Muguna v Karani & 3 others (Judicial Review Application E017 of 2022)
[2023] KEELC 20500 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20500 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW APPLICATION E017 OF 2022

CK NZILI, J

OCTOBER 4, 2023

BETWEEN

ERASTUS MUNG'ATIA MUGUNA ..... EXPARTE APPLICANT

AND

MBUI JOSEPH KARANI ..... 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING ..... 2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 3RD RESPONDENT

ATTORNEY GENERAL OF KENYA ..... 4TH RESPONDENT

JUDGMENT

1. Following leave granted by the court on January 25, 2023, the *exparte* applicant filed a notice of motion dated February 6, 2023 seeking for an order of *certiorari* to remove to this court to quash the decision made by the 1st & 2nd respondents on Minister's Appeal No 110 of 2020, involving land parcel No 4168 Ruri/Rwarera Adjudication Section, between the *exparte* applicant and the 1st respondent. The application was supported by a statement of facts and a verifying affidavit sworn by Erastus Mungatia Muguna dated December 8, 2022.

2. The *exparte* applicant averred that he has been the registered owner of parcel No 4/68 Ruiri Rwarera Adjudication section to which the 1st respondent filed objection No 2376 before the Land Adjudication Officer, claiming 3 acres of land allegedly sold to him *vide* a sale agreement dated October 17, 2005. The *exparte* applicant stated that the objection was dismissed since the 1st respondent had breached the sale agreement. Aggrieved by the Land Adjudication Officer's decision, the 1st respondent filed a Minister's appeal, which the 2nd respondent allowed and ordered that the suit land be subdivided into 3 acres in favor of the 1st respondent, while the *exparte* applicant would retain ½ an acre.

3. It was averred that the decision mentioned above was erroneous and a nullity for lack of jurisdiction and a perpetuation of an illegality. The exparte applicant averred that the sale agreement indicated that the total purchase price was Kshs 240,000/=, where the 1st respondent had only paid Kshs 70,000/= and defaulted in clearing the balance, and was notified of the intention to sell the land to a third party, which elicited objection No 2145. The *exparte* applicant attached a copy of the sale agreement, proceedings and decision in objection No 2145, proceedings and the decision in Objection No 2376, Minister's appeal proceedings and decision in Appeal No 110 of 2020, copy of a retirement benefits letter dated January 30, 2001 and consent to sue dated November 24, 2022, as annexures marked EMM "1" – "6", respectively.

4. The 1st respondent opposed the notice of motion through a replying affidavit sworn by Mbui Joseph Karani on March 27, 2023. He averred that he bought the land in 2005, paid a deposit of Kshs 140,000/=, took vacant possession, and later paid Kshs 70,000/= while awaiting the transfer to clear the Kshs 30,000/= balance. He attached the sale agreement as an annexure marked K1 "1". The 1st respondent averred that paragraphs 1 (b) & (4) (4) of the sale agreement indicated that a balance of Kshs 100,000/= would be paid after the transfer, but the applicant refused to sign the transfer form, allegedly claiming that his land was 3 ½ acres.

5. Further, the 1st respondent acknowledged receiving the demand letter in 2012, barring him from entering into the land, followed by a forceful eviction, with the *exparte* applicant misusing his office as the then area chief.

6. The 1st respondent averred that he filed an objection with the Land Adjudication Officer, only to be warned by the Arbitration Committee and the area chief at Tatua not to step into the land. It was averred that the decision was delayed until 2017, only to be told that it was delivered in his absence, yet the applicant had denied him access and at the same time remained with his money.

7. The 1st respondent averred that the appeal was filed and heard, and a site visit was conducted in the presence of the parties and a third party with whom the applicant had allegedly resold the land to. The 1st respondent termed the hearing and determination of the appeal by the 2nd respondent as procedural, final, and regular. He described the notice of motion as bad in law, vexatious, and an abuse of the court process.

8. The 2nd – 3rd respondents opposed the notice of motion through a replying affidavit sworn by Josephine Njenga on May 30, 2023. It was stated that the Minister, following an appeal filed under sections 26 & 29 (1) of the *Land Adjudication Act*, had the authority by notice in the gazette to delegate his powers, duties, and functions to hear an appeal to any public officer.

