REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT SIAYA
JUDICIAL REVIEW APPLICATION NO. E004 OF 2025

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 40, 47, 50, 64, 159 AND 165(6) OF THE CONSTITUTION.

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(1)(2), 19(2)(3), 20(2)(3)(4), 21(1), 22(1)(2), 23(1), 27(1), 40(1)(2), 47(1), 48 AND 50 OF THE CONSTITUTION.

AND

IN THE MATTER OF SECTIONS 4, 5 AND 12 OF THE FAIR ADMINISTRATIVE ACT 2015.

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26.

AND

IN THE MATTER OF SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284.

AND

IN THE MATTER OF NYAMONYE ADJUDICATION SECTION.

AND

IN THE MATTER OF LAND PARCEL EAST YIMBO/NYAMONYE/4250.

BETWEEN.

REPUBLIC ..... APPLICANT

=VERSUS=

DEPUTY COUNTY COMMISSIONER, BONDO SUB-COUNTY (Joined as the office authorized by The Cabinet Secretary of Land pursuant to Section 29(4) of CAP 284) ..... 1ST RESPONDENT

SAMWEL ODHIAMBO (Joined in his capacity as the legal representative of the estate of Priscilla Aoro Omollo ..... 2ND RESPONDENT

CHARLES ODUOR OMOLLO (Joined in his capacity as the legal representative

of the estate of Paul Omollo Gulu) ..... 3RD RESPONDENT

AND

DIRECTOR OF LAND ADJUDICATION BONDO SUB-COUNTY ..... 1ST INTERESTED PARTY

LAND REGISTRAR BONDO SUB- COUNTY ..... 2ND INTERESTED PARTY

AND

JACK DICKSON NGESA ..... 1ST EX-PARTE APPLICANT

ROSEMARY NGESA ..... 2ND EX-PARTE APPLICANT

JUDGMENT

1. This is a Judgement pertaining to a Judicial Review substantive Notice of Motion application dated 7th April 2025 instituted by the Ex - Parte Applicants' . The Ex – Parte Applicants sought for the following orders; -
    i. THAT this Honorable court be pleased to grant an order of CERTIORARI against the 1st respondent to move into this Honorable court for purposes of being quashed the Judgement dated 20-09-2024 of the Appeal to the Minister case number 251/2000.
    ii. THAT this Honorable court be pleased to grant an order of CERTIORARI to quash the entire proceedings of the office of the 1st respondent that led to the Judgement dated 20-09-2024.
    iii. THAT this Honorable court be pleased to grant an order of PROHIBITION against the 2nd and 3rd respondents by themselves or through their agents, employees and/or people duly authorized under them from interfering and dealing in any way with land parcels EAST YIMBO/NYAMONYE/4250.
    iv. SPENT.

v. THAT this Honorable court be pleased to grant an order of MANDAMUS to compel the 1st and 2nd Interested Parties jointly and severally to rectify adjudication record and land registrar to reflect the name of the 1st applicant as the legal owner of parcel EAST YIMBO/NYAMONYE/4250.

vi. THAT the cost of this application be in cause.

2. The application herein was premised on the factual background outlined on its face, and averments made in the Supporting Affidavit of – ROSEMARY NGESA, the 2nd Applicant herein sworn and dated the same day.

3. The Applicant averred that she was the wife of the 1st Applicant who had authorized her to prosecute this suit since he has a medical condition which has impaired his locomotory and oratory abilities. Annexed as RN-001 is a true copy of the consent.

4. It is averred that at all material times, EAST YIMBO/NYAMONYE/4250 was hived off the larger parcel EAST YIMBO/NYAMONYE/2178. It is a factual finding by Land Adjudication Officer that the parcel EAST YIMBO/NYAMONYE/2178 falls within MASAMBA VILLAGE hosting the KANYIMENYA and JOGOYE CLAN where the applicants belong. They are bordered by JOKOWIL CLAN where the 3rd respondent hails.

5. That EAST YIMBO/NYAMONYE/2178 was about 180 acres and shared amongst the above clans and used for cotton and sisal planting. No people stayed therein which has remained the current status. It is used for grazing.

