Wilson & 3 others v National Land Commission & 9 others (Civil Appeal 15 of 2020) [2025] KECA 1410 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1410 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 15 OF 2020

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

JULY 31, 2025

BETWEEN

EPHRAIM MURIUKI WILSON .... 1ST APPELLANT

WILSON KARUNGARU .... 2ND APPELLANT

SIMON MURIITHI KABURU .... 3RD APPELLANT

JOSEPH MACHIRA .... 4TH APPELLANT

AND

THE NATIONAL LAND COMMISSION .... 1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYERI .... 2ND RESPONDENT

FREDRICK MURAGE .... 3RD RESPONDENT

IBRAHIM NDAMBI .... 4TH RESPONDENT

MUNDIA KARUMU .... 5TH RESPONDENT

THUMBI WERU .... 6TH RESPONDENT

KIANA GIKUHI .... 7TH RESPONDENT

GEOFFREY NGUNYI .... 8TH RESPONDENT

SAMUEL KIONGO KAMAU .... 9TH RESPONDENT

SAMUEL MUNGA .... 10TH RESPONDENT

(Being an appeal against the Ruling of the Environment and Land Court, Nyeri (M.C. Oundo) dated 25th July 2019 in ELC Judicial Review Case No. 2 of 2019)

JUDGMENT

1. This appeal arises from the ruling of the Environment and Land Court (ELC) delivered on 25th July 2019 in regard to the Notice of Motion dated 20th March 2019, brought under Order 53(1), (2), (3) and (4) of the Civil Procedure Rules. In the motion, the appellants, then ex parte applicants, sought an order of certiorari to quash the decision of the National Land Commission, (NLC) the 1st respondent herein, dated 21st January 2019 whereby the 1st respondent reviewed the grants and dispositions of public land in Sofia Area, Karatina Township and revoked titles to block 1/422 1/426 1/428 1/433 1/435 1/438 1/441 1/444 1/448 1/450 1/421 1/423 1/424 1/425 1/427 1/429 1/430 1/431 1/432 1/436 1/437 1/439 1/440 1/442 1/422 1/443 1/445 1/446 1/447 and 1/449.

2. The appellants' grievance was that the 1st respondent failed to involve them in the inquiries and hearings conducted by the 1st respondent before arriving at the impugned decision, thus violating their rights under Article 47 and 50 of *the Constitution*.

3. The appellants also sought an order of prohibition prohibiting the 1st respondent whether by themselves, agents, employees or whomsoever from taking any steps, action and/or measures to revoke the said titles from the appellants as it does not have any mandate to revoke the said titles.

4. In order to place this appeal in proper perspective, a short history of the circumstances that led to the Judicial Review application is necessary. The 1st respondent by a letter dated 21st January 2019 revoked titles to Block 1/422 1/426 1/428 1/433 1/435 1/438 1/441 1/444 1/448 1/450 1/421 1/423 1/424 1/425 1/427 1/429 1/430 1/431 1/432 1/436 1/437 1/439 1/440 1/442 1/422 1/443 1/445 1/446 1/447 and 1/449 belonging to the appellants and others. The decision aggrieved the appellants and so they moved to court by way of Judicial Review to stop their titles from being revoked. As a prerequisite to filing the Notice of Motion, the appellants applied for leave to move the court pursuant to Rule 53(1) of the Civil Procedure Rules.

5. Having considered the submissions and the annexures on record, the learned Judge found that the dispute touched on issues based on a claim of ownership of land as well as the jurisdiction of the National Land Commission. The Judge held that those issues ought to be determined through a civil suit and not by way of a Constitutional Petition or Judicial Review.

6. The learned Judge further held that Judicial review, is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of. The learned Judge thus declined to exercise her discretion in favour of the appellants as sought and dis-allowed the application for leave and struck out the Notice of motion with costs to the interested party.

