



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 4 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

BETTY RONO.....3RD RESPONDENT

(Sued as the Executrix of estate of the late DAVID RONO)

AND

ALMER FARM LIMITED.....EX-PARTE APPLICANT

JUDGMENT

The Ex-Parte Applicant's Case

1. By a notice of motion dated 9/4/2019 the *ex-parte* applicant herein sought the following orders:-

(1) That an order of *certiorari* directed (sic) to the National Land Commission to remove into this honourable court and be quashed its decision dated 7th February, 2019 in case No. NLC/HL1/112/2017, Uasin Gishu County.

(2) That an order *certiorari* directed (sic) to the National Land Commission to remove into this honourable court and be quashed its decision in the Gazette Notice Vol. CXX1-No. 27 published on 1st March, 2019.

(3) That an order of prohibition directed to the National Land Commission remove (sic) into this honourable court prohibiting it from interfering with the applicant's ownership and possession of Land Reference Number 8940.

(4) That the costs of this application be provided for.

2. The application is based on the grounds set out in the statutory statement dated 26/3/2019 and the verifying affidavit of **Abraham Kiptanui**, a director of the applicant herein dated 26/3/2019.

3. A perusal of those documents reveals that the background to the applicant's case as far as the *ex parte* applicant's narrative is concerned is that the late Nicholas Biwott, Kipng'eno Arap Ngeny and the deponent together with some other persons agreed to coordinate third parties for the purpose of using the *ex parte* applicant company (which the deponent refers to as "*my company*") for the sole objective of buying land from one Per Bogelund Jensen(Jensen); that the *ex parte* applicant company entered into an agreement with Jensen for the purchase of **LR No. 8940** measuring **1198 acres** for the consideration of **Kshs.5,838,000/=** and the land was transferred to it by the seller on **2/12/1982** and immediately charged to **Kenya Commercial Finance Co. Ltd (KCFC)**; that a committee of purchasers was immediately formed to run the affairs of the suit property; that at the time of acquisition of the suit property the company had a membership of **87** persons including the late David Rono; that the suit property was intended to be distributed among the members of the company with each initial member getting a portion of the property according to the extent of his mobilization of potential shareholders and contribution to the *ex parte* applicant's account meant to defray the charged sum and the property was so subdivided; a land control board consent was applied for and secured for the purpose; that the late David Rono deposited in the *ex parte* applicant's account amounts totaling to **Kshs.300,000/=** entitling him to **25** acres out of the suit property; that the *ex parte* applicant believed that the sum paid by David Rono was paid by him as a member of the company on behalf of "*his shareholders*" but it later emerged that one Daniel Some Metto who had been assured by the late David Rono that

the latter would transfer to him 120 acres of land had paid that money; that the late David Rono was charged convicted and sentenced in **Criminal Case No. 4557 of 1989** for obtaining money by false presences from the said Daniel Some Metto; that it further emerged that David Rono had obtained some amounts of cash from 12 other persons on the basis that he would transfer from his share as a member of the company various portions of land to them and that all those monies were never remitted to the *ex parte* applicant company; that the District Commissioner Trans Nzoia, a Mr. Mberia, resolved the above dispute when it was escalated to him by indicating to the disgruntled “*Rono’s shareholders*” that the amount remitted by Mr. Rono was only **Kshs.300,000/=** which only entitled him and “*his shareholders*” to a maximum of 25 acres and directed that the 13 acres out of the 25 acres be allocated directly to Mr. Daniel Some Metto who was the largest contributor in the group while the remaining 12 acres were shared equally among the 12 shareholders of Mr. Rono’s group; that Abraham Kiptanui was merely a member/director bestowed with the duty of management of the property of behalf of the applicant and David Rono was never a director in the company; that at no time did the said Abraham Kiptanui, the late honourable Nicholas Biwott and the late David Rono agree that they would share equally the suit property upon its purchase and therefore David Rono was not entitled to a portion of 400 acres and the suit property was not vested in Abraham Kiptanui’s individual capacity; that the *ex parte* applicant defaulted on its loan repayment obligation and convened a meeting on **28/8/2004** to strategize on how to repay the loan; that since the government had by a waiver reduced the indebtedness from **Kshs.5,400,000/=** to **Kshs.1,162,631/=** it was resolved that repayment would be based on the number of acres owned by each member and each member was apportioned **Kshs.700/=** “*which would be cleared with the previous debt of Kshs.1710/= per acre*” if it had not been paid up; that the company register then reflected that David Rono and “*his shareholders*” (excepting Daniel Some Metto) had only 12 acres and therefore their outstanding debt amounted to **Kshs.28,920/=**; that the loan repayment to AFC was completed and the suit land discharged; that subsequently the applicant applied for further subdivision of the property to accommodate other members who amounted to 306 and the application was approved; that Betty Rono the 3rd respondent then complained to the 1st respondent and the 1st respondent mandated the NLC County Coordinator Trans Nzoia county to investigate the complaint which he did, and he forwarded a report to the NLC stating that the 3rd respondent had no legitimate claim against the applicant; that his report was ignored by the NLC which held various hearings on various dates, that is, **1/3/2018**, **6/4/2018** and **26/4/2018**; that the NLC made a determination on **7/2/2019** recommending that the claim against the respondents stands as an injustice against the estate of David Rono, that restitution be given to that estate by way of the Chief Land Registrar excising 400 acres from Almer Farm and registering the same in the name of the 3rd respondent; that vide **Gazette Notice No. 1995 of 1/3/2019** the NLC made a different recommendation to the effect that Mr. Abraham Kiptanui reconstitute to the estate of late David Rono 400 acres and that the chief Land Registrar do effect that decision by excising the said portion from the Farm.

