REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC MISCELLANEOUS JUDICIAL REVIEW APPLICATION CASE NO. E002 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY MINISTRY OF LANDS

& PHYSICAL PLANNING.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION

& SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

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

AND

RAUNI NKARI.....INTERESTED PARTY

PHARES MUGAMBI.....EXPARTE APPLICANT

JUDGMENT

1. The Notice of Motion in this suit states as follows:

NOTICE OF MOTION

Order 53 Rule 3 (1) of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act, Cap 26, and all other enabling provisions of law

(Pursuant to leave granted by His Lordship Justice on the 26TH day of October 2020)

TAKE NOTICE that this court will be moved on the ……. day Of …… 2020 at 9.00 O` Clock in the forenoon or soon thereafter, when counsel for the applicant will be heard on an application for: -

1. An order of certiorari be issued to remove into the Honourable Court for the purpose of it, being quashed a decision made by and/or award by the 1st Respondent (**THE CABINET SECRETARYMINISTRY OF LANDS & PHYSICAL PLANNING)** in respect of **land parcel no 106 MAREMBO/RIANTHIGA** Adjudication Section in minister Appeal Case No 24 of 2018 between RAUNI NKARI and PHARES MUGAMBI. Contained in the ruling dated **01.09.2020** awarding to RAUNI NKARI the INTERESTED PARTY All the Disputed Land. Whereby it was decided on the 1ST day of September 2020 that RAUNI NKARI the INTERESTED PARTY be awarded All the Disputed Land known as Land Parcel no 106 MAREMBO/RIANTHIGA

2. An order of prohibition be issued prohibiting the 2nd & 3rd Respondents from further Implementing by altering the duplicate adjudication register to conform with the decision of the 1st respondent, and or certify on the duplicate adjudication register that it has become final in all respects , nor send details of the alterations and a copy of the certificate to the 3rd Respondent for alteration of the Adjudication register and or in any manner whatsoever effect the decision contained in the ruling dated 01.09.2020.

3. THAT costs be awarded to the Applicant.

4. Such further and other relief be granted to the applicant as this court deems fit.

THIS NOTICE OF MOTION is made on the following grounds;-

a. THAT The 1st Respondent failed to recognize the rights of the Applicant as a Registered Proprietor of the said LAND PARCEL NO 106 MAREMBO/RIANTHIGA Adjudication section.

b. THAT The decision of the 1st Respondent have has the Effect of taking away the Applicant's land which is not only Ancestral but which he holds in trust for his siblings.

With the further Effect of him standing to lose his developments thereon, which have not only cost a pretty penny, time consuming and are also inter-generational.

c. THAT The Applicant was served with a very short notice, (which he received on 27th of December 2018 with the Appeal hearing slated for hearing on 3rd of January 2019) which did not allow him time to call witnesses as the previous ones being elderly were already dead. Thus denying him his constitutional right to fair administrative action and right to be heard all in all an affront to rules of natural justice.

d. THAT The 1st Respondent, decision in supporting the unsatisfactory answer of the interested party on as to why he never filed an objection against the Applicant at Adjudication committee level was openly biased and intended to reward the indolent.

e. THAT The 1st Respondent failed to visit parcel of land no 106 MAREMBO/RIANTHIGA to prove and ascertain the ownership of the dwelling houses thereon ,Livestock and general husbandry .

f. THAT The decision by the 1ST Respondent will create a humanitarian crisis in terms of displacement of persons already settled on the land, not to mention breach of peace and is not only unjust but also malafides.

WHICH APPLICATION is supported by the grounds set out in the Statement attached hereunder and in the annexed affidavit of **PHARES MUGAMBI** and on such further grounds as may be adduced at the hearing hereof.

DATED at **CHUKA** this ……10th ….. day of ……November,…. 2020.