9. Josephine Njenga averred that an appeal No 110 of 2020 was filed by the 1st respondent against the applicant. Under section 7 (2) (b) of the *Fair Administrative Actions Act* 2015, the court could review an administrative action or decision if a mandatory and material procedure or condition prescribed by the empowering provision was not complied with. Further, the 2nd and 3rd respondents averred that under section 29 (1) of the *Land Adjudication Act* (cap 284), the Minister could determine the appeal and make such orders thereon as he thought just and was final. Additionally, the 2nd – 3rd respondents averred that the exparte applicant had failed to demonstrate how the decision in issue was taken with an ulterior motive or purpose calculated to prejudice his legal rights as required by section 7 (2) (e) of the *Fair Administrative Action Act*.

10. Without leave of court, the 1st respondent filed a supplementary affidavit sworn on April 14, 2023 by Mbui Joseph Karani stating that the decision he had appealed against before the Minister was to be delivered on notice, which never happened. He attached a copy of the receipt number 8461616 and

a letter marked as annexure KM 1 (a) and (b). The 1st respondent averred that on July 17, 2018, he requested for the proceedings and paid for the same, which were supplied to him on July 19, 2018. He attached the receipt and the proceedings, receipt, and forms of the appeal to the Minister as annexures marked KM 2(a) & (b) and 3 (a) & (b) respectively. The 1st respondent also averred that he filed the appeal precisely 23 days after the judgment, whose hearing and determination took time. He attached an annexure marked KM 4 (a) & (b).

11. With leave of court, the exparte applicant filed a supplementary affidavit sworn by Erastus Mungatia Muguna on June 8, 2023 regarding the additional testimony by the 1st respondent alluded to above. He termed the alleged receipts for payments made by the 1st respondent on July 17, 2018 and August 7, 2018, annexed as KM "2 (a)" & KM "3 (a)", as irregular, bearing different signatures, lacking receipt stamps, and not authenticated by the issuing office.

12. Further, the applicant averred that it was curious that an appeal was filed in 2018 but registered in 2020. He termed the move as an attempt to fill the gaps in the 1st Respondent case, especially after written submissions had been filed on May 11, 2023 and May 18, 2023.

13. With leave of court, parties opted to hear and determine the notice of motion through written submissions based on the respective affidavit evidence on record. The exparte applicant relied on written submissions dated May 17, 2023 in which he isolated three issues for the court's determination.

14. On whether the 2nd respondent acted without jurisdiction, the *exparte* applicant submitted that the decision appealed against was made on July 17, 2018 by the District Land Adjudication and Settlement Officer. However, the appeal which was heard by the Minister was filed in 2020, approximately 1 ½ years. Therefore, the *exparte* applicant submitted the appeal was made out of time and heard by the Minister acting without jurisdiction per the timelines in section 29 of the *Land Adjudication Act*.

15. The exparte applicant submitted that the minister had no powers to hear appeals out of an A/R objection, but he could only do so in appeals lodged on time or with leave, if time-barred. Therefore, to hear and determine a time-barred appeal, the 2nd respondent acted illegally and unprocedurally, and the decision was tainted with procedural impropriety.

16. On whether the 2nd respondent acted *ultra vires* his powers, the exparte applicant submitted that the appeal against A/R Objection No 2376 was out of an appeal registered as case No 110 of 2020, meaning it was filed in 2020. Relying on *Zacharia Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 others* (2013) eKLR citing with approval *Pastoli v Kabale District Local Government Council and others* (2008) 2 E. A 200, the exparte applicant submitted that the decision before the court was tainted with illegality since the 2nd respondent acted without jurisdiction.

17. On whether the grounds for granting judicial review had been met, the exparte applicant submitted that he had demonstrated that the 2nd respondent acted without jurisdiction for the appeal was time-barred and should not have been entertained; hence, the decision was *ultra vires*.

18. By written submissions filed on May 11, 2023, the 1st respondent isolated two issues for the court's determination. On the first issue as to whether the 2nd respondent exercised its statutory duties as per the law, the 1st respondent submitted that in a judicial review, the court would not be concerned about the merits of the decision as alleged of whether there was a sale agreement but with the process through which the decision was made. Reliance was placed on *Land Adjudication and Settlement Officer Maara Sub-County & 3 others exparte M' Munyiri Ragwa; Njeru Kirika (IP)* (2021) eKLR which cited with approval *Republic v KNEC exparte Gathenji & others* C.A No 266 of 1996 and *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* (2002) eKLR. The 1st respondent submitted that the

2nd respondent conducted the appeal procedurally, including attending a scene visit where all parties were afforded a fair hearing.

