Republic v Cabinet Secretary, Ministry of Lands and Physical Planning & 3 others; Riungu & 3 others (Interested Parties); Gitonga & another (Exparte Applicants) (Environment and Land Judicial Review Case E003 of 2024) [2025] KEELC 4838 (KLR) (23 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4838 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2024

BM EBOSO, J

JUNE 23, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 2ND RESPONDENT

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

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

AND

M'NYIRI RIUNGU ..... INTERESTED PARTY

ESTHER MAKAMBA ..... INTERESTED PARTY

GRACE WANJIRA (RUTH WANJIRA) ..... INTERESTED PARTY

CHARLES KIMATHI (REP JUSTUS MAKAMBA - DCD) . INTERESTED PARTY

AND

FREDRICK GITONGA ..... EXPARTE APPLICANT

M'NGERENI MATHAIYA ..... EXPARTE APPLICANT

JUDGMENT

1. Through a judicial review motion dated 23/7/2024 and expressed as brought under Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*, Fredrick Gitonga (1st ex-parte applicant) and M'Ngereni Mathaiya (2nd ex-parte applicant) seek:

   (i) an order of certiorari quashing the decision of the 1st respondent made on 26/3/2024 in Minister's Appeal No 297 of 2017 relating to land parcel numbers 803, 805, 806, 817 and 818, located in Kamwimbi "A" Adjudication Section;

   (ii) an order prohibiting the 2nd and 3rd respondents against implementing the said decision; and

   (iii) an order providing for costs of this case. The said judicial review motion is the subject of this judgment. The broad question to be answered in this judgment is whether the application satisfies the criteria for grant of the judicial review orders of certiorari and prohibition under Section 8 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules.

2. The application was premised on the grounds outlined on the face of the motion dated 23/7/2024 and in the 1st ex-parte applicant's supporting affidavit dated 23/7/2024 and the applicants' further affidavits dated 19/3/2025. It was canvassed through written submissions dated 3/1/2025, filed by M/s Ojwang Sombe & Co Advocates. The respondents and the interested parties opposed the application.

Ex-parte Applicant's Case

3. The case of the ex-parte applicants is that, being aggrieved by the decision of the adjudication officer responsible for Kamwimbi "A" Adjudication Section, the 1st ex-parte applicant, under the sponsorship/representation of the 2nd ex-parte applicant, lodged an appeal to the Cabinet Secretary (hereinafter referred to as "the Minister") under Section 29 of the *Land Adjudication Act*. The Minister heard the appeal and rendered a decision on the appeal on 24/2/2022. Aggrieved with the Minister's decision, the ex-parte applicant moved to the Environment and Land Court (the ELC) vide ELC JR Case No E006 of 2022 and procured from the said court an order quashing the Minister's decision. Further, the ELC decreed that the appeal was to be heard afresh by the Minister. Consequently, their appeal to the Minister was heard afresh. The decision/award that is the subject of this judgment was subsequently rendered on 26/3/2024 by the Minister through her delegatee under Section 29 (4) of the *Land Adjudication Act*.

4. Through the impugned decision dated 26/3/2024, the Minister made the following findings:

   (i) parcel numbers 802, 803, 805, 806, 817 and 818 are original demarcation parcels;

   (ii) the said parcels were not generated from parcel number 799 as claimed by the ex-parte applicants;

   (iii) the interested parties and their families live in the said parcels;

   (iv) the interested parties do farming on the said parcels;

   (v) there were two new permanent houses belonging to the ex-parte applicants, which the interested parties claimed were constructed by use of force in total disregard of the status quo order that had been given;

   (vi) there was no land parcel registered in the name of the ex-parte applicants; and

(vii) there was a new grave relating to the late Muriungi who had been buried on one of the parcels in 2021 without any complaint from the 2nd ex-parte applicant.

5. Consequently, the Minister dismissed the appeal in the following verbatim terms:

> " I therefore dismiss appeal case No. 297 of 2017
>
> Parcel No. 802 to remain under the name of Muriungi Thigunku.
>
> Parcel No. 803 to remain under the name of M'nyiri Riungu.
>
> Parcel No. 805 to remain under the name of Esther Nkindu Makamba.
>
> Parcel No. 806 to remain under the name of Grace Wanjira Njeri.
>
> Parcel No. 817 to remain under the name of Justus Makamba (DCD).
>
> Parcel No. 818 to remain under the name of Justus Makamba (DCD).
>
> Land Adjudciton to consider registering land parcels number 817 & 818 in Charles Kimathi Makamba (son) as requested.
>
> The Sub County Surveyor to restore the beacons to the above parcels.
>
> Any aggrieved party has a right to appeal against this ruling at the High Court."

