

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**JUDICIAL REVIEW NO. E002 OF 2025**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**PRINCIPAL MAGISTRATE BONDO LAW**

**COURTS.....1<sup>ST</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR BONDO.....3<sup>RD</sup> RESPONDENT**

**AND**

**HERINE ACHIENG GARI.....1<sup>ST</sup> INTERESTED PARTY**

**GRACE AYIEKO ODIDA.....2<sup>ND</sup> INTERESTED PARTY**

**FREDRICK NG'ONG'A.....3<sup>RD</sup> INTERESTED PARTY**

**AND**

**DR. JOTHAM OKOME ARWA.....EXPARTE APPLICANT**

**RULING**

1. The Applicant herein filed an application vide a Notice of Motion dated 24<sup>th</sup> April 2025 seeking the following prayers:

- i) Certiorari- to remove to the Honourable Court for purposes of quashing the decision of the 1<sup>st</sup> Respondent dated 8/4/2025 directing that the grant of letters of administration intestate made to Herine Achieng Gari, the 1<sup>st</sup> Interested Party, on 16/2/2017 and confirmed on 13/11/2017 be revoked and further that all titles arising

from sale and/or transfer of LR No. West Asembo/Siger/596 and LR No. West Asembo/Siger/653 be cancelled and the titles to revert back to the name of the deceased for succession to be done in compliance with the law (the impugned decision).

- ii) Prohibition- restraining the Respondents and Interested parties whether by themselves, their agents, or persons acting on their behalf from any further implementation of the impugned decision.
- iii) Costs of the application be provided for.

2. The Applicant's application is supported by the grounds set out on its face as inter alia; that the Exparte Applicant is the registered owner of the property known as West Asembo/Siger 653 (the suit property) which was purchased from the 1<sup>st</sup> interested party and a title issued on the 12<sup>th</sup> January 2021; that on or about the 8/4/2025, the exparte Applicant was notified of a decision by the 1<sup>st</sup> Respondent directing that the Grant of Letters of Administration intestate made to Herine Achieng Gari, the 1<sup>st</sup> Interested Party revoked and further that all titles arising from sale and /or transfer of land parcel number West Asembo/Siger/653 be cancelled and the titles to revert back to the name of the deceased for succession to be done in compliance with the law(the impugned decision); that impugned decision was as a result of an application for summons for revocation of grant dated 15/8/2023; that in issuing the said

decision, the 1<sup>st</sup> Respondent was sitting as a succession court; that as a succession court, the 1<sup>st</sup> Respondent was duty bound to comply with explicit provisions of the law, which the 1<sup>st</sup> Respondent failed to do so; that the decision issued by the 1<sup>st</sup> Respondent is ultra vires, irrational and illegal and ought to be immediately stayed and any further implementation stopped; that the rights of the exparte Applicants have been affected by the impugned decision and are likely to continue being affected; that the impugned decision arbitrarily deprives exparte applicant of his suit property if implemented; that the exparte applicant was not given any notice or granted any opportunity to be heard on the impugned decision before it was made; that the Exparte Applicant's rights have therefore been violated and which violation will result in the exparte Applicant being deprived of his property unless this Honourable Court intervenes to prevent further violation; that the Exparte Applicant seeks to challenge the decision of the 1<sup>st</sup> Respondent on the grounds that it is ultra vires and in excess of jurisdiction, tainted with illegality, based on grave misapprehension of the law and thorough misunderstanding of the facts and which amounts to abuse of power as the same is based on irrelevant consideration and which failed to consider relevant facts and that the decision is Wednesbury unreasonable and irrational; that the decision is ultra vires and in-excess of jurisdiction as well as an abuse of process conferred upon the 1<sup>st</sup> Respondent for several reasons to wit:

- a) Rule 44(1) of the Probate and Administration Rules provides that only the High Court has jurisdiction to revoke a confirmed grant. Despite this clear provision of the law, the 1<sup>st</sup> Respondent purported to issue an order revoking a confirmed grant;
- b) A succession court in a succession matter has no jurisdiction over title to land and could not issue the orders cancelling the ex parte Applicant's title to the suit property;
- c) A magistrate court sitting in a succession matter has no jurisdiction to quash a title, as this is a preserve of the Environment and Land Court as per Section 13 of the Environment and Land Court Act, or such magistrates' court as are duly gazetted as per Section 26 of the Environment and Land Court Act.
- d) The 1<sup>st</sup> Respondent who is obligated to ensure that every person is heard in a matter that affects them in compliance with Article 50 of the Constitution and Rule 44(5) of the Probate and Administration Rules, failed to direct or order the ex parte Applicant to be joined or served with any court process, in spite of having knowledge that the ex parte Applicant is the registered owner of the suit property which was subject to the proceedings before him and that the ex parte Applicant was going to be affected by his decision.

- e) That the said action is also based on a grave misapprehension of law and through misunderstanding of facts for the reasons that:
- f) Section 93 of the Law of Succession Act provides that any transfer of any interest in immovable or movable property made to a purchaser by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant. The 1<sup>st</sup> Respondent in issuing the impugned decision canceling the 1<sup>st</sup> Respondent in issuing the impugned decision cancelling this ex parte Applicant's title proceeded on a grave understanding of the law;
- g) The 1<sup>st</sup> Respondent proceeded on a thorough misunderstanding that it had the jurisdiction to revoke a confirmed grant and equally to cancel a title when it had no such jurisdiction;
- h) That the said court ruling was made without according the proprietor of the suit land the opportunity to be heard, in clear violation of natural justice in general and the audi alteram partem rule in particular.

That the Respondent made considerations of irrelevant factors and failed to take into account relevant facts as follows:

- a) Failing to have the ex parte Applicant joined to the proceedings when the ex parte Applicant is the registered owner of the

property despite the fact that the 3<sup>rd</sup> Interested Party duly informed the court (replying affidavit par 5) that the court did not deem it proper or expedient to direct the Petitioner in that case to enjoin the true owner of the suit land to the proceedings in order to give him opportunity to be heard prior to being deprived of an interest in the land as is mandatorily required by law.

b) Intentionally ignoring clear interest in land as is mandatorily required by law

The decision is equally irrational and unreasonable for the reasons that:

a) Under the rule in *Allen v Dumas* (1775-1802) All 398, it is extremely unreasonable for a court of law to condemn a person for obeying a lawful order issued by a court of law by purchasing property from another person who has been given a lawful authority to sell that property through a grant of probate, simply because the grant of probate has subsequent to the sale been annulled;

b) An order issued by a court of law is valid and should be obeyed until it is set aside and any act done in obedience of such order remains valid even after the order has been set aside;

c) Despite clear provisions of the law that protects purchasers of movable and immovable properties, the 1<sup>st</sup> Respondent proceeded to cancel and quash titles of such a purchaser;

d) That 1<sup>st</sup> Respondent's decision to punish the ex parte Applicant through cancellation of his title, behind his back, and thereby subjecting him to losses worth millions of shillings for the sin or crim of obeying a lawful order, by purchasing the suit land from the 1<sup>st</sup> Respondent

3. The Applicant herein swore a verifying affidavit dated 14<sup>th</sup> April 2025 in support of his case wherein he avers inter alia; that on or about 8/4/2025, he was notified of a decision by the 1<sup>st</sup> Respondent directing that the Grant of Letters of Administration intestate made to Herine Achieng Gari, the 1<sup>st</sup> Interested Party on 16/2/2017 and confirmed on 13/11/2017 be revoked and further that all titles arising from sale and/or transfer of land parcel number West Asembo/Siger/596 and West Asembo/Siger/653 be cancelled and the titles to revert back to the name of the deceased for succession to be done on compliance with the law (the impugned decision annexed hereto and marked as JOA-3); that the impugned decision was as a result of an application for summons for revocation of grant dated 15/8/2023 as per the annexed copies of summon for revocation of grant and marked as JOA-3; that in issuing the said decision, the 1<sup>st</sup> Respondent was sitting as a succession court and as a succession court, the 1<sup>st</sup> Respondent was duty bound to comply with explicit provisions of the law, which the 1<sup>st</sup> Respondent failed to do; that the impugned decision is ultra vires, irrational and illegal and ought to be immediately stayed and further implementation stopped; that the Applicant's rights have been affected by the impugned decision

and are likely to continue being affected and that the said decision arbitrarily deprives him of the suit property if implemented; that he was not given any notice or granted any opportunity to be heard on the impugned decision before it was made as his rights have been violated and which violation will result being deprived of his property unless this court intervenes to prevent further violation; that the Applicant seeks to challenge the decision at the 1<sup>st</sup> Respondent on the ground that it is ultra vires and in excess of jurisdiction; tainted with illegality; based on grave misapprehension of the law and thorough misunderstanding of facts, amount to abuse of power, based on irrelevant considerations and failed to consider relevant facts and the decision in *Wednesbury* unreasonable and irrational.

4. The 2<sup>nd</sup> Respondent filed grounds of opposition dated 30/4/2025 wherein it raised two grounds inter alia; that the application is misconceived, frivolous, vexatious and an abuse of the due process of the law; that the Applicant has not appealed or applied to set aside the orders complained of.
5. The Exparte Applicant filed a further affidavit dated 30/6/2025 in response to 2<sup>nd</sup> Respondent's contention that the appropriate recourse lay in an appeal, and to the 4<sup>th</sup> Respondent's position that the matter ought to have been subjected to review before the 1<sup>st</sup> Respondent, that he asserts that he is entitled, as a matter of law to frame his cause of action in a manner that aligns with the specific reliefs sought, provided that the chosen procedure is

legally permissible, in the present circumstance, judicial review constitutes the most suitable and efficacious avenue for seeking the intervention of this court in respect of the orders prayed for therein for several reasons; that in judicial review jurisdiction, this court exercises special jurisdiction and is only concerned with the decision making process of a subordinate court or tribunal such as the 1<sup>st</sup> Respondent herein, and that the court has special jurisdiction to issue orders of mandamus, prohibition and certiorari as the remedies against acts or omissions by public entities; that the supervisory jurisdiction of this court can be applied in special circumstances and where there is evidence of obvious miscarriage of justice; that it has long been settled that the decision affecting legal rights of an individual which is arrived at by procedure which offends the principles of natural justice is outside the jurisdiction of the decision making authority. As such, a party has the right to challenge the said decision by invoking the supervisory jurisdiction of this court through the writ of judicial review; that he was never made a party to the proceedings before the subordinate court, an adverse decision was, therefore, made without affording him a right to be heard; that an adverse decision having been made without my participation and the same is not binding on me and I have chosen to challenge it by way of judicial review and special jurisdiction of this court; that as impugned decision is not binding on himself, he cannot appeal against it within the confines of law of Succession Act being that he was not a party to the

proceedings before the trial court; that the grant obtained by the 1<sup>st</sup> Interested Party was issued pursuant to a valid court order, and for the duration it remained in force, and even thereafter, any transaction undertaken pursuant thereto retained their validity in accordance with the provisions of Section 93 of the Law of Succession Act and by issuing a decision contrary to express provisions of the law, the subordinate court acted without jurisdiction and this court has the special jurisdiction to correct the said ultra vires decision under its judicial review jurisdiction; the transfer of the suit property to him by the 1<sup>st</sup> interested party did not, in any manner, contravene the established legal principles of nemo dat quod non habet for the following reasons:

- a) That he purchased the suit property from the 1<sup>st</sup> Interested party for valuable consideration.
- b) That as the time of the said purchase, the 1<sup>st</sup> interested party had a grant of representation in force.
- c) That the 1<sup>st</sup> Interested Party was entitled by law to petition for letters of administration.

6. That his right to the suit property is protected by Article 40 of the Constitution and Section 93(1) of the Law of Succession Act; that if he would have been joined to the proceedings, he would be able to demonstrate the foregoing and a decision contravening my non-derogate right to a hearing would not have been issued; that the Respondent admitted that these are facts that ought to have been considered, albeit in an application for review as opposed to a judicial review and that he has a right to be heard, which right

he admits was impinged and I should be given an opportunity to be heard; that in Section 11 of the Interpretation and General Provisions Act, which address the manner in which applied laws are to be construed within the Kenya legal framework, is inapplicable to the interpretation of Rule 44(1) of the Probate and Administration Rules. This is by reason of the definition of “applied law” under Section 3 of the said Act, which expressly defines applied laws as an Act of the Legislature of another country or an order in council of the United Kingdom or the subsidiary legislation of these specific laws. The law of Succession Act and by extension, the Probate and Administration Rules do not form part of applied law as defined under the Interpretation and General Provision Act; that consequently, the High Court’s jurisdiction to entertain applications for revocation of grant as preserved under Rule 44(1) of the Probate and Administration Rules, cannot be subject to reinterpretation or modification through the application of interpretive provisions intended for applied laws; that contrary to the 4<sup>th</sup> Respondent’s assertion, Section 48 and 49 of the Law of Succession Act donate to the High Court authority to determine succession dispute where both a magistrate’s court and the High Court are situate. That in this dispute, there is a High Court in Siaya and the magistrates court could not purport to exercise such jurisdiction when there exists a High Court and therefore there is no conflict at all between Rule 44 of Probate and Administration Rules and Section 48, 49 and 93 of the Law of Succession Act; that any

contention seeking to advance the notion of a mistaken belief regarding rightful ownership of the suit property and failure to enjoin him as a party to the proceedings is baseless, given that the 4<sup>th</sup> Respondent was a party to the impugned proceedings before the 1<sup>st</sup> Respondent and was aware that ownership had been transferred to him; that a cursory examination of the court record and pleadings filed before the trial court would have readily revealed that he is the duly registered proprietor of the suit property and/or that there was a third party who was in occupation and ownership of the suit property and that nothing prevented the 4<sup>th</sup> Respondent from ascertaining ownership of the suit property as it filed its pleadings in the trial court.

