th October 2015 to the date of cessation of the management of the said suit premises by the 1st Respondent.

    ii. The said accounts to be provided within 7 days.

    iii. Mention for further orders on the 15th August 2016.

36. From the foregoing orders, what is evident and abundantly clear is that the Honorable Judge heard, dealt with and disposed of the Application dated 23rd November 2015, by granting the orders of Judicial Review in the nature of Mandamus only.

37. Furthermore, it is instructive to note that the orders of the Learned Judge which were issued on the 19th July 2016, were indeed issued in the presence of counsel for the 1st and 2nd Respondents. Consequently, there is no gainsaying that the said orders were issued in the presence of the concerned advocates and were thus binding on the Parties.

38. Notwithstanding the foregoing, it id also not lost on the Honourable court that the named orders, which were issued on the 19th July 2016, were in respect of the Application dated 23rd November 2015. In this respect, it is explicit and beyond peradventure that the entire Application was heard and disposed of.

39. To my mind, the Honorable Judge having anxiously considered the Application dated 23rd November 2015, was only persuaded to grant the orders of Judicial Review in the nature of Mandamus and no more.

40. My take from the nature of the orders that were granted by the Honorable Judge is to the effect that the rest of the prayers which were sought at the foot of the application dated 23rd November 2015, but which were not granted, were deemed to have been dismissed.

41. Given the foregoing position, the question that now does arise is whether there are any outstanding Judicial Review proceedings, pending before this Honorable court and capable of being ventilated and/or canvassed any more.

42. Sadly, the moment both the Ex-parte Applicant and the Respondents canvassed the application before the Learned judge, culminating into the orders issued/made on 19th July 2016, the Ex-parte Applicant herein cannot be heard to revert back to court and pretend that there is an outstanding limb of the dispute, which is capable of being adjudicated upon by this Honourable court.

43. In the premises, I surmise that the entirety of the proceedings which have been taken ex-post the order of the Learned Judge made on the 19th July 2016 have been taken, albeit in the absence of any legitimate suit, capable of anchoring such proceedings.

44. Additionally, it is imperative to state and underscore that once the High court or such other Court of Equal status has engaged with and pronounced his/herself on a dispute pertaining to Judicial review, the matter is finalized and closed. Consequently, there cannot be reversion back to the matter, in any manner or otherwise, save for the question of costs and incidental Proceedings.

45. To underscore the foregoing position, it is instructive to take cognizance of the provisions of Sections 8 and 9 of The Law Reforms Act, Chapter 26 Laws of Kenya, which are explicit and unequivocal.

46. For ease of reference, the provisions (supra), stipulate as hereunder;

> 8. Orders of mandamus, prohibition and certiorari substituted for writs
>
> (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.
>
> (2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.
>
> (3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.
>
> (4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.

9. Rules of court

(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—

(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;

(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

47. Inevitably, the Drafters of the *Law Reform Act*, were explicit to the extent that once the Superior Court has granted an order of Judicial Review, like in the instant case, there is no window for return and further engagements in the matter. For clarity, the only available avenue is one for Appeal and not otherwise.

48. Despite the clear provisions alluded to in the preceding paragraph, there has been a back and forth on the issue before the court and furthermore, the Ex-parte Applicant herein even misled Eminent Judges of the High court , (some now Judges of the Court of Appeal) into making orders on the 24th July 2019 and 4th September 2019, respectively relating to the fixing of the Application dated 23rd November 2015 for hearing.

49. Clearly, the manner in which the Ex-parte Applicant has conducted herself in this particular proceedings, is wrought and fraught with impropriety, if not deceit. However, in my humble view there are no further proceedings that can be entertained and prosecuted in respect of the subject matter, whatsoever.

ISSUE NUMBER 2

Whether this Honorable court whilst dealing with Judicial Review Proceedings can engage with and/or calibrate upon disputed issues of Accounts or otherwise.

50. Other than the foregoing, it is also instructive to note that pursuant to the orders which were issued by the Honorable Judge on the 19th July 2016, the Judge directed, inter-alia that the Accounts in question be provided within 7 days of the order under reference.

51. Admittedly, the 1st Respondent endeavored and supplied accounts at the foot of a Replying affidavit sworn by one P. M Muriithi, the Chief Accountant in charge of rates and wherein the said deponent alluded to the figure of Kes.2, 554, 400/= only as the rates which had hitherto been collected by the 1st Respondent.

52. Nevertheless, the Ex-parte Applicant herein contended that the amount of kes.2, 554, 400/= only which had been disclosed and supplied by and on behalf of the 1st Respondent was neither accurate nor contained the requisite breakdown. Simply put, the Ex-parte Applicant disputed the accounts.

53. Having disputed the Accounts which were availed and supplied by and on behalf of the 1st Respondent, the Ex-parte Applicant is now before the court and seeking to have the court to engage with and interrogate the question of accounts to be supplied by the 1st Respondent.

54. Furthermore, the ex-parte Applicant has ventured further and is now seeking that other than the provision of account, this court should order and direct the 1st Respondent to waive the penalties and interests which were levied in respect of the Months of November and December 2015, respectively.