4. The applicant avers that the NLC’s decision of **7/2/2018** is *ultra vires* illegal irrational and without jurisdiction since it was contrary to **Section 15 of National Land Commission Act** and the **National Land Commission (Investigation of Historical Land Injustices) Regulations 2017** as the NLS had no power to direct any other independent office and institution to deal with private land matters; that the *ex parte* applicant’s and its *bona fide* members’ right to property under **Article 40 of the Constitution** has been therefore breached.

5. In the *ex-parte* applicant’s further affidavit dated **13/6/2019** the applicant’s director avers that the 3rd respondent’s statements contained her replying affidavit are unsupported by any evidence and reiterates that the suit property was purchased by Almer Farm Ltd who is the *ex parte* applicant and the purchase price was paid by way of a bank loan which the *ex-parte* applicant took from KCFC which had a charge registered against the title. He also reiterated his denial that individuals including David Rono had agreed that they would share the property between them. He maintained that David Rono is a mere member who was convicted for obtaining by false presentences and served sentence. He also maintained that he and the company are distinct personalities and asserted that the gazette notice bearing his name was unlawful.

6. In the *ex-parte* applicant’s further affidavit dated **20/6/2019** the deponent director maintains that a resolution to sue does not have to be filed simultaneously with the suit but can be produced at any stage before the hearing of the suit; to that affidavit is annexed the resolution of the *ex-parte* applicant bearing the date **20/3/2019** resolving that a suit be instituted against the respondents herein.

The 1st Respondent’s Case

7. The 1st respondent responded to the notice to motion vide the sworn affidavit dated **21/6/2019** of **Edmond Gichuru**, Deputy Director, Legal Affairs and Enforcement of the 1st respondent. The gist of the 1st respondent’s affidavit is that the 1st respondent is mandated under **Article 67 (1) (e) of the Constitution** to initiate investigations on its own motion or upon a complaint into present or historical land injustices and recommend appropriate redress and in so doing it acts as a quasi-judicial body under **Article 169(1) of the Constitution** and in accordance with the procedure set out in **Article 67(3) of the Constitution** as more fleshed out under **Section 15 of the National Land Commission Act**; that while investigating historical land injustices, illegal takeover of individual and community land by public and private institutions is part of its mandate; that the 1st respondent was informed through a complaint lodged by the 3rd respondent which warranted it to invoke its jurisdiction under **Section 15(1) of the National Land Commission Act**; that hearings were held and the 3rd respondent and the *ex-parte* applicant appeared thereat either in person or by way of representation; that both parties submitted to jurisdiction of the 1st respondent over the matter; that the 1st respondent secretariat also conducted independent investigation including a ground visit to the suit land; that the 1st respondent thereafter made a well-informed determination which appeared in the gazette notice of **3/3/2019** and therefore **Article 50 of the Constitution**, the provisions of the **Fair Administrative Action Act** and **Section 15 of the NLC Act** were observed; that the right to protection of property under **Article 40** is not absolute; that the 1st respondent deprecates the fact that the *ex-parte* applicant failed to present the evidence it has now brought forth in this suit while the 1st respondent was hearing the dispute. The deponent avers that the judicial review application lacks merit and the same ought to be dismissed with costs.

