



**M'mucheke v Land Adjudication Officer Igembe District & 3 others; Jeremiah (Interested Party)
(Judicial Review E006 of 2022) [2023] KEELC 21395 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW E006 OF 2022
CK YANO, J
NOVEMBER 9, 2023**

BETWEEN

FRANCIS M'MUKIRI M'MUCHEKE APPLICANT

AND

**THE LAND ADJUDICATION OFFICER IGEMBE DISTRICT 1ST
RESPONDENT**

MINISTER FOR LANDS AND SETTLEMENT 2ND RESPONDENT

THE DIRECTOR LAND ADJUDICATION 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

THADEUAS MUTURA JEREMIAH INTERESTED PARTY

JUDGMENT

1. The ex-parte applicant commenced these Judicial Review Proceedings vide a notice of motion dated 20th July, 2022 brought under Order 53 Rule 3 of the Civil Procedure Rules seeking for orders that-;
 - 1) That this Honourable court be pleased to issue orders of certiorari quashing the decisions of the respondents herein, the Land Adjudication Officer Igembe Districts in the Arbitration Board Objection No. 560 dated 5th December, 2014 and decision of the minister for lands and settlement in appeals to the minister case no. 483 of 2015 dated 27th January, 2022.
 - 2) That the costs of this application be provided for.
2. The Motion is supported by the statement of facts and verifying affidavit of Francis M'mukiri M'mucheke, the ex-parte applicant sworn on 30th June 2022 together with the annexures thereto.



3. The application is opposed by the interested party through a replying affidavit dated 21st November, 2022. The respondents did not file any response though they were duly served with the application.

The Applicant's Case

4. The ex-parte applicant avers that he was the owner of land parcel No. 1322 Lower Athiru Gaiti "A" Adjudication section formerly Land Parcel No. 879 Lower (Athiru Gaiti) and that he has been in occupation of the said land since 1974. That the interested party filed committee case No. 434 of 1990 that never conclusively decided who the owner of the suit land was and directed that the matter be determined by the Njuri Ncheke. The ex-parte applicant contended that the interested party frustrated any effort to have the matter heard by the Njuri Ncheke, but managed to have the said land transferred to him.
5. The applicant avers that the interested party filed objection No. 560 at the Land Adjudication and Settlement Office and the 1st respondent herein conducted the objection proceedings without there being the requisite members of the arbitration board as required under the *Land Consolidation Act* and the *Land Adjudication Act*. That the applicant appealed to the minister, but the minister ignored/ failed to recognize the defect/failure on the part of the Land Adjudication Officer and instead upheld the decision of the land Adjudication Officer.
6. The applicant avers that the Athiru Njuri Ncheke called for a meeting on 29th March 2014 but the interested party failed to attend. That a second meeting was called by the said Njuri Ncheke on 12th April 2014 in which the interested party attended and the matter was heard and a decision made that the said land belongs to the applicant. It is the applicant's contention that the 1st and 2nd respondents ignored the report by the Athiru Njuri Ncheke and used a decision that was allegedly from the Maua Njuri Ncheke. The applicant states that the decision in AR objection 560 was founded solely by the report of the Maua Njuri Ncheke who do not come from their area. That the minister did not consider these grounds which were raised during the appeals to the minister.
7. It is the ex-parte applicant's contention that the minister took into account extraneous factors that were not relevant in resolving the dispute and gave an example of the Tharaka-Igembe conflicts that happened in 1998. That the minister alleged that the interested party left the suit land during the Igembe Tharaka clashes and that the ex-parte applicant took advantage whereas it was unchallenged that the ex-parte applicant had lived in the suit land since 1974. That additionally, the minister's decision was founded on many grounds that the interested party had not raised. The ex-parte applicant has annexed copies of an adjudication booklet for land Parcel No. 879 Lower Athiru Gaiti, a letter dated 31st January, 2013 by the District Land Adjudication Officer, Letter dated 30th November, 2012, the Arbitration Board Objection proceedings dated 9th December, 2014, the proceedings for minister's land case NO. 483 of 2015, the Njuri Ncheke proceedings dated 29th March 2014, Njuri Ncheke Council of Elder's Judgment dated 12th April 2014 and a copy of the applicant's National Identity Card.
8. In their submissions dated 31st May 2023 M/s Ngunjiri Michael & Co. Advocates for the ex-parte applicant gave a detailed background of the matter and identified the following issues for determination-;
 - i. Whether the court can re-look at the decision of LAO officer dated 9th December, 2014 and the decision of the minister on appeal dated 27th January, 2022.
 - ii. Whether the DLASO objection decision is illegal, irregular and procedurally flawed.