19. On whether the judicial review orders were available to the applicant, the 1st respondent submitted that the allegations leveled against the 2nd respondent went to the merits of the decision instead of the process followed in making the decision; hence, the remedies were unavailable. Reliance was placed on *Republic v Director Immigration Services and 2 others Exparte Olamilekan Gbenga Fasuyi & 2 others* (2018) eKLR, *Land Adjudication & Settlement Office Maua* (supra) which cited with approval *Commissioner of Lands v Kunste Hotel Ltd* (1997) eKLR. Therefore, the 1st respondent submitted that the applicant had failed to demonstrate with sufficient clarity the nature of erroneous information that the Minister relied on or substantiated the allegations in the notice of motion. He termed the application as standing on quicksand for the decision has not been shown as flawed to be subject to scrutiny for lack of fairness, objectivity, or procedural propriety.

20. In further submissions filed on May 26, 2023, the 1st respondent added another issue for the court's determination: whether his appeal had been filed on time as per section 29 of the *Land Adjudication Act*. On this issue, the 1st respondent submitted that the supplementary affidavit dated April 14, 2023 attached annexure marked KM 3 (a) & (b), both dated August 7, 2018, received by one Korir Eric K, filed and received precisely 23 days after the judgment was read. He termed the appeal as filed in compliance with the law, and after that, he had no discretion whatsoever on when the 2nd respondent would hear it under section 29 (1) (b) of the *Land Adjudication Act*.

21. The 2nd – 4th respondents filed written submissions dated May 30, 2023 and isolated three issues for the court's determination.

22. On whether the 2nd – 4th respondents exercised their statutory duties as per section 29 of the *Land Adjudication Act*, it was submitted that the genesis of the decision was appeal case No 110 of 2020, which the 2nd respondent heard as per the statutory duty bestowed on it under section 29 of the said act, as read together with section 4 (1) of the *Fair Administrative Action Act*. To this end, the 2nd – 4th respondents submitted that the 2nd respondent heard both the applicant and the 1st respondent by giving them the same opportunity to present their cases, giving notice of the decision, and eventually delivering it in their presence.

23. On whether the reliefs of judicial review were available to the applicant, the 2nd – 4th respondents submitted that under section 7 (1) of the *Fair Administrative Actions Act* as read together with the holding in *Zacharia Wagunza* (supra), three broad grounds are outlined on when the court could intervene. Reliance was also placed on *Pastoli* (supra) and *Republic v Director of Immigration* (supra). Therefore, the 2nd -4th respondents, relying on the cited caselaw, submitted that judicial review was not concerned with private rights or the merits of the decision being challenged but the decision-making process so that parties may be given fair treatment by the authority to which they are subjected.

24. Regarding costs, the 2nd – 4th respondents submitted that there was no demonstration that the 2nd – 4th respondents acted *ultra vires* during the appeal hearing. On the contrary, they acted reasonably, objectively, and procedurally since the *Land Adjudication Act* did not prescribe a formula or style on how to conduct an appeal but instead gives the 2nd respondents the mandate to listen to the appeal and make a final decision. On this aspect, the 2nd – 4th respondents submitted that the notice of motion raised various issues that needed evidence to be adduced and parties heard on those issues, which would then force the court to go to the merits of the case as opposed to the process that the 2nd respondent followed. The court was urged to find that the process followed by the 2nd respondent was not flawed enough to warrant the issuance of orders of judicial review by way of *certiorari*.

25. The court has carefully reviewed the pleadings by the respective parties, evidence tendered by way of affidavits and annexures, the written submissions, and the law cited. It is trite law that parties are bound by their pleadings. A court of law can only determine issues flowing from the pleadings unless a case has been raised and left for the court to decide by the parties.

