



**Mukembo (On Behalf of 21 others) v Attorney General & another; Nthakanio (Deceased) Represented by Albert Njeru Gachoni & 2 others (Interested Parties); Nyaga & 3 others (Proposed Interested Parties) (Environment and Land Judicial Review Miscellaneous Application 3 of 2014) [2025] KEELC 3911 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3911 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION 3 OF 2014**

**AK BOR, J**

**MAY 9, 2025**

**BETWEEN**

**JOSPHAT NYAGA MUKEMBO (ON BEHALF OF 21 OTHERS) ..... APPLICANT**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**MINISTER FOR LANDS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**FRANCIS NJERU NTHAKANIO (DECEASED) REPRESENTED BY ALBERT NJERU GACHONI ..... INTERESTED PARTY**

**RUGANO NTHIGA ..... INTERESTED PARTY**

**LANDS REGISTRAR, MBEERE DISTRICT ..... INTERESTED PARTY**

**AND**

**DOMINIC NJERU NYAGA ..... PROPOSED INTERESTED PARTY**

**AGOSTINO NGARI NJERU ..... PROPOSED INTERESTED PARTY**

**PETER MURIITHI NJERU ..... PROPOSED INTERESTED PARTY**

**JOHN NYAGA ..... PROPOSED INTERESTED PARTY**



## RULING

1. The 1<sup>st</sup> Interested Party, Albert Njeru Gachoni who represents the late Francis Njeru Nthakanio raised a preliminary objection to the applications dated 30/9/2020, 30/4/2021, 19/4/2021, 13/1/2023 and 20/7/2023. The objection was premised on grounds that the applications are fatally defective and an abuse of the court process. Further, that judicial review proceedings are sui generis and that after delivering judgment on 9/6/2016, this court became functus officio and that no other proceedings can be entertained in this matter since there is already a judgment in the matter.
2. In order to appreciate the issues raised in the preliminary objection, a brief background of the matter is necessary. This suit was instituted by the applicants, Josphat Nyaga Mukembo on behalf of 21 others vide a judicial review application dated 4/5/2012 which sought to have the decision of the 2<sup>nd</sup> respondent, the Minister for lands, dated 27/10/2011 in Minister's Appeal No. 258 of 2003 quashed on the claim that it deprived the applicants of their property without a reasonable cause and that the decision was unreasonable, irregular and against the rules of justice. They also sought an order to prohibit the Land Registrar, Mbeere District from registering land parcels Mbeere/Mbita/2XX0 to 2XX3, 2XX7 and 2XX9, 2XX4 to 2XX0, 2XX9, 2XX1, 2XX6, 2XX6 to 2XX9, 2XX2 to 2XX2, 2XX0, 2XX2, 2XX2, 2XX4 and 4XX2 in favour of the 1<sup>st</sup> Interested Party as well as orders to stay registration of the disputed parcels of land.
3. Judgment was delivered on 9/6/2016 in favour of the applicants. The applicants filed the application dated 30/9/2020 seeking to remove the restrictions on the disputed parcels of land and orders directed at the Land Registrar to effect the transfer of the suit parcels of land to the respective beneficiaries, which in their view was to implement the court's judgment. That application triggered the myriad applications which are the subject of the preliminary objection.
4. The application dated 30/4/2021 was filed by Dominic Njeru Nyaga, Agostino Ngari Njeru and Peter Muriithi Njeru, who sought to be joined as interested parties in the application of 30/9/2020 as they claimed that they were not made party to the judicial review proceedings despite being the registered proprietors of land parcels 2XX1, 2XX4 and 2XX9. That application was allowed on 8/12/2021.
5. The application dated 19/4/2021 was filed by Josphat Nyaga Mukembo seeking to change advocates. The application dated 13/1/2023 was filed by the 2<sup>nd</sup> to 22<sup>nd</sup> applicants seeking to expunge all parties who were not part of the judicial review proceedings from the record.
6. The application dated 20/7/2023 was brought by John Nyaga, the 4<sup>th</sup> Interested Party, who claimed that he was the registered owner of Mbeere/Mbita/2185. He sought to have the judgment delivered 9/6/2016 set aside because he was not made party to the proceedings.
7. Returning to the preliminary objection, the court directed parties to file and exchange written submissions which it has considered. On 22/10/2024, the 2<sup>nd</sup> to 21<sup>st</sup> applicants withdrew their submissions and instead chose to support the preliminary objection. The rest of the parties filed their respective submissions.
8. The 1<sup>st</sup> Interested Party, Albert Njeru Gachoni, submitted that this was a judicial review application in which judgment was rendered on 9/6/2016. He urged that judicial review proceedings are sui generis which in essence means that no other proceedings can take place in the matter other than the special proceedings provided for under Article 47 of *the Constitution*, the Fair Administrative Actions Act, the *Judicature Act*, the *Law Reform Act* and the general supervisory jurisdiction of the High Court over



subordinate courts and tribunals both judicial and quasi-judicial and which are procedurally brought under Section 9 of the *Fair Administrative Action Act* and Order 53 of the Civil Procedure Rules. He argued that the applications filed in this matter are under other provisions of the law and cannot be sustained in these proceedings.