- iii. Whether the DLASO decision ought to be quashed for being unreasonable, biased and or irrational;
 - iv. If (iii) above is in the affirmative, whether the decision on appeal to the minister dated 27th January, 2022 can stand and
 - v. Whether the applicant should cater for the costs of this application.
9. The applicant's counsel submitted that the court has the necessary judicial review powers to re-look at the decision by the LAO and Minister for being decision by inferior bodies exercising quasi-judicial powers and that the power to re-look at not only the process but also the merits of the said decisions has been granted to court by statute through the passing of the Fair Administrative Actions Act, 2015 and therefore is anchored in law.
 10. It is applicant's submission that the power of Judicial review has been expanded to include a re-look at the "merits" of a decision made by a body exercising quasi-judicial powers and made reference of Section 7(2) of the said Act which provides instances when a court may review the decision of a quasi-judicial body. The applicant's counsel relied on the case of *Matwanga Kilonzo v District Commissioner, Kitui & another* [2021] eKLR.
 11. It is therefore their submissions that the court has the mandate to not only look into the procedure leading up to the two decisions but also look into the merits of the two decisions in right of the constitutionally guaranteed Right of Fair Administrative Action under Article 47.
 12. The applicant's counsel urged the court to use both lenses i.e the merit review and procedural issues in reaching its decisions given that the applicant is at the verge of losing the suit land which he has occupied for over 40 years.
 13. On the issue as to whether the DLASO objection decision is illegal, irregular and procedurally flawed, the advocate for the applicant submitted that the [Land Adjudication Act](#) and the [Land Consolidation Act](#) are relevant in this case. That it is not in dispute that the suit land was within an adjudication area declared as such and that parties are in agreement that sometime in the year 1991, the first dispute between the parties was partially heard by a Land Committee as provided for under Sections 8, 20 and 21 of the [land Adjudication Act](#), but no decision was reached, but the committee referred the matter for "Kithiri oathing" before delivering the final decision. That the matter went mute from 1991 to 2012 and the DLASO held that the proceedings before the 1991 were a nullity and could not be implemented.
 14. The applicant contended that the matter only resurrected at the point of preparation of the Adjudication register by the DLASO wherein the interested party was directed to file an objection by reason of which the hearing of the objection as articulated under Cap 284 was supposed to be followed culminating in an objection decision. The applicant argued that the decision of the DLASO allegedly made on 9th December, 2014 was illegal, irregular and procedurally flawed for the reason that the said decision was made by the DLASO alone without the involvement of the land committee contrary to the requirements of the [Land Adjudication Act](#). The advocate for the applicant cited Section 20 of the said Act which provides for the functions of the committee which include adjudication of any dispute in line with recognized customary laws and advising the adjudication officers on matters customary laws. It is the applicant's advocates contention that the Njuri Ncheke are not committee members appointed as such by the DLASO. It is therefore their submission that the involvement of the land committee is central to the resolution of a land dispute under Cap 284 and failure to do so makes a decision illegal and irregular.