MOMANYI GICHUKI & COMPANY

ADVOCATES FOR THE APPLICANT

2. The suit was canvassed by way of written submissions.

3. The ex-parte applicant's submissions are pasted herein in full without any alterations whatsoever.

EXPARTE APPLICANT'S WRITTEN SUBMISSIONS

Your honor, these are the ex-parte applicants' humble written submissions. First the submissions will briefly cover on the background of the case and thereafter delve into the legal submissions

Background

The ex-parte applicant sought orders of stay and leave to apply or orders of certiorari and prohibition to quash the decision of the 1st Respondent and prohibit the 2nd and the 3rd Respondents from effecting the 1stRespondent's decision concerning Parcel No. 06 MAREMBO/ RIANTHIGA vide chamber summons dated 23rd October.

Upon being granted leave the ex-parte applicant filed a notice of motion dated 10TH November 2020 seeking orders inter alia Certiorari and Prohibition to quash the decision of the 1stRespondent and prohibit the 2nd and 3rd Respondents from complying with said orders.

Legal argument

The application is based on the grounds set out in the chamber summons dated 23rd October 2020, statutory statement and verifying affidavit. It is the applicant's submission that the decision of the **1st Respondent's decision is unlawful, unprocedural, an improper exercise of power, made in ignorance of relevant considerations, unreasonable, made in bad faith, an inflexible application of policy and an outright denial of natural justice**.

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 cause (nemojudex in causasua), and second that no man is to be condemned unheard (audialterampartem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct".***

The above definition as read with article 47 of the constitution seeks to emphasize on the importance of the manner in which a decision is taken. For an administrative action to be fair one has to hear both parties equally. This includes granting them adequate time to prepare for the hearing.

From grounds adduced in the abovementioned notice of motion, the 1st respondent did not accord the applicant enough time to prepare or the hearing. The applicant was served with a hearing notice which he received on the 27th of December 2018 which invited him for the appeal hearing slated or 3rd of January 2019. It is our submission that the 5-day period granted to the applicant was not sufficient for the applicant to prepare for the hearing and to seek proper representations thus the act itself being an affront to natural justice.

> **In Zachariah wagunza & Another v Office of the Registrar, Academic Kenyatta University & 2 others(2013)Eklr the learned judge reiterated the broad Grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of pastoli vs. kabala district local Government Council and others (2008) 2EA300.** ***at pages 300-304.***
>
> **In that case the court cited with approval Council of civil unions vs Minister for the civil service (1985) AC 2 and an Application by Bukoba Gymkhana Club (1963)EA 478 and held;**
>
> ***"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 a 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. 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 to 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 legislature instrument by which such authority exercises jurisdiction to make a decision."***

We will submit on the following areas;

1. Whether there was procedural impropriety denying applicant right to be heard
2. Whether the Respondents have acted Irrationally
3. Whether the respondent acted in ignorance of relevant considerations
4. Whether the orders of Judicial Review are available

<u>Whether there was procedural impropriety denying applicant right to be heard</u>

As deponed in the Ex-parte Applicant statement of facts dated 23rd October 2020, the Respondent effected late service upon the EX-PARTE APPLICANT which was received on 27.12.2019 and the hearing was for 3.01.2020 and despite protest by the applicant, that since his witnesses were demised that the notice was too short he be given time to look for witnesses, the Respondent heard the Appeal in absence of any witnesses for the Applicant. **In the Case of Republic v Nairobi City County ex-parte; Gucharn Singh Sihra & 4 others (2014) Eklr , While placing reliance on Republic vs Kenya Revenue Authority Ex-parte Yaya Towers Limited (2008) Eklr the court observed**

> **' the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. it is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. unless that restriction on the power of the court is observed, the court will under the guise of preventing abuse of power, be itself, guilty of usurpation of power……..**
>
> **<u>Whether the Respondents acted Irrationally or in bad faith</u>**
>
> **In Republic v Kenya Revenue Authority Ex-parte; Cosmos Limited(2016) Eklr, a judicial Review matter wherein the Ex-**

parte applicant, cosmos Limited, sought inter alia an order of judicial review by way of an order of mandamus to compel KRA to process and pay the Applicant the value Added Tax Refunds due to it forthwith ,the Honourable Judge whilst granting the Order quoted Associated Provincial picture Houses vs Wednesbury Corporation (1948) 1KB 223 a case which explains the concept of unreasonableness and bad faith. in the said case the Honourable Judge stated;

