



Republic v James Finlay (Kenya) Ltd & another; National Land Commission & 4 others (Interested Parties); Cheruiyot & another (Exparte Applicants) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 6970 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023**

LA OMOLLO, J

OCTOBER 24, 2024

IN THE MATTER FOR AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLE 23(3) (F) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLE 1(1), 2(2), 3(1), 10, 35, 47 AND 60 OF THE CONSTITUTION OF KENYA 2010 AND THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

JAMES FINLAY (KENYA) LTD 1ST RESPONDENT

COUNTY GOVERNMENT OF KERICHO 2ND RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

BROWN INVESTMENTS PLC INTERESTED PARTY

COUNTY ASSEMBLY OF KERICHO INTERESTED PARTY

CAPITAL MARKETS AUTHORITY INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

AND

VINCENT KIPLANGAT CHERUIYOT EXPARTE APPLICANT

FRANKLINE KIPSANG NGENO EXPARTE APPLICANT



RULING

Introduction.

1. This ruling is in respect of the 1st Respondent's Grounds of Opposition dated February 12, 2024. They are as follows;
 - a. The Ex parte Applicants have not identified the public land allegedly occupied by the 1st Respondent upon which the share transaction emanates from.
 - b. That assuming that the 1st Respondent is in occupation of public land the Ex parte Applicants have provided neither the legal basis nor factual evidence as to how the sale and disposal of shares of the 1st Respondent allegedly in occupation of the said land constitute a substantial transaction involving the conversion of public land to private land within the Provisions of Section 9(3) of the *Land Act* Chapter 280 of the Laws of Kenya. To this end the jurisdiction of the Honourable Court over the alleged dispute is questionable.
 - c. Judicial review proceedings cannot be sustained against the 1st Respondent because it is a private limited liability company and is neither an administrative branch of the government, a subordinate Court, a tribunal nor an executive member of a public authority responsible for executive and/or administrative actions.
 - d. Judicial review is not a relief which can be sought to quash, compel, or prohibit corporate or commercial decisions or transactions made between private individuals.
 - e. The alleged sale and disposal of shares by the 1st Respondent to the alleged 2nd Interested Party does not fall within the regime of public administrative actions that can be subjected to judicial review.
 - f. The alleged sale and disposal of shares between two private entities is a private contractual relationship which does not require public participation.
 - g. The legal obligation to manage public land on behalf of the national and County Governments and to ensure that public land under the management of designated state agencies is sustainably managed for the intended purpose falls within the functions of the National Land Commission as established under Article 67(2) of *the Constitution* and further provided by Section 5(1), (a) and (c) of the *National Land Commission Act* Chapter 281 of the Laws of Kenya and yet the National Land Commission is not a Co-Respondent in the application for leave. Any orders granting leave to the Ex-parte Applicant to institute judicial proceedings would therefore serve no purpose as no substantive orders can be issued against a person listed as an Interested Party in the proceedings.
 - h. Under prayer No. 8(a) on reliefs sought in the application on (sic) of them being orders of certiorari the Ex – Parte Applicants have not laid before the Court the material containing matters to be quashed and the Honourable Court cannot give orders in a vacuum.
 - i. Under prayer No. 2(b) and (d) an order of mandamus is being sought to compel the 1st and 2nd Respondents to refer the decision of sale and disposal of shares to be debated by the County Assembly of Kericho while the County Assembly of Kericho which is listed as an Interested Party is supposed to be ordered by way of mandamus to debate the issue but that County Assembly is only listed as an Interested Party against whom no orders can be issued in law.



