



M’Thiringi (Suing as the legal representative of the Estate of M’Thiringi M’Anampiu - Deceased) v District Land Adjudication and Settlement Officer Karama Adjudication Section & another; Munya & 2 others (Interested Parties) (Environment and Land Judicial Review Case E007 of 2023) [2024] KEELC 13606 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2023**

CK YANO, J

DECEMBER 5, 2024

BETWEEN

MARIQUETA NKOYAI M’THIRINGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M’THIRINGI M’ANAMPIU - DECEASED) APPLICANT

AND

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER KARAMA ADJUDICATION SECTION 1ST RESPONDENT

THE OFFICE OF THE ATTORNEY GENERAL 2ND RESPONDENT

AND

KOBIA STEPHEN MUNYA INTERESTED PARTY

SHADRACK GUANTAI INTERESTED PARTY

NKUBITU LICHUNGI INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted by the court on 26th July, 2023, the ex-parte applicant for unclear reasons, filed the Notice of Motion dated 15th August, 2023 and another notice of motion dated 7th June 2024. Both are similar in all forms and are brought under Order 53 Rule 3 (1), (2) of the Civil Procedure Rules, Section 8 and 9 of the *Law Reform Act*, Cap 26 and all enabling provisions of the Law, Seeking for orders that:

1. An order of certiorari to remove into the High Court for the purpose of quashing the decision made by the District Land Adjudication and Settlement Officer, Karama made on 6th day of



December 2022 dismissing Karama Adjudication Section Objection No. 3084,3086,3085 and 3094 upholding the interested parties' position.

2. An order of mandamus directed to District Land Adjudication and Settlement Officer, Karama to compel the District Land Adjudication and Settlement Officer, Karama to cancel the registration of the interested parties as the owners of the suit land from the adjudication record and to rectify the adjudication register and records and register the applicant's father as the absolute owner of the said properties being Karama Land Adjudication Section parcels Nos.11136,7770,11478 and 3866
 3. An order of prohibition prohibiting District Land Adjudication and Settlement Officer, Karama from registering the interested parties as the owners of the said parcel of land.
 4. An injunction restraining the interested parties whether by themselves,their servants or agents or howsoever otherwise from interfering with the applicant and the applicant's family's use and occupation of the said land being Karama Land Adjudication Section Parcels No. 11136, 7770, 11478 and 3866
 5. A declaration that the judgement of the District Land Adjudication and Settlement Officer, Karama Adjudication Section made on the 6th December, 2022 was un-procedural, unfair and is invalid, ultra vires and void and of no effect.
 6. A declaration that the District Land Adjudication and Settlement Officer, Karama Adjudication Section is in breach of his duty under Cap 283 Laws of Kenya and acted ultra vires.
 7. A declaration that the decision of District Land Adjudication and Settlement Officer Karama to give applicants land parcels no.11136, 7770 and 3866 and 11478 to the interested parties respectively is against the rules of natural justice.
 8. A declaration that the decision of the District Land Adjudication and Settlement Officer Karama to hear the Karama Adjudication Section Objection No. 3084, 3086, 3085 and 3094 without constituting a new and proper committee as ordered by the learned judge, Justice C.K. Nzili on 18th May,2022 is unprocedural and in contempt of a court order.
 9. A declaration that the suit land belongs to the plaintiff's father.
 10. Damages arising from the matters herein and interest thereon.
 11. An order for costs.
 12. Such further and other relief be granted to the applicant as the court deems fit.
2. The motion is supported by the facts and grounds contained in the statutory statements dated 7th June 2023 and 15th August 2023 and the supporting affidavits of MARIQUETA NKOYAI M'THIRINGI, the Ex-parte Applicant dated 15th August, 2023 and 7th June 2024 and the annexures thereto.
 3. The respondents filed a replying affidavit dated 16th November, 2023.
 4. The 1st Interested Party filed a Replying Affidavit sworn on 25th October, 2023.
 5. The 2nd interested party filed a replying affidavit sworn on 25th October,2023.
 6. The 3rd interested party filed a replying affidavit dated 25th October,2023.