It is true the discretion must be exercised reasonably. Now what does that mean lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word unreasonable in a rather comprehensive sense. it has frequently been used and is frequently used as general description of the things that must not be done. for instance a person entrusted with discretion must, so to speak ,direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those Rules , he may truly be said, and often is said ,to be acting 'unreasonably' similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in short vs Poole Corporation (1926) Ch.66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is so unreasonable that it might almost be described as being done in bad faith and in fact, all these things run into each other''

The 1st Respondent purported to Rely on a decision made by Purported NJURI NCHEKE ELDERS during what he refers to as the time of Chief Issack Knowing fully well that His decision could only rely on mechanisms under Cap 284 a good example of Irrationality.

Further the 1st Respondent claims the Ex-parte Applicant never appeared for Demarcation Yet it is the initial process after land gathering and boundary walking that confers and establishes boundaries and ownership whereas the Ex-parte Applicant was settled on the Suitland and was the one sued in all objections pertaining to the Suitland which finding is unreasonable

Whether the respondent acted in ignorance of relevant considerations

We submit that the Respondent decision making process did take into account irrelevant matters like Giving lame excuses and reasons on behalf of the Interested party indolence and failure to file any Objections at Committee, Board , AND AR was because he obviously knew the land was his yet he had never farmed thereon nor raise opposition when the applicant father was buried on the land.

Claiming the land issues concerning the Suitland herein MAREMBO/RIANTHIGA/106 were adjudicated by elders before Chief Isaack whereas it is Trite law the adjudication act was the applicable statute guiding any ministerial Decisions and Or Appeal .

Whether the orders of Judicial Review are available

The Right to Fair administrative Action, is enshrined in Article 47 Constitution of Kenya 2010. The said Administrative Action , should be **expeditious, efficient, lawful, reasonable and procedurally fair**.

Section 4 of the Fair Administrative Action Act 2015 states inter alia that where a person's right or fundamental freedoms is likely to be affected by an Administrative decision, the administrator must give the person affected by the decision; prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations. It is our contention that the Exparte applicant was not treated to fair administrative action as the notice for hearing was received on 27th December 2018 and the appeal to the minister was heard on 3rd of January 2019, Further the Applicant was not allowed witnesses.

Section 11 of the fair administrative act buttresses and justifies Orders in Judicial Review in a bid to met Justice.

*Section **4(3) of the Fair Administrative act** requires that where an administrative action is likely to adversely affect the rights and fundamental freedoms of a person, the administrator should act in a manner that amplifies his obligations by observing principles of fair hearing and natural justice. We aver that the 1st respondent should have created time and visited the disputed property and paid due regard to the facts stated above that existed prior to his decision. The 1st respondent failed in performing said acts thus we submit that the decision made was not in tandem with the rules of fair administrative action and natural justice.*

As I conclude, public bodies and officers are required to observe fair and administrative actions and practices whenever they take administrative actions by observing principles of fair hearing and natural justice as required by the law. Where there's failure to follow the letter and spirit of the constitution as opined above, it breeds cynicism and encourages impunity where such failure stems from a deliberate effort to undermine the constitution. It is our prayer that this honourable court recognizes this deliberate attempt to interfere with the applicants constitutionally guarded rights and intentional and deliberate efforts by the 1st respondent to undermine the constitution and corrects the illegality occasioned herein.

We humbly pray that our prayers contained in the notice of motion dated 10th October 2020 be granted with costs granted to the Exparte Applicant

DATED at **CHUKA** this……17th ….day of……March,….2021

MOMANYI GICHUKI & COMPANY

ADVOCATES FOR THE EXPARTE APPLICANT

4. The 1st to 4th Respondents' submissions are pasted herebelow without any alterations whatsoever.

1ST- 4TH RESPONDENTS' SUBMISSIONS

Your Lordship, the humble submissions of the 1st- 4th Respondents.

These submissions are made in response to the Ex-Parte Applicant's Notice of Motion Application dated 10th November 2020.

