Republic v Deputy County Commissionner Mutomo Sub-County, Kitui County & another; Mbwika & another (Interested Parties); Mauta & another (Exparte Applicants) (Environment and Land Judicial Review Case E006 of 2022) [2023] KEELC 17710 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELC 17710 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E006 OF 2022

LG KIMANI, J

JANUARY 31, 2023

IN THE MATTER OF: ARTICLE 22, 23, 40 & 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF: PART III & IV OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF: THE LAND APPEAL TO THE MINISTER CASE NO.146 OF 2020

NGWANI ADJUDICATION SECTION, MUTOMO SUB-COUNTY, KITUI COUNTY-PARCELS NO.1831, 1829 AND 1832

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONNER MUTOMO SUB-COUNTY, KITUI COUNTY ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

LAMUEL KISINGU MBWIKA ..... INTERESTED PARTY

MWALIMU MULI ..... INTERESTED PARTY

AND

JAMES KIOKO MAUTA ..... EXPARTE APPLICANT

RABAN KISILU NZUMBI ..... EXPARTE APPLICANT

JUDGMENT

1. The *ex parte* applicant filed a Notice of Motion Application dated 22nd day of April 2022 seeking the following orders:

    1. That the Honourable Court be pleased:

        a. To remove into this Court and quash the decision by the 1st Respondent in allowing Appeal to the Minister Case Number 146/2020 against Land Parcel Numbers 1831 and 1829 at Ngwani Adjudication Section, Mutomo Sub-County and directing the said parcel to be transferred to Lamuel Kising'u Mbwika, for being unlawful, irrational and against the rules of natural justice.

        b. To declare that the Applicants are the rightful owners of Land Parcel Numbers 1831 and 1829 Ngwani Adjudication Section respectively and that the title be registered in their names accordingly.

        c. To restrain the Respondents from implementing the decision made on November 3, 2020 in Appeal to the Minister Case Number 146/2020 against Land Parcel Numbers 1831 and 1829 at Ngwani Adjudication Section.

    2. The Honourable Court be pleased to grant any such other or further orders or directions as the Honourable Court may deem just and equitable to grant in the circumstances, for the ends of justice to be met.

    3. The costs of this application be provided for.

2. The *ex parte* Applicant further filed a Statement of facts, supporting affidavits and attached documents in support of the application herein. The 1st *ex parte* applicant claims that he bought land parcel number 1831 Ngwani Adjudication Section, Mutomo Sub County, Kitui County from Wanzau Nzumbi (Deceased) which was part of a previously larger block that comprised of two other parcels being numbers 1829 and 1832 Ngwani Adjudication belonging to the 2nd applicant and the 2nd interested party respectively.

3. According to the *ex parte* applicants, the 2nd Applicant was gifted a portion by virtue of being a step son to Wanzau Nzumbi(Deceased) while the 2nd Interested Party had purchased his portion from Wanzau Nzumbi for valuable consideration just like the 1st Applicant. During the Adjudication process, the parcel 1831 was recorded in the name of the previous owner Wanzau Nzumbi (Deceased), parcel 1829 in Raban Kisilu Nzumbi's name and parcel 1832- Mwalimu Muli 2nd interested party. However, the 1st Interested Party laid claim on all the 3 parcels of land.

4. At the adjudication committee stage, all 3 parcels were awarded to Wanzau Nzumbi and the 1st Interested Party appealed to the Arbitration Board. The appeal was allowed and on parcels 1829 and 1832 while the appeal regarding parcel 1831 was dismissed.

5. During objection stage, Wanzau Nzumbi (Deceased) raised an objection on parcel numbers 1829 and 1832 but the objection was dismissed. This meant that parcels 1829 and 1832 remained registered in the interested party's name and parcel 1831 remained in the name of Wanzau Nzumbi.

6. The 1st interested party appealed to the Minister as against parcel number 1831 where Nzau Nzumbi appeared as Respondent and an objector in the other two parcels 1829 and 1832. On appeal regarding parcel 1831, the 1st interested party was successful and directions were issued on 3/1/2020 to transfer the parcel of land to him.