That the claim of inadvertence is baseless and to be disregarded totally; that his inclusion as a party to the impugned proceedings before the 1<sup>st</sup> Respondent was imperative, and the failure for his inclusion occasioned procedural and substantive prejudice; that whether or not inclusion to the case would have altered the legal status of the grant in question was a matter reserved for determination of the court and not the 4<sup>th</sup> Respondent and that the constitution is very clear that the right to a hearing cannot be limited and it was imperative that he be joined to the proceedings and that no justification exists for the omission to join him in the said proceedings; that the 4<sup>th</sup> Respondent acknowledged the failure of his joinder to the proceedings as an honest mistake while the question of efficacy of his joinder to the said proceedings when he is the registered owner of the suit property

as Respondent joined Grace Ayieko Odida and Fredrick Otieno Ngong'a (2<sup>nd</sup> and 3<sup>rd</sup> Interested Party) to the said proceedings as he believed the said persons to be the registered owners of the suit property shows double speak by the 4<sup>th</sup> Respondent regarding his right to have been party to the proceedings before the 1<sup>st</sup> Respondent; that the claim that Section 76 of the Law of Succession Act allows for revocation of titles issued during the pendency of a valid Grant is devoid of any merit by dint of the explicit provisions of Section 93 thereof; that the claim of forum shopping has no basis as he has filed the instant application before the court, which in any event would have been the court that entertained the appeal had he been joined to the proceedings before the trial court and had he appealed from the decision thereof.

7. The 2<sup>nd</sup> Respondent who acts for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition dated 30<sup>th</sup> April 2025 wherein it raised two grounds inter alia; that the application is misconceived, frivolous, vexatious and an abuse of the due process of law and should be dismissed with costs; that the Applicant herein has not appealed from and/or applied to set aside the orders complained of.
8. The 4<sup>th</sup> Respondent filed a replying affidavit dated 12/6/2025 in response to the application wherein he averred inter alia; that he is a stranger to the parties described in the statement of the Exparte Applicant dated 15/4/2025 and that he has never lodged

any claim against them, their rights or interests; that he was advised that the issues disguised in the Judicial Review application arise from a misconception of the law and should have properly been before a review or an appellate court and are therefore tantamount to an abuse of court process and should be dismissed in limine; that Article 40 of the Constitution provides for right to property and which does not form part of the non derogable rights under Article 25 of the Constitution and in the same breath, Article 40(6) of the Constitution does not protect a right to property that has been acquired unlawfully as is the case with Exparte Applicant's title; that Section 93 of the Law of Succession Act in which the Exparte Applicant seeks refuge is subservient to the Constitution and cannot be used to justify and sanitize the fraudulent means employed by the 1<sup>st</sup> Interested Party to unlawfully acquire the grant used to administer the estate of the deceased person and that part (b) of the provisions intimates that with sufficiently compelling reasons like the 4<sup>th</sup> Respondent was able to demonstrate to the lower court, the invalidation of the grant would definitely operate dictum, "nemo dat quod non habet" that no one can transfer a title they did not have in the first place; that the assertion that only the High Court has jurisdiction to revoke a grant as per Rule 44(1) of the Probate and Administration Rules is a narrow understanding, interpretation and application of the law as it is a ground upon which this suit is founded and that Section 11 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provide that an

applied law shall be read with such formal alterations as to names provides that an applied law shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties or otherwise as may be necessary to make it applicable to the circumstances, and in particular to a reference to a Probate Court, Bankruptcy court or Admiralty court or similar expression, shall be construed as a reference to the High Court exercising the appropriate jurisdiction; that Section 7 of the Magistrate's Court Act 2015 as read together with Section 48(1) and Section 49 of the Law of Succession Act Cap 160, insists that nothing stops a magistrate from entertaining a succession dispute including an application for revocation of grant in respect to an estate the gross value of which falls within the set out pecuniary limits, that Rule 44(1) that has been relied on by the Exparte Applicant is subject to the parent Act, the Law of Succession Act Cap 160 as set out in Section 3 of the Judicature Act Cap 8 Laws of Kenya; that his failure to enjoin the Applicant in the proceedings before the lower court was not out of spite, ill motive or in bad faith but was purely an inadvertent mistake since he is now 87 years old and that due to the intricacies of age, he was uncertain of the land parcel number occupied by the Exparte Applicant and that he was not in financial capacity to engage a land surveyor to assist and establish the parcel number; that he genuinely believed that West Asembo/Siger/653 was in the name of the 3<sup>rd</sup> Interested Part as far as he can remember from the information his late brother Pitalis Odongo gave him and

that he maintained in his records and that he was surprised to see in the current application before court that the said land actually is in the name of the Exparte Applicant which parcel was also subject of the suit before the lower court; that failure to enjoin the Exparte Applicant in the suit before the lower court was not fatal and/or prejudicial to him since he has not demonstrated how his inclusion in that suit would have changed the fact that the 1<sup>st</sup> Interested party fraudulently obtained the grant in question or varied the outcome before the lower court; that this matter should have been subjected to a review as provided by Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules or in the alternative canvassed by way of an appeal; that the allegations against the judicial officer by the Applicant do not have any legal basis; that a succession court has power under Section 76 of the Law of Succession Act to revoke grants if sufficient reasons are furnished and that the said courts upon revoking the grants are empowered to nullify title deeds emanating from the revoked grant; that the Applicant is forum shopping with the ultimate aim of hiding from justice and that this court should dismiss the instant judicial review application with costs to the 4<sup>th</sup> Respondent.

9. The application was canvassed by way of written submissions. Both parties complied.

10. The Applicant's submissions are dated 30<sup>th</sup> June 2025.

11. Counsel for the Exparte Applicant submitted that the 1<sup>st</sup> Respondent delivered a decision on 8/4/2025 directing that the Grant of Letters of administration intestate made to the 1<sup>st</sup> Interested party on the 16/2/2017 and confirmed on the 13/11/2017 be revoked. That all the titles arising from the sale and /or transfer of the parcel of lands known as West Asembo/Siger/596 and West Asembo/Siger/653 were to be cancelled and the titles to revert back to the name of the deceased for succession to be done in compliance with the law.
12. That the impugned decision arose from an application dated 15/8/2023 which sought revocation of the grant to the 1<sup>st</sup> Interested Party and that at the material time, the 1<sup>st</sup> Respondent was duly presiding in its capacity as a succession court and was therefore under a legal obligation to strictly adhere to the express provisions of the law which it failed to discharge.
13. It was submitted that Exparte Applicant is the duly registered proprietor of the suit land as whole namely Land Parcel No. West Asembo/Siger/653 having lawfully acquired the same from the 1<sup>st</sup> Interested Party and which the title was issued on 12/1/2021. That the Applicant being the registered proprietor of the suit property was neither served with any summons nor notified of the proceedings before the 1<sup>st</sup> Respondent, and remained

unaware thereof until the said impugned decision was rendered. That the Applicant intends to convince this court that the 1<sup>st</sup> Respondent's decision is ultra vires and in excess of the jurisdiction as Rule 44(1) of the Probate and Administration Rules provides that only the High Court has jurisdiction to revoke a confirmed grant; a succession court sitting as such has no jurisdiction to cancel title to a suit property; and the Respondents violated the Applicant's constitutional right to a fair hearing by failing to summons or join the Applicant as a party to the proceedings despite having full knowledge that he is the lawful proprietor of the suit property.

14. Further, that the impugned decision is a grave misapprehension of law and thorough misunderstanding of facts herein for the reasons that it violates clear provision of Section 93 of the Law of Succession Act; the 1<sup>st</sup> Respondent proceeded on a fundamental misapprehension of the law in purporting to exercise jurisdiction to revoke a confirmed grant and to cancel an already issued title to land; the impugned decision was rendered in contravention of the rules of natural justice, and in particular in breach of the audi alteram partem principle; that the impugned decision was riddled with procedural impropriety and thus irrational and unreasonable for the reasons that Applicant was not accorded a chance to be heard; the impugned decision was manifestly unreasonable in that it sought to punish the Applicant for complying with the lawful court orders and proceeding to

purchase the suit property on the strength of those orders; that the 1<sup>st</sup> Respondent took into account irrelevant considerations and failed to give due regard to material and relevant facts of the case, notwithstanding that the 3<sup>rd</sup> Interested party expressly stated that he was not the rightful owner of the suit property and that it was only just and proper that the Applicant being the lawful proprietor that he be joined to the said proceedings. That the impugned decision was tainted with bias against the Applicant and occasioned a gross miscarriage of justice as the 1<sup>st</sup> Respondent rendered a determination that was wholly inconsistent with the available facts and applicable law and acted in complete disregard of the Applicant's constitutionally protected right to a fair hearing and that contrary to 3<sup>rd</sup> and 4<sup>th</sup> Respondent's position, the circumstances surrounding the impugned decision rendered judicial review the most appropriate and viable remedy available to the Applicant.

Therefore, the Applicant raised two issues for determination namely whether the court has jurisdiction to exercise judicial review over the 1<sup>st</sup> Respondent and whether the Applicant has demonstrated the grounds for the exercise of the judicial review jurisdiction.

15. On the issue whether the Applicant has audience before the court, it is his contention that the decision of the 1<sup>st</sup> Respondent as

prosecuted before it by the 4<sup>th</sup> Respondent, violated his right to property and to fair hearing, as prosecuted under Article 40 and 50 of the Constitution as well as the right to property as per Section 26 of the Land Registration Act and Section 93 (1) of the Law of Succession Act. That the 1<sup>st</sup> and 4<sup>th</sup> Respondents acted contrary to law and in violation of constitutional principles. Reliance was placed on Article 165(6) and (7) of the Constitution which provides as follows:

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For the purposes of clause (6) the High Court may call for record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

Further, a reliance was placed in the case of Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party)) Judicial Review E033 OF 2021(2022) KEHC 10 (KLR), Mativo J (as he then was) stated as follows on the supervisory jurisdiction of the court and judicial review jurisdiction (page 6 of the Applicant's authorities).

The power conferred to this court under Article 165 (6) of the Constitution is used sparingly only when the lower court or tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction which is the case here. That the High Court under the jurisdiction which is the guise of Article 165 (6) cannot assume unlimited prerogative to correct all species of hardship or wrong decisions and that for it to interfere there must be a case of flagrant abuse of fundamental principles of law or it can interfere where there is an order which has resulted in grave injustice. That the fact that the learned magistrate assumed jurisdiction not expressly conferred upon him by the law and in a blatant breach of Section 14 of the CPA is itself a proper case for this court to exercise its supervisory jurisdiction to prevent grave injustice and abuse of the law. That Judicial Review is the review by a judge of the High Court of a decision, proposed decision; or refusal to exercise a power of decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. That it is referred to as supervisory jurisdiction -reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised... and in the instant case, the impugned decision is a judicial function arrived at outside the confines of the jurisdiction conferred to the court by the law, which to him is amenable to both judicial review and supervisory jurisdiction.

Further, a reliance was placed in the case of Republic v Chief Magistrate, Mombasa & 3 Others; Sega Ventures Limited & Another (Interested Parties); Kirima (Exparte) (Judicial Review Application 1 of 2022) [2023] KEELC 180 (KLR) (24 January 2023) Judgment) it was held viz page 26 of the Applicant's authorities):

**In his opinion supervisory jurisdiction under Article 165 (6) of the Constitution will be invoked by the court where the court identifies serious misdirection or error by the subordinate court which leads to a gross injustice for which the superior court must intervene so that justice is done. There are situations that cry and groan out for justice and it will be remiss for the court to close its ears to such cries. The court must rise up and see to it that justice is done in such occasions. Such instances may include failure by the subordinate court to follow its own orders, or failure to follow substantial provisions of the law, which result in gross violation of another person's right especially those contained in the Bill of Rights. He also of the view that in order to invoke its supervisory jurisdiction the court can do so on its own motion or on being moved by any person including parties to the suit. That the court ought to be slow to invoke its supervisory jurisdiction**

under Article 165(6) of the Constitution where there are other specifically provided mechanisms. That it is a jurisdiction that ought to be sparingly invoked, and this will not be the case if the court utilizes it for every infraction, even where there are provided mechanism for redress....what has been presented before me is in my opinion, one case that cries out for the intervention of this court under the supervisory jurisdiction outlined in Article 165 (6) of the Constitution, so that the administration of justice is not brought into disrepute or embarrassment, and so that the court process is not used to violate the applicant's right to property. He persuaded to assess the substantial complaints that the ex parte applicant has outlined against the Magistrate's court and give such orders or directions as I deem it for the case at hand. I am aware that the applicant herein did not specifically invoke this court's supervisory jurisdiction under Article 165 (6) of the Constitution but as I have explained above, this court can suo moto be moved to exercise that power, and he so persuaded, given the circumstance, the Magistrate's Court. if this was an ordinary case, he would determine whether this is a fit case for setting aside judgment but as matters stand, the

issue is much more complicated. First, there is doubt whether the Magistrates' court has jurisdiction given the value of the subject matter. Secondly the title of the suit land has already changed and is in the hands of persons who are not parties to the suit before the magistrate. The magistrates' court given the contention and instead guide the parties to move the court within the provided mechanisms. That as earlier stated it is a jurisdiction that ought to be sparingly invoked, and this will not be the case if the court utilizes it for every infraction, even where there are provided mechanisms for redress .....what has been presented before me is in my opinion, one case that cries out for the intervention of this court under the supervisory jurisdiction outlined in Article 165(6) of the Constitution, so that the administration of justice is not brought into disrepute or embarrassment, and so that the court process is not used to violate the Applicant's right to property. That he was persuaded to assess the substantial complaints that the exparte applicant has outlined against the magistrates' court and give such orders or directions as he deems it for the case at hand. He is aware that the applicant herein did not specifically invoke this court's

supervisory jurisdiction under Article 165 (6) of the Constitution but he has explained that this court can suo moto be moved to exercise that power and he is so persuaded given the circumstances of this case. That an application to set aside the judgment would be made in the court which passed the judgment, and that in this instance, the magistrates court. That if this was an ordinary case, he would straight away direct the parties to the magistrates' court for the court to determine whether it is fit for setting aside judgment but as it stands the matter is more complicated and that there is doubt whether the Magistrates' court has jurisdiction given the value of the subject matter. That the title of the suit land has already changed and is in the hands of persons who are not parties to the suit before the subject matter, and may not have the jurisdiction given the value of the subject matter, and that the titles of the suit land has already changed and is in the hands of persons who are not parties to the suit before the magistrate. Hat the magistrates court given the contention on the value of the subject matter may not have the jurisdiction to cancel the title and that even if the judgment is set aside, the question of cancellation of title may be beyond the orders that the