7. The appellants were aggrieved by the entire decision and preferred this appeal vide a notice of appeal dated 26th July 2019. In their memorandum of appeal, the appellants raised grounds, inter alia, that the learned Judge erred in law and fact: in it's determination to the effect that the remedy of challenging the 1st respondent's decision dated 21st January, 2019 which revoked the title deeds issued in Sofia Area, Karatina Township, in particular titles numbers Block 1/422, 1/426, 1/428, 1/433, 1/435, 1/438, 1/441, 1/444, 1/448, 1/450, 1/421, 1/423, 1/424,1/425, 1/427, 1/429, 1/430, 1/431, 1/432, 1/434, 1/436, 1/437, 1/439, 1/440, 1/442, 1/443,1/445, 1/446, 1/447 and 1/449 should have been instituted in a normal civil suit as opposed to a judicial review process; in its aforesaid holding in that given the circumstances under which the 1st respondent made its decision dated 21st January, 2019 it was not open for the appellants to commence an ordinary civil suit to challenge the said decision; by holding that the dispute filed by the appellants touches on issues based on a claim of ownership of land yet the

Judicial Review application filed by the appellants simply sought to quash the decision made by the 1st respondent on 21st January, 2019; by failing to find that the respondent did not have the power and/ or jurisdiction to revoke a certificate of title issued under the Registration of Titles Act or any other law; by failing to find that the procedure adopted by the 1st respondent in revoking the appellants' titles breached the rules of natural justice and the appellants' rights to fair hearing action; by failing to find that in revoking the appellant's titles the 1st respondent acted ultra-vires and in excess of its jurisdiction; by failing to find that the 1st respondent acted unreasonably, irrationally, un-procedurally and in bad faith in arriving at the decision dated 21st January, 2019; by failing to grant the appellants leave to commence Judicial Review proceedings yet the appellants' application raised a prima facie case which had the probability of success; and in holding that the chamber summons dated 20th March, 2019 was res-judicata in light of the decision issued in Nairobi High Court Judicial Review No. 12 of 2017; Republic v. National Land Commission ex-parte Ephrahim Muriuki Wilson & Others yet the Chamber Summons dated 20th March, 2019 sought to challenge the decision issued by the 1st respondent on 21st January, 2019 which decision was not a subject in the said case.

8. At the plenary hearing of the appeal on 28th May 2024 learned counsel Mr. Gikandi was present for the appellants while learned counsel Ms. Karimi appeared for the 2nd respondent; learned counsel Ms. Ndungu appeared for the 3rd, 4th and 6th respondents and Mutisya Mwanzia appeared for the 7th, 8th and 9th respondent. There was no representation on the part of the 1st respondent. The appeal against 5th respondent was marked as having abated under rule 102 of the Court of Appeal Rules. Counsel informed the Court that they would rely on their written submissions and also made brief oral highlights.

9. In the submissions dated 17th October 2023 filed by learned counsel for the appellant, it was submitted that guided by Article 10 of *the Constitution* a court of law ought to act in a credible and accountable manner. Further that Article 47 of *the Constitution* provides for fair administrative action. It was submitted that the court did not address whether the 1st respondent had the power in law to revoke the aforesaid Deeds in January 2019.

10. It was submitted further that section 14(1) of the *National Land Commission Act* clearly states that-

> "Subject to Article 68(c)(v) of *the Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality."

Counsel reiterated that it was clear from that provision that the 1st respondent did not have the mandate in law to handle the said matter as its mandate had expired in the year 2017 and its dealing with this matter in 2019 was an act that was, ultra vires.

11. It was submitted that the 1st respondent is a national body that has the legal authority to determine questions affecting the rights of subjects and has a duty to act judicially. It was submitted that the appellants lost their right to own property as their title deeds were revoked and re-registered by the 1st respondent without a fair hearing. Learned counsel emphasised that the appellants have a right to institute court proceedings under Article 22 of *the Constitution* and further have a right of relief of Judicial Review as set out in Article 23 of *the Constitution*. Reliance was placed in Kenya National Examination Council -vs- Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR .

12. Counsel further submitted that the 1st respondent acted ultra vires since section 14(5) of the *National Land Commission Act* clearly states that the National Land Commission ought to direct the Registrar

to revoke a title but not go ahead and revoke it by itself and, further, that section 14(7) of the said Act clearly indicates that no revocation of title shall be effected without notifying the affected party. Counsel contended that the appellants were not notified of any intended hearing geared or aimed towards revoking of any title.

13. Learned counsel maintained that the appellant used the proper channel to bring forth the claim as the main issue was in regards to the revocation of their titles made by the 1st respondent. It was submitted that the most efficacious way to deal with the matter is through a Judicial Review and that the appellants have an arguable case and the trial court ought to have granted the reliefs sought by the appellants. Reliance was placed in Republic -vs- County Council of Kwale & Another exparte Kondo & 57 others [1998]1 KLR(E&L).

