



**Ustawi Limited v Municipal Manager, Kapsabet Municipality & 4 others (Environment and Land
Judicial Review Case E001 of 2023) [2024] KEELC 1453 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023
MN MWANYALE, J
MARCH 14, 2024**

BETWEEN

USTAWI LIMITED EXPARTE APPLICANT

AND

MUNICIPAL MANAGER, KAPSABET MUNICIPALITY 1ST RESPONDENT

COUNTY PHYSICAL PLANNER, NANDI 2ND RESPONDENT

COUNTY GOVERNMENT OF NANDI 3RD RESPONDENT

THE COUNTY ATTORNEY, NANDI 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The Exparte Applicant, Ustawi Limited, was granted leave on 11th October, 2023 to commence Judicial Review proceedings, the leave granted was in term as follows; -
 - i. Spent
 - ii. The Exparte Applicant is hereby granted leave to Institute Judicial Review application for an order of Mandus compelling the 1st to 3rd Respondents to issue the Exparte Applicant with the fencing permit allowing it to fence land parcel number Nandi/Kapsabet Municipality 417 measuring 1.519Ha.
 - iii. The Exparte Applicant I hereby granted leave to institute Judicial Review application for an order of prohibition restraining and/or prohibiting the 1st to 3rd Respondents from carrying out and or continuing to carry out public participation for change of use of parcel number Nandi/kapsabet Municipality 417 and/or further interfering with the Exparte Applicants



peaceful possession and use of land parcel Nandi/kapsabet Municipality 417 measuring 1.519 Ha.

2. The above leave was issued in ELCLJR E002/2023 as sought in the Exparte Chamber summons filed on 9th October 2023. The Exparte Applicant had sought in the said Exparte chamber summons for the leave to operate as a stay which prayer was not granted and the Exparte Applicant sought to be heard on the issue of the leave to operate as a stay, and filed another certificate of urgency on 16/10/2023 where the Court directed the service of the Exparte chamber summons and the issue of leave to operate as a stay was to be canvassed on 18/10/2023.
3. On 18/10/2023, Mr. Nyekwei Learned Counsel for the Exparte Applicant appeared and stated that he was abandoning the other prayers in the chamber summons other than the prayer for leave and would be able to file the substantive motion by close of business on the said date, and a mention date for 23/10/2023 was given.
4. On 23/10/2023, Mr. Nyekwei for the Exparte Applicant Mr. Kogo for the 1st to 4th Respondent and Ms. Odeyo appeared in the matter where the Court directed service of the substantive motion by close of business on that date, and the Respondents were to file their responses within 3 days of service and a mention dated of 26/10/2023 was issued to take further directions. Having filed the substantive motion, the file in respect of ELCLJR/002/2023 was closed.
5. In its substantive notice of motion dated 18th October 2023, the Exparte Applicant seeks the following orders that;
 - i. A declaratory order do issue holding that the Ex-parte Applicant is the lawful owner of land parcel number Nandi/Kapsabet/Municipality/417.
 - ii. A declaratory order holding that the proposed developed plan REF KAP/126/2023/04 dated 10/08/2023 is unlawful to the extent that the same purports to plan the Exparte Applicants land parcel Nandi/Kapsabet/Municipality/417 into Government Land Housing land without the consent of the Exparte Applicant.
 - iii. An order of prohibition restraining the 1st – 3rd Respondent from planning the Exparte Applicants land parcel Nandi/Kapsabet/Municipality/417 as proposed in Development Plan REF No. KAP/126/2023/04 dated 10/08/2023.
 - iv. An order of prohibition restraining the 1st to 3rd Respondents from interfering with the Exparte Applicants peaceful possession and use of land parcel Nandi/Kapsabet/Municipality/417.
 - v. An order of mandamus compelling the 1st to 3rd Respondents to issue the exparte Applicant with the fencing permit allowing it to fence land parcel Nandi/Kapsabet/Municipality/417.
 - vi. Costs be provided for.

Ex-p arte Applicants Case: -

6. It is the Exparte Applicants case as contained in the grounds in support of the motion as well as the affidavit that;
 - i. It is the registered owner of Nandi/Kapsabet/Municipality/417, measuring 1.519Ha having purchased the same on 13/8/2015 after conducting all the due diligence to ensure that the vendor therein held a valid title to the suit land.