**magistrates court may make. He found that there are special circumstances that would entitle this court to invoke its supervisory jurisdiction ...that he sees no prejudice to the Respondents because they have also addressed themselves substantively on the issues raised by the Applicant. That the powers above are very wide ranging in nature. That it will be seen that the superior court may call for the record of any proceedings before any subordinate court and the other institutions mentioned. That power to “call” buttresses the point that supervisory jurisdiction can be invoked by the court suo moto upon being informed or being aware of a matter that demands invitation for the exercise of the court’s supervisory jurisdiction. that the court may make any order or give any direction it considers appropriate to ensure the fair administration of justice. That it will be observed that the court is not limited in the nature of order that it can make and that what is important is that such order serves the administration of justice.**

It is further submitted that the Applicant is challenging a judgment of court delivered in violation of his rights as particularized in the suit. That a judicial decision made in violation of the law is not an administrative decision within the meaning of Section 2 of the Fair Administrative Action Act. that

it is a judicial action for which the High Court has supervisory powers over, and may issue judicial review orders of, among others, certiorari and that the violation of the Applicant's rights gives the Applicant the requisite locus to institute the instant application. Reliance was placed in the case of Republic v Director, Kenya School of Law & 2 Others; Kitsao (Exparte Applicant) (Judicial Review Application E001 of 2024) [2024] KEHC 2975 (KLR) (22 March 2024) (Judgment) the court stated thus (page 15 of the Applicant's authorities);

**Article 22(1) of the Constitution guarantees to every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. That this court has unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear any question with respect to the interpretation of the Constitution. Article 23 provides that the Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Right and grant appropriate relief. That the remedies available are stipulated in Article 23(3) as follows..... As can be seen, the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, is guaranteed under the**

**Constitution. This right is not among those limited under Article 24. In light of the foregoing, the Court finds that it has the requisite jurisdiction to entertain the matter before it.**

Further, counsel for Applicant contends and seek to demonstrate to this court that his rights were violated in the proceedings before the 1<sup>st</sup> Respondent. That for the foregoing reasons, the Applicant humbly submits that this court has jurisdiction to entertain the instant application seeking redress for violation of his right and the law.

That the fact of existence of an appellate or review mechanism does not divest this court of the supervisory jurisdiction it possesses to address gross violations of rights and absence abuse of jurisdiction, as will be demonstrated. Reliance was placed in the case of **National Social Security Fund v Sokomania Ltd & Chief Magistrate's Court Milimani [2021] KEELC 1639 (KLR)** the court while upholding its supervisory jurisdiction and entertaining a judicial review application held as follows (**page 58 of the Applicant's authorities**)

**The above cases that were cited by the 1<sup>st</sup> Respondent give some guidance on the exercise of the court's supervisory powers under Article 165(6) of the Constitution. I am in agreement with the 1<sup>st</sup> Respondent under Article that the supervisory power**

should be exercised sparingly and only in exceptional circumstances. It is also clear that the power should not be exercised where there is an appropriate alternative remedy. As I have stated earlier, the Applicant had a right of appeal against the orders of the 2<sup>nd</sup> Respondent sought to be reviewed. There is however, some aspect of the Applicant's application that gives me some discomfort as far as the alternative remedy of appeal is concerned. The Applicant's complaint does not concern only the orders that were issued by the 2<sup>nd</sup> Respondent but also the proceedings before the 2<sup>nd</sup> Respondent as a whole. Whereas, the orders that were issued by the 2<sup>nd</sup> Respondent could be appealed or reviewed as I have held, I have doubts with regard to the appealability of the entire proceedings before the 2<sup>nd</sup> Respondent which the Applicant has termed an abuse of the process of the court since the same is challenging the decision of the tribunal. I am persuaded that the Applicant has made out a case for the exercise of this court's supervisory jurisdiction with respect to the proceedings before the 2<sup>nd</sup> Respondent.

Again, in **Ngei v Chief Officer, Public Service Management & Devolution; Migori County Public Service Board (Interested Party) (Judicial Review E024 of 2023) [2023] KEELRC 2447 (KLR) (12 October 2023) (Ruling)** it was held as follows (Page 53 of the Applicant's authorities);

The Judicial Review proceedings herein, were initiated on the basis of violation of specific fundamental rights and freedoms and which have been spelt out in the Applicant's substantive review motion ...The alleged violations are not part of what is contemplated to constitute appeals to the PSC under Article 234 (2) (i) as read with Section 77 of the County Government Act and Sections 85, 86 and 87 of the Public Service Commission Act, 2017 KEHC 8950 (KLR) explained that to succeed in a judicial review application, a party must prove that (page 1 of the Applicant's authorities);

**The person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is beyond the powers (in Latin ultra vires) of the person or body responsible for it.**

16. It was further submitted that upon a careful consideration of the circumstances of this case, the Applicant has adequately demonstrated that, firstly the 1<sup>st</sup> Respondent bore a legal duty to make its determinations on the basis of accurate facts and applicable law a duty it failed to discharge. That the impugned decision was ultra vires and amounted to an abuse of power. That the 1<sup>st</sup> Respondent's glaring disregard for the manifest miscarriage of justice that would arise from the Applicant's

deprivation of the right to property and fair hearing, as guaranteed under Article 40 and 50 of the Constitution respectively coupled with its indifference to the considerable judicial resources likely to be expended in setting aside the said decision, amounts to a clear abuse of both power and the judicial process.

17. Further, that judicial review emerges as the more appropriate remedy in preference to a review or an appeal against the impugned decision, particularly in light of the objectives sought to be achieved by the Applicant. That in affirming this position, the court in *Republic v Public Procurement Administrative Review Board & Another Ex parte Intertek Testing Services (EA) Pty Limited & Authentix Inc: Accounting Officer, Energy and Petroleum Regulatory Authority & Another* [2022] eKLR, while citing Peter Kaluma's *Judicial Review, Law, Procedure and Practice* at page 46 stated that (page 161 of the Applicant's authorities);

**The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision-making process and the legality of the decision making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely in Judicial review the court's exclusive merit process**

**itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely in judicial review the court's exclusive concern is with the legality of the administrative action or decision in question. Thus, instead of substituting its own decision for that of another body, as happens in appeals, the court in an application for judicial review is concerned with the question as to whether or not the action or decision in question was procedurally lawful and fair. Thus, instead of substituting its own decision for that of another body, as happens in appeals, the court in an application for judicial review is concerned with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed."**

17. It was further submitted that the Applicant does not invite this Honourable court to substitute the impugned decision with its own, instead the Applicant's objective is to demonstrate that the impugned decision is unlawful, ought not to be sustained and should consequently be quashed. That litigation belongs to the parties, and it is a cardinal principle that a litigant retains the right to frame and present their case in a manner consistent with the remedies they seek. In this case, the Applicant is seeking the remedy of judicial review. That in light of these manifest violation of process, the Applicants is permitted by Article 22 and 258 of

the Constitution to challenge the 1<sup>st</sup> Respondent's decision, a permission that is further bolstered by this court's jurisdiction to issue judicial review orders as under Article 23 of the Constitution.

19. On the issue of whether the impugned decision was ultra vires for lack of requisite jurisdiction, the Applicant further submitted that the impugned decision was ultra vires and issued without jurisdiction. That the locus classicus on the question of jurisdiction remains the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR (page 76 of the Applicant's authorities)

**Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.**

20. Counsel for Applicant placed reliance on Section 76 of the Law of Succession Act which is as follows:

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

- (a) That the proceedings to obtain the grant were defective in substance;
- (b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
- (d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either –
  - (i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or date thereof, or such longer period as the court order or allow; or
  - (ii) To proceed diligently with the administration of the estate; or
  - (iii) To produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraphs € and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) That the grant has become useless and inoperative through subsequent circumstances.”

Reliance was placed in Re **Estate of Peter Mbogo Gitunu (Deceased) [2018] Eklr** the court held as follows (page 132 of the Applicant's authorities)

**The implication of the rule is that the court with jurisdiction to entertain applications for revocation and annulment of grants in the High Court. the rule states the procedure where the grant was issued in a Resident Magistrates Court. Th application shall be through the High Court Registry by summons in Form 107. The heading of Form 107 is "Summons for Revocation or Annulment of Grant." It bears a footnote that this summons must be issued in the High Court. my view is that an application for revocation of grant from the Magistrates court through a summon is proper when filed as a Miscellaneous Cause.**

That the Respondent was sitting in its capacity as a succession court and therefore lacked the requisite jurisdiction to issued orders cancelling the Applicant's title to the suit property. It is trite law that a magistrate's court when exercising jurisdiction under the law of Succession Act, cannot annul or interfere with registered land titles. The power to determine dispute relating to Land Court pursuant to Section 13 of the Environment and Land Court Act and in limited circumstances, such jurisdiction may also be exercised by a court and Section 9 of the Magistrates Court Act. That this meant that even where

jurisdiction is lawfully donated to a magistrate's court, such jurisdiction is strictly limited in scope and purpose. Accordingly, even if a magistrate's court is duly gazetted under Section 13 of the 26 of the Environment and Land Court and Section 9 of the Magistrates Court Act. That this means where jurisdiction is lawfully donated to a magistrate's court, such jurisdiction is strictly limited in scope and purpose. Accordingly even if the magistrate's court is duly gazette to handle land matters, it can only exercise such jurisdiction while sitting specifically as an Environment and Land Court. it cannot purport to exercise those powers while sitting as a succession court. the above position was reiterated in **Kamau & Another v Ngang & Another [2024] KEELC 1060 (KLR) thus** (page 145 of the Applicant's authorities):

**Investigations on how a title is registered and cancellation of irregularly acquired titles can only be done in a Civil suit filed in Environment and Land Court or before Magistrates courts with requisite jurisdiction to hear such matters.**

21. Further, it was submitted that any orders made outside that narrow legal framework, such as the cancellation of a title in succession proceedings are ultra vires, unlawful and devoid of any legal effect.

22. On the issue of violation of the Applicant's legitimate expectation, fair hearing and rules of natural justice, it is a cardinal principle of natural justice that any person who is likely to be affected by a decision must be given an opportunity to be heard. It constitutes the right to fair hearing and is entrenched under Article 50 (1) of the Constitution that provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

That the interested Parties, in the proceedings before the 1<sup>st</sup> Respondent, informed the court that they had no interest in the suit property and as such the court was aware that the prayers sought by the 4<sup>th</sup> Respondent were inevitably going to negatively affect non-parties to the suit. Therefore, the 4<sup>th</sup> Respondent's decision not to join the Applicant, and the 1<sup>st</sup> Respondent's failure to issue directions for the joinder of the Applicant violated the Applicant's right to be heard and the rules of natural justice that require one not be condemned unheard. A reliance was placed in the Court of Appeal case in **JMK V MWM & MWM & Ano. [2015] KECA 524 (KLR)** where the court was of the considered view that a court should join a party where the decision of the court is likely to affect the non-party.

**...the power of the court to add a party to**

**proceedings can be exercised at any stage of the proceedings, either before, or during the trial; and that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable.**

23. That the 1<sup>st</sup> and 4<sup>th</sup> Respondents' obvious omission not only violates the principles of natural justice, particularly the right to be heard under **Article 50 of the Constitution**, but also raises legitimate concerns regarding the impartiality and fairness of the proceedings and renders such decision a nullity. In **Onyango Oloo Vs Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows (page 103 of the Applicant's authorities):

**“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that**

**rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at. Denial of the right to be heard renders any decision made null and void ab initio**

And in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, the Court of Appeal again stated that (**page 135 of the Applicant's authorities**):

**“The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. Your Lordship, it is evident that the manner in which the 1<sup>st</sup> Respondent arrived at the impugned decision is wholly inconsistent with the rules of natural justice and right to a hearing. At no point was the Applicant notified of the proceedings, invited to attend or given an opportunity to be heard. As a result, the Applicant was denied his constitutional right to a fair hearing, as guaranteed under**

**Article 50 of the Constitution. The impugned decision, therefore, stands in direct violation of the constitutional right to be heard and the fundamental principles of natural justice.”**

24. From the foregoing, it matters not that the 1<sup>st</sup> Respondent would have arrived at the same decision of revoking the grant. The simple act of failing to join a party who has been adversely affected by the decision renders the decision a nullity. The explanation by the 4<sup>th</sup> Respondent that he mistakenly failed to join the Applicant has no basis, as the Interested Parties were clear that they had no interest in the suit property, which is registered in the name of the Applicant.