14. We were urged to allow the appeal.

15. In opposing the appeal, the 2nd respondents in their submissions dated 10th November 2023 submitted that under Order 53 Rule 1 of the Civil Procedure Rules no application for Judicial Review orders should be made unless leave of the court was sought and granted. That the reason for the leave was explained by Waki, J in Republic -vs- County Council of Kwale & Another exparte Kondo & 57 others; Mombasa HCMCA No 384 of 1996.

16. It was submitted that the appellants did not satisfy the threshold for the grant of leave to commence Judicial Review proceedings which are that the applicant must show that he/she has an arguable case and that the case has a reasonable chance of success and that the applicant must show that the action must be on some rule of public law.

17. Learned Counsel contended that when the 1st respondent invited the appellants for public hearings on 5th November 2015 in Nyeri County on 18th November 2016, 25th January 2017 and 26th June 2018 in Nairobi County, the appellants failed to attend the hearings and as such that the appellants cannot complain of a process that they were uninterested in.

18. According to learned Counsel, prior to the institution of Judicial Review proceedings at the ELC in Nyeri the appellants had filed Judicial Review proceedings at the High Court in Nairobi in Republic -vs- National Land Commission Exparte Ephrahim Muriuki & others [2018] eKLR in which the appellants alleged that the parcels of land are trust/community land. It was stated that the 1st respondent being the respondent in that matter submitted that the parcels of land were public land and as such that it had jurisdiction to hear the matter under Article 67 of *the Constitution* and Section 14(1) of the *National Land Commission Act*, 2012 and that based on this Mativo, J. (as he then was) dismissed the judicial proceedings initiated by the appellants.

19. Further it was submitted that the appellants' Judicial Review proceedings in the instant appeal were dismissed by M.C. Oundo, J. in Nyeri ELC Judicial Review Case No. 2 of 2019 on the basis that the appellants' application was res judicata on the basis of the decision in Nairobi in Republic -vs- National Land Commission Exparte Ephrahim Muriuki & others [2018] eKLR.

20. Learned counsel contended that the appellants did not show that the action was based on public law as their claim largely leans towards ownership, occupation and usage of the parcels of land, and that it is not a coincidence that the two Judges of the High Court and ELC have ruled against the appellants on the same subject matter. It was further submitted that the appellants' dispute is a private law dispute which can be fully resolved in a civil court for the reason that the alleged revocation of titles of the parcels of land does not affect the public in any way but rather affects the appellants in their individual capacities.

21. Counsel summed up by stating that the appellants did not satisfy all the conditions necessary for the grant of leave to commence the Judicial Review proceedings, and their appeal lacks merit and ought to be dismissed.

22. Submissions filed on behalf of the 3rd, 4th and 6th respondents in opposition to the appeal were in the same vein. They asserted that the decision by the trial court to deny the appellants leave to institute judicial review proceedings was made in exercise of the court's discretionary powers and that this Court should not lightly interfere with such discretion unless it is shown there was a misdirection in law or the decision was plainly wrong. Reliance was made in African Airlines International Ltd -vs- Eastern & Southern African Trade & Development Bank (PTA Bank) [2003] eKLR.

23. It was submitted that if the appellants were aggrieved by the decision of the 1st respondent, they were required by regulation 30 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations to approach the ELC as an appellate court by way of an appeal and not Judicial Review application. Further that notably, there is no contention by the appellants that the appeal mechanism could not deal with the grievance complained of. Reliance was placed in Republic -vs- National Land Commission & 2 others Exparte Almer Farm Limited [2020] eKLR. Counsel asserted that it was proper for the learned Judge to deny the appellants leave to file Judicial Review proceedings as the appellants had not exhausted the appeal procedure prescribed in the law.

24. Further it was submitted that, as rightly pointed out by the learned Judge, there had been Nairobi Judicial Review No 12 of 2017 which was heard and dismissed. That the matter involved the same parties and in it the appellants were challenging the National Land Commission's jurisdiction to entertain the dispute relating to the property in question which is the same issue that the appellants are still complaining about in the present matter.

