



**Republic v Deputy County Commissioner Buuri East Sub-County & 2 others; Kathuri & 2 others (Interested Parties); Tirindi (Exparte Applicant) (Environment and Land Judicial Review Case E004 of 2023) [2024] KEELC 59 (KLR) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 59 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2023  
CK NZILI, J  
JANUARY 17, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER BUURI EAST SUB-COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER IMENTI NORTH DISTRICT ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL STATE LAW OFFICE .... 3<sup>RD</sup> RESPONDENT**

**AND**

**STEPHEN KATHURI ..... INTERESTED PARTY**

**GEORGE MWIRIGI ..... INTERESTED PARTY**

**LAWRENCE M'RINGARA ..... INTERESTED PARTY**

**AND**

**EVANGELINE TIRINDI ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The court is asked to call for and quash the decision and proceedings delivered on 9.9.2022 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in Minister's Appeal No. 160, 159 & 154 of 2018 over Parcel No's 1293, 1294, 1299 and 1300 Ruiiri/Rwarera Adjudication Section. The grounds are contained in the notice of motion dated 9.3.2023, the statutory statement of facts dated 8.3.2023, and an affidavit verifying facts sworn by Evangeline Tirindi on 8.3.2023.



2. Briefly, the exparte applicant's case is that she was the bonafide recorded owner of land Parcels No's 1293, 1294, 1299, and 1300 Ruiru/Rwarera Adjudication Section measuring 23.85 acres, following confirmation of the status at the committee and arbitration board stages. She produced a copy of a confirmation letter dated 4.6.2009 from the District Land Adjudication and Settlement Officer marked as annexure ET "1."
3. It was averred that the interested parties had filed committee cases vide Objection No's.79733 and 138, regarding Parcels No. 1294, 1299, and 1293, which were dismissed per proceedings attached as annexures marked E.T. "3".
4. Aggrieved by the committee's decision, the exparte applicant averred the interested parties filed arbitration board case No. 1486 initially 55/86, over Parcels No's 1300, 1299, 378, 1301, and 1298 Ruiru/Rwarera on which they also lost by a decision dated 23.7.1991.
5. The exparte applicant averred that the interested parties filed minister's appeals, whose decision was delivered on 9.9.2023. The exparte applicant averred the Minister's appeal was a blatant violation of her constitutional right to fair hearing and fair administrative action and was also ultra vires.
6. The exparte applicant deposed that the interested parties alleged to be purchasers of the land from her late husband, yet no documentary evidence was produced. Further, the exparte applicant averred that the 1<sup>st</sup> respondent colluded with the interested parties during the appeal hearing and denied her an opportunity to challenge the evidence of the purchase. Regarding the site visit, the exparte applicant averred that the 1<sup>st</sup> respondent's record did not show who attended the same but proceeded to act ultra vires awarding the land to the interested parties.
7. Additionally, the exparte applicant averred that others claimed that the land belonged to their fathers and that the committee and the arbitration board had dismissed her father-in-law's objection, yet the 1<sup>st</sup> respondent did not hear such evidence. Therefore, the exparte applicant averred that the interested parties had threatened to enter her land and implement the decision, and she was likely to suffer irreparable loss, harm, and damage.
8. The respondents opposed the notice of motion through a replying affidavit by Josephine Njenga sworn on 8.9.2023. It was averred that as the 1<sup>st</sup> respondent, she heard case No. 154/2018 brought by the 3<sup>rd</sup> interested party as the appellant against the exparte applicant.
9. The 1<sup>st</sup> respondent averred before determining the case that she visited the locus in quo and made the following findings that; there were two concrete tanks with a capacity of 1,000 liters each belonging to the 3<sup>rd</sup> interested party's family, irrigation of crops and two water points had been installed a posho mill and that the exparte applicant had no house or farming activities thereon for fear of an attack.
10. Based on those findings, the 1<sup>st</sup> respondent averred that she decided that 7 acres of the suit land belonged to the 3<sup>rd</sup> interested party.
11. The interested parties entered appearance through Ayub K. Anampiu & Co. Advocates. The 2<sup>nd</sup> and 3<sup>rd</sup> interested parties who opposed the notice of motion through replying affidavits of George Mwirigi and Lawrence M'Ringeria sworn on 6<sup>th</sup> and 14<sup>th</sup> April 2023, respectively. It was averred that the original land Parcel No. 37 belonged to the late M'Mutungi Mugambi, from which he sold 10 acres to the 2<sup>nd</sup> interested party's father, Jacob M'Mbogori, for Kshs.90,000/= in 1976, with the knowledge of the exparte applicant.
12. The 2<sup>nd</sup> interested party averred his father paid Kshs.7000/= and took vacant possession, which he has continued with after his father passed on a while ago following an official land transfer by the deceased.



