



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

MISC. CIVIL APPLICATION NO. 1 OF 2018

(FORMERLY ELDORET MISC. APP. NO. 349 OF 2008)

ISAAC CHEMOIYWO KOSKEI.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR BARINGO DISTRICT.....RESPONDENT

JAPHETH CHERONO KIPKEMEI

DICKSON KIPKOECH TARUS

KIPLAGAT CHESIRE

HILLARY MWAITA

SOTE KOSGEL.....INTERESTED PARTIES

JUDGMENT

1. By Notice of Motion Dated 12/8/2008 upon leave granted by the Court, the ex parte applicant sought Judicial Review Orders as follows:
 - a) *An order of certiorari do issue to forthwith remove into the High Court and quash the decision of the Respondent made on 10.6.2008 in respect of boundary dispute between parcel number BARINGO/KAPROPITA 275, 276, 273, 1060 and 1061 between the Applicant and the Interested Parties.*
 - b) *An order do issue prohibiting the Respondent from Registering any boundary changes made in respect of land parcel number BARINGO/KAPROPITA 275, 276, 273, 1060 and 1061.*
 - c) *Costs to the Applicant.*
2. The Grounds of the Notice of Motion which are the same as the ground for the relief in the statutory statement were as follows:
 - i) *The Respondent undertook the said survey exercise and proceedings without due regard to the fact that the registered owner of land parcel number BARINGO/KAPROPITA/273 had since died and no letters of administration had been undertaken.*
 - ii) *The applicant was never accorded any opportunity to air his views.*
 - iii) *Leave of this Court to institute this application was granted on 28.7.2008.”*
3. The Respondent filed a Replying Affidavit in answer to the ex parte applicant’s case emphasizing that this action was within statute and an implementation of the Registry Index Map (RIM) of 1968 in which the road access subject of the Judicial Review proceedings was created during the Land Adjudication exercise, as follows:

“REPLYING AFFIDAVIT OF 6TH MARCH 2012

I A.K. SEWER of Post Office Box No. 22 – 30400 Kabarnet Baringo make Oath and state as follows:

1) **THAT** I am the District Land Registrar, Baringo District and well conversant with the facts in this matter and competent and duly authorized to depone to the facts thereof.

2) **THAT** I have been shown by Wanjiku A. Mbiyu (Ms) Senior Deputy Chief Litigation Counsel acting for the Respondent the Notice of Motion application dated 12th August 2008 together with the Verifying Affidavit and have read the same and understood the full import of the facts and wish to respond as below.

3) **THAT** I have in my custody as the District Land Registrar the file records relating to the Baringo/Kapropita and registered on 22nd Nov 1968 vide Baringo/Kapropita sheet No. 8.

4) **THAT** I am aware that a request to open up the road of access was lodged in my office through the area Chief on 21st January 2005 by fourteen (14) citizens including the Interested Parties on record namely:

- | | |
|--------------------------|--------------|
| 1. Richard C. Chepsergon | Plot No. 283 |
| 2. Charles Kimutai | Plot No. 280 |
| 3. Japhet Kemei | Plot No. 275 |
| 4. Edward Kiprop | Plot No. 277 |
| 5. Symon Chebore | Plot No. 276 |
| 6. Jackson Komen | Plot No. 278 |
| 7. Raymond Kipsang | Plot No. 279 |
| 8. Francis Kiplagat | Plot No. 247 |
| 9. A) Henry Kiptoo | Plot No. 370 |
| B) Stanley Kiptoo | Plot No. 270 |
| 10. Julius Kiprop | Plot No. 354 |
| 11. Symon C. Chemoiywo | Plot No. 248 |
| 12. Kibet Chemoiywo | Plot No. 274 |

Annexed and marked as exhibit **AKS – 1** is a copy of the letter.

5) **THAT** subsequent on 16th January 2006, three members of the Kiptorokwo Village Community did write directly to my office on the same issue of road of access namely:

- i. Raymond K. Kipsang
- ii. Charles K. Kimoto
- iii. Henry K. Kiptoo

6) **THAT** this new letter was informed my office of the alleged partial closure of the access road by the Applicant and other land owners in the area namely:

- i. Richard Chebon Chepsergon
- ii. Soti Kosgei
- iii. Kibet Chemoiywo
- iv. Japhet Kipkemoi Cheronno
- v. Dickson Tarus
- vi. Symon Cheronno Arap Chemoiywo

Annexed and marked as exhibit **AKS – 2** is a copy of the letter.