- ii. That the Exparte Applicant compiled with all the legal procedures that ensured that title legally passed on to it, and had enjoyed proprietary rights over the suit land since the time of purchase to date.
 - iii. The Exparte Applicant had applied to the 1st Respondent on January 2021 for permit to fence the suit land with intention to develop the same, but after a lengthy delay the 1st Respondent informed it verbally that permits are issued by the 2nd Respondent and advised it to address its application to the said office.
 - iv. On 11/5/2022, the Exparte Applicant applied for the permit to the 2nd Respondent who replied on 16/5/2022 stating that the request was declined because the suit land is planned for slaughter house and there was no evidence of change of use.
 - v. Vide a letter dated 28/7/2022, the Exparte Applicant wrote to the 2nd Respondent informing it that it did not intend to change use. In response the 2nd Respondent vide a letter dated 28th July 2022, stated that the suit land is reserved for slaughter slab and that the Applicant could only fence if it was contracted to fence on behalf of Government.
 - vi. The Exparte Applicant reiterated its ownership claim on the suit parcel and had learnt that the 2nd Respondent dealt with the said application without legal authority to do so; and it learnt that the 2nd and 3rd Respondents have developed a development plan Ref; KAP/126/2023/04 dated 10/8/2023 which proposes to plan the suit land into Government Low Costs Housing Project; which project is meant to be carried out on the Exparte Applicant's private land and without its consent or authority in violation of its constitutional right to property; hence the refusal to grant the fencing permit as requested is not legally justifiable, as it violates its constitutional right to Fair Administrative Action contrary to Article 47 of *the Constitution* of Kenya.
 - vii. The 1st to 3rd Respondents failure to issue fencing permit is a violation of Section 3 and 4 of their fair Administrative Act No. 4/2015 which demands the Respondent to act lawfully and the decision meant that the Exparte Applicant cannot secure the lawful property or to proceed to develop the same as planned hence violating the Applicant's constitutional right to property.
 - viii. The Exparte Applicant contents that the 1st to 3rd Respondent's action was not only unfair but in violation of his legitimate expectation that once an individual bestowed with public authority received a lawful request for permit, to fence its land, such permit shall be issued on such terms as are laid out under the relevant regulations, and the Applicant urged the Court to find the 1st to 3rd Respondents action were unlawfully and were in violations of Section 3, 4 and 7 of the *Fair Administrative Action Act*; and urged the Court to allow the Judicial Review Application.
7. The above grounds were reiterated in the statutory statement as well as the affidavit in verification of facts sworn by Micah Kipruto Bunei; who annexed thereto, a copy of the certificate of incorporation and CR12 of Ustawi Ltd, copy of certificate of lease of Nandi/Kapsabet/Municipality/41, copy of the Agreement for Sale, copies of Certificate of Lease dated 29/11/2011, certificate of Incorporation Aquiline Ltd, rates payment receipts, clearance certificate, Beacon Certificate and Letter of Allotment transfer, consent to transfer, receipts of stamp duty, search, rent payment receipts, beacons certificates letter dated 16/5/2022, letter dated 25/7/2022, letter dated 28/7/2022, letter dated 19/1/2023 letter dated 6/9/2023.