7. The *ex parte* applicant complained that during objection stage it was mentioned that there would be a site visit but it is not clear if the same took place or whether the person who did it was authorized by law.

8. The *ex parte* Applicants contend that they were never accorded an opportunity to be heard during the whole adjudication process and neither was the 2nd Interested Party regardless of them being in occupation and use of the said parcels, despite this being brought to the attention of and acknowledged during the proceedings. They were also never issued with notices or summons and neither were the decisions communicated to them and it was not until more than one year after the appeal was decided that they were supplied with certified copies of the proceedings simultaneously with a letter from the area chief requiring them to vacate their parcels of land or be evicted.

9. The *ex parte* Applicants have argued that the finding in the Minister's appeal was irrational, improper, oppressive and against the rules of natural justice as they have built their homes on the said parcels of land and developed the same, planted trees and cultivated crops.

10. The 1st *ex parte* Applicant stated that he was summoned by the Officer Commanding Police Division (OCPD) Mwingi and was confronted with an order from Mwingi Law Courts of which case he was never served with court documents at the time of being sued in order to defend his case. He stated that he lives with his family on the said land and there are currently crops and trees on the land and hence an eviction will result in irreparable loss. They further contend that their right to own and peacefully enjoy their property has been threatened by the decisions of the Respondents which are unlawful, irrational and oppressive and against the rules of natural justice. The 1st *ex parte* Applicant lays claim to purchasing Land Parcel 1831 while the 2nd *ex parte* Applicant lays claim to parcel No 1829 given as a gift from his step-mother.

The *ex parte* Applicants' submissions

11. The *ex parte* Applicants submitted that the Notice of Motion application was brought under the provisions if Article 22, 23, 40 and 47 of the *Constitution*, the *Fair Administrative Action Act, 2015* and the *Land Adjudication Act* cap 284 as well as the Environment and Land Court.

12. They contended that the 1st Interested Party was a stranger to the suit lands and the and the Appeal was heard and determined in the absence of the 2nd Applicant and the 2nd Interested Party. They also submitted that there was need for a site visit to the disputed area and the same was not done according to law.

13. The *ex parte* Applicants also submitted that the appeal was unlawfully filed outside of time as the objection was heard and decision rendered on 16.7.2018 but the Minister's Appeal was heard and determined on 3.11.2020. They also contended that they were denied access to important information which they ought to have been supplied with by the Respondent, that the Deputy County Commissioner considered matters not relevant and disregarding irrelevant matters and that the decision was unlawful, irrational and against the rules of natural justice.

14. The *ex parte* Applicants submitted that the decision was unlawful because the arbitration board was improperly constituted and violated Section 7 of the *Land Adjudication Act* in that it shall not be constituted by less than 6 members or less than five in particular circumstances and Section 8

mandating the executive officer to communicate the decision to absent parties. They also contended that the appeal was not within 60 days from the determination of the objection Board. In their view, they were not granted a fair hearing according to Section 4(3) and (5) of the *Fair Administrative Action Act, 2015*.

15. The *ex parte* Applicants submitted that the decision was irrational for the Respondent to conclude that because there was no appeal on the other 2 parcels of land, the affected person was satisfied and that the Chief's letter was not tabled and considered.

16. The *ex parte* Applicants submitted that they are entitled to the judicial review orders and relied on the case of *Republic v Technology* (Judicial Review E002 of 2021) (2022) KEHC 494 (KLR) (May 12, 2022) (Judgment) and prayed that the application that be allowed with costs.

The 1st and 2nd Respondents' Case

17. The 1st and 2nd Respondents raised a preliminary objection dated June 15, 2022 on grounds that the application offends the provisions of Order 53 rule1(1) of the *Civil Procedure Rules, 2010* as the orders sought cannot be granted without leave being obtained first.

1st and 2nd Respondents' written submissions.

18. The 1st and 2nd Respondents' written submissions in support of their Preliminary Objection were to the effect that no application of judicial review can be made by a party without leave of the court under Order 53(1) of the *Civil Procedure Rules*.