7) **THAT** I am further aware and confirm that the issue of the road of access for Baringo/Kapropita area affecting Land Parcels Numbers 283, 273,274, 279, 278, 248, 280, 277, 270, 247 and 274 had been deliberated as far back as year 1999 and in-deed on 27th January 1999, the then Assistant Land Registrar, Baringo District had written to the affected land owners of the above parcels informing them of a site visit to the suit lands which was to be done on 9th February 1999 for purposes of opening up the road access.

Annexed and marked as exhibit **AKS – 3** is a copy of the letter from the Land Registrar.

8) **THAT** however, the issue of the opening up of the road of access had not up to year 2008 been implemented on the ground by former Land Registrars.

9) **THAT** pursuant to the communication shown in Exhibit AKS – 2, I did in my capacity as Land Registrar issues summonses to all the affected parties.

Annexed and marked as exhibit AKS – 4 is a copy of the summons.

10) **THAT** I am also aware that in or about 27th January 2005 one land owner of (L.R 354) Julius Kiprop who is not a party in these proceeding had paid a sum of Kshs One Thousand Two Hundred and Fifty (1250) on account of boundary dispute of our office.

Annexed and marked AKS – 5 is a copy of the receipt.

11) **THAT** further, the same land owner had on 18th July 2005 on behalf of other land owners paid a sum of Kshs Twenty Two Thousand Only (22,000) on account of Survey Dispute Fees which fees had been contributed by the land owners except the Ex parte Applicant.

Annexed and marked AKS – 6 is a copy of the receipt.

12) **THAT** as it is reflected in the receipt, the fees were for the following suits lands: Baringo/Kapropita/283/273/274/275/276/280/277/279/280/277/279/247/278/248.

13) **THAT** I confirm that on 10th June 2008 I visited the area in the company of the District Surveyor Mr. G. Makokha together with the Assistant Area Chief, Japhet Bowen and on arrival met many land owners from the affecting area as well as their neighbors including the Applicant

14) **THAT** after a ground inspection, we ascertained with the surveyor that the road of access which was provided for in the Registry Index map herein letter referred to as the R.I.M did not exist on the ground and the area which was for the road had been encroached by the neighboring land owners including the Applicant and the following land owners **L.R No. 280, L.R No. 276, L.R No. 277, L.R No. 279, L.R No. 283, L.R No. 273** (The Ex parte Applicants predecessor in title – Soti Kosgei).

15) **THAT** after discussing with the affected land owners, a ground survey was carried out and the road access was opened from the junction of two roads between L.R 273 and 283 terminating at the junction of two roads between L.R 247 and 248. We did not interfere at all with the boundaries of the suit lands when carrying out the ground survey and we were strictly guided by the RIM in determining the position of the access road.

16) **THAT** I thereafter advised anybody who was not satisfied with the decision of opening up of the road to lodge an appeal to the Chief Land Registrar and to my knowledge no appeal was ever lodged within the stipulated period and the only complaint I received was a letter dated 25th June 2008 from the Applicant complaining about destruction of his property.

17) **THAT** I also received a copy of a letter from M/s Mirugi & Co. Advocates addressed to the Applicant's Advocates on the issues of opening of the road of access and I further confirm that since opening of the road of access the same has been in use by fourteen (14) families from adjoining lands as well as other members of public.

Annexed and marked Exhibit **AKS – 7** is a copy of the letter.

18) **THAT** it is not true that I did not afford the Applicant an opportunity to be heard as it is clear that he participated and was present on the site on 10/6/2008 and his verbal protest was why I was following the issue of the road of access while previous Land Registrars had never taken action.

19) **THAT** I have been advised by Wanjiku A. Mbiyu (Ms) Senior Deputy Litigation Counsel that the Notice of Motion is incompetent and the orders of Certiorari and prohibition sought ought not to issue on the following grounds:

i) The Land Registrar is under the Registered Land Act Cap 300 empowered to hear any complaint on boundary dispute and rectify the same.

ii) The Registry Index map for the Baringo/Kapropita Adjudication Area had provided an access road which was not on the

ground due to illegal closure/blocking by the Applicant's predecessor in title with other neighboring land owners.

iii) Every registered land parcel has a right of access which right is granted by law.

iv) The decision to open the road of access was done in compliance with the law.

v) The ex-parte applicant was afforded a right of hearing and Appeal which he failed to exercise.

vi) The application lacks merits.

vii) The balance of convenience is in favour of the general members of public including Interested Parties.