25. On their part, in opposing the appeal, the 7th, 8th and 9th respondents in their submissions dated 17th May 2024 submitted that the appellate court has to be cautious in dealing with an interlocutory appeal of this nature, so that it does not arrive at findings or make orders which amount to a determination of the suit before the trial court considering that the trial court only considered the question of whether leave ought to be granted or not.

26. They submitted that if this Court were to consider the grounds of appeal as drawn, it would have simply determined the merits of Judicial review application yet what the trial court was considering was the question of leave only. It was contended that the appellant has totally failed to address the reasoning upon which the trial court declined to grant him leave, that is, the failure to exhaust the appropriate mechanisms set by law. Reliance was placed in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014 eKLR. It was submitted that though the Court has been invited to make conclusive findings regarding the Judicial Review application by the manner in which the grounds of appeal have been drawn, this Court should decline the said invitation and only address the question of whether the trial court exercised its discretion, in denying leave.

27. As to whether the trial court exercised its discretion, in denying leave whimsically it was submitted that whether to grant or deny leave to initiate Judicial Review proceedings is an exercise of the discretion of the court. It was contended that it is settled law that an appellate court will not readily interfere with the trial court's exercise of discretion unless it is shown that the discretion was not properly exercised. Reliance was placed in Deynes Muriithi & 4 others -vs- Law Society of Kenya & Another; (SC Application No. 12 of 2015); [2016] eKLR.

28. It was submitted that section 29 of the National Land Commission (Investigation of Historic Land Injustices) Regulations, 2017 provides for the avenue and timeline within which an aggrieved party

dissatisfied by the decision may lodge an appeal. Counsel maintained that the appellant ought to have complied with the above Regulation once it was dissatisfied with the decision issued by the Commission on 21st January, 2019 as that was an appropriate mechanism/redress set by law which the appellants ought to have followed.

29. Counsel emphasised that where there is a clear procedure for the redress of a particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Reliance was placed in The Speaker of the National Assembly - vs- Karume (1992) KLR 22. It was submitted that based on the case the trial court was therefore right in denying the appellants leave.

30. Finally, it was submitted that as correctly stated by the trial court, there were other pending court cases, namely, Nyeri ELC 256 of 2015, Judicial Review No. 12 of 2017, HCC No. 68 of 1978 and HCC Petition No. 2 of 2013. It was submitted that the appellants would still have ventilated their grievance, if any, in the said cases and that the Judicial Review that the appellants sought to commence was an abuse of the court process.

31. We were urged to hold that the appeal is unmerited and dismiss the same with costs.

32. This being a first appeal, this Court's mandate is as stipulated by Rule 31(1)(a) of the Court of Appeal Rules; to re-consider and re- evaluate the issues raised in the appeal as contained in the record of appeal in its entirety and arrive at its own conclusion on matters of both fact and law. See also Selle & another -vs- Associated Motor Boat Co. Ltd & others [1968] EA 123 where the said mandate is elaborately set out. We shall only depart from the decision of the learned Judge if it is based on no evidence or where the court is shown to have acted on wrong principles of law. See Jabane -vs- Olenja [1986] KLR 661.

33. At this point, we wish to state that, as pointed out by learned counsel for the respondents, some of the grounds of appeal raised and a substantive part of the appellants' submissions address issues that were to be canvassed in the substantive Notice of motion, had leave been granted, and which issues were not determined by trial Court. If we were to make any findings on them, we would be making dispositive findings in respect of matters that were not heard or determined by the trial court. We must, therefore, eschew making any findings that touch on the merits of the yet to be heard Notice of Motion, and confine ourselves to the application for leave and whether it was properly considered and dismissed.

34. Having considered the record of appeal and the rival submissions of the parties, we are of the view that the issue that falls for our consideration is whether in declining to grant the appellants leave to seek relief by way of Judicial Review, the ELC misdirected itself.

35. Whether or not to grant leave to apply for orders of mandamus, certiorari and prohibition is a discretion that should be exercised by a single Judge judiciously and justly. The case of Mbogo and Another -vs- Shah [1968] E.A. 93, Sir Charles Newbold, President, put it succinctly thus:

> " ... a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

36. Under Judicial Review proceedings, for the relief sought to be granted, the applicant must demonstrate that the threshold requirements have been met. In the case of Biren Amritlal Shah & Another -vs- Republic & 30 others [2013] eKLR this Court stated thus;

> "Judicial review is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision-making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question."