6. The deponent states that in 1960's, the elders both from JOGOYE and JOKOWIL CLANS decided to put a boundary between the two clans where the elders unanimously decided to grant EAST YIMBO/NYAMONYE/2178 to the Late ENOCK MBALA ONGALA who is the 1st Applicant's father and the deponents father-in-law.
7. That due to demise of 1st Applicant's father in 1987, the 3rd respondent through his father, the Late Paul Omollo Gulu, wantonly grabbed the entire EAST YIMBO/NYAMONYE/2178 disregarding the unanimous decision of the elders from JOGOYE and JOKOWIL clans. To realize this nefarious scheme, the Late Paul Omollo Gulu, raised an objection with the Land Adjudication Officer on 11-10-1991 where he sought sub-division of the said parcel into 10 portions. One of such portions was EAST YIMBO/NYAMONYE/4250 which was allegedly sold to the 2nd respondent's mother, the Late Priscilla Aoro Omollo.
8. It is averred the objection was heard on 21-9-1995 and allowed on the same day. That during the said hearing, the 1st Applicant was not present because he had no notice of this other objection because he had already lodged one concerning the same parcel on 27-09-1991, 15 days earlier, which was yet to be heard. A copy of the objection decision lodged on 11-10-1991 and decided on 21-9-1995 is annexed.
9. It is alleged that before then the 1st ex-parte Applicant had lodged an objection with the Land Adjudication Officer on 27-9-1991. This objection was set down for hearing from 25- 03-1997 to 21-05-1997 when a decision was given by the Land Adjudication Officer. That the respondent was Paul Omollo Gullu

where all the parties were allowed to call witnesses who were examined and cross examined to ascertain the correct position of ownership of EAST YIMBO/NYAMONYE/2178.

10. That all parties were heard and the Land Adjudication Officer conclusively determined the matter on 21-05-1997 in favor of the 1st Applicant. The effect of the findings was that the decision made on 21-09-1995 allowing the sub-division of EAST YIMBO/NYAMONYE/2178 was cancelled and ordered transfer of the parcel to the 1st Applicant. That curiously, the Land Adjudication Officer decided that EAST YIMBO/NYAMONYE/4250 would not be affected by the orders since Priscilla Aoro Omollo had bought it from Paul Omollo Aoro thus the Doctrine of Bona fide purchaser for value without notice was in her favor. A copy of Objection Proceedings and decision lodged on 27-09-1991 and decided on 21-05-1997 by the Land Adjudication Officer were attached.
11. The deponent notes that this objection was about 15 days before the objection by Late Paul Omollo Gullu on sub-division the same having been filed on 11-10-1991. That interestingly and curiously the Land Adjudication Officer adjudged the objection lodged on 11-10-1991 first instead of the objection lodged on 27-9-1991. That the objections concerned the same subject matter and therefore hearing the 1st objection should have conclusively disposed the 2nd objection. That the sub-judice rule came into play which abhor multiplicity of suits concerning the same subject matter while there is a subsisting suit. Therefore, the decision by the Land Adjudication Office to allow lodging of a second objection regarding same land while there

was another objection pending hints a fraudulent collusion between the Land Adjudication Officer and the Late Paul Omollo Gullu.

12. It is stated that aggrieved by the said part order regarding EAST YIMBO/NYAMONYE/4250, the 1st ex-parte applicant appealed the decision to the Minister for lands in the year 2000 which was designated as APPEAL TO THE MINISTER CASE NO. 251 OF 2000. The deponent adds that the 1st ex-parte applicant failed to appeal within the mandatory 60 days due to illnesses which had taken a toll on his health. A copy of the acknowledgement note after filing appeal is annexed.
13. That albeit inordinately late, the 1st respondent responded to the appeal filed by the 1st ex-parte applicant in 2000 vide a letter dated 27-10-2023 indicating, 23 years later. The letter stated the appeal 251 of 2000 was to be heard on 16-11-2023 at Deputy County Commissioners Office from 10.00 AM. Further, the letter advised that all parties to carry documents and witnesses that will help support their position regarding the dispute. A copy of the letter is was attached.
14. It is stated that the 1st Applicant together with his witnesses attended but were informed that the hearing had been postponed until a later date to be communicated. That 1 year later on 15-08-2024, the matter was set down for hearing and the 1st respondent conclusively determined the dispute vide a decision delivered on 20- 09-2024 where the finding that the 1st applicant was the lawful owner of EAST YIMBO/NYAMONYE/4250 was dismissed and the 1st respondent ruled in favor of the 2nd respondent necessitating the instant proceedings. A copy of the

Proceedings and Decision regarding Appeal case 251 of 2000 dated 20-09-2024 is annexed.

