Kamumo v District Land Adjudication and Settlement Officer Igamba Ng'ombe Sub-County & 2 others; Njeru (Interested Party) (Environment and Land Judicial Review Case E002 of 2024) [2024] KEELC 13296 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13296 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2024

CK YANO, J

NOVEMBER 20, 2024

BETWEEN

EPHANTUS NJUKI KAMUMO .... EXPARTE APPLICANT

AND

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER IGAMBA NG'OMBE SUB-COUNTY .... 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER .... 2ND RESPONDENT

THE HON ATTORNEY GENERAL .... 3RD RESPONDENT

AND

FESTUS NJUE NJERU .... INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted by the court on 17/1/2024, the ex-parte applicant filed the Notice of Motion dated 1st February, 2024 brough under Article 23 (3) (f) and 47 of *the Constitution* of Kenya 2010, Section 8 and 9 of the *Law Reform Act* Cap 26, Order 53 Rule 1 (1), (2) and 3 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law seeking for orders that:

   a. An order of certiorari be issued against the 1st and 2nd respondents quashing the decision of the findings of the Appeal Case No. 203 of 2019 and 163 of 2019 over land parcel No. Kamwimbi 'A' 632 and 1086 made on 15th August, 2023.

   b. A Judicial Review order of prohibition prohibiting the Respondents from proceeding with the execution of the foresaid decree until further orders of the court.

   c. Costs of the case be awarded to the Applicant.

2. The motion is grounded upon the matters set out in the statutory statement and verifying affidavit of the applicant dated 1st February, 2024 and the annexures thereto as well as the supplementary affidavit dated 17th August, 2024.

3. The Respondents filed grounds of opposition dated 22nd September, 2024.

4. The Interested party filed a Replying Affidavit sworn on 24th April, 2024.

The Applicant's Case

5. The applicant avers that land parcel Kamwimbi 'A' Adjudication Section Parcels No. 1086 and 632 are his lands that he purchased from the Mbuya Clan and has been utilizing since 1978. The Applicant attached a copy of the sale agreement marked ENK-1.

6. The Applicant states that he was the beneficial owner/proprietor of the suit lands which were illegally awarded to the interested party.

7. The Applicant avers that he lodged a case at the adjudication and settlement office along with Objection Nos. 669, 864 and 168 (with regard to parcel No. 632) and Objection Nos. 670 and 551 (with regard to parcel No. 1086) whereby the Land Adjudication and Settlement Officer held that the interested party is entitled to the suit lands and unprocedurally awarded the same to him. That the Land Adjudication and Settlement Officer held that the interested party is entitled to both land parcels Nos. 1086 and 632 Kamwimbi 'A' Adjudication Section and unprocedurally awarded the same to him. The Applicant attached a copy of the Objection proceedings marked ENK-2.

8. The Applicant states that being aggrieved by the decision to award the suit property to the Interested Pary, which decision was unfair, he lodged an appeal to the Minister for Lands and Physical Planning as provided under Section 29 of the *Land Adjudication Act*. The Applicant attached a copy of the appeal proceedings for both cases marked ENK-3. The applicant avers that the proceedings before the Minister were flawed with gross irregularities and un-procedural conducts by the panel sitting in Appeal to the Minister Case No. 203/2019 and 163/2019 thus arriving at an unjust and unfair decision. That at the time of the hearing, the 2nd Respondent clearly misunderstood and ignored the fact that the interested party herein claimed he belonged to Mbuya Clan yet the Respondent proceeded and awarded him the suit lands claiming that he belonged to the Nyonga clan. The Applicant attached a copy of the Minister's decision for both cases marked ENK-4. The applicant contends that the interested party gave false testimony to the effect that he belonged to Mbuya Clan yet his own witness Misheck Nyaga contradicted that testimony by stating that he belonged to Nyonga Clan. That the Interested Party's incessant claims to belong to Mbuya Clan is based on gluttonous reasons of wanting to dispossess the applicant of his parcel of land.

9. The Applicant avers that the 2nd respondent did not have a proper grasp of the facts of the case and only relied on the evidence of the interested party but did not consider the suit on its facts and merits. That the interested party is of the Nyonga Clan which is under Kamwimbi "B" Adjudication Section yet he falsely alleges to be from the Mbuya Clan.