20) **THAT** I swear this affidavit in opposition of the Notice of Motion and the prayers sought.”

4. Counsel for the parties filed written submission on the respective cases. For the ex parte applicant the submissions dated set out the ex parte applicant's case as follows:

“EX-PARTE APPLICANT'S CASE SUBMISSIONS OF 5TH OCTOBER 2018

3. Ex Parte Applicant's case is that the Ex Parte Applicant's mother Sote Kipteer as also known as Soti Koskei was the registered owner of land parcel No. Baringo/Kapropita/273 who is now deceased having passed away on 4/6/2005.

4. The Ex Parte Applicant petitioned for Letters for Administration which were granted on 18/7/2008.

5. Some of the Interested Parties alleged to be neighbours to the applicant bordering each other and they brought a claim of a boundary dispute in regard to an access road against the Applicant.

6. The Interested Parties were summoned. The deceased was also alleged summoned on 12/3/2008 a date when she had already passed on that is 2 years 8 months after she died.

7. The Respondent purportedly conducted a hearing in the absence of the Applicant and proceeded to give a verdict without taking into consideration the following facts:

a. The land in question was still in the names of a deceased person and no Letters of Administration had been taken out.

b. The Applicant was never accorded an opportunity to explain his side of the story and in particular that the land in question was still under his mothers' names and that as far as he was concerned he had no dispute with his neighbors.

c. The immediate neighbors with whom he shares the long boundary was never invited nor made a party to the proceedings before then.

8. It is therefore the Applicant's case that the Respondent acted ultra vires his power and mandate.”

5. The Respondent's case was set out in their Submissions of 21ST January 2019 at paragraph 4 – 13 as follows:

“THE RESPONDENT'S WRITTEN SUBMISSIONS OF 21ST JANUARY 2019

4. The question that begs to be answered is whether this communication is a decision capable of being quashed or it is a mere communication. We submit that the extract page dated 10th June 2008 is only a communication by the District Land Registrar Baringo County on the implementation of a decision made by the Director of surveys in terms of creating an access road as per the records in 1968. The contents of the extract as per paragraphs 1 and 2 thereof are very clear that District Land Registrar had instructions in line with his mandate under the Registered Land Act to implement the decision by the Director of survey as embodied in the Index Registry Map of 1968; ultimately it means that the Director of survey had made a decision way back in 1968 and that decision was the creation of an access road for BARINGO/KAPROPITA/275, 276, 276, 273, 1060 and 1061.

5. It is thus our submissions that the extract by the District Land Registrar dated 10th June 2008 was not a decision parse but merely communication on how the Director of Surveys decision made way back in 1968 was implemented.

6. We further submit that the extract dated 10th June 2008 does not fall in any of the categories as contemplated under the provisions of order 53 Rule (2) of the Civil Procedure Rules 2010 envisages a situation where one applies for orders of certiorari. That is: “...to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed...” Your Lordship looking at the prayers being sought by the applicant it is evident that the applicant acknowledges there being a decision from Director of Survey creating an access road and thus this extract from the District Land Registrar is not that decision.

It is also imperative to note that the road of access is not created by the District Land Registrar neither does he amend the Registry Index Map to reflect the same. A road of access is created pursuant to statutes, physical planning department and director of

surveys who are not parties to this proceedings, extract dated 10th June 2008 cannot be deemed, misconstrued and/or misinterpreted as an alteration or amendment of Registry Index Map that was created in 1968. The Registry Index Map provided by the respondent has never been challenged, it provides for road of access and there is no evidence whatsoever that the applicants acreage on the title has been reduced to accommodate the access road. We rely on the holding in the case of *Judicial Review Civil Application Number 55 of 2013 at Nakuru Naomi Asitbar and 6 others vs Nakuru Sub County Commander Administration Police and 3 others (2014) eKLR*

7. It is our considered submission that the remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but with the decision making process itself. There are no proceedings annexed instead the applicant is attacking the merit of the said decision and not the process itself.