26. The issues calling for this court's determination are:-

    i. Whether the 2nd respondent had a valid appeal against objection No 2376, dismissed by the Land Adjudication Officer on July 17, 2017.

    ii. If in hearing and determining the appeal, the 2nd followed the statutory and constitutional parameters on fair administrative action.

    iii. If statutory and constitutional directions were breached on fair administrative action.

    iv. Whether the *exparte* applicant is entitled to the reliefs sought.

    v. What is the order as to costs?

27. The notice of motion dated February 6, 2023, the statement of facts, and the verifying affidavit dated December 8, 2022, were premised on articles 23 (3) (f), 40, 48, and 50 of the *Constitution* as read together with sections 8 & 9 of the *Law Reform Act*, the *Land Adjudication Act* and the Fair Administrative Actions Act 2015. The *exparte* applicant pleaded that the 2nd respondent heard the appeal where the 2nd respondent claimed part of his land under a sale agreement dated October 17, 2005, which he termed as a nullity for it could not be enforced under the *Land Adjudication Act*, was unlawful and perpetuation of illegality.

28. In verifying the facts to the statement of facts, the *exparte* applicant, in the affidavit sworn on December 8, 2022, attached the sale agreement of EMM "1" and acknowledgment of Kshs 70,000/= dated February 1, 2006. He also attached an Objection No 2145 before the District Land Adjudication and Settlement Officer, which transferred the land to Ntinyari Doris Kimathi as EMM "2,". The objection was allowed on July 17, 2018, leading to the Minister's appeal. He averred that the 1st respondent had filed his Objection No 2316, seeking for the land out of a sale agreement.

29. The *exparte* applicant, in paragraph 9 of the verifying affidavit, averred that the Minister acted without jurisdiction since he lacks powers to enforce sale contracts under the *Land Adjudication Act*. Therefore, the *exparte* applicant urged the court to find that the 2nd respondent should not have entertained the objection or handled it the same way he did; otherwise, an injustice was visited upon him.

30. Josephine Njenga, on behalf of the 2nd – 4th respondents, did not specifically plead to the contents of paragraphs 7, 10 (a) (b), and (c) of the statement of facts and paragraphs 3, 4, 5, 6, 7, 8, 9 & 11 of the verifying affidavit, which went to the jurisdiction in a Minister hearing and determining a dismissed A/R objection solely based on enforcement of a sale agreement.

31. In his response to the notice of motion, the 1st respondent relied on an affidavit sworn on March 27, 2023, where he attached the sale agreement as an annexure K "1". He admitted purchasing the land in 2005, taking vacant possession after paying a deposit. Lastly, he alleged a breach of the terms thereof, on balance, the signing of transfer forms, forceful eviction, hearing of the A/R objection by the committee at Tatua, delay in rendering the decision, and eventually filing the Minister's Appeal.

32. In a supplementary affidavit dated April 14, 2023, the 1st respondent complained against the 3rd respondent regarding how the A/R objection was heard and the decision delivered in his absence and

without notice. He attached annexures marked KM 2 (a) & (b) and KM "3 (a) & (b)", the Minister's memorandum of appeal, and the receipt said to have been filed on time.

33. Ground numbers (1) (2), (3), (4), & (5) of the Minister's appeal dated August 7, 2018 revolved around the enforcement and or breach of the sale agreement, including the resale of the land to Ntinyari Doris on June 15, 2016. In a supplementary affidavit dated June 8, 2023, the exparte applicant insisted on the late filing, admission, and hearing of the appeal by the 2nd respondent, which was time-barred.

34. The 2nd – 4th respondents failed to plead to the issues raised by the 1st respondent and the *exparte* applicant on whether the appeal, was filed on time or not and if not so, avail before the court the memorandum of appeal, certificate of payment of appeal tracing fees, certified copies of committee arbitration board, and objection proceedings tracing from the demarcation map of the boundaries of the parcel under appeal, copies of payment receipts made and any other documents relevant to the appeal, which the Minister had received from the 1st respondent, including the date of receipt of the appeal. It was not enough for the 2nd – 4th respondents to allege that there was substantial compliance with the *Land Adjudication Act* in processing the appeal and hearing it under sections 4, 7 (b), (1), and (2) of the *Fair Administrative Actions Act.*

35. Time without number, courts have held that written submissions do not and cannot replace pleadings and or amount to evidence. See *Daniel Toroitich Arap Moi v Stephen Murithi* (2014) eKLR. Evidence in law has to be tendered before a court of law through a known process. It cannot be sneaked into the court file through written submissions. It must be cogent, authentic, and reliable. It must meet the test set out under sections 107-113 of the *Evidence Act*.