10. The Applicant states that the interested party's evidence that the land parcels were part of their Clan land is not true since he hails from Kamwimbi "B" Adjudication Section and not Kamwimbi "A" Adjudication Section where the suit lands are located. That that narrative was not supported by any evidence since he could not account for any of his relative who might have come back and or been buried on the same suit lands.

11. The Applicant avers that the 2nd respondent ignored the testimony of the interested party's own witness who admitted that the suit lands belong to the Applicant and not the interested party.

12. The Applicant states that the findings by the 2nd respondent that he visited the suit lands is not true as alleged, and that, that alone invalidates the credibility of his judgment. Further that there is nothing on record that shows that he visited the suit lands.

13. The Applicant contends that the 2nd Respondent completely ignored his evidence, including the area chief's letter which indicated that the witnesses the Interested party relied on are from Nyonga Clan in Mbeere District, Embu County. The Applicant attached a copy of the chief's letter marked ENK-5.

14. The Applicant contends that the 2nd respondent's judgment and findings was not based on any particular evidence except the contradictory and untrue statements of the interested party and his witnesses.

15. The Applicant further avers that the 2nd respondent refused to hear his witnesses without any justifiable cause and/reasons even though he had brought them before him to be heard.

16. The Applicant states that the 2nd respondent did not consider that the applicant had legally acquired the suit lands by purchase and had been allocated parcel number 632 in which he was registered as the proprietor. That the 2nd respondent did not give any particular reasoning behind his decision of awarding the Interested Party with the portion of the suit Parcels of Land even though all the evidence produced before him was inconsistent and false. The applicant states that neither the Interested Party nor any of his family members have ever lived on the suit lands. He states that he lays claim on the suit lands through purchase which is supported by evidence.

17. The Applicant states that the interested party's claim that the suit land is ancestral cannot be traced or confirmed in any way. That the 2nd respondent's decision was inconsistent with the evidence produced before him and therefore his findings were unfair, marred with gross irregularities and therefore leading to unjust decision and findings.

18. The Applicant further contends that the action of the 2nd respondent of not affording him a fair hearing is illegal, actuated with malice, unreasonable and biased. That the 1st and 2nd Respondents breached their obligations and the duty to act fairly.

19. The Applicant avers that unless the Court intervenes and upholds the law and *the constitution*, injustice shall be occasioned to him and his family. That it is therefore in the interest of justice that the orders sought herein be granted.

The Respondents' Case

20. It is the Respondents' case that the application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore unsustainable in the obtaining circumstances. That judicial review proceedings purely deal with the procedure and process of decision making and not the merits and/or substance of the case, but in this case, the Applicant is seeking that the court determines the merits of the decision. That the Application is bad in Law and only meant to defeat the cause of justice and is otherwise frivolous, vexatious and an abuse of the court process and therefore ought to be dismissed with costs.

The Interested Party's Case

21. The interested party avers that he is the legal owner of parcel numbers 1086 and 632 the subject of these proceedings and the proceedings before the minister. That the initial parcel of land was number 632 and subsequently number 1086 was created therefrom following a decision of the Arbitration Board.

22. The interested party states that whereas the exparte applicant's principal contention is that he purchased the parcels of land in dispute in 1978, the minister's delegate who is the Deputy County Commissioner was categorical in his decision that the sale agreement produced in evidence did not properly describe the location of the parcel of land alleged to have been purchased. That interestingly, the exparte applicant has in the present proceedings produced a sale agreement allegedly translated by one Mwenda F. on 22nd October 2023. That the alleged translation was designed for purposes of these judicial review proceedings and could not have been possibly availed to the minister at the time of the hearing of the appeal. The interested party contends that the introduction of the translated version in the instant proceeding is irregular and against the rules of procedure. That in fact the possibility of mischief on the part of the exparte applicant cannot be ruled out.

23. The interested party contends that the entire application is bad in law and fatally defective for failure to adhere to the principles governing the institution of judicial review proceedings. That for instance, it has not been demonstrated that the proceedings before the minister suffered any procedural impropriety or deficiency.

24. The interested party states that allegation that the exparte applicant's witness were not accorded an opportunity to be heard is not supported by the evidence on record as it is clear that they did not only testify but also subjected to cross examination. That further, the exparte applicant seems to dwell on disputed issues of fact whereas he had the legal duty to prove his case to the required standard which he unfortunately did not.