15. Learned counsel for the ex-parte applicant relied on the case of Tigania East District Land Adjudication and Settlement Officer & another Joseph Mathita Ikirima ex-parte Solomon Mworio Samuel [2020]eKLR and submitted that in this case, the decision that the ex-parte applicant appealed to the minister was flawed for lack of a committee and ought not to have stood before the minister.
16. Regarding the issue as to whether the DLASO and minister decisions ought to be quashed for being unreasonable, biased and or irrational, counsel for the applicant submitted that it was true that the traditional review powers was only concerned with the process leading up to the decision and not the merits of the decision. They however submitted that with the coming into force of the Fair Administrative Actions Act, 2015, courts have quashed administrative decisions for being unreasonable, biased and irrational. Further, that decisions which are unfair and or not proportionate to interests and or rights of interested party are also subject to review. It was pointed out that the decision in this case was majorly informed by the Njuri Ncheke meetings allegedly after an oathing ceremony requested by the applicant, and it was submitted that the decision by the LAO dated 9th December, 2014 was irrational for various reasons stated.
17. The applicant's counsel cited Section 7 (2) (1) of the Fair Administrative Actions Act and submitted that the information before the Land Adjudication Officer and the minister was that the interested party had refused to participate in the Kithiri oathing to establish the truth of the case, that the applicant had proved that he had been in occupation of the parcel of land for over 40 years and had demonstrated that he had developments on the said land which he had acquired after being given by one Mulindo, the initial owner who was from the same clan as the interested parties and who were then elders of the Amunju clan. It is submitted that the DLASO failed to consider that Mulindo who was from same clan as the interested party could have been the owner of the land and decided to gift the applicant, and therefore the said decision is unfair and biased against the applicant who did not have another parcel of land unlike the interested party. Counsel for the applicant relied on the case of Bato Star Fishing Pty) Ltd v Minister of Environmental Affairs and others and submitted that the decision to deprive the applicant of land he currently occupies and has done so for 40 years is unreasonable and not proportionate to the rights and interests contrary to Section 7(2) (1) of the Fair Administrative Actions Act. That the interested party has not demonstrated any interests or rights howsoever on the suit land except the allegation that his brother, Nahashon never claimed the said land. It is therefore the applicant's submission that the decision by the LAO was unreasonable, unfair, disproportionate to the rights and interests of parties and therefore irrational.
18. It is also submitted by the advocate for the applicant that the minister appeal decision was made in considerations of irrelevant factors that were not submitted for consideration on appeal and therefore against the Fair Administrative Action Act and ought to be vitiated by this court. Counsel for the applicant gave a summary of the dispute and relied on Patel v Witbank Town council 1931 TPD 294, and Matwanga Kilonzo v District Commissioner, Kitui & another (supra)
19. It is the applicant's submission that he has proved his case and the application should be allowed with costs to the applicant.

Interested Parties Submissions.

20. In their submissions dated 12th July, 2023 M/s Mithega Kariuki Advocates for the interested party identified the issues which present themselves for determination in this matter are as follows-;
 - i. Whether or not the decision by the DLASO did not follow laid out procedure in accordance to the relevant laws.



