



Republic v CECM Lands, Energy, Housing & Urban Development County Government of Marsabit & 3 others; Alelo alias Qalicha Arero (Ex parte Applicant) (Judicial Review Application E005 of 2025) [2026] KEELC 1370 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEELC 1370 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
JUDICIAL REVIEW APPLICATION E005 OF 2025**

**JO MBOYA, J
MARCH 5, 2026**

BETWEEN

REPUBLIC APPLICANT

AND

**CECM LANDS, ENERGY, HOUSING & URBAN DEVELOPMENT COUNTY GOVERNMENT OF MARSABIT 1ST RESPONDENT
COUNTY GOVERNMENT OF MARSABIT 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT
DIID SOLOMON ROBA 4TH RESPONDENT**

AND

KALICHA ALELO ALIAS QALICHA ARERO EX PARTE APPLICANT

JUDGMENT

1. Before me is the Notice of Motion application dated the 14.10.2025 brought pursuant to the Provisions of Sections 8 and 9 of the Law Reform Act, Chapter 26 Laws of Kenya; and Order 53 Rule 3 and 4 of the Civil Procedure Rules 2010. The reliefs sought thereunder are:
 - i. That an order of Certiorari do issue to bring into this Honorable Court and quash, the decision of the County Executive Committee Member, Lands, Energy, Housing and Development County Government of Marsabit, contained in a letter dated 15th August, 2025 referenced CGM/LANDS/VOL/2025, ordering re-planning, subdivision, and re-allocation of the unregistered Community land occupied by the Applicant.



- ii. That an order of Prohibition do issue prohibiting the 1st and 2nd Respondents, their officers, servants, agents or any persons acting under their authority from implementing, enforcing or in any manner acting upon of giving effect to the decision of the County Executive Committee contained in a letter dated 15th August, 2025 referenced CGM/LANDS/VOL/2025, ordering re-planning, subdivision, and registration of unregistered community land occupied by the Applicant.
 - iii. That costs of this application be borne by the Respondents.
 - iv. That this Honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances.
2. The Application is premised on the statement of facts dated the 06.10.2025; the affidavit in verification of the statements of facts sworn on the 06.10.2025; the various annexures attached thereto; and the grounds exhibited in the body thereof. In particular, the applicant has contended: The 1st respondent herein has since proceeded to and issued a decision/directive dated the 15.08.2025; the directive touches on and concern[s] sub-division of the suit property; the suit property is and forms part of community land; the community land under reference has not been registered; the decision of the 1st respondent amounts to and constitute[s] alienation of community land; the 1st respondent has not power to alienate community land; and the decision complained of was arrived at without jurisdiction; and the Decision is thus Ultra-vires.
3. Additionally, the applicant has posited that the suit property has been under his occupation, possession and use; the suit property was the subject of proceedings before Moyale Principal Magistrate's court vide PMC ELC NO. 1 of 2020; the said court rendered a judgment; the judgment of the court confirmed and decreed that the suit property is an unregistered community land; the land in question is held on trust by the 2nd respondent; the 2nd respondent has no capacity to alienate the land; in any event the decision of the 1st respondent contravenes the provisions of Article 10 and 47 of *the Constitution*; and the decision is therefore illegal, unlawful and invalid.
4. The subject application is supported by the affidavit in verification of the statement of facts and a further affidavit in support of the motion sworn on the 14.10.2025. The deponent of the twin affidavits, has reiterated the grounds contained in the body of the statement of facts and the application itself.
5. Flowing from the contents of the affidavit in verification of the statement of facts; the supporting affidavit attached to the application; and the annexures thereto, the applicant has invited the court to find and hold that the impugned decision was ultra vires the mandate/jurisdiction of the 1st respondent. The court has been implored to quash the impugned decision and to prohibit the 1st and 2nd Respondents from implementing the impugned decision, which essentially touches on and concerns unregistered community land.
6. The 1st and 2nd Respondents duly entered appearance and thereafter filed a replying affidavit. The named Respondents have contended that the suit property indeed forms part of the unregistered community land falling within the jurisdiction of the 2nd respondent. Furthermore, it has been contended that the 2nd respondent has the mandate and authority to supervise the unregistered community land in accordance with the provisions of *the Constitution* and the *Community Land Act, 2016*.
7. Furthermore, the named Respondents have also averred that the actions of the 1st respondent complained of were taken in line with and in accordance with the directions of the court in terms of



the Judgment issued vide Moyale PMCELC No. 1 of 2020. To this end, it has been contended that the decision/directive complained of was procedural, lawful and valid.