15. It is deponed that the said decision by the 1st respondent is procedurally improper and injures the applicants right to property as guaranteed by Article 40 of the Constitution notwithstanding that it was rendered in a manner that was discriminatory.
16. On the advise of counsel the decision is termed illegal in the wake of the case of **Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** by affording protection to the 2nd respondent after having established that the first owner who sold it to him acquired it fraudulently. Further that the applicants have approached the court using the right vehicle since decisions of the 1st respondent regarding land disputes in adjudication sections are final and are not subject to further appeal.
17. That post the decision of **Edwin Harold Dayan Dande & 3 Others v The Inspector General, National Police Service & 5 Others Petition 6(E007), 4(E005) & 8(E010) OF 2022 (Consolidated)[2023]KESC 40 KLR** , courts such as this are mandated to consider Judicial review applications can do a merit review and overturn the decision of the 1st respondent if rights and fundamental freedoms were violated. It is stated with further advise of counsel that this is a common law jurisdiction and therefore the court is bound by the doctrine of stare decisis.
18. That the 1st respondent's judgement dated 20-09-2024 violates the applicants' rights to property, right to fair administrative

action that is expeditious and is discriminatory considering the compelling constitutional provisions at Articles 27, 40 and 47.

19. The 2nd respondent attended court on 3/7/2025 where he informed the court that he was not aware of the procedure for filing a response. This court explained the procedure allowed him to file his response which he did dated 22/7/2025. He stated that the land in dispute was theirs having been purchased by Mama (Pesila Aoro) from Paul Omolo Gulu. That it is upon the demise of Pesila that the applicants started to demand the land back. That the matter has been in court twice and proceedings determined in their favor as against the applicants.

20. All parties were served as evidenced in by the Affidavit of Service sworn by Cosmas Oyoo Laja sworn on 26/5/2025. The Attorney General filed a Memorandum of Appearance dated 27/5/2025 for the 1st and 2nd Interested Parties. However, they did not participate any further in this matter thereafter. The 2nd respondent filed a response dated 22/07/2025 indicating they have always worn cases against the applicants.

SUBMISSIONS

21. The court issued directions on disposal of the petition by way of written submissions which were reiterated to the 2nd respondent on the day he attended court. Only the Ex – Parte Applicants complied.
22. The Ex Parte Applicants, through the Law Firm of Messrs. **Amondi & Company Advocates**, filed their written submissions dated 19th June 2025.

23. Rehashing the background of facts and events as deponed by the 2nd Applicant Learned Counsel submitted that Judicial Review is grounded on the well-established principles of illegality, irrationality, and procedural impropriety as set out in the decision of **Council of Civil Service Unions v Minister for the Civil Service** and reaffirmed in **Pastoli v Kabale District Local Government Council**.
24. It was argued that the 23-year delay in hearing the appeal constituted manifest irrationality, abuse of statutory power, and procedural impropriety. Counsel relied on Article 159(2)(b) of the Constitution and Article 47(1), which guarantee expeditious and fair administrative action. Further reliance was placed on the case of **Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission & 3 Others** where the Court held that unreasonable delay is dependent on the facts and circumstances of each case.
25. Counsel submitted that Section 29(1) of the Land Adjudication Act requires appeals to be lodged within 60 days, and that it would defeat the spirit of the statute and constitutional principles for such appeals to remain unheard for over two decades without explanation.
26. The Applicants further contended that the 1st Respondent's reliance on the doctrine of bona fide purchaser was unlawful in light of the Supreme Court decision in **Dina Management Limited v County Government of Mombasa & 5 Others**, where the Court clarified that title derived from an unlawful root cannot benefit from protection under Article 40(6) of the Constitution.

27. Counsel argued that by September 2024, when the impugned decision was rendered, the jurisprudence in **Dina Management** (supra) was binding, and failure to apply it rendered the decision per incuriam and illegal.
28. The Applicants submitted that the prolonged delay and failure to adhere to binding precedent violated their legitimate expectation of fair, predictable, and lawful adjudication. They argued that public officers are bound to act within constitutional dictates and established judicial precedent.
29. Counsel relied on the Supreme Court decision in **Edwin Harold Dayan Dande & 3 Others v Inspector General National Police Service & 5 Others**, submitting that where constitutional violations are alleged, this Court is empowered to undertake a merit review beyond the traditional confines of Order 53 of the Civil Procedure Rules.
30. It was contended that the Applicants' rights to fair administrative action, fair hearing, and property were violated, thereby justifying substantive intervention by this Court.
31. In conclusion, Learned Counsel submitted that the Applicants had established grounds of illegality, irrationality, procedural impropriety, abuse of power, and breach of legitimate expectation sufficient to warrant issuance of the prerogative orders sought.
32. On costs, Counsel urged the Court to exercise its discretion in favour of the Applicants and condemn the Respondents, particularly the 1st Respondent, to bear the costs of the application.