The Applicant's Case

7. The Applicant avers that she had sued the respondents and the interested parties herein in Meru JR. No. E009 OF 2021 JR No. E10 of 2021 and JR No. E011 of 2021 where the court on 18th May 2022 quashed the earlier decisions in objection No. 3094 in respect of parcel No. 3866 and remitted the objections to the 1st respondent in line with Section 11 of Fair Administrative Actions Act for reconsideration by a different Adjudication officer and a committee within 6 months from the date of the judgment. The applicant contends that the 1st respondent failed to hear the objection as ordered by the court and that the hearing of those objections were marred with unfairness. Further, that the committee was not different as ordered by the court. That the 1st respondent also involved the same demarcation officer that the applicant had protested against in the proceedings and subsequent scene visit on the suit land contrary to the court order.
8. The applicant avers that the 1st interested party herein is related to the 7th, 8th, 9th and 10th committee members namely, Erastus Baaru Cyprian Gitonga, George Kayoi and Dinus M'Itumitu, who were all committee members in the earlier proceedings. That George Kayoi is an in law to the 1st interested party. That the 2nd interested party is also an in law to Erastus Baariu, the 7th committee member and a relative to the 2nd committee member, one Julius Kobia and another committee member by the name of Atanasio Mugambi. The applicant avers that the 3rd interested party herein is a brother to William Kaberege who was a former committee member and a good friend to Erastus Baariu, Cyprian Gitonga, Dinus M'Itumitu and George Kayoi.
9. The applicant states that all the committee members who were present at the hearing of the objections and who conducted the hearing were in the previous hearing of the objections which were quashed by the court. That a bunch of new committee members who were new to the case were appointed in early September, but that 1st respondent refused and/or declined to approve them and instead insisted on hearing the objections with the old committee members who the applicant alleges interfered with his father's land.
10. The applicant states that in mid October, 2022, the applicant received a call from one of the committee members by the name Saverio Mutuma who told the applicant that the 1st respondent asked him to inform him that the objections would be heard on 8th November, 2022 by a different DLASO by the name Okoth, but declined to disclose the names of the committee members. That on the day of hearing of the objection, the applicant saw the committee members and he objected to the participation of Joel Kiremaa, Julius Kobia, Erastus Baariu, Cyprian Gitonga, Dinus M'Itumu and George Kayoi and gave reasons as alluded hereinabove. That although the DLASO assured them that those committee members had left, they attended the scene visit of the suit land on 4th November, 2022 together with the DLASO and the demarcation officer who was also involved in the first hearing.

Respondents' Case

11. It is the Respondents' case that the decision made by the committee and the Adjudication Officer was procedurally fair and followed due process. That the allegations made by the applicant that the committee was not properly constituted is untrue and unsubstantiated. The respondents contended that they adhered to the court's orders and a new committee was properly constituted. They referred to the proceedings of the committee where the names of the committee members together with their identification numbers were listed with the new Land Adjudication Officer. That the applicant had not raised any objection during the course of the proceedings on how the committee members were constituted.



12. The respondents stated that the earlier committee that delivered its judgment on 26th November, 2020 were David Thirinja, Patrick Thurania, Andrew Ntongai, Mwiti Munoru, Patrick Koome, George Kajoi, Gilbert Thairu, Romano Muthee and Joseph Mukaria while the newly constituted committee that delivered its judgement on 6th December 2022 were Josphat Muthee, Julius Kobia Lichoro, Joseph Mukaria M'kumbuku, Shadrack Thiangu M'eringo, Denos Thirinja, Patrick Muketha Mwereria, Erastus Baariu Ntoimuti, Cyprian Gitonga, George Kayoi Thitura and Nturu Dinus M'itumitu.
13. The respondents state that the Adjudication Officers are also different. That the first objection delivered on 26th November 2020 was led by Charles M. Githinji while the one of 6th December 2022 was led by Andrew Khaemba.
14. It is the respondents' contention that the applicant is not aggrieved by the decision-making process of the committee but rather the merit of the decision which is a gross violation of the principles of judicial review. That the application is frivolous, baseless and a waste of the court's time and ought to be dismissed.