- ii. Whether or not the appeal decision by the Minister did not follow laid out procedure in accordance to the relevant laws.
 - iii. Whether or not the decision by the DLASO was generally unfair, unreasonable, irrational, biased, improper and unsafe to uphold.
 - iv. Whether or not the decision by the Minister was generally unfair, unreasonable, irrational biased, improper and unsafe to uphold.
 - v. Costs of this suit.
21. On the first issue, it is the interested party's advocates submissions that the said decision was most aptly made and cited Section 26 of the [Land Adjudication Act](#). The interested party further submitted that it is not in dispute that objection No. 560 was an objection against the register. That this objection is by law a preserve of the adjudication Officer to hear at first instance and does not require the Adjudication Committee or Arbitration Board. Learned counsel for the interested party argued that the said decision was made by the DLASO after further consultation and inquiries as he thought fit which is what the law required of him and went an extra mile to note the proceedings of the enquires and consultations he made being the two sessions by the two Njuri Ncheke councils in order to enhance transparency but was not required to sit down with the Adjudication Committee or the Arbitration Board in order to make a lawful determination. It is also the interested party's submission that the many assertions by the applicant concerning the lack of signatures and names of committee members who heard the objection is a red herring intended to mislead the Honourable court and occasion a miscarriage of justice.
22. The interested party pointed out that it is not in dispute that the applicant filed an appeal to the minister in this matter after the determination of the Adjudication Officer and submitted that it is trite that such an appeal to the minister is not possible under the [Land Consolidation Act](#). That under the [Land Consolidation Act](#) the Adjudication Officer's decision is final but the said decision must be arrived at with the input of the committee or Arbitration Board and that the fact that the applicant himself appealed to the Minister and the Minister heard the appeal is sufficient evidence that the [Land Consolidation Act](#) was not applicable in this matter but rather the [Land Adjudication Act](#) was and therefore the decision by the DLASO should have conformed to the legal requirements set out under Section 26 of the [Land Adjudication Act](#).
23. In response to the applicant's argument that by virtue of Section 20 of the [Land Adjudication Act](#), the DLASO was bound to involve the committee in his decision and failure to do the same fatally injures his decision, counsel for the interested party submitted that the land adjudication committee under the [Land Adjudication Act](#) is only involved in the earlier stages of recording interests in land and demarcation where the recording officer (not the adjudication officer) is required to refer any dispute as to ownership which he cannot determine to the land adjudication committee. They cited section 19 (2) of the [Land Adjudication Act](#) and submitted that the position by the applicant that the DLASO decision is bad in law because it was made without the involvement of the committee is erroneous because under the [Land Adjudication Act](#), an objection to the register is heard by the DLASO and does not require the DLASO to involve the Land Adjudication Committee in resolving the same. The interested party submitted that the DLASO'S decision is however not final as compared to the DLASO's decision under the [Land Consolidation Act](#) which is final but the law requires that such a determination must be made with the involvement of the Land Committee or with the Arbitration Board as provided under Section 19 of the [Land Consolidation Act](#).
24. The interested party submitted that the proceedings are categorical that both the applicant and the interested party were heard in that they testified and were cross examined and that the assertions by the



- applicant that he was never heard are clearly false. That the law with regard to hearing of objections was religiously adhered to especially with regard to the swearing of witnesses and generally that the procedure should mimic civil suits and that is in compliance to Section 12 of the [Land Adjudication Act](#).
25. The interested party pointed out that it is also crucial to note that the said decision was made prior to the commencement date of the Fair Administrative Actions Act of 2015 which Act was assented to on the 27th of May 2015 but came into force on the 17th of June 2015. That the DLASO made the myriad of concerns raised by the applicant that are pegged under the provisions of the Fair Administrative Actions Act are not applicable with regard to the DLASO's decision as it is trite that the law does not operate retrospectively. It is therefore the submission of the advocates for the interested party that a decision made prior to the coming into force of the [Fair Administrative Action Act](#) cannot be subject to the requirements under the Fair Administrative Actions Act, and submitted that the DLASO'S decision in objection No. 560 dated 9th December, 2014 was made in religious adherence to the laid down procedure by the relevant and applicable laws.
26. Regarding the issue whether or not the appeal decision by the minister did not follow laid out procedure in accordance to the relevant laws, the advocates for the interested party cited Section 29 (1) of the [Land Adjudication Act](#) which provides as follows
- “ Any person who is aggrieved by the determination of an objection under Section 26 of this act may within sixty days after the date of the determination, appeal against the determination to the minister by
- (a) delivering to the minister an appeal in writing specifying the grounds of appeal;
- b) Sending a copy of the appeal to the Director of Lands Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
27. The interested party also cited Section 29 (4) of the said Act which allows the minister to delegate by notice in the gazette his power to hear appeals and his duties and functions under this section to any Public Officer by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the minister.
28. The interested party's advocate submitted that the said provisions are clear that one J.K Sawe who is the Deputy County commissioner Igembe south Sub County was qualified to hear the matter and pronounce himself of a determination. It is submitted that the minister can hear such an appeal as arises from a determination under Section 26 of the [Land Adjudication Act](#) and the proceedings before him should as much as possible mimic civil suits and that the parties and their witnesses were clearly heard, cross examined and documents produced in evidence. That the procedure adopted by the minister was in accordance to the minimum threshold necessary and therefore the Appeal decision by the minister followed laid down procedure.
29. As to whether or not the decision by DLASO was generally unfair, illegal, unreasonable, irrational, biased, improper and unsafe to uphold, counsel for the interested party submitted that the proceedings before the DLASO and the final decision thereof dated 9th December 2014 showed that the applicant was given a chance to be heard and he was cross examined by the interested party as well as the Land Adjudication Officer. That the interested party was also heard, was also cross examined by the applicant as well as the adjudication officer and that the details of the statement show that even though the



