



Karanja & 72 others v Attorney General & 3 others (Judicial Review Application E006 of 2024) [2024] KEELC 13218 (KLR) (Judicial Review) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E006 OF 2024**

MC OUNDO, J

NOVEMBER 14, 2024

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 27, 28, 41, 47, 48, 55 AND 259 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 AND IN THE MATTER OF ARTICLE 159 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF IMPLEMENTATION OF THE RECOMMENDATION OF THE AD HOC COMMITTEE ON NGATI FARM CONFLICTS ALTERNATIVE DISPUTE RESOLUTION

BETWEEN

PHILIP GITUNDU KARANJA & 72 OTHERS & 72 OTHERS & 72 OTHERS & 72 OTHERS & 72 OTHERS & 72 OTHERS APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY PLC 2ND RESPONDENT

LAND REGISTRAR, NAIVASHA 3RD RESPONDENT

COUNTY GOVERNMENT OF NAKURU 4TH RESPONDENT

JUDGMENT

1. Pursuant to the Leave granted by the Court on 28th February, 2024, the Applicants have now filed a Notice of Motion Application dated 16th March, 2024 brought pursuant to the provisions of section 3A of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 51 and Order 53 Rule (3) and (4) of the Civil Procedure Rules, 2010, Sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya and all enabling provisions of the law wherein they have sought the following orders:



- i. That the Honorable Court be pleased and do hereby grant judicial review order of mandamus directing the 1st and 4th Respondents to within 30 days, form a multi-agency team to oversee implementation of the recommendations of the Ad Hoc Committee on the Alternative Dispute Resolution on Ngati Farmers' Cooperative Society dated 23rd September 2020.
 - ii. That the Honorable Court be pleased and do hereby grant judicial review order of mandamus directing the multi-agency team to, within 90 days from the date of formation and/or establishment, publish a status report on the implementation of the recommendations of the Ad Hoc Committee on the Alternative Dispute Resolution on Ngati Farmers' Cooperative Society.
 - iii. That the Honorable court be pleased and do hereby issue a declaration that the sale process of the Applicants' land comprised in title no. L.R Narok/Maiela Estate No. 8398/2 to the 2nd Respondent was illegal and was tainted with irregularities and therefore null and void.
 - iv. That the Honorable court be pleased and do hereby grant judicial review order of mandamus directing the 3rd Respondent to cancel the title deed issued to the 2nd Respondent for title number L.R Narok/Maiela Estate No. 8398/2.
 - v. That the Honorable court be pleased and do hereby grant judicial review order of mandamus directing the 3rd Respondent to issue the Applicants title deeds for their respective portions of land comprised in title No. LR Narok/Maiela Estate No. 8398/2.
 - vi. Any other order that the honorable court will be pleased to issue in the circumstances.
 - vii. That costs be in the cause.
2. The said application was based on the grounds in the Statutory Statement together with the Supporting Affidavit of an equal date sworn by Philip Gatundu, one of the Applicants herein who gave a history of the Nga'ti Farmers' Cooperative Society Limited (Ngati Society) to the effect that it had been registered in the year 1964 with the objective of buying land and settling its members wherein it had bought three blocks of land with a total acreage of 16,708 acres being land reference Nos. Narok/Maiela Estates No. 1380 measuring 8,245 acres, Narok/Maiela Estate No. 8398 measuring 3,465 acres and Narok/Maiela Estates No. 2662 measuring 5000 acres. That the Applicants by dint of being shareholders of Nga'ti Society had balloted for and were entitled to 5.5 acres each per share out of the parcel of land known as LR Narok/Maiela Estate No. 8398/2 (suit property) wherein they had paid for the requisite survey fees of Kshs. 8000/= each to facilitate the sub-division of the said land.
 3. That despite this, the then Management Committee had proceeded to sell the land to KenGen, the 2nd Respondent herein without the members' involvement and consent, public participation, notices and resolution by the Ngati Society members to sell.
 4. That the minutes that the 2nd Respondent had also relied on allegedly giving consent to Ngati Management Committee to sell the suit property was misrepresentation of facts and therefore not valid.
 5. That it had been after chaos erupted when the members sought for accountability from the then officials, that the members of the Society petitioned the 4th Respondent and the National Government to intervene. Subsequently, the 4th Respondent had established an Ad Hoc Committee on Ngati Farm Conflicts Alternative Dispute Resolution to help the members of the Society adjudicate over their dispute of almost 20 years and realize their well-deserved right to access justice in respect of the mismanagement of the Society and illegal sale of the suit property to the 2nd Respondent.



