Republic v Cooperative Tribunal; Borop Multipurpose Co-operative Society Limited & 2 others (Interested Parties); iongok & 10 others (Ex parte Applicants) (Judicial Review Application E010 of 2024) [2025] KEHC 10305 (KLR) (1 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10305 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

JUDICIAL REVIEW APPLICATION E010 OF 2024

SM MOHOCHI, J

JULY 1, 2025

IN THE MATTER OF: ARTICLE 65, 159 AND 162 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT NO.19 OF 2011

AND

IN THE MATTER O F THE PART XV OF THE CO-OPERATIVE SOCIETIES ACT

AND

IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR AN ORDER PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF: THE COOPERATIVE TRIBULNAL CAUSE 06 OF 2010 BETWEEN BOROP MULTIPURPOSE COOP SOCIETY LTD AND SONAIYA SERSER & 3 OTHERS.

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE COOPERATIVE TRIBUNAL ..... RESPONDENT

AND

BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED . INTERESTED PARTY

CHIEF LAND REGISTRAR ..... INTERESTED PARTY

LAND REGISTRAR NAKURU ..... INTERESTED PARTY

AND

MOSES K SIONGOK ..... EX PARTE APPLICANT

JOEL K YEGON ..... EX PARTE APPLICANT

CAROLINE CHELANGAT TUIGONG ..... EX PARTE APPLICANT

JAMES KIPRUTO LANGAT ..... EX PARTE APPLICANT

REUBEN MARITIM BUSIENEI ..... EX PARTE APPLICANT

DAVID KIPRONO NG'ENO ..... EX PARTE APPLICANT

BEATRICE CHEPKOSKEI CHUMO ..... EX PARTE APPLICANT

CHELULE ARAP ELIBO ..... EX PARTE APPLICANT

DOUNE FARM LIMITED ..... EX PARTE APPLICANT

JOEL C RONNO ..... EX PARTE APPLICANT

TAITA ARAP TOWETT ..... EX PARTE APPLICANT

RULING

1. On 10th May, 2024 this Court granted leave to the *ex-parte* Applicants to initiate judicial review proceedings.

2. The *ex-parte* Applicants consequently filed the judicial review Application on the 24th of May 2024pursuant to the provisions of Order 53 Rules 1(1), (2) and (4), rule 2 and Rule 3 of the *Civil Procedure Rules*, and Section 8(2) and 9 of the *Law Reform Act*, Cap 26, Laws of Kenya and all other enabling provisions of the law.

3. It is the *ex-parte* Applicants case that;

    i. Spent

    ii. That this Honourable Court be pleased to issue judicial review orders of certiorari to quash the Respondents decision of the 30th November 2023 in which it ordered:

        a. That the Orders issued by the Cooperative Tribunal at Nairobi on the 30th March, 2015 are varied to the extent that the Respondent surrenders to the Claimants the title to LR no. 9045/10 or the title to subdivision from LR no 9045/10.

        b. Or in the alternative the cancellation of the titles originating from the subdivisions of LR no 9045/10 and order the registrar of titles to restore the Claimant's original title to LR no 9045/7 which is the mother title, for a fresh subdivision of the society land to their members.

iii. That this Honourable Court be pleased to issue judicial review orders of prohibition prohibiting and/or preventing Respondent and the Interested Party, its agents, assigns, employees or anyone claiming under it from acting on and for implementing the Respondents decision of the 30th November 2023 in which it ordered:

a. That the orders issued by the Cooperative Tribunal at Nairobi on the 30th March, 2015 are varied to the extent that the Respondent surrenders to the Claimants the title to LR no. 9045/10 or the title to subdivision from LR no 9045/10.

b. Or in the alternative the cancellation of the titles originating from the subdivisions of LR no 9045/10 and order the registrar of titles to restore the Claimant's original title to LR no 9045/7 which is the mother title, for a fresh subdivision of the society land to their members.

iv. That the costs of this suit be provided for.

4. The Application was opposed by the Respondent that raised grounds of opposition dated 10.6.24 arguing that the instant Application was fatally defective having been filed out of time.