The 1st to 4th Respondent's Case: -

8. The 1st to 4th Respondents filed a responded to the Judicial Review application by filing a Replying Affidavit through Veronicah Ndunge Musee who deposed that;
- i. She is the Assistant Director of Physical Planning and offering technical support to the County Government of Nandi had been authorized to act for the 3rd Respondent and hence competent sworn the affidavit.
 - ii. That Nandi/Kapsabet/Municipality/417 was a public land as it was never allocated to any private individual through any known process hence the certificate of lease in the name of the Exparte Applicant was acquired illegally and unprocedurally.
 - iii. She set out the allocation process pursuant to Section 117, and 118 of the repealed constitution, trust land act and circular dated 10th September 1971 for the process of allocation.
 - iv. That any allocation and leasing out must be proceeded by a duly approved Part Development Plan (PDP), which is the primary document in the allocation of public land.
 - v. That Nandi/Kapsabet/Municipality/417 was previously reserved for proposed slaughter house and was not available for allocation as the slaughter house was to be a public utility.
 - vi. Planning authority cannot issue development permission under the Physical and Land Use Planning Act Land private individual on a public land unless the private individual is acting as an agent of the County Government or National Government.
 - vii. The use of land parcel number Nandi/Kapsabet/Municipality/417 had been changed to Affordable Housing which change of user had been publicized for the statutory period of 60 days as required with no objection received from the Exparte Applicant the suit property is now reserved for affordable housing.
 - viii. No consent from the 3rd Respondent had been issued in respect of any assignments of lease or transfer, and the charge created to the bank was done without the knowledge and consent of the 3rd Respondent.
 - ix. That a fencing permit application by the Exparte Applicant had been dealt with promptly and denied as the suit land is government land.
 - x. The part development plan No. KAP/126/2023/02 having been approved on 25/8/2023 and adopted the use the ex-parte Applicants prayers were not tenable.
 - xi. There was none exhaustion of the internal dispute mechanism under Section 61 (3) and (4) of the Physical Land use Planning Act before resorting to the Court.
 - xii. That the leave had been issued in respect of 2 judicial review orders but the Exparte Applicant had expanded the reliefs sought to 5 prayers.
 - xiii. Application was in bad faith and ought to be dismissed.
9. The Deponent did annex a copy of the delegation letter, copy of the circular dated 10/9/1971, copy of the development plan, and copy of the part development plan, gazette notice, Taifa Leo newspaper and standard newspaper excerpts application for fencing, and the response to the application, copy of the order granting leave to commence the Judicial Review.



10. The 1st to 4th Respondents equally filed a Notice of preliminary objection which preliminary objection was dealt with vide the ruling dated 14th December 2023, where the Preliminary Objection was dismissed as the Court needed to ascertain certain facts hence the same not premised on pure points of law. Among the facts that the Court needed to ascertain was the exhaustion of the internal dispute mechanism, and whether the public officer who made the impugned decision was authorized and/or acted ultravires.

The 5th Respondent's Case: -

11. The 5th Respondent filed grounds of opposition to the petition dated 25/10/2023. The grounds were;
- i. The suit offends Section 61 (3) of the Physical Land Use Planning and Land Use Planning Act (PLUPA).
 - ii. No authority was given to the deponent Michael Kipruto Bunei or the firm of Nyekwei and Company Advocates to sign the affidavit and represent the Applicant who is a company.
 - iii. Enforcement of breach of rights ought to be way of a petition as opposed to judicial review.
 - iv. The provision of the *Physical and Land Use Planning Act* No. 13/2019 divests the Court the primary adjudicatory mandate and vests the same to the County Physical and Land Use Planning Liaison Committee and granted the Court only Appellate jurisdiction.
 - v. The Exparte had not exhausted the alternative means of dispute resolution provided by statute.
12. On the strength of the above the 5th Respondent urged the Court to dismiss the application as an abuse of the Court process; with costs.
13. Parties were directed to file written submissions in respect of the motion.

Exparte Applicant's Submission: -

14. The Exparte Applicant framed and submitted on the following issues for determination; -
- i. Whether the Judicial Review which issue the Exparte Applicant framed and submitted on 4 sub issues; -
 - a. On failure to file company resolution, the Exparte Applicant submits that the same is a procedural requirement that did not to the merits and/or substance of the case. That the requirement is provided for under Order 4 Rule 1 (4) of the Civil Procedure Rules and has placed reliance in the decision in the case of Spire vs Land Registrar & 2 others 2019 eKLR on the import of Order 4 Rule 1 (4).
15. It is the Exparte Applicant submissions that as the deponent was both a director of the Exparte Applicant he was authorized to act on behalf of the company; and that the provisions of Order 4 Rule 1 (4) cannot be invoked in the circumstances of this case to strike out the suit.
- b. On whether the 5th Respondent is wrongly enjoined in the suit, the Exparte Applicant submits that under Section 2 (1) of *Government proceedings Act*, Cap 40, the Civil proceeding against the government shall by instituted by or against the Attorney General. The Exparte Applicant further cites Section 5 (i) (ii) of the Office of the Attorney General Act No. 49/2012.