6. The ex-parte applicants contend that the impugned decision of the minister was tainted with a mix-up involving inclusion of parcel number 802 which was not a subject of the proceedings at the objection stage. They add that the decision of the Minister went against logic, contending that some of the interested parties did not hail from the area and did not have any related communities and/or clans in the area and could not, therefore, have ancestral land passed to them in the area. The ex-parte applicants further fault the Minister for including Ruth Wanjira and Dominic Mwangangi as respondents in the appeal yet they were not parties to the objection proceedings.

7. The ex-parte applicants fault the Minister for recording "misleading" and "inaccurate" proceedings, adding that the Minister failed to capture the testimonies of the ex-parte applicants and their witnesses. They contend that the decision of the Minister was against established policy and principles in adjudication under the *Land Adjudication Act*. The ex-parte applicants argue that the impugned decision was pre-determined and manifestly biased, hence unjust, illegal, prejudicial and without any material facts. They contend that the Minister contravened the rules of natural justice, adding that the impugned decision amounted to an abuse of power and/or authority.

The Respondents' Case

8. The respondents opposed the application through grounds of opposition dated 25/10/2024 and a replying affidavit sworn on 25/2/2025 by Angela N. Wanyama (the Deputy County Commissioner for Chuka who was the Minister's delegate under Section 29 (4) of the *Land Adjudication Act*) and written submissions dated 26/2/2025, filed by Ms. E. Kendi, Senior Litigation Counsel. The case of the respondents is that the appeal to the Minister in Appeal Case Number 297 of 2017 related to parcel numbers 802, 803, 805, 806, 817 and 818 falling within Kamwimbi "A" Adjudication Section. They add that the appeal was first heard on 7/10/2021 and was subsequently dismissed for lack of merit. Upon the ex-parte applicants filing a judicial review application, the Minister's decision was set aside and the appeal was heard afresh by a different delegatee on 17/10/2023. The appeal was again dismissed for lack of merit. The respondents add that the Minister established that parcel numbers 799, 802, 803,

805, 806, 817 and 818 were all original demarcations within Kamwimbi "A" Adjudication Section, and that they were not hived out of parcel number 799.

9. The respondents state that Faith Wanjiru Kinyua is a daughter of the late Grace Wanjira, adding that Faith's first name was erroneously captured as "Ruth." The respondents further state that Dominic Mwangangi was a sponsor of the interested parties (the respondents in the appeal to the minister) and that parcel number 802 featured in the evidence which was tendered during hearing, adding that, its mention as one of the original demarcations did not affect the decision making process. They contend that the rules of natural justice were fully adhered to. They urge the court to dismiss the motion.

1st Interested Party's Case

10. The 1st interested party opposed the application through a replying affidavit dated 18/10/2024 and written submissions dated 24/1/2025, filed through M/s David John Mbaya & Co Advocates. His case is that he is the owner/registered proprietor of parcel number 803 within Kamwimbi "A" Adjudication Section. He has been in actual open and continuous occupation of the said parcel since "time immemorial" and he has developed the land extensively by fencing it and by planting crops and trees on it.

11. The 1st respondent adds that the Minister's decision was made on merit after all the parties had been accorded an opportunity to present evidence and to be hard. He contends that the ex-parte applicants have failed to demonstrate misconduct/bias in the "actions" of the Minister. He faults the ex-parte applicants for inviting the court to review the merits of the Minister's decision, contending that this is outside the purview of judicial review and that under Section 29 of the *Land Adjudication Act*, the Minister's decision is final. He urged the court to dismiss the applications.

2nd & 4th Respondents' Case

12. The 2nd and 4th respondents opposed the application through a replying affidavit dated 29/8/2024 and written submissions dated 17/12/2024, filed by M/s I C Mugo & Co Advocates. Their case is that parcel numbers 803, 805, 806, 807, 818 and 799 within Kamwimbi "A" Adjudication Section were all original demarcations and were not hived out of parcel number 799 as contended by the ex-parte applicants. They add that in ELC JR Application No. E006 of 2022, the court made it clear that the Minister was to include parcel number 802 in the proceedings and findings.

13. The 2nd and 4th respondents add that the adjudication process in Kamwimbi "A" Adjudication Section commenced prior to 1993 during the lifetime of the late Justus Makamba and that M'Ngereni Mathaiya and the late Justus Makamba were parties to the adjudication process that culminated in a decision awarding the late Justus Makamba parcel numbers 805 by the arbitration board. They contend that because Justus Makamba was deceased, the land was awarded to his widow (the 2nd interested party). They add that the 1st ex-parte applicant was adjudicated to be the legitimate owner of parcel number 739.

14. The 2nd and 4th interested parties argue that they have been cultivating parcel numbers 805, 817 and 818, adding that during the pendency of the appeal to the Minister, the ex-parte applicants entered parcel number 818 by force and started building permanent structures on it. They state that prior to the adjudication exercise, the late Justus Makamba purchased land from the family of one Manguru, adding that, during adjudication and demarcation, the land was sub-divided into parcel numbers 805, 817 and 818.