- j. Under prayer No. 2(c) the Ex-parte Applicants are seeking orders that the National Land Commission be compelled by way of Mandamus to initiate the process of public participation, yet the National Land Commission is listed as an Interested Party against whom no orders can issue in law.
 - k. Leave to institute judicial review order of prohibition sought under prayer No. 2 (e) is not tenable because the transaction involving sale and disposal of shares was completed as between the 1st Respondent and the alleged 2nd Interested Party sometime in November, 2023.
 - l. An order of prohibition sought under prayer No. 2(f) is overtaken by events because even if it was tenable the sale of shares and transfer has been finalized.
 - m. An order for prohibition sought under prayer No. 2(g) is not obtainable because no orders can issue against an Interested Party and further nothing remains to be prohibited as the shares have been sold and transferred.
 - n. For the prayer that the leave granted to operate as a stay as sought under Prayer No. 3 the same is not tenable since there is nothing to be stayed.
 - o. The 1st Respondent shall further rely on the Replying Affidavit sworn by Simeon Hitchinson and filed herewith.
- p. The entire application for leave is misconceived, incurably defective, bad in law and an abuse of the process of the Court and should be dismissed with costs.

Factual Background.

2. The Ex parte Applicants commenced the present proceedings vide the Chamber Summons application dated 22nd May, 2023. The Application is brought under Article 23(3)(f) of *the Constitution* of Kenya 2010, Order 53 Rule 1 and 2 of the Civil Procedure Rules, Section 7 (1) & (2) of the *Fair Administrative Action Act* 2015 and Sections 8 & 9 of the *Law Reform Act*.
3. The application seeks the following orders;
 1. The application be certified as urgent and service thereof be dispensed with in the first instance.
 2. Leave be granted to the Applicants to apply for the following judicial review orders;
 - a. An order of certiorari to remove into this Honourable Court and quash the decision of the 1st and 2nd Respondents to sell/ dispose of all the shares of the 1st Respondent in tea estates in Kericho to the 2nd Interested Party before subjecting the same to public participation and subsequently approved by the County Assembly of Kericho.
 - b. An order of mandamus directed to the 1st and 2nd Respondent (sic) compelling them to refer the said decision to be debated by the County Assembly of Kericho that will in turn subject the same to public participation and approved.



- c. An order of mandamus directed to the 1st Interested Party compelling them to require the approval of the County Assembly that has been subjected to public participation before giving consent to the 1st Respondent to sell/dispose off its shares in tea estates in Kericho to the 2nd Interested Party.
 - d. An order of mandamus directed to the 3rd Interested Party Compelling them to take views of the public during the debate to approve the decision by the 2nd Respondent to allow the 1st Respondent to sell/dispose off its shares in tea estates in Kericho to the 2nd Interested Party.
 - e. An order of prohibition directed at the 1st and 2nd Respondent to restrain them or their agents from proceeding with selling/ disposing off its shares in tea estates in Kericho to the 2nd Interested Party until the County Assembly of Kericho subject the same to public participation, debates and approve it.
 - f. An order of prohibition directed at the 1st Interested Party to restrain them or their agents from approving and giving consent to the 1st and 2nd Respondents to sell/dispose off its shares in tea estates before it's subjected to public participation, debated and approve (sic) by the County Assembly of Kericho.
 - g. An order of prohibition directed at the 3rd Interested Party or its agents to restrain them from debating and approving the decision to sell/dispose of the shares of the 1st in (sic) tea estates in Kericho before subjecting the same to public participation and taking views of the public.
 - h. Costs of and incidental to this application.
3. The leave so granted do operate as stay of the decision of the 1st and 2nd Respondent's decision to sell/dispose of all shares in tea estates in Kericho belonging to the 1st Respondent to the 2nd Interested Party pending the determination of the application.
 4. Costs of and incidental to the application be provided for in favour of the applicant.
4. In response to the application, the 1st Respondent filed a Replying Affidavit on 14th February, 2024 sworn by Simon Hutchinson.
 5. The 1st Respondent also filed the Grounds of Opposition under consideration.
 6. The matter came up on 15th February, 2024 and the learned Judge, then seized of this matter, gave the following directions;

“The Grounds of Opposition herein having attacked the jurisdiction of this Court, it is trite that the same be disposed of in the first instance. To this effect, it is directed that the Ex parte Applicant files his response to the Grounds of Opposition within 7 days. The Grounds of



Opposition shall be disposed of through written submissions to which parties shall file their respective submissions within 21 days...”

