



**Republic of Kenya v Deputy County Commissioner Tharaka South & 3 others; Kiria (Interested Party); Mangaara. (Exparte) (Judicial Review E006 of 2021) [2022] KEELC 3296 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3296 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
JUDICIAL REVIEW E006 OF 2021**

**CK YANO, J**

**JUNE 7, 2022**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW PROCEEDING FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND IN THE MATTER OF THE LAW REFORM ACT, CAP 26, THE LAND ADJUDICATION ACT, CAP 284, THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND IN THE MATTER OF THE PROCEEDING, FINDINGS AND DECISION MADE ON 18.03.2021 IN APPEAL NO. 93/2018 OVER PARCEL OF LAND NO. 1233 SITUATE IN KAMANYAKI/KAMARANDI ADJUDICATION SECTION WITHIN THARAKA SOUTH SUB-COUNTY**

**BETWEEN**

**REPUBLIC OF KENYA ..... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER THARAKA SOUTH .. 1<sup>ST</sup> RESPONDENT**

**DIRECTOR LAND ADJUDICATION AND SETTLEMENT OFFICER..... 2<sup>ND</sup> RESPONDENT**

**THARAKA SOUTH SUB-COUNTY ADJUDICATION AND SETTLEMENT OFFICER ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**PAUL KIRIMI KIRIA ..... INTERESTED PARTY**

**AND**

**ROSCO KIBARA MANGAARA. .... EXPARTE**



## JUDGMENT

1. Pursuant to leave granted by court the *ex parte* Applicant filed a notice of motion application dated 7<sup>th</sup> December, 2021 seeking orders that:
  - a. That this honourable court be pleased to grant the *ex parte* applicant an order of *Certiorari* to remove into the High Court and quash the proceedings, findings and decision made by the 1<sup>st</sup> Respondent on 18.03.2021 in the appeal to the Minister Cause No.93 of 2018 over land parcel No.1233, situate in Kamanyaki/Kamarandi Adjudication section in which it purported to allocate the applicant's parcel of land to the interested party.
  - b. That this honourable court be pleased to issue judicial review orders of prohibition directed to the respondents prohibiting them from making attempts to cancel registration of ownership of land parcel No.1233, situate in Kamanyaki/Kamarandi Adjudication Section in the name of the *ex parte* and the attempts to register the same in the name of the interested party.
  - c. That this honourable court be pleased to issue judicial review orders of *mandamus* directed to the respondents requiring them to forthwith re-instate the registration of land parcel No.1233, situate in Kamanyaki/Kamarandi Adjudication section in the name of the *ex parte* applicant as the owner.
  - d. That costs of this application and the *ex-parte* Chamber Summons for leave be borne by the Respondents and interested party jointly and severally.
  - e. Order that the costs herein abide the outcome of the substantive notice of motion application.

### **Applicant's Case**

2. The motion is supported by the statutory statement of facts and verifying affidavit of Rosco Kibara Mangaara sworn on 19.4.2021 and supplementary affidavit sworn on 4.4.2022 and is based on the following grounds;
  - a. That the *Ex-parte* Applicant filed an objection case No.114/2008 against the Interested party claiming land parcel No.1233 Kamanyaki/Kamarandi Adjudication Section which apparently had been unlawfully registered in the name of interested party.
  - b. The said objection was heard and allowed by the 3<sup>rd</sup> Respondent while sitting with the appointed committee members and ordered that the land belongs to the *Ex-parte* Applicant.
  - c. That the interested party subsequently filed an appeal with the minister in accordance with section 29 of the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
  - d. The 1<sup>st</sup> Respondent sitting on behalf of the Minister overturned the decision on 18.03.2021 and purported to give the interested party the *Ex-parte* Applicant's land.
  - e. The 1<sup>st</sup> Respondent further exhibited extreme bias in the conduct of his proceedings and proceeded to rely on irrelevant matters to disregard the testimony of the *Ex-parte* Applicant's witness his witnesses (sic).
  - f. The 1<sup>st</sup> Respondent disregarded the testimony of the *Ex-parte* Applicant and his witness and instead relied on non-existing evidence of the interested party. This was outright bias.