The 2nd Respondent’s Case

8. The 2nd respondent never filed any response or submissions in this matter.

The 3rd Respondent’s Case

9. The 3rd respondent filed replying affidavit dated **24/4/2019** and a further affidavit dated **9/9/2019**. Her response is that she believes that the determinations of the NLC were perfectly within the law and within its powers and jurisdiction. She states that her grounds for so believing are that Almer Farm Ltd the *ex parte* applicant never purchased the suit land, but Nicholas Biwott, David Rono and Abraham Kiptanui did so with the intention of sharing it, with each contributor getting **400 acres**; that the *ex parte* applicant never applied its own funds to purchase the suit property; that subsequently Abraham Kiptanui and Kipngeno Arap Ngeny (the latter whom she alleges never participated in the purchase) formed the *ex parte* applicant company and had the suit land transferred to its name; that David Rono was **not** a shareholder of the *ex parte* applicant and the dispute before the NLC was not one between members of company; that by allocating land to Daniel Metto (who could only claim land through David Rono) the *ex parte* applicant had acknowledged that David Rono was entitled to a share of the property; that the District Commissioner had no power to determine the dispute; that the recommendation of the NLC County Coordinator were not final but recommended a hearing between the parties and that the determinations of the NLC were within the law and that Abraham Kiptanui being the director of the *ex parte* applicant was the person to effect compliance with the NLC's decisions and that there was no conflict between the decisions of **7/2/2019** and the contents of the gazette notice of **1/3/2019**.

10. The technical aspects affecting the *ex parte* applicant's case as raised by the 3rd respondent are that the copy of criminal case judgment annexed to the verifying affidavit bears no land reference number; that no company resolution to institute the proceedings herein has been filed; that the **CR12** shows a name different from that of the deponent to the verifying affidavit as one of the directors of the *ex parte* applicant and that Abraham Kiptanui has not complained about the contents of the **Gazette Notice No CXXI No 27 of 1/3/2019**, and as such the *ex parte* applicant has no authority to complain over the contents thereof on his behalf.

11. In her further affidavit filed on **9/9/2019** the 3rd respondent supports the contents of the 1st respondent's replying affidavit.

The Ex-Parte Applicant's Submissions

12. These judicial review proceedings were disposed of by way of written submissions. The *ex parte* applicant filed his submissions on **15/7/2020**. In those submissions the contents of the *ex parte* applicant's affidavits set out above are reiterated. It was submitted that the NLC had exceeded its jurisdiction in handling the matter regarding the suit land, the dispute being one between and company and one of its members and that dispute did not fall within the provisions of **Section 15(4) of the NLC Act**. Citing the case of **Daniel Toroitich Arap Moi Vs Mwangi Stephen Mureithi & Another 2014 eKLR**, counsel for the *ex parte* applicant submitted that the decision of the NLC is contrary to public policy because it ignores the principle of separate corporate personality set out in **Salomon Vs Salomon & Co Ltd 1897 AC 22**. While citing **Guo Dong Vs Multi Win Trading Company Limited & 6 Others 2015 eKLR**, the *ex parte* applicant's counsel submitted that a member of a company may only be entitled to shares and not the assets of the company and the modality of operations of the company is left to the internal mechanisms of the company as prescribed by the memorandum and articles of association; that remedies are prescribed under **Section 782 of the Companies Act**.

13. It was the *ex parte* applicant's submission that the dispute had in any event been resolved way back in **1991** and the land subdivided and members had assumed possession of their portions.

14. Citing the decision in **Robert Mutiso Lelli and Cabin Crew Investments Ltd -vs- National Land Commission & 3 Other [2017] eKLR** and **Halbury Laws of England Judicial Review (Volume 61) 2010, 5th Edition para 639 and Article 50 of the Constitution of Kenya**, it was also submitted that Abraham Kiptanui, who is a director of the *ex parte* applicant, was not given a fair hearing by the 1st respondent on the dispute yet the issued gazette notice compelled him to make restitution while he was not a party and the claim was against the *ex parte* applicant only.

15. Citing **Republic -vs- Public Procurement Administrative Review Board & 2 Others Ex parte Pelt Security Services Ltd [2018] eKLR**, **Republic -vs- Ministry of Planning & Another, Ex parte Professor Mwangi S. Kimenyi HCC Misc. Appl. 1769 of 2003** and **Republic -vs- Commissioner for Co-operative Ex parte Kirinyaga Tea Growers [1991] 1 EA 245** the applicant's counsel also submitted that the 1st respondent's decision was laden with bias and irrationality for the reason that it was not supported by facts or evidence, that it ignored the 1st respondent's Regional Coordinator's report and made unjustified recommendations. It was also alleged it ignored crucial evidence that David Rono had remitted part of the money obtained from other people without disclosing that the contribution was from those other persons and that this had led to his conviction in a criminal case.