report the Njuri Ncheke made may have contributed to inform the Adjudication Officer's decision, it was not the only consideration that the Adjudication Officer made. That that decision was made in adherence to all the principles of natural justice such as affording the parties the right to be heard. That the fact that the Adjudication Officer allowed the applicant's request to refer the matter to the Njuri Ncheke for oathing is well within his powers because he has the power as noted above to pursue further consultation and inquiries as he thinks fit in order to determine the objection. That it is however not binding on him that the Njuri Ncheke's report should be the sole influence for the decision as he had freedom to consider other factors such as the fact that the applicant was not clear on how he came into possession of the property and gave contradictory statements, the fact that the interested party owned and sold a portion of land adjacent to the said suit land and no one has ever raised any issue and the fact that the bordering properties belong to the family of the interested party who have either sold them to the current owners or they are still in ownership thereof.

30. It is the interested party's contention that the fact that the Superior District Council of Njuri Ncheke elders based in Maua ruled in favour of the interested party was also apt in informing the decision for the reason that the said council is superior to the lower Athiru Divisional council and therefore its decision would be binding on the latter and that the said council would more likely be impartial and its decision would be independent of the influence of the applicant who is a member of the Divisional Lower Athiru GAiti Njuri Ncheke Council. It is the interested party's submission that the objection proceedings marked and produced by the applicant as FMM – 4 clearly show that when this matter went before the Divisional council of Njuri Ncheke elders of lower Athiru Gaiti, only three members of the said council were present and only three members ruled in favour of the applicant herein. That in the said letter, the chairman of that Divisional council also alleges that the applicant testified before them that he has been given that land by M'Alaibua, Metiri and Kawadu and that was in direct contrast to his previous averments before the Land Adjudication Officer that he acquired the said property from one Mulindo.
31. The advocates for the interested party relied in the case of *Republic v Public Procurement Administrative Review Board, & 2 others ex-parte Rongo University* [2018] eKLR which noted as follows-;

“The grant of the orders or certiorari, mandamus and prohibition is discretionary. The Court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought”
32. It is the interested party's advocates submission that there is really no basis as to justify the orders sought by the applicant and that the decision of the DLASO was well within his jurisdiction and was also not unfair, unreasonable, illegal, unfair, biased, improper or unsafe to uphold.
33. Learned counsel for the interested party submitted that it is manifestly apparent that the decision by the DLASO was not illegal and does not contravene or exceed its authority, it does not pursue an objective other than that for which it is authorized and it is authorized by Section 26 of the *Land Adjudication Act*. The interested party's advocates further submitted that the decision is not biased and relied on the High Court case of *Republic v Fazul Mahamed & 3 others Ex-parte Okiya Omtatah Okoiti* [2018] eKLR.
34. The interested party pointed out that the applicant made contradictory statements about who gave him the property and submitted that if at all the applicant had been on the suit land for forty years as alleged, it is still not proof of ownership because possession is different from ownership and that moreover the interested party testified that he was on the said property forcefully and illegally despite being well aware that the interested party's family owned the property.



