



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**JUDICIAL REVIEW MISC. APPLICATION NO 4. OF 2021**

**(FORMALLY ELC CASE NO. E005 OF 2021)**

**IN THE MATTER OF AN APPLICATION BY DAVID TUM AND WILLIAM NGETICH**

**APPLICATION FOR ORDERS OF MANDAMUS CERTIORARI**

**IN THE MATTER OF KIMONDI FOREST SQUATTERS.**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NANDI COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NANDI.....2<sup>ND</sup> RESPONDENT  
AND**

**DAVIDKIPLAGAT TUM.....1<sup>ST</sup> EXPARTE APPLICANT**

**WILLIAM KIPSANG NGETICH.....2<sup>ND</sup> EXPARTE APPLICATION**

**JUDGMENT**

1. Upon been granted leave of commence Judicial Review Proceedings for the orders sought as in the title above; the ex-parte applicants filed the substantive motion on 3/5/2021 seeking orders.

a) That an order of mandamus do issue to the 2<sup>nd</sup> Respondent to implant the decision of the National Land Commission dated 7/2/2019 without any alteration of the Petitioners.

b) That an order of Certiorari do issue to being into Court and quash the proceedings and decision of the 1<sup>st</sup> Respondent dated 1/12/2020 to the extent that it alters the decision of the National Land Commission dated 7/2/2019.

2. The substantive motion filed by Messrs Amondi and Company Advocates, narrates that the Exparte Applicant together with members are beneficiaries of a determination by the National Land Commission made on 7/2/2019.

3. The said determination made on 7/2/2019 and subsequently gazzetted on 1/3/2019 mandated the 2<sup>nd</sup> Respondent to collaborate with the Ministry of Lands (Adjudication and Settlement Department) in ensuring the members of Kimondi Forest Squatters were settled.

4. Upon issuance of the determination as observed above, a leadership wrangle among the beneficiaries ensued leading to a petition being filed by the Exparte Applicants to the 2<sup>ND</sup> Respondents. Committee of Lands and Environment and Natural Resources with a view that the said committee was to arbitrate the said leadership wrangle.

5. The committee arbitrate as called upon by the Petitioners (the Exparte Applicants herein), and made a decision on 1/12/2020. It is this decision made by the 2<sup>nd</sup> Respondent pursuant to the arbitration proceedings at the behest of the Exparte Applicant that the Exparte Applicant now seeks to challenge through the orders of Certiorari, on the one hand, and to implement the National Land Commission decision of 1/2/2019 without any alternations on the other hand by an order of Mandamus.

