Kiplangat v Cabinet Secretary of Lands and Physical Planning & 5 others; Chelagat & another (Interested Parties) (Land Case 8 of 2021) [2023] KEELC 803 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 803 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 8 OF 2021

FM NJOROGE, J

FEBRUARY 15, 2023

BETWEEN

HENRY KIPTIONY KIPLANGAT .... APPLICANT

AND

CABINET SECRETARY OF LANDS AND PHYSICAL PLANNING .... 1ST RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING .... 2ND RESPONDENT

DIRECTOR OF SURVEY - MINISTRY OF LANDS AND PHYSICAL PLANNING .... 3RD RESPONDENT

DIRECTOR LAND ADMINISTRATION MINISTRY OF LANDS & PHYSICAL PLANNING .... 4TH RESPONDENT

CHIEF LAND REGISTRAR, MINISTRY OF LANDS & PHYSICAL PLANNING .... 5TH RESPONDENT

DISTRICT LAND REGISTRAR KOIBATEK .... 6TH RESPONDENT

AND

NANCY RUTH CHELAGAT .... INTERESTED PARTY

GEORGE GATHENYA .... INTERESTED PARTY

JUDGMENT

1. The Ex-parte applicant herein through a substantive judicial review notice of motion application dated 25/8/2021 seeks the following orders:

1. ... spent.
2. That this Honourable Court be pleased to issue an Order of prohibition against the 1st, 2nd, 3rd, 4th, 5th and 6th respondents by themselves, their agents, servants and or anybody acting on their behalf from implementing the decision of Cabinet Secretary Lands and Physical Planning to expunge the lease and interfering with the lease records, of all that parcel of land known as Eldama Ravine Township Block 1/656 registered in favor of Henry Kiptiony Kiplangat – applicant herein issued vide internal memo dated 26th July 2021.
3. That an order of *certiorari* is hereby issued, quashing the decision of the 1st respondent – Minister of Lands and Physical Planning, communicated vide a letter dated 26/7/2021; directing the 2nd, 3rd, 4th, 5th and 6th respondents to expunge the lease and lease documents from their records or in the alternative reinstate the expunged lease and lease documents of the applicant issued by the 6th respondent – District Land Registrar Koibatek on 8/4/2021.
4. That an order of *mandamus* be and is hereby issued compelling the 3rd respondent – Director of Surveys to reinstate cancelled surveys of Eldama Township Block 1/656 registered in favor of applicant, Henry Kiptiony Kiplangat and further orders compelling the 2nd, 4th, 5th and 6th respondents to reinstate expunged lease and records of Eldama Ravine Township Block 1/656 registered in favor of applicant, Henry Kiptiony Kiplangat.
5. That this Honourable Court be pleased to issue any further Orders it may deem fit, geared at upholding substantive justice at large.
6. The costs of this application be provided for.

2. The grounds relied on are at the foot of the motion and are replicated in both the verifying affidavit and the statutory statement attached thereto. The grounds briefly set out at the foot of the motion are as follows:

i. The applicant is an innocent purchaser of value and the current registered owner of all that parcel of land known as Eldama-Ravine Township Block 1/656 having bought it on 23rd March 2021 and had it transferred to his favor on 8 April 2021.

ii. That 1st respondent vide a letter tittle internal memo dated 26th July 2021 addressed to the 2nd, 3rd, 4th, 5th and 6th respondents, have been instructed without according the applicant a chance to be heard, yet he is an innocent purchaser of value.

iii. This decision has been made without any communication whatsoever to the applicant, it has been done behind his back which is contrary to the tenets of natural justice.

iv. Obtaining this information on that part of the applicant was extensively concealed that he had to commit the 6th respondent- District Land Registrar – Koibatek to Civil jail vide Eldama-Ravine PMCC Miscellaneous Application in the said proceedings.

v. This decision equates to condemning the applicant unheard and it is contrary to the rules of natural justice.

vi. The applicant has a genuine certificate of lease by the respondents jointly and severally. None of the respondents has ever hinted to him that his genuine certificate of lease is suspect, un-authentic and or it was fraudulently obtained.

vii. The sanctity of title/lease must be respected and upheld at all times; therefore expunging the same without hearing from the applicant is unjustified, and an act gaining its base from an illegality.

viii. The applicant as an innocent purchaser of value and deserves serious protection of the law and moreso, vide this Honourable Court.

ix. The law requires that in such situations where a Cabinet Secretary of the ilk of the 1st respondent, exercises powers she does not have; an application of such a natural must be made.

x. The application is made for the best interest of justice and outmost good faith, and fairness to every party.

3. In this case the applicant claims that the respondents want to use unorthodox means to deny him his legal entitlement in the suit property. He avers that he has enjoyed quiet and peaceful possession