35. The interested party submitted that the applicant has failed to demonstrate that the DLASO'S decision in Objection No. 560 dated 9th December, 2014 was unfair, illegal, unreasonable, irrational, biased, improper and unsafe to uphold.
36. Regarding the fourth issue, counsel for the interested party submitted that the proceedings before the minister show that he allowed the parties hereto to testify together with their witnesses. That the interested party produced relevant documents unlike the applicant.
37. It is the interested party's case that from the findings, it is clear that the LAO had reason to believe that the applicant herein had taken advantage of the generosity of the interested party's brother to forcefully detain the suit property and the tone of the verdict depicts a finding that the applicant was clearly committing a wrongful act. That the applicant contradicted himself concerning how he came on the property. The interested party submitted that the applicant was not truthful.
38. The interested party submitted on the tests of reasonableness, fairness, legality, proportionality and fairness as alluded to in the case of Republic v Fazul Mahamed & 3 others Ex-parte Okiya Omtatah Okoiti [2018] and submitted that if the same be employed in this instance given the material before the minister, it would be outrageous for the minister to rule otherwise.
39. The interested party pointed out that the annexure by the applicant marked FMM 1 in the matter was never presented before the Adjudication Officer nor was it presented before the minister during the appeal. That both decision makers simply had the applicant's word of mouth and/or his witnesses and the said annexure is also suspect by dint of another applicant's annexure marked FMM – 2, the letter dated 31st January, 2013 by the DLASO. The interested party argues that the said letter alleges that the land adjudication committee did not finalize the objection to the recording of interests in land by the interested party that had previously been heard in 1990s and therefore sought to have the objection treated as not finalized so that the registration of the applicant herein as recorded proprietor would stand. That if at all the committee stage hearing was never finalized, the interested party would not be in possession of the interested party's annexure marked TJM – 1 and the applicant's annexure marked FMM – 2 would also be unnecessary because the applicant would be in possession of a valid FMI – 1 from the date noted therein. It is therefore the interested party submission that the said annexures were manufactured by the applicant in order to mislead the court and defeat the course of justice.
40. It is the interested party's submission that the material before the minister as well as the testimonies of the parties and their witnesses had the effect of making it certain that the said decision maker would come to no other conclusion except for the determination he made and that this position is taken in view of the spirit of constitutionalism that frowns upon the denial of substantive justice on the alter of procedural technicality. It is the interested party's submission that this suit should fail.
41. The interested party submitted that costs follow the event and prayed for costs of the suit.
42. The interested party urged the court to find that the applicant has failed to meet the threshold for issue of the orders of certiorari and dismiss this suit with costs to the interested party.
43. The respondents did not file any submissions.

Analysis and Determination

44. I have considered the pleadings, the legal and statutory authorities and the written submissions filed. The issue for determination are-;