36. Before this court, the main issue raised was whether the 2nd respondent had jurisdiction to hear the appeal, whose core issues were on enforcement of a sale agreement alleged to have been breached by the seller, the *exparte* applicant. The exparte applicant, on the other hand, had raised issues of fundamental breach of the sale agreement making it unenforceable.

37. Article 47 of the *Constitution* grants every person the right to an administrative action that is expeditious, efficient, lawful, reasonable, procedurally fair and with written reasons if the administrative action is likely to adversely affect the person.

38. The processing of the appeal by the 2nd respondent and its decision must pass the constitutional parameters mentioned above for it to stand. The court in *Pastoli v Kabale* (supra), held that the process must not be tainted with illegality, irrationality, and procedural impropriety for the eventual decision to stand out. In exparte, *John Mbiri Njagi* (supra), Yano J held that the appeal must be filed on time from the decision date. The court cited with approval Republic v Kenya National Examinations Council and *Zacharia Wagunza v Office of the Registrar* (supra), that it must be demonstrated that the public officer had acted unprocedurally and that the impugned decision was illegal. Further, the court cited with approval *Pastoli v Kabale* (supra), that illegality was established when the decision-making authority committed acts of error of law in taking or making the decisions or acted without jurisdiction or *ultra vires* or contrary to the provisions of law or its principles as some of the instances of illegality.

39. *Yano J* (supra) observed that the purpose of judicial review was to check public bodies or persons holding public authority by exercising functions by ensuring that they do not exceed their jurisdiction and carry out the said duties within the confines of the law. In *Chimbevo v Chief Land Registrar & others* v (2022) KEELC 4773 (KLR), M.A Odeng J echoed the same sentiments as Yano J that the Minister could not hear an appeal filed outside time under section 29 of *Land Adjudication Act* and that such decision was null and void *ab initio*. See also *Republic v Cabinet Secretary for Land, Housing and Urban Development & 2 others; Francis Nzeli Maundu (interested party), exparte*

Onesmus Kimanzi Musili & others (2019) eKLR, where Angote J held that an appeal to the Minister filed after two years was contrary to sections 29 (1) of the said Act for such timelines were pertinent in preparation of the register in an adjudication area.

40. In this matter, the 2nd – 4th respondents failed to counter the allegations that the appeal was filed outside the timelines set under the law. The date the appeal was filed and received was not indicated by the 2nd and 3rd respondents, and more so, why it was given a case number for the year 2020 instead of 2018 if it was allegedly filed on August 1, 2018. A stamp from the receiving office did not verify the same. It was the statutory duty on the part of the 2nd – 4th respondents before this court to substantiate that all the procedural requirements were followed by the 1st respondent in invoking its jurisdiction and that there was no procedural impropriety.

41. The next main contention of the *exparte* applicant is whether the 2nd – 4th respondents had powers to entertain an appeal camouflaged as such, yet it was an enforcement of a sale agreement. In response to the notice of motion, the 2nd – 4th respondents averred that section 29 (1) of *Land Adjudication Act* was complied with and the decision made was just in the absence of any demonstration by the exparte applicant that it was taken with an ulterior motive or purpose calculated to prejudice his legal rights under section 7 (2) (e) of *Fair Administrative Actions Act*.

42. In written submissions dated May 30, 2023, the 2nd – 4th respondents submitted that the proceedings and decision were made within the confines of section 4 (1) of the *Fair Administrative Actions Act* and that the parties were accorded a similar opportunity to be heard and to present witnesses. Further, the 2nd – 4th respondents submitted that the decision should be allowed to subsist since there was compliance with all mandatory and material procedures or conditions prescribed by the empowering provisions as per section 7 (1) & (2) of the *Fair Administrative Actions Act*. The 2nd – 3rd respondents submitted that *Land Adjudication Act* does not prescribe the formula or style of conducting the appeal but gave the minister the mandate to listen to the appeal and make a final decision.