33. The Applicants therefore prayed that the Judicial Review application be allowed as prayed.

ANALYSIS AND DETERMINATION

34. I have carefully read and considered the substantive Notice of Motion application dated 7th April 2025, the submissions on record and the cases cited herein by the Ex – Parte Applicants, the relevant provisions of the Constitution of Kenya, 2010 and the relevant statutes.
35. Having considered the foregoing, the main issue for determination is Whether the Ex parte Applicant has established any grounds to warrant the Court to grant the Judicial Review prerogative writs/orders sought and Who bears the costs of these proceedings.
36. Before I delve into the analysis, I will discuss the nature of judicial review and how it has evolved over time.
37. The Black's Law Dictionary, 9th Edition defines judicial review as:

> ***"A court's power to review the actions of other branches or levels of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower courts or an administrative body's factual or legal findings".***

38. The traditional view of Judicial review is that it is concerned with the decision-making process and not merits. **I**n **Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR** the Court Appeal stated thus; -

'***That is the effect of this Court's decision in the*** *KENYA NATIONAL EXAMINATION COUNCIL* ***case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. 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 power, 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? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.'***

39. Recently in the case of **Dande & 3 Others Vs. Inspector General National Police Service & 5 Others (Petition 6 E007), 4)E005) & 8(E010) of 2022 (Consolidated)**

(2023)KESC 40 KLR, the Supreme Court Kenya aptly enumerated the evolution of judicial review thus;-

> ***[76] We note that judicial review was introduced to Kenya from England in 1956 through Sections 8 and 9 of the Law Reform Act, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court of Kenya. Under this system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were borrowed from common law.***
>
> ***[77] Prior to the promulgation of the Constitution in 2010 there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan Courts found in Sections 8 and 9 of the Law Reform Act Cap 26, which constituted the substantive basis for judicial review of administrative actions on the one hand, and, Order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.***
>
> ***[78] However, the entrenchment of judicial review under the Constitution of Kenya 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right***

enshrined in the Constitution. Thus, Article 47 provides that "every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

[79] Furthermore, Section 7 of the Fair Administrative Actions Act provides that:

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

[80] Fundamentally also, Article 23 (3) of the Constitution provides that:

> ***(3) In any proceedings brought under Article 2, a court may grant appropriate relief, including-***
>
> ***(a) a declaration of rights;***
>
> ***(b) an injunction;***
>
> ***(c) a conservatory order;***
>
> ***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***
>
> ***(e) an order for compensation; and***
>
> ***(f) an order of judicial review.***

40. The Apex Court further stated thus; -

81.The entrenchment of judicial review in the *Constitution* has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.

82.In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* SC Petition No 14 Consolidated with 14A, 14B, & 14C of 2014 [2014] eKLR this court in resolving the controversy stated as follows:'[355] However, notwithstanding our findings based on the common law principles of estoppel and res-judicata, we remain keenly aware that the *Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of the *Constitution*.

83.Also, this Court in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* SC Petition No 2 of 2019 [2020] Eklr observed as follows:'[40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as

the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.'We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner.

84.More recently in *Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others)* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) *Praxedes Saisi* case this court stated that:'It is our considered opinion that the framers of the *Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'

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

41. In essence the Supreme Court's decision broadens the scope of judicial review, allowing courts to delve into the merits of

administrative decisions. This shift ensures that administrative actions are not only procedurally correct but also substantively just.

42. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli – Versus - Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

> *"**In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).***
>
> ***Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality…..***
>
> ***Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by***

Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

43. It is also important to note that in an application for Judicial review the Applicant must be a person with a sufficient interest – (***Locus Standi)*** and who commences proceedings promptly. See **Republic – Versus - Speaker of the Senate and Another Ex-parte Afrison Export Import Limited 2018 eKLR Republic –Versus- Stanley Mambo Amuti (2018) eKLR."; the Kenya National Examination Council – Versus - Republic (Ex - Parte - Geoffrey Gathenji & Another Nairobi Civil Appeal No. 266 of 1996.**

44. I will now proceed to discuss the remedies available to an applicant seeking judicial review.

<u>Certiorari.</u>

45. Order 53 Rule 7 of Civil Procedure Rules, provides: -

1) **In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.**
2) **Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court.**

46. The Court of Appeal in **Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge (1997) eKLR** stated:-

'Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.'