15. The 2nd and 4th respondents contend that the ex-parte applicants have no evidence to support the contention that the Minister's decision was pre-determined, adding that the Minister did not breach the principles of natural justice. They urge the court to reject the application.

3rd Interested Party's Case

16. The 3rd interested party opposed the application through a replying affidavit dated 14/2/2024, written submissions dated 24/1/2025, and further written submissions dated 14/2/2025. Her case is that her correct name is Faith Wanjiru Kinyua, and that Grace Wanjiru Ngari is her deceased mother. She adds that parcel number 806 within Kamwimbi "A" Adjudication Section is registered in her deceased mother's name.

17. The 3rd interested party contends that the case against her is a nullity because she does not have the locus standi to be sued as an interested party.

Analysis and Determination

18. The court has considered the application, the responses to the application and the parties' respective submissions. As observed in the opening paragraphs of this judgment, the broad issue to be determined is whether the application meets the criteria for granting of judicial review orders of certiorari and prohibition under Section 8 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules. Before I dispose the issue, I will make some observations about the locus standi of the 1st exparte applicant.

19. It is not clear why Fredrick Gitonga designated himself as the first ex-parte applicant in the notice of motion dated 23/7/2024. It does emerge from the objection proceedings and from the appeal that was before the Minister that Fredrick Gitonga was a "sponsor" or "representative" of M'Ngereni Mathaiya. He was not a substantive party to the preceding proceedings. His locus standi was, however, not canvassed as a key issue for determination by this court. Given the above circumstances, and noting that M'Ngereni Mathaiya who was the appellant in the appeal to the Minister is one of the two named ex-parte applicants, I will dispose the application on its merits without focusing on the issue of the locus standi of Fredrick Gitonga.

20. The ex-parte applicants moved this court under what they described on the face of the motion as:

> " Order 53 rule 34 (1) of the Civil Procedure Rules, Section 8 and 9 of the Law of Reform Act, Cap 26 and all enabling provisions of the law" (sic)

21. The ex-parte applicants did not cite breach of any identified article of *the Constitution* or breach of any identified right within the Bill of Rights in *the Constitution*. Consequently, the interpretation this court gives to the notice of motion dated 23/7/2024 is that the ex-parte applicants invited this court to examine the process that the Minister employed in reaching the impugned decision. They did not invite this court to examine the merits of the impugned decision.

22. In SGS Kenya Limited v Energy Regulatory Commission & 2 Others; SC Petition No 2 of 2019 (2020) eKLR, the Supreme Court of Kenya stated as follows:

> " [40] The petitioner approached the High Court by way of the prescribed procedures under judicial review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic "Administrative Law," is clear enough, and it is unnecessary to belabor the point.

We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner."

23. In Praxides Saisi & 7 Others v Director of Public Prosecutions & 2 Others (Petition 39 & 40 of 2019 (consolidated) [2023] KESC 6 (KRL) (Civ) 27 January 2023) (Judgment), the Supreme Court of Kenya stated as follows:

> "It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority."

24. In the most recent decision in Dande & 3 Others v Inspector General, National Police Service & 5 Others (Petition 6 (E007) & 8 (E010) of 2022 (consolidated) [2023] KESC 40 [KLR] (16 June 2023) (Judgment), the Supreme Court of Kenya outlined the origin and evolution of judicial review jurisdiction in Kenya and outlined the law as follows:

> "It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution*, then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se."

25. Having examined the pleadings and the prevailing jurisprudence, it is clear that the jurisdiction which the court was invited to exercise is limited to a review of the process and the manner of arriving at the impugned decision.

26. Does the application under consideration meet the threshold for grant of orders of certiorari and prohibition? The writ of certiorari is essentially a court order reviewing the decision of a lower court or a government agency or a public officer. The principles which guide issuance of the writ vary depending on the judicial review process through which the applicant approaches the court. The two judicial review processes are:

    (i) the common law judicial review process which is anchored on Sections 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules; and

    (ii) Article 47 judicial review process which is anchored on various articles of *the Constitution* and on the framework in the Fair Administrative Actions Act and the rules made thereunder.

27. Where an applicant anchors his plea on Sections 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules, he is expected to plead and demonstrate one of the following elements:

    (i) illegality;

    (ii) procedural impropriety; and

(iii) irrationality. Indeed, in Republic Vs. Kenya National Examination Council; Ex-parte Geoffrey Gathenji & 9 Others, the Court of Appeal outlined the above requirements as follows:

> " The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment."