25. The interested party avers that whereas there is no legal obligation cast upon the minister to make a physical visit of the disputed portions of land, there is evidence that a visit was conducted in which it was found that the exparte applicant's occupation could not be established on the ground. That having participated in the proceedings before the minister, the allegations tendered against the 2nd respondent are false and baseless as the proceedings were conducted fairly with each party being accorded sufficient and ample time to put forth their case.

26. The interested party prayed that the suit be dismissed with costs.

27. Pursuant to directions given by the court, the parties consented to canvassing the application by way of written submissions. The applicant filed his submissions through the firm of B. Musili Advocates while the Respondents filed theirs dated 27th September, 2024 through the Honourable Attorney General and the interested party filed his dated 24th September, 2024 through the firm of Basilio Gitonga, Muriithi & Associates Advocates.

Ex-parte Applicant's Submissions

28. The Applicant submitted that the advent of *the Constitution* 2010 gave judicial review Constitutional underpinning, and specifically the provision in Article 47. The Applicant cited Section 7(2) of the *Fair Administrative Action Act* which provides for ground of review which include bias, procedural impropriety, ulterior motive, failure to consider relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power. The Applicant relied on the

case of Republic Vs. Unclaimed Financial Assets Authority; Cabinet Secretary, Treasury & 2 Others [2022]KEHC12435 (KLR)

29. The Applicant submitted on the scope of judicial review and stated that judicial review has been resolved through a myriad of decisions which have held again and again that Judicial Review is concerned with the decision-making process and not with private rights or merits or the decision being challenged. The Applicant relied on the cases of Pastoli Vs. Kabale District Local Government Council and Others (2008) 2 EA 300 and Isaac Gathungu Wanjohi & Another Vs. Director of City Planning of Nairobi & Another [2014] eKLR.

30. The applicant submitted that with the ratification of *the Constitution* of Kenya in the year 2010, it was emphasized by the Court of Appeal in Suchan Investment Limited Vs. Ministry of National Heritage & Culture & 3 Others (2016)KLR that Article 47 of *the Constitution* as read with the grounds for review provided by Section 7 of the *Fair Administrative Action Act* brings forth new jurisprudence in judicial review in that judicial review henceforth included aspects of merit review of administrative action. That however, the reviewing court has no authority to substitute its own decision for that of the administrator.

31. The Applicant submitted that the sitting panel failed to consider the relevant considerations. It was submitted that during the hearing of the Appeal to the Minister Case, the Applicant presented the very evidence that was critical to him being awarded the parcel of land by the adjudication officers when they began the adjudication process. That the very same piece of evidence which is an agreement translated to the language of the Honourable Court was not taken into consideration when arriving at the impugned decision. The Applicant relied on the case of Republic Vs. Unclaimed Financial Assets Authority; Cabinet Secretary, Treasury & 2 Others (2022) HEHC 12435 (KRL).

32. The Applicant further submitted that the sitting panel as well the visiting panel acted unreasonably by failing to consider the relevant considerations as presented before them such as the record of proceedings and sale agreement marked ENK-1 that indicated that the applicant purchased the suit parcels of land from the Seller who is of the Mbuya clan. That it suffices that a person of Nyonga (the interested party) clan or any other clan, cannot lay ancestral claim to the suit parcels of land. That the 2nd respondent ignored the testimony of the interested party's own witness Mischeck Nyaga who admitted that the suit lands belong to the Applicant and not the interested party, and testified that the Interested Party belonged to the Nyonga Clan. The applicant argued that the 2nd respondent completely ignored the applicant's evidence including the area chief's letter which indicated that the witnesses who the Interested Party relied on are from Nyonga Clan in Mbeere District, Embu County. The applicant submitted that from the foregoing, it is very clear that the relevant considerations were not taken into consideration when arriving at the impugned decision. The applicant relied on Kenya Revenue Authority & 2 others Vs. Darasa Investments Limited [2018] eKLR and submitted that due process and rules of natural justice demand that a party is given an opportunity to present their case on a given matter and that such representation are given due consideration before a final decision is made by the decision-making body.

33. The Applicant also submitted on procedural impropriety and relied on the case of Zachariah Wagunza & Another Vs. Officer of the Registrar, Academic Kenyatta University & 2 Others (2013)eKLR in which the court reiterated the grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of Pastoli Vs. Kabale District Local Government council and Others (2008) 2 EA 300.