The Interested Parties' Case

15. The 1st interested party averred that he is the owner of Land Parcel No. 11136 Karama Land Adjudication Section which he stated he bought and was transferred to him by one Julius Kithinji from the F/No. 1915. The 2nd interested party also stated that he owns parcel No. 7770 while the 3rd interested party owns Parcel No. 11478 which they stated they bought from the same person Julius Kithinji. They aver that the applicant commenced judicial review proceedings in JR. NO. E09 of 2021 and E011 OF 2021 claiming she was not accorded a fair hearing in Objection proceedings 3084, 3085 and 3086. The interested parties stated that the court delivered its judgment on 18th May, 2022 wherein the proceedings and decision in those Objections were brought to court and quashed. That the court further ordered that the objection be remitted for re-hearing by the 1st respondent through another Land Adjudication Officer and Land Committee within six months.
16. The interested parties aver that they complied with the court order and proceeded for the rehearing of the objection and a decision was delivered on 6th December 2022 where Objections were dismissed. That the Applicant has once again moved the Court with the application seeking for orders of certiorari, mandamus and prohibition on the grounds that the Committee was not properly constituted.
17. It is the interested parties' contention that the committee was properly constituted and that the Interested Parties are not in any way related to any of the Committee members. That the allegation that the committee was not different is untrue, baseless and not factual. That none of the members in the Committee is related to the interested Parties in any way whatsoever and are in fact all from different communities and that they also took an oath and expressed that they would be just and fair.
18. The interested parties stated that on the date of the hearing, the Applicant objected to some of the Committee members present and all the persons she opposed were removed from the Committee except two members who the applicant had no objection to and others were called. The interested parties aver that the Land Adjudication Officers were also different in both proceedings and the same can be ascertained from the objection proceedings. They contend that the applicant's actions of instituting these proceedings are actuated by malice as she is well aware that the suit property belongs to them. They argue that litigation must come to an end and that they cannot keep litigating over the same issue for years and years.



19. It is the interested parties contention that the application is frivolous, baseless and a waste of the court's time and should be dismissed with costs.
20. Pursuant to directions given by the court, the application was canvassed by way of written submissions. The applicant filed her submissions dated 28th October, 2023 and 9th October, 2024 through the firm of Vivian Aketch & Co. Advocates and the respondents filed theirs dated 16th November, 2023 through the Honourable Attorney General while the 1st, 2nd and 3rd interested parties filed theirs dated 15th November, 2023 through the firm of Thurania Atheru & Co. advocates.