28. In the application under consideration, the ex-parte applicants, through their written submissions dated 3/1/2025, contended that the elements of irrationality and abuse of power were demonstrated in the impugned decision. They further contended that there was a mix-up of issues by the Minister in that he made a finding relating to parcel number 802 which was not the subject of the appeal. The ex-parte applicants added that the elements of irrationality and abuse of power were demonstrated by the fact that the Minister gave parcels of land to the four interested parties yet they neither occupied the parcels nor cultivated them. The ex-parte applicants faulted the Minister contending that he "entered a hearing of appeal by including Ruth Wanjira and Dominic Mwangangi" who were not in the previous proceedings.

29. The response of the respondents on the first issue is that the appeal which the 2nd ex-parte applicant lodged before the Minister challenged the adjudication register in relation to parcel numbers 802, 803, 805, 806, 817 and 818. They add that parcel number 802 featured in the evidence that was tendered before the minister.

30. The court has reflected on the ex-parte applicants'' arguments and on the counter arguments. The ex-parte applicants did not exhibit before this court a copy of their memorandum of appeal to the Minister. Secondly, in their appeal before the Minister, the 1st ex-parte applicant expressly tendered oral evidence relating to parcel number 802 as follows:

> " 802-the reason why we objected on land 802 was on boundary. It was between 985 and 802. We requested the boundary to be put on ground. It was heard during objection. It was resolved that the boundary follows as it was on the map. It was not implemented. That is why I challenged at the court of law. The road which stretches from 2174 to Ruguti connecting 2170. The road to be opened by the OCS Chuka on802. They agreed to sub-divide 2073, 2071, 1835, 1833, 802, 1831 and 1130 sheet No 18."

31. It is clear from the above evidence and from the materials that are before this court that parcel number 802 featured in the 1st expert applicant's evidence before the Minister. It is also clear that the ex-parte applicants' case was that the parcels which were the subject matters of the objection proceedings and the appeal before the Minister were sub-divisions that had been hived out of parcel number 799. The Minister was expected to make a finding on that issue. Consequently, the minister made a finding to the effect that the parcels which the ex-parte applicants alleged to be sub-divisions hived out of parcel number 799 were in fact original demarcations and that parcel numbers 799 and 802 were similarly original demarcations. I do not see any mix-up or any tainting illegality or tainting irrationality in the above finding.

32. The decision of the Minister to uphold the adjudication officer's decision regarding occupation and ownership of the contested parcels was a matter of evidence. I observed in one of the preceding paragraphs of this judgment that a judicial review court moved under Sections 8 and 9 of the *Law*

Reform Act and Order 53 of the Civil Procedure Rules does not venture into the merits of a decision. Having been invited to exercise review jurisdiction under the above framework, the court will abide by the law as outlined above and will not examine the merits of the impugned decision.

33. The ex-parte applicants faulted the minster on the ground that the Minister "entered a hearing of appeal by including Ruth Wanjira and Dominic Mwangangi" who were not in the previous proceedings. The respondents' answer to the above allegation was that Dominic Mwangangi was a sponsor/representative of the interested parties who were respondents in the objection proceedings. Indeed, the record of the Minister shows that Dominic Mwangangi was retained as a sponsor/ representative during the appeal. Similarly, the 1st ex-parte applicant was retained as the 2nd ex-parte applicants sponsor/representative.

34. The respondents explained that there was a typographical error relating to the first name of Faith Wanjiru, and noted that it was supposed to read "Faith" instead of "Ruth". They further explained that Faith Wanjiru is a daughter to the late Grace Wanjira who was adjudicated to be the owner of parcel number 806 which the ex-parte applicants do not dispute was one of the parcels in dispute.

35. The ex-parte applicants faulted the Minister for failing to accurately capture what they stated in evidence. They did not, however, disclose with specificity what it is that they stated in evidence and what it is that the Minister recorded erroneously or failed to record. In the absence of specifics and particulars, I do not find basis in the above allegation.

36. Lastly, the ex-parte applicants faulted the Minister for failing to make a proper analysis of the evidence tendered. The evidence tendered was recorded and reproduced verbatim by the Minister. Based on the evidence and the findings reached, the Minister pronounced herself on the merits of the appeal that was before her. The ex-parte applicants have not cited any legal framework which required the Minister to analyze evidence the way the Civil Procedure Rules enjoin judges to analyze evidence. Looking at the totality of the record, findings and decision of the Minister, this court is satisfied that the Minister discharged her statutory mandate in accordance with the law.

37. For the above reasons, this court has not found merit in the judicial review motion dated 23/7/2024. The motion is rejected for lack of merit. In accordance with the general principle in Section 27 of the *Civil Procedure Act*, the ex-parte applicants shall bear costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 23RD DAY OF JUNE, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Ms. Ochola for the Ex-parte Applicants

1st, 2nd, 3rd and 4th Respondents – Absent

Mr. Nyaga Advocate for the 1st and 3rd Interested Parties

Mr. I C Mugo Advocate for the 2nd and 4th Interested Parties

Court Assistant – Mr. Mwangi