8. On the merit of the case it is our submission that the *ex parte* applicant has miserably failed to sufficiently demonstrate either by facts or evidence how the respondent action to open up an already existing access road will prejudice his proprietary rights over the said piece of land. In actual fact the applicants has not annexed a copy of title of BARINGO/KAPROPITA/273 to show the correlation between the alleged action and his actual loss if any.

9. On the other hand we do submit that the respondents have demonstrated through it's annexure more particularly the Registry Index Map which is a map prepared in 1968 as per the adjudication records. It is clear and notable that indeed the road of access was created to serve parcels of land known as BARINGO/KAPROPITA/275, 276, 273, 1060 and 1061 way back in 1968 properly conducted by a Government survey then detailing all the features as shown from the survey map. It can also be deducted from the survey map of 1968 the total acreage of very parcel of land indicated therein the more reason why the applicant has not annexed a copy of title of BARINGO/KAPROPITA/273. That even though parties have tried to interfere with the said access road, it remains as it was planned way back in 1968 a fact well known to the applicant herein and the Director of Survey has never authorized any amendments to the said plan that would in turn affect the size of the access road.

10. There is no evidence laid before Court to suggest that indeed the respondent's decision to open up the existing road to its original status was arrived at in breach of the applicant's rights and/or would interfere with the applicant's right to free and quiet possession. That the decision to open up the access road has been ongoing from way back in 1999 a fact the applicant has hidden from Court.

11. On account of documents supplied by the applicant to the Honourable Court, it is our submissions that the documents cannot be relied upon. The documents are full of contradictions, for instance the death certificate provided an annexure number I.K 1. This document shows that one Sote Kipter died on 4th June 2005 before the decision was made though there is nothing to link the said Sote to the land in Court. The other document which is applicant annexure number I.K 2, grant clearly shows that Sote Kipter died on the 18th day of July 2008 one month after the decision was made. Surely which date should the Court rely on?

12. Be as it may the applicant has not exhibited the title documents and/or any other proposed drawings to this Honourable Court to prove that if an access road is restored to its original size then his land would be encroached onto and to what extent. In fact in is our submission that both the applicant and the respondents do agree that there exists an access road as indicated in the survey map of 1968. The only contention being the size of the road. The respondents have clearly demonstrated that indeed at the time of subdivision and creation of the above stated parcels in 1968, a road of access as set out in the Registry Index Map.

13. We submit that the applicant has miserably failed to demonstrate that the respondent's decision to restore the public access road is tainted with illegality, irrationality and procedural impropriety to warrant the issuance of the orders sought. In fact we do submit that the decision to have a public access road running through BARINGO/KAPROPITA/275, 276,273, 1060 and 1061 was made way back in 1968, which decision has never been challenged to date and the applicants land will remain intact as per the acreage created in 1968."

Issues for determination

6. The principal question before the Court is the nature of impugned process, whether it is a decision capable of being quashed by the order of certiorari and whether in making the process and taking the action thereunder the regarded infringed the principles of natural justice as alleged.

Determination

7. At the outset it must be pointed out that Judicial Review is not concerned with the private rights as was held by the Court of Appeal in **THE COMMISSIONER OF LANDS VERSUS KUNSTE HOTEL LIMITED**, CIVIL APPEAL NO. 234 OF 1995, [1997] eKLR as follows:

"But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See; R v. Secretary of State for Education and Science ex part Avon County Council (1991) 1 ALL ER.282, at p. 285.). The Point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans (1982) 1 WLR 1155, by Lord Hailsham of St. Marylebone, thus: "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."

8. It does appear to this Court that in filing the Judicial Review Proceedings herein the *ex parte* applicant was seeking to enforce merely the private rights of his worker the registered proprietor of the suit property. From the *ex parte* applicant's letter to the respondent dated 25th

June 2008 before filing these proceedings it is clear that the applicant seeks compensation from crops allegedly destroyed upon opening-up of the road access and demonstrates the applicant's private interest for compensation for destruction of fence and crops, as follows:

"ISAAC C. KOSGEI,

P.O. BOX 67,

KABARNET.

25-06- 2008

THE DISTRICT LAND REGISTRAR,

P.O. BOX 22,

KABARNET.