6. That the said Ad hoc Committee on the Alternative Dispute Resolution on the Society had held lengthy public hearings, received submissions from all concerned parties including site visits and in conclusion made its findings in regards to the issues of conflict which had been communicated vide its report dated 23rd September, 2020.
7. That the purported sale of the Applicants' land comprised in the title number L.R 8398/2 to the 2nd Respondent had been illegal and fraught with irregularities for the following reasons;
 - i. That no resolute and or consent had been obtained from the Applicants to authorize and or validate the sale.
 - ii. That no public participation at all had been done prior to the acquisition as required by the Constitution of the Republic of Kenya 2010.
 - iii. That the National Land Commission had not been consulted and or involved in the entire process of the purported sale.
 - iv. That no notice had been issued to the Applicants by the 2nd Respondent of the intended acquisition.
 - v. That the purported sale had been predicated upon forged minutes of the Society where Mr. Muritu Surveyor who had been deceased by then was alleged to have attended.
8. That the 2nd Respondent had not obtained a good title to the Applicants' land and the same should be cancelled and or revoked by the 3rd Respondent. That the Respondents were yet to implement any of the recommendations and/or resolutions made by the Ad Hoc Committee to date.
9. That Ngati Farm being a volatile area, unless the court rose to the occasion to compel the Respondents to implement the recommendations of the Ad Hoc Committee on Ngati Farm Dispute resolution committee, the Applicants' right to access justice would continuously get impaired.
10. In response and in opposition to the Applicants' application, the 2nd Respondent vide its Replying Affidavit dated 7th June, 2024 sworn by Francis Kaloki, the 2nd Respondent's Acting Property Manager deponed that the 2nd Respondent was a Government Parastatal whose core business was developing, managing and operating power generation plants to supply electric power to the Kenyan market and, in the future to the East Africa region. That in order to fulfil the said mandate, the Government of Kenya had granted it Geothermal License to develop the Olkaria Geothermal Field, which had an estimated potential of 1,200 megawatts and Land Parcel No. 8398/2 (suit property) lay within the 2nd Respondent's geothermal license area.
11. That upon the 2nd Respondent securing the requisite funding for the development of the geothermal field, it had commenced extensive drilling activities within its Geothermal License area in the year 2006 and to date, the 2nd Respondent had drilled over 116 wells in the licensed area with a steam capacity of over 500 megawatts. That some of the said wells had been dedicated to the development of 280 MW of Olkaria 1 Unit 4 and Olkaria IV projects that had been commissioned in the year 2015. That the 2nd Respondent in the execution of its co mandate of power generation, had continued to conduct feasibility studies for geothermal resources within the licensed area hence they had amongst other properties identified the suit property then belonging to Ngati Farmers' Co-operative Society Limited as a suitable area for geothermal resource development. That the 2nd Respondent had previously purchased a parcel of land measuring 370 acres (part of the original plot L.R No. 8349) from Ngati



- Society to develop its Olkaria 1 Power Station, which had further affirmed the area's suitability as a geothermal resource.
12. That upon the 2nd Respondent's satisfaction on the viability of developing the geothermal resource on the suit property, it had decided to acquire the same wherein it had embarked on conducting the necessary due diligence and charting an acquisition road map including;
 - i. conducting an official title search at the Land Titles Registry at Ardhi House, Nairobi, and from the Search dated 24th April, 2013, it had been confirmed that Ngati Society was the registered owner of the property measuring approximately 3093 acres for a leasehold term of 983 years with effect from 1st January 1955 and that the property had no encumbrances.
 - ii. That given that the registered owner of the property was a Co-operative Society, the 2nd Respondent had conducted due diligence as to the office bearers of Ngati Society from the relevant authorities being the District-Co-operative's Officer, Naivasha as well as the Commissioner of Co-operative Development and Marketing, Nairobi.
 - iii. That concerning the authority to sell the suit land, the 2nd Respondent had been provided with a resolution passed during a special general meeting of Ngati Society that had been held on 11th November, 2011 authorizing the Chair and the Management Committee of Ngati Society to sell the suit property.
 13. That to date, the resolution dated 11th November, 2011 and the Management Committee's authority to sell the suit property were yet to be successfully challenged before any court. That subsequently, the 2nd Respondent had formally expressed interest in purchasing the suit land in which the Ngati Society had responded to by requesting a meeting to discuss the proposed purchase. That thereafter, parties had held several negotiation meetings, with each party engaging private and Government Valuers to inform their respective positions regarding the property's price. That at the negotiation meeting between the 2nd Respondent and Ngati Society teams held on 14th March, 2013, the parties had reached an agreement for the sale and purchase of the suit property at a price of Kshs. 505,000,000/= wherein a Sale Agreement had been prepared and duly signed by the parties' officials on 19th April, 2013.
 14. That pursuant to clause 3 of the said Agreement for Sale, a 20% deposit translating to Kshs. 101,000,000/= had been paid to Ngati Society on execution of the Agreement and the balance being 80%, which translated to Kshs. 404,000,000/= had been paid upon registration in strict compliance with clause 3.2 of the said Agreement wherein the suit property had been transferred to the 2nd Respondent and a title issued therein. That subsequently, once the 2nd Respondent had paid the total agreed purchase price and the suit property transferred in its name, the 2nd Respondent's title was indefeasible and the Certificate of Title was prima facie evidence that it was the absolute and indefeasible owner of the suit property.
 15. That it was after the purchase and transfer of the suit property to the 2nd Respondent that a section of Ngati Society members had commenced proceedings in Nakuru ELC Case No. 76 of 2016, Ngati Farmers' Co-operative Society & Others v KenGen & 9 Others, in which they had challenged the validity of the sale and transfer of the suit land to the 2nd Respondent. That however, the suit had been dismissed, by consent for want of prosecution on 15th October, 2020.
 16. That thereafter, another group of Ngati shareholders had attempted to commence Judicial Review proceedings in Judicial Review Application No. E004 of 2021 (Naivasha) Ngati Farmers' Co-operative Society & Another v The Attorney General, KenGen & 6 Others but on being granted leave to file