34. The Applicant submitted that he was not involved in the site visit of the suit parcel of land. He stated that there is no record of him being present in the proceedings of the site visit. That he was denied the

only opportunity he had to point out the location of his parcel of land to the sitting/visiting panel. Further, that he was denied the only opportunity he had to point out and identify the boundaries to his parcel of land as captured in the sale agreement. He argued that that was outrightly unfair treatment and bias which is contrary to the tenets of natural justice. The Applicant relied on the case of Onyango Oloo Vs. Attorney General.

35. It was submitted that it matters not that the same decision would have been arrived at as ignoring the representations by the applicant is in complete derogation of the applicant's right to fair administrative action as provided in Article 47 of *the Constitution*. That the failure to put into account the applicant's representations means that the respondent's agent failed to consider relevant matters. That the process and the impugned decision fail the test of procedural propriety and the same offends the provisions of Section 7(2) (c), (f) and (n) of the *Fair Administrative Action Act*. The Applicant relied on the case of Msagha Vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] KLR.

36. Regarding the translation of the agreement dated 11th November, 1978 and 25th November, 1978 to the language of the court, it was submitted that Article 7 of *the Constitution* of Kenya provides for the National and Official Languages of the Republic of Kenya. That the official languages of the Republic are Kiswahili and English and that the *High Court (Organization and Administration) Act* 27 of 2015 and rule 44 of the same Act provides that English and Kiswahili are the official Languages of the Court.

37. On the burden of proof the applicant relied on the case of M'Bita Ntiro Vs. Mbae Mwirichia & Another (2018)eKLR and submitted that he has provided sufficient evidence to support the allegation of bias, procedural impropriety, failure to consider relevant considerations, unfair treatment and that as per Section 107 of the *Evidence Act*, (Cap 80), it is a cardinal principle of law that he who alleges a fact must prove it. The applicant submitted that he has demonstrated that the impugned decision was arbitrary, irrational and unreasonable as the same was arrived at after a hearing conducted in a manner that did not observes the rules of natural justice and adheres to the rule of law. That he has also demonstrated that part of the respondent's decision did not resonate with the evidence placed before it.

Respondents' Submissions

38. The respondents identified two issues for determination, namely, whether the impugned decision was arrived at in the manner envisaged by the law and whether the judicial review remedies of Certiorari and Prohibition are available to the Applicant. Regarding the first issue, the respondents pointed out that the ex-parte Applicant seeks orders of Judicial Review in the nature of Certiorari against the decision of the Proceedings to the Minister Appeal No. 203 of 2019 and 163 of 2019 in respect of land parcel number 632 and 1086 Kamwimbi "A" Adjudication made vide the ruling delivered on the 15th August, 2023.

39. It is the respondents' submission that the order of Certiorari is now well established that the said order only issues if the decision being challenged was made without or in excess of jurisdiction or where the rules of natural justice were not complied with. The respondents relied on the case of *Kenya National Examination Council Vs. Republic Ex-parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996*.

40. The respondents pointed out that it is necessary to examine whether in the delivery of the impugned ruling, the Respondents acted with the authority granted to them by the *Land Adjudication Act*, Cap 284 and observed the rules of natural justice. It is their submission that it is not in dispute that the *Land Adjudication Act*, Cap 284 provides for the delegation of powers by the Cabinet-Secretary in-charge of Lands to hear and determine appeals. The Respondents cited Section 29(4) of the said Act. It is also the respondents' submission that it is equally not in contention that pursuant to the above

referenced provision, the norm has been that the Minister in-charge of lands would delegate its powers and functions to hear appeals to the holders of the office of the Deputy County Commissioner as seen in the case of Republic Vs. Cabinet Secretary, Ministry of Lands and Settlement & 2 Others Ex-Parte Gerald Mbuuri Kabugu [2018]eKLR.

41. The respondents pointed out that in the instant case, the ex-parte Applicant alleges that the impugned decision was marred by illegality and procedural impropriety. The respondents submitted that in contrast, the Adjudication Section that is subject of this suit underwent all the adjudication process in accordance with the provisions of the *Land Adjudication Act*. The respondents contend that the appeal process was undertaken lawfully. It is the respondents' submission that the impugned decision in the appeal to the Minister's case was arrived at after due consideration of evidence tabled before the decision makers, as such, they submit the DCC was statutorily mandated to issue the impugned decision which was legal and procedurally proper.