25. It was further submitted that title nullification is contrary to law Pursuant to the provisions of Section 93 (1) of the Law of Succession Act in that any transfer of movable or immovable property made by a person to whom a grant of representation has been lawfully issued remains valid notwithstanding any subsequent revocation or variation of such grant. It is provided as follows:

**“All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been**

**granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”**

26. Had the 1<sup>st</sup> Respondent properly construed and applied the aforesaid statutory provision, it would have arrived at the correct finding that any purported cancellation of titles arising from the sale or transfer of the suit property was legally untenable. This is because, even in the event that the Grant of Letters of Administration Intestate issued to the 1<sup>st</sup> Interested Party were to be revoked, such revocation would have no legal effect on transactions lawfully undertaken by the said party during the period when the grant was valid and subsisting. It follows thus, that the *ex-parte* Applicant lawfully acquired ownership of the title to the suit property at a time when the 1<sup>st</sup> Interested Party was acting under the authority of a valid grant. As a *bona fide* purchaser for value, the Applicant is entitled to the protection afforded under **Article 40 of the Constitution, Section 93(1) of the Law of Succession Act** and **section 26 of the Land Registration Act** in respect of any property lawfully acquired during the subsistence of the valid grant.

**Article 40 of the Constitution** provides *viz*:

**(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

**(a) of any description; and**

**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person—**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

- (i) requires prompt payment in full, of just compensation to the person; and**
- (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

27. Section 26(1) of the Land Registration Act then provides:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

28. Thus, for the Applicant's title to have been cancelled, it ought to have been within the confines of the law as espoused above. The 1<sup>st</sup> Respondent proceeded to cancel the Applicant's title contrary to the foregoing legal provisions.

29. Gitari J. in **In re Estate of Mutethia Tharaka (Deceased) (Succession Cause 477 of 2015) [2024] KEHC 4425 (KLR)** explained thus (**page 124 of the Applicant's authorities**):

**I find that Section 93 of the Law of Succession Act shields the purchasers and their interest in their respective parcels of land cannot be challenged or impugned even if the court orders the grant to be revoked. That is to say that since the purchasers were bona fide purchasers for value from the administrator who had a valid grant, the validity of their transfer cannot be affected by the revocation of grant. The purchase and the subsequent transfer to them of the suit property is protected under Section 93 of the Law of Succession Act.**

30. And in **Mugambi v Kinoti (Succession Cause 3 of 2018) [2024] KEHC 10732 (KLR) (29 August 2024) (Ruling)** the Court stated (**page 156 of the Applicant's authorities**):

**The section provides the sale of immovable or movable property by a grant holder and which grant is subsequently revoked shall be valid not**

**withstanding any subsequent revocation. The provision is couched in mandatory terms. The section provides that the transfer is valid notwithstanding any subsequent revocation or variation of the grant. The section aims to protect innocent purchasers for value of properties constituting estates of deceased persons even where the grant is subsequently revoked...This is based on the fact that the grant of representation to the estate of a deceased person gives the holder of the grant authority to deal with the properties of a deceased person. Thus, a revocation of grant does not invalidate a transfer of movable property where the person was an innocent purchaser. I find that the under Section 93 of the Law of Succession Act the actions by the respondent to transfer the property to herself and to sell the motor vehicle to the Interested Party long before the grant was revoked is valid. The order revoking the grant which was issued by this court did not invalidate the transfers of the said properties as no orders were issued to cancel the transfers and revert the properties to the estate... I find that the properties were transferred and sold by the administrator when she had a grant issued by this court and the**

**actions by the respondent are shielded by Section 93 of the *Law of Succession Act*.**

31. Finally, in **In re Estate of Jeremiah Njoroge (Deceased) [2021] KEHC 2053 (KLR)** the Court stated (**page 115 of the Applicant's authorities**) However, the deceased administratrix transferred Plot No. 864/1/MN in full to the 1<sup>st</sup> respondent who excised  $\frac{1}{2}$  acre comprising of 8125/1/MN and sold the same to Mohamed Sufi and Said Mope sometime 2008. The applicant withdrew her claim over this property. Under Section 93 of the Law of Succession, a transfer of interest in immovable or movable property made to a purchaser either before or after commencement of this Act by a person to whom representation has been made shall be valid notwithstanding revocation or variation of the grant. Section 93 protects purchasers for value of property which has been acquired without knowledge that the title was tainted with illegality.... For sure, the two purchasers of LR 8125 although not parties to these proceedings had no idea that the title of the property they were buying was being challenged. They are therefore protected under Section 93(1) of the Succession Act hence the withdraw of the claim against them as bonafide purchasers for value was proper.
32. In considering the effect of **Section 93 of the Law of Succession Act**, the court in the case of **Jeremiah Njoroge (Deceased)**(*supra*) proceeded to hold that the beneficiaries

were to share the proceeds of sale of the deceased's estate, in place of revoking the titles already issued. The underlying objective of the Law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.

33. By cancelling the Applicant's title contrary to the foregoing provisions of the law, the 1<sup>st</sup> Respondent issued a decision that was founded on a serious misunderstanding of law.

34. It was submitted, that the 1<sup>st</sup> Respondent did not appreciate the relevant facts in making its determination in the impugned decision. It is a settled principle that a court, like any party, is bound by the facts as pleaded and placed before it. A determination arising from inaccurate, misleading, or irrelevant facts is legally untenable and is liable to be set aside as a nullity.

35. In the present matter, paragraph 5 of the 3<sup>rd</sup> Interested Party's Replying Affidavit to the petition for grant expressly disclosed to the 1<sup>st</sup> Respondent that the 3<sup>rd</sup> Interested Party neither owned nor had any proprietary interest in the suit property. Despite being duly informed of these facts, the 1<sup>st</sup> Respondent failed to take the appropriate procedural step of joining the lawful proprietor of the suit property to afford them a hearing. Consequently, the 1<sup>st</sup> Respondent proceeded to render a determination in the absence of the Applicant and based its decision on facts that were both misunderstood and legally irrelevant.

36. It was submitted that had the 1<sup>st</sup> Respondent taken into account this material fact, it would have duly acknowledged the Applicant's proprietary interest in the suit property and accordingly joined him in the proceedings as already submitted. That it was also submitted that the 1<sup>st</sup> Respondent failed to do so, thereby acting in breach of the nuggets by Lord Greene M.R. in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223**, wherein His Lordship held that (page [ ] of the **Applicant's authorities**):

**For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.**

37. It was also submitted that the decision of the 1<sup>st</sup> Respondent meets the threshold of Wednesbury unreasonableness (**Wednesbury Corporation**) (*supra*). Thus, the decision is so irrational, and so devoid of logic or adherence to established legal and moral standards, that no reasonable decision-maker properly directing their mind to the issue could have arrived at the same. The 1<sup>st</sup> Respondent violated the rights of the Applicant inter alia; that it purported to condemn the Applicant for obeying a lawful court order. In **Allen v Dundas (1775-1802) All 389**

the court argued that condemning a person for obeying a lawful order, or proceeding with an action on the premise of a lawful order issued by a court meets the threshold of unreasonableness. The court held that a person who purchased property based on a lawful Grant of Letters of Administration, issued by a court, should not be penalized after the grant was set aside; that the Applicant proceeded with the purchase of the suit property following a valid legal Grant of Letters of Administration, the same lending legality to the title of the suit property. Any act by the Applicant based on this legal order remains legally in force even after the grant is set aside; that the Applicant contends that the 1<sup>st</sup> Respondent's decision to annul his title to the suit property, without affording him any notice or opportunity to be heard, and thereby subjecting him to financial loss amounting to millions of shillings, was irrational and wholly devoid of reasonableness. The said decision, reached without proper application of the facts and law, offends the principles of fairness and justice. It is untenable in law; that failing to join the Applicant in the proceedings and proceeding to issue an adverse decision was an unreasonable act within the definition of Wednesbury unreasonableness; that by cancelling the Applicant's title in total disregard of clear legal provisions is an action that can only be termed as irrational and unreasonable. An objective court, faced with the succinct legal provisions, could not have arrived at the same decision as the

1<sup>st</sup> Respondent.

38. It was submitted that the 1<sup>st</sup> Respondent's decision was tainted with bias against the Applicant which resulted in gross miscarriage of justice. The "real likelihood of bias" is a test that the court has adopted in establishing bias in decision making. The Court explained in **Doshi v Central Bank of Kenya [2023] KEHC 24096 (KLR)** that (page 167 of the Applicant's authorities):

**I prefer the test of the real likelihood of bias. In this case, it is not necessary to prove actual bias but whether, a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.**

39. Counsel pointed out that the above position was adopted from **Attorney General of Kenya Versus Professor Anyang Nyong'o & 10 Others EACJ Application No. 5 Of 2007** where the court explained that the question that ought to be asked is whether the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not or will not apply his mind to the case impartially.

40. Applying the applicable legal test to the circumstances surrounding the impugned decision, it is evident that there

exists a reasonable apprehension that the 1<sup>st</sup> Respondent failed to exercise its mandate with the requisite impartiality. The evidence in support of this assertion is overwhelming and clearly demonstrates that the 1<sup>st</sup> Respondent arrived at the impugned decision without due regard to all relevant facts and applicable legal principles, as previously outlined. This conduct is in direct contravention of the legitimate expectations imposed upon the 1<sup>st</sup> Respondent and falls short of the constitutional standards. Notably, **Articles 10(2), 159, 160(1), and 232 of the Constitution** impose a heightened duty of professional ethics, including the obligation to act impartially and fairly in the execution of public duties.

41. It was finally submitted that the irrationality and unreasonableness of the impugned decision, coupled with the clear exercise of jurisdiction contrary to law, can only point to bias against the Applicant.

42. In view of the foregoing, counsel submitted that it is abundantly clear that the impugned decision by the 1<sup>st</sup> Respondent was made without jurisdiction, in contravention of the Applicant's constitutional and statutory rights, and in utter disregard of the established principles of natural justice. The Applicant, having lawfully acquired title to the suit property under a valid grant,

could not lawfully be deprived of the same without being afforded an opportunity to be heard. The 1<sup>st</sup> Respondent's conduct was not only *ultra vires* but also irrational, unreasonable, biased, and procedurally unfair. Accordingly, this Honourable Court is respectfully asked to grant the judicial review orders sought in the Notice of Motion dated 24<sup>th</sup> April 2025. Specifically, the Court is invited to issue orders of Certiorari to quash the impugned decision in its entirety, Prohibition to bar its enforcement or further implementation, and such further reliefs as may be just and appropriate in the circumstances, including costs of these proceedings.

43. The 4<sup>th</sup> Respondent filed submissions dated 29<sup>th</sup> July 2025 wherein he raised four issues for determination namely:

- i. Whether the lower Court had jurisdiction to hear and determine Summons for Revocation by the 4<sup>th</sup> Respondent (then Applicant).
- ii. Whether Judicial Review is the appropriate remedy for the Exparte Applicant in the circumstances.
- iii. Whether this Court should grant the reliefs sought.

iv. Who bears costs?

SIAYA HC JUDICIAL REVIEW NO. E002 OF 2025 - RULING

44. As regards the 1<sup>st</sup> issue, it was submitted that jurisdiction has aptly been captured in a litany of judicial decisions, of most prominence rendered the locus classicus is the case of: ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR***, where the trial court authoritatively adjudged that jurisdiction is everything, without which a Court has no power to make one more step or down its tools. Learned counsel pointed out that this is not the first time the issue of jurisdiction of the Magistrate Court to handle succession disputes was questioned in this matter in that, the 2<sup>nd</sup> Interested Party unsuccessfully made a similar attempt at the first instance but her quest was dismissed on the ground that the trial court had jurisdiction to entertain the summons for revocation of grant. Learned counsel cited the provisions of the Magistrate's Courts Act particularly **Section 7 of The Magistrate's Courts Act 2015** as read together with **Section 48(1)** and **Section 49** of the **Law of Succession Act Cap 160** which anchors the judicial authority of a Magistrate to hear and determine succession disputes by noting that nothing stops a Magistrate from entertaining a succession dispute including an application for revocation of grant in respect of an estate the gross value of which falls within the set out pecuniary limits. It is indisputable that an application for revocation of grant, as was before the lower court in this matter, is a succession dispute therefore, nothing as suggested by the Applicant could effectively oust the jurisdiction of the lower

court thereto. The yardstick for the jurisdiction of Magistrate Courts in succession matters lies purely on the pecuniary limits and nothing else. It is inaccurate as the Applicant alleges that Magistrate Courts cannot exercise jurisdiction on application for revocation of grant or that they can only entertain an application for revocation if framed as a Miscellaneous Cause as suggested is tantamount to approbating and reprobating.