- g. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have completely refused to supply the *ex-parte* applicant with the proceedings, decision and the adjudication register to enable pursue these proceedings despite various demands. They keep tossing the applicant and his advocate from one place to another.
  - h. That all this is a larger scheme to deprive the *ex-parte* applicant his land.
  - i. The 1<sup>st</sup> Respondent acted in excess of his authority by purporting to give the Interested party land that belong to the *Ex-parte* applicant without any basis.
  - j. The 1<sup>st</sup> Respondent made the verdict in Appeal to the minister *land case No.93 of 2018* capriciously and with extreme bias
  - k. The decision of the 1<sup>st</sup> Respondent is against the rule of law.
3. The *ex-parte* applicant reiterated that he owns and has been in actual possession, occupation and user of land parcel No.61 Kamanyaki/kamarandi Adjudication Section as it were since the gathering to demarcation and subsequent registration of the section.
  4. The *ex-parte* applicants submits *inter alia* that that it is undisputed as the same is admitted throughout the proceedings and as a matter of fact that it is admitted by the respondent and the Interested party that the *Ex-parte* Applicant's home is located on the disputed part of the land namely P/NO.1233 presently recorded in the name of the Interested Party and is part of P/No. 61. It is the ex-parte applicant's case that the Interested Party and the adjudication Officer secretly and fraudulently excised the suit land from his land parcel No. 61.
  5. The *ex-parte* Applicant submits that he discovered this secret deal when he was confirming the land register before it was closed and that the said portion unlawfully excised was fraudulently allocated to the Interested Party by the offices of the respondents.
  6. The *exparte* Applicant submits that upon discovery of the illegality, he filed an objection No.114/2008 with the office of the DLASO (District land Adjudication Settlement Officer). That the objection was heard and determined in favour of the *Ex-parte* Applicant whereby it was ordered that the name of the Interested Party be deleted from the register over P/No.1233 and the same be replaced with the name of the *Ex-parte* Applicant and that the decision was read on 13.05.2009.
  7. The *exparte* applicant contend that in the year 2018 the Interested Party instituted an appeal to the minister being appeal to the minister case No.93 of 2018. That the Minister awarded the suit parcel of land P/No.1233 to the Interested party, in essence reversing the decision of the DLASO.
  8. The ex-parte applicant states that the Interested party was categorical that the land he was claiming emanated from P.No.62 which land belonged to Kirema Karanguand father to Joseph Mwendwa Kiremaand that it is from that parcel of land where his portion was excised from and numbered P/No. 1233 and urges the honourable court to look at the evidence and answers by the interested party and his witness in the proceedings before the minister.
  9. The *exparte* applicant submits that the minister in his findings unilaterally and in utter biasness and discrimination decided that the subject suit land P/No. 1233 was to be excised from the *ex-parte* applicant's land P/No.61 instead and that this was not only acting in biasness but is an unlawful move to dispossess the applicants his land corruptly and that that was a deprivation to a fair hearing.
  10. The *ex-parte* applicant submits that he was not accorded a fair hearing for the simple reason that the 1<sup>st</sup> respondent disregarded and did not consider the applicant's evidence at all and that to compound the matter, the 1<sup>st</sup> respondent also did not consider the evidence by the interested party and his witness to



the extent that the Interested Party's land was to be hived from P/No.62 and not from P/No.61 which belongs to the *ex parte* applicant. The *ex-parte* applicant has alleged that the 1<sup>st</sup> respondent decided of his own motion that the land be superimposed on the *ex-parte* applicant's land hence the same was unfair, discriminatory and unlawful hearing.

11. The *ex-parte* applicant submits that denial of fair hearing is further manifested to the extent that the material evidence before the minister was that the parcel of land subject to excision in favour of the interested party was P/No.62 and that despite there being no evidence, consent or approval for excision of any portion of P/No.61, the 1<sup>st</sup> respondent unlawfully and in utter discrimination unilaterally decided that it was the applicant's land that was to be excised.
12. The *ex-parte* applicant submits that the minister relied on unreasonable and irrelevant information not connected to the case in arriving at the impugned unlawful, unreasonable, discriminatory decision which should be set aside.
13. The *ex-parte* applicant further submits that the grounds of opposition filed by the respondents should be disregarded since they were filed late and that they are baseless.