7. The matter was thereafter mentioned on 3rd June, 2024 to confirm filing of submissions. The matter was further mentioned on 4th June, 2024 when the 1st Respondent was granted leave to file supplementary submissions.
8. The 1st Respondent later opted not to file supplementary submissions and the matter was reserved for ruling on 16th July, 2024.

Issues for Determination.

9. The 1st Respondent filed its submissions on 31st May, 2024 while the Ex Parte Applicants filed their submissions on 3rd June, 2024.
10. The 1st Respondent in its submissions rely on the judicial decision of Mukisa Biscuit Co. v West End Distributors Limited [1969] EA 696 and submits that the ex parte Applicants have not identified the subject matter of the dispute to demonstrate that this Court has jurisdiction.
11. The 1st Respondent submits that this Court was established pursuant to Article 162(2)(b) of *the Constitution* of Kenya and Section 13(2) of the *Environment and Land Court Act*.
12. The 1st Respondent also submits that the ex parte Applicants have not provided any particulars of the said land that is alleged to be public land so as to demonstrate that it is covered by Section 9(3) of the *Land Act*, 2012.
13. The 1st Respondent further submits that the ex parte Applicants have not demonstrated any co-relation between the sale of shares by a private company and the use of land that is envisaged by the provisions of Section 9(3) of the *Land Act*, 2012.
14. It is the 1st Respondent’s submissions that the ex parte Applicants have not adduced any evidence to show that the said land is leased by the 2nd Respondent to the 1st Respondent so as to invite public interest in the alleged sale transaction.
15. The 1st Respondent relies on the judicial decision of Humphrey Makokha Nyongesa & another versus Communication Authority of Kenya & 2 Others [2018]eKLR, Halsbury’s law of England 4th Edition Volume 1 as was cited in Republic v Kenya Cricket Association & 2 Others [2006] eKLR and submits that the 1st Respondent is neither an administrative branch of the government, a subordinate Court, a tribunal or an executive member of a public authority so as to make its action subject to judicial review by a superior Court.
16. The 1st Respondent submits that both the National Land Commission and the County Assembly of Kericho are listed as Interested Parties and yet the ex parte Applicants are seeking substantive orders against them.
17. The 1st Respondent also submits that for instance, the ex parte Applicants are seeking orders of mandamus to compel the 1st Interested Party to debate on the issue of the decision of the sale and disposal of shares and yet it is listed as an Interested Party.
18. The 1st Respondent relies on the judicial decisions of Florence Nafula Ayodi & 5 Others vs Jonathan Ayodi Ligure v John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 Others (Applicants/ Intended Interested Parties) [2021] eKLR, Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others [2015] eKLR, Njeru & another v Nyakundi (Civil Appeal E021 of 2021) [2022]



- KEHC 13963 (KLR) (11 October 2022) (JUDGEMENT) and submits that an Interested Party cannot be directly involved in litigation and that orders would not issue against it.
19. The 1st Respondent therefore seeks that the Court finds that the ex parte Applicant's application for leave to file Judicial Review proceedings is untenable in law and should be struck out with costs.
 20. The ex parte Applicants on the other hand submit on the following issues;
 - a. Whether the 1st Respondent's application (sic) on the preliminary objection is merited.
 - b. Who should bear the costs of this application.
 21. With regard to the first issue, the ex parte applicants rely on the judicial decisions of Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others Civil. Appl No. 2 of 2011, Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969] EA 696 and submit that the 1st Respondent violated the principles set in Mukisa Biscuit case by failing to state the laws relied on in its objection and instead raised it at paragraph two of its submissions.
 22. The ex parte Applicants submit that the 1st Respondent's application is brought in bad faith and is frivolous and vexatious and only intends to mislead this Court.
 23. The ex parte Applicants therefore pray that this Court strikes out the 1st Respondent's preliminary objection with costs.

Analysis and Determination.