16. Citing **Republic -vs- Chairman Emuhaya Land Disputes Tribunal & another Ex-parte Alfred Esitiba Ebita [2014] eKLR**, the *ex parte* applicant's counsel submitted that the gazette notice was ambiguous and cannot be implemented as crafted for the reason that it does not specify where the **400 acres** would be excised from yet Mr. Kiptanui does not own the suit land. It is submitted that the directions in the gazette notice only give room for speculation regarding the 1st respondent's intention. Finally it is submitted that the decision of the 1st respondent dated **7/2/2019** and the gazette notice of **1/3/2019** are at great variance and so the exact decision of the 1st respondent "remains a mystery".

The 3rd Respondent's Submissions

17. The respondent's submissions filed her written submissions on **6/7/2020** through her counsel R.E. Nyamu & Co. Advocates. The gist of those submissions is that the application is presented by the *ex parte* applicant which is a registered company yet the statutory statement and the verifying affidavit of Abraham Kiptanui introduces into the case facts which cannot be determined through judicial review proceedings. He submits that those facts can only be determined by the 1st respondent under the **National Land Commission Act**. He also states that the *ex parte* applicant admits to having been granted an opportunity to participate in the impugned proceedings.

18. It is submitted further that since a company acts through its directors, the *ex parte* applicant would suffer no prejudice if Abraham Kiptanui its director is required to give effect to the decision to hive off **400 acres** from the suit land.

19. Regarding the allegation that the decision of the 1st respondent is at variance with the contents of the gazette notice counsel for the 3rd respondent cited **Article 159 (2) (d) and (e)**, to paraphrase, that justice should be administered without undue regard to technicalities; he faulted the entire notice of motion for not dealing with the substance of justice. In furtherance of that argument he stated that the subject property is known and it does not belong to Abraham Kiptanui but to the *ex parte* applicant and that in accordance with **Section 37 (2) (b) of the Companies Act**, Abraham Kiptanui has power to give effect to the decision of the 1st respondent made on 7/2/2019.

20. Finally, counsel submitted that pursuant to **Regulation 29 of the National Land Commission (Investigation of Historical Land Injustices) Regulations 2017** a person aggrieved by the National Land Commission decision may within **28** days appeal to the court yet the instant proceedings invite the court to re-evaluate the facts as represented before the NLC and so the judicial review notice of motion is improperly before the court, fails to attain the threshold for judicial review and should be dismissed. The 3rd respondent adopted wholly the position taken by the 1st respondent in its replying affidavit dated **21/6/2019** regarding NLC's jurisdiction and the propriety of its proceedings on the subject matter.

DETERMINATION

Issues for Determination

21. I have examined the application and the responses. The issues for determination in this matter are as follows:

- a. Whether the judicial review application is properly before court;*
- b. Whether Abraham Kiptanui was accorded a fair hearing;*
- c. Whether the National Land Commission had jurisdiction to determine the dispute;*
- d. Whether the National Land Commission decision is laden with bias and/or irrationality;*
- e. What orders should issue as to costs?*

22. These issues are dealt with as hereunder.

(a) Whether the Judicial Review Application is properly before Court

23. In all litigation it is incumbent upon the claimant to establish their case to the required standard of proof. Judicial review is no exception and in this case where the *ex parte* applicant alleges that no documentary evidence was presented by the respondents in their replying affidavits, the position remains the same. In the case of **Republic v Business Premises Rent Tribunal & another Ex parte Albert Kigera Karume [2015] eKLR**, Odunga J observed as follows:

“It must be stressed that in judicial review applications the burden is always on the ex parte applicant to prove his allegations to the satisfaction of the Court.”

24. In the case of **Republic -vs- Kenya Power & Lighting Company Ltd [2013] eKLR**, Korir J voicing similar opinion stated as follows:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

25. The basis of the argument by the 3rd respondent to the effect that the judicial review notice of motion has not met the threshold for judicial review and is thus improperly before court is that the *ex parte* applicant has introduced into it facts not worthy of determination in a judicial review application, but which can only be determined by the NLC. In furtherance of this argument also, the 3rd respondent avers that the provisions of **Regulation 29 of the National Land Commission (Investigation of Historical Land Injustices) Regulations 2017** a person aggrieved by the National land Commission decision may within **28** days appeal to the court.