42. With regard to the issue as to whether the rules of natural justice were observed, the respondents relied on the case of Republic Vs. County Director of Education, Nairobi & 4 Others Ex-Parte Abdukadir Elmi Robleh [2018] eKLR in which the court cited with approval the case of Msagha Vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 (HCK) [2006] 2 KLR 553 and submitted that the impugned ruling was compliant with the rules stated therein. The respondents submitted that the ex-parte Applicant was given an opportunity to participate in the appeal proceedings. That a cursory look at the copy of the Minister appeal proceedings will reveal that the ex-parte Applicant, as the Plaintiff, participated in the appeal process on the 15th August, 2023.

43. The respondents further submitted that no evidence was brought by the ex-parte Applicant of any interest, conduct or association of the Respondents as the primary decision maker, which would lead to a likelihood or apprehension of bias in favor of the Interested Party.

44. The respondents also submitted that the impugned decision was indeed based on evidence that was material. They noted that it referred to the testimonies given by various participants during the Minister appeal proceedings as well as a site visit. In light of the foregoing, the respondents urged the court to find that the rules of natural justice were adhered to and as such, the ex-parte Applicant's right to fair hearing was never controverted. Equally, they invited the Court to find that the Respondents arrived at the impugned decision in a lawful and legal manner.

45. On whether the judicial review remedies of Certiorari and Prohibition are available to the applicant, the respondents contend that judicial review proceedings purely deal with the procedure and process of decision –making and not with the merits and/or substance of the case. The respondents relied on the case of Republic Vs. Director of Immigration Services & 2 Others Ex-parte Olamilekan Gbenga Fasuyi & 2 Others (2018)eKLR. The respondents contend that the ex-parte Applicant, being aggrieved by the decision of the Deputy County Commissioner, through this judicial review proceeding intends that this court delves into the substance of the Appeal proceedings and review the evidence. They argue that although the application purports to call into question the process adhered to in arriving at the decision, the same is a disguised attempt to revisit the merit of the decision. The respondents submitted that all parties, including the ex-parte applicant were afforded an opportunity by the Respondents to present their respective cases.

46. It is the respondents' submission that owing to the serious nature of judicial review orders, it is not enough for the Ex-parte Applicant to claim that the Deputy County Commissioner acted illegally, unreasonably or in breach of rules of natural justice. That the actual sins by the impugned office must be exhibited for judicial review remedies to be granted as demonstrated in the case of Republic Vs. Kenya Power & Lighting Company Limited & Another [2013]eKLR. The respondents also relied on

the case of East African Community Vs. Railways African Union (Kenya) and Others (No.2) Civil Appeal No. 41 of 1974 [1974] EA 425.

47. The respondents urged the court, in the exercise of its discretion, to find that the Ex-Parte Applicant has not provided sufficient grounds to warrant an award of Judicial Review remedies of Certiorari and Prohibition. It is the respondents' submission that the Ex-parte Applicant's Application does not satisfy the requisite threshold to warrant the Court's exercise of its discretion in favour of the applicant. The respondents urged the court to find that the applicant's claim is a challenge on the merits of the decision of the 1st Respondent concealed as one against the procedure adopted, adding that the instant Application lacks merit and should be dismissed with costs to the Respondents.

Interested Party's Submissions

48. The interested party submitted that the prayer for prohibition is not available to the Ex-parte Applicant for the reason that the Minister returned a negative verdict in the twin decisions. That the dismissal of the appeals technically means that there is nothing for the court to prohibit and therefore prayer (b) of the motion must fail.

49. With regard to the prayer for Certiorari, the interested party submitted on the purview of judicial review. The interested party relied on the case of Municipal Council of Mombasa Vs. Republic & Another [2002]eKLR in which it was held that judicial review is concerned with the decision making process, not with the merits of the decision itself. It was submitted that in the instant case, it is absolutely clear that Ex-parte Applicant's complaint stems from his dissatisfaction with the merits of the decision by the minister. That the claim is largely premised on disputed issues of fact particularly the question as to which clan the interested party belonged. The interested party submitted that the extraction of one's ancestry is a matter that goes to the merit of the decision and has nothing to do with the procedural conduct of the matter by the minister.