8. Premised on the forgoing, the named Respondents have contended that the subject application is devoid of merits and thus courts dismissal. In this regard, the court has been invited to dismiss the application and to award costs to the 1st and 2nd respondents.
9. The 3rd and 4th Respondents [represented by the Hon. Attorney General] duly entered appearance and filed grounds of opposition. The Hon. Attorney General has highlighted four key issues. The issues are: The decision complained of was not made by the 3rd respondent; the 3rd and 4th Respondents have been mis-joined; the Ex-parte Applicant is non-suited; and the application is devoid of merits.
10. The interested party similarly entered appearance and filed a replying affidavit. The interested party has contended that the decision of the 1st respondent is lawful and valid. Furthermore, the interested party has posited that the suit property is unregistered community land. In addition, it has been contended that the applicant herein does not have any lawful rights to and in respect of the suit property. Besides, it has been posited that the application is premature; misconceived and thus an abuse of the due process of the court.
11. The subject application came up for hearing/directions on the 04.11.2025 whereupon the court issued directions pertaining to the disposal of the application. The directions were: The Respondents and the interested party shall file and serve their responses within seven [7] days from the date of the directions; the Ex-parte Applicant shall be at liberty to file and serve supplementary affidavit [if any] within seven days from the date of service; the Ex-parte Applicant shall equally file and serve written submissions alongside the supplementary affidavit; the Respondents and the interested party shall be at liberty to file written submissions within seven days from the date of service; and the Ex-parte Applicant shall have liberty to file rejoinder submissions [if any] within seven days from the date of service.
12. The Ex-parte Applicant filed written submissions dated the 18.11.2025. The written submissions have highlighted four [4] key issues. The issues are: The suit property constitute[s] unregistered community land; the 1st respondent has no authority or mandate to alienate the suit property; the actions of the 1st respondent are contrary to and in contravention of the constitution and the law; and the decision complained of is illegal, unlawful and ultra vires.
13. The interested party file written submissions dated the 02.03.2026. The written submissions have highlighted two [2] key issues. The issues are: The decision complained of was lawful; and the subject application does not disclose a reasonable cause of action or basis.
14. The respondents, including the Hon. Attorney General, did not file any written submissions. Nevertheless, it is common ground that the replying affidavits filed on behalf of the Respondents form part of the record of the court. In the premises, the said replying affidavit shall be considered and taken into account, where necessary.
15. Having reviewed the notice of motion application; the statement of facts dated the 06.10.2025; the affidavit in verification of the statement of facts; the replying affidavits in opposition thereto; and the written submissions on record, I come to the conclusion that the determination of the subject application turns on three [3] key issues. The issues are: Whether the 3rd and 4th Respondents have been properly impleaded; whether the suit property is unregistered community land and if so, whether the 1st respondent is seized of jurisdiction to alienate same or any portion thereof; and whether the impugned decision was/ is ultra vires.