- substantive Notice of Motion, they had failed to do so and as a result, the said leave had lapsed by operation of law thus the proceedings had been struck out.
17. That subsequently, the instant Application was another attempt by a section of Ngati Society to frustrate the 2nd Respondent's effort to put the suit property to the noble use of generation of electricity to narrow the demand and supply gap in so far as the generation and consumption of electricity in Kenya was concerned.
 18. That the 2nd Respondent's purchase of the suit land had been above board, further, individual shareholders lacked the capacity to commence the instant proceedings against the 2nd Respondent with respect to the sale and purchase of the said suit property. That since Ngati Society was a limited liability company incorporated under the provisions of the Companies Act, pursuant to the elementary principle of company law in *Foss v Harbottle*, the proper party to a wrong done to a company was the company itself.
 19. The Applicants herein lacked the capacity to commence or prosecute the present proceedings unless leave to commence a derivative action under the provisions of Section 780 and 782 of the Company Act had been sought and granted. That further, under the provisions of Section 28 of the Co-operative Societies Act, only the Committee had the power to contract or institute proceedings on behalf of the Society since no individual member had such powers.
 20. That accordingly, without the aforesaid leave, the present proceedings herein were bad in law, an abuse of the Court process and specifically designed to frustrate the Olkaria project that was being implemented by the 2nd Respondent in the best interest of the nation.
 21. That in any case, the suit property having been sold, transferred and registered in the 2nd Respondent's name, the Ad Hoc Committee on Ngati Farm Alternative Dispute Resolution lacked jurisdiction to purport to hear a dispute over the sale and transfer of the same thus the purported Committee's recommendation had been without basis, null and void and incapable of implementation as sought by the Applicants herein.
 22. The only institution under the provisions of Article 162(2) of the Constitution with the jurisdiction of hearing and determining disputes relating to title to land was the Environment and Land Court thus the Ad Hoc Committee lacked jurisdiction. That the 2nd Respondent having fully paid the agreed purchase price to Ngati Society, the Ad Hoc Committee's ex-gratia compensation proposal had no basis whatsoever since it had violated the 2nd Respondent's rights under the provisions of Article 40 of the Constitution as it had amounted to taking the 2nd Respondent's property without justification and compensation.
 23. That subsequently, prayers (i) and (ii) of the Notice of Motion dated 16th March, 2024 were not available to the Applicants. Secondly, since Judicial Review remedy was not an appropriate remedy in matters where evidence was contested, prayers (iii) and (iv) of the application would also fail. That lastly, effect of prayer (v) would be to substitute Ngati's decision with the Court's decision which was not available since a court in a judicial review may not substitute the decision it was reviewing with its own decision.
 24. The 2nd Respondent thus urged the court to find that the substantive Notice of Motion dated 16th March, 2024 was without merits and to dismiss the same with costs.
 25. The 1st and 3rd Respondents also opposed the Applicants' Application and the Supporting Affidavit therein on the grounds that it was bad in law, misconceived, incompetent, a nullity and an outright abuse of the Court process there having been numerous cases filed by Ngati Farmers' Cooperative



Society (a co-operative society from which the Applicants herein were members) touching on the same subject matter but where there was no zeal to prosecute their cases to finality to this extent they gave examples as;

- a. Nakuru ELC 76 of 2016 wherein a section of the members of the cooperative society had challenged the sale and transfer of the suit land to KenGen. The case had been dismissed for want of prosecution on 15th October, 2020.
 - b. Nakuru ELC JR No. E004 of 2021 wherein some members sought the orders of mandamus to compel the Respondents to make payments of the compensation that was due. The 2nd Respondent's grounds of opposition had been dismissed in a ruling of 20th September, 2022 wherein no steps have been taken by members of Ngati Farmers' Co-operative Society to pursue their case.
 - c. Judicial Review Application in Naivasha ELCIJR/4/2024 Ngati Farmers' Cooperative Society v Office of the Land Registrar and Anti-Corruption Commission and 6 others which case had been dismissed/struck out on 13th May, 2024.
26. That secondly, the orders sought by the Applicants specifically the orders iii, iv and v were not available under Judicial review as the underlying dispute herein concerned the ownership of land which could not be addressed by way of Judicial Review since the court would require viva voce evidence for the Court to make a determination on conflicting issues of fact.
27. That further, Public Interest in the instant matter overrides private rights and lastly the Application was an abuse of precious judicial time the Applicants being members of Ngati Farm which had filed several cases that had been dismissed.
28. In a rejoinder, the Applicants filed a Supplementary Affidavit dated 24th June, 2024 sworn by Philip Gitundu, one of the Applicants herein, who deponed that the 2nd Respondent's failure to involve the National Land Commission which was the Government body mandated to acquire land for Government had rendered the entire process of the purchase of the suit property null and void and reiterated that the entire process of the purchase of the suit property by the 2nd Respondent had been irregular and fraudulent for reasons that the 2nd Respondent had failed and/or neglected to conduct due diligence to the required standard and they had not been aware of the sale of the suit property to the 2nd Respondent since there had not been a resolution authorizing the said sale.
29. That Ngati Cooperative Society was a cooperative society established under Co-operative Society Act Cap 490 and as such Section 780 and 782 of the Company Act did not apply to it. That they were not involved in JR No. E004/2024 (Naivasha) hence they should not be denied the opportunity to seek legal redress and finally the substantive motion in JR No. E004/2021 (Naivasha) was not heard and determined on merit.
30. The application was canvassed by way of written submissions wherein only the Applicants and the 2nd Respondent complied and filed their respective submissions as herein under summarized:

Applicants' Submissions.

31. The Applicants vide their written submissions dated 23rd July, 2024 first summarized the factual background of the matter and proceeded to frame their issues for determination as follows; -
- i. Whether the Honorable court should grant Judicial Review order of Mandamus directing the 1st and 4th Respondents to, within 30 days form a multi-agency team to oversee implementation



of the recommendations of the Ad Hoc Committee on the Alternative Dispute Resolution on Ngati Farmers' Cooperative Society dated 23rd September, 2020.

- ii. Whether the Honourable Court can issue a declaration that the sale process of the Applicants' land in title No. L.R Narok/Maela Estate No. 8398/2 to the 2nd Respondent was illegal, tainted with irregularities and therefore null and void.
 - iii. Whether the Honourable Court can grant the Judicial Review order of Mandamus directing the 3rd Respondent to cancel the title deed issued to the 2nd Respondent for title No. L.R Narok/Maela Estate No. 8398/2.
 - iv. Whether the Honourable Court can grant the Judicial Review order of Mandamus directing the 3rd Respondent to issue the Applicants title deed for their respective portions of land comprising title No L.R Narok/Maela Estate No. 8398/2.
 - v. Jurisdiction of the Ad Hoc Committee.
 - vi. Whether this suit is res judicata.
32. On the first issue for determination, the Applicants' submission was in the affirmative to the effect that both the 1st and 4th Respondents were bound to promote social justice, inclusiveness, human dignity, human rights, equity, equality, non-discrimination and protection of the marginalized pursuant to the provisions of Articles 10 and 259 of *the Constitution*. Reliance was placed on the decided case of Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR to submit that granting the order sought would promote the Constitutional values and principles, more precisely, the principle of social justice, good governance and inclusiveness. That the acquisition of the Applicants' land by the 2nd Respondent and as confirmed by the Ad Hoc Committee in their report, had been unlawful and marred with irregularities wherein the Applicants had been deprived of their land unjustly. That the formation of a multi-agency team to oversee implementation of the recommendations of the Ad Hoc Committee on the Alternative Dispute Resolution would go a long way in entrenching the aforementioned principles, peace and harmony.
33. That the Applicants had a legitimate expectation that once the Ad Hoc Committee was formed and having arrived to its finding and recommendation, the same was going to be implemented by the Respondents. Reliance was placed on the decided case of Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR to submit that the 4th Respondent had made a clear and unambitious representation by appointing the Ad Hoc Committee on Ngati Farm Conflicts Alternative Dispute Resolution. That the expectation was reasonable since it was induced by the 4th Respondent as a result of the known long-standing dispute that had affected the security and socio-economic lives of the Applicants as Ngati Society members.
34. On the second and third issues for the determination, the Applicants submitted that the sale process of their land in title No. LR Narok/Maiela Estate No. 8398/2, the suit property herein to the 2nd Respondent had been illegal, tainted with irregularities hence was null and void. That there was no due diligence by the 2nd Respondent who failed to validate;

-the forged resolution minutes dated 11th November, 2011 allegedly authorizing the Patrick Karanja led Management Committee to sell the suit property to the 2nd Respondent,

-the purported representation of one Mr. Muritu, a surveyor who was already deceased having passed away on 12th November, 2010,



-the signatures of the members who had purportedly attended the said meeting wherein it would have discovered that the minutes were a forgery.