- The 2<sup>nd</sup> interested party averred that it was only after the ex parte applicant's husband passed on that she started denouncing the sale and claiming his occupation was illegal. Similarly, the 2<sup>nd</sup> interested party averred after losing before the committee and arbitration board that he preferred a Minister's appeal, gave evidence in support of his assertions, and that all parties were accorded a fair hearing before a fair and just decision was rendered.
13. The 3<sup>rd</sup> interested party, on his part, averred that in 1976, the late M'Mutungi M'Mugambi sold him 4 acres of land at Kshs.1000/= per acre, which he paid in installments until completion. The 3<sup>rd</sup> interested party indicated he initially acquired 1 acre and eventually reduced the transaction in writing since the deceased was not a recorded owner for the adjudication process had not commenced. It was averred that the land committee for the area was eventually created and directed land purchasers to lodge objections, which he did when they visited the land and found relatives of the ex parte applicant on it, giving them part of the land as 3 acres.
  14. The 3<sup>rd</sup> interested party averred that the deceased was in dire need of money, and after he gave him the money, he was admitted to Nyeri Hospital, where he died. Therefore, the 3<sup>rd</sup> interested party verified that he has been in actual occupation and use of land Parcel No. 1299 since he bought it in 1976, until the ex parte applicant started submitting a claim. He termed the appeal, site visit, hearing and determination fair, legally procedural, and valid.
  15. With leave of court, the ex parte applicant filed a supplementary affidavit dated 20.9.2023. It was averred that whereas the 1<sup>st</sup> respondent has jurisdiction to hear and determine Ministers' appeals, the rationale and or evidence of the existence of the rights of the interested parties and informing her to find them entitled to 7 acres was missing. Further, the ex parte applicant averred that the interested parties did not furnish evidence to support their allegations of purchase, and in the absence of it, the 1<sup>st</sup> respondent erred and acted ultra vires.
  16. Additionally, the ex parte applicant averred that mere occupation did not entitle one ownership rights and that the 1<sup>st</sup> respondent failed to observe that the interested party was a mere licensee in occupation without any protectable legal right. She termed the decision as unreasonable, more so in failing to find there was previous evidence that the interested party had evicted and demolished her dwelling house, and therefore, she feared for her life.
  17. Lastly, the ex parte applicant averred that the decision was irrational, unreasonable, and unproportionate compared to the evidence available and the applicable law.
  18. The ex parte applicant relied on written submissions dated 9.11.2023. She submitted that the Minister's decision based on forceful entry, use, and occupation of the land by the interested parties had disregarded her evidence. As to remedies applicable, the ex parte applicant relied on the Municipal Council of Mombasa vs Republic Ex parte Umoja Consultants Ltd NRB Civil Appeal No. 185 of 2001, among them, grounds being a decision tainted with illegality, irrationality, and procedural impropriety.
  19. In this case, the ex parte applicant submitted that the Minister's decision was irrational and unreasonable because it failed to address the relevant facts, evidence, and issues expected of a reasonable decision-maker. Further, the ex parte applicant submitted that the issues had been litigated before the committee and board stages. Therefore, the 1<sup>st</sup> respondent must have considered relevant facts that constituted the claim's rationality on procedural propriety. The ex parte applicant submitted that no scene visit notice was served to her contrary to rules on fair hearing. Therefore, the ex parte applicant submitted the scene visit report dated 7.12.2023 could not remedy the impropriety already meted against her. Additionally, even if there was a notice to visit the locus in quo, the proceedings and the