The *ex-parte* Applicants case

5. It is the *ex-parte* Applicants case that having been granted leave to file as substantive judicial review motion on the 10th June 2024, that;

i. The Application is premised on grounds in the Annexed Statutory Statement of fact and an Affidavit of support sworn by James Kipruto Langat dated 24th May 2024.

ii. The *ex-parte* Applicants depone that the instant application is a substantive motion seeking judicial review orders and that it is their wish to rely on the Statutory Statement of Facts dated 8th April, 2024 and annexed to their application for leave to file the instant application.

iii. Furthermore the *ex-parte* Applicants wish to rely on the Affidavit in Verification of Facts dated 8th April, 2024 and the annexures thereto as annexed to the application for leave to file the instant application.

6. In their filed written submissions dated 19th May 2025 the *ex-parte* Applicants isolate the following issues as necessary for determination;

i. Whether the Applicants have the right to institute judicial review proceedings.

ii. Whether the Applicants have the right to be heard.

iii. Whether the Tribunal's decision is barred by the doctrine of res judicata.

iv. Whether the Cooperative Tribunal had the jurisdiction to order cancellation of titles of land.

v. Whether the Cooperative Tribunal acted in ultra vires by ordering the cancellation of titles.

vi. Whether the Applicants are entitled to the orders sought.

7. In the 1st issue the *ex-parte* Applicants submit thatSection 7 of the *Fair Administrative Action Act* states;

i. Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

a. a Court in accordance with section 8; or

b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

ii. A Court or tribunal under subsection (1) may review administrative action or decision if;

(a) The person who made the decision-

i. Was not authorized to do so by the empowering provision;

ii. Acted in excess of jurisdiction or power conferred under any written law....

8. Reference is made to the case of *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 3 others ex-parte Mwalulu & & others* [2004] KEHC 1337 (KLR), the learned judges quoted *Administrative Law* by Wade 8 Edition, which outlined the scope of judicial review to be:-

> "By obtaining orders of the court in the form of mandamus certiorari or prohibition the Crown fread Republic could ensure that public authorities carried out their duties and that inferior tribunals kept within their Jurisdiction. They were essentially remedies of ensuring efficiency and maintaining order in the hierarchy of courts, commissions and authorities of all of all kinds."

9. That it is thus *ex-parte* Applicants submission that, they do have a right to institute judicial review proceedings, having been aggrieved by the decision of the Co-operative Tribunal. On the 2nd issue as to whether the *ex-parte* Applicants have the right to be heard, Section 4(2) of The *Fair Administrative Action Act*, 2015 states;

> "(2) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
>
> (a) Prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> (b) An opportunity to be heard and to make representations in that regard.."

10. That, the above position was echoed by the Court in the case of *Catherine Chepkemol Mukenyang v Evanson Phemei Lomaduny & another* [2022] eKLR, where the Court quashed the unlawful impeachment proceedings against the Petitioner by the Respondents.

11. That it is trite that in every Court proceeding parties thereto are given an opportunity to be heard. In the instant case, the Applicants together with several others who were members of the 1st Interested Party (Borop Multipurpose Co-operative Society Ltd) were allocated individual parcels and registered as;

a. James Kipruto Langat- Mau Summit/Sachangwan Block 10/133

b. Caroline C. Tuigong- Mau Summit/Sachangwan Block 10/140

c. Moses A. Bi-Mau Summit/ Sachangwan Block 10/130

d. Kipketer A. Maritim-Mau Summit Sachangwan Block 10/166

e. Susan Chelangat Bett-Mau Summit/Sachangwan Block 10/92

f. Paul K. Tuigong- Mau Summit/Sachangwan Block 10/8

g. Chemeyet E. Arap Sang-Mau Summit Sachangwan Block 10/64

h. David K. Ngeno-Mau Summit/Sachangwan Block 10/107

i. Beatrice C. Chamo-Mau Summit/Sachangwan Block 10/197

j. Chelule Arap Elibo-Mau Summit Sachangwan Block 10/185

k. Reuben M. Busienei- Mau Summit/Sachangwan Block 10/96

12. That, it is noteworthy of the persons listed above, none were party to Co-operative Tribunal Case No. 06 of 2010, yet the effect of the Tribunal's order restoring LR no. 9045/7 is to nullify and/or cancel their titles without being accorded an opportunity to be heard.