- i. Whether the court can re-look on the decision of LAO officer dated 9th December 2014 and the decision of the minister on appeal dated 27th January, 2022 on merits.
 - ii. Whether or not the decision by the DLASO did not follow laid out procedure in accordance to the relevant laws.
 - iii. Whether or not the appeal decision by the Minister did not follow laid out procedure in accordance to the relevant laws.
 - iv. Whether the applicant is entitled to the relief sought.
45. Before the promulgation of *the Constitution* 2010, judicial review was governed by the principles of common law largely borrowed from the United Kingdom. The Jurisdiction to entertain applications for judicial review remedies was vested in the High Court. The basis of juridical review in Kenya was derived from the *Law Reform Act* (Cap 26) Laws of Kenya and Order 53 of the Civil Procedure Rules, 2010 as better developed by case law on the area. Section 8 and 9 of the *Law Reform Act* provides the substantive basis while Order 53 provided the procedural basis. The remedies in judicial review are three namely, certiorari, prohibition and mandamus. The grounds upon which one could have an application for judicial review were under the heads of illegality, irrationality, procedural impropriety and proportionality.
46. The law in this regard was fairly settled by the High Court in *Keroche Industries Limited v Kenya Revenue Authority & 5 others*. Misc. Civ Application 743 of 2006; [2007] eKLR had set out what a party needed to demonstrate in order to prove illegality, irrationality, procedural impropriety and proportionality. The Court of Appeal in the case of *Commissioner of Lands v Kunste Hotel Limited*, Civil Appeal No. 234 of 1995; [1997] eKLR had also settled that judicial review was only concerned with the decision making process. In doing so, the court was paying homage to the words of Lord Hailsham of St Marylebone in *Chief constable of the North Wales Police v Evans* (1982) 1WLR 1155, that: “The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”

PARA 47.

All appeared to be in order until the Kenya Constitution arrived. judicial review was no longer a common law prerogative, but was now entrenched in *the constitution* to safeguard the constitutional principles, values and purposes. In particular, Article 23 (3) (f) provides for the orders of judicial review as one of the available remedies concerning the enforcement of the bill of rights. Article 47 (1) of *the Constitution* guarantees every person the right to Administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 165 (6) grants the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. In 2015, parliament in adherence to Article 47 of *the constitution* enacted the *Fair Administrative Action Act*. No. 4 of 2014, Laws of Kenya (FAA Act).

48. Also instructive to the application of judicial review, is that Article 10 of *the Constitution* sets out the national values and principles of governance, key among them being the rule of law. These values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets this constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.
49. Due to this codification of the law on judicial review, two schools of thought have emerged. The first believes that since the promulgation of *the constitution* 2010 judicial review had shifted from



the “process only approach” to merit review in appropriate cases. This is evident in decisions from the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR; *Child Welfare Society of Kenya v Republic & 2 others ex-parte child in Family Focus Kenya*, Civil Appeal 20 of 2015, [2017 eKLR, *Joshua Sembei Mutua v Attorney General & 2 others*, Civil Appeal 93 of 2015; [2019] eKLR, *Super Nova Properties Limited & Another v District Land Registrar Mombasa & 5 others*, Civil Appeal No, 98 of 2015, [2018] eKLR; *Josephat Kiplagat v Michael Bartenge*, Civil Appeal 357 of 2013 [2016] eKLR to name but a few.

50. The second school of thought had maintained the traditional approach that believes that Judicial review proceedings involve a process only approach” limited to the interrogation of the process and not the merits of the decision being challenged. This is evident in the case by the Court of Appeal in *Kenya Revenue Authority & 2 others v Daras Investment Limited*, Civil appeal No. 24 of 2018; [2018] EKLR’ *Captain (Rtd) Charles Masinde v Augustine Juma & 8 others*, Civil appeal No. 1 of 2018, (2014; [2016] eKLR *Ransa Company Ltd v Manca Francesco & 2 others* [2015] eKLR, and *Republic v Chairman Amagoro Land Disputes Tribunal & another ex-parte Paul Magwabi Wanyama*, Civil appeal No. 41 of 2013 [2014] eKLR.
51. However, in a recent case of *Daude & 3 others v Inspector General National Police Services & 5 others* (petition 6 (E007) 4 (E005) & 8 (E010 of 2022 (Consolidated) 2023 KESC 40 (KLR), the Supreme Court of Kenya held that a judicial review ought to carry out a merit review of a case when a party approaches it under the provisions of *the Constitution*. The court held that judicial review was no longer a strict Administrative Law remedy but also a Constitutional Fundamental Rights enshrined in *the Constitution*. The court further held that when a party approached a court under the provisions of *the constitution* then the Court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions of order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of *the Constitution*, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision.
52. I have perused the application herein. The same was brought under Order 53 Rule 1 of the Civil Procedure Rules. I note however, that the applicant has also cited Section 9 of the Fair Administrative Actions Act, No. 4 of 2015 Article 22, 23 (3), 40 and 47 of *the Constitution* of Kenya. It can therefore be taken that the applicant has approached the court under the provisions of *the constitution* as well as statute law. I will therefore determine the issues herein as guided by the supreme court in the case of *Daude* (Supra)
53. The applicant’s complaint is that the DLASO convened objection proceedings without the requisite members as required under the *Land Consolidation Act* & the *Land Adjudication Act* and further the decision in AR objection was not signed by the chairman of the Board as required by the *Land Adjudication Act*.
54. I am of the view that the court cannot review the decision of the DLASO on that basis. If there was any issue in that regard the applicant should have raised the same in the appeal to the minister. It should be noted that the *Land Adjudication Act* has elaborate mechanisms of resolving disputes.
55. Section 29 of the *Land Adjudication Act* Cap 284 Laws of Kenya provides inter alia that-;
 1. Any person who is aggrieved by the determination of an objection under Section 26 of this Act may within sixty days after the date of the determination, appeal against the determination to the minister by-;
 - (a) Delivering to the minister an appeal in writing specifying the grounds of appeal.