16. The Exparte Applicant further submits that the 2nd Respondent being an employee of the Ministry of Lands, Public Works, Housing and Urban Development an office in the National Director of Physical Planning ought to be represented by the 5th Respondent hence the 5th Respondent is a necessary part.
 - c. On the non – exhaustion of the internal dispute resolution, it is the Applicants submissions that the 2nd Respondent was an employee of National Government and hence the provisions of Section 61 (3) and (4) of PLUPA are not applicable.
17. That the constitutional rights having been threatened the provisions of Section 9 of the Fair Administrative Act would not apply, so submits the Applicant. The decision complained of cannot be tackled under Section 61 (3) and (4) and hence Section 9 of the Fair Administrative Actions does not apply.
18. The Exparte Applicant urges that having invoked Articles 23,40 and 47 of *the Constitution* as well as Section 4, 7 and 11 of the *fair Administrative Action Act* No. 4/2015, the Exparte Applicant is able to seek reliefs arising under Article 47 of *the constitution* including orders for declaration of rights, declaration of invalidity of an action, orders compelling or restraining an administrators to do or desist from doing an act; and prayed that the Court grants the powers to grant the prayers in the judicial review application.
19. On the second issue, is whether Veronica Ndunge Musee, is competent to depose to facts on behalf of 1st, 3rd and 4th Respondents, it is the Exparte Applicants position that the based on the Annexure M20 and M21, Veronica Musee wrote letters on behalf of the National Government and related to issue number 3, the County Attorney as the 4th Respondent was at fault to represent the 2nd Respondent, in accordance with Section 7 of the Office of the County Attorney Act No. 14/2020.
20. It is the Exparte Applicants submission that an employee of the National Government, Veronica Ndunge Musee could not depone on behalf of the 1st, 2nd and 3rd Respondents and could not be represented in the proceedings by the 4th Respondents.
21. The Exparte Applicant submits that declaratory orders should issue declaring him the rightful owner of Nandi/Kapsabet/Municipality/417 since the 2nd Respondent has deposed to the suit property being public land and the Exparte Applicant has annexed documentary evidence on ownership and that his title is protected under Section 24 and 26 of the *Land Registration Act*, and that the 2nd Respondent did not have capacity as an Assistant Director of Physical Planning to declare the suit property as public or public utility land.
22. The Exparte Applicant further submits that declaratory orders should issue holding that the proposed development plan KAP/126/2023/04 is unlawful. In support of this, the Exparte Applicant submits that the 2nd Respondent in her affidavit stated that the Development plan had been approved on 25/8/2023 yet there was no proof of the timeless having been adhered to, as well as compliance with Section 41 (3) and (4) of the *Physical and Land Use Planning Act* (PLUPA).
23. In support of this limb of submissions, the Exparte Applicant has cited the decision in the case of David Gitau Thairu vs County Government of Machakos and 2 others.
24. On whether prohibition orders ought to issue against the 2nd and 3rd Respondent the Exparte Applicant submits that as the 2nd and 3rd Respondents are converting Nandi/Kapsabet/Municipality/417 as part of Government Low Cost Housing Land they ought to be prohibited and in that regard the Exparte Applicant places reliance on the decision in the case of Republic vs Secretary of the Firearms Licensing



Board Exparte Senator Johnstone Muthama (2018) KLR and David Gitau Thairu vs the County Government of Machakos and 2 others (2020) eKLR.

25. Whether an order of mandamus should issue against the 3rd Respondent, the Exparte Applicant submits for issuance of the mandamus order for the Respondent to issue the fencing permit, and has placed reliance in the decision in the case of Katiba Institute vs President of the Republic of Kenya (2021) KEHC 442 KLR.
26. The Exparte Applicant has submitted that as costs follow the event, the same to be awarded to the Exparte Applicants.