16. Regarding the first issue, it is important to recall and reiterate that the decision complained of was made by the 1st Respondent. In addition, it is common ground that the 1st respondent is an officer in the employment of the 2nd respondent. Furthermore, it suffices to posit that the 2nd respondent is an autonomous body created and established under *the Constitution* 2010. [See the provisions of Article 176 of *the constitution* 2010].
17. To the extent that the 1st respondent is an officer in the employment of the 2nd respondent, its decisions can only impact upon the 2nd respondent and where there is infringement on the rights of a party, in this case, the Ex-parte applicant, the suit/proceedings can only be taken against the 1st respondent and 2nd respondent. Instructively, the 2nd respondent would be joined and impleaded on the basis of vicarious liability arising from the actions or omissions of an employee/servants. [See the holding of the Court of Appeal in the case of *Selle and Another versus Associated Motor Boat Limited* [1968] EA 93]
18. On the other hand, the 3rd the 4th Respondents can only be sued/impleaded, if and only if, the omission complained of was undertaken by an officer/servant of the National Government and not otherwise. In this case, there is no action or omission that has been undertaken by an officer of the National Government to warrant the joinder of the Honourable Attorney General. Suffice it to state that the Honourable Attorney General is the principal legal advisor of the National Government and thus same is joined in proceedings touching on and concerning the National Government. [See the provisions of Article 156 [4] of *the constitution* 2010].
19. Additionally, it is worth pointing out that community land and the manner in which community land is to be dealt with/disposed of, is well provided for under the provisions of the *Community Land Act*, 2016. Notably, where the community land has not been registered, same is held on trust by the County Government. Nevertheless, the county government as a trustee has no power; mandate or authority to alienate such land.
20. However, where the community land has been registered, the power/mandate to alienate or allocate the land is bestowed upon the designated assembly. In addition, the Community Land Registrar undertakes registration of transactions; dealings; or activities affecting registered community land, albeit on behalf of the Community.
21. Be that as it may, it is not lost on me that the community land under reference has not been registered. It then means that the community land registrar has no role or mandate to play in respect of the action complained of. Simply put, the suit and or proceedings against the community land registrar are premature; misconceived and legally untenable.
22. In a nutshell, it is my finding and holding that the Exparte Applicant herein has no cause of action against the 3rd and 4th respondents. Moreover, the 3rd and 4th Respondents did not make any decision[s] capable of being quashed by way of certiorari, either in the manner sought or at all.
23. In the absence of a decision by the 3rd and 4th respondent capable of being quashed, it suffices to posit that the said Respondents are mis-joined. Moreover, the Ex-parte Applicant is clearly, non-suited as against the 3rd and 4th respondents.
24. The next issue for consideration touches on and concerns whether the suit property is unregistered community land and if so, whether the 1st and 2nd Respondents have the requisite jurisdiction to alienate same. To start with, the suit property was the subject of proceedings before the Principal Magistrate's Court at Moyale, namely; Moyale PMCELC NO. 1 of 2020. The court heard the dispute between the Ex-parte Applicant and the interested party herein and thereafter rendered a Judgment dated 30.11.2022.



25. The Judgment of the court clearly stipulated that the suit property was unregistered community land. The court further held that being unregistered community land, same fell within the jurisdiction of the 2nd respondent. In addition, the court posited that the county government of Marsabit held the land on trust.
26. Furthermore, the court proceeded to and directed that the county government of Marsabit was at liberty to undertake survey; planning and registration in respect of the suit property. In addition, the court posited that subject to such survey and planning, the county government of Marsabit [The Second Respondent] may undertake allocation by way of [sic] issuance of letter of allotment.
27. Regarding the aspect of the judgment, which touches on the survey; planning and registration being undertaken by the County Government of Marsabit, I am afraid that the learned trial magistrate did not correctly appreciate the law.
28. In particular, the learned trial magistrate misapprehended; and misconstrued the provisions of Article 62 and 6 of *the Constitution*, 2010. Moreover, the Learned Magistrate misconstrued the tenor of the provisions of the *Community Land Act*, 2016.
29. Simply put, the County Government of Marsabit holds the unregistered community land on trust for the residents [The Community] of the said county. By virtue of being a trustee, the said county government cannot undertake survey; planning; allocation and registration of the land. Such actions can only be undertaken by the designated officers and upon compliance with the various provisions of the *community land act* including Section 6 and 8 of the said *Community Land Act* [2016].
30. Other than the foregoing observations, it is imperative to underscore that the finding[s] that the suit property constituted an unregistered community land remains in situ. Moreover, the said decision was a judgment in rem. Further, and in any event, all the parties before the court appear to confirm the said position.
31. The question that does arise is whether the 1st respondent could therefore issue the decision under reference. Instructively, the impugned decision directed thus:

The Land be subjected to re-planning; the re-planned parcels be subdivided into two equal parts for fresh re allocation to the parties.
32. To my mind, the 1st respondent cannot purport to [sic] allocate or re-allocate, what constitute[s] unregistered community land. To this end, the tenor of the letter/decision sought to be quashed was indeed made without jurisdiction. The impugned decision was illegal, unlawful and invalid. Same was equally ultra vires.
33. The last issue that merits consideration relates to the reliefs to be granted. The Exparte Applicant has sought an order of judicial review in the nature of certiorari; and prohibition. The gravamen of the exparte applicant's case is to the effect that the suit property has been under his occupation; possession and use. In addition, it has been contended that the impugned decision was made and or undertaken without notice to ; or involvement of the Ex-parte Applicant.
34. The Exparte Applicant has therefore invited the court to find and hold that the impugned decision was contrary to and in contravention of the Article 10 of *the Constitution* [National Values and Principles of Governance] and Article 47 of *the Constitution* [Fair Administrative Actions].
35. I have examined the complaints by the exparte applicant. I agree that the impugned decision could not have been made without due notice to; involvement of; and participation by the exparte applicant. Instructively, the impugned decision was bound to affect the rights and interest of the Exparte



Applicant and therefore, there was need for his involvement. In particular, the provisions of Articles 47, And 50 of *the Constitution* are apt. [See also the holding of the court in the case of County Assembly of Kisumu versus The Clerk, Kisumu County Assembly Service Board and Others, 2015 eKLR, David Oloo Onyango Versus the Attorney General 1987, eKLR, Judicial Service Commission versus Gladys Boss Shollei [2022] KESC; Mike Sonko Mbuvi versus the City County Assembly of Nairobi and others [2022] KESC; and Gikenyi versus the County Government of Nakuru and others [2026] KESC].

36. Other than the aspect of the decision which contravened the provisions of Articles 47 and 50 of Constitution, there is also the finding that the 1st respondent could not direct sub division and re-allocation of an unregistered community land. Any purported allocation or [sic] re-allocation of such land was ipso facto an illegality.
37. It is common ground that an act which is illegal, remains illegal and void for all intents and purposes. Such an act cannot be sanitized in whatsoever manner.
38. In the case of *Macfoy Vs United Africa Co Ltd (1961) 3 All ER, 1169*, the Privy Council [Per Lord Denning MR] stated thus:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”

Conclusion

39. The Ex-parte Applicant contended that the impugned decision was made in contravention of the provisions of Articles 10, 47 and 50 of *the Constitution*. Where an action/decision contravenes the tenets of the rule of law, such a decision is bad in law. It matters not that the administrator/decision maker would have arrived at the said decision anyway.
40. Additionally, it was contended that the 1st respondent sought to alienate and allocate a portion of unregistered community land. Such land cannot be allocated by the county government. The county government merely holds the land as a trustee. Its powers and mandate are circumscribed. The County Government cannot exercise a power that it does not have. That would be in contravention of Article 1 of *the Constitution*, 2010.
41. In the premises, it is my finding that the Exparte Applicant has duly proved the claims at the foot of the Application. To this end, the application is merited, save for mis-joinder of the 3rd and 4th Respondents.

Final orders

42. Flowing from the foregoing, the final orders of the court are:
 - i. The suit against the 3rd and 4th Respondents be and is hereby struck out.
 - ii. The Application be and is hereby allowed in terms of prayers 1and 2 thereof.



- iii. In particular, there be and is hereby granted an order of judicial review in the nature of Certiorari and Prohibition as against the 1st and 2nd Respondents only.
- iv. The costs of the Application are awarded to the Ex-parte Applicant.
- v. The costs in terms of clause [iv] above shall be borne by the 1st and 2nd Respondents.
- vi. The suit property remains an unregistered community land and thus subject to the provisions of the *Community Land Act*, 2016.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 5TH DAY OF MARCH, 2026

OGUTTU MBOYA FCIArb ;CPM [MTI- EA]

JUDGE

In presence of:

Mukami: Court Assistant

Ms. Makena Mbogo for the Ex-parte Applicant.

Ms. Nkirote Nknuu for the 3rd and 4th Respondents.

Mr. Bahailu for the Interested Party.

N/A for the 1st and 2nd Respondents.