- (b) Sending a copy of the appeal to the Director of the Land Adjudication and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

56. The applicant has raised issue that the DLASO convened objection proceedings without the requisite number of members. Section 8 (3) of the [Land Adjudication Act](#) Stipulates that-;

“The quorum of a committee or board, where the total number of members is an even number, shall be one-half of that number, and where the total number of member is an uneven number it shall be one-half of the even number that is greater than the number by one...”

57. I have perused the objection proceedings and I note that the same has listed three members which meets the quorum required under the Act. Therefore, the complaint over membership, in my view, has no basis and is rejected.

58. The applicant has also raised the issue that the AR objection was not signed by the Chairman. Section 8 (5) of the [Land Adjudication Act](#) stipulates that “Any decision of a committee or board shall be signified in writing and signed by the chairman and the executive officer, and the executive officer shall inform any of the parties who are not present of the decision.”

59. While the applicant’s complaint may be true, I still maintain the view that issues of appeal of DLASO should have been raised at the appeal to the minister and not raised belatedly before the court. I note that the said decision was made way back in 2014 while this application was only filed in 2022. It is trite law that judicial review proceedings ought to be brought to court expeditiously.

60. It is also the applicant’s contention that the decision by the minister considered irrelevant factors including an alleged Tharaka-Igembe conflict that happened in the year 1998 whereas the initial committee stage incomplete decision was made on 1991 even before the alleged invasion. It is the applicant case that the minister seemed to have started the case afresh instead of considering the facts and evidence as presented before the DLASO during Objection proceedings.

61. In this case, the applicant and the interested party presented their respective cases before the Deputy County Commissioner and the same was heard and determined. Both parties had witnesses and even observers. It is apparent that the applicant is dissatisfied with the merits of the decision and that is why he has filed this Judicial review application. However, in the circumstances of this case, I do not think that this court should act as an appeal court over the minister’s decision, especially where due process was followed and in a case where both parties were given a hearing. In the appeal to the Minister the applicant claimed ownership on the basis of use while the interested party was able to demonstrate that that was his father’s land. The Minister dismissed the appeal No. 483/2015 affecting parcel Number 1322. The minister determined that the land be registered to the interested party. In my considered view, the minister had the discretion on who to believe and who not to believe based on the evidence presented before him.

62. In my view the application is not merited and the same is dismissed with costs to the interested party.

63. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF NOVEMBER, 2023

IN THE PRESENCE OF

Court assistant- V. Kiragu/Lena M.



Ms Gitari for interested party

Njindo for ex-parte applicant

No appearance for A.G for respondents

C.K YANO

JUDGE