1st to 4th Respondent's Submission: -

27. The 1st to 4th Respondent submit that Veronica Ndunge Musee was offering technical support to the County Government of Nandi exercising such powers vide the delegation letter dated 21st November 2019, annexure VNM 1. The 1st to 4th Respondent submit on two issues for determination.
 - i) whether the Court has jurisdiction to determine this application
 - ii) whether orders 1 and 2 sought in the application can be granted and whether the orders of mandamus and prohibition can issue
 - iii) who bears costs of the suit?
28. On issue number 1, the 1st to 4th Respondent submit that Section 78 of the PLUPA does not limit jurisdiction of the liaison committee hence the issue that the decision made by the physical planner was made without authority is within the jurisdiction of the Liaison Committee to hear and determine.
29. They submit that the physical planner was competent and qualified to perform the duties having been delegated to do so.
30. On issue number 1 and 2 the 1st to 4th Respondent, submit placing reliance in the decision in Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd (2002) eKLR, on the position that Judicial Review is concerned with decision making process and not merits of the decision and that the Applicant having brought the application under Order 53 (Rule 3 the declaratory orders are not available, as order 53 provides only for certiorari, mandamus and prohibition whilst the declaratory orders are reserved for petitions, as well as civil Suits, and the Respondent relies on the decision in Republic vs Commissioner of Mines and another vs Exparte Basu Mining and Cortec Mining Company Ltd.
31. It is the 1st to 4th Respondent's case that since there is a dispute of ownership, the same could not be ventilated vide the Judicial Review proceedings.
32. The 1st to 4th Respondent submit that since Veronica Ndunge Musee had the requisite authority to perform County Director duties under Section 20 of the Physical Planning and Land Use Act, she did not act ultra vires and the whole Judicial Review having been premised on the same ought to be dismissed.

5th Respondent's Submission: -

33. The 5th Respondent represented by Miss M. Odeyo Senior State Counsel have framed and submitted on 4 issues for determination.



34. Issue 1, whether the Court has jurisdiction, on the said issue it is their submission that under Sections 9 (2) and (4) of the Fair Administrative Actions Act and Section 61 (3) of the *Physical and Land Use Planning Act*, an internal resolution mechanism is created which bestows the Court with Appellant jurisdiction and hence the Court has no jurisdiction. Towards this end, the 5th Respondent places reliance in the decision in Isiolo County Assembly Service Board vs principal Secretary (Devolution) 2016 (eKLR) and Geoffrey Muthinja Kabiru and 2 others vs Samuel Munga Henry and 1756 others (2015) eKLR.
35. The 5th Respondent submits that the Applicant came to Court prematurely as they ought to ventilate their claims at the County Physical and Land Use Planning Liaison Committee.
36. On issue number 2, on whether the application falls within the scope of Judicial Review, the 5th Respondent submits that the application does not meet the threshold for judicial review and have cited the decision in Republic vs Public Procurement Administrative Review Board and 2 others Exparte – (Sanitam Services E. A. Limited) as well as Municipal Council of Mombasa versus Republic and Umoja Consultants Civil Appeal No. 185/2001 to support this position.
37. On the issue as to whether the declaratory orders are available in these proceedings, the 5th Respondent submits that the same are not given the Judicial Review is a special supervisory jurisdiction, different from an appeal and normal civil litigation.
38. On the strength of the above submissions the 5th Respondents submits that the declaratory orders are not available and seeks for the dismissal of these proceedings.

Exparte Applicants Rejoinder Submission: -

39. The Exparte Applicant sought and was granted leave to file rejoinder submissions on 13/2/2024. In its rejoinder the Exparte Applicant submits that the Court has jurisdiction to hear and determine the matter since the preliminary objection had been dismissed and there was no appeal against the dismissal; hence raising the issue of jurisdiction would be resjudicata.
40. On prayers sought the Exparte Applicant submits that Order 53 of the Civil Procedure Rules does not state that leave is required before instituting judicial review proceeding for all forms of writs including a declaratory order and that having invoked all the statutory and constitutional provisions, the Exparte Applicant did not need leave to pray for a declaratory order in the circumstance of this case.
41. The Exparte Applicant submits that the declaratory orders thus can issue and that the issue before Court is not an ownership dispute but judicial review application for refusal to issue a fencing permit.
42. The Exparte Applicant submits that the letter served upon them with reference to the 2nd Respondent status was a letter dated 24/3/2023 and not 21/11/2019, and the said letter did not relate to the 2nd Respondent's status in the County Government and hence same ought not to be relied upon as it was not served upon the Exparte Applicant and in any event the CECM could not appoint Veronicah Ndunge Musee and her actions were all illegal.
43. The Exparte Applicant urges the Court to allow the Judicial Review application.

Issues for Determination: -

44. Before framing issues for determination, the Court notes a few undisputed facts as here follows; -
 - a. That the proceedings herein were initiated via Judicial Review and leave to institute judicial review was granted to the Exparte Applicant on 11th October 2023, and that this Judicial



Review application has sought for declaratory orders on ownership of Nandi/Kapsabet/Municipality/417.

