REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC LJR NO. E001 OF 2025

REPUBLIC ……

APLLICANT

JOSEPH JUMA APUSAYI …… EXPARTE APPLICANT

= VERSUS =

DISTRICT LAND REGISTRAR, BUSIA ……

RESPONDENT

= AND =

JULIANA NAFULA WANYAMA …… INTERESTED PARTY

J U D G M E N T

1. This judgment was due on 10th February 2026. However, following my transfer from Busia to Iten Court which was effective 15th January 2026, I had to prioritize the hearing of my part heard cases. That explains the delay in delivering this judgment and the same is regretted.

2. Having obtained leave in **BUSIA ELC MISC APPLICATION NO E007** of **2024** on 6th February 2025, **JOSEPH JUMA APUSAYI** (the Applicant) first filed this Judicial Review application on 25th February 2025 in the **JR** Miscellaneous file **NO E007** of **2024** and later in this file on 10th March 2025. He seeks against the **DISTRICT LAND REGISTRAR BUSIA** (the Respondent) and **JULIANA NAFULA NANYAMA** (the Interested Party) the following orders:

    a) **An order of Certiorari do and is hereby issued to call to this Court and quash the decision of the District Land Registrar Busia made on 18th June 2024 and 1st August 2024 opening a road of access through the land parcel NO BUKHAYO/MUNDIKA/14674.**

    b) **That costs of this application be provided for.**

3. The application is grounded on the matters set out in the Applicant's statutory statement and verifying affidavit.

4. The gravamen of the Applicant's grievance is that he is the registered proprietor of the land parcel **NO BUKHAYO/MUNDIKA/14674** (suit land) measuring

0.48hectares or thereabout and which is one of the resultant sub-divisions of the original land parcel **NO BUKHAYO/MUNDIKA/7900** since 15th July 2019. Among the other sub-divisions created out of the original land parcel **NO BUKHAYO/MUNDIKA/7900** are parcels **NO BUKHAYO/MUNDIKA/14676, 14675, 14670, 14671, 14672** and **14673** and a road of access to serve those parcels was created and is indicated on the **BUKHAYO/MUNDIKA** registration diagram **NO 10**.

5. That the Interested Party in an attempt to create a road of access which she considers to be a 'short cut' to land parcel **NO BUKHAYO/MUNDIKA/14672** is attempting to create it through the suit land yet its boundaries have been created by planting trees. The Interested Party complained to the Respondent that the Applicant had blocked the access road leading to the land parcel **NO BUKHAYO/MUNDIKA/14673.**

6. On 18th June 2024, the Respondent acting on the Interested Party's allegations visited the site and created a road through the suit land to serve the land parcels **NO BUKHAYO/MUNDIKA/14672** yet there is already an

existing road to serve that land since 2019. The creation of an access road to serve the land parcel **NO BUKHAYO/MUNDIKA/14672** through the suit land has reduced the size of the Applicant's land which action is unjust, oppressive and contrary to the rules of Natural Justice. That has necessitated the filing of this application.

7. The following documents are annexed to the application:

1) Copy of the title deed to the land parcel **NO BUKHAYO/MUNDIKA/14674.**
2) Copy of the Register for the land parcel **NO BUKHAYO/MUNDIKA/14672.**
3) Copy of the map for **MUNDIKA REGISTRATION SECTION.**
4) Copy of letter dated 5th August 2024 from the County Forest Conservator Busia addressed to Officer in charge Mayenje Patrol Base assessing damage of Applicant's trees.
5) Copy of **OB/04/205/7 2024**
6) Report by the Busia Land Registrar dated 18th June 2024 on access road serving land parcels

NO BUKHAYO/MUNDIKA/14672, 14673 and **14674**.

7) Report by the Land Registrar Busia dated 1st August 2024.

8) Receipt.

9) Mutation Form.

The Respondent has not filed any response to the application.

8. The Interested Party filed a replying affidavit dated 11th March 2025. She describes the application as fatally defective, incompetent and not maintainable in law adding that the Applicant whose interest the application has been filed, is not disclosed. Further, that the Applicant did not comply with the directions to file the application within 7 days and therefore, there is no suit for hearing.

9. That the Applicant has not filed the substantive application independent of the miscellaneous application for which leave was sought and further, that there is no statutory notice to the Registrar intimating the intention to file this Judicial Review application including the order which mandated the Land Registrar Busia to visit the site and file

a report. That the Applicant has also not enjoined the Senior Principal Magistrate as a party.