26. The 3rd respondent's argument on the propriety of these proceedings commenced in the replying affidavit which raised two other allegations to the effect that **(i)** no company resolution to institute the proceedings herein has been filed and, **(ii)** that the **CR12** shows a name different from that of the deponent to the verifying affidavit as one of the directors of the *ex parte* applicant.

27. The last two grounds are easier to deal with and they were addressed by the *ex parte* applicant's further affidavit filed on **15th July 2020** which annexed a company resolution to sue and reiterated that Abraham Kiptanui was its director. Citing **Leo Investments Ltd vs Trident Insurance Company Ltd (2014) eKLR** and **Republic Vs Registrar General & 13 Others 2005 eKLR**, the *ex parte* applicant posited that a resolution to sue does not have to be filed simultaneously with the suit but can be produced at any time before the hearing of a case. The respondents appear to have acquiesced under that response for they did not address the issue of lack of a company resolution again in the matter. Furthermore, this court agrees with the position stated in the two cases cited by the *ex parte* applicant on the point.

28. Regarding the submission that the judicial review notice of motion has not met the threshold for judicial review and that it is improperly before court, and that the *ex parte* applicant has introduced into it issues not worthy of determination in a judicial review a deeper scrutiny of

the record would be necessary. Although this court may not owing to what is to be stated later in this judgment embark on such deeper scrutiny, it must be remembered that ordinarily, judicial review deals with the process and not the merits of a decision. In the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR**, the court (**Mativo J**) observed as follows:

“In judicial Review proceedings, the court can only determine the process not the merits of the decision. The arguments advanced by counsel for the ex parte applicant were raised and considered by the Board. By inviting this court to re-consider the same issues amounts to inviting this court to engage in a merit review which is an appellate function hence outside the scope of Judicial Review jurisdiction.”

29. A judicial review application should therefore never be considered as an equivalent of an appeal, for in an appeal the court has greater latitude to re-evaluate the evidence given in the proceedings in the lower court or tribunal or other quasi-judicial body and subject to allowing a margin in respect of the demeanour of witnesses whom it did not observe give evidence first hand, draw its own conclusions from the facts.

30. There is no express allegation in the instant application that the 1st respondent did not conduct a fair hearing or that it breached rules of natural justice with regard to the *ex parte* applicant. That allegation is only made with regard to the *ex parte* applicant's director, and it shall be dealt with later in this judgment.

31. Consequently it is the proper conclusion to make here that that the *ex parte* applicant was granted an opportunity to be heard and that the proceedings were conducted to its satisfaction, but that it was nonetheless dissatisfied with the final outcome of the hearing.

32. It is clear from the record that the 1st respondent's inquiry into the dispute arose under its jurisdiction under the **National Land Commission Act** to determine claims of historical land injustices under **Article 67(1)(e)** of the **Constitution of Kenya 2010**:

“(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;”

33. A historical injustice is defined as follows in **Section 15** of the **NLC Act**:

(1) Pursuant to Article 67 (3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.

(2) For the purposes of this section, a historical land injustice means a grievance which-

(a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;

(b) resulted in displacement from their habitual place of residence;

(c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated;

(d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and

(e) meets the criteria set out under subsection 3 of this section.

34. **Section 15(3)** of the **NLC Act** provides as follows:

(3) A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria-

(a) it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;

(b) the claim has not or is not capable of being addressed through the ordinary court system on the basis that-

(i) the claim contradicts a law that was in force at the time when the injustice began; or

(ii) the claim is debarred under section 7 of the Limitation of Actions Act, (Cap. 22) or any other law;

(c) the claimant was either a proprietor or occupant of the land upon which the claim is based;

(d) no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and

(e) it is brought within five years from the date of commencement of this Act.

35. This court has not heard the *ex parte* applicant to say that the dispute did not fall under the category of a historical injustice for the purpose of an investigation by the 1st respondent under **Section 15** of the **NLC Act** and the relevant regulations. Indeed the closest the *ex parte* applicant came to raising that argument is when it raised a broader allegation in the affidavit and submissions that NLC lacked jurisdiction in that under **Section 15** of **National Land Commission Act** and the **National Land Commission (Investigation of Historical Land Injustices) Regulations 2017** as the NLS had no power to direct any other independent office and institution to deal with a dispute between a member of a company and a company; this in my view is a complaint different from a claim that the NLC may not have jurisdiction over the subject matter, for it is only a complaint based on the nature of recommendation that the NLC made at the end of its inquiry. However, this court has observed that the dominant issue that was before the 1st respondent was not a commercial dispute over shares of the company but the distribution of land between the parties who allegedly purchased the land by their own efforts.