Ex-parte Applicant's Submissions

21. The Applicant gave a brief background of the case and submitted that the Substratum of the application is premised under the [Land Consolidation Act](#) Cap 283 and the [Land Adjudication Act](#) Cap 284. The Applicant identified four issues for determination, namely, whether the applicant stands to suffer prejudice if this application is not allowed, the doctrine of exhaustion of remedies taking into consideration the provisions of the [Land Adjudication Act](#) and the [Land Consolidation Act](#) as compared with procedural provisions and the power of the court to award judicial review orders; Whether the decision by the respondents to hear the objection proceedings by the applicant without constituting a new committee and by including the interested parties relatives and blood relations as committee members was procedural, ultra vires and prejudicial and whether the applicant is entitled to the judicial review orders sought.
22. Regarding the doctrine of exhaustion of remedies, under the [Land Adjudication Act](#) and the [Land Consolidation Act](#), the applicant cited Section 26 of the [Land Consolidation Act](#) and Section 28 of the [Land Adjudication Act](#). The applicant submitted that in the instant case, she lodged objection proceedings before the 1st respondent. That the proceedings involved two conflicting claims over parcels of land that were allotted by Karama Adjudication Section yet they were dismissed without being given adequate forum to be heard and adjudicated upon. That the 1st respondent had the power to look into the register and rectify any errors that related to the adjudication of the applicant's ancestral land before summary dismissal of the proceedings.
23. The Applicant submitted that this is consequently a case that involves the interpretation of a customary tenure system since the land that the applicant seeks to safeguard is one that is ancestral land from her grandfather and that her family has now lived that has been passed on for more than a decade. The Applicant relied on the case of Joshua Mithika & another v Kobia Kangeri & 2 others (2021) eKLR ELC Appeal No.16 of 2020.
24. Regarding the issue whether the applicant is entitled to the judicial review orders sought, and if quashing the objection proceedings by the applicant was ultra vires and prejudicial, the applicant submitted that in seeking an order for judicial review, the Court is invited to consider if due process was followed and if any rights have been infringed upon without necessarily going into the merits of the case. The Applicant relied on the case of Judicial Review Application No.22 of 2017; Land Adjudication and Settlement Officer Tigania East Exparte Simon Mugambi Nabea, Alexander Kanjoi (interested party) (2021) eKLR wherein the court highlighted the case of [Municipal Council of Mombasa v Republic & Umoja Consultants Civil Appeal No.185 of 2001](#)(2002) eKLR
25. The Applicant invited the court to decide whether the impugned decision by the 1st respondent in dismissing the objection by the applicant without proper forum was procedural or it violates the constitutional rights of the applicant and that of her family. That the issue at this stage is not whether the adjudication officer dismissed the proceedings, but whether due process was followed in the dismissal. That this court is also tasked with the mandate of taking into account and making an



interpretation as to the constitutional provisions of Article 47 on the right to fair administrative action for all citizens. The applicant cited the provisions of Article 47.

26. The Applicant submitted that her rights to fair administrative action were infringed upon by the respondents' decision to dismiss her objection proceedings without giving her a chance to be heard nor providing her with any reason for the dismissal. That since the objection by the applicant was dismissed without due administrative procedure, it is doubtful that the adjudication committee even took into consideration all the factors that should be considered as the adjudication officer makes a decision such as proper constitution of a committee as provided in Section 9 of the [Land Consolidation Act](#) as they look into the merit of an objection proceeding. That the said provisions should also be taken into consideration with the provisions of Section 19(2). It was submitted on behalf of the applicant that fair administrative action was not followed since the subject matter of the applicant's claim was not even considered before the summary dismissal. The Applicant relied on the case of Civil Appeal 28 of 2015 Peter Kimandiu v Land Adjudication Officer Tigania West District & 4 others (2016) eKLR. The applicant submitted that the Administrative Officer ought to have involved the committee to look into the merits of the case over the objections 3084 and 3086 over the plots 11136 and 7770 where two different people were claiming ownership in accordance with Section 19(2) of the [Land Consolidation Act](#).
27. It was further submitted that a new committee was not constituted as per the court order and that the applicant has never been issued with demarcation maps. That some of the committee members have blood relation with the interested parties and some even have direct interest on the applicant's land as they had allocated themselves the same. That this is not refuted by the respondents and the interested parties which is contrary to the laws of natural justice that state one should not be a respondent, a prosecutor and a judge in the same case. It was submitted that the court's direction was very express with regard to the new committee members.
28. The applicant submitted that this court is empowered by Section 3 of the [Fair Administrative Action Act](#) No. 4 of 2015 to look into the decision of the adjudication officer since it affects the ownership and acquisition rights of the applicant taking into account the provisions of the [Land Consolidation Act](#) and the [Land Adjudication Act](#) that dealt with such objections. The applicant cited Section 11 of the Fair Administrative Actions Act that provide the orders that one may seek. The applicant also cited Article 35 of [the Constitution](#) on access to information. It is the applicant's submission that she has proved her case and should be granted the orders sought in the application.