45. Learned counsel further added that **Section 7 of The Magistrate Courts Act 2015** is couched in the following terms: -

*“A **magistrate's court shall have and exercise such jurisdiction** and powers in proceedings of a civil nature in which the **value of the subject matter does not exceed** —*

***a) twenty million shillings**, where the court is presided over by a chief magistrate;*

***b) fifteen million shillings**, where the court is presided over by a senior principal magistrate;*

***c) ten million shillings**, where the court is presided over by a principal magistrate;*

***d) seven million shillings**, where the court is presided over by a senior resident magistrate; or*

***e) five million shillings**, where the court is presided over by a resident magistrate.”*

**f)** On the other hand, **Section 48 (1)** and **Section 49 of The Law of Succession Act Cap 160** provides as follows: -

S.48(1)

***“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 of the Magistrates' Courts Act (Cap 10)”***

S.49

*“The Magistrate's Court within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed the pecuniary limits set out in section 7(1) of the Magistrates' Courts Act (Cap 10), have in respect of that estate the jurisdiction conferred by section 48.....”*

46. It was pointed out that the subject properties are about 6 acres in total and with an acre going for about Kes.400,000 on the higher side within the locus in quo, the total value thus stand at an all-inclusive sum of no more than Kes.2,400,000 and hence the subject properties fell within the pecuniary limits of the jurisdiction of the Lower Court as envisaged in Section 7 of the Magistrate Court Act and forms part of a succession dispute as affirmed by Section 48 (1) as read

together with Section 49 of the Law of Succession Act Cap 160 above. Counsel therefore contended that the Lower Court was seized with sufficient jurisdiction to adjudicate the matters before it. Further, it was submitted that the High Court whose original jurisdiction to entertain succession matter falling under **Section 76** of the Law of Succession Act is not the only forum to deal with the matters as such power was given to the Magistrates' court by Act No.26 of 2015. A similar position was underpinned by Musyoka J ***In re Estate of Charles Boi (Deceased) [2020] KEHC 1263 (KLR):-***

*“This ruling is concerned with jurisdiction to revoke grants made by the magistrate’s court. Under Act No. 26 of 2015, by virtue of the amendment of section 48(1) of the Law of Succession Act, a magistrate’s court now has power to revoke a grant of representation that it has power to make. There is now no need, for a person who wishes to have a grant made by a magistrate’s court revoked, to move the High Court. All what that person needs to do is to file a summons for revocation of grant within the cause in which the grant was made by the magistrate’s court.....The taking away of jurisdiction from the High Court, with respect to revocation of grants, made by the magistrate’s court, would mean that **the High Court no longer has original jurisdiction to address that issue, and that its jurisdiction, over the issue, would be as an appellate court, from a ruling of the magistrate’s court, on a summons for revocation of the grant issued by that***

***court. I have no jurisdiction, therefore, sitting as a High Court, to entertain a summons for revocation of grant, where the applicant has not filed such application at the magistrate's court in the first instance, since the Law of Succession Act, as currently framed, does not vest me with such jurisdiction"***

47. Counsel submitted that the argument by the Applicant at **Paragraph 9** of his Motion dated 24.04.2025 that **Rule 44 (1)** of the Probate and Administration Rules, exclusively confers the jurisdiction to revoke a grant to the High Court is not only misguided but redundant as the Applicant seems to be referring to the old Succession Law regime at Section 48 that was repealed by the **Section 23** of the **Magistrate Courts Act No.26 of 2015**. That infact, Section 48 (1) of the Law of Succession Act begins with the term "Notwithstanding any other written law"-**Notwithstanding** being the operative word therefore excludes Rule 44(1) of the Probate and Administration Rules. Furthermore, the **Judicature Act cap 8** at **Section 3** outlines the order of supremacy of the Kenyan laws with Rules and Regulations falling subservient to the parent Act. The parent Act in these circumstances being the Law of Succession Act therefore in case of conflict there is no difficulty in finding that the Act takes precedence over the Rules.

It was further submitted that it would be an absurdity and certainly not an intention of the drafters of the legislation in howsoever it may be interpreted for it to with the right hand,

confer powers to the Magistrate Court to entertain a succession a dispute and issue orders only to deny it the power of enforcement with the left hand. This is the Applicant's case when he argues that the Magistrate Courts only have powers to adjudicate on succession cause and confirm grant but cannot revoke the grant it had issued.

Additionally, it was submitted that **Section 11 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya** provide that an applied law shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties or otherwise as may be necessary to make it applicable to the circumstances, and in particular a reference to a **Probate Court**, Bankruptcy Court or Admiralty Court, or similar expression, shall be construed as a reference to the **High Court exercising the appropriate jurisdiction**. This would mean that if the Applicant's reference to Rule 44(1) is anything to go by, then reference to the High Court would also mean reference to a Probate Court (the Lower Court in this case) and vice versa. The Applicant's argument that the Interpretation and General Provisions Act does not apply to Kenyan laws can only be termed sad. This is in light of the fact that, the said Act at the preamble introduces the intention by legislators to provide some form of universal interpretation of written laws with exclusion of the **Constitution** only at Section 2. The Act does not mention exclusion of Kenyan laws, the

assertion by the Applicant that it does is only meant to mislead this Court.

48. Finally, it was submitted that the averment by the Applicant that only the Environment and Land Court can order cancellation of titles to land is fallacious. That the identification of beneficiaries and assets of a deceased person and subsequent distribution of those assets including title to land to intended beneficiaries fall well within the mandate of a succession court. Hence, where anyone with beneficial interest in the property of a deceased person is aggrieved with the manner of administration thereof, he can approach a succession court under Section 76 of the Act to interrogate and if the court satisfies itself that grounds under that Section have been established and subsequently revokes a grant, can direct the property comprised in the estate of a deceased person to vest back to the estate of the deceased and give any further directions so as to give effect to its orders including ordering the cancellation of titles arising from the revoked grant. Reliance was placed in the case of *In re Estate of Adriano Nthiga Thangari (Deceased) (Succession Cause 175 of 2015) [2024] KEHC 8913 (KLR) (24 July 2024) (Ruling)*;-

***“Firstly, the respondent has challenged the jurisdiction of this court to order cancellation of titles. It is her argument that such an order may only be granted by the Environment and Land***

***Court. The issue of cancellation of titles arises from this court's ruling revoking the grant that had been issued to the respondent. In this case, the High Court bears jurisdiction to order cancellation of titles since it is the only way to give effect to its judgment. Once the grant was revoked, it became necessary that the estate of the deceased be reconstituted as it was, before the respondent petitioned for the grant.***

49. Accordingly, it was submitted that this Court has no difficulty in coming to a conclusion that the Lower Court was properly seized with Jurisdiction to adjudicate the issues that were tabled before it and grant the necessary remedial orders as it did including canceling the titles thereto.

50. As regards the second issue, it was submitted that the doctrine of exhaustion of alternative remedies comes in handy to deny the Applicant the orders sought because the Applicant was under obligation to ensure that he has exhausted all available remedies for redress before rushing to this court. It was submitted that, Judicial Review is the supervisory power of the High Court to interrogate the substantive and procedural fairness of administrative actions. While an appeal on the other hand is a creature of statute empowering a higher court to examine the correctness and/or propriety of a decision of a lower court. That Article 165 (6) of the Constitution of Kenya 2010 provides for the Judicial Review mandate of the High Court

which overlaps other existential remedies inter alia; Appeal or Review leading to confusion thereby resulting in multiplicity of suits, forum shopping and abuse of Court process. The foregoing led to uproar within the corridors of justice as to the appropriate remedy within varying set of circumstances. Parliament in a bid to restore sanity as to the appropriate mode of seeking redress where such confusion manifested, enacted **Fair Administrative Actions Act, 2015** and attendant **Rules**. The intention of the drafters of this legislation was to make discernible as far as possible, the circumstances that necessitated one to invoke the supervisory power of the High Court under Judicial Review. Courts have also added their voice to this important discourse and in their wisdom cautioned that where other remedies are available, judicial review would be last resort unless a statute expressly provided for it or where the statute is silent on the mode of challenging decisions of subordinate courts, tribunals, bodies, authorities or persons exercising judicial or quasi-judicial function. This therefore means that judicial review should not be resorted to where there are other suitable ways of redressing a grievance. This position is coined in what is now celebrated as the doctrine of exhaustion of alternative remedies. The same is found in **Section 9 (2) and (3)** of the Fair Administrative Actions Act which provides as follows:

*“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act **unless the mechanisms including internal mechanisms for appeal or***

**review and all remedies available under any other written law are first exhausted.**

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

51. Again, under **Section 65(1)(b)** of the **Civil Procedure Act, 2010** the same provides that:

*“Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, on a question of law or fact.”*

52. Similarly, **Section 50 (1)** of **The Law of Succession Act cap 160** laws of Kenya on the other hand states thus: -

*“(1) An **appeal shall** lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.”*

53. It was submitted that in view of the foregoing provisions, it is accurate to conclude that an action against a decree or order of a subordinate court shall be by way of Appeal to the High Court as espoused by the aforementioned statutes. The deliberate use of the word “**shall**” leaves no doubt as to the mandatory terms in which the provisions are couched. Courts have equally added their voice in support of a similar position as in the case of **Republic v Tribunal; Kenya School of Law & another (Interested Parties); Chepkwony (Exparte Applicant) (Judicial Review Application E062 of 2024) [2025] KEHC 5231 (KLR) (Judicial Review) (28 April 2025) (Judgment)** where Justice Aburili in dismissing Judicial Review Application while citing the case **In Republic v Ministry of Interior and Coordination of National Government and Another Exparte ZTE Judicial Review Case No. 441 of 2013** had the following to say;-

*“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCM ANo. 997 of 2003, **for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or***

*otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.....***Exceptions(when judicial review may be allowed without exhausting remedies) include, the alternative remedy being inadequate or ineffective; delay in the statutory process would cause irreparable harm; there is evidence of bias or lack of impartiality in the appellate body”**

54. It was submitted that for an application for judicial review to be considered over other available alternative forms of remedy, an Applicant must show exceptional circumstances in his case to justify Judicial Review. The exceptional circumstances have been interpreted by courts to mean one must satisfy the following; - that the alternative remedy is inadequate or ineffective, that delay in the statutory process would cause irreparable harm, that there exists clear evidence of bias or impartiality from the appellate body. The Applicant in the instant suit has not demonstrated with particularity these exceptional circumstances that negate an appeal as stipulated by the aforementioned Acts and precedent in **Republic v Tribunal; Kenya School of Law (Supra)**- he only says that pleadings are to be left to parties to frame as they please which explanation does not meet the threshold set above and inevitable must fail.

55. It was further submitted that Judicial review is inapplicable to judicial decisions unlike administrative actions are not subject of judicial review. This is for the good reason that judicial officers are immune to actions emanating from decisions rendered in the usual conduct of judicial functions done in good faith and therefore should not be enjoined as a party to suits arising from such decisions. The foregoing is affirmed by **Section 6** of the **Judicature Act cap 8** which stipulates as follows: -

***“No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.”***

56. Again, subjecting judicial decisions to judicial review would be an overstretch beyond the intentions of the **Fair Administrative Actions Act** and **Article 47** of the Constitution of Kenya. Reliance was placed in the case of **Republic v Chief Magistrate, Mombasa & 3 others; Sega**

**Ventures Limited & another (Interested Parties); Kirima (Exparte) (Judicial Review Application 1 of 2022) [2023] KEELC 180 (KLR) (24 January 2023) (Judgment)** the learned judge while dismissing the Judicial Review Application asserted at para 46 that:-

*“What I am trying to say is that I see no place for one who is aggrieved by a court decision, to approach the High Court or courts of equal status, for redress under the FAAA. A decision of a Magistrate, whether it be a judgment or order, is not an administrative decision so as to fall under the ambit of the FAAA. If we are to expand the FAAA to include judicial decisions then we will be going outside the intention of Article 47 of the Constitution whose purpose is to address persons and bodies performing administrative duties and quasi-judicial functions...”*

Finally, it was contended that the High Court does not exercise its supervisory powers unless the circumstances of a case are so peculiar as established above and that a party has exhausted all available remedial actions and only when it is apparent that the trial court or tribunal exercised jurisdiction it did not have which is not the case in the present suit. Reliance was placed in the case of **Republic v Magistrates Court, Mombasa; Absin Synergy Limited (interested party), Judicial Review E033 of 2021 (2022) KEHC 10 (KLR)**, Mativo J pronounced himself thus: -

***“The power conferred to this court under Article 165 (6) of the Constitution is used sparingly only when the lower court or tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction which is the case here. However, the High Court under the guise of Article 165 (6) cannot assume unlimited prerogative to correct all species of hardship or wrong decisions.”***

57. Learned counsel urged the court to agree with the 4<sup>th</sup> Respondent’s submission and find that the trial court had jurisdiction to entertain the matter and to make the orders it did.