### **The Respondents' Case**

14. The Respondents opposed the application and filed grounds of opposition dated 17<sup>th</sup> March, 2022, on the following grounds:
  - i. That the application does not demonstrate with sufficient clarity the nature of misconduct in the action of the Respondents in the exercise of their statutory duties.
  - ii. That Judicial Review deals with procedure and not results.
  - iii. That the orders sought are discretionary and can be denied even warranted (sic).
  - iv. That the application is misconceived and a non-starter.
  - v. That the application is vexatious, frivolous, scandalous and an abuse of court process.
15. The respondents submit *inter alia*, that in the instant application the *ex parte* applicant is dissatisfied with the judgement awarded by the minister which allocated land parcel No.1233 Kamanyaki/Kamarandi Adjudication section to one Paul Kirimi Kiria thus the reason he is seeking the above orders.
16. The respondents further submit that the decision was not favorable to the *ex parte* applicant and that is why he filed for an appeal disguised as a judicial review and that the applicant wants to take the court in a fishing expedition. The respondents cited Section 29 of the [Land Adjudication Act](#) which provides that:

- “(1) Any person who is aggrieved by the determination of an objection under section 26(1) & (2) 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; and
  - b. sending a copy of the appeal to the Director of Land Adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.



(2) The minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.”

17. The respondents submit that the appeal by the *ex-parte* applicant was in line with section 29 of the [Land Adjudication Act](#) and that the 3<sup>rd</sup> Respondent through the Deputy County Commissioner conducted appeal proceedings and came to a decision while following proper procedure and in line with the law and therefore there was no irrationality in the 1<sup>st</sup> Respondent’s decision in the appeal as pleaded by the *Ex- parte* Applicant.
18. The Respondent’s counsel submitted that the *ex parte* applicant has merely cited issues of non-observance of the rules of natural justice and unfair administration action by the Respondents herein without demonstrating the exact manner in which the alleged misconduct was carried out and that the same is untrue as the proceedings attached to this suit clearly demonstrate that the *ex-parte* applicant was present at the hearing, cross examined the other party’s witnesses and participated in the field visit.
19. The Respondents’ counsel cited section 107,108 and 109 of the [Evidence Act](#) Cap 80 Laws of Kenya which provide as follows:

“ 107

(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

20. The respondents have also referred to the case of [M’Bita Ntiro v Mbae Mwirichia & another](#) (2018) eKLR , where it was held:

“The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”

21. The respondents also cited the case of [Republic v Kenya Revenue Authority & another Ex-parte Trade Wise Agencies](#) (2013) eKLR, where Justice J.V. Odunga in quoting the Uganda case of [Pastoli v Kabale District Government Council and Others](#) (2008) 2 EA 300, observed among other things that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegally, irrationality and procedural impropriety: illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provision of law or its principles are instances of illegality...”



22. The respondents have also quoted the case of *Republic v Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others* (2018) eKLR where it was held that:

“...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere.”

The Respondents have also cited the *Supreme Court Practice of England 1997 Vol. 53/1-14/16*.

23. The respondents submit that the process followed by the 1<sup>st</sup> Respondent throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural and that the *Ex-parte* Applicant’s notice of motion lacks basis.
24. In conclusion the respondents submit that the *Ex-parte* Applicant has failed to show why this court should exercise its discretion and that therefore the Application is misconceived, a non-starter and an abuse of the court process and further referred the court to its own decision *Elc Jr Application No.E002 of 2021* whose facts were similar to this case and where the court decided that the application lacked merit. The Respondents also relied on the case of *Republic v Chairperson Business Rent Tribunal and another Ex-parte Keiyo Housing Co-operative Society Ltd & another* [2014] eKLR and case of *Peris Wambogo Nyaga v Kenyatta University* [2014] eKLR.