47. In the case of ***Pastoli …Vs. Kabale District Local Government Canal & Others (2008)2EA 300*** the court persuasively emphasised that for the orders of certiorari to issue the applicant must demonstrate that a decision has been made which is grossly unreasonable, careless, procedurally improper

and demonstrated utter disregard for the principles of natural justice.

MANDAMUS

48. An order for Mandamus is normally to compel performance of a duty. This was aptly stated in **Judicial Review Misc Application No.429 of 2012 Mwangangi & Company Advocates Vs The Governor Nairobi County Odunga J (Now Judge of Appeal**) citing his dictum in **High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the "Republic – Versus - The Attorney General & Another ex parte James Alfred Koroso,** stated thus;-

'this Court expressed itself as hereunder:

> ***"…in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government……***
>
> ***The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". In mandamus cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the***

duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform……."

PROHIBITION

49. The Order of ***"Prohibition"*** issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.

50. Having set out the legal framework governing judicial review and the scope of the prerogative writs of Certiorari, Prohibition, and Mandamus, this Court now proceeds to apply those principles to the facts and circumstances of the instant case. I will also be guided by the authorities cited hereinabove on merit review.

Whether the Ex parte Applicant has established any grounds to warrant the Court to grant the Judicial Review prerogative writs/orders sought?

51. The reliefs sought by the Ex-Parte Applicants have already been set out at the beginning of this judgement. The question that emerges is whether the decision of the 1st Respondent delivered

on 20th September 2024 in Appeal to the Minister Case No. 251 of 2000 is vitiated by illegality, irrationality, or procedural impropriety so as to warrant the intervention of this Court by way of the prerogative orders sought.

52. I find it necessary to look at the jurisdiction of the 1st Respondent. The 1st Respondent the Deputy County Commissioner, Bondo Sub-County exercised jurisdiction pursuant to the provisions of Section 29 of the Land Adjudication Act (Cap. 284, Laws of Kenya). Section 29(4) empowers the Cabinet Secretary to designate an authorized officer to hear and determine such appeals. The exercise of this quasi-judicial power by the 1st Respondent is thus anchored in statute.

53. I have noted and respectfully agree with the Applicants' submission that decisions made by the Minister or an authorized officer under Section 29 of the Land Adjudication Act are final and that the only avenue of challenge lies in judicial review before this Court. The jurisdiction of this Court to entertain this application is therefore not in doubt. However, I must quickly add that jurisdiction to entertain an application is distinct from the question of whether the applicant has, on the merits, made out a case sufficient to warrant relief.

54. I will now address the issue of procedural impropriety. The Ex Parte Applicants' most prominent ground is that the 1st Respondent took approximately twenty-three (23) years from the filing of the appeal in the year 2000 to the delivery of the decision on 20th September 2024, to determine Appeal No. 251 of 2000,

and that this delay constitutes manifest procedural impropriety in violation of Article 47(1) of the Constitution.

55. The court acknowledges that inordinate and unexplained delay in the conduct of administrative proceedings may, in appropriate cases, constitute procedural impropriety, the Applicants' submission on this ground, when closely interrogated pose some challenges. Why do I make this observation?

56. Firstly, to me the very root of the delay is traceable to the Applicants themselves. The Supporting Affidavit of Rosemary Ngesa clearly concedes, at paragraph (l), that the 1st Ex Parte Applicant failed to file the appeal within the mandatory sixty (60) days period prescribed by Section 29(1) of the Land Adjudication Act. The Applicant attributes this failure to ill health. However, no medical evidence whatsoever has been placed before this Court to substantiate this claim. The annexures to the Supporting Affidavit make no reference to any medical documentation aligning with the year 2000 that would corroborate the claim of incapacity.

57. It is trite that in administrative law and equity a party who seeks relief must come to court with clean hands. A litigant who contributes to or causes the very delay he now seeks to impugn cannot, without more, be heard to complain of that delay as a ground of procedural impropriety against the decision-maker. The 1st Respondent's office was under a duty to hear and determine appeals filed in accordance with the statute.