55. Arising from the foregoing, the issue that merits deliberation, is whether this Honorable court sitting and exercising Judicial Review mandate can engage with and calibrate upon disputed issues of Accounts.

56. In my humble view, Judicial Review proceedings are tailor-made to address and redress very specific issues, which were hitherto christened as interrogating the decision-making process by Quasi Decision Tribunal and other authorities. For coherence, the instant position fits well within the traditional prescription of Judicial review proceedings. See Commissioner Of Lands v Kunste Hotel Limited [1997]eKLR.

57. Nevertheless, upon the promulgation of *the Constitution* 2010 and the entrenchment of Article 47 thereof, the scope of the Judicial review proceedings has been enhanced and expanded. Furthermore, the expansion of the scope of Judicial Review proceedings has also been underscore by the enactment of the Fair Administrative Actions Act, 2015.

58. Arising from the foregoing, it is therefore instructive to state that whereas the court engaged with Judicial review proceedings can undertake a merit review, pertaining to and concerning the decision of the impugned body or quasi-judicial tribunal, however the intended merit review can only go as far as interrogating uncontroverted/ uncontested facts and not otherwise.

59. In the premises, where the facts that are impleaded in a Judicial review matter are contested and in controversy, then the Honorable court cannot venture forward and endeavor to resolve the factual controversy under the guise of exercising Judicial review mandate.

60. Recently, the Supreme Court of Kenya had occasion to underscore the extent and scope of Judicial Review proceedings in the case of Saisi & 7 others versus Director of Public Prosecutions & 2 others

(Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), where the court stated and observed as hereunder;

75. In order for the court to get through this extensive examination ofsection 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter.

    Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1) (e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

61. Bearing the foregoing in mind, I come to the conclusion that this court in exercise of Judicial review mandate, cannot be called upon to deal with and interrogate the questions of accounts, which are heavily in controversy. For good measure, whereas the Ex-parte Applicant says that what was disclosed is neither correct nor does not contain the requisite particulars; on the other hand, the Respondent are stating that the Ex-parte Applicant owes the Respondents more than Kes32, 338, 790/= only in rates arrears.

62. Before departing from the issue of accounts, it is my humble view that the taking and giving of Accounts is an issue that can only be resolved and addressed in ordinary civil proceedings, where the Parties shall be at Liberty to summon and call witnesses and not otherwise.

63. Perhaps, it is instructive to invite the attention of learned counsel for the Ex-parte Applicant to the provisions of Order 20 of the Civil Procedure Rules, 2010 whose contents are crystal clear, elaborate and succinct as far as taking of accounts are concerned.

64. Suffice it to point out that even if I had found and held that there were outstanding aspects of the Judicial review proceedings capable of being attended to and/or addressed by this court, (which is not the case) I would still have had difficulty with disposing of the issue of Accounts, in Judicial Review proceedings and in any event in the absence of Viva Voce evidence.

Issue Number 3:

What Reliefs ought to be granted.

65. The Ex-parte Applicant herein in her short and economical submissions has implored the Honourable court to, inter-alia, compel the 1st Respondent to give accounts of the monies by way of the individual daily collections for the months of November and December 2015, respectively.

66. In my humble view, the order for the giving of Account was duly made by the Honorable Judge on the 19th July 2016 and hence the question of giving accounts is now water under the bridge. In this respect, this Honorable court is now functus officio.

67. Other than the foregoing, Learned counsel for the Ex-parte Applicant has also impressed upon the Honourable court to order and direct the 1st Respondent to waive the penalties and interests levied on the Ex-parte Applicant's property. clearly, it is common knowledge that Parties are bound by their own pleadings.

68. To this end, the Ex-parte Applicant herein cannot now purport to create and generate new issues and new reliefs, through the written submissions; and thereafter seek to invite this Honourable court to blindly grant same.

69. Without belaboring the point, it is appropriate to draw the attention of Learned counsel for the Respondents to the ratio decidendi in the case of Independent Electoral Boundaries Commission & Others versus Stephen Mutinda Mule (2014)eKLR, where the court of appeal stated and held thus;

> " ....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

70. From the foregoing succinct position, I must decline the invitation by the Ex-parte Applicant to grant the orders which were never sought for in the body of the pleadings filed before the Honourable court. For good measure, courts of law cannot grant any relief under the guise of AOB.

Final Disposition

71. Having calibrated upon the salient and pertinent issues, whose details were enumerated herein before, it must have become crystal clear that there is no outstanding perspective in this matter to warrant further proceedings, either in the manner sought by the Ex-parte Applicant or otherwise.

72. Furthermore, even though the Respondents purported to file a Replying affidavit sworn on the 4th September 2020; same is tantamount to locking the stable long after the horse has bolted. Clearly, one cannot be filing a Replying affidavit long after participating in the determinative orders of the court issued on the 19th July 2016.

73. In a nutshell, the order that commends itself in respect of the instant proceedings is one that commands that the entire file be terminated and closed. Consequently, the entire Judicial Review file herein be and is hereby marked as closed with no orders as to costs.

74. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Ms. Waitere for the Ex-parte Applicant.

Mr. Gituma h/b for Mr. Morara for the Respondents.