43. In *Republic v Special District Commissioner and another* (2006) eKLR, the court observed that section 29 (1) (a) of the said Act had specified the form and the procedure that an aggrieved party had to follow in filing the appeal against the land adjudication officer's decision. The court observed that the Minister has to be forwarded the lower tribunals record, including the written grounds of appeal, to assist him in determining the appeal. The court said that the Minister had to examine all the grounds of the appeal alongside with the land adjudication officer's proceedings and the award, which he could not ignore, in line with the cardinal rule of fairness that, just like in a court, an appellant had the right to put his case before it. The court held that the legislature intended that the aggrieved party would file the grounds of appeal and that the tendency to consider fresh evidence was not provided for or disallowed by section 29 (1) of the said Act. Further, the court stated that in hearing the appeal, the Minister was not bound to follow the *Civil Procedure Act* or the strict rules of evidence as in ordinary courts. The court cited with approval Makenge v Ngochi C. A No 25 of 1978 and *Mahaja v Khutwalo* (1983) KLR 553, that there was an error on the face of the District Commissioner's record in not recording the evidence systematically and exhaustively the way he had started recording it, especially on the site visit proceedings and the observations therein.

44. The court said that even if the District Commissioner was an administrator, in exercising quasi-judicial functions; the principles of justice required him to discharge those functions fairly and justly, as held in *Republic v Director General of E. A Railways Corporation exparte Kaggwa* (1977) KLR 194, that the court, as the custodian of the parties' rights, must ensure justice is done.

45. In the case of Republic v Mwingi District Commissioner and 2 others exparte Mutindi Mwangangi (2014) eKLR, the court held that though there was no legal requirement for the Minister only to review

the proceedings and decision made by the land adjudication officer or arbitration board or committee, nothing barred the minster under the Act to hear fresh evidence. Similarly, in Matwanga Kilonzo v D.C Kitui & another (2021) eKLR, the court observed that the Minister was not obligated to visit the land. Additionally, in Republic v Minister for Land & Housing Exparte Boniface Njeru Ngari & another (2013) eKRL, the court said the Minister had the discretion on who to believe and not to believe based on the evidence before him and the demeanor of the witnesses.

46. As indicated already, the replying affidavit by Josephine Njenga did not reflect to the land adjudication officer records, the grounds of appeal, and the proceedings before the decision was made on the date of the decision. There is no indication if the exparte applicant cross-examined the appellant and his witnesses. The proceedings and the observations during the scene visit on September 30, 2022 were missing.

47. In Nicholas Njeru v Attorney General & others (2013) eKLR, the Court of Appeal observed that the appellants would only challenge the minister's decision if it was more than jurisdiction or did not comply with the rule of law in the discharge of public duties or acts by public bodies or persons.

48. The court observed that it was a cardinal principle of law that a court was supposed to hear parties before making orders that would affect them.

49. In the grounds of appeal, evidence tendered before the Minister, and at the site visit, the issue was on breach of a sale agreement, non-compliance with its terms, the outstanding balance of the consideration, and the cancellation of the sale agreement, leading to the *exparte* applicant selling and transferring the land to a third party, through A/R Objection No 2145 of June 15, 2016. No appeal had been filed against the A/R Objection No 2145, giving the subject land to Ntinyari Doris Kimathi, who also featured in the Minister's appeal. The subject land had passed to the said third party at the time of the appeal. The Minister's decision was made oblivious of the rights of the third party and the *exparte* applicant under the law.

50. In hearing and determining the appeal, the Minister had to consider all the grounds of appeal and reach a just finding. There are good reasons why section 29 (1) of the *Land Adjudication Act* requires an aggrieved party to file grounds of appeal. They are the bedrock of the appeal. The Minister could not ignore the grounds of the 1st respondent and or fail to consider and analyze them. There cannot be fairness if the decision-making authority fails to exercise discretion in evaluating the strength or lack of it of every ground filed against the land adjudication officer's award.

51. The fact that the law relies on the sense of justice of the minister does not give him a free hand to decide the appeal in any manner he so wishes. There must be a mark of expedition, efficiency, lawfulness, reasonable never and procedural fairness as article 47 of the *Constitution* dictates.