### **The Interested Party’ Case**

25. The Interested party opposed the application through a replying affidavit sworn by Paul Kirimi Kiriawho is the interested party on 19.01.22. The interested party avers that the *ex-parte* applicant’s supplementary affidavit was filled with falsehoods and mere denials.
26. The Interested party submits that judicial review remedies are discretionary and the party seeking the same is obligated to place before court sufficient materials to enable the court exercise such discretion in its favour, else the remedy should be denied.
27. The interested party has relied on the court of Appeal decision in Nakuru Court of Appeal Civil Appeal No. 234 of 1997: *The Commissioner of lands v Kunste Ltd* where it was held 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 court.”



28. The interested party submits *inter alia* that the parties embroiled in this matter have procedurally followed up the laid laws in ascertaining their rights over the land parcel No. 1233 in Kamanyaki/Kamarandi Adjudication section. That an objection was lodged at the Arbitration Board and the dissatisfied party lodged an appeal to the minister as it's the law. That the appeal to the minister, all parties were afforded opportunity to call upon their witnesses and adduced evidence to which it culminated to the judgement being made by the Minister. That the judgement made by the minister aggrieved the *Ex-parte* applicant herein who filed to court the judicial review application as a disguised appeal.
29. The interested party submits *inter alia* that it is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The Interested party submits that the court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1<sup>st</sup> respondent as the *ex-parte* applicant is insinuating. The interested party has cited the case of [\*Douglas Tsuma Mumba v National land commission & 2 others\*](#) (2020) eKLR.
30. The interested party contend that the allegations by the *ex parte* applicant that interested party influenced the land officials are unfounded taking into account that all along the *ex-parte* applicant has represented his clansmen in all matters related to land in their clan as pinpointed by the averments in the Replying Affidavit.
31. The interested party submits that the *exparte* applicant is inviting the court to delve into the merits of the decision rather than the decision-making process which is not within the purview and or remedy of judicial review. The interested party has cited the case of [\*Municipal council of Mombasa v Republic Umoja Consultants ltd\*](#), Nairobi civil Appeal No.185 of 2007 (2002) eKLR; [\*Stanley Thiaine Mbui & another v Land Adjudication Officer, Tigania West District & Ano.\*](#) [2013] eKLR, and [\*Republic v District Land Adjudication Officer, Tigania East/West Ex-parte Zaverio Mithbeka\*](#) [2018] eKLR.
32. The interested party submits that an order of prohibition is meant to stop an event which has not yet occurred and cannot issue, where the targeted eventuality has taken place already. The interested party submits that in this matter, a prohibition order is sought to halt implementation of beleaguered decision, in the subject appeal to the Minister No.93 of 2018. The Interested Party relied on [\*Republic v Land Disputes Tribunal & another ex-parte Samuel Muyaa & 3 Others\*](#) [2005] eKLR.
33. The interested party urged the court to hold that this judicial review matter has no merits and proceed to dismiss it with costs to the interested party.

### **Analysis And Determination**

34. I have considered the arguments and submissions made and find that two issues arise for determination:-
  - i. Whether the Respondents' decision was made *ultra vires* or made contrary to rules of natural justice.
  - ii. Whether the applicant ought to be granted the prayers sought.

### **Whether the Respondents' decision was made ultra vires or made contrary to rules of natural justice.**

35. Judicial review does not concern itself with the merits of the decision. It is focused on the process through which decisions were made.