Dear Sir,

RE: ACCESS ROAD BETWEEN LAND PARCELS BARINGO (KAPROPITA) 273 & 283

I am writing on behalf of the registered owner Baringo/Kapropita/273 (Sote Kosgei – Deceased, who has a common boundary with parcel Baringo/Kapropita/283 as follows:-. That, on 10/06/08, you visited the above parcels amongst others in your letter of invitation with the District Surveyor – Baringo to ascertain the road of access which passes between the two parcels. Though, I arrived late, you had interviewed those present **BUT** wasn't given a chance to air my views. From your summons, I noticed one glaring mistake which I think it must be the gist of the matter; the Proprietor of Baringo/Kapropita/283 wasn't among those required to have his land surveyed, why? Yet it's the one sharing the common boundary with mine.

Sir, as you know the owner is deceased. It was an omission in your side to proceed and survey parcel Baringo/Kapropita/273 without a proper attorney, in this case myself.

After, you surveyed the said parcel, goons known to me vandalized my fence and went ahead to plough my shamba and destroyed crops and nappier grass among other things which I intend to make a valuation report from Ministry of Agriculture – what you told us that day was that, I had 30 days to make any appeal if I had BUT status quo was to be maintained till the expiry of 30 days.

.....your office 27/06/2008 that from reliable sources, I destruction the next day, to which you took me to the Chief's office who took prompt action by ringing one of them and gave firm instructions that nobody was to visit the said parcels till further notice.

On the 28/06/08, to my utter surprise the same guys came and continued with the demolition.

Sir, the damage caused is too high to bear and from what I have tabulated, I think it was fair if both parcels Baringo/Kapropita/273, 283 be surveyed to ascertain the person who blocked the road of access. Moreover, there is one existing presently but you ignored to confirm the same whether it is the true road of access between the two parcels. From your summons the owners of parcels Baringo/Kapropita/275, 276, 1060, 1061 & 273 were the one's required on that day that is the 10/06/2008, why not the owner of Baringo/Kapropita/283.

I have reported this destruction to the police (OB – 32/20/06/08) and would request the police to make a follow up especially the hirelings who destroyed the fence and have them apprehended for prosecution on damaging of property. Also, the issue of 30 days should be a matter of concern, why destroy the fence before the 30 days lapses.

The next course of action, I contemplate to take will be to have or know the cost of the damage done.

Sir, as you assured me that nobody was to destroy my fence, until after the 10/7/08, hopefully, you will forewarn those who took the law into their hands without following the right procedure.

Thanking in advance.

I remain.

ISAAC C. KOSGEI (heir apparent)

CC.

THE DISTRICT SURVEYOR – BARINGO (for information)

The OCS, KBT police station.

(See if you can provide personnel to ascertain the destruction).”

9. It is also apparent that the District Land Registrar was acting pursuant to his authority under section 21 of the Registered Land Act Cap 300, (similar to section 18 of the Land Registration Act 2012), which provide as follows:

“21. (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.”

10. From the record of the proceedings by the Respondent, it does appear that the registrar acted within his statutory mandate over boundaries as follows:

“BOUNDARY DISPUTE – OPENING OF ROAD ACCESS

BARINGO/KAPROPITA 275; 276; 1060; 1061 AND 273

JAPHETH CHERONO; DICKSON KIPKOECH TARUS AND OTHERS

VS

BARINGO/KAPROPITA 248 AND 274

KIBET CHEMOIWO; SYMON K. CHEMOIWO AND OTHERS

BEFORE A.K. SEWER

DISTRICT LAND REGISTRAR

BARINGO

AND MAKOKHA – SURVEYOR

ON

10TH JUNE, 2008

This is a case of closed road of access and the community using the same complained that they were using the access roads which at times is impassible and they cannot grade it because it passes through private lands provided by owners on humanitarian grounds.

By looking by the RIM each parcel is provided with an access road but this is not interpreted on the ground.

We were informed that the access road in question has not been opened since.

People were living as they were before the land adjudication process started in this section.

The process were living as they were before the land adjudication process started in this section.

The process of opening the access road started from the junction of two roads between plot 273 and 283 and ended at the junction of two roads between plot No. 247 and 248 each plot contributing 3 metres.

A.K. SEWER

DISTRICT LAND REGISTRAR

BARINGO

10TH JUNE, 2008.”