- b. The genesis for the Judicial Review proceedings was refusal to issue a fencing permit by Veronicah Ndunge Musee, acting as the 2nd Respondent
45. Having reviewed the pleadings, the motion the affidavits as well as the rival submissions of the parties the Court frames the following as issues for determination.
 46. The first two issues are issues that are preliminary in nature touching on the competence of the application and orders sought therein which will touch on the jurisdiction of the Court to issue the prayers, and the issue of exhaustion of the internal mechanisms which shall determine the jurisdiction of the Court to hear and determine the application.
 47. The other issues are mainly issues of the merits of the application.
 48. The issues for determination are thus; -
 - i. Whether the judicial review application and the orders sought therein are competent.
 - ii. Whether the Court has jurisdiction to hear and determine the application in view of the internal mechanisms under Section 9 (2) of the Fair Administrative Act and Sections 61 (3) and (4) of the *Physical and Land Use Planning Act* (This issue had been raised in the preliminary objection vide the ruling dated 14th December 2023 and in dismissing the preliminary objection the Court stated that it had to ascertain certain facts at trial including certain correspondences and hence this issue is not resjudicata as submitted by the Exparte Applicant).
 - iii. Whether the application is merited.
 - iv. What reliefs ought to issue?
 - v. Who bears the costs of the application?
 49. On issue number 1, the Respondents submit that Judicial Review proceedings are meant to look at the decision-making process and not on merits of a decision.
 50. It is the Exparte Applicant submission that in addition of the orders of mandamus and prohibition sought the Court can issue orders under Article 23 of *the Constitution* as well as under Section 11 of the Fair Administration Action Act including a declaration of rights to any matter in which the administrative action relates.
 51. The Exparte Applicant submits that a merit review of the decision is possible and hence the orders and or remedies sought in this judicial review application.
 52. From the Court of Appeal in its decision in the case of Super Nova Properties & Another vs District Land Registrar Mombasa & Kenya Anti-corruption and 2 others as well as in its decision in the case of Judicial Service Commission & Another vs Lucy Muthoni Njora has held that there is a change of the scope of judicial review proceedings, which now include a merit review of the decision.
 53. In the Lucy Njora decision at paragraph 48, it was quoted as follows 27, “on our part, we find no fault that the Judge expanded the grounds of Judicial review above the conservative grounds to include the principles of proportionality, public trust, accountability by public officers, justice and equity. The test of proportionality would automatically lead to a greater intensity of review of the merits as it invites



- the Court to evaluate the merits of the decisions by assessing the balance to make, that is whether the decision to be made is within the range of rationality.”
54. The Supreme Court of Kenya in its decision in the Dande and 3 others vs Inspector General, National Police Service and 5 others; cited by the Exparte Applicant held inter alia that “when a party approached the Court under the provisions of *the constitution* then the Court ought to carry out a merit review of the case. However, if, a party filed a suit under the provisions of Order 53 of the Civil Procedure Rules or even violation of *the constitution*, then the Court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not merits of the decision per se.....
A Court could not issue judicial review orders under *the constitution* if it limited itself to the traditional review known to common law. The dual approach to judicial review existed but that approach must be determined based on the pleadings and procedure adopted by the parties at the inception of proceedings.....”
 55. It follows from the above decisions that a merit review is now possible, but the Court has to look in the matter in which the judicial review was initiated.
 56. In the decision in the case of County Government of Nyeri another vs Cecilia Wangechi Ndung’u 2015 (eKLR), the Court observed that the judicial review remedies are available in a constitutional petition as provided for in Article 23 of *the Constitution*.
 57. It follows that instance a merit review is in a constitutional petition including issuance of the judicial review under Article 23 of *the Constitution* and orders under Section 11 of the Fair Administrative Act.
 58. The Court has already found that this is a Judicial Review Application and not a constitutional petition, and the mere invoking of the Constitutional provision including Article 23 does not metamorphize this judicial review application to a constitutional petition.
 59. The Exparte Applicant had a choice to file a constitutional petition and seek judicial review orders, therein as provided under Article 23, but chosen the expressway of Judicial Review application under Order 53 of the Civil Procedure Rules, the Court has now to ascertain, as was stated in the Edwin Harold Dande case above, whether the merit review is applicable from the pleadings and the procedure adopted by the Applicant at the inception of the proceedings.
 60. The pleading in this judicial review application is the statutory statement that was filed at the leave stage which accompanied the Exparte Chamber Summons filed on 9th October 2023, as set out at paragraph 1 of this judgment.
 61. The reliefs sought in the statutory statement were 4 namely; -
 - i. A declaratory order holding that the Exparte Applicant is the lawful owner of land parcel Nandi/Kapsabet/Municipality/417.
 - ii. An order of Mandamus compelling the 1st to 3rd Respondents to issue the Exparte Applicant with the fencing permit allowing it to fence land parcel Nandi/Kapsabet/Municipality/417.
 - iii. An order of prohibition restraining the 1st to 3rd Respondent from interfering with the Exparte Applicant’s peaceful possession and use of land parcel Nandi/Kapsabet/Municipality/417.
 - vi) Costs
 62. In reaching the determination that the pleading is the statutory statement is the main pleading, I am guided by the decision in the case of Commissioner General Kenya Revenue Authority vs Silvano Onema Owaki t/a Marenga Filling Station 2001 (eKLR). where the Court of Appeal held “we must