13. *Ex-parte* Applicants submit that they were condemned unheard hence the reason for this Court to grant the orders sought.

14. On the 3rd issue as framed the *ex-parte* Applicants contend that Section 7 of the *Civil Procedure Act* states that:-

> " no court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit and between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

15. That in this instance, the Respondent pronounced itself in a matter already adjudged by the Nakuru High Court in Nakuru HCC No. 102 of 2004 consolidated with Nakuru HCC No. 41 of 2006 where the Court found no fault in the acquisition of title arising out of Mau Summit/Sachangwan Block 10 (Borop).

16. That, the doctrine of res judicata is to ensure finality in court matters. It prevents multiple law suits based on the same issue. It was therefore an abuse of the court process for the Respondent to pronounce itself on a matter already decided upon and more so by a superior court.

17. On the 4th Issue as to whether theRespondent had the jurisdiction to order cancellation of titles of land? It is submitted that, the *Cooperative Societies Act* establishes the Cooperative Tribunal under Section 77 which is mandated to under Section 76 to handle disputes concerning the business of a co-operative society;

(1)

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society, or

(c) between the society and any other co-operative society.

2) A dispute for the purpose of this section shall include-

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.

(c) a claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority.

18. That Section 80 of the *Land Registration Act* states that;

> "(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."

19. As to who has the jurisdiction to order cancellation of titles, the *ex-parte* Applicants submits that the Respondent lack jurisdiction and reference is made to the case of *Donald Kawinzi Muteti v Mali Ya Mungu Mutel & another* 120201 KEELC 1683 (KLR), the learned Judge noted that;

> "The issue of whether the Cooperative Tribunal has jurisdiction to settle land disputes amongst members of a Cooperative, or between members and a Cooperative is now settled. Indeed, this court associates itself with the findings of the court in the case of *Ol Kalaou West Farmers' Co-operative Societies Lid v David Kibue Kinyanpui* [2019] eKLR ...

20. Reliance is placed on the case of *Paul Mutua Mutwtwa v Kimeu Kyumba and 2 others* Machakos HCCC No. 438 of 2012 where it was held:-

> "The provisions of Section 76 of the *Cooperative Societies Act*, No. 12 of 1997 do not contemplate the Cooperative Tribunal to determine the ownership of land even if the dispute is between members, present, past, deceased and even if it was, the same has been superseded by the enactment of article 162(2) (b) of the *Constitution* and the creation of the Environment and Land Court. Thus, this court has jurisdiction to entertain this matter and the preliminary objection is dismissed."
>
> That, Indeed there is no evidence before me that points to the fact that the dispute herein concerned "the business of a Co-operative Society" (emphasis mine). The authorities cited herein by the Appellant in support of this argument are distinguishable to the present case.

21. Further reference is made to the case of *Toratio Nyang'au & 4 Others v Lietego FCS Limited* (2011) eKLR Maraga J., (as he then was) observed

> "In its effort to resolve the matter the Tribunal attempted to define the term "dispute". That is where, in my view it started erring. The operative word in that section is "business". So the Tribunal should have determined whether or not the dispute before it concerned the "business" of the respondent society.
>
> The *Cooperative Societies Act* does not define the term "business". But we know that cooperative societies are business organizations owned and operated by a group of individuals for their own mutual benefit. Although we are not told what the respondent was established to do, I am, however, certain that resolving its land disputes with third parties whether or not they are its members cannot have been one of the businesses of the respondent society. In the circumstances the land ownership dispute in this case did not fall

within the purview of Section 76 of the *Societies Act* and the Tribunal had, therefore, no Jurisdiction to entertain the matter.

Even if I am wrong in my understanding of Section 76 of the *Cooperative Societies Act* I am certain that as the land in this case is registered under the Registered Land Act. Cap 300 i clear from Section 159 thereof that the Tribunal had no jurisdiction to try the matter"

In this regard, it is my finding that it is only this court and the Magistrate's courts that have jurisdiction to determine disputes relating to ownership, possession and title to land, and not the Cooperative Tribunal.