Respondents' Submissions

29. The respondents identified two issues for determination, namely, whether there was a properly constituted committee and whether the orders sought in judicial review motion can be granted. Regarding the first issue, the respondents pointed out that the objection proceedings were governed by the [Land Consolidation Act](#) Cap 283. That there was a properly constituted committee during the proceedings.
30. The respondents submitted that as per the Court's orders, the committee was newly constituted and a new Land Adjudication Officer was appointed. That this is evidenced by the proceedings of the committee where the names of the committee members together with their identification numbers were listed with the new Land Adjudication Officer.
31. The respondents submitted that the applicant did not raise any objections during the cause of the proceedings on how the committee members were constituted. That the applicant's only objection was that she wanted two committee members who had participated in the previous committee to be part



- of the new objection proceedings and the same was allowed. The respondents relied on JR 61 of 2010 Republic Vs Tigania East & West District Land Adjudication and Settlement Officer and Attorney General Ex parte Applicant; Josphat Muchui.
32. The respondents submitted that the Act does not stipulate that the names of the committee members be recorded in the proceedings, but the respondents went an extra mile and ensured that the names of the members of the committee were listed together with their identification numbers. That this further prove that the 1st respondent was not biased and ensured that due process was adhered to.
 33. The respondents pointed out that the earlier committee that delivered its judgment on 26th November, 2020 were David Thirinja, Patrick Thurairira, Andrew Ntongai, Mwitii Munoru, Patrick Koome, George Kajoi, Gilbert Thairu, Romano Muthee and Joseph Mukaria while the newly constituted committee that delivered its judgement on 6th December, 2022 were Josphat Muthee, Julius Kobia Lichoro, Joseph Mukaria M'kumbuku, Shadrack Thiangu M'eringo, Denos Thirinja, Patrick Muketha Mwereria, Erastus Baariu Ntoimuti, Cyprian Gitonga, George Kayoi Thitura and Nturu Dinus M'itumitu. That the Adjudication Officers who were present in the first objection was led by Charles M. Githinji while the one on 6th December, 2022 was led by Andrew Khaemba.
 34. The respondents submitted that from the foregoing it is quite clear that the allegations made by the applicant that the committee was not properly constituted are baseless, unfounded and unsubstantiated allegations. That, the only reason the applicant raised a claim against the respondents was because the objections were dismissed. The respondents submitted that the applicant had been accorded adequate notice to prepare for the hearing and she came prepared equipped with witnesses for her defence. That that is further proof that the committee was fair, impartial, reasonable and reached a logical verdict. The respondents relied on the case of Kori Erick Nganga vs University of Nairobi (2019) eKLR.
 35. The respondents submitted that the applicant had been given the opportunity to be heard and she brought two witnesses and they both participated fully in the proceedings and were cross-examined. It is the respondent's submissions that the committee was properly constituted and the allegations by the applicant are untrue.
 36. With regard to the issue as to whether the orders sought in the Judicial Review Motion can be granted, the respondents relied on the case of Republic Vs *Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No. 266 of 1996*. They submitted that the applicant has not proved nor demonstrated that the decision-making process was flawed to warrant judicial review orders by the Court. That the decision made by the 1st respondent was not unreasonable and was in line with the rules of natural justice. The respondents relied on the decision of Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553. The respondents also submitted that the first respondent in adherence to all the principles of natural justice ensured that the applicant was accorded the opportunity to be heard and presented her case as evident from the proceedings. That in compliance with the court's directives both the committee and the Adjudication Officer were replaced, and the newly appointed Adjudication Officer was not previously involved in the matter eliminating any potential bias. That the decision made by the committee and the 1st respondent was one that was logical and backed by evidence as they had also gone for a site visit. It was submitted that it is clear that the applicant was not aggrieved by the decision-making process as due process was followed which has been proved by the respondents but rather the merit of the case as the objections had been dismissed, which they submitted is a gross violation of the principles of judicial review. The respondents relied in the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR.