The Notice of Motion Application seeks inter alia the following orders:

1. An order of certiorari be issued to remove into the Honourable Court for the purpose of it, being quashed a decision made by and/or award by the 1st Respondent **(THE CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING)** in respect of land parcel no **106 MAREMBO/RIANTHIGA** Adjudication Section in minister Appeal Case No 24 of 2018 between RAUNI NKARI and PHARES MUGAMBI. Contained in the ruling dated 01.09.2020 awarding to RAUNI NKARI the INTERESTED PARTY All the Disputed Land. Whereby it was decided on the 1st day of September 2020 that RAUNI NKARI the INTERESTED PARTY be awarded All the Disputed Land known as Land Parcel no 106 MAREMBO/RIANTHIGA.

2. An order of prohibition be issued prohibiting the 2nd and 3rd Respondents from further implementing by altering the duplicate adjudication register to conform with the decision of the 1st Respondent, and or certify on the duplicate adjudication register that it has become final in all respects, nor send details of the alterations and a copy of the certificate to the 3rd Respondent for alteration of the Adjudication register and or in any manner whatsoever effect the decision contained in the ruling dated 01.09.2020.

3. THAT costs be awarded to the Applicant.

4. Such further and other relief be granted to the applicant as this court deems fit.

In response thereto, the Respondents have filed their Grounds of Opposition dated 3rd December 2020 and wish to rely on the same.

Your Lordship, Judicial Review is not confined to reviewing the decisions of public bodies or public officials. Judicial review is about the decision making process.

As was held in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited, (2008) eKLR,** the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

We submit that the Ex-Parte Applicant has not placed any evidence before this Honourable Court to show that the process in which the decision of the 1st Respondent was flawed with illegality, fraud or irrationality.

Your Lordship, in the case of **Republic vs Kenya Revenue Authority & another Ex-Parte Tradewise Agencies (2013) eKLR**, Justice J.V Odunga in quoting the case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 it was stated inter alia 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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

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 provisions of a 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. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

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 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

Therefore, in order for this Honourable Court to exercise its discretion the Ex-parte Applicant ought to provide the court with sufficient evidence to show that Rules of Natural Justice were not adhered to. We submit that the Ex-parte Applicants have failed to disclose how the 1st Respondent's actions were against the requisite rules and procedure provided for under section 29 of the Land Adjudication Act Cap 284 Laws of Kenya.

We refer to the case of **Republic v Director of Immigration Services & 2 others Exparte Olamilekan Gbenga Fasuyi & 2 others [2018] eKLR** where the Court stated inter alia 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; proposed 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 processes followed by the decision-maker are proper, and the decision is within the confines of the law, a Court will not interfere. "

We therefore pray that the Court finds that the Notice of Motion Application dated 10th November 2020 is not merited and that the said application is dismissed entirely with costs to the Respondents.

This is our humble prayer.

DATED AT MERU THIS……12TH……..DAY OF……MARCH….2021

J.M KIONGO

SENIOR LITIGATION COUNSEL

FOR: HON. ATTORNEY GENERAL

& DEPARTMENT OF JUSTICE

5. The 1st to 4th Respondents' grounds of opposition dated **3rd December, 2020** are reproduced herebelow without any alterations whatsoever.

1ST TO 4TH RESPONDENTS' GROUNDS OF OPPOSITION TO THE NOTICE OF MOTION DATED 10TH NOVEMBER, 2020

Take notice the 1st, 2nd, 3rd and 4th Respondents shall at the hearing of the Notice of Motion Application dated **10th November, 2020** oppose the same on the following grounds:

1. That Judicial Review deals with procedure and not the results.

2. That the orders sought are discretionary and can be denied even when warranted.

3. That the application is a misconceived and is a non-starter.

4. That the application is vexatious, frivolous, scandalous and an abuse of court process.

Reasons wherefore the Respondents pray that this application be dismissed with costs.

Dated at Meru this……. 3rd day of…….. December, …….2020

J.M. KIONGO

SENIOR LITIGATION COUNSEL.

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE.