- observe that it is the verifying affidavit not the statement to be verified which is of evidential value in an application for judicial review.”
63. With regard to the procedure adopted by the parties, the Ex parte Applicant having sought leave to commence judicial review proceedings adopted the procedure under Order 53 of the Civil Procedure Rules, since no leave ordinarily sought in a constitutional petition. Despite invoking constitutional provisions having adopted Judicial Review under Order 53, the Ex parte Applicant just like the expressway he choose, limited itself to the traditional reliefs, under Order 53 hence the declaratory orders that he sought are not available to the Ex parte Applicant as, firstly there are not part of the traditional reliefs available under Order 53, as this is not a merit review; and secondly the substantive motion ought to seek reliefs based on similar grounds as set out in the statement as under Order 53 (rule 1 and 3 (1) of Civil Procedure Rules, limits the prayers sought in the substantive motion to that which leave was obtained thus any prayer outside the leave granted is incompetent, and a nullity as was held in *Republic vs Chief Magistrates Court Nairobi Ex parte Geff Koinange and 11 others 2017* (eKLR).
 64. Having found that the prayer a, b and c were not premised on the leave initially granted to the Ex parte Applicant, the same are incompetent and are struck out.
 65. Prayer (a) of the application was contained in the statement of claim but was not granted at the Ex parte stage and was eventually abandoned together with the prayer of leave to operate as a stay as captured at paragraphs 2, and 3 of this judgment.
 66. In answer to issue number 1, prayers a, b, and c are incompetent and the same are hereby struck out.
 67. The Court shall now consider issue number 2 of its issues for determination.
 68. As pointed out at paragraphs 10 and 46 of this judgment, the issue of this Court’s jurisdiction was initially raised in the preliminary objection and handled in the ruling delivered on 14th December 2023 where the Court was of the view that there need to be ascertainment of facts which made the preliminary objection not to be a pure point of law and hence dismissed the same. It follows therefrom that the issues raised in the preliminary objection were not heard and determined on their merits and hence are not resjudicata and shall now be evaluated.
 69. It is the Ex parte Applicant’s position that the Veronica Ndunge Musee who signed off as the County physical planner was in fact an employee of National Government, being an Assistant Director of Physical Planning as was confirmed by Annexure M20 and M21 and hence she acted ultravires, thus the provisions of exhaustion of the internal remedies provided under Section 9 of the *Fair Administrative Action act* was not applicable. In response to this the said Veronica Ndunge Musee while in her Replying Affidavit sworn on behalf of the 1st to 3rd Respondent, described herself as an Assistant Director of Physical Planning who was offering technical support to the 3rd Respondent. She exhibited a letter dated 21.11.2019 which she described as a delegation letter, annexure VNM1.
 70. The said letter under the hand of a Dr. Philemon Bureti, the then CECM Lands, Environment and Natural Resources Nandi County. The said letter reads as follows “RE: Delegation to Perform Physical Planning Functions. “Article 6 (2) of *the Constitution* require the National and county Governments to conduct their affairs on basis of consultation and co-operation. Consequently, part 1 of the fourth schedule of *the constitution* has mandated the National Government to provide technical support and assistance to County Government. The *physical and land use planning Act* No. 13/2019 has appointed the County Executive Committee member for physical and land use planning as planning authority at



the County level. To perform this function, the Act require the County Director of Physical and Land Use Planning Director of Physical and Land Use Planning to offer advisory services to the CECM.