58. Secondly, the Applicants' complaint about delay is tainted by the doctrine of acquiescence. The record reveals that the 1st Ex

Parte Applicant filed this appeal around the year 2000 and thereafter made no documented follow-up, demand, or formal complaint to the 1st Respondent's office for a period of over twenty years. There is no averment in the Supporting Affidavit, and no annexure on record, demonstrating any demand letter, complaint to the 1st Respondent's superior authority, or any step taken by the Applicants to pursue the appeal between the years 2000 and 2023. A party who lies in wait for two decades without asserting his rights cannot equitably invoke delay as a ground for quashing the ultimate decision. The law aids the vigilant and not the indolent.

59. Thirdly, the question of delay must be looked at in relation to the decision ultimately made and not in isolation. Even if the Court were to find that the delay was inordinate, the applicable remedy would not necessarily be the quashing of the decision on the merits. Delay in the decision-making process does not automatically taint the substantive correctness of the decision ultimately reached. I find support in Council **of Civil Service Unions v Minister for the Civil Service [1985] AC 374**, where it was emphasized that the question of procedural fairness must be considered in its totality and in the context of the legitimate interests of all parties. In this case, the 1st Respondent ultimately heard all parties, considered the evidence, and delivered a reasoned decision. The delay, however regrettable, does not of itself vitiate a decision that was substantively sound.

60. Fourthly, the Applicants' evidence reveals that when the hearing notice was eventually issued on 27th October 2023 and the matter was scheduled for 16th November 2023, the hearing

did not proceed on that date. The Applicants attribute this to the 1st Respondent's failure. However, the Supporting Affidavit does not disclose what transpired at that sitting, whether all parties were present, or whether the adjournment was occasioned by any party's unpreparedness. The bare assertion that the hearing did not proceed is insufficient to found a ground of procedural impropriety, particularly where the matter was subsequently heard on 15th August 2024, a date at which the Applicants did appear and participate in the proceedings and a decision duly delivered. In my considered view any procedural irregularity relating to the November 2023 date was effectively cured by the subsequent substantive hearing.

61. For the foregoing reasons, the ground of procedural impropriety must fail.

62. I will now look at the question of illegality, plea of subjudice and the adjudication process. The Ex Parte Applicants further contend that the proceedings before the Land Adjudication Officer were infected with fraud and illegality, arising from the determination of the later objection (filed 11th October 1991 by the late Paul Omollo Gulu) ahead of the earlier objection (filed 27th September 1991 by the 1st Ex Parte Applicant) concerning the same parcel. It is argued that this sequence of events violated the sub-judice rule and constituted fraudulent collusion between the Land Adjudication Officer and the late Paul Omollo Gulu.

63. The sub-judice rule, as codified in Section 6 of the Civil Procedure Act, operates to stay a suit in a court of law where the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties in a court of

concurrent jurisdiction. I must observe that the cases were in the same forum and not different forums of concurrent jurisdiction. The Land Adjudication Officer possessed statutory power under the Land Adjudication Act to consider objections in such sequence and manner as the Act and administrative practice prescribed. The fact that two overlapping objections were filed does not, without more, establish that the determination of the later one first was unlawful.

64. Moreover, the Applicants' allegation of fraudulent collusion between the Land Adjudication Officer and the late Paul Omollo Gulu is a serious and grave matter. It is trite law that fraud is not lightly inferred and must be specifically pleaded and proved. The Supporting Affidavit of Rosemary Ngesa does not plead fraud with the requisite specificity. The averment, at paragraph (k), that the sequence of determination 'hints a fraudulent collusion' is speculative. No particularized evidence of any corrupt arrangement between the Land Adjudication Officer and the late Paul Omollo Gulu has been placed before this Court. This Court, in the exercise of its supervisory jurisdiction, will not quash an administrative decision on the basis of suspicion.

65. Additionally, and most significantly, the very same Land Adjudication Officer who determined the second objection in 1995 subsequently heard the 1st Applicant's objection between 1997 and 21st May 1997 and found in his favour to the extent of cancelling the subdivision of the parent parcel EAST YIMBO/NYAMONYE/2178. This outcome is wholly inconsistent with the Applicants' claim of a fraudulent scheme. An adjudicator engaged in deliberate fraud in favour of Paul Omollo Gulu would

not simultaneously rule against him on the primary question of ownership of parcel No. 2178 in the 1997 proceedings. The 1997 determination substantially vindicated the 1st Applicant on the main question. The only portion of the dispute that was not resolved in his favour being the status of parcel No. 4250 which was addressed through the application of the doctrine of bona fide purchaser, which is a legitimate and well-established principle of property law.