19. The 1st and 2nd Respondents relied on the following cases to back up their preliminary objection: *Republic vs Kahindi Nyafula & 3 others ex parte Kilifi South East Farmers' Co-operative* (2014), *Felix Kiprono Matagei vs Attorney General; Law Society of Kenya (Amicus Curiae)* (2021) and *Republic v Chief Magistrate Milimani Commercial Courts & 2 others ex parte Fredrick Bett* 2022.

20. The 1st and 2nd Respondents submit that failure by the applicants to seek leave is an abuse of the court process and time since it does not afford the court the opportunity to evaluate the matter at hand and assess whether it indeed qualifies for judicial review and the application should be dismissed.

21. Secondly, the 1st and 2nd Respondents submitted that a court in exercising its judicial review jurisdiction is concerned with the procedural impropriety of a decision, rather than its merits as they relied on the cases of *Republic vs Kenya Revenue Authority and Another ex parte Bear Africa(K) Limited* and *Republic vs Public Procurement Administrative Review Board & 2 others ex parte Sanitam Services(E.A) Limited*(2013) where the court cited the Ugandan Case of *Pastoli vs Kabale District Local Government Council and others* (2008) 2EA 300 where it was held 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 or procedural impropriety.

22. Further, it is the 1st and 2nd Respondents' submission that the authority to make the decision in the land adjudication process emanates from the *Land Adjudication Act* cap 284 and the 1st Respondent acted within his mandate as stipulated by the statute hence the decision does not warrant judicial review orders because then parties were given a chance to be heard and present their witnesses and therefore the rules of natural justice were followed.

23. In submitting that a judicial review application should not be construed as an appeal against the Minister's decision, the 1st and 2nd Respondents relied on the case of *Republic vs Advocates Disciplinary Tribunal ex parte Apollo Mboya* (2019). They contend that the Applicants were aggrieved by the decision of the 1st Respondent and not in the manner in which the proceedings were carried

out as they also relied on this courts holding in the case of *Republic v Attorney General ex parte Dominic Mwendwa Muthui* (2022) eKLR where the court held that disputes that fall under the *Land Adjudication Act* ought to be heard by the authorized bodies and the Court should not usurp this mandate.

24. The 1st and 2nd Respondents therefore submit that the application is mischievous, misconceived, vexatious frivolous and an abuse of court process and should be struck out in the first instance and does not disclose any cause of action and does not show how the Deputy Cunty Commissioner acted ultra vires or unprocedurally.

25. The interested parties did not file any documents. An affidavit of service sworn by Boniface M. Kyenza on 16th September and filed in court on September 16, 2022 shows that the 1st interested party was served with the notice of motion herein. The said affidavit of service further stated that the 2nd interested party was deceased.

Analysis and Determination

26. I have considered the Notice of Motion dated April 22, 2022, the Statement of Facts, verifying affidavits and documents filed in opposition to the said application and submissions by Counsel for the parties. I am of the view that the following issues arise for determination;

    A. Whether the application offends the provisions of order 53 rule (1) of the *Civil Procedure Rules*

    B. Whether the decision made by the 1st Respondent was unreasonable, irrational and against the rules of natural justice

27. Order 53(1) of the *Civil Procedure Rules (2010)* provides for leave of court in filing of an application for judicial review and states that:

> " Applications for *mandamus*, prohibition and certiorari to be made only with leave.
>
> (1) No application for an order of *mandamus*, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
>
> (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on."

28. Nyamweya J. in the case of *Republic v Registrar of Companies & another ex parte Prakla East Africa Limited; Prakla Bohrtecknic GMBH (Interested Party)* [2021] eKLR broke down the reasons an application for leave and stay pending the substantive Judicial Review Application.

> " I have considered the arguments made by the parties herein, and the applicable law for leave to commence judicial review proceedings, namely Order 53 Rule 1 of the *Civil Procedure Rules*. The main reason for the leave as explained by Waki J. (as he then was), in Republic vs. County Council of Kwale & Another *ex parte* Kondo & 57 Others, Mombasa HCMCA No 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

29. Thus according to the court in the above case a judicial review application must go through prior screening in exercise of the court's discretion before being filed and can only be filed once it is considered

amenable for judicial review. In the case of *Uwe Meixner & another v Attorney General* [2005] eKLR cited by State Counsel for the 1 and 2nd Respondents, the Court of Appeal held that:

> " The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion."