9. Further, he submitted that this court became functus officio once it delivered judgment and that no other proceedings can be entertained in the matter as there is already a judgment. He added that whereas courts may generally entertain applications even after rendering judgment, the applications must be seeking to perfect the judgment and not dismantle it or open a new front of litigation as in this case. He went further to argue that this still has to do with the special nature of judicial review proceedings. He cited several decisions in support of this point and urged the court to strike out the applications with costs.
10. Josphat Nyaga Mukembo, the 1<sup>st</sup> applicant, submitted that an application such as his application dated 19/4/2021 could not be said to be res judicata because it was application for counsel to come on record after judgment. He argued that any objection to that can only be through a replying affidavit raising grounds why leave should be denied and that counsel can only be denied leave to come on record based on issues of fact which cannot be argued through a preliminary objection. He implored the court to dismiss the preliminary objection and allow the application dated 19/4/2021 which was unopposed.
11. The Honourable Attorney General (Hon. AG) submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents together with the 3<sup>rd</sup> Interested Party, that is, the Minister for Lands and the Land Registrar, Mbeere District that the subject matter of the preliminary objection had merit and met the criteria set out in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA* for it raises a straight forward point of law. They averred that the gist of the objection is that the court is bound by law not to issue the orders that the applicants are seeking through their applications. Hon. AG submitted that the applications were fatally defective as this court already delivered a judgment in the matter and as such, it cannot entertain other proceedings. They argued that courts have held in various judicial decisions that a court in judicial review proceedings exercises sui generis jurisdiction exclusively brought under Order 53 of the Civil Procedure Rules and that other provisions of the *Civil Procedure Act* and Rules do not apply to judicial review proceedings.
12. Further, they argued that the applicants could not competently bring their application within this suit since they rely on the *Civil Procedure Act* and the Civil Procedure Rules which do not apply in judicial review proceedings hence the applications lack merit and are defective and ought to be dismissed and the objection upheld. Further, it was urged that the judgment sought to be set aside was issued by this court and it is law that once the court has made its decision, it is final and conclusive and the court becomes functus officio and cannot grant further orders.
13. John Nyaga Kamau, an Interested Party who joined the suit post-judgment submitted that his application dated 2/6/2021 which was allowed by the court and his other pending application dated 20/7/2023 were neither fatally defective nor an abuse of the court process. He averred that judicial review proceedings could be sui generis but they should not contravene the principles of natural justice. He contended that applications for judicial review ought to be served on all persons directly affected by the decision being reviewed especially at the hearing of the substantive application, in accordance with Order 53 Rule 3(2) of the Civil Procedure Rules which did not happen in this case. According to him, that went against the law on fair hearing and the procedure prescribed by Order 53 of the Civil Procedure Rules.
14. He was of the view that the judgment delivered on 9/6/2016 should be set aside as sought in the application dated 20/7/2023 because the applicants did not make full disclosure of all material facts.



Further, he contended that he was condemned unheard and that the implementation of the judgment would cause irreparable damage on him. He urged that the court had authority to set aside the leave granted in judicial review proceedings as well as the entire judgment delivered in the judicial review process. He urged that the preliminary objection purporting that the court is *functus officio* was bad in law and should fail and that the court had jurisdiction to hear the application dated 20/7/2023 seeking to set aside its judgment.