35. That they had not been sufficiently compensated for the acquisition of their land whereby the illegal management committee led by Patrick Karanja Mwachuki had been charged in Naivasha CMCC CR Case No. 559/2016 for conspiracy to defraud them of the proceeds of the sale of suit property.
36. That since the 2nd Respondent and the illegal management committee had colluded to fraudulently transfer the suit property without following the due process of the law, it would be in the interest of justice to declare the sale process of the suit property as illegal, in order to protect and advance the Applicants proprietary rights.
37. That the fact that the sale process of the suit property had been marred with irregularities, the illegal management committee thus had no good title to pass to the 2nd Respondent.
38. That pursuant to the provisions of Section 27 of the *Co-operative Societies Act*, no meeting was ever held giving consent to Ngati Management Committee to sell the suit property. That an order of Mandamus thus be issued directing the 3rd Respondent to cancel the title deed issued to the 2nd Respondent to remedy the Applicants against the injustice.
39. On the fourth issue for determination, their submission was that having balloted for the suit property on 16th December 2011, and having subsequently paid a survey fee of Kshs. 8,000/= each, accordingly a resolution had been made prior on 11th November, 2011 to have the suit property sold to the 2nd Respondent which meant that the land could not have been available for balloting on the 16th December, 2011.
40. That whereas the suit property at the time of the sale process had been registered in the name of Ngati Co-operative Society, the Applicants had a collective ownership stake through their shares hence an order of Mandamus directing the 3rd Respondent to issue the applicants with title deeds for their respective portions of land comprising title No. LR Narok/Maiela Estate No. 8398/2 would be appropriate or in the alternative, a compensation to the Applicants loss of land based on the current market value would suffice.
41. On the fifth issue for determination, the Applicants argued that the Ad Hoc Committee on the Alternative Dispute Resolution on Ngati Farmers' Cooperative Society had jurisdiction to investigate into the Ngati Farm land related disputes and conflict and come up with recommendations. Reliance was placed in the decided case of Patrick Karanja Mwachuki & 2 Others v Governor Lee Kinyanjui & 2 Others; Ngati Farmers' Cooperative Society (interested party) eKLR (sic).
42. On the sixth issue for determination as to whether the instant suit was res judicata, the Applicants response was in the negative for reasons that they had not been parties to the suits that had been mentioned in the 1st and 3rd Respondents' Grounds of Opposition and further that the said cases were never heard and determined on merit. In conclusion, they urged the court to grant them the orders sought in their substantive motion dated 16th March, 2024.
43. The 2nd Respondent vide its submissions dated 17th July, 2024 also summarized the factual background of the matter before submitting that the that traditionally the nature and remedy of judicial review was a procedure used by courts to supervise the exercise of public power as a means in which improper exercise of such powers could be remedied. That subsequently, the remedy was concerned with reviewing the processes of decision-making but not the merit of the decision. Reliance was placed in the decided case of Republic v Judicial Service Commission of Kenya exparte Pareno (2004) 1 KLR 203.



44. That this position had since shifted following the promulgation of *the Constitution* of Kenya 2010 and upon the enactment of the Fair Administrative Actions Act. It placed reliance on the Supreme Court of Kenya's decision in the case of *Saisi & 7 Others v Director of Public Prosecution & 2 Others* [2023] KESC 6 (KLR) to submit that whereas some measure of merits may be considered in judicial review proceedings, the intention for considering such merits was not to transform judicial review into a full-fledged inquiry into the merits of a matter based on disputed facts or evidence. That the merits of a case were based analyzed in a trial or on appeal after hearing testimony, cross-examining witnesses and examining evidence.
45. That the issues raised in the instant case related to the sale and transfer of LR No. 8398/2 (Suit property) by Ngati Society to the 2nd Respondent which issues were based on highly contested or disputed facts or evidence and therefore, judicial review was not appropriate in the circumstances.
46. On the prayers in (i) and (ii) of the substantive motion, the 2nd Respondent submitted that there had been no evidence of the existence of the said Ad Hoc Committee. That the report had not been published in the Kenya Gazette for the court to take judicial notice under the provisions of Section 60 of the *Evidence Act* and further that they are needed be evidence produced prove the said report as required by the law. Reliance was placed in the decided case of *Kenneth Nyaga v Austin Kiguta & 2 others* [2015] eKLR .
47. That it was not in dispute that on 12th October, 2018, the then Governor of Nakuru County, Hon Lee Kinyanjui, had appointed an Ad Hoc Committee whose terms of reference had included establishing the status and processes of transaction in which the suit property had been sold to the 2nd Respondent. That the said Ad Hoc Committee in its report at page 79 had determined that whereas the sale process of the suit property to the 2nd Respondent had not been above board, being fraught with irregularities, the 2nd Respondent being a public entity and the investment on the suit property being beneficial to the public including the Ngati members, it would not be in the interest of the public good to cancel the sale. That the Committee had thus recommended that the bonafide Ngati Society members be fully compensated by the 2nd Respondent on an ex-gracia basis.
48. That the Ad Hoc Committee had also established that after selling the suit property to the 2nd Respondent, Ngati Society had distributed the amount that had been received to its members and therefore the Applicants, having pleaded to be members of the Ngati Society, it implied that they had been recipients of the purchase price of the suit property.
49. The 2nd Respondent referred to the decided case of *Owners of Motor Vessel "Lilian S" v Caltex Kenya Civil Appeal No. 50 of 1989*, to submit that whereas it had conceded that at the time the Governor of Nakuru County appointed the Ad Hoc Committee, the suit property had already been registered in favour of the 2nd Respondent, thus its right to the said property had crystalized and the pursuant to the provisions of Article 50 of *the Constitution*, the Ad Hoc Committee did not fit the definition of a court or an independent impartial tribunal envisaged under the said provisions and therefore had no jurisdiction over the registered parcel of land which was the preserve of the Environment and Land Court pursuant to the provisions of Article 162 (2) of *the Constitution*. That the recommendations in paragraph 79 of the Ad Hoc Committee report were therefore null and void for being made without jurisdiction. Reliance was placed in the decided case of *MacFoy v United African Ltd* (1961) 3 ALL ER 1169 at 1172.
50. That whereas Ngati Society was established under the *Companies Act*, it was licensed under the *Co-operative Societies Act* thus any dispute between its members or members and management ought to



have been referred to the Co-operative Tribunal under Section 76 and 77 of the *Co-operative Societies Act* and not to an Ad Hoc Committee established by the Governor.