10. The Interested Party has averred, further, that the Judicial Review relief is not available to the Applicant who should have filed an appeal against the decision of the Land Registrar or an application for review under **Section 80** of the **Civil Procedure Act** as read with **Order 45** of the **Civil Procedure Rules.** Therefore, an order of Certiorari cannot be sought to quash a decision made pursuant to a Court order which has not been appealed from following the hearing of all the parties concerned. That this application has been filed outside the mandatory 6 months period and is therefore not maintainable, is incompetent and should be dismissed with costs.

11. The application has been canvassed by way of written submissions. The same have been filed by **MR OTANGA** instructed by the firm of **BOGONKO OTANGA & COMPANY ADVOCATES** for the Applicant and by **MR OKUTTA** instructed by the firm of **OUMA-OKUTTA & ASSOCIATES ADVOCATES** for the Interested Party. The

Respondent, as I have already stated above, did not file any response to the application.

12. I have considered the application, the rival affidavits and annextures as well as the submissions by counsel.

13. The Interested Party has averred, inter alia, that this application has been filed outside the 6 months period for seeking and order of Certiorari. It is true that **Order 53 Rule 2** of the **Civil Procedure Rule** makes it mandatory that leave to file for an order of Certiorari must be made not later than 6 months after the date of the proceedings sought to be quashed. The report of the Land Registrar which created an access road between the suit land and land parcel **NO BUKHAKO/MUNDIKA/5150** to serve the Interested Party's land parcel was made on 18th June 2024. A further report was prepared on 1st August 2024. The Applicant moved to this Court vide **J.R.** Miscellaneous application **NO E007** of **2024** dated 11th September 2024 seeking leave to file this Judicial Review application. There was compliance with the provisions of **Order 53 Rule 2** of the **Civil Procedure Rules** since the leave was sought within 6 months of the report of the Land Registrar. The

order sought to be quashed was not made by the Senior Principal Magistrates Court as alleged. Leave was granted on 6th February 2025 and the Motion was filed on 25th February 2025 which was within the 21 days in **ELC MISC NO E007** of **2024**. It was not filed on 7th March 2025 as alleged by the Interested Party. It is also not correct, as averred by the Interested Party at paragraph 6 of her replying affidavit, that the Applicant has not been named. The Applicants' name is clearly indicated at the top of the application.

14. Having dealt with those preliminary issues raised by the Interested Party both in the replying affidavit and in the Preliminary Objection dated 11th March 2025, I shall now consider whether or not the Applicant has met the threshold of the grant of the orders of Certiorari to quash the Land Registrar's orders dated 11th June 2024.

15. What is the scope of Judicial Review? In the case of **MUNICIPAL COUNCIL OF MOMBASA -V- R & UMOJA CONSULTANTS LTD C.A. CIVIL APPEAL NO 185** of **2001** the Court stated the duty as follows:

> **"The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the powers, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters.**

It is now well settled that in order to succeed in a Judicial Review Application, the Applicant must show that the decision complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or it's principles are instances of illegality. Irrationality is when there is such gross un-reasonableness in the decision taken or act done that no reasonable authority addressing itself to the fact and the law before it would have made such a decision. Such a

decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority. Unfairness may be in the non-observance of the rules of natural justice – see **PASTOLI -V- KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS 2008 2 E.A. 300, COUNCIL OF CIVIL UNIONS -V- MINISTER FOR THE CIVIL SERVICE 1985 AC 347** and also an application by **BUKOBA GUMKHANA CLUB 1963 E.A. 478.**

16. The Applicant did not cite the provisions of **Article 47(1)** of the **Constitution** which provides that:

> **"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."**

Neither has he cited the **Fair Administrative Action Act**.

17. The Supreme Court also discussed the scope of Judicial Review Application orders in the case of **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER -V- CABINET SECRETARY TRANSPORT & INFRASTRUCTURE & 3 OTHERS S.C. PETITION NO 17** of **2015 [2021 KESC 39 KLR].** It stated as follows at paragraph 102:

“Despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. This finding is further reinforced by the fact that though the Court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision.”