6. The Interested Party's submissions are pasted herebelow without any alterations whatsoever.

INTERESTED PARTY SUBMISSIONS

1. Your lordship this JR is challenging and faulting the decision of the minister dated 1st September 2020. An appeal to the minister is a culmination of a well established law and procedure based on an act of parliament. In this case the relevant act is the land adjudication act cap 284 laws of Kenya. when an act of parliament lays down a certain procedure to be followed

it is mandatory that the procedure should be followed to the letter and spirit. The decision of the minister in this case was the logical conclusion to a matter that started with land committee hearing then followed by the arbitration board hearings and the AR objection. after hearing of the appeal to the minister the minister concluded that the land in issue 106 MAREMBO/RIANTHIGA AJUDICATION SECTION belong to the interested party.

My lord the decision by the minister should be faulted by this court if only , it is established that there was impropriety in the manner the minister conducted himself or herself. This court should not engage in interrogating the facts or the merit of the case. In a judicial review , which is not an appeal , the court should concern itself , with the process of decision making and not the merit or demerit of the case . the question the court should ask itself is whether there is anything to blame on the minister in the manner he or she arrived at the decision he or she made(and not the decision itself that was arrived at). The ministers decision was informed by all the hearings right from land committee hearings. The court should ask itself whether any law was breached during the hearings of the appeal or the principles of natural justice were violated especially against the respondent (exparte applicant). We submit that no law was bleached and the principles of natural justice were adhered to during the proceeding and in particular , the exparte applicant was given a hearing and aright to cross examine the interested party. We urge this court not to interfere with the decision of the minister because no impropriety has been demonstrated by the exparte applicant.

2. My lord we are guided by the principles set out at paragraph 40 to 47 page 8,9 and 10 of the judgment in MISC . CIVIL APPLICATION (JR) NO.59 OF 2014- REPUBLIC VERSUS NAIROBI CITY COUNTY, BERNADETTE GITARI , GUCHARN SINGH SIHRA, MAEVE MARY SIHRA ,DAVINDER SINGH BHARIJ AND SOREJ KUMARI BHARIJ . in this case the justice GV ONDUNGA summarized the ingredient that must be proved in a judicial review case , the judge in the judgment also provided what a judicial review is and what the judge in a judicial review should concerned himself with. At paragraph 43 of the judgment justice ONDUNGA quoting a judgment in MUNICIPAL COUNCIL OF MOMBASA VERSUS REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL NO.185 OF 2001 when he said ‘’**judicial review is 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’’**

3. My lord there is no time that the exparte applicant has ever been registered with 106 MAREMBO/RIANTHIGA ADJUDICATION SECTION.it is untrue on the part of exparte applicant to suggest in ground (1) in support of his notice of motion that the minister failed to recognize that the exparte applicant was the registered owner of 106 MAREMBO RINTHIG adjudication section. for all intends and purposes the exparte applicant was **ONLY recorded** with 106 MAREMBO RINTHIGA ADJUDICATION SECTION. The existence of the appeal to the minister could not allow the exparte applicant to be registered with the suit land until the appeal was heard and determine. When the minister gave its decision after hearing the exparte applicant and the interested party , the decision was in favour of the interested party. The minister issued the necessary orders to the chief land registrar informing him that 106 MAREMBO RIANTHIGA ADJUDICATION SECTION belonged to the interested party.

4. My lord as we have submitted earlier , the appeal to the minister is the logical end of an adjudication process. From the time the land committee hearing started. The exparte applicant made development on the contested land at his own risk. If there are any development by the exparte applicant on the suit land. He made the development knowing very well that the land had a dispute. After winning fraudulently at arbitration hearing and 60 days objection. the exparte applicant ought to have taken precaution now that the interested party had lodged an appeal to the minister . the exparte applicant now ought to remove the structures ,improvement or development on the suit land ,now that the land officially and formally belong to the interested party as per the decision of the minister. The exparte applicant is now a trespasser on the interested parties land 106 RIANTHIGA MAREMBO ADJUDICATION SECTION.

The exparte applicant contend that the decision of the minister was to the effect that , he was deprived of his property and in particular ancestral land. We must submit that the interested party has always maintained that the suit land was his ancestral land. The exparte applicant having loss in the appeal to the minister can no longer say that he has been deprived of his land. It is the interested party who is now cerebrating and he should do so because his land he has been deprived off by the exparte applicant for so long as come back to him through a legal process . The interested party infact could claim for mesned profit but this would not work because the suit land was under adjudication and full determination had not been made. Ground 2 in support of notice of motion is wanting in merit and the same should not be considered as having any probative evidence to persuade this court allow this JR.