51. That parties were bound by their pleadings thus the phrase ‘the Applicants land comprised in title No. LR Narok/Maiela Estate No. 8398/2’ employed in prayer (iii) of the instant Motion had signified that the suit property had been registered to the 2nd Respondent. That accordingly, the Applicants were bound to tender evidence before the court to demonstrate that the suit property had been registered in their names as pleaded before the same had been transferred to the 2nd Respondent. Reliance was placed on the provisions of Section 107 of the *Evidence Act*, decided case in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR and Murphy on Evidence 11th Edition which cited the House of Lords in Re B (Children) FC 2008 UKHL 35 to submit that in the instant case, there had been no evidence whatsoever that the suit property had been registered in the Applicants’ names but had been registered in the name of Ngati Farmers’ Co-operative Society Limited, a limited liability company separate from the Applicants in the present case, before the same had been transferred to the 2nd Respondent. It thus submitted that the allegation that the suit property had been the Applicants’ property had no basis whatsoever. That whereas the Applicants had alleged that they ought to have been consulted yet legally, a cooperative society transacts through its officials which was done in the instant case where the Ngati Society’s officials who had transacted on its behalf had been referred to as the ‘Directors of Ngati Farmers’ Co-operative Society Limited’ in the Charge Sheet dated 5th April 2016.
52. That judicial review proceedings were not appropriate where issues of facts and evidence were highly contested further, the 2nd Respondent having purchased the suit property over 10 years ago, pursuant to the provisions of Section 4(2) of the *Limitation of Actions Act* the Applicants had 3 years within which to bring a claim based on the tort of fraud. The three years had lapsed and the court lacked jurisdiction to entertain the dispute based on the alleged fraud. Its reliance was placed on a combination of decisions in the case of Edward Moonge Lengusuranga v James Lanaiyara & another [2019] eKLR and Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2021] eKLR.
53. That the sale and transfer of the suit property had been pursuant to a contract between the 2nd Respondent and Ngati Farmers’ Co-operative Society Limited where the Applicants had not been parties to the said Agreement for Sale, thus pursuant to the doctrine of privity of contract, they had no locus standi to sue the 2nd Respondent over the said sale and transfer. Reliance was placed on Chitty on Contract 2004 Edition and the decisions in the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR among others to submit that the Applicants were strangers to the sale agreement and had no locus to sue on the same, hence the prayer for cancellation of the 2nd Respondent’s title was without merits.
54. That whereas Ngati Farmers’ Co-operative Society Limited was a limited liability company which had sold the suit property to the 2nd Respondent, to date, no court proceedings or determinations had found its officials to have had no power or capacity to transact in the sale agreement for and/or on behalf of Ngati Society, and them not being parties to the instant proceedings, the legality or otherwise of the transactions executed by the said officials could not be discussed in their absence. That in any event, the court lacked jurisdiction to interrogate their actions in relation to the sale and transfer of the suit property to the 2nd Respondent.
55. That internal wrangling within the Ngati society over management were not the concern of outsiders like the 2nd Respondent, thus it could not be the basis upon which the transaction between Ngati Society and the 2nd Respondent should be cancelled. Reliance was placed in the decided case of Florence Mwangi & Another v British American Insurance Company Limited & Another [2010] eKLR to



- submit that the 2nd Respondent was only required to identify the society's registered officials when transacting with the Ngati Society. That the sale between Ngati Society and the 2nd Respondent had met the threshold of a legally binding agreement and no evidence to the contrary had been adduced.
56. The Applicant's herein being members of the Ngati Society, the dispute between them and their officials ought to have been referred to the Co-operative Tribunal as the court did not have jurisdiction to entertain disputes emanating from cooperative societies since jurisdiction was conferred by *the constitution* or the statute. On the jurisdiction to inquire into the powers of the management committee. Reliance was placed on the provisions of Section 77 of the *Co-operative Societies Act*. That the prayers sought in (iii) and (iv) should fail.
57. That prayer (v) was not available to the Applicant because the same would require the court to do a thorough review of the merits of the issues through a full trial. That the purported bundles of ballots and payment receipts were neither authenticated nor were they certified copies and therefore did not amount to proof of contested issues in the present matter. Reliance was placed in the Kenneth Nyaga Mwige's case (supra) to submit that the membership question and alleged payment had not been proved.
58. That cancellation of the 2nd Respondent's title to the suit property could only be done pursuant to the provisions of Section 26 (1) of the *Land Registration Act* wherein in the instant case, fraud had yet to be pleaded and proved against the 2nd Respondent in obtaining the title to the suit property. The instant proceedings did not meet the threshold for cancellation of the 2nd Respondent's title to suit property. Reliance was placed on the definition of fraud in the Black's Law Dictionary 11th Edition and the decided case of Vijay Morjaria v Nansingh, Madhusingh Barbar & Another [2000] eKLR.
59. The 2nd Respondent also placed reliance in the Saisi Case (supra) to submit that by directing the 3rd Respondent to issue titles to the Applicants as sought out in prayer (v) herein, the court would be substituting the decision it is reviewing with its own wherein it lacked such jurisdiction in judicial review proceeding. The 2nd Respondent thus urged the court to dismiss the Application against the 2nd Respondent with costs.