36. In the instant case the *ex parte* applicant submitted that the minister in his findings unilaterally and in utter biasness and discrimination decided that the subject suit land P/No. 1233 was to be excised from *ex parte* applicant's land P/No.61 instead and that this is not only acting in biasness but in an unlawful move to dispossess the applicants his land corruptly and that this was a deprivation to a fair hearing.
37. The *ex parte* applicant contended that, he was not accorded a fair hearing for the simple reason that the 1<sup>st</sup> respondent disregarded and did not consider the applicant's evidence at all and to compound the matter the 1<sup>st</sup> respondent also did not consider the evidence by the interested party and his witness to the extent that the IP's land was to be hived from P/No.62 and not from P/No.61 which belongs to the *ex parte* applicant.
38. The *ex parte* applicant alleged that the 1<sup>st</sup> respondent decided out of his own volition that the land be superimposed on the *ex parte* applicant's land hence the same was unfair, discriminatory and unlawful hearing.
39. Similarly, the *ex parte* applicant submitted that denial of fair hearing is further manifested to the extent that the material evidence before the minister was that the parcel of land subject to excision in favour of the interested party was P/No.62 and that despite there being no evidence, consent or approval for excision of any portion of P/No.61, the 1<sup>st</sup> respondent unlawfully and in utter discrimination unilaterally decided that it was the applicant's land that was to be excised.
40. In the case of *Wagunza & another v Office of the Registrar, Academic Kenyatta University & 2 others* (2013) eKLR the court reiterated the broad grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of *Pastoli v Kabale District Local Government council and Others* (2008) 2 EA 300, and observed among other things that:

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provision of law or its principles are instances of illegality...

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision is usually in defiance of logic and acceptable moral standards.

Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice act or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

41. The principles for Judicial Review were set out by the Superior Court in a land mark case of; *Republic v Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996*, the Court of Appeal stated: *inter alia* that “an order of *certiorari* can only quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court



- that a public officer has acted unprocedurally, that his decision was unreasonable and the impugned decision was illegal.”
42. The *Ex- parte* Applicant has not provided any evidence in support of his allegations neither has he shown how the 1<sup>st</sup> respondent actions were against rules of Natural Justice. All that the applicant has done is to make general allegations.
43. Natural justice was outlined in the *Halsbury Laws of England volume 1 (1)* page 218, as follows: -
- “Natural justice comprises two basic rules: first that no man is to be a judge in his own case (*nemo iudex in causa sua*) and second that no man is to be condemned unheard (*audi alteram partem*).
- The rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct.”
44. In the case of *Republic v Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others* (2018) eKLR it was held that:
- “...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere.”
45. From the material on record, it is evident that all parties, including the *ex parte* applicant were afforded an opportunity by the Minister to present their respective cases. In my considered view, the process followed by the respondents throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. As already stated, judicial review remedy is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision-making process itself.
46. The role of the court in judicial review is supervisory, not an appeal. It has not been shown that the impugned decision herein was made contrary to the law or that the rules of Natural justice were violated.
47. In the case of *Municipal Council of Mombasa v Republic & another* [2002] eKLR, the Court of Appeal held as follows:
- “Judicial Review is only concerned with the decision-making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a



court of appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.”

48. In the same breadth the court relies on the decision in case of *Republic v Kenya National Examination Council Ex-parte Gathenji* and Civil Appeal No. 266 of 1996, where the Court of Appeal stated *inter alia*, that:

“It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision –making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.”

49. Similarly, the broad grounds on which the court exercises its Judicial Review jurisdiction was also reiterated in *Zachariah Wagunza & another v Office of the Registrar, Academic Kenyatta University & 2 Others* [2013] eKLR as was stated in the Uganda case of *Pastoli v Kabale District Government Council and Others* (2008) 2 EA 300 and observed among other things that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegally, irrationality and procedural impropriety: illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provision of law or its principles are instances of illegality...”

50. It is clear therefore that the purpose of Judicial Review is to check that public bodies or persons holding public authority and exercising their function, do not exceed their jurisdiction and carry out their duties within the limit defined by the law. Examples of these is where the lawful authority departed from procedures stipulated by statute.

51. It is trite law in evidence that he who asserts must prove his case and that apart from alleging biasness on the part of the 1<sup>st</sup> Respondent, the applicant does not go any further to establish whether the process was tainted with illegality, irrationality and procedural impropriety as was held in the case of *Pastoli v Kabale District Local Government Council and Others* (2008) 2 EA 300, a Ugandan case quoted in *John C. Chelanga v Minister for Lands & 3 Others* [2021] eKLR. The Respondents submitted that the applicant herein was afforded an avenue to settle the dispute as per the law, and the matter was heard and determined fully by the minister who acted within his authority and mandate as stipulated under the law. That the applicant is inviting the court to delve into the merits of the decision rather than the decision-making process which is not within the purview and or remedy of judicial review.