Respondent, 2nd and 3rd Intrested Parties Case

22. The Respondent opposed the Application by filed grounds of opposition dated 10.6.24 and filed written submissions on its own behalf and on the behalf of the 2nd and 3rd interested parties dated 13th May 2025 maintaining that the application offends the provisions of Order 53 of the *Civil Procedure Rules* and Section 9 of the *Law Reform Act* which states as follows:

> " In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law, and where that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law, and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by late for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

23. That Order 53 rule 2 states;-

> " Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

24. The Respondent refined only two issues as to whether the Application is merited and who bears the costs and submits that,the instant application is not merited hence should be dismissed.

25. That the application offends, stated above, the provisions of Order 53 r 2 of the *Civil Procedure Rules* and Section 9 of the *Law Reforms Act*. In this regard reliance is placed on the case of *Republic v Salim & 2 others; Gami (ex-parte Applicant)* (Environment and Land Judicial Review Case E006 of 2022) [2024] KEELC 5440 (KLR) (23 July 2024) (Judgment). J. Matheka in dismissing the suit stated as hereunder:

> " However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provisions set out in Section 9(3) of the Late Reform Act (above), and it is trite law that rules made under statute, cannot override a statutory provision. The *Law Reform Act* itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6-month limitation

period. The applicant ought to have filed an appeal against the decision of the 3rd respondent as opposed to a judicial review. I find this application is not merited and is hereby dismissed with costs to the respondents. It is so ordered".

26. In addition to the above Section 81 of the *Cooperative Societies Act* states that any person aggrieved by the decision of the Cooperative Tribunal Decision shall within 30 days of the award appeal to the High Court against such decision. In the instant case the applicants never appealed against the impugned decision hence this honorable court lacks jurisdiction to hear and determine this suit.

27. The court is urged to consider the decision of *Thomas Akinyl Apela v Lolwe Cooperative Society* [2020] eKLR. J Ombwayo in dismissing the suit held as follows:

> " The appeal was filed on 18/6/2016 more than one year after the decision of the tribunal. The appellant did not comply with Section 81 of the Act. The suit was filed out of time".

28. It is the Respondent submission that they acted within its jurisdiction and its decision was never tainted with any illegality. That the applicants have failed to avail evidence to the contrary. Placing reliance on the case of *Republic v Cooperative Tribunal & 2 others ex-parte Jackson Wekesa Abala* [2019] eKLR in which J Nyamweya stated thus:

> " In considering the said issues, it is imperative at the outset to delineate the parameters of this Court's powers in judicial review. The broad grounds for the exercise of judicial review Jurisdiction were stated in the case of *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300 at pages 303 to 304 thus:
>
> "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.....

29. Finally owing to the hopelessness of the Application by lacking evidence it is their submissions that they should be awarded costs.

The 1st Interested Party's case

30. The 1st Interested party opposed the Application in its written submissions dated 27th June, 2025 that, it remains undisputed and is common ground is that the *ex-parte* applicants are engaged in the multiplicity of litigations as follows:

    a. Before this Honourable court seeking to quash the decision of the 1st respondent the Honourable Co-operative Tribunal delivered on the 30th November, 2023 vide the Judicial Review case herein dated the 8th April, 2024(Judicial Review dated the 8th April,2024).

    b. Before the Co-operative Tribunal at Nairobi Case No. 6 of 2010 *Sonoiva Serser & 3 Others v Borop Multi-Purpose Co-operative Society Limited* they filed an application dated 8th April,

2024 seeking the Honourable tribunal to set aside and/or vary its ruling of 30 November, 2023 which application is pending hearing (a review dated the 8th April, 2024).

c. Before the High Court of Kenya at Nairobi Misc Application No. E 313 of 2024 *Sonoiva Serser & 3 others v Borop Multi-Purpose Co-operative Society Limited vide* an application dated the 8 April, 2024 seeking leave to lodge appeal (against the Honourable Tribunal ruling of the 1" respondent delivered on the 30th November, 2023) out of time, which application was subsequently withdrawn on the 8th April,2025.