Determination.

60. I have anxiously considered the Application, the affidavits filed, the submissions as well as the authorities cited. I have also considered the fact that the 1st 2nd and 3rd Respondents did not file their submissions as directed by the court.
61. Mandamus is a judicial remedy in the form of an order from a Court to any Government, subordinate Court, Corporation, or Public Authority, to do (or forbear from doing) some specific act which that body is obliged under law to do (or refrain from doing), and which is in the nature of public duty, and in certain cases one of a statutory duty.
62. The purpose of an order for Mandamus is to remedy defects of justice. It lies in the cases where there is a specific right but no specific legal remedy for enforcing that right. The grant of an order for Mandamus is therefore an equitable remedy; a matter for the discretion of the Court, the exercise of which is governed by well-settled principles.
63. An order for Mandamus, being a discretionary remedy, its Application must be made in good faith and not for indirect purposes. The Applicants must, of course, satisfy the Court that they have the legal right to the performance of the legal duty as distinct from mere discretion of authority.



64. An order for Mandamus is normally issued when an officer or an authority by compulsion of statute is required to perform a duty and that duty, despite demand in writing, has not been performed.
65. The Court of Appeal in the case of *The Commissioner of Lands vs. Kunste Hotel Ltd* [1997] eKLR held as follows:
- “Judicial Review is concerned not with private rights on the merits of the decision ... but with the decision making process ... purpose is to ensure individual is given fair treatment by the authority to which he has been subjected.”
66. And in the decided case of *Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996* the Court of Appeal inter alia held as follows:
- “The order of Mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual...These principles mean that an order of Mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”
67. Lastly, the Court of Appeal in the case of *Municipal Council of Mombasa vs. Republic, Umoja Consultant Ltd*, (2002) eKLR held as follows;
- “The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a Court hearing a matter by way of Judicial Review is concerned with and such Court is not entitled to act as a Court of Appeal over the decider. Acting as an Appeal Court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.
68. From the above captioned authorities, it is clear that any person who seeks an order of mandamus, must satisfy the Court that the action they seek to compel the Respondent to perform is a duty which the Respondent is under a duty whether at common law or by statute to perform.
69. The history of the matter in issue is to the effect that the Applicants herein were members of Farmers’ Cooperative Society Limited (Ngati Society) whose objective was buying land and settling its members. That it had subsequently bought the suit land herein LR Narok/Maiela Estate No. 8398/2 wherein the Applicants by dint of being shareholders of the society balloted for and were entitled to 5.5 acres each per share out of the parcel of land. That they had then paid for the requisite survey fees of Kshs. 8000/= each to facilitate the sub-division of the said land. However this was not to be as the then Management Committee sold the land to KenGen, the 2nd Respondent.



70. The Applicants' argument was that the sale was undertaken without the members' involvement and consent, public participation, Notices and resolution by the Ngati Society members to sell. That subsequently members sought for accountability from the then officials, and the Society petitioned the 4th Respondent and the National Government to intervene wherein the 4th Respondent had established an Ad Hoc Committee on Ngati Farm, Conflicts Alternative Dispute Resolution who had after lengthy public hearings and site visits made its findings in a report dated 23rd September, 2020 to the effect that the purported sale of the Applicants' land comprised in the title number L.R 8398/2 to the 2nd Respondent had been illegal and fraught with irregularities there having been no resolute and/or consent authorizing and or validating the sale, no public participation had been done prior to the acquisition, the National Land Commission had not been consulted and/or involved in the entire process of the purported sale, no notice had been issued of the intended acquisition and finally that the purported sale had been predicated upon forged minutes of the Society where Mr. Muritu Surveyor who had been deceased by then was alleged to have attended.
71. The Applicants' position was that 2nd Respondent had not obtained a good title to their land and that the Respondents were yet to implement any of the recommendations and/or resolutions made by the Ad Hoc Committee to date for which they sought the following orders;
- i. The Court directs the 1st and 4th Respondents to within 30 days, form a multi-agency team to oversee implementation of the recommendations of the Ad Hoc Committee on the Alternative Dispute Resolution on Ngati Farmers' Cooperative Society dated 23rd September 2020.
 - ii. That there be an order issued directing the multi-agency team to, within 90 days from the date of formation and/or establishment, publish a status report on the implementation of the recommendations of the Ad Hoc Committee on the Alternative Dispute Resolution on Ngati Farmers' Cooperative Society.
 - iii. That the court declares the sale of land parcel L.R Narok/Maiela Estate No. 8398/2 illegal, null and void.
 - iv. That the court directs the 3rd Respondent to cancel the title deed issued to the 2nd Respondent for title number L.R Narok/Maiela Estate No. 8398/2 and thereafter issue the Applicants title deeds for their respective portions of land comprised in title No. LR Narok/Maiela Estate No. 8398/2.
72. The application was opposed by the 2nd Respondent whose position was that being a Government Parastatal whose core business was developing, managing and operating power generation plants to supply electric power to the Kenyan market had formally expressed interest in purchasing the suit land in which the Ngati Society had responded to by requesting for a meeting to discuss the proposed purchase. That thereafter, parties had held several negotiation meetings, with each party engaging private and Government Valuers to inform their respective positions regarding the property's price. That at the negotiation meeting between the 2nd Respondent and Ngati Society teams held on 14th March, 2013, the parties had reached an agreement for the sale and purchase of the suit property at a price of Kshs. 505,000,000/= wherein a Sale Agreement had been prepared and duly signed by the parties' officials on 19th April, 2013.
73. They argued that having paid the total agreed on the purchase price, the suit property was transferred in its name, and therefore its Certificate of Title was prima facie evidence that the it was the absolute and indefeasible owner of the suit property.