66. It is my finding that the ground of illegality based on fraud is accordingly not established.

67. The Applicants have placed considerable reliance on the Supreme Court decision in **Dina Management Limited v County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)** to buttress the proposition that the 1st Respondent was bound to set aside the bona fide purchaser protection afforded to the late Priscilla Aoro Omollo and to hold that her title to parcel No. 4250 was unprotected because it derived from an unlawful root. This submission, while creatively advanced, in my view represents a misreading of the Dina Management decision and its applicability to the facts of this case.

68. The Dina Management case (supra) concerned circumstances where the original allocation of land was itself made in contravention of the law by the allocating authority, a public body. The Supreme Court held that land allocated in contravention of the law by a public body cannot, through the process of registration, attain constitutional protection under Article 40(6) of the Constitution. The ratio decidendi of that decision was directed primarily at titles traceable to illegal grants,

allocations, or dispositions by public authorities acting outside their statutory mandate.

69. The facts of the instant case are materially different. The land parcel No. 4250 was created pursuant to an objection determination by the Land Adjudication Officer a quasi-judicial exercise and was thereafter sold by Paul Omollo Gulu to the late Priscilla Aoro Omollo. The Land Adjudication Officer, in his 1997 determination, expressly found that the late Priscilla Aoro Omollo purchased the parcel for value without notice of any defect. The bona fide purchaser doctrine, as applied by the Land Adjudication Officer in 1997, was not the product of the 1st Respondent's 2024 decision as it was an earlier judicial finding made in proceedings in which the 1st Applicant himself was a participant.

70. The 1st Applicant did not challenge the 1997 bona fide purchaser finding by any available legal process at the time. Having accepted whether by choice or inadvertence the Land Adjudication Officer's determination in 1997, the 1st Applicant now seeks, through the vehicle of this judicial review application brought against a 2024 appellate decision, to collaterally attack and unsettle a finding made in 1997. This Court cannot support such an attack. The proper challenge to the 1997 finding, if any, should have been made through a timely direct legal challenge at that time.

71. The 1st Respondent, in affirming the bona fide purchaser status of the late Priscilla Aoro Omollo, applied the law as it stood and as it had been applied in the 1997 adjudication proceedings. The decision of the 1st Respondent to dismiss the Applicants' appeal was consistent with the legal foundation of parcel No. 4250 as

established through prior adjudication proceedings. The ground of illegality based on the alleged misapplication of the case of Dina Management (supra) therefore must fail.

72. What about irrationality? The Applicants contend that the decision of the 1st Respondent was irrational in the Wednesbury sense. As stated in **Pastoli v Kabale District Local Government Council (supra)**, a decision is irrational where it is so grossly unreasonable that no reasonable authority, addressing itself to the relevant facts and the law before it, would have made such a decision. This is a high threshold to meet. A court exercising judicial review jurisdiction will not interfere with the substantive outcome of a decision merely because it would have decided the matter differently, or because the Applicant disagrees with the outcome. The irrationality ground is not an invitation to the Court to substitute its own judgment on the merits for that of the appointed decision-maker.

73. Having considered the decision of the 1st Respondent as disclosed by annexure RN-006 in its totality, the Court cannot find that the decision was irrational. The 1st Respondent was faced with a dispute in which:

(a) The 1st Applicant had filed an out-of-time appeal against the partial finding of the Land Adjudication Officer in 1997;

(b) The parcel in dispute — No. 4250 — had been in the possession of the estate of the late Priscilla Aoro Omollo since its purchase from the late Paul Omollo Gulu;

(c) A prior adjudication determination had expressly protected the title of the late Priscilla Aoro Omollo on the basis of bona fide purchaser status; and

(d) The 1st Applicant had no evidence of a prior registered title to parcel No. 4250 specifically, as distinct from the parent parcel No. 2178.

74. In those circumstances, the dismissal of the appeal by the 1st Respondent was a rational and defensible outcome. It was consistent with the prior adjudication history, protective of an innocent purchaser's estate, and supportive of finality and certainty in land adjudication proceedings. A reasonable administrative decision-maker, addressing these facts and the applicable law, could perfectly well have arrived at the same conclusion. The ground of irrationality in my view has not been made out.