58. Learned counsel for the 4<sup>th</sup> Respondent also submitted that the Applicant seems to suggest that he is aggrieved by the judgment or orders of the trial court wherein he was not a party and now seeks this court to quash the decision of the trial court on the ground that the same were ultra vires. It was further submitted that a party originally not party to a suit may seek for varied forms of legal redress including Appeal or Review although Judicial Review is not one of them. Reliance was placed in the case of ***Republic v Nairobi City County Council Assembly & another; Musumba & 4 others (Exparte Applicants) (Judicial Review Application E082 of 2023) [2025] KEHC 5656 (KLR) (Judicial Review) (5 May 2025) (Ruling)*** where justice

Aburili stated thus:- *“If a third party believes that they are affected by the judgment, they may file afresh suit(if they can show a cause of action), or they may seek review (before the same court) or appeal...”*

59. Learned counsel further pointed out that Judicial Review is concerned with the legality or otherwise of the procedure used by an administrative body to arrive at a decision and not factual or substantive issues affecting the merits of the decision as raised by the Applicant in this matter. The Applicant at Paragraph 16 of his Statement dated 15.04.2025 faults the lower court’s jurisdiction, misapplication of various provisions of the law and facts in issue and that these are issues which should be formulated as grounds of Appeal rather than Review or Judicial Review. Reliance was placed in the case of ***Republic v Nairobi City County Council Assembly & another (Supra)*** the court stated at Para 72 thus; -

*“Why does this matter? This principle of not allowing appeals to be disguised as review applications matters because, allowing parties to raise appealable issues as review grounds would undermine the principle of finality in litigation, allow abuse of court process by filing review instead of timely appeals and blur the separation between appellate and review jurisdictions. It follows that a party dissatisfied with the correctness of a judgment on facts or law must appeal, not seek review. Review is only available for limited procedural*

*or factual anomalies, not for re-evaluating the judgment's merits”*

60. It was noted that the Applicant has also blamed the lower court of trampling upon his constitutional rights to property enshrined under Article 40. However, the 4<sup>th</sup> Respondent contends that these are not issues to be dispensed by a judicial review court because they do not question the process but rather the merits. In any case, the rights under Article 40 can be limited and even Section 93 of the Law of Succession Act cannot aid a party who has obtained property unlawfully. The Court of Appeal held in like manner in ***Musa Nyaribari Gekone & 2 others v Peter Miyienda & another [2015] KECA 573 (KLR):-***

***“We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief\_acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”***

61. The 4<sup>th</sup> Respondent's counsel further took issue with the Applicant's allegation that the trial court should have enjoined the Applicant into the proceedings. Reliance was placed in the case of ***Wycliffe Khisa Lusaka v Independent Electoral and Boundaries Commission [2017] KEHC 8950 (KLR)*** which provides for parameters for success in judicial review application and provides thus: -

***“the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.”***

62. The Applicant at paragraph 19 of his submissions faults the trial court for among other things failing to apply its mind to law and facts in arriving at the decision it did. A judicial review court is not concerned with merits of the decision and thus cannot consider these issues as framed therefore as we have already stated above, these are issues to be canvassed on appeal, that cannot be overemphasized. Secondly, the trial court was seized with proper jurisdiction as explained above and if the Applicant was in doubt, that should have been a mature ground for appeal not judicial review. Thirdly, on the issue of fair hearing and by extension non-joinder of the Applicant at the proceedings before the trial court, it is imperative that we clarify here that the **trial court had no duty to enjoin the Applicant** to the proceedings before it, moreover, in light of the documents filed therewith, the court even by any stretch of imagination, could not have possibly

concluded that the Applicant was left out. The Applicant knew that these proceedings were before the lower court but failed to make an application to be enjoined, it is now too late and the lower court cannot be faulted for that, at least not before a judicial review court since it had no that duty. Further, it was contended that the Applicant has not demonstrated how his inclusion at the proceedings before the trial court would have changed the fact that the 1<sup>st</sup> Interested Party illegally, fraudulently and unlawfully obtained a grant that was used to irregularly transfer land to him and thereby alter the court's decision. Indeed, the outcome before the lower court could not have been any different and this court even if it enjoined the Applicant could have arrived at the same finding without changing a word. Granted that the Applicant knew the 1<sup>st</sup> Interested Party in person, he cannot escape the ugly reality that he knew that she misled court to obtain grant as the daughter of the deceased to rank higher in beneficial priority to disinherit the 4<sup>th</sup> Respondent and other beneficiaries entitled to the estate. These misdeeds account for the Applicant's participation to the 1<sup>st</sup> interested Party's fraud. Courts have cautioned purchasers for value to exercise due diligence and vigilance in dealings with purchase of customary land and the Applicant being a senior lawyer and a resident of the locus in quo from his birth and personally known to the 1<sup>st</sup> Interested Party would have done better. That the Applicant fell short of the expectation of a man of his standing for which consequences he must now face. This Court is invited to

decline the invitation by the Applicant to aid his intention to disinherit a poor man of his only available source of livelihood.

63. Counsel added that the totality of their submissions on this limb of arguments affirms that in the instant matter the only appropriate remedy would be Appeal and not judicial review. Hence, the Applicant's Judicial Review Application is fatally defective and that this Court is respectfully left with no other choice than to dismiss it in its entirety.

64. As regards the third issue, it is noted that judicial review orders are discretionary in nature. Judicial review is a discretionary authority of a court which must only be exercised judiciously and not capriciously, ***In Republic v Tribunal; Kenya School of Law & another (Interested Parties); Chepkwony (Supra)*** the Court while dismissing an Application of JR orders held thus: -

*"...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMANo. 997 of 2003..."*

Equally, Courts have been reluctant to issue judicial review remedies even where grounds for it exist. More particularly, if it is established that other forms of remedies could have

been pursued or judicial review is not the most efficient for the ends of justice to be met. Reliance was placed in **Republic v Kenyatta University Ex parte Martha Waihuini Ndungu 2019KEHC11128(KLR) Mativo J** at Para 87 & 88 had this to say while dismissing a judicial review application: -

*“Mandamus, Certiorari and Prohibition are discretionary remedies, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles....The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant’s own conduct has been unmeritorious or unreasonable. For example, where the applicant has unreasonably delayed in applying for judicial review, or where the applicant has not acted in good faith, or where a remedy would impede the authority’s ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.*

65. Flowing from the foregoing authorities, it was submitted that the principles above if applied to the instant case, the Applicant knew the 1<sup>st</sup> Interested Party and knew that she was not the daughter of the deceased and proceeded to purchase land from her on the strength of an illegal grant and equally knew that summons for revocation cause was before the trial court, the Applicant's claim is thus devoid of good faith. Secondly, the lower Court has a legal duty to hear and determine matters within a reasonable time for ends of justice to be met, it cannot embark on a hunting mission in the whole world in a quest to establish who should be enjoined to a case before it, condemning its decisions on an account that it did enjoin a party it had no knowledge of would impede delivery of justice. Thirdly, we have explained with sufficient detail that judicial review orders would not be effective in the instant matter since the rightful beneficiaries of the estate who are entitled to inherit therefrom will be left hopeless and ends of justice shall not be achieved should the court proceed to quash orders of the trial court. Finally, counsel urged the court to find that the Applicant's recourse could have properly been disposed of by way of an appeal.

66. Learned counsel for the 4<sup>th</sup> Respondent further submitted that the Applicant in coming to this court through this Judicial Review has the intention relitigate on the matter as can be seen from the various claims and reliefs sought by the Applicant yet the Applicant is fully aware that a Judicial Review is only concerned with the process of arriving at a decision but

not the merits of such decisions. That the present Judicial review application is predicated on among other grounds that the trial court misdirected itself as to the facts and law and that the court failed to consider relevant facts. That allowing the Applicant to proceed with this review application would upset the principle of finality of litigation which this court must frown upon. Reliance was placed in the case of **Republic v Nairobi City County Council Assembly & another (Supra)** the Court stated that:-

*“Judicial review focuses on the process, illegality or impropriety and not the merits. **Once the court has rendered a decision, it is not possible to reopen the matter just because a new party wants a different interpretation of the law. That would violate the principle of finality and legal certainty**”*

67. It was submitted that the Applicant seems to confuse the right to fair hearing under **Article 50** of the constitution which is not synonymous with the fair administrative action under **Article 47** that would invite judicial review mandate of this Court. That a question of fair hearing should be brought under the umbrella of judicial review but on appeal to a higher court which should determine it based on the merits of each case, which this court cannot do. We refer to the decision in **Republic v Kenyatta University Ex parte Martha Waihuini (Supra)** where the court held that:-

*“I find comfort in the Court of Appeal decision in J.S.C. vs Mbalu Mutava[53] that succinctly elucidated the law in cases of this nature. **It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) (2) of the Constitution.** Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. **It also held that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[54] Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.”***

68. Finally, on the issue of costs, the same should be awarded to the successful party as was held in the case of **Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR** at paragraph 8 where the Court in citing the case of:-

**British Columbia (Minister of Forest) vs. Okanagan Indian Band [2003] 3 S.C.R 371, 2003 SCC** noted that: -

***“The traditional purpose of costs awards remained indemnification and that regular award of cost have four standard characteristics;***

- i) They are an award to be made in favour of a successful or deserving litigant, paid by the loser;*
- ii) Of necessity, the award must await the conclusion of the proceedings as the success or entitlement cannot be determined before that time;*
- iii) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceedings; and iv) They are not payable for the purpose of assuring participation in the proceedings*
- iv) The Court further noted that in addition to indemnity, other justifications have been introduced in law for award of costs, which include: encouragement of settlement, the prevention of frivolous & vexatious litigation & discouragement of unnecessary steps in the proceedings.*

69. I have considered the Applicant’s application, rival affidavits, submissions and authorities cited. It is not in dispute that the 1<sup>st</sup> Interested Party herein had earlier lodged succession before the lower court at Bondo and obtained a grant which

was later confirmed. It is also not in dispute that the said 1<sup>st</sup> interested party transferred parcel numbers West Asembo/Siger/596 and West Asembo/Siger/653 to the Exparte Applicant herein. It is also not in dispute that the 4<sup>th</sup> Respondent later filed summons for revocation of grant before the said court which were allowed by the 1<sup>st</sup> Respondent and who further directed that the Applicant's land titles aforesaid be cancelled and that properties do revert back in the name of the deceased and made available for distribution among the beneficiaries. It is also not in dispute that the Applicant herein was not enjoined into the lower court proceedings during the hearing of the summons for revocation of grant and therefore did not participate therein. It is also not in dispute that the Applicant has not sought for review or appeal over the lower court's orders aforesaid or even approach the Environment and Land Court for redress. I find the issues for determination are inter alia; whether the trial court had jurisdiction to order cancellation of titles; whether this court has jurisdiction to exercise judicial review over the 1<sup>st</sup> Respondent; whether the Applicant has demonstrated sufficient grounds to warrant the orders sought.

70. As the Applicant has attacked the lower court over the orders that they had made on the basis of lack of jurisdiction, it is trite that a court should always ensure that it has jurisdiction to deliberate on a dispute placed before it. The locus classicus case of **Owners of the Motor Vessel "Lillian S" v Caltex**

**Oil (Kenya) Ltd [1989] eKLR**, dealt with the issue of jurisdiction. In the said case, the court held

***“jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

71. Learned counsel for the Applicant has contended that the 1<sup>st</sup> Respondent did not have jurisdiction and therefore acted ultra vires by unlawfully assuming jurisdiction to revoke a confirmed grant which is exclusively vested in the High Court pursuant to Rule 44 (1) of the Probate and Administration Rules. The same provided as follows:

***“ Where any person interested in the estate of the deceased seeks pursuant to the provisions of Section 76 of the Act to have a grant revoked or annulled he shall save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued, or where the grant was issued b a Resident Magistrate,***

***through the High Court registry situated nearest to that Resident Magistrate registry.***

72. Again, it was the Applicant's contention that the 1<sup>st</sup> Respondent sitting as a succession court lacked the requisite jurisdiction to issue orders cancelling the Applicant's title to the suit property. It was further contented that it is trite law that a magistrate's court, when exercising jurisdiction under the Law of Succession Act, cannot annul or interfere with registered land titles since the power to determine disputes relating to title to land, including the cancellation of title, is vested in the Environment and Land Court pursuant to **Section 13 of the Environment and Land Court Act** and in limited circumstances, such jurisdiction may also be exercised by a Magistrate's Court duly gazetted under **Section 26 of the Environment and Land Court Act** and **section 9 of the Magistrates Court Act**. Counsel urged that even where jurisdiction is lawfully donated to a magistrate's court, such jurisdiction is strictly limited in scope and purpose and that even if a magistrate's court is duly gazetted to handle land matters, it can only exercise such jurisdiction while sitting specifically as an Environment and Land Court and cannot purport to exercise those powers while sitting as a succession court. Counsel relied on the case of **Kamau & another v Nganga & another [2024] KEELC 1060 (KLR)** thus :

**“Investigations on how a title is registered and cancellation of irregularly acquired titles can only be done in a civil suit filed in Environment and Land Court or before Magistrates courts with**

**requisite jurisdiction to hear such matters.”**

Counsel therefore submitted that any orders made outside that narrow legal framework, such as the cancellation of a title in succession proceedings, are *ultra vires*, unlawful, and devoid of any legal effect.

73. It is noted that the 4<sup>th</sup> Respondent’s summons for revocation of grant were predicated on Section 76 of the Law of Succession which provides as follows:

**A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**

**(a) that the proceedings to obtain the grant were defective in substance;**

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—**

**(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or**

**(ii) to proceed diligently with the administration of the estate; or**

**(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

**(e) that the grant has become useless and inoperative through subsequent circumstances.**

The above provision is available to parties who wish to seek for the revocation of grants before a magistrate's court or the High Court pursuant to the provisions of the Law of Succession Act.