31. That, tied to the multiplicity of actions dated the 8th April, 2024 is that therefore the *ex-parte* applicants were engaged in an abuse of the court process. Reference being made to the case of *Water Front Holdings Limited v Registrar of Titles Mombasa & another* (2022), the court held that:

> " Further, it is my view that Judicial Review remedies being sought herein are not the most efficacious in the circumstances. It is submitted that already there is Appeal No. 88 of 2019 pending. In my view, that appeal should be the most efficacious way of addressing the *ex-parte* applicant's grievance which in my view questions the merits of the decision of the Judge Yano in ELC No. 126 of 2019. It is not a proper exercise of Judicial Review process to litigate over this application when there is a pending case at the Court of Appeal...."

32. The 1st interested Party further relies on the case of *Diani Properties Limited & 2 others v Business Premises Rent Tribunal; Jurgen Fuks t/a Shakatak Disco* 202 where the court in dismissing a Judicial Review Similar to this with several application in other courts noted that;

> " This court notes that several applications pending before, the BPRT and which need to be resolved and determined. Let the tribunal do its work. There is also ELC 4 of 2021 which has also been pending before this court on the mother title or lease which has been pending in court for some time which parties need to prosecute with diligence for closure. The upshot is that the judicial review application herein is not merited and the same is dismissed..... ".

33. That, the practice of filing new and separate cases despite the existence of a similar case relating to the same subject matter amounts to an abuse of the court process. Courts usually frown on this practice since it leads to unnecessary backlog of cases and a waste of the precious judicial time.

34. The 1st interested party refers to the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) KLR 229, where the court of appeal held;

> " The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexations or oppressive"

35. Further fortification of the abuse of process argument cites the case of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others* 12022] eKLR quoting paragraphs *29*, *30*, 31and 32 of the ruling-

> " 29. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court process. In

other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process"

30. The point to underscore is that a litigant has no right to purse paripasua more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks

31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice....."

32. Abuse of court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society."

36. That additionally, it is the interested party case that the judicial review litigation herein is fundamentally flawed since the *ex-parte* applicants are inviting this court to review the factual determinations or the merits of the decision, rather than the legality or procedural propriety of the decision-making process. Judicial review is not the appropriate remedy. Judicial review is concerned with the processes by which a decision is made, not with the correctness of the decision itself. Therefore since the *ex-parte* applicant's grievances pertain solely to factual determinations and not to any procedural impropriety or illegality, the application for judicial review is misconceived and should be dismissed. If the issue is that the Co-operative Tribunal get its facts wrong or that the J.R No.9045/7 was not part of the pleadings before the Tribunal, then those could constitute grounds of appeal and not for Judicial Review as it was a matter within the realm of the merits of the decision making.

37. That the orders sought are discretionary in nature. In *Halsbury's Laws of England* 4 Edition Volume 2 Page 508 where it is stated that;

> " Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining.

38. The Court has held *Republic v Cabinet Secretary for Interior & Co-ordination of National Government & another* (*supra*) above,

> " .....The discretionary nature of the Judicial Review remedies sought in this application means that even if a Court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include

where the applicant's own conduct has been unmeritorious or unreasonable, or, where the decision is taken in public interest....."

39. That in the case of *Water Front Holdings Limited Registrar of Titles Mombasa & another, Kandie (Interested Parts)* (Judicial Review 13 of 2021) (2022) KEELC 13694 (KLR) (25 October 2022) (Ruling), the Court held.

> "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 court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1st Respondent"

40. That, in the case of *Seventh Day Adventist Church(East Africa) Limited v Permanent Secretary Ministry of Nairobi Metropolitan Development & Assther* [2014]KLR the court held that

> "Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits....."

41. That the *ex-parte* applicant's contention that the Co-operative Tribunal lacked jurisdiction over the land dispute among Co-operative members is untenable. The dispute in question pertains to the affairs of the cooperative society, specifically the allocation of land to its members, which squarely falls within the ambit of the Tribunal's jurisdiction ns stated in Section 76 of the *Co-operative Societies Act*. Section 76(1) of the Act which provides that disputes concerning the business of a co-operative society, arising among members, past members, or persons claiming through them, shall be referred to the Tribunal. The term "business of a co-operative society" has been interpreted broadly to include activities such as land allocation to members, which is a common function of housing and land-based Co-operatives such as the Borop Multipurpose Co-operative Society Limited.