30. Mativo J reiterated this in the case of *Republic v Kenya Revenue Authority, Commissioner ex parte Keycorp Real advisory Limited* (2019) eKLR held as follows regarding the leave stage in judicial review applications:

> The leave stage is used to identify and filter out, at an early stage, claims which may be trivial or without merit. At the leave stage an applicant must show that:-
>
> (i) sufficient interest' in the matter otherwise known as locus standi;
>
> (ii) that he/she is affected in some way by the decision being challenged;
>
> (iii) that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law;
>
> (iv) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

31. On the other hand, some courts have held that Article 47 of the *Constitution of Kenya, 2010* and the Fair Administrative Actions Act do not provide procedure for filing of judicial review applications and neither do they provide for leave prior to filing the same. Indeed section 10(1) of *FAAA* provides that an application for judicial review shall be heard and determined without undue regard to procedural technicalities.

32. In the present case, the *ex parte* Applicants have stated that their application is anchored on Articles 22, 23, 40 and 47 of the *Constitution of Kenya* and the Fair Administrative Act 2015 and argue that they have demonstrated in the statements of facts that their constitutional rights under the quoted provisions have been violated and the court has jurisdiction to hear this matter based on the stated provisions of the law. The argument is that an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3) (f) and should therefore not be curtailed by technicalities.

33. Examination of recent decisions reveal fundamental changes to the judicial review jurisprudence brought about by the promulgation of the *Constitution of Kenya, 2010*. In *Republic v Kenya Revenue Authority ex parte Stanley Mombo Amut*i [2018] eKLR Mativo J as he then was observed as follows:

> " The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the *Constitution* and the constitutional dictate to develop the law on that front. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would

pass an Article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay. 38. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). Fourth, section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review. Fifth, Article 159 commands courts to administer justice without undue regard to procedural technicalities."

34. Further, Okong'o J in *National Social Security Fund v Sokomania Ltd & another* [2021] eKLR expounded on the issue and stated as follows: -

> " Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the *Civil Procedure Rules*. Following the promulgation of the *Constitution of Kenya*, 2010 and *Fair Administrative Action Act*, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under the *Constitution of Kenya, 2010* and/or the *Fair Administrative Action Act*, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court."

35. In view of this jurisprudence, the Court in the case of *Peter Orengo Migiro (suing on behalf of the Late Christopher Orenge Makori) v Samwel Omagwa James & 2 others* [2022] eKLR concluded as follows:

> " What can be gleaned from the decisions is that indeed the scope of Judicial Review is no longer confined to the legal framework under the *Law Reform Act* and Order 53 of the *Civil Procedure Act* but is now entrenched in the *Constitution* and the Fair Administrative Act. However as correctly held in the in NSSF (supra), if one opts to file an application for Judicial Review under the *Law Reform Act* and Order 53 of the Civil Procedure Rules, one must apply for leave within six months of the decision as the court has no discretion to enlarge time within which to file the application for leave."

36. In the case of *James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others* [2017] eKLR the Hon. Justice Joel Ngugi as he then was stated as follows concerning the formalization of procedure of filing judicial review cases vis-a vis the *Constitution of Kenya, 2010*;

> " I agree with the scholarly views of Prof. Akech and Prof. Gathii. It is therefore my view that FAAA provides ..... independent avenue for exercising the Constitutional right to fair administrative action. In the absence of any rules of practice under the FAAA it is unclear what form the originating document for such a suit should be. It would, however, be absurdly formalist and reification of procedural technicalities to strike out such a suit founded by way of Notice of Motion without leave of the Court because such suits founded under Order 53 of the Civil Procedure Rules require leave of the Court first. In my view until Rules of Procedure under FAAA are prescribed by the Honourable Chief Justice, parties may approach the Court in any form that provides adequate notice to the other party as to the nature of the case they are bringing. In this case, the 1st and 2nd Respondents have nowhere claimed that the suit as filed fails to give them adequate notice of the Applicants' grievances. Instead, Respondents' complaint is a formalistic one: that the Applicants ought

to have filed a Chamber Summons Application in the first instance to obtain the leave of the Court."