6. The grounds in support of the Judicial Review application are that the 2<sup>nd</sup> Respondent did not have power under Schedule 4 of the Constitution to entertain the petition, and that the 1<sup>st</sup> Respondent had taken long to implement the decision of the National Land Commission. The Exparte Applicants further query the 2<sup>nd</sup> Respondents for recognizing at one Mr. Nicholas Sawe of the splinter group and that eh decision of 1/12/2020 was irregular, illegultravires and void abintior.
7. In opposition to the said application the 1<sup>st</sup> Respondent filed Grounds of Opposition dated 3/12/2021 and surprisingly filed a “**supporting affidavit**” in support of the grounds of opposition. The Court takes the view that the “**supporting affidavit**” ought to be a **replying affidavit** and shall treat the same as a replying affidavit. The Grounds of Opposition are to the effect that the 1<sup>st</sup> Respondent was entertaining a petition so as to arbitrate on the leadership wrangles of Kimondi Forest Squatters and not a petition on Historical Land Injustice.
8. That the petition was committed to its Committee on Land, Environment and Natural Resources to deliberate on it where the exparte Applicants participated in the committee deliberations and therefore cannot run away from the process. In the Replying Affidavit, the 1<sup>st</sup> Respondent has annexed a copy of the petition to arbitrate on leadership wrangles, that petition was received by the assembly on 23/4/2019 and was authored on the same date by the Exparte Applicants.
9. The 1<sup>st</sup> Respondent has annexed the impugned report, that the Exparte Applicant seeks to quash as well as the determination by the National Land Commission, the 1<sup>st</sup> Respondent thus prays that this Judicial Review application be dismissed.
10. On the part of the 2<sup>nd</sup> Respondent, they filed a grounds of opposition, on grounds , interalia that the subject matter giving rise to the proceedings does not fall within the definition of administrative action which Judicial Review proceeding is the proper forum for resolution.
11. The 2<sup>nd</sup> Respondent further contends that the impugned decision was as a result of an arbitration process that he Exparte Applicants agreed to be bound, and being a consent decision or agreement cannot be challenged by way of Judicial Review and that the remedies sought go beyond the scope of the impugned decision.
12. The course and scope of Judicial Review has now drastically changed since the decision in **Civil Appeal No. 486 of 2019 JSC VS. Lucy Muthoni Njora** where the Court observed “*to my mind even faulty to be traditional process only approach to Judicial Review must involve a measure of merit analysis.....Judicial Review as an area of law is not static and its parameters have never been cast in stone.....*” whereas the traditional Judicial Review dealt with the procedural aspects of a administrative actions including decisions. The merits of the administrative actions and decision are under the Post Lucy Muthoni Njora dispensation considered.
13. Taking the cue from the **Lucy Muthoni Njora** decision this Court shall now examine procedural aspects of the impugned decision as well as the merits thereof.
14. For starters the impugned decision is the report on the arbitration over the leadership wrangle among the leaders of Kimondi Forest Squatters.
15. The Exparte Applicant submit that the 2<sup>nd</sup> Respondent did not have jurisdiction under Schedule 4 of the Constitution to examine a petition on historic land injustices and that the report is thus a nullity for lack of jurisdiction.
16. However what was before the 2<sup>nd</sup> Respondent was actually a petition authored by the Exparte Applicants seeking arbitration over leadership wrangles among leaders of Kimondi Forest Squatters. The 2<sup>nd</sup> Respondent did not consider a petition on Historical Land Injustices as that had already been considered and determined by the National Land Commission.
17. The Objection and submissions that he 2<sup>nd</sup> Respondent did not have jurisdiction to entertain a historical land injustice dispute, which was the foundation of this judicial review application is thereby a red herring and it fails as it is unfounded.
18. It follows therefore that the decision by the 2<sup>nd</sup> Respondent was entertained properly as a public petition and the 2<sup>nd</sup> Respondent had powers to make the determination it did.
19. The nature of the impugned decisions was an arbitration that was initiated that the behest of Exparte Applicants. Being an arbitral decision on the leadership wrangles was a compromise I consent deacon and it is binding on the parties and cannot beset aside under the judicial review application.
20. I agree with the submissions of the Respondents that an arbitral decision cannot be set aside under the Judicial Review Mechanisms, but only under the provisions of the Arbitration Act.
21. In so far as the impugned decision seeks to streamline the leadership of the Kimondi Forest Squatters, the said decision does not in any way alter the determination of the National Land Commission. The determination of the National Land Commission recognized two sets of claimants, and the Exparte Applicants belonged to the 2<sup>nd</sup> set of Claimants and the decision was made for the benefit of both sets of claimants, and as the impugned decision has streamlined the leadership thereof, the only remaining part is the implementation of the determination by the National Land Commission.
22. The submission that the 1<sup>st</sup> Respondent has taken long, to impact the decision of the National Land Commission is equally a red herring, as it is the Exparte Applicants themselves who subjected themselves to the process of the 2<sup>nd</sup> Respondent so as to resolve the leadership dispute among the leaders of the Kimondi Forest Squatters, and having resolved he same, have now filed this Judicial Review. It is the

Court's view that the 1<sup>st</sup> Respondent could not implement the decision of the National Land Commission whilst the Arbitration process was ongoing at the 2<sup>nd</sup> Respondent and this ensuing Court process. This ground equal fails.

23. This Judicial Review application commenced by the Exparte Applicants is a self aggrandizement exercise by the Exparte Applicants, who initially worked tirelessly to the benefit of the community before the determination was made, but are now letting down the community as they seek endless self preservation mechanism.

24. As the grounds of this Judicial Review Application have failed, it follows that the orders of Mandamus and Certiorari as sought in the application are denied, however, in order to finalize the Kimondi Forest Squatters issue and there been a determination by the National Land Commission, the Exparte Applicants and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby directed to implement the National Land Commission decision for the benefit of all the beneficiaries of the determination before the lapse of the timelines provided in the National Land Commission Act.

25. The Exparte applicant shall bear the costs of the Judicial Review application.

26. Orders accordingly.

**DATED AT KAPSABET THIS 8TH DAY OF FEBRUARY, 2022.**

**HON. JUSTICE M. N. MWANYALE**

**JUDGE.**

**IN THE PRESENCE OF MS. MATHAIRO FOR THE EXPARTE APPLICANT.**

**NO APPEARANCE FOR THE RESPONDENTS.**