37. The respondents submitted that the applicant has not demonstrated with sufficient clarity how the decision-making process leading to the decision was unreasonable as the proceeding provided prove that the applicant had been accorded the same opportunity as the interested parties. It was submitted that the 1st respondent's decision herein was made in accordance with the law and the rules of natural justice were adhered to. The respondents urged the court to dismiss the application.

Interested Parties' Submissions

38. The interested parties gave a background of the case and submitted on only one issue that is, whether the decision of the District Land Adjudication and Settlement Officer Karama to hear the Objection without constituting a new committee as ordered by the court, on 18th May, 2022 was unprocedural and in contempt of a court order. The interested parties submitted that the purpose of judicial review was set out in the case of Municipal Council of Mombasa...Vs...Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007 (2002) eKLR.
39. The interested parties submitted that the ex-parte Applicant herein filed judicial review No. E009 of 2021 and JR No.E010 of 2021 against the respondents and the interested parties herein in which she averred that objection Nos, 3084, 3086, 3085 and 3094 against the interested parties were unfairly and/or unprocedurally heard and dismissed by the 1st respondent. That this court in its judgments for the two judicial review matters delivered on 18th May, 2022 ordered that the objections be remitted to the 1st respondent in line with Section 11 of the Fair Administrative Actions Act for reconsideration by a different Land Adjudication Officer and a Committee within 6 months from the date thereof.
40. The interested parties submitted that from the Committee Proceedings adduced before court for the newly constituted committee and the earlier committee proceedings adduced in the JR No. E009 of 2021 and E10 of 2021, it clearly show that the committee members that heard the Objections a fresh were different as directed by the court. That the earlier committee that delivered its judgment on 26th November, 2020 dismissing the Applicant's objections was comprised of David Thirinja, Patrick Thuraira Frances, Andrew Ntongai, Mwiti Munoru, Patrick Koome, George Kajoi, Gilbert Thairu, Romano Muthee and Joseph Mukaria. That the new committee that delivered its judgement on 6th December, 2022 also dismissing the Applicant's objections was comprised of Josphat Muthee, Julius Kobia Lichoro, Joseph Mukaria M'kumbuku, Shadrack Thiangucu M'eringo, Denus Thirinja, Patrick Muketha MIwereria, Erastus Baariu Ntuimuti, Cyprian Gitonga, George Kayoi Thitura and Dinus M'itumitu.
41. The interested parties submitted that from the list of the above committee members, it is clear that the committee constituted to rehear the objection after the judgement of the court is significantly different from the earlier committee apart from two members who the ex-parte applicant agreed to have in the new committee. That it is therefore not true that the orders of the court were not followed to the letter.
42. The interested parties further submitted that the Adjudication Officers who handled those objections are also different. That the earlier committee was led by an Adjudication Officer by the name Charles M. Githinji whereas the newly constituted committee was led by one Andrew Khaemba as the Adjudication Officer. It is therefore the interested parties' submissions that the orders of the court were followed to the latter. That the issues by the applicant are not backed by evidence.
43. It was submitted that that the process leading to the making of the decision by the Adjudication Committee was correct. That the newly appointed Adjudication Officer convened a committee meeting to hear the objections herein and the Applicant and interested parties summoned. That the Applicant objected to some of the members that she found in the meeting and the same was considered.



That from the proceedings adduced in this court, at no point were the people objected to by the applicant involved in the hearing of the objection or decision making and it was only the committee members who cross-examined the witnesses thereon.