The Supreme Court went on to cite **LORD HAILSHAM L.C** in the case of **CHIEF CONSTABLE OF NORTH WALES POLICE -V- EVANS 1982 3 ALL ER** at page **141** thus:

“It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been

subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The Court will not, however, on a judicial review application, act as a 'Court of Appeal' from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the Court would, under the guise of preventing the abuse of power be guilty itself of usurping power."

The bottom line basically is that a Judicial Review Application is not an appeal and does not consider issues of

merit. It is all about processes. I shall be guided by the above precedents and principles.

18. It is clear from a perusal of the application annextures and affidavits, that the Applicant is raising issues of the merit of the Land Registrar's decision yet this Court is not supposed to interfere with the discretion of the Land Registrar and substitute it with mine. In his submissions, counsel for the Applicant has cited the case of **KIPKIRUI** Arap **KOSKE -V-PHILEMON KIPSIGEI TANGUS & ANOTHER 2015 KEECC 295 KLR** which also involved the creation of a road. Counsel then states:

> **"It is our submission that the District Land Registrar's decision to create a road through the Exparte Applicant's parcel where none is reflected on the cadastral map is illegal, irrational and sheer nullity.**
>
> **The decision of the County Land Registrar has resulted into a reduction of the size and dimension of L.R NO BUKHAYO/MUNDIKA/14674 and creation of an easement without following due process. Consequently, the Exparte**

Applicant has suffered loss as a result of destruction of his trees which has been perpetrated by the Registrar's illegality, irrationality and procedural impropriety."

There is no dispute that the Land Registrar had the jurisdiction to determine the dispute between the parties which was basically a boundary dispute. **Section 18** of **Land Registration Act** is clear on that. The case of **KIPKIRUI** Arap **KOSKE -V- PHILEMON KIPSIKEI TANGUS** (supra) had been filed in the Superior Court alleging fraud on the part of the Land Registrar and the Defendant in fraudulently and unlawfully altering the Index Map to create a road where non-existed. The dispute had initially been heard by the **BOMET LAND DISPUTES TRIBUNAL.** This being a Judicial Review Application, it is not in dispute that the Land Registrar had the jurisdiction to determine the dispute before him and therefore, the issue of illegality does not arise.

19. On the ground of irrationality, I have looked at the decision of the Land Registrar and I do not see any evidence of gross unreasonableness. The Land Registrar heard the oral

testimonies by the parties and reached a decision that indeed the road of access was as a result of the sub-division of the original land parcel **NO BUKHAYO/MUNDIKA/7900.** The Land Registrar then made a decision inter alia, that the suit land belonging to the Applicant had encroached onto the access road by one meter. I do not see how that decision was un-reasonable given the circumstances in this case.

20. As to whether there was any procedural impropriety or failure to act fairly by the Land Registrar such as non-observance of the rules of natural justice, the record shows that the Applicant was invited to the hearing. He was engaged elsewhere but sent his brother **MOSES WANDERA** to represent him. The Applicant also addressed the session on phone and made his comment on the dispute. The same are captured on the record and at no time did he complain during the hearing that the Interested Party was using her office to influence the proceeding. He has now averred in paragraph 20 of his verifying affidavit thus:

“That the Interested Party is using her influence as a member of county assembly of Busia to force a road of access where non exists.”

I would have thought that if the Interested Party was using her office to arm twist the Land Registrar to arrive at a decision which was not in accordance with the evidence, that is a matter which should have been raised during the hearing.

21. Among the grounds upon which the application is premised is that the Land Registrar abused his office and refused to receive evidence as required under **Section 18(3)** of the **Land Registration Act** thereby resulting in the reduction of the suit land by refusing to consider the Cadastral Map of the area. In paragraph 22 of his affidavit, the Applicant has deposed as follows:

22: “That the action by the Land Registrar not to use the map of the area when resolving issues of road access and boundaries is contrary to the law and practice.”