- decision by the 1<sup>st</sup> respondent did not show that the attendees and the happenings during the scene visit which was against the *exparte* applicant's constitutional rights.
20. The respondents relied on a written submission dated 25.10.2023. In contrast, it was submitted that while the court has powers to quash a decision that is unreasonable, irrational, and against the law, the purpose of Judicial Review as stated in the *Municipal Council of Mombasa (supra)*, was limited and would not act as an appeal over the decider especially on merits such as whether this was or there was sufficient evidence to support the decision. Relying on *Pastoli vs Kabale District Local Government Council & others (2008) 2 E.A 300 KNEC vs. Republic ex parte Geoffrey Gathenji & others NRB C. A No. 266 of 1196*, and *Republic vs Anti-Counterfeit Agency Ex parte Caroline Manyala t/a Hair works Salon (2019) eKLR*, the respondents took the view that Judicial review was only available if the *exparte* applicant could demonstrate an excess of jurisdiction, a commission of errors of law, the decision was in defiance of logic and acceptable moral standards, the decider was unfair or failed to observe rules of natural justice or contravened the rules of the land.
  21. Further, the respondents submitted that judicial review was unavailable to question a wrong decision based on the merits of the proceedings. To this end, the respondents submitted that the 1<sup>st</sup> respondent had jurisdiction under Sections 29 (1) & 4 of the *Land Adjudication Act* after she was delegated the authority to hear the appeal by the minister.
  22. The respondents submitted that the *exparte* applicant failed to adduce evidence that the decision was illegal, irrational, or unreasonable; otherwise, her statement of facts verifying and supplementary affidavit sought to challenge the decision's merits rather than the process. Lastly, the respondents urged the court to find no cause of action disclosed against them.
  23. The 2<sup>nd</sup> and 3<sup>rd</sup> interested parties relied on written submissions dated 11.5.2023. They believed that the 1<sup>st</sup> respondent did not violate any rights of natural justice or fair administrative action of the *exparte* applicant for this court to call for and quash the decision made on 9.9.2022. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties submitted no evidence to sustain the claim on their collusion with the 1<sup>st</sup> respondent or that it acted *ultra vires* has been availed.
  24. It was submitted that under Sections 29 and 30 of the *Land Adjudication Act*, the 1<sup>st</sup> respondent had jurisdiction to hear, determine, and render a final decision, meaning the register cannot be reopened. Reliance was placed on *Robert Kilinga Nyamu vs Musembi Mutunga and another (2022) eKLR*. *Julia Kaburia or Kabeera and 5 others Nyeri Civil Appeal 1340 of 2002*, *Lepore Ole Maito vs. Letwat Kortom and others (no citation)*.
  25. The issues calling for the court's determination are:
    - i. If the proceedings and the decision by the 1<sup>st</sup> respondent has undertaken and complied with the constitutional and statutory framework governing hearing and determination of appeals by inferior tribunals.
    - ii. If the *exparte* applicant has pleaded and discharged the burden to establish a violation of constitutional and statutory framework, governing the 1<sup>st</sup> respondent in hearing and determining the Minister's appeal.
    - iii. Whether the *exparte* applicant is entitled to the reliefs sought.
    - iv. What is the order as to costs?
  26. The primary pleadings before the court are the notice of motion dated 9.3.2023, the statement of facts, verification, and the supplementary affidavit sworn on 9.3.2023 and 20.9.2023 respectively.



27. In the said pleadings, the ex parte applicant attacked the minister's proceedings and decision on account of lack of evidence to sustain it, unreasonableness, irrationality, violation of her rights to fair hearing and fair administrative action, ultra vires, against the law and made in collusion with the interested parties.
28. In reply, the respondents relied entirely on a replying affidavit of Josephine Njenga sworn on 8.9.2023. The affidavit is specific to appeal No. 154 of 2018 regarding the 3<sup>rd</sup> interested party and the findings of her scene visit. She averred that out of the said findings, she was justified to determine that 7 acres of the ex parte applicant's land be registered in the name of the 3<sup>rd</sup> interested party. In the supplementary affidavit sworn on 20.9.2023, the ex parte applicant termed the replying affidavit by the respondents and that of the interested parties as lacking the rationale or evidence to find purchasers' interest in favor of the interested parties as opposed to mere licensees who unlawfully and illegally occupied the land. The ex parte applicant termed the decision irrational, unreasonable, disproportionate, and lacking support of the law.
29. In trite law, parties are bound by their pleadings, and issues flow from them. See Raila Amollo Odinga & others vs. IEBC (2017) eKLR and Mutinda Mule vs IEBC (2014) eKLR.
30. In our system of law, three or four facts must be present for the court's determination. They include adjudicatory facts, which must be established through testimony and exhibits. They are critical as a court depends on them to decide the matter. The second are those facts that a court can take judicial notice of, for they are incontestable. They do not need to be established by evidence to be taken as accurate. They include legislative facts, which bear on the formulation or interpretation of legal doctrines. They need not be established for the court to take judicial notice of them. The third set are background facts. Every case has a context that makes a judicial opinion come alive. They include maps, photographs, and diagrams. They set up the case and illustrate the uncontested facts. Sections 35, 65, 68, and 69 of the [Evidence Act](#), as read together with Order 3 Rule 2, Order 7 Rule 5 and Order 16 Rules 6 & 7, Order 11 Rule 3 (2) Civil Procedure Rules cover such facts and documents.
31. Judicial review after 2010 was elevated to some constitutional reliefs under Articles 22 and 23 of [the Constitution](#), given that the right to fair administrative action is a constitutional right. A party seeking the internal dispute resolution mechanism under Article 159 (2) (c) of [the Constitution](#) is constitutionally entitled to a process and a decision that is efficient, effective, lawful, timely, expeditious, and procedurally fair. Further, the party is entitled to written reasons for the decision.
32. Conversely and in line with Article 47 of [the Constitution](#), Parliament enacted the [Fair Administrative Action Act](#), 2016 as the substantive and procedural law governing quasi and non-quasi-judicial tribunals handling administrative actions.
33. Therefore, an administrative action includes matters relating to the 1<sup>st</sup> respondent as it handles the Minister's appeal. Section 29 of the [Land Adjudication Act](#) has to be read alongside the [Fair Administrative Action Act](#) and within the constitutional framework on fair administrative action.
34. Other than Sections 8 and 9 of the [Law Reform Act](#), Order 53 of the Civil Procedure Rules, a party questioning an administrative action has a right to invoke Section 9 (2) of the Fair Administrative Actions Act and Article 22 (3) of [the Constitution](#). Similarly, the remedies available to an aggrieved party and the court's role are broader in scope after the 2010 Constitution. Therefore, it goes without saying that any quasi- and non-quasi-decision-maker must correctly understand the law regulating his decision-making power and give effect to it. To act otherwise than is provided by the operative substantive and procedural law, the decision maker would be operating outside the law.