74. It is noted that magistrates' courts have been empowered to handle succession matters pursuant to the provisions of the Magistrate's Courts Act particularly **Section 7** of the **Magistrate's Courts Act 2015** as read together with **Section 48(1)** and **Section 49** of the **Law of Succession Act Cap 160** which anchors the judicial authority of a Magistrate to hear and determine succession disputes by

indicating that nothing stops a Magistrate from entertaining a succession dispute including an application for revocation of grant in respect of an estate the gross value of which falls within the set out pecuniary limits. It is noted that the application for revocation of grant, as was before the lower court, is a succession dispute and thus the 1<sup>st</sup> Respondent had the requisite jurisdiction to determine the same. The yardstick for the jurisdiction of Magistrate's Courts in succession matters lies purely on the pecuniary limits and nothing else. That being the position, Magistrate's Courts have jurisdiction to entertain applications for revocation of grant. **Section 7 of The Magistrate Courts Act 2015** is couched in the following terms: -

*“A **magistrate's court shall have and exercise such jurisdiction** and powers in proceedings of a civil nature in which the **value of the subject matter does not exceed** —*

***g) twenty million shillings**, where the court is presided over by a chief magistrate;*

***h) fifteen million shillings**, where the court is presided over by a senior principal magistrate;*

***i) ten million shillings**, where the court is presided over by a principal magistrate;*

***j) seven million shillings**, where the court is presided over by a senior resident magistrate; or*

***k) five million shillings**, where the court is presided over by a resident magistrate.”*

**I) On the other hand, Section 48 (1) and Section 49 of The Law of Succession Act Cap 160 provides as follows: -**

**S.48(1)**

***“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 of the Magistrates' Courts Act (Cap 10)”***

**S.49**

***“The Magistrate's Court within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed the pecuniary limits set out in section 7(1) of the Magistrates' Courts Act (Cap 10), have in respect of that estate the jurisdiction conferred by Section 48.....”***

75. It is noted that the assets of the deceased comprised in the lower court case appear to have a value not exceeding

Kshs20,000,000/= as can be seen by the fact that the parties who appeared before the Chief Magistrate's Court at Bondo did not raise any issue regarding lack of the court's pecuniary jurisdiction and hence the subject properties fell within the pecuniary limits of the jurisdiction of the lower Court as envisaged in Section 7 of the Magistrate Court Act and forms part of a succession dispute as affirmed by Section 48 (1) as read together with Section 49 of the Law of Succession Act. I find that the lower Court was seized with sufficient jurisdiction to adjudicate the matters before it. Even though the Applicant has contended that it is only the High Court which has jurisdiction to entertain matters of revocation, it is clear from the foregoing provisions that the Magistrate's courts have jurisdiction to entertain such applications by dint of Section 48 (1) and 49 of the Law of Succession Act, following the amendment of the Law of Succession Act, vide the Magistrate's Court Act No. 26 of 2015. Musyoka J ***In re Estate of Charles Boi (Deceased) [2020] KEHC 1263 (KLR)*** was faced with a similar situation and held as follows:

*"This ruling is concerned with jurisdiction to revoke grants made by the magistrate's court. Under Act No. 26 of 2015, **by virtue of the amendment of section 48(1) of the Law of Succession Act, a magistrate's court now has power to revoke a grant of representation that it has power to make. There is now no need, for a person who wishes to have a grant made by a magistrate's court revoked, to move the High Court. All what that person needs to do is to file a summons for***

*revocation of grant within the cause in which the grant was made by the magistrate's court.....The taking away of jurisdiction from the High Court, with respect to revocation of grants, made by the magistrate's court, would mean that the High Court no longer has original jurisdiction to address that issue, and that its jurisdiction, over the issue, would be as an appellate court, from a ruling of the magistrate's court, on a summons for revocation of the grant issued by that court. I have no jurisdiction, therefore, sitting as a High Court, to entertain a summons for revocation of grant, where the applicant has not filed such application at the magistrate's court in the first instance, since the Law of Succession Act, as currently framed, does not vest me with such jurisdiction”*

76. It is noted that the 4<sup>th</sup> Respondent's counsel has contended that the Applicant's argument that **Rule 44 (1)** of the Probate and Administration Rules, exclusively confers the jurisdiction to revoke a grant to the High Court should not be believed as the Applicant seems to be referring to the old Succession Law regime at Section 48 that was repealed by the **Section 23** of the **Magistrate Courts Act No.26 of 2015**. That in fact, Section 48 (1) of the Law of Succession Act begins with the term “Notwithstanding any other written law”- **Notwithstanding** being the operative word therefore excludes Rule 44(1) of the Probate and Administration Rules. Furthermore, the **Judicature Act cap 8** at **Section 3** outlines

the order of supremacy of the Kenyan laws with Rules and Regulations falling subservient to the parent Act. The parent Act in these circumstances is the Law of Succession Act and therefore in case of conflict, the Act takes precedence over the Rules.

That being the position, it is obvious that the drafters of the legislation intended that magistrate's courts would have power to revoke grants and issue attendant orders so as to give effect to the Act. The Applicant's case seems to be that the Magistrate's Courts only have powers to adjudicate on succession causes and confirm grants but cannot revoke the grant it had issued and even go ahead to cancel titles. Both counsels herein in their submissions also mentioned the provisions of section 11 of the Interpretation and General Provisions Act cap 2 laws of Kenya which provide that an applied law shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties or otherwise as may be necessary to make it applicable to the circumstances, and in particular a reference to a **Probate Court**, Bankruptcy Court or Admiralty Court, or similar expression, shall be construed as a reference to the **High Court exercising the appropriate jurisdiction**. This would mean that if the Applicant's reference to Rule 44(1) is anything to go by, then reference to the High Court would also mean reference to a Probate Court (the lower Court in this case) and vice versa. Hence, the Applicant's contention that the Interpretation and General Provisions Act does not apply to

Kenyan laws is incorrect since the said Act at the preamble introduces the intention by legislators to provide some form of universal interpretation of written laws with exclusion of the Constitution only at Section 2. The Act does not mention exclusion of Kenyan laws. As noted above, the amendment of the Magistrates' Court Act No. 26 of 2015 vide section 23 thereof empowered the Magistrate's courts to handle succession matters vide section 48(1) and 49 of the Law of Succession Act.

77. It has been contended by the Applicant that only the Environment and Land Court can order cancellation of titles to land. The Magistrate's courts having been empowered to handle matters such as revocation of grant, are allowed to make such orders as are appropriate and that upon revocation, the trial court still had jurisdiction to proceed to direct that the properties do revert in the names of the deceased so that the same could be shared among the legitimate beneficiaries. Hence, the identification of beneficiaries and assets of a deceased and subsequent distribution of those assets including title to land to intended beneficiaries fell within the mandate of a succession court. Hence, where anyone with beneficial interest in the property of a deceased person is aggrieved with the manner of administration thereof, he can approach a succession court under Section 76 of the Act to interrogate and if the court satisfies itself that grounds under that section have been established and subsequently revokes a grant, can direct the property comprised in the estate of a deceased person to

vest back to the estate of the deceased and give any further directions so as to give effect to its orders including ordering the cancellation of titles arising from the revoked grant. I find that the 1<sup>st</sup> Respondent, upon allowing the summons for revocation of grant, was obligated to cancel the titles so as to ensure that the properties revert back in the name of the deceased for distribution among the beneficiaries. Further, I find that the court seized with jurisdiction ought to be allowed to handle the matter to conclusion. In the case of ***In re Estate of Adriano Nthiga Thangari (Deceased) (Succession Cause 175 of 2015) [2024] KEHC 8913 (KLR) (24 July 2024) (Ruling);-***

***“Firstly, the respondent has challenged the jurisdiction of this court to order cancellation of titles. It is her argument that such an order may only be granted by the Environment and Land Court. The issue of cancellation of titles arises from this court’s ruling revoking the grant that had been issued to the respondent. In this case, the High Court bears jurisdiction to order cancellation of titles since it is the only way to give effect to its judgment. Once the grant was revoked, it became necessary that the estate of the deceased be reconstituted as it was, before the respondent petitioned for the grant.”***

78. The Applicant has also contended that he is protected by section 93 (1) of the Law of Succession Act since he had obtained the transfer of the parcels of land after confirmation of the grant and hence the titles were valid notwithstanding any subsequent revocation or variation of the grant. Whereas the Applicant's rights under that provision was catered for, he was under obligation to present his grievances before the trial court on review and thereafter appear before the High Court on appeal if aggrieved. As the Applicant had not been enjoined in the lower court proceedings, he simply ought to have approached the trial court and seek to be enjoined and obtain any orders deemed fit and that upon determination of his claim, he could then approach this court on appeal or even the ELC for redress.

79. In view of the foregoing, I find that the 1<sup>st</sup> Respondent was properly seized with Jurisdiction to adjudicate the issues that were tabled before it and grant the necessary remedial orders as it did including canceling the titles thereto.

80. As regards the second issue, it is noted that the Applicant has approached this court by way of judicial review and seeks the court to exercise its supervisory powers under Article 165 (6& 7) of the Constitution. The Applicant contends that the 1<sup>st</sup> Respondent exceeded its jurisdiction and acted ultra vires by proceeding to cancel titles to his two parcels of land that he had lawfully acquired through a lawful transfer emanating from a confirmed grant. Further, the Applicant maintains that the 1<sup>st</sup> Respondent acted in an irrational and unreasonable manner

when he made the orders on the ground that the Applicant was not enjoined into the proceedings and thus he was condemned unheard as the Applicant has come by way of Judicial review then he is deemed to be challenging the decision made by the 1<sup>st</sup> Respondent. Indeed, judicial review is not concerned with the merits of a decision made by a public body but instead whether the decision has been correctly made and implemented according to public law and further that the said public body has acted illegally, with unreasonableness/irrationality as well as procedural impropriety and that the decision affected the legitimate expectation of the Applicant. The Applicant has sought reliance under Article 165 (6&7) of the Constitution which provides as follows:

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For the purposes of clause (6) the High Court may call for record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

The Applicant seeks this court to resort to the foregoing provisions in order to do justice on the ground that the lower court (1<sup>st</sup> Respondent) has not properly handled the suit in

the best interest of the parties and especially the Applicant herein. The Applicant therefore seeks this court to quash the decision by the 1<sup>st</sup> Respondent who has acted without jurisdiction. It is noted that the Applicant has sought reliance in the case of Republic v Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party)) Judicial Review E033 OF 2021(2022) KEHC 10 (KLR) where Mativo J (as he then was) stated as follows on the supervisory jurisdiction of the court and judicial review jurisdiction:

**The power conferred to this court under Article 165 (6) of the Constitution is used sparingly only when the lower court or tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction which is the case her. That the High Court under the jurisdiction which is the guise of Article 165 (6) cannot assume unlimited prerogative to correct all species of hardship or wrong decisions and that for it to interfere there must be a case of flagrant abuse of fundamental principles of law or it can interfere where there is an order which has resulted in grave injustice. That the fact that the learned magistrate assumed jurisdiction not expressly conferred upon him by the law and in a blatant breach of Section 14 of the CPA is itself a proper case for this court to exercise its supervisory jurisdiction to prevent grave injustice and abuse of the law. That Judicial Review is the review by a judge of the High Court of a decision,**

**proposed decision; or refusal to exercise a power of decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. That it is referred to as supervisory jurisdiction -reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised... and in the instant case, the impugned decision is a judicial function arrived at outside the confines of the jurisdiction conferred to the court by the law, which to him is amenable to both judicial review and supervisory jurisdiction.**

Also, a reliance was placed in the case of *Republic v Chief Magistrate, Mombasa & 3 Others; Sega Ventures Limited & Another (Interested Parties); Kirima (Exparte) (Judicial Review Application 1of 2022) [2023] KEELC 180 (KLR) (24 January 2023) Judgment*) where it was held:

**In his opinion supervisory jurisdiction under Article 165 (6) of the Constitution will be invoked by the court where the court identifies serious misdirection or error by the subordinate court which leads to a gross injustice for which the superior court must intervene so that justice is done. There are situations that cry and groan out for justice and it will be remiss for the court to close its ears to such cries. The court must rise up and see to it that justice is done in such occasions. Such instances may include failure by**

**the subordinate court to follow its own orders, or failure to follow substantial provisions of the law, which result in gross violation of another person's right especially those contained in the Bill of Rights. He also of the view that in order to invoke its supervisory jurisdiction the court can do so on its own motion or on being moved by any person including parties to the suit. That the court ought to be slow to invoke its supervisory jurisdiction under Article 165(6) of the Constitution where there are other specifically provided mechanisms. That it is a jurisdiction that ought to be sparingly invoked, and this will not be the case if the court utilizes it for every infraction, even where there are provided mechanism for redress....what has been presented before me is in my opinion, one case that cries out for the intervention of this court under the supervisory jurisdiction outlined in Article 165 (6) of the Constitution, so that the administration of justice is not brought into disrepute or embarrassment, and so that the court process is not used to violate the applicant's right to property. He persuaded to assess the substantial complaints that the ex parte applicant has outlined against the Magistrate's court and give such orders or directions as I deem it for the case at hand. I am**

aware that the applicant herein did not specifically invoke this court's supervisory jurisdiction under Article 165 (6) of the Constitution but as I have explained above, this court can suo moto be moved to exercise that power, and he so persuaded, given the circumstance, the Magistrate's Court. if this was an ordinary case, he would determine whether this is a fit case for setting aside judgment but as matters stand, the issue is much more complicated. First, there is doubt whether the Magistrates' court has jurisdiction given the value of the subject matter. Secondly the title of the suit land has already changed and is in the hands of persons who are not parties to the suit before the magistrate. The magistrates' court given the contention and instead guide the parties to move the court within the provided mechanisms. That as earlier stated it is a jurisdiction that ought to be sparingly invoked, and this will not be the case if the court utilizes it for every infraction, even where there are provided mechanisms for redress .....what has been presented before me is in my opinion, one case that cries out for the intervention of this court under the supervisory jurisdiction outlined in Article 165(6) of the Constitution, so that the administration of justice is not brought into

disrepute or embarrassment, and so that the court process is not used to violate the Applicant's right to property. That he was persuaded to assess the substantial complaints that the exparte applicant has outlined against the magistrates' court and give such orders or directions as he deems it for the case at hand. He is aware that the applicant herein did not specifically invoke this court's supervisory jurisdiction under Article 165 (6) of the Constitution but he has explained that this court can suo moto be moved to exercise that power and he is so persuaded given the circumstances of this case. That an application to set aside the judgment would be made in the court which passed the judgment, and that in this instance, the magistrates court. That if this was an ordinary case, he would straight away direct the parties to the magistrates' court for the court to determine whether it is fit for setting aside judgment but as it stands the matter is more complicated and that there is doubt whether the Magistrates' court has jurisdiction given the value of the subject matter. That the title of the suit land has already changed and is in the hands of persons who are not parties to the suit before the subject matter, and may not have the jurisdiction given the value of the subject matter,

and that the titles of the suit land has already changed and is in the hands of persons who are not parties to the suit before the magistrate. Hat the magistrates court given the contention on the value of the subject matter may not have the jurisdiction to cancel the title and that even if the judgment is set aside, the question of cancellation of title may be beyond the orders that the magistrates court may make. He found that there are special circumstances that would entitle this court to invoke its supervisory jurisdiction ...that he sees no prejudice to the Respondents because the have also addressed themselves substantively on the issues raised by the Applicant. That the powers above are very wide ranging in nature. That it will be seen that the superior court may call for the record of any proceedings before any subordinate court and the other institutions mentioned. That power to “call” buttresses the point that supervisory jurisdiction can be invoked by the court suo moto upon being informed or being aware of a matter that demands invitation for the exercise of the court’s supervisory jurisdiction. that the court may make any order or give any direction it considers appropriate to ensure the fair administration of justice. That it will be observed that the court is not limited in the nature of

**order that it can make and that what is important is that such order serves the administration of Justice.**

85. It is further noted that judicial review is the supervisory power of the High Court to interrogate the substantive and procedural fairness of administrative actions. The Fair Administrative Actions Act 2015 and Rules thereunder was enacted by Parliament so as to widen the field for parties to decide whether to approach the courts through supervisory jurisdiction of the High Court or approach the concerned administrative bodies. The courts have been cautious in dealing with such applications and that the courts always consider whether there are other remedies available to the parties before coming up with judicial review applications in order to give effect to the doctrine of **Exhaustion of alternative remedies**.