Section 19(2) of the **Land Registration Act** requires that the Land Registrar shall give all the parties an opportunity

to be heard. That opportunity was given to the Interested Party. He opted to address the Land Registrar by phone having sent his brother to inform the Land Registrar that he would address him vide a phone call which he did. If he had any documentary evidence to adduce including the map, he should have given it to his brother to present it or made reference to it himself. Instead, all that he did was to tell the Land Registrar how he had acquired the suit land from his father and adding that he did not sell any land to the Interested Party. Then he made the following final comment:

> **"Nothing be implemented until a new date that I will be present, that is all."**

The Applicant forgot, or did not want to recognize, that the prerogative of deciding when and where the hearing would be held was the responsibility of the Land Registrar and not of the parties. And if the date set by the Land Registrar was not convenient to him, he should have sought an adjournment and even suggested another date. However, having opted to be represented by his brother and having further decided to address the Land Registrar by phone,

then he was heard in that manner. It was improper for him to proceed and give ultimatums to the Land Registrar. The opportunity to be heard was afforded but the Applicant decided to squander it. The **Constitution** in **Article 50(1)** refers to **"<u>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</u>."** The right to be heard is fundamental. It is the cornerstone of the rule of law. But when it is availed to any party, as was the position in this case, it must be utilized and not squandered. The Applicant was given an opportunity to be heard. He addressed the Land Registrar in the manner which he considered to be the best way to articulate his grievance including issuing ultimatums. He cannot now complain that the Land Registrar abused his office and refused to receive his evidence. What he told the Land Registrar on 18th June 2024 was his evidence which the Land Registrar was at liberty to accept or reject before arriving at a decision. That ground must therefore be dismissed.

22. Counsel for the Applicant has submitted that the Respondent did not file any response to the application. That is correct but nothing really turns on that because the report by the Land Registrar filed by the Applicant himself, speaks for itself. Counsel has also submitted at page 4 of his submissions that:

> **"Your Lordship, the District Land Registrar, without reasonable explanation, refused to receive crucial evidence relating to the creation of road through L.R NO BUKHAYO/MUNDIKA/14674. The Exparte Applicant obtained a map from Kakamega Land Registry which indicates that the road which was being opened in L.R NO BUKHAYO/MUNDIKA/14674 did not exist on the map. The Registrar's actions not to use the map of the area when resolving issues of road access and boundaries is contrary to the law and practice."**

To confirm if there is any justification in the above submission, I shall reproduce in extensor what the

Applicant (who was the Respondent in the proceedings before the Land Registrar on 18th June 2024) and his witness said:

"Respondent

I am Moses Wandera brother to Joseph Juma states that my brother is away and he only asked me to be around and see what transpires. His instructions are he be reached on his mobile phone, that is all.

Joseph Juma on Phone

As am aware of your visit but due to short notice I was unable to travel, however, I want to state the following:

- **My father gave me land from end of Nick NO 5150 measuring 0.48ha hence there is no road between us.**
- **I did not sell land to Juliana to warrant a road from me, thus let him ask those who are lying to her about road.**
- **Nothing be implemented until a new date that I will be preset that is all."**

As is clear from the above narrative, at no point did the Applicant or his brother adduce any evidence relating to any map which the Land Registrar declined to receive.

23. The Applicant is obviously trying to challenge the merit of the Land Registrar's decision and as is clear from the precedents herein, Judicial Review is not about the merit of the decision.

24. This application is for dismissal.

25. But that is not all. **Section 86(1)** of the **Land Registration Act** provides that:

> **86(1) "If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties."**

Counsel for the Interested Party has submitted that the Applicant had recourse to appeal the decision of the Land Registrar but did not do so. What counsel is obviously

alluding to is the doctrine of exhaustion. It is now well settled that where there is a clear procedure for the redress of any grievance prescribed by the **Constitution** or any other **Act**, that procedure should be strictly followed. That was settled in the case of **SPEAKER OF NATIONAL ASSEMBLY -V- KARUME 1992 KLR 21** and also the case of **GEOFFREY MUTHINJA KABIRU & OTHERS -V- SAMUEL MUNGA HENRY & 1756 OTHERS 2015 eKLR**. It is not clear why the Applicant did not pursue the route set out in the **Land Registration Act** if he was aggrieved by the decision of the Land Registrar dated 18th June 2024.

26. That notwithstanding and having considered the Applicant's Motion seeking Judicial Review and order of Certiorari, this Court makes the following dispositive orders:

    1) **The Motion is devoid of merit and is hereby dismissed.**

    2) **Costs to the Interested Party.**

BOAZ N. OLAO

JUDGE

10TH APRIL 2026

Judgment dated, signed and delivered on this 10th day of April 2026 by way of electronic mail and with notice to the parties.

Right of Appeal.

BOAZ N. OLAO
JUDGE
10TH APRIL 2026