35. In the case of *Timotheo Makenge vs Manunga Ngochi* (1979) eKLR, the Court of Appeal held that a Land Adjudication Officer, so far as is practicable, follows the procedure directed to be observed in the hearing of civil suits. The court said, therefore, that a judgment as per Order 22 Rule 4 of the Civil Procedure Rules must contain a concise statement of the case, the points for determination of the decision thereon, and the reason for such decision. The court faulted the minister decision as harsh and similar to that in *Bisuche vs Barasa* (unreported), where the appellant's right to ownership of certain land in an adjudication area had been recognized by the arbitration committee, the board and the adjudication officer yet on appeal he lost everything.
36. In *Daniel Musili Nyeki and 49 others vs Cabinet Secretary of Land and Settlement and another, Bernard Malonza Musya and 30 others* (interested parties) (2021) eKLR, the court observed that the internal disputes mechanism set under the [Land Adjudication Act](#) (Cap 284) are supposed to deliver constitutional protection and just determination of rights culminating into the appellate process under Section 29 of the Act where a Minister determines the appeals and make such order thereon as he thinks just.
37. The purpose of judicial review is to check whether quasi- and non-quasi-judicial bodies adhere to the constitutional and statutory frameworks as they carry out their duties within the limits of the law. They cannot divert from both statutes; otherwise, they would act illegally and unprocedurally, and the result would be contra-statute or unconstitutional. Under Section 29 thereof, an appellant must complete an appeal form in duplicate. Regulations 4 (1) of the Land Adjudication Regulations 1970 states that any person submitting the appeal to the minister shall attach also his appeal a tracing from the demarcation map of the boundaries of the holdings in dispute. The Minister has to admit, hear, and determine the appeal judicially. See *Republic vs Minister for Land and others* (1988) eKLR. The Minister must adhere to the law; otherwise, the court can intervene.
38. In *Tobias Ocholla Osidi vs Cyprianus Otieno Ogolla & others* (2013) eKLR, the court said it had a supervisory role to ensure the land adjudication process accord with the law interpret and determine any points or issues of law but cannot usurp the powers of those adjudicatory bodies. In *Amarnath* (suing on behalf of the estate of the late Amarnath Gupta vs Kazungu & others (C.A E033 of 2021) (2023) KECA (1280) KLR (27<sup>th</sup> October 2023) Judgment, at issue was a plaint seeking to set aside the minister's appeal otherwise than through the procedure stipulated under Section 29 of the [Land Adjudication Act](#). The court of appeal said an aggrieved party, after losing a Minister's appeal, must pursue the judicial review process provided under Article 47 of [the Constitution](#) and [Fair Administrative Action Act](#), 2015 and approach the court through a plaint he was attempting to undo the process he had participated in suing a process unknown or provided in law. The court cited with approval *Julia Kaburia vs Kabeere and others* (2007) eKLR and said an Environment and Land Court had no jurisdiction to entertain such a suit filed otherwise than in the manner contemplated by the law.
39. What, then, should the Minister do to comply with the law? He must consider the grounds of appeal and the previous evidence tendered and make his determination as he deems just and fair. He must look into and consider the record of the land adjudication officer and arrive at an independent decision. He need not take fresh evidence without leave of the parties to clarify specific issues. He must give reasons why he disagrees with the previous record and findings. See *Matwanga Kilonzo vs District Commissioner Kitui & another* (2021) eKLR, *Republic vs. Special District Commissioner & another* (2006) eKLR, *John Masiantet Saeni vs Daniel Aramat Lolungiro & others* (2017) eKLR, *Dumederi Mumbo & 19 others vs Cabinet Secretary Land Housing and Urban Development and 6 others* (2016) eKLR.