86. It is noted that that judicial review applications deal with the legality of the administrative action or decision in question that has been made by a subordinate court, tribunal etc and that the High Court is called upon to determine whether the process leading to the decision was lawful and whether the same should be allowed to stand or be quashed. As noted above, there were available remedies to the Applicant such as review or appeal which the Applicant has not exhausted. The doctrine of exhaustion

of alternative remedies must be considered in that the Applicant was under obligation to ensure that he has exhausted all available remedies for redress before rushing to this court. Judicial Review is the supervisory power of the High Court to interrogate the substantive and procedural fairness of administrative actions. While an appeal on the other hand is a creature of statute empowering a higher court to examine the correctness and/or propriety of a decision of a lower court. The Applicant has sought reliance under Article 165 (6) of the Constitution of Kenya 2010 which provides for the Judicial Review mandate of the High Court which overlaps other existential remedies inter alia; Appeal or Review leading to confusion thereby resulting in multiplicity of suits, forum shopping and abuse of Court process. The foregoing led to uproar within the corridors of justice as to the appropriate remedy within varying set of circumstances. Parliament in a bid to restore sanity as to the appropriate mode of seeking redress where such confusion manifested, enacted **Fair Administrative Actions Act, 2015** and attendant **Rules**. The intention of the drafters of this legislation was to make discernible as far as possible, the circumstances that necessitated one to invoke the supervisory power of the High Court under Judicial Review. Courts have also added their voice to this important discourse and in their wisdom cautioned that where other remedies are available, judicial review would be last resort unless a statute expressly provided for it or where the statute is silent on the mode of challenging

decisions of subordinate courts, tribunals, bodies, authorities or persons exercising judicial or quasi-judicial function. This therefore means that judicial review should not be resorted to where there are other suitable ways of redressing a grievance. This position is coined in what is now celebrated as the doctrine of exhaustion of alternative remedies. The same is found in **Section 9 (2) and (3)** of the Fair Administrative Actions Act which provides as follows:

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

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1) - being proceedings for Judicial Review.”**

87. Again, under **Section 65(1)(b)** of the **Civil Procedure Act, 2010** the same provides that:

*“Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as*

*may be prescribed, an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, on a question of law or fact.”*

88. Similarly, **Section 50 (1) of The Law of Succession Act cap 160** laws of Kenya on the other hand states thus: -

*“(1) An **appeal shall** lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.”*

89. It is noted that the Applicant has attacked the decision by 1<sup>st</sup> Respondent on the ground that the impugned decision though a judicial function was arrived at without the court’s adherence to the law namely that it did not have the jurisdiction thereby warranting the JR application to quash it. However, as noted in the preceding paragraphs, the trial court having been mandated by provisions of Section 48(1) and 49 of the Law of Succession Act had jurisdiction to determine the summons for revocation of grant filed by the 4<sup>th</sup> Respondent and that upon the revocation of the grant being allowed, it was necessary for the estate of the deceased to be restored back and allow fresh distribution of the estate to be carried out.

90. It is noted that the Respondent has blamed the Applicant for not lodging an appeal or review against the impugned ruling of the 1<sup>st</sup> Respondent since an action against a decree or order of a subordinate court shall be by way of Appeal to the High Court

as espoused in the foregoing statutes. The deliberate use of the word “**shall**” leaves no doubt as to the mandatory terms in which the provisions are couched. Courts have equally added their voice in support of a similar position as in the case of **Republic v Tribunal; Kenya School of Law & another (Interested Parties); Chepkwony (Exparte Applicant) (Judicial Review Application E062 of 2024) [2025] KEHC 5231 (KLR) (Judicial Review) (28 April 2025) (Judgment)** where Justice Aburili in dismissing Judicial Review Application while citing the case **In Republic v Ministry of Interior and Coordination of National Government and Another Exparte ZTE Judicial Review Case No. 441 of 2013** had the following to say;-

*“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCM ANo. 997 of 2003, **for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be***

***less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.....Exceptions(when judicial review may be allowed without exhausting remedies) include, the alternative remedy being inadequate or ineffective; delay in the statutory process would cause irreparable harm; there is evidence of bias or lack of impartiality in the appellate body”***

91. The Applicant herein is deemed to have been aware of the existence of other other available alternative forms of remedy and now that he has opted to approach this court for redress, he must show exceptional circumstances to justify an order of judicial review. The exceptional circumstances have been interpreted by courts to mean one must satisfy the following; - that the alternative remedy is inadequate or ineffective; that the delay in the statutory process would cause irreparable harm; that there exists clear evidence of bias or impartiality from the trial court. The Applicant in the instant suit has not demonstrated with particularity these exceptional circumstances that negate an appeal as stipulated by the aforementioned Acts and precedent in ***Republic v Tribunal; Kenya School of Law (Supra)***- The Applicant has lamented the fact that the trial court did not bother to enjoin him in the proceedings so as to enable him participate and thus he was condemned unheard. However, it must be noted that the principal parties herein who included the administrator who had sold land to him was expected to have alerted him about

the summons for revocation of grant as the trial court could not have known about his interest in the estate. The Applicant upon learning of the new developments ought to have approached the trial court and seek for review of the impugned orders and to be enjoined in the proceedings. No reasons have been given by the Applicant as to why he did not take that route. It is my considered view that judicial review is inapplicable to judicial decisions unlike administrative actions which are not subject of judicial review. This is for the good reason that judicial officers are immune to actions emanating from decisions rendered in the usual conduct of judicial functions done in good faith and therefore should not be enjoined as a party to suits arising from such decisions. This is affirmed by **Section 6** of the **Judicature Act cap 8** which stipulates as follows: -

***“No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he***

***would have been bound to execute if within the jurisdiction of the person issuing it.”***

In the case of ***Republic v Chief Magistrate, Mombasa & 3 others; Sega Ventures Limited & another (Interested Parties); Kirima (Exparte) (Judicial Review Application 1 of 2022) [2023] KEELC 180 (KLR) (24 January 2023) (Judgment)*** the court while dismissing the judicial review application held at para 46 as follows:-

***“What I am trying to say is that I see no place for one who is aggrieved by a court decision, to approach the High Court or courts of equal status, for redress under the Fair Administrative Actions Act. A decision of a Magistrate, whether it be a judgment or order, is not an administrative decision so as to fall under the ambit of the Fair Administrative Actions Act. If we are to expand the said Act to include judicial decisions then we will be going outside the intention of Article 47 of the Constitution whose purpose is to address persons and bodies performing administrative duties and quasi-judicial functions...”***

Even though the Applicant has urged this court to consider his application, the rule of thumb has always been that the High Court does not exercise its supervisory powers unless the circumstances of the case are so peculiar and that a party has exhausted all available remedial actions and only

when it is apparent that the trial court or tribunal exercised jurisdiction it did not have. In the case of **Republic v Magistrates Court, Mombasa; Absin Synergy Limited (interested party), Judicial Review E033 of 2021 (2022) KEHC 10 (KLR)**, Mativo J (as he then was) pronounced himself thus: -

***“The power conferred to this court under Article 165 (6) of the Constitution is used sparingly only when the lower court or tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction which is the case here. However, the High Court under the guise of Article 165 (6) cannot assume unlimited prerogative to correct all species of hardship or wrong decisions.”***

As noted from the preceding paragraphs, the trial court had the requisite jurisdiction to entertain the 4<sup>th</sup> Respondent’s summons for revocation of grant and thus the orders issued were regular and that the Applicant ought to have approached the said court for review as well as joinder. Indeed, the Applicant has expressed his misgivings at seeking for joinder as he believes that the trial court ought to have enjoined him suo motto. The trial court could not have been in the know except the administration (1<sup>st</sup> Interested Party) and hence it cannot be faulted for the decision it made. An aggrieved party is at liberty to seek review or appeal if need be. In the present

circumstances, the Applicant had the option of seeking for a review of the order before the trial court and thereafter approach this court on appeal if dissatisfied by the eventual decision. The Applicant could still exercise the option of filing suit in the Environment and Land Court against the administrators of the estate and obtain the requisite orders.

92. Looking at the Applicant's application, one cannot fail to see that the same raises a raft of accusations against the 1<sup>st</sup> Respondent such as lack of the lower court's jurisdiction, misapplication of various provisions of the law and facts in issue. I find that these are issues which should be formulated as grounds of appeal rather than review or judicial review. It is clear that the Applicant is challenging the merits of the decision of the 1<sup>st</sup> Respondent which should not be the case in a judicial review application. In the case of **Republic v Nairobi City County Council Assembly & Another: Musumbu & 4 others (Exparte Applicants) (Judicial Review application E082 of 2023 [2025] eKLR** Aburili J held at Para 72 thus; -

*“Why does this matter? This principle of not allowing appeals to be disguised as review applications matters because, allowing parties to raise appealable issues as review grounds would undermine the principle of finality in litigation, allow abuse of court process by filing review instead of timely appeals and blur the separation between appellate and review jurisdictions. It follows that a party dissatisfied with the correctness of a judgment on facts or law must appeal, not seek*

*review. Review is only available for limited procedural or factual anomalies, not for re-evaluating the judgment's merits”*

93. It was noted that the Applicant has also blamed the lower court of trampling upon his constitutional rights to property enshrined under Article 40 of the constitution. However, the 4<sup>th</sup> Respondent contends that these are not issues to be dispensed by a judicial review court because they do not question the process but rather the merits. In any case, the rights under Article 40 can be limited and that even section 93 of the Law of Succession Act cannot aid a party who has obtained property unlawfully. Indeed, the trial court found that the 1<sup>st</sup> Interested Party had obtained the grant through false representation and material facts. The Court of Appeal held in like manner in *Musa Nyaribari Gekone & 2 others v Peter Miyienda & another* [2015] KECA 573 (KLR) held:-

***“We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen***

***property. The transaction would be void ab initio and the property is traceable.”***

As the grant that had been issued to the 1<sup>st</sup> Interested Party was found to have been obtained irregularly, it follows that any interests acquired from the said flawed grant stood to be affected and hence the Applicant was required to approach the trial court for review of its orders and seek to be enjoined so that he could ventilate his case. The Applicant through this judicial review seems to suggest that he should not be interfered with just because he has a title to the suit properties yet he ought to approach the trial court to ventilate his case. It would appear to me that the Applicant in coming to this court through this judicial review has the intention to re-litigate on the matter as can be seen from the various claims and reliefs sought by the Applicant yet the Applicant is fully aware that a judicial review is only concerned with the process of arriving at a decision but not the merits of such decisions. For instance, the present application is predicated on among other grounds that the trial court misdirected itself as to the facts and law and that the court failed to consider relevant facts. Hence, allowing the application would upset the principle of finality of litigation which this court must frown upon. It is appropriate for the Applicant to approach the trial court for review of the impugned ruling as well as seek for joinder and thereafter lodge an appeal if need be or file

a suit against the administrators in the appropriate forum. I am convinced that this should have been the proper approach to take by the Applicant but not to move this court by way of judicial review. The Applicant seems to suggest that he should not be interfered with at all by any of the parties herein who should let him have quiet enjoyment of the suit properties and that he is not ready to get into the arena and contest his acquisition of the said properties. I find that the Applicant should proceed and seek review of the orders issued by the trial court and seek to be enjoined so that he gets an opportunity to ventilate his case.

94. In view of the foregoing observations, it is my finding that the Applicant's application dated 24<sup>th</sup> April 2025 lacks merit. The same is dismissed. This being a succession matter involving family members, I order each party to bear their own costs.

Orders accordingly.

**Dated and delivered at Siaya this 19<sup>th</sup> day of November 2025.**

**D.KEMEI**

**JUDGE**

**In the presence of :**

**Masara for Wakwaya.....for Applicant**

**Okoth.....for 1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Respondents**

**Ochieng.....for 4<sup>th</sup> Respondent**

**Maureen/kimaiyo.....Court Assistant**

SIAYA HC JUDICIAL REVIEW NO. E002 OF 2025 - RULING