36. In view of the foregoing it is clear that the regulations made under the **NLC Act** with the principal objective of operationalizing the Act regarding the determinations of the NLC in respect of historical injustices and their direction regarding consequent appeals must be construed to apply to the letter.

37. In this court's view the point raised by the 3rd respondent is that an appeal should have been filed within **28 days** of the publication of the determination of the NLC and the matters raised in this judicial review application are matters only within the jurisdiction of the NLC and, on appeal against the NLC decision, this court. I have already stated that a judicial review application should never be conceptualized as an appeal, however attractive that course of action may seem. Thus this court is inclined to examine whether the right course of action under the regulations has been followed.

38. **Regulation 29** of the **NLC (Investigation of Historical Injustices) Regulations** stipulates as follows:

“A person aggrieved by the decision of the Commission may, within twenty eight days of the publication of the decisions, appeal to the Court.”

39. There is a plethora of decisions that emphasize that where a certain course of action or procedure of seeking redress has been specifically provided for, then that procedure ought to be followed before any other recourse to the court for relief. In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR, NBI Civil Application No. 92 of 1992** the court stated as follows:

“In our view, there is considerable merit in the submission 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.”

40. In **Geoffrey Muthinja Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 Others (2015) eKLR** the Court of Appeal stated as follows:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."...

41. In the **Speaker case (supra)** the respondent had filed a petition prior to filing the judicial review notice of motion and both matters were pending in court by the time the decision of the Court of Appeal was made regarding strict adherence to prescribed procedure.

42. In the **Wachira Martin Nguni & 3 others v Independent Electoral and Boundaries Commission & 5 others [2013] eKLR** the Petitioners herein filed a petition against the Respondents pursuant to Provisions of the Constitution, Election (General) Regulations 2012 and the Political Parties Act. The court in that case stated as follows:

“The Political Parties Act sets out the procedure to be followed in a case where dispute arises from nominations and it should be followed to the letter. It does not anywhere provide for Judicial Review which at times is the only alternative where the Act is silent or does not provide for how to appeal from a decision of any given body.”

43. In the instant case, the 1st respondent's decision in the dispute was gazetted vide a gazette notice issued on **1/3/2019**. The judicial review notice of motion was filed on **27/3/2019**, clearly within the time that the appeal prescribed under **Regulation 29** of the **NLC (Investigation of Historical Injustices) Regulations** ought to have been filed.

44. The dispute herein should have therefore been subjected to an appeal as the first point of call before any other court action such as judicial review. In the light of the foregoing I find that the notice of motion dated **9/4/2019** is improperly before this court and there is not any need of delving into the rest of the issues for determination set out herein above save what I will state in the paragraph immediately below.

45. One issue that does not specifically go into the merits of the *ex parte* applicant's own case and which this court needs to comment on before finalizing this judgment is the allegation that Abraham Kiptanui was not granted a fair hearing by the 3rd respondent.

46. The response raised by the 3rd respondent to that allegation is the retort that under the **Companies Act 2015** Abraham Kiptanui being the

director of the *ex parte* applicant can act on behalf of the *ex parte* applicant but the *ex parte* applicant can not act for him. Further the 3rd respondent's counsel submitted that Abraham Kiptanui is a director of the company and in any event he would be the person to effect the decision of the 1st respondent in the dispute. In the long run, the *ex parte* applicant's impeccable argument inspired by **Salomon Vs Salomon & Co. Limited (supra)** that a company is at law a different person altogether from the subscribers to the memorandum came to haunt it in the form of the 3rd respondent's submission which in this court's view is correct. This court holds that to be a sufficient answer to the argument erected by the *ex parte* applicant, save to add that since Abraham Kiptanui is not a party to the proceedings this court would lack a legal basis to address any claim that his rights were violated. He alone as a natural person may be heard to complain of any violations. This court therefore needs not engage in a futile inquiry into the issue as to whether Abraham Kiptanui was granted a proper hearing or not, for he is not an *ex parte* applicant herein.

47. For the foregoing reasons I find that the notice of motion dated **9/4/2019** is improperly before this court and it is hereby struck out with costs to the 1st and 3rd respondents only.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 1st day of December, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.