42. That in the case of *Innathan Maingai Ninguna & 12 others v Samuel Mwaura & 3 others* 2010 KLR the court noted:

> "would appear the two avenues could be approached as alternative method of dispute resolution mechanism in cooperative societies disputes. In other words, the fact that there is an alternative remedy did not oust the Cooperative Tribunal's jurisdiction to hear the disputes"

43. Further reference is made to the case of *Kibus Distillers Limited & 4 others v Benson Ambati Adega 43 others* (2020) KLR wherein the Court of Appeal [Makhandia J] emphasized this principle and stated the following regarding multifaceted pleadings; -

> "To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine

a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dieta that is *Speaker of the National Assembly v James Njenga Karume*[1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....."

44. And in the the case of *Republic v Inland Revenue Commissioner ex-parte Opman International* 1986 1ALL ER 328, the Court held that the fact that there is an alternative procedure available to address a particular grievance does not mean one cannot apply for the remedy of Judicial Review. The Court stated that;

> "Judicial Review is however the procedure of last resort and is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim....."

45. That in light of the foregoing the 1st Interested Party submits that the application for Judicial Review ought to be dismissed as inappropriate as there are other Litigations in other appropriate forums and specifically before the Co-operative Tribunal for review being the Co-operative Tribunal at Nairobi Case No.6 of 2010 which is an active litigation seeking to review the Co-operative Tribunal orders issued on the 30th November, 2023, the same orders which are also being challenged in the instant judicial review case. The very essence of judicial review is to correct procedural illegality, not to re-evaluate substantive findings already before the Co-operative Tribunal for review. Discretion to grant certiorari must be exercised sparingly where alternative efficacious remedies exist; and permitting this judicial review would amount to forum-shopping and an abuse of this court process. Accordingly, this Court ought to decline jurisdiction and leave the matter for the appropriate forum/tribunal.

Analysis and Determination

46. The issue for determination is whether the *ex-parte* Applicants application is competent or not and whether the *ex-parte* Applicants are entitled to the orders sought.

47. Judicial review jurisdiction is a special Jurisdiction which is neither Civil nor Criminal and it is governed by Section 8 and 9 of the *Law Reform Act* which is the substantive law while Order 53 of the *Civil Procedure Rules* set out the procedural law. By those provisions the court is mandated to issue orders of mandamus, certiorari or prohibition in appropriate judicial review proceedings.

48. Section 9 of the *FAAA* makes provision for judicial review. In order to appreciate the full import of the provision, it is necessary to reproduce the entire Section 9 as hereunder:

    i. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution*.

    ii. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

iii. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

iv. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

v. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

49. A person aggrieved by an administrative action or quasi-judicial decision may apply to this Court, for review of such action or decision. Where such administrative action or decision results in denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights has been denied, such person may pursuant to Article 22 of the *Constitution*, institute court proceedings. An order of judicial review is one of the appropriate reliefs that this Court may grant, under Article 23.

50. Applications for prerogative orders have a limitation period. The *Law Reform Act* Cap 26 Laws of Kenya, provides as follows at Section 9 (3):-

> " In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law: and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

51. The above provision is echoed in the *Civil Procedure Rules, 2010*, which in Order 53 rule 2 provides as follows:-

> " Order 53 Rule 2 – Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act: and where the proceedings is subject to appeal and the time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

52. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of impugned decision. The decision of the Respondent that is sought to be quashed is dated 30th November 2023. This Decision was a Review of a decision dated 30th March 2015.

53. This application for leave was filed on 24th of May 2024. The leave was granted on the 10th of June 2024 and the Applicants filed the Application for judicial Review on the 24th June 2024 the Application dated 24th June 2024 was filed within the statutory timelines but is bereft of any evidence and there is a futile attempt to invite the court to refer to the statement of facts as filed in the motion for leave.

54. That the Onus was upon the *ex-parte* Applicants to file together with their substantive motion a statement of facts together with a detailed verifying Affidavit including such an impugned ruling sought to be quashed.

55. This court cannot import spent and exhausted pleadings as the basis of the review.

56. One would wonder that the impugned ruling under attack was a review of a decision by the Respondent dated 30th March, 2015 which is currently not in issue before this court as to its legality or otherwise. The decision by the Respondent dated 30th March, 2015 was never challenged on Appeal or review and its legality and lawfulness remains unimpeached.