74. That various sections of members of Ngati Society had filed suits in court in vain to frustrate its effort to put the suit property to the noble use of generation of electricity to narrow the demand and supply gap in so far as the generation and consumption of electricity in Kenya was concerned. That in Nakuru ELC Case No. 76 of 2016, Ngati Farmers' Co-operative Society & Others v KenGen & 9 Others, the validity of the sale and transfer of the suit land to the 2nd Respondent was challenged wherein the suit had by consent been dismissed, for want of prosecution on 15th October, 2020.
75. That thereafter, another group of Ngati shareholders had attempted to commence Judicial Review proceedings in Judicial Review Application No. E004 of 2021 (Naivasha) Ngati Farmers' Co-operative Society & Another v The Attorney General, KenGen & 6 Others but on being granted leave to file a substantive Notice of Motion, they had failed to do so and as a result, the said leave had lapsed by operation of law thus the proceedings had been struck out. This position was also held by the 1st and 3rd Respondents of whose position was that the application herein was bad in law, misconceived, incompetent, a nullity and an outright abuse of the Court process.
76. Having laid down the background of the matter in question and having looked at decisions of the Court of Appeal in relation to what entails an order of Mandamus in a Judicial Review process, the matter that arises for determination herein is whether the Applicants are entitled to the remedies sought.
77. It is quite clear that the Applicant's cause of action is based on an allegation that the sale and purchase of the suit land herein was based on a null and void sale agreement and the title to land parcel No. LR Narok/Maiela Estate No. 8398/2 registered to the 2nd Respondent should be cancelled and thereafter be registered in their names.
78. It is trite law that the Torrens System is applicable in Kenya to the effect that the title of a bonafide purchaser for value without notice of fraud cannot not be impeached. The Court of Appeal in the case of Charles Karathe Kiarie & 2 Others –vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 others [2013] eKLR, held as follows:
- ‘The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.’
79. Section 26 (1) of the [Land Registration Act](#) provides:-
1. The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-



- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
80. From the above provisions it is clear that a title can only be challenged on grounds of fraud or misrepresentation in obtaining the same and in such case, the registered proprietor has to be shown to have been a party to the fraudulent or illegal activities that led to him being registered as owner. The rectification of the register in regard to a registered title can only be effected if fraud is proved under Section 80 of the *Land Registration Act*, 2012.
81. Section 80 (1) provides thus:-
1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.
 2. The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
82. From the above provisions of the law the 2nd Respondents would only lose protection of the law and/or Constitution in as much as its title is concerned if it is proved to have acquired the property fraudulently and/or had knowledge of the fraud which can only be through a hearing in a full trial.
83. Time and again it has been held that where a legislation has been enacted to give effect to a constitutional right, a litigant shall found a cause of action by challenging the legislation in question. That normal proceedings shall not be invoked in judicial controls of administrative action an ordinary statute but shall be redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure.
84. Indeed the Supreme Court of Kenya case of *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27th January 2023) (Judgment) observed as follows with regards to the expanded nature of Judicial Review Proceedings.

“In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019*; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads



to intolerable superficiality. This would certainly be against article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”

85. Having found that the nature and remedy of a Judicial Review is to supervise the exercise of public power as a means in which improper exercise of such powers could be remedied, it is not therefore concerned with private rights on the merits of the decision, but with the decision making process such as whether those who made the decision had the power, whether they took into account relevant or irreverent matters and so on. The court is therefore not entitled to act as a Court of Appeal over the decider; by going into the merits of the decision itself-such as whether that the sale process of the Applicants' land comprised in title No. L.R Narok/Maiela Estate No. 8398/2 to the 2nd Respondent was illegal and tainted with irregularities and therefore null and void, whether the title issued to the 2nd Respondent should be cancelled and so on as these matters are not a province of Judicial Review.
86. Having said that, I find that the Notice of Motion on a Judicial Review application on the writ of mandamus dated 16th March, 2024 herein filed by the Applicants was based on highly contested or disputed facts or evidence and therefore, Judicial Review was not appropriate in the circumstances the same cannot stand and is dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 14TH DAY OF NOVEMBER 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