11. Did the Respondent fail to give the applicants’ a fair hearing in breach of Article 47 of the Constitution? First, the applicant was not the registered proprietor of the suit property plot. No. 273 at all material times. The applicant alleged that the registered proprietor had died over 2 years 8 months before the date of the impugned proceedings for opening of the road access on 10/6/2008. The Respondent has not been shown to have been aware that the registered proprietor was deceased at the material times.

12. The applicant was granted a temporary grant of representation to the Estate of the deceased registered proprietor by the Magistrate’s Court pursuant to section 49 of the Law of Succession Act on 23/7/2008, over 40 days after the date of the proceedings for road access and order of 10/6/08. In accordance with the Court of Appeal decision in **TROUSTIK UNION INTERNATIONAL & INGRID URSULA HEINZ VERSUS JANE MBEYU & ALICE MBEYU**, CIVIL APPEAL NO 145 OF 1990, [1993] EKLR, the applicant had no legal authority to take up or make representation with regard to the Estate of the deceased registered proprietor of the suit property. The applicant could not therefore validly take up the role of an administrator of an intestate without obtaining Letters of Administration. He had no right to represent the estate of the deceased registered proprietor before appointment as the Legal Representative. Accordingly, his claim to represent the estate at the proceedings for opening of road access is without merit.

13. Without locus standi to represent the estate for the deceased registered proprietor, the applicant could not mount a claim for enforcement of the right for fair administrative action under Article 47 of the administration, with respect to the subject parcel of land.

14. However, for the Replying Affidavit and the applicant’s own letter before action it is clear that the applicant was along with other persons affected by the road opening heard on the dispute.

15. It was also demonstrated by the Replying Affidavit that the issue in dispute was the implementation of a road access which was provided for in the Registry Index Map (RIM) but not reflected on the physical ground “*could the area which was for the road had been encroached by the neighboring land LR. No. 280, LR No.276, LR. No. 277, LR. No. 279, LR. No. 283, LR. No. 273.*”

16. There was public interest in the implementation of the road of access from as pointed out in paragraph 17 of the Replying Affidavit “*since the opening .of the road of access the same has been in use by fourteen (14) families from undergoing the lands as well as other members of public.*”

Conclusion

17. Having considered the Judicial Review Proceedings herein the Court takes the view that the issue in dispute is a private matter for compensation for the implementation of a road access that had allegedly led to the destruction of the applicant’s crops and property – on the suit land. On the test of **Commissioner of Lands v. Kuste**, supra, the matter before the Court is a private interest matter which is not suitable for the determination by the judicial review Court. See also, *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] eKLR, where the Court of Appeal applied **Kunste** as follows:

*“It should also be noted, that judicial review remedies cannot be used to assert private law, the very issues the appellants are attempting to do by trying to force a crystallisation of the 2002 negotiations into a formal lease agreement. In **Commissioner of Lands v Kunste Hotel Limited [1997] eKLR** this Court held that:*

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

18. The applicant may, if so advised by Counsel, pursue before an appropriate Court, a suit for the determination of the validity of the road access and for compensation if the road access was improperly implanted by the Respondent.

19. The thrust of the Applicant’s case as urged by Counsel in paragraph 29 of the Applicant’s Submission dated 5/10/18, as follows:

*“29. From the foregoing the applicant has proved its case on a balance of probability and has demonstrated that the Respondent acted illegally unprocedurally by undertaking a serving exercise and proceedings **without due regard to the registered owner of the land parcel no. Baringo/Kapropita/273 who had since died and no letters of administration had been undertaken.**”*

20. Apart from its clear private interest nature, the applicant’s case is self-contradicting in that there having been no validity appointed legal representative of the allegedly deceased registered proprietor, the applicant had no **locus standi** and could, therefore, not sustain a claim for infringement of rights of the deceased, and the Respondent not having been shown to have been aware that the registered proprietor was deceased was entitled to proceed with the hearing of the dispute upon issuance of summons to the registered proprietors of the affected lands, some of whom were shown to have attended the proceedings.

21. In addition, despite provision for appeal, the applicant did not pursue an appeal in accordance with law within 30 days.

22. The applicant is, accordingly, left to his devices, as he may be advised by Counsel to pursue any rights in appropriate forum.

Orders

23. The Judicial Review Proceedings herein are accordingly dismissed with costs to the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF MAY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Magare Musundi & Co Advocates for the Ex Parte Applicant.

Mr. D. O. Wabwire, Litigation Counsel for the Attorney General.