57. This court finds that, the Application for judicial review herein lack requisite evidence that would persuade this court to grant reliefs sought, a case in point is the supporting affidavit of James Kipruto Langat, dated 24th June 2024 that depones that,the *ex-parte* Applicants wish to rely on the Statutory Statement of Facts dated 8th April, 2024 and annexed to their application for leave and the *ex-parte* Applicants further wish to rely on the Affidavit in Verification of Facts dated 8th April, 2024 and the annexures thereto as annexed to the application for leave to file the instant application.

58. While the failure to file the Verifying, Affidavit is itself not fatal and under the circumstances the court ought to consider the supporting Affidavit filed together with the substantive motion.

59. The attempted reliance on pleadings filed in the motion seeking leave cannot pass which motion is spent and exhausted and the same does not form part of the pleadings envisioned underSection 8 and 9 of the *Law Reform Act*.

60. The Court in *Sabina Zaverio Masaku v County Secretary, County Government of Meru & 2 Others* [2021] eKLR while dealing with a similar issue stated thus;

> " My understanding is that facts must exclusively be contained in a verifying affidavit and whose omission makes the application and proceedings fatally defective as was held in *Tana River Pastoralists Development Organization & 4 Others v National Environment Management authority & 6 Others* [2009] eKLR.
>
> However, it should also be noted the *Tana River Pastoralists cases* (*supra*) was determined pre-2010 Constitution and before judicial review was elevated into a constitutional right governed by Article 22, 23 and 47 of the *Constitution*.
>
> In light of the above developments and given a constitution must under Article 259 be interpreted, as if law is always speaking, I am constrained to find the omission curable under Articles 22 and 159 of the Constitution as read together with Section 1A and 1B of the *Civil Procedure Act*. The supporting affidavit to the motion dated 7.2.2020 suffices under the circumstances."

61. The import of a Verifying Affidavit in judicial review proceedings was discussed by the Court of Appeal in *Commissioner General, Kenya Revenue Authority thro' Republic v Silvano Onema Owaki T/A Marenga Filling Station* [2001] eKLR, where it was stated as follows;

> " We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review."

62. The court in *Commissioner General*(*supra*) relied on the *Supreme Court Practice 1976* Vol. 1 paragraph *53*/1/7 which stated: -

> " The application for leave "By a statement". The facts relied on should be stated in the affidavit (See *R. v Wandsworth J.J. EXP. Read* (1942) IKB 281."

63. This position was reinforced in the case of *Republic v Busia Chief Magistrate and 2 Others Exparte - Mathias Murumbe Makokha* [2016] eKLR where the Court restated that.

> " the legal position on Judicial Review remains that it is the Verifying Affidavit not the statement to be verified which is of evidential value".

64. This thus leads be to the inevitable conclusion that the Application contravenes the provisions of Order 53 r 2 of the *Civil Procedure Rules* and Section 9 of the *Law Reforms Act*. reference is made to the case of *Republic v Salim & 2 others; Gami (Exparte Applicant)* (Environment and Land Judicial Review Case E006 of 2022) [2024] KEELC 5440 (KLR) (23 July 2024).

65. The *ex-parte* Applicants have failed to demonstrate by way of evidence that, the reviewed ruling by the tribunal is illegal, irrational and tainted with procedural any impropriety hence their application is frivolous, vexations and an abuse of the court process.

66. The *ex-parte* Applicants equally failed to demonstrate as to why they never preferred an Appeal as is provided for under the *Cooperatives Act*.

67. It is noteworthy that the underlying decision by the Respondent dated 30th March, 2015 not in contest now, has never been reversed and while the same revolves on the affairs of the 1st interested party and its assets, the Respondents therein were to return documents in their possession relating to the cooperative they were once leaders of. I further note that, the proper forum to adjudicate disputes relating to ownership and use of land is the environmental and land court.

68. I thus find the Application dated 24th June 2024 to be without merit and the same is dismissed with costs to the Respondent, the 1st, 2nd and the 3rd Interested Party.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 1ST DAY OF JULY 2025.

MOHOCHI S.M.

JUDGE.