50. The interested party pointed out that the dispute before the minister revolved around the alleged purchase of the suit parcels of land by the Ex-parte applicant and not customary law. The interested party relied on the case of Republic Vs. Attorney General Ex-parte Dominic Mwendwea Muthuli; Julius Wambua Kanyenze (interested party) [2021]eKLR. It is the interested party's submission that the Ex-parte applicant is inviting the court to enter into the realm of an appellate court which is definitely outside the ambit of judicial review proceedings. That in any case, it is the Ex-parte Applicant that had the onus to prove his case before the Minister and not the Interested Party.

51. Regarding the ex-parte applicant's contention that the Deputy County Commissioner did not visit the locus in quo and that there is no evidence that he did so, it was submitted by the interested party that there is no legal requirement for the minister to visit the suit land when determining an appeal. The interested party relied on the case of Matwanga Kilonzo Vs. District Commissioner, Kitui & Another [2021]eKLR.

52. With regard to the applicant's complaint that the Deputy County Commissioner declined to hear his witnesses and that his decision was not premised on any evidence, the interested party submitted that whereas that would constitute a valid argument requiring the intervention of the court, the proceedings of the deliberation before the minister demonstrate that the parties and their witnesses were accorded an opportunity to tender their evidence and be cross examined. Further that it is evident that the Deputy County Commissioner carefully considered all the testimony adduced prior to arriving at the reasonable decision. The interested party submitted that it is therefore false for the Ex-parte Applicant to allege that the 2nd Respondent did not accord him a fair hearing as a result of which he arrived at a malicious, unreasonable and biased decision. The interested party relied on the case of Republic

Vs. The Cabinet Secretary Ministry of Lands & Physical Planning, & 3 Others; Mitambo (exparte); Njiru (interested party) [2022] KEELC 3255 eKLR and urged the court to find that the allegations are without basis.

53. The interested party stated that the applicant's appeal was based on an alleged purchase of the suit properties. That it is apparent that he produced a sale agreement which the Deputy County Commissioner considered and determined that it lacked material particulars especially on the description of the land. That the decision of the minister having been delivered on 15th August, 2023, it is without dispute that the translated version of the agreement filed in this case was not produced in those proceedings as it is said to have been authored on 22nd December, 2023. That the said document is hence irregularly introduced in these judicial review proceedings having not formed part of the evidence in the impugned proceedings.

54. The interested party submitted that the notice of motion application as drafted is fatally defective for the reason of not containing grounds upon which it is predicated and offends the provisions of Order 51 Rule 4 of the *Civil Procedure Act*. The interested party submitted that the Application lacks merit and prayed that the same be dismissed.

Analysis And Determination

55. I have considered the pleadings, the legal and statutory authorities and the written submissions filed. The issues that call for determination are:

    i. Whether the Respondents exercised their statutory duties as envisaged in the law.

    ii. Whether the orders of Judicial Review are available.

56. It is trite Law that the purview of judicial review proceedings concerns itself with the procedure applied in arriving at the impugned decision and not the merits of the decision. The court will therefore confine itself with the decision-making process and not the merits of the decision.

57. In the case of Republic Vs. Kenya National Examination Council Ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997]eKLR, the Court of Appeal stated inter alia:

> " That an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of judicial review is not concerned with the merits of the case, but the decision-making process. In order for an applicant to succeed in an application for judicial review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal...."

58. In the case of Municipal Council of Mombasa Vs. Umoja Consultants Ltd. [2002]eKLR, the Court of Appeal held that:

> " Judicial review is not concerned with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself, such as whether there was or there was not sufficient evidence to support the decision".

59. I am therefore guided that in deciding the application herein, the court will not concern itself with the merits of the impugned decision. Instead, the court will decide whether the applicant has demonstrated that the decision-making process was tainted with illegality, whether the decision was made without jurisdiction, and whether the rules of natural justice were not adhered to.

60. Section 108 of the *Evidence Act* provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side while Section 107 puts the burden of proof on the person who desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he/she asserts.

61. In the case of M'Bita Ntiro Vs. Mbae Mwirichia & Another (2018)eKLR, it was held:

> "The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is proved by any law that the proof of fact shall lie on any particular person."

62. From the material on record, the applicant states that he was aggrieved by the decision to award the suit property to the Interested Party, which decision, according to him, was unfair. That he lodged an appeal to the Minister for Lands and Physical Planning as provided under Section 29 of the *Land Adjudication Act*. That the proceedings before the Minister were flawed with gross irregularities and un-procedural conducts by the panel sitting in appeal to the Minister Case No. 203/2019 and 163/2019 thus arriving at an unjust and unfair decision. That at the time of the hearing, the 2nd respondent clearly misunderstood and ignored the fact that the interested party herein claimed he belonged to Mbuya Clan yet the Respondent proceeded and awarded him the suit lands claiming that he belonged to the Nyonga Clan.