As you are aware, currently the County Government of Nandi does not have a registered physical planner to perform physical and land use planning functions in line with Section 20 of the Act. I hereby appoint you to perform the functions under Section 20 of PLUPA until such a time the County Government will employ registered planner. This is to ensure professionalism and integrity in offering quality planning services across the county. You shall be answerable to the office of the CECM in charge of Lands and Physical Planning.

I wish you well as you diligently perform these functions

(Signed)

Dr. Philemon Bureti (PHD)

CECM, Lands Environment and National Resources

Nandi County.”

71. The Exparte Applicant disputes the capacity of the CECM to appoint the Veronica Ndunge Musee, while the 1st and 4th Respondent submits that the delegation conferred Veronica Ndunge Musee, with the requisite authority to perform the duties of the 2nd Respondent.
72. The 1st to 4th Respondent submit that the delegation was in order as Veronica Ndunge Musee met all the qualifications.
73. I have perused the applicable law and it must be deemed that in offering technical support to the County Government of Nandi, Veronica Ndunge Musee was under a ‘Re- designation’ as provided for under Section 40 of the *Public Service Commission Act*, and she was thus redesigned to offer services to the County of Nandi, as the County Physical Planer, the 2nd Respondent and as an Assistant Director of National Planning, she would still be able to discharge her said functions in that office.
74. Having found that Veronica Ndunge Musee was redesigned as such and on the strength of the delegation letter, she was to carry out functions of the County Director of Physical Planning which included at Section 20 (j) issuance of development permission and other development control instruments under this Act with the approval of the County Executive Committee member.
75. A fencing permit requires permission hence it is for all intents and purposes a development permission under Section 20 (j) of the *Physical and Land Use Planning Act*, and one of the functions of the County Executive Member delegated to the physical Planner vide the annexure VNMI.
76. The relevant provisions of Section 61 thus apply in this scenario. Any person aggrieved by the decision of the CECM, which in the case were delegated to the 2nd Respondent, had to lodge an Appeal to the county Physical and Land use Planning Liaison Committee established under Section 61 (3) of the PLUPA and would approach the ELC Court on appeal against the decision made by the Liaison Committee under Section 61 (3) by virtue of Section 61 (4) of the PLUPA.
77. It follows therefrom that the PLUPA provides an internal dispute resolution mechanism and offers to this Court appellate jurisdiction. The provision of Fair Administrative Act, vide Section 9 (2) provides for the exhaustion of the internal mechanisms and bars this Court from proceeding to review the administrative action.



78. Having found that Veronica Ndunge Musee exercised powers conferred and delegated to her under Section 20 of the PLUPA and the Exparte Applicant was bound to exhaust the internal mechanism provided under Section 61 (3) of the Act before approaching this Court.
79. The upshot is that the Judicial Review application was prematurely filed for lack of exhaustion of internal mechanism and this Court lacks jurisdiction to entertain the same as it is hereby struck out with costs to the Respondents.
80. The Court has noted a simmering ownership dispute in respect of Nandi/Kapsabet/Municipality/417 and the parties ought to move for resolution of the same via the available means.
81. Under Section 8 of the Fair Administrative Act, a determination ought to be made in 90 days, but in the circumstance of this case where the Court had to deal with a preliminary objection first the same was not possible, and it may be important for the Legislature to look into the provisions with a view to expanding the time lines to say about 6 months which may be practical.
82. Having found that the Court lacks jurisdiction for failure to exhaust internal mechanism as per Section 9 (i) of the Fair Administrative Action and Section 61 (3) of the PLUPA, the Court shall not consider the merits of the Judicial Review application, as the same is struck out with costs to the Respondents.
83. Orders accordingly.

JUDGMENT, DELIVERED AND DATED AT KAPSABET THIS 14TH DAY OF MARCH 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Ms. Odeyo for 5th Respondent
2. Mr. Kipnyikwei for Exparte Applicant
3. Mr. Kogo for 1st to 1st to 4th Respondent