The court went on to dispose of the matter and stated that;

> " My express holding is that I find no requirement in our law or rules of procedure that a party seeking to commence a suit under the Fair Administrative Actions Act must first obtain the leave of the Court. I also expressly find that, in the absence of Rules promulgated by the Honourable Chief Justice under Section 10(2) of the Fair Administrative Actions Act, bringing a suit under the act by way of notice of motion does not render such a suit fatally defective and liable to be struck out."

37. I am persuaded by the above authorities and hold that since in this case the *ex parte* Applicants have anchored the main application under Articles 22, 23, 40 and 47 of the *Constitution of Kenya* and the Fair Administrative Actions Act 2015, leave of the court before commencement of the action is not a prerequisite to filing of the judicial review application.

B) Whether the decision made by the 1st Respondent was unreasonable, irrational and against the rules of natural justice

38. The *ex parte* Applicants contend that the decision of the Appeal to the minister case number 146/2020 was unlawful, irrational and against the rules of natural justice. The 1st *ex parte* Applicant states that he acquired an interest in the suit land by an agreement between himself and Wanzau Nzumbi for the purchase of an unspecified portion of land at Kitiliko Misango village for a total sum of Ksh.85, 000.

39. I note that the *ex parte* Applicants have sought orders regarding Land Parcels Nos. 1831 and 1829 at Ngwani Adjudication Section, Mutomo Sub-County. However, a look at the decision of appeal to the Minister number 146 /2020 shows that the appeal was against parcel number 1831 Ngwani Adjudication section and the parties were Lamuel Kising'u Mbwika (Appellant) and James Kioko Mauta and Wanzau Nzumbi (Respondent) and the same did not deal with land parcel number 1829. The said parcel number 1831 is claimed by the 1st Applicant.

40. The parameters of judicial review were set out by the Court of Appeal in *Municipal Council of Mombasa v Republic & another* [2002] eKLR.

> " Judicial review is concerned with the decision making process, not with the merits of the decision itself: The Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..."

41. With regard to the question of whether the 1st Applicant being a person in occupation and use of the land was heard during the proceedings before the 1st Respondent, I do observe that the proceedings, findings and judgment show that the 1st Applicant was heard and he gave evidence. Indeed, he is addressed as the 2nd Appellant and he clearly stated that he purchased the land parcel 1831 for a sum of Kshs 85,000 and he asked that the same be transferred to him. His claim was confirmed by the evidence of Wanzau Nzumbi. In the 1st Respondents findings he stated that "the second appellant James Kioko Mauta who alleges to have bought the disputed parcel from the respondent cannot assume ownership until the case is determined"

42. When it came to the final determination of the dispute, the 1st Respondent found that:

Findings

1. The Respondent (Wanzau Nzumbi) had arbitration number 35 and 37 against parcel 1829 and 1832 which she lost and never appealed.

2. Taking into consideration that parcel number 1831 was originally a block of land together with parcel number 1829 and 1832 shows clearly that the disputed parcel of land belongs to the respondent since the respondent was satisfied by the decision of the objection of the trial court. (Emphasis added)

3. The second appellant, James Kioko Mauta who alleges to have bought the disputed parcel from the respondent cannot assume ownership until the case is determined.

Judgement

> In view of the above findings, Appeal to the Minister Case Number 146/2020 is hereby allowed. Parcel number 1831 is hereby transferred to the first Appellant, Lamuel Kising'u Mbwika" (Emphasis added)

43. The above finding and judgement in my view are not logical for the reason that in the 1st Respondents findings he states that the disputed land belongs to the Respondent in the appeal while in the judgment he states that the appeal is allowed and directs that the land be transferred to the first appellant Lamuel Kising'u Mbwika. In my view the judgment by the 1st Respondent does not flow from the findings and is not connected to the reasons given for the final decision. My conclusion is that the final judgment is irrational and ought to be quashed. Section 7(2) (i) of *Fair Administrative Action Act* which provides that:-

> " A court or tribunal under subsection (1) may review an administrative action or decision, if-
>
> i. the administrative action or decision is not rationally connected to-
>
> a) the purpose for which it was taken;
>
> b) the purpose of the empowering provision;
>
> c) the information before the administrator; or
>
> d) the reasons given for it by the administrator."