15. The other proposed interested parties that is, Dominic Njeru Nyaga, Agostino Ngari Njeru and Peter Muriithi Njeru also filed submissions and chose to focus on their amended notice of motion application dated 30/4/2021 which was allowed on 8/12/2021 and added them to the suit as interested parties. They submitted that a preliminary objection should be based on a pure point of law which must not be blurred by factual details which are open to contest or that require proof through evidence. They argued that the ground that judicial review proceedings are *sui generis* in nature cannot constitute a pure point of law under which a preliminary objection ought to be raised. On the issue of *functus officio*, they expressed that their application to be joined in the suit was not contested by the 1<sup>st</sup> Interested Party and it was curious that he had raised this objection more than a year later. They urged that the preliminary objection did not meet the required threshold and that it be dismissed.
16. The issue for determination is whether the preliminary objection has merit. A preliminary objection should raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side were correct. It should not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
17. The main issue for determination is whether this court is *functus officio* and therefore barred from entertaining the impugned applications based on the fact that judgment was delivered on 9/6/2016 in the judicial review proceedings which are *sui generis* in nature. In this court's view, these are pure points of law.
18. Judicial review is primarily concerned with the process by which decisions are made and not the merits of the decisions themselves. It operates under a special procedural regime under Article 47 of *the Constitution*, the Fair Administrative Actions Act, the *Law Reform Act*, and Order 53 of the Civil Procedure Rules. In *Republic v County Government of Kajiado & 2 others Ex-Parte Leah Wanjiru Mburu* [2014] KEHC 4302 (KLR) the court held that judicial review proceedings are *sui generis* proceedings exclusively brought under Order 53 of the Civil Procedure Rules, and that the other provisions of the *Civil Procedure Act* and Rules were inapplicable.
19. In *Commissioner of Lands v Kunste Hotel Limited* KLR (E&L) 1 249, the Court of Appeal stated that a court in judicial review proceedings was exercising neither a civil or criminal jurisdiction. In *Wellamondi v The Chairman, Electoral Commission of Kenya*, (2002)1 KLR 286, Ringera J. (as he then was) explained the legal position as follows:

“I agree that judicial review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the Order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the Order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction *sui generis*. It follows therefore that it is incompetent to invoke the provisions of Section 3A and Order 1 Rule 8 of the Civil Procedure rules. It is equally incompetent to invoke Section 42.”



20. In Republic v Kahindi Nyafula & 3 Others, Ex parte Kilifi South East Farmers' Co-Operative [2014] KEELC 403 (KLR) the court stated that:
- “Judicial review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the *Civil Procedure Act* and the Rules made thereunder.”
21. The substantive judicial review application dated 4/5/2012 sought to have the decision of the 2<sup>nd</sup> respondent, the Minister for lands, dated 27/10/2011 in Minister's Appeal No. 258 of 2003 quashed on the claim that it deprived the applicants of their property without a reasonable cause and that the decision was unreasonable, irregular and against the rules of justice. The Applicants also sought an order to prohibit the Land Registrar, Mbeere District from registering parcel numbers Mbeere/Mbita/2XX0 to 2XX3, 2XX7 and 2XX9, 2XX4 to 2XX0, 2XX9, 2XX1, 2XX6, 2XX6 to 2XX9, 2XX2 to 2XX2, 2XX0, 2XX2, 2XX2, 2XX4 and 4XX2 in favour of the 1<sup>st</sup> Interested Party as well as orders to stay registration of the disputed parcels of land.
22. Judge B. N. Olao quashed the decision of the 2<sup>nd</sup> Respondent issued on 27/10/2011 in Appeal Case No. 258 of 2003 as being irregular for purporting to cancel a title which was the preserve of the court. The Learned Judge went on to find that having quashed the Minister's decision dated 27/10/2011 there was nothing to prohibit since the registration could not proceed. The Judge nevertheless issued the order prohibiting the 3<sup>rd</sup> Respondent from registering the disputed portions of land.
23. In his judgment, Judge Olao cited Municipal Council of Mombasa v Republic and Umoja Consultants Ltd, Civil Appeal No. 185 of 2001 where it was held that judicial review was concerned with the decision making process and not with the merits of the case. That the court concerned itself with issues such as whether the decision maker had 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 he took into account irrelevant matters.
24. When determining the judicial review matter, this court was concerned with the decision making process of the Minister for Lands in arriving at the decision dated 27/10/2011. The court was not concerned with the merits of the decision and in its determination. The court found that the Minister for Lands acted without jurisdiction when he purported to cancel a title.
25. The applications dated 30/9/2020, 30/4/2021, 19/4/2021, 13/1/2023 and 20/7/2023 were brought under provisions of the Civil Procedure Rules which do not apply to judicial review proceedings. Once the court delivered its judgment on the judicial review application, it became functus officio. The applications dated 30/9/2020, 30/4/2021, 19/4/2021, 13/1/2023 and 20/7/2023 are struck out for being irregularly filed in a concluded judicial review matter.
26. The preliminary objection is upheld. This matter is finalised as it were and there is nothing more to be done.

**DELIVERED VIRTUALLY AT EMBU THIS 9<sup>TH</sup> DAY OF MAY 2025.**

**K. BOR**

**JUDGE**