5. We have already submitted that the minister accorded the exparte applicant and the interested party a chance to be heard . the interested party testified and the exparte applicant was given a chance to cross examine the interested party , the interested party called witness who testified and were cross examined by the exparte applicant. The exparte applicant complained that he was given a very short notice for hearing of the appeal to the minister. Evidence shows that he was served on 27th December 2018 and the hearing was slated for 3rd January 2019. The exparte applicant complained that he was not given enough time to call his ‘’witnesses’’ because his witnesses who were old had passed on. One wonders then where the exparte applicant would have picked witnesses if his witnesses had passed on. This could have achieved by couching new ‘’witnesses’’ .My lord the exparte applicant did not raise this issue during the hearing , he ought to have told the minister that he was not ready to proceed because he had no witnesses and he required time to avail them. The exparte applicant remained mute over this issue and continued with the proceeding comfortably . the issue of calling witnesses is an afterthought which should not be entertained by this court. Along this point my lord we wish to submit that this was an appeal , it did not require calling witnesses. However the issue of calling witnesses did not arise at the hearing and it should not be raised at this time of JR.

6. The reasons as to why, the interested party did not raise an objection at committee hearing was elaborately and carefully explained by the interested party. Originally the interested party was recorded with 106 MAREMBO RIANTHIGA ADJUDICATION SECTION During committee hearing. Mysteriously the interested parties name was removed from the record and that of the exparte applicant was put there instead. Infact the interested party came to know that his name had been removed when he found that they were some cases against the exparte applicant in respect of the suit land at committee hearing. It was too late for the interested party to lodge an objection and he awaited to go to the arbitration board. My lord at arbitrating board hearing the interested party was categorical that his name had been fraudulently removed from the adjudication record by non other than the exparte applicant. The arbitration board ordered and directed that the name of the interested party SHOULD be re-enstated on the register. This order was never implemented by DLASO , making the interested party to loose his case and land to exparte applicant see the decision of arbitration board proceeding attached herewith. There is no merit my lord in ground no.d in support of the exparte applicant substantive motion.

7. The exparte applicant has faulted the 1st respondent (the minister) for failing to visit the suit land and establish ownership of the land and the development thereon. The interested part contend and submit that indeed the minister visited the locus in quo and made various observation. We submit that this was an appeal and visiting the locus in quo was not very essential although the minister went an extra mile and visited the suit land. The exparte applicant is not candid enough to tell the truth. He is economic with the truth . at the hearing of the appeal the exparte applicant did not make an application that the suit land be visited by the minister. At the end of the day He did not complain that the minister had not visited the locus in quo. In any event my lord this is an issue of fact which the court should not concerned itself with. Ground no.e of exparte applicant substantive motion is wanting in merit and it is equally an afterthought.

8. We have pointed supra that the exparte applicant has been on the interested parties land for a very long time now. The decision of the minister came out to serve justice. Justice is two edged . in an adversarial system like ours one party is bound to loose and other party is bound to win , in the present case the minister pronounced that now LR.RIANTHIGA /106 is the property of the interested party. We fail to see the humanitarian crisis that will occur if the exparte applicant and his family and those who claim at his behest being ordered to move out of the interested parties land. After all the exparte applicant has been illegally and unlawfully occupying the interested party's land from around 2008 when the adjudication process commenced in Marembo rianthiga adjudication section is moving out of the suit land will relief the interested party for deprivation he has suffered at the hands of exparte applicant from around 2008.

There is no panic that they will be a breach of peace. Only the exparte applicant can cause a breach of peace. If the exparte applicant moved out of the suit land peacefully, no one is going to behave in a manner that is likely to cause a breach of peace. Of course if the exparte applicant does not wish to move out of the suit land peacefully, the law should take is cause. The police is there after all to keep peace. Justice is too edged and it cannot only be just if the exparte applicant is left to occupy and settle on the interested parties land illegally and unlawfully. The interested party has an equal right to his land. The issue of eviction after all should not be a concerned in a JR matter. It does not follow under the categories of issues that a JR should look at, when adjudging a JR.