52. Judicial Service Commission v Mbalu Mutava & another (2015) eKLR, the court observed that article 47 of the *Constitution* was a constitutional foundation for the control of the powers of state organs and other administrative bodies as they follow article 10 of the *Constitution* on the rule of law, human dignity, social justice, good governance, transparency and accountability, which parameters are restated in section 4 of *Fair Administrative Action Act*. The decision by the 2nd respondent was silent on the rights and duties of the 1st respondent and the exparte applicant regarding the *Law of Contract Act*.

53. The Minister was duty-bound to adhere to the Land Adjudication Regulations, 1970. The decision touched on the ascertainment and the recording of rights and interests to land governed by the *Land Adjudication Act*. The exparte applicant has invoked article 40 of the *Constitution*. In Ransa Co Ltd v Manca Francesco & 2 others (2015) eKLR, the court observed that a court sitting on judicial review exercises sui generis jurisdiction challenging the process and other technical issues like excess

in the jurisdiction whose remedies are restrictive. Further, in Republic v Nairobi City council exparte Gurcharn Singh Sihra & 4 others (2014) eKLR, the court cited with approval Republic v Kenya Revenue Authority exparte Yaya Towers Ltd (2008) eKLR, that in judicial review, the court seeks to ensure a party was accorded a fair hearing and that the judgment could not substitute his opinion with that of the body mandated to decide the matter or attempt to adopt the forbidden appellate approach save to establish if the decision or action was unauthorized or invalid, as it exercises its supervisory role to hold public bodies accountable. Further, in Enton Njuki Makango v Republic & 2 others (2014) eKLR, the court observed that judicial review relief of certiorari was neither created nor established to create or confer title to land. Additionally, in *Nicholas Njeru v AG* (supra), the court observed that the supervisory role of the court was to check the excess of jurisdiction and non-compliance with the rule of law by inferior bodies discharging public acts.

54. An administrative action, as defined under the *Fair Administrative Action Act* 2015, includes the power, functions, and or duties of authorities or quasi-judicial tribunals; it also contains acts, omissions, or decisions of a body or authority affecting the legal right or interest of any person whom such action relates.

55. In exercising the review of administrative actions, the court, under section 7 (2) of the *Fair Administrative Actions Act*, looks at whether the administrator had powers, acted within the powers, was biased, denied a party hearing, failed to comply with the material procedure or conditions precedent, if he was procedurally fair, if he considered material facts, if he acted with ulterior motives or under the influence or prejudiced the aggrieved party's rights; if he acted in bad faith or irrational or abused discretion or if there was unreasonable delay or failure to perform or failed to meet legitimate expectations or was unfair in decision making or made the decisions in abuse of power.

56. In granting the reliefs, section 11 of the *Fair Administration Action Act* provides that a court may grant declaratory order, restraining order, order the administrator to give written reasons, issue prohibitory orders, set aside decisions, compel the performance of public duty, remit the matter for re-consideration, grant temporary reliefs or interdicts; award costs or declare the rights of the parties including directing parties to do or refrain from doing something which is in the interest of justice.

57. The bottom line of the Minister's appeal was the sale agreement, where the parties had defined their respective positions at signing the sale agreement, its execution, the consequences of breach, and the aftermath of the non-completion. It is trite law that parties have the freedom to contract, and courts of law do not rewrite contracts unless on account of public policy, illegality, fraud, unconscionable or oppressive nature. See National Bank of Kenya Ltd v Pipe Plastic Samkolit (K), and Muranga County Public Service Board v Grace Makori & 178 others (2015) eKLR.

58. The effect of the decision by the Minister was tantamount to rewriting the party's sale agreement and granting the 1st respondent more than what he had bargained for. The Minister acted beyond the governing statute law in hearing appeals and instead took the duty of courts of law in enforcing a sale agreement instead of ascertaining interest and rights to land, as envisaged under the *Land Adjudication Act*.

59. Consequently, my finding is that the decision was ultra vires, illegal, irrational, and unreasonable. The same is a result of this brought before this court and quashed. The appeal shall be heard afresh by another person except the 2nd respondent with the involvement of Ntonjira Doris, within six months from the date hereof.

60. Costs to the exparte applicant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 4TH DAY OF OCTOBER 2023

In presence of

C.A Kananu

Miss Otieno for exparte applicant

Miss Maina holding brief for Mbaikyatta for 2nd, 3rd and 4th respondents

HON. CK NZILI

ELC JUDGE