75. I will now address the constitutional rights alleged to have been infringed. The Ex Parte Applicants have invoked Articles 27 (equality and non-discrimination), 40 (right to property), and 47 (fair administrative action) as grounds for this application.

76. On Article 47, the Applicants argue that the decision was neither expeditious nor procedurally fair. The Court has already found, that the ground of procedural impropriety arising from delay is not established, for the reason that the Applicants themselves contributed to the delay by filing an out-of-time appeal and by failing to actively pursue the matter for over two decades.

77. As regards the procedural fairness of the hearing itself, the uncontroverted evidence discloses that the 1st Applicant was present and participated at the substantive hearing on 15th August 2024, that both parties were afforded an opportunity to present their cases, and that a written decision was delivered on 20th September 2024. These facts are consistent with a hearing that met the minimum standards of procedural fairness required by Article 47 and Section 4 of the Fair Administration Action Act. No specific instance of bias, predetermination, or unfair treatment during the hearing process has been particularized by the Applicants. This ground therefore fails.

78. On Article 40, the Applicants assert that the decision arbitrarily deprived them of property. The right to property guaranteed by Article 40 is not absolute. It protects existing property rights that are legally vested. The 1st Applicant has not demonstrated that he was at any material time the registered proprietor of parcel EAST YIMBO/NYAMONYE/4250. His claim rests on a historical and customary entitlement to the parent parcel, which was partially vindicated in 1997 save for the portion constituting parcel No. 4250. A claim of entitlement grounded in historical occupation and clan decision-making, however on its own terms, does not automatically translate into a registered proprietary right in a land parcel governed by the Land Adjudication Act. The 1st Respondent's dismissal of the appeal did not deprive the Applicants of a right that was legally established in their favour. This ground also fails.

79. On Article 27, the Applicants allege discrimination but have failed entirely to place before this Court any comparative

evidence demonstrating that they were treated differently from similarly situated persons on the basis of a protected ground enumerated under Article 27(4). The allegation is bare and unsubstantiated and cannot be sustained.

80. The Ex Parte Applicants have invoked the Supreme Court's decision in **Edwin Harold Dayan Dande & 3 Others v Inspector General, National Police Service & 5 Others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR)** in support of the proposition that this Court is empowered to undertake a merit review of the 1st Respondent's decision because constitutional rights have been alleged to have been violated. The Court agrees with position in the said decision to the effect that where a party properly invokes the constitutional framework and alleges violation of fundamental rights, the court conducting judicial review is not limited to process review but may conduct a merit review.

81. However, the Dande case (supra) does not lower the substantive threshold for judicial review. It expands the scope of inquiry but does not relieve the applicant of the burden of demonstrating, with adequate evidence and particularity, that a constitutional right has indeed been violated. The Supreme Court indeed cautioned in the case the constitutional avenue for judicial review does not transform the High Court into an appellate body that reweighs the evidence before the administrative decision-maker and substitutes its own factual findings. The Court may review the merits of the decision in the sense of assessing

whether it violated constitutional standards but it is not a rehearing of the administrative appeal on the facts.

82. Secondly, even on a merit review as contemplated by the Dande case (supra) this Court has examined the decision of the 1st Respondent in Appeal No. 251 of 2000 and finds that the decision, taken in its entirety, does not disclose any violation of the constitutional rights alleged. As demonstrated above, the procedural fairness of the hearing was not vitiated; the substantive outcome was rational and consistent with the prior adjudication history; and the bona fide purchaser protection was not improperly applied. A merit review, therefore, does not assist the Applicants, it leads to the same conclusion: the application must fail.

83. I think I have said enough why the motion herein must fail. The Ex Parte Applicants have not discharged the burden of establishing the grounds of illegality, irrationality, or procedural impropriety that would warrant the grant of the prerogative writs sought.

84. The upshot of the foregoing is that the suit is dismissed with no orders as to costs.

Orders accordingly.

Dated at Siaya this 29th Day of April, 2026

HON. JUSTICE A. E. DENA

JUDGE

29/4/2026

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of

Ms. Wochune for the Applicant

Mr. Okoth holding brief for Ms. Essendi for 1st respondent,1st & 2nd Interested parties

No appearance for the rest of the parties

Court assistant: Dorothy Awuor