44. The interested parties submitted that the adjudication committee had the requisite jurisdiction to hear and determine the objections. That these powers are drawn from the *Land Consolidation Act* which gives the adjudication committee the powers to hear and determine all disputes arising from the ascertainment of existing rights. They submitted that the Applicant was given an opportunity to be heard and brought in two witnesses who testified on her behalf. That the interested parties were also given an opportunity to be heard and were cross examined by both the Applicant and the committee members and therefore all parties were given a fair opportunity to be heard before the decision was made.
45. The interested parties submitted that as per the proceedings of the committee all relevant matters were considered. That the Committee members even went further and made a site visit to ascertain the correct position of the suit lands herein on the ground and it is from these steps that it was able to decide
46. The interested parties submitted further that it is trite law that he who alleges must prove and that the applicant has not proven on a balance of probability that the orders of the court were not followed. That the applicant has also not proven how the presence of strangers during the scene visit influenced the decision of the committee. That the proceedings adduced before court clearly show that all parties were given an opportunity to be heard before the determination was made. That this clearly shows that the right process was followed and they prayed that the court finds that the applicant has not proven her case on a balance of probability and her application should be dismissed with costs.

ANALYSIS & DETERMINATION

47. The Court has read and considered the application, the supporting affidavits, the responses and submissions filed and finds that the issues for determination are whether there was a properly constituted committee and whether the ex parte Applicant is entitled to the judicial review orders sought.

Whether there was a properly constituted committee

48. The Purpose of Judicial Review was set out in the case of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, where the Court of Appeal held that:-

“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 made 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 there was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.



49. Further, circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the Uganda case of *Pastoli ...Vs..Kabale District Local Government Canal & Others* (2008) 2EA 300 at pages 300-304 as follows:

“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 or contrary to the provision of a law or its principles are instances 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. 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 to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi...Vs...Secretary of State for the Housing Department* (1990) AC 876”.

50. What Judicial Review Orders entails was elaborated in the case of *Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others*, Nairobi Civil Appeal No.266 of 1996, where the Court held that: -

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See *Halsbury’s Law of England*, 4th Edition vol.1 at Pg.37 paragraph 128.”

51. From the foregoing cases, the applicable law in cases of judicial review have already been established. In this case, the applicants’ complaint is that the 1st respondent failed to hear the objections as were ordered by the court in JR Nos. E009 of 2021, E010 of 2021 and E011 of 2021 vide the judgments delivered on 18th May 2022. The applicant complained that the 1st respondent heard objection No. 3084, 3086, 3085 and 394 without constituting a new and proper committee as ordered by the court in the earlier case. That the same demarcation officer that the applicant had protested against was also involved in the proceedings, including the subsequent scene visit on the suit land.
52. I have perused the judgment in Judicial Review No. E009 of 2021, E010 of 2021 and E011 of 2021 in which the court (Nzili J.) directed that the objections be remitted to the 1st respondent in line



with Section 11 of the Fair Administrative Actions Act for re-consideration by a different Land Adjudication Officer and Land Committee within 6 months from the date of judgment. It is therefore proper for the court to peruse the impugned proceedings to determine if the same were conducted as directed by the court.