44. Further to the above even if the 1st Respondent wrongly stated that the land belonged to the Respondent as stated in his findings instead of the appellant as stated in his judgment, it will still mean that the 1st Respondent took into account an irrelevant consideration in coming to his decision. This is for the reason that the mere fact that Wanzau Nzumbi did not appeal the decision over parcels 1829 and 1832 and that the three parcels of land were originally one block of land did not automatically mean that parcel 1831 did not belong to her. In my view the 1st Respondent ought to have considered all the claims to the suit land and made a reasoned finding and judgment. In my view the 1st Respondent herein was under an obligation to hear the appeal substantively and make a decision. The manner in which proceedings should be conducted by the Minister under section 29 of the *Land Adjudication Act* was captured in the case of *Republic vs. Special District Commissioner & another* [2006] eKLR as follows:

> " It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the

documents which form the lower...court record that will assist him to, "...determine the appeal and make such order thereon as he thinks just ...." ..... This means to me that the District Commissioner (Minister) has to examine the written grounds of appeal along with the Land Adjudication Officer's proceedings, judgment, ruling or award, and from it, he will, make a just order or judgment. Can the District Commissioner refuse to read the substance of the evidence and the decision of the Land Adjudication Officer from whom the appeal came."

45. In the case of *Republic v Kenya Revenue Authority & another; Shapi & 3 others (Exparte)* (Judicial Review E038 of 2021) [2021] KEHC 401 (KLR) the Court found that:

> " It is a well-established principle that if an administrative or quasi- judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated."

46. Similarly, the Court of Appeal in *Suchan Investments Limited v. Minister of National Heritage& Culture & 3 Others* [2016] eKLR the Court of Appeal stated that:

> "Analysis of Article 47 of reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision."

47. In my opinion, it was not reasonable to conclude that the Land Parcel No1831 Ngwani Adjudication Section could not possibly belong to the Respondent simply because she did not object to the decision regarding Parcels 1829 and 1832.

48. In conclusion, I am of the opinion that the 1st Respondent took into account an irrelevant factor that since the Respondent did not contest the other two parcels of land then 1831 Ngwani Adjudication Section is also not hers. This was also an unreasonable conclusion that led to the contested final decision. With regard to the land parcel No 1829, I note that the said land was not the subject of the appeal before the 1st Respondent. The Court cannot make a determination on land parcel 1829 Ngwani Adjudication Section as it was not the subject of the impugned decision by the 1st Respondent. Further the court cannot issue prayer 2 of the Notice of Motion by declaring the Applicants as the rightful owners of land parcel numbers 1831 and 1829 Ngwani Adjudication Section respectively and order that the title be registered in their names. Such a decision would amount to the usurpation of the powers only given to the Minister in ascertainment and recording of rights and interests in Trust land formerly community land under the *Land Adjudication Act*. This is more so considering that the Applicants were not beneficiaries of the judgement of the Land Adjudication Officer in objection proceedings under section 26 of the *Land Adjudication Act*.

49. The final orders of this court are that the Notice of Motion dated April 22, 2022 partly succeeds as follows ;

    1. An order be and is hereby issued to remove into this Court and quash the decision by the 1st Respondent in allowing Appeal to the Minister Case Number 146/2020 against Land Parcel Numbers 1831 Ngwani Adjudication Section, Mutomo Sub-County and directing the said parcel to be transferred to Lamuel Kising'u Mbwika.

2. An order be and is hereby issued directing that the appeal to the Minister be remitted back for fresh hearing by the Ministers designate other than Ronald Enyakasi Deputy County Commissioner Mutomo Sub County.

3. Prayer 2 and 3 of the Notice of Motion dated April 22, 2022 are hereby dismissed.

4. Costs of the suit to be paid by the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 31ST DAY OF JANUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of;

Musyoki - Court Assistant

Kariuki Advocate for the *ex parte* Applicant

M/s Njuguna State Counsel for the Respondents

James Mauti – Applicant

Lamuel Kisingu – interested party