37. The impugned decision of the ELC that the appellants wanted to challenge concerned the revocation of titles in Sofia Area, a public land in Karatina Town registered in the names of the appellants initially granted as Temporary Occupation Licences (TOL) by the defunct Karatina Council. The decision was made by the 1st respondent in its administrative capacity, and it was, therefore, amenable to judicial review.

38. The appellants' complaint is that they were not given an opportunity to be heard before the decision was reached by the 1st respondent revoking the said titles. They also complained that the decision revoking the titles did not follow the laid down procedures, which meant that, the 1st respondent had acted in excess of the jurisdiction granted by the Act, thereby rendering the decision ultra vires, null and void.

39. The appellants also assailed the 1st respondent's decision on the basis that its constitutional mandate had expired by the time it made the impugned decision and there was, therefore, the issue of jurisdiction which could be challenged by way of judicial review.

40. All these issues were within the purview of judicial review, so why was leave denied?

41. In declining to grant leave, the learned Judge stated that she noted that the appellants and the 3rd to 10th respondents were involved in Nairobi High Court Judicial Review No. 12 of 2017 (Republic -vs- National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others [2018] eKLR) in which the appellants were challenging the 1st respondent's power to hear and entertain complaints that had been lodged with it by interested parties with respect to Plot No. S E.1 to E.18 (Now Block 1/422-450, Sofia Area, Karatina, Nyeri County).

42. The learned Judge held that the matter had been determined in Nairobi where it had been dismissed and the application was, therefore, res judicata the Nairobi High Court Judicial Review No. 12 of 2017. The learned Judge went ahead to state that Judicial review was not the most efficacious remedy, to determine the matter as the same related to a dispute touching on issues based on a claim of ownership of land as well as the jurisdiction of the National land Commission, which issues ought to be determined through a civil suit.

43. As aptly expressed by Waki (J. as he then was), in Republic -vs- County Council of Kwale & Another exparte Kondo & 57 others (supra)

> "The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly, to ensure that the applicant is only allowed to proceed to the substantive hearing if the court is satisfied that there is a case fit for further consideration. Leave may only be granted, therefore, if on the material available the court is of the view,

without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for Judicial Review. It is an exercise of the court's discretion but as always it has to be exercised judicially."

44. Did the appellants' application meet the above threshold? The learned Judge concluded that the application was res judicata. Republic -vs- National Land Commission Exparte Ephrahim Muriuki & others [2018] eKLR which according to the learned Judge dealt with the same issues and same parties. We have perused the proceedings in the said matter. We note that the orders sought in the said Judicial Review were for quashing the decision of the 1st respondent to proceed with the exercise of reviewing the titles in respect of the appellants' plots. The ex-parte application also sought orders of prohibition to stop the 1st respondent from proceeding with the hearings.

45. The decision sought to be quashed in the current matter was the one revoking the titles after the hearings were concluded. In essence, the two proceedings related to the quashing of two different decisions of the 1st respondent. In that regard, we find that the learned Judge misconstrued the applicability of the doctrine of res-judicata to the applicant's application. The matter before the ELC was not frivolous and, prima facie, raised issues that needed to be considered by the court at the hearing of the substantive motion.

46. Was the doctrine of exhaustion applicable? The appellants were challenging the jurisdiction of the 1st respondent, a public body in exercise of its administrative authority. That in our view lies squarely within the realm of Judicial Review and not by way of a civil suit. The appellants' application for leave to move the court for prerogative orders was, therefore, properly before the court. The result of the foregoing is that, the learned Judge misdirected herself in declining to grant the leave sought, and we find it necessary to interfere with that decision.

47. Accordingly, we allow the appeal, set aside the orders of the learned Judge of 25th July 2019, and substitute therefor an order allowing the appellants' chamber summons application dated 20th March 2019. We also order that the matter be and is hereby remitted back to the Environment and Land Court at Nyeri for the hearing of the substantive Notice of Motion, by a Judge other than Oundo, J.

48. The appellants shall have the costs of both this appeal and the costs in the ELC against the 1st respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY 2025.

W. KARANJA

....

JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

A.O. MUCHELULE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED DEPUTY REGISTRAR