40. Coming to the appeal, which the Minister heard, the *exparte* applicant is complaining about the manner, process, and outcome of the Minister's exercise of statutory duties contrary to the statute and *the Constitution*. The *exparte* applicant averred that her right to fair administrative action was violated since she was not given a fair hearing, and the 1<sup>st</sup> respondent relied on no evidence to find the interested parties entitled to part of her land.
41. In *Judicial Service Commission vs. Mbalu Mutava & another* (2015) eKLR, the court observed that Article 47 of *the Constitution* was reflective of some of the national values in Article (4) thereof, such as the rule of law, human dignity, social justice, good governance, transparency, and accountability. The court said state organs and administrative bodies were subject to Article 47 (1) to the principle of constitutionality rather than the doctrine of ultra vires from which administrative law under the common law was developed. Therefore, the duties of the 1<sup>st</sup> respondent are subject to Section 4 of the *Fair Administrative Action Act*, which requires an administrative action that is lawful, expeditious, efficient, procedurally, fair and reasonable.
42. As to the procedure, the Minister in conducting an appeal has a wide latitude on how he conducts the proceedings so long as they meet the substantive end of justice. See *Dominic Musei Ikombo vs Kyule Makau* (2019) eKLR. To this end, the *exparte* applicant avers that the minister's record did not show who was present during the visit to the locus in quo what was observed on the ground, and who owned what. She said she was not accorded a fair hearing during the scene visit.
43. The 1<sup>st</sup> respondent did not specifically respond to and refute those averments. She did not avail copies of her proceedings or records to show how the scene visit was conducted and in whose presence. In *Pastoli vs Kabale* (*supra*), the court said illegality occurs when the decision-making authority commits an error of law while taking or making the act subject to the complaint. In the case of *Paul Nzomo Mwitiki vs Minister of Lands (through) the District Commissioner Mukaa Sub-County and others; David Mutoko Musyimi (interested party)* (2019) eKLR, the court cited with approval *Ransa Co. Ltd vs Manca Francesco & 2 others* (2015) eKLR that while sitting on judicial review a court exercises *sui generis* jurisdictional. See also *Northern Construction Co. Ltd vs. Attorney General & 2 others* (2008) eKLR.
44. In *Kenya Revenue Authority and others vs. Darasa Investments Ltd* 2018, the court observed that a need to take into account relevant considerations and ignore irrelevant facts in the decision-making process, had a close nexus with the need to act reasonably and that a decider must direct himself properly in law and must call his own attention to matters which he is bound to consider and the failure to do so could be said to be acting unreasonably as held by Lord Greene MR in *Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation* (1948) 1KB 223.
45. In *Republic & others vs A.G. and another* (2006) 2 E. A 265, the court said considering an irrelevant consideration invites for judicial review. In *Republic vs Minister Appeal Tribunal DCC Kilungu Sub County exparte Paul Kinyambu Maundu & Gabriel Musiu Maingi & another (interested party)* (2021) eKLR, the court held the minister's judgment was tainted with an error of law in that he acted contrary to Sections 18 & 29 of the Act and that there was procedural impropriety by failing to act fairly or decide on the nature and particulars of the boundaries.
46. The proceedings in three appeals before the Minister contain only witness statements, cross-examination, respondents' evidence, cross-examination, findings and the ruling. There is no analysis of the facts, evidence and written reasons for the decision. There is no record showing the particulars of the scene visit. There is no indication if the 1<sup>st</sup> respondent considered the grounds of appeal as preferred by the interested parties in their respective appeals. It is a legitimate expectation that the Minister would



look at the grounds of the appeal, consider the material before it through evidence, and come up with justifiable reasons why it should be allowed.