63. The Applicant further contends that the interested party gave false testimony to the effect that he belonged to Mbuya Clan yet his own witness Misheck Nyaga contradicted that testimony by stating that he belonged to Nyonga Clan. The Applicant states that the interested party's own witness, Misheck Nyaga, confirms averments of the Applicant that indeed the interested party belong to Nyonga Clan and not Mbuya Clan. That the 2nd respondent did not have a proper grasp of the facts of the case and only relied on the evidence of the interested party and did not consider the suit on its facts and merits.

64. From the above assertions, I am of the view that the applicant purports to call into question the merits of the decision and not the process adhered to in arriving at the decision and is a disguised attempt to revisit the merits of the decision. Indeed, the applicant is accusing the 2nd respondent for failing to have a proper grasp of the facts of the case and the evidence adduced.

65. The applicant complained that the 2nd respondent did not visit the suit lands as alleged and that that alone invalidates the credibility of his judgment and further that there is nothing on record that shows that he visited the suit lands. I opine that it is not mandatory for the 2nd respondent to visit the suit land since it is not a legal requirement.

66. The Applicant further complained that the Deputy County Commissioner declined to hear his witness. It is evident however, that all parties, including the ex-parte applicant were afforded an opportunity by the Minister to present their respective cases.

67. In my considered view, the process followed by the respondents throughout the appeal proceedings as well as the making of the decision were fair, objective and procedural. There was no evidence that the

2nd respondent did not allow the applicant's witness to testify during the proceedings before him. On the contrary and as evidenced by the proceedings, the applicant's witness took part in the proceedings.

68. In this case, the Applicant also argued that the 2nd Respondent completely ignored the applicants evidence including the area chief's letter which indicated that the witnesses the Interested Party relied on are from Nyonga Clan in Mbeere District, Embu County. It is clear from that assertion that the Applicant is challenging the merits of the case. As already stated, judicial review remedy is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision-making process itself. The role of the court in judicial review is supervisory, not an appeal. It has not been shown that the impugned decision herein was made contrary to the law or that the rules of Natural Justice were violated.

Whether the orders of Judicial Review are available

69. On the issue of whether the Ex-parte Applicant herein is entitled to the orders of certiorari and prohibition, it should be noted that the judicial review orders are discretionary. In the case of Zachariah Wagunza & Another Vs. Office of the Registrar, Academic Kenyatta University & 2 Others (2013)eKLR, the court reiterated the broad grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of Pastoli Vs.Kabale District Local Government Council and Others (2008) 2 EA 300, and observed among other things that:

> " In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires contrary to the provision of law or its principles are instance of illegality...
>
> Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision is usually in defiance of logic and acceptable moral standards.
>
> Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with unprocedural fairness towards one to be effected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."

70. Similarly, in the case of Republic Vs. Director of Immigration Services & 2 others Exparte Olamilekan Gbenga Fasuyi & 2 Others (2018)eKLR it was held that:

> " ...It is common ground that the prayers sought at Judicial Review remedies and the rules governing grant of judicial review orders so apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the high court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction-reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable

for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made not the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper and the decision is within the confines of the Law, a Court will not interfere."

71. In this case, the applicant alleged that the 2nd respondent's judgement and findings was not based on any particular evidence except the contradictory and untrue statements of the interested party and his witnesses. In my view, these allegations go to the merits of the case. This clearly spells out the issue is the decision and not the process.

72. The case of Commissioner of Lands vs Kunste Hotel Limited (1997)eKLR reiterated Lord Bright man's view and observed:

> " ...it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individuals is given fair treatment by the authority to which he has been subjected."

73. From the material on record, it is my finding that the process followed by the 2nd Respondent throughout the appeal proceedings as well as the making of the decisions were fair, objective and procedural. The Ex-parte Applicant's application lacks merit.

74. Consequently, the Notice of Motion Application dated 1st February, 2024 is dismissed with costs to the respondents and the Interested Party.

75. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF NOVEMBER, 2024.

Court Assistant – Mwangi

Ms. Kendi for Respondents

Ms. Musili for Ex-parte Applicant

Muriithi for Interested Party

C. K. YANO

JUDGE