24. I have considered the 1st Respondent's Grounds of Opposition and the rival submissions. My view is that the only issue arising for determination is whether this court has jurisdiction to hear and determine this matter.
25. The crux of the 1st Respondent's Grounds of Opposition is that this Court does not have jurisdiction to hear the ex parte Applicant's application seeking leave to commence judicial review proceedings.
26. The 1st Respondent submits, first, that Judicial Review is not a relief that can be sought to compel, quash or prohibit commercial decisions between private entities.
27. Secondly, The 1st Respondent submits that the ex parte Applicants have not demonstrated how the sale and disposal of shares of the 1st Respondent constitutes a substantial transaction involving the conversion of public land to private land.
28. Thirdly, it submits that the public land allegedly occupied by them upon which the share transaction emanates from has not been identified.
29. In response, the ex Parte Applicants submit that the 1st Respondent's Grounds of Opposition are defective as they do not state the laws they rely on and they should therefore be struck out with costs.
30. As aforementioned, the ex parte Applicant filed the application dated 22nd May, 2023 seeking leave to commence judicial review proceedings and in response, the 1st Respondent filed a Replying Affidavit sworn by Simon Hutchinson on 13th February, 2024 and also filed Grounds of Opposition dated 12th February, 2024.
31. When the matter came up for directions on 15th February, 2024 the Court observed that the 1st Respondent's Grounds of Opposition attack the jurisdiction of this Court and gave directions that the Grounds of Opposition be dispensed with first; to the extent that it, by inference, raises the question of jurisdiction. I note that this was not expressly stated in the said Grounds of Opposition.



32. Order 51 Rule 14 of the Civil Procedure Rules provides as follows;

“ 14.

(1) Any Respondent who wishes to oppose any application may file any one or a combination of the following documents -

(a) a notice preliminary objection: and/or; Court.

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;...”

33. In the judicial decision of Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR cited by the Court of Appeal in Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR held as follows;

“Ground of Opposition which were filed are only deemed to address issues of law.

They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”

34. In the judicial decision of ARJ Capital Limited v Njeru & 3 others (Environment & Land Case E041 of 2022) [2024] KEELC 323 (KLR) (24 January 2024) (Ruling) the Court held as follows;

“Grounds of Opposition are to be deemed as general averments and do not deny or respond to issues in an application.”

35. As was held in the above cited judicial decisions, Grounds of Opposition are filed to address issues of law and are deemed to be general averments.

36. Upon further consideration of the 1st Respondent’s Grounds of Opposition, I find that they contain questions of fact. For example, ground (e), (f) and (k).

37. As observed earlier, there is already a replying affidavit filed in response to the ex parte application. My view is that it would be prudent and in the interest of justice to give consideration to the issues raised in the Grounds of Opposition (which are not entirely questions of law) when determining the ex parte Applicants application dated 22nd May, 2023.

38. Ordinarily, an application to institute Judicial Review proceedings is ex parte in nature. This Court thought it prudent to bring this application to the attention of the Respondents and once that was done, the question whether or not to grant leave should have been addressed in the responses by the Respondents. So far, only one party (The 1st Respondent) has filed a response.

39. The question of Jurisdiction is one among numerous questions for determination as it has come up, though not expressly, in response to the application dated 22nd May, 2023. My view is that whether or not this court has jurisdiction cannot be determined in isolation and by making inferences on the averments contained in the Grounds of Opposition.

Disposition.

40. Consequently, I order that the application dated May 22, 2023 proceeds to hearing. The parties minded to raise the question of jurisdiction are at liberty to expressly do so in their responses.



41. I further make orders as follows:

- a. The application dated May 22, 2023 shall be heard by way of written submissions.
- b. All parties shall file their responses and submissions to the said application within 30 days of the date hereof.
- c. The matter shall be mentioned on December 3, 2024 for submissions.
- d. Costs shall abide the outcome of the suit.

42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 24TH DAY OF OCTOBER, 2024.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Sawe for Obura for the 1st Respondent

The firm of Mitei Kirui for ex-parte Applicant. Absent.

Court Assistant; Mr. Joseph Makori