47. Under Section 7 (1) of the *Fair Administrative Action Act*, the Minister's decision may be reviewed if a mandatory and material procedure or condition prescribed by the empowering law was not complied with or if relevant considerations were not taken into account or was made in bad faith and was rationally not connected to the purpose of which it was taken, or was not based on the information before it, or where reasons for it are lacking, or where there is failure to act or the decision is unreasonable or unfair or taken in abuse of power.
48. The bottom line is that the appeals herein touched on contested facts on rights or interests to land. Facts are proved through direct or documentary evidence. The decision maker is expected to give proper, genuine, and realistic considerations of the grounds of appeal, weigh the evidence before it, and give a reasons for the preference of one set of facts or evidence instead of the other.
49. In *Republic vs Public Procurement, Administrative Review Board & 2 others exparte Sanitam services E. A Ltd* (2013) eKLR, the court said procedural impropriety is the hallmark of judicial review rather than the merits of a decision. The court said *Wednesbury Principles* may be applied if the decision was so unreasonable that no reasonable authority could ever come to it.
50. In *Bukoba Gymkhana Club* (1963) E.A 478, the court said failure to act fairly while making the decision, non-observance of rules of natural justice, or failure to act fairly to the affected person by the decision or to observe or adhere to procedural rules could attract court intervention.
51. The 1<sup>st</sup> respondent made findings and conclusions as to why the interested parties were entitled to a portion of land belonging to the exparte applicant. The justification for the decision is lacking. See *Amaranath* (supra) *Republic vs District Commissioner Machakos & another exparte Kakui Mutiso* (2014) eKLR. Under judicial review, the court looks into the lawfulness and not the wisdom of the decision to ensure the applicant is treated fairly. See *Republic vs. Public Procurement Administrative Review Board and others* (supra) and *Grain Bulk Handlers Ltd vs J.B Maina & Co. Ltd & others* (2006) eKLR. The court looks into the decision-making process to ensure it conforms to fairness, reasonableness, and legality.
52. In *Penina Nadako Kisilwa vs. IEBC & others* (2015) eKLR, the Supreme Court of Kenya held that in judicial review, the court's target is always no more than the processes in which the ultimate decision was arrived at to correct any mistake of illegality, irrationality, and procedural defects. In *Suchan Investments Ltd vs Ministry of National Heritage and Culture and others* (2016) eKLR, the court said over and above the traditional judicial review Section 7 (2) (1) of the *Fair Administrative Actions Act* provides proportionality as a ground for statutory judicial review. The Court of Appeal observed that the court has to evaluate the decision its merits assess the balance which the decision maker struck to its relative weight accorded to its interests and consideration.
53. The court said Article 47 of *the Constitution*, as read together with Sections 7 (2) (f) of the *Fair Administration Actions Act*, had shifted J.R. to include excerpts of merit review of administrative action, including abuse of discretion. The exact position was taken by Onguto J in *Kenya Human Rights Commission vs NGO Coordination Board* (2016) eKLR.
54. In my considered view, therefore, I think the 1<sup>st</sup> respondent's decision fails the proportionality test under Section 7 (1) & (11) of the *Fair Administration Action Act*. It does not give reasons, rationale, or justification for the interests and rights of the affected parties, especially the exparte applicant. The decision fails to meet:
  - a. Balancing test



b. Necessity test and

c. Suitability test.

See Republic vs Kenya Revenue Authority exparte Tom Odhiambo Ojienda t/a Prof. Tom Ojienda and Associates (2018) eKLR.

55. The upshot is that the application has merits the replying affidavit by Josephine Njenga falls short of showing that the decision-making process she adopted and the decision met the proportionality test. In Edwin Harold Dayad Dande & 3 others vs. Inspector General, National Police Service & 5 others (2023) KESC 40 (KLR), the court said a dual approach to judicial review must be adopted. The said proceedings and decision are hereby quashed. The appeals are remitted for re-hearing by the Minister through a different officer within 3 months from the date hereof.

56. Costs to the exparte applicant.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17<sup>TH</sup> DAY OF JANUARY 2024.**

**HON. CK NZILI**

**JUDGE**

In presence of

C.A Kananu/Mukami

Mr. Ashava for Mwiti for exparte applicant

Anampiu for 2<sup>nd</sup> & 3<sup>rd</sup> interested parties

Miss Maina for respondents