53. The earlier committee that delivered its decision on 26th November, 2020 comprised of David Thirinja, Patrick Thurair, Andrew Ntongai, Mwitumunoru, Patrick Koome, George Kajoi, Gilbert Thairu, Romano Muthee and Joseph Mukaria while the Land Adjudication Officers were led by Charles M. Githinji. The newly constituted committee that participated in the impugned decision dated 6th December, 2022 were Josphat Muthee, Julius Kobia Lichoro, Joseph Mukaria M’Kumbuku, Shadrack Thiangu M’Eringo Denos Thirinja, Patrick Muketha Mwereria, Erastus Baariu Ntuimuti, Cyprian Gitonga, George Kayoi Thitura and Nturis Dinus M’Itumitu. The Land Adjudication Officer was Andrew Khaemba. I note that the two committees were mainly different, save one or two names such as George Kayoi. Having perused the proceedings, there is no evidence to show that the applicant raised any objections against those two committee members who sat in the proceedings for both objections. It is now that the applicant is raising the issue of not only some committee members having sat in the earlier and the new proceedings, but also complaining about the relationship of some of them to the interested parties. Having agreed to have the proceedings heard in the presence of those committee members, it may be taken that the applicant had no objection to the participation. The conclusion that the court arrives at is that the complaint arose following the decision that was not favourable to the applicant. How else can one explain the applicant’s readiness to proceed with the hearing of the proceedings and the subsequent scene visit without any objection being raised until after a decision has been made. I opine that the applicant’s complaint in regard to the committee members and the Land Adjudication Officer is an afterthought. It is also clear from the proceedings that the objections that were raised by the applicant were addressed by the District Land Adjudication Officer before the hearing of the objections. The evidence on record confirm that some committee members who were objected to left. The current complaint before this court in my view is unsubstantiated and an afterthought.
54. The other complaint by the applicant against the 1st respondent is that the objection proceedings were conducted contrary to the Rules of Natural Justice. The Rules of Natural Justice demands that no man/woman may be condemned unheard. This rule is deeply rooted in the English Common Law and been entrenched in our Constitution. In the case of Msagha VS Chief Justice & 7 others Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule JJ on 3/11/2006) (HCK) [2006] 2KLR 553 it was held:

“The court observes firstly that the rule of natural Justice “ audit alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the Principles of Natural Justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the Principles of Natural Justice are violation in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of Justice. The decision must be declared to be no decision ... It is paramount at this juncture that this court establishes the ingredients and /or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the right



of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker: secondly, that no one ought to be judged in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly that an administrative decision must be based upon logical proof or evidence material.”

55. 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.

56. In the case of *M’Bita Ntiro v 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 provided by any law that the proof of fact shall lie on any particular person.”

57. From the material on record, it is evident that all parties, including the ex parte applicant were afforded an opportunity to present their respective cases. In my considered view, the process followed by the respondents throughout the proceedings as well as the making of the decision were fair, objective and procedural. Further, the same adhered to the directions given by the court. 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.

58. On the issue of whether the ex parte applicant herein is entitled to the orders of certiorari, mandamus and prohibition, it should be noted that judicial review orders are discretionary.

59. In *Zachariah Wagunza & Another v 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 Other* (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 or contrary to the provision of law or its principles are instances 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 act or to act with procedural fairness towards one to be affected 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.”



60. Similarly, in the case of Republic v 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 are Judicial Review remedies and the rules governing grant of judicial review orders do 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 than 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.”

61. According to Halsbury Law of England 4th EDN. Vol. 1 (1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of Certiorari) prohibiting orders formerly known as orders of prohibition (mandatory orders formerly known as orders of mandamus) ...are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”

62. The objective of Judicial review was observed in Chief Constable of the North Wales Police VS Evans (1982)1 WLR where 1155 Lord Brightman noted:

Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.

63. In the instant case the applicant has levelled various allegations but it is a disguised appeal on the merits of the objection. The court in Commissioner of Lands vs Kunste Hotel Limited (1997) eKLR with authority 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.”

64. It is my finding that the process followed by the 1st respondent throughout the objection proceedings as well as the making of the decision were fair, objective and procedural. The ex-parte applicant’s Notice of Motion dated 15th August 2023 and 7th June 2024 lack merit.



65. Consequently, the Notice of Motion Applications dated 15th August 2023 and 7th June 2024 are dismissed with costs to the respondents and the interested parties.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF DECEMBER, 2024

IN THE PRESENCE OF:

Court assistant – Lenah

Atheru for interested parties

Ms Onyango holding brief for Ms Aketch for applicant

No appearance for A.G for respondents.

C. K. YANO

JUDGE.