9. My lord in conclusion, we submit that the exparte applicant as not on the balance of the probability proved his allegation. The ministers decision remain unchallenged or faulted. There is no impropriety on the party of the minister , in the manner the minister conducted the appeal to the minister by the interested party. The decision is sound , the court should not disturb it , the JR should be dismissed with cost.

10. We rest our submission and pray.

DATED AT CHUKA THIS 4TH DAY OF MARCH, 2021

DRAWN AND FILED BY

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M/S I.C MUGO & CO,

ADVOCATES FOR THE INTERESTED PARTY

7. This is one case where the parties involved are properly seized of the applicable law in Judicial Review Proceedings. They all agree that Judicial Review principally concerns itself with the Judicial making process rather than the decision reached and made by the decision maker. All the authorities they have proffered in their submissions are good authorities in their facts and circumstances. All the assertions they have proffered are reasonable assertions in their facts and circumstances. Courts of law in civil matters reach their decisions on a balance of probabilities.

8. I will not regurgitate the principles contained in the authorities offered by the parties to buttress their assertions because they have been reproduced in full in their submissions which appear in an earlier part of this judgment.

9. In terms of the provision of order 21, Rule 4 of the Civil Procedure Rules, the claim by the ex-parte applicant is that the decision of the minister in this case was made through a process that was procedurally unfair, was irrational, and was made in ignorance of relevant law and considerations. The respondents and the Interested Party have counter-argued that the minister's decision was procedurally fair, was rational and did not evince any evidence of his ignorance of the law. For their diametrically incongruent assertions, the parties ask the court to be persuaded by their arguments. For the ex-parte applicant, he wants the court to uphold his position. On the other hand, the Respondents and the Interested Party have urged the court to dismiss the suit. The only issue for determination is if or if not the Judicial Review orders sought

by the exparte applicant are deserved.

10. In their grounds of opposition the respondents, assert that:-

a) Judicial Review deals with procedure and not the results.

b) The orders sought in Judicial Review are discretionary and can be denied even when warranted.

c) The application is misconceived and a non-starter.

d) The application is vexatious, frivolous and an abuse of the court process.

11. Grounds a and b are a restatement of some of the principles which guide the Judicial Review process. However, ground b is not completely correct. Although Judicial Review orders are discretionally, they cannot be handled in a capricious and non-judicial manner. Grounds c and d are veritably nebulous and do not invite themselves to a carefully and legally based finding.

12. Many of the issues canvassed by the exparte applicant do challenge the decision made by the minister and not the decision making process. He does not deny that he was allowed to participate in the proceedings which culminated in the impugned decision. In my view, however, the scope of his participation may have been extenerated and grossly and veritably escoriated by the extremely short notice of five days he was granted by the minister before the appeal was heard. Every reasonable Kenyan will agree that five days were not enough for the exparte applicant to adequately prepare his case and if necessary to seek legal advice. On this ground alone, I find that the exparte applicant's right to a lawful, reasonable and fair hearing was trampled upon by the minister. Having made this finding, I don't find it necessary to delve into the other issues raised by the parties.

13. In Judicial Review Proceedings, a court of law may not direct the minister on how to handle an appeal. The minister must always be guided by the law. This includes if or if not the minister decides to visit the suit land.

14. In the circumstances, the following orders are issued:

a) This suit is upheld with the result that the minister's decision is hereby quashed and it is directed that the appeal be heard by another officer and not the one who made the impugned decision.

b) The Exparte Applicant and the Interested Party will bear their own costs in view of the fact that the Exparte Applicant and the Interested Party are not to blame for the decision made by the minister. In short, no costs are awarded.

DELIVERED IN OPEN COURT AT CHUKA THIS 23RD DAY OF JUNE, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Kiongo for the Respondents

Advocate for Interested Party Absent

Advocate for the ex-parte applicant Absent

Interested Party present

P. M. NJOROGE,

JUDGE.