52. It is trite law that a court exercising Judicial Review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. That the court cannot be invited to act as an appellate court to reverse the decision of the 1<sup>st</sup> Respondent as the *ex-parte* applicant is insinuating. This was the finding in the case of *Douglas Tsuma Mumba v National Land Commission & 2 Others* [2020] eKLR and *Republic v Attorney General & 4 Others Ex-parte Diamond Hasim Lalji & another* [2014] eKLR.

53. In this case, the *Ex-parte* Applicant is trying to invite the court to determine a myriad of contested issues and the application herein is an appeal disguised as a Judicial Review application. The application can neither stand nor pass the very well and clearly established tests and/or threshold for a competent Judicial Review. There is nothing in the instant application that demonstrate any illegality, procedural unfairness and/or irrationality on the part of the respective authorities while arriving at the decision/judgment. There is also nothing in the application to demonstrate that the decisions by



the adjudicating authorities were *ultra vires*. The court observes that the application is wanting and poignantly incompetent, and the same lacks the core elements and essential clarity that are the hallmark of and which may warrant a Judicial Review of any obtaining acts by an authority. What is before court is a situation where the resolution of the dispute at hand will require the court to make a determination on some disputed issues of fact.

### **Whether the orders of Judicial Review are available**

54. On the issue of Whether the *Ex parte* Applicant herein is entitled to the orders of *certiorari*, prohibition, and *mandamus* it should be noted that judicial review orders are discretionary.

55. According to *Halsbury Law of England* 4<sup>th</sup> EDN.Vol. 1 (1) para 12 page 270:

The remedies of quashing orders (formerly known as orders of *Certiorari*) prohibiting orders formerly known as orders of prohibition (mandatory orders formerly known as orders of *mandamus*) ...are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.

56. The objective of Judicial review was observed in *Chief Constable of the North Wales Police v Evans* (1982)1 WLR where 1155 Lord Brightman noted:

Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.

57. In the instant case the applicant has levelled various allegations that go to the root of the case. This clearly spells out the issue is the decision and not the process.

58. In *Commissioner of Lands v Kunste Hotel Limited* (1997) eKLR the court with authority reiterated Lord Bright man's view and observed:

“...it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision- making process. Its purpose is to ensure that the individuals is given fair treatment by the authority to which he has been subjected.”

59. In the instance case the applicant has not demonstrated that Rules of Natural Justice were not adhered to the parties having been granted an opportunity to give their testimony, call witnesses and adduce evidence. Justice was deemed to have been served as it ought to have, and therefore the applicant cannot then question the mandate and authority of the 1<sup>st</sup> Respondent who followed the procedure laid in law to arrive at the Judgment he made. The allegations by the applicant are mere falsehoods that are farfetched and cannot be a basis for quashing the Judgment made by the minister.

60. In the applicant's submission he stated that it is unreasonable, unfair and discriminative how the Minister reached the decision of awarding the applicant's parcel of Land while the land belonged to him. This observation clearly goes to the merits of the case.



61. From the material placed before court, it is clear that all the parties were accorded a fair hearing in that each of them was given an opportunity to testify, call witnesses who testified and to cross examine the other side. If that was the case, then there is no basis for the *ex-parte* applicant to question the decision of the minister.
62. It is my finding that the process followed by the 1<sup>st</sup> Respondent throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. The *Exparte* Applicant Notice of Motion lacks merit.
63. Consequently, the notice of motion Application dated 7<sup>th</sup> December 2021 is dismissed with costs to the respondents and the Interested Party.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF JUNE, 2022**

in the presence of:

CA: Ann

Mutuma Kithinji for Interested Party

Muriithi h/b for Thangicia for Ex-parte Applicants

**C.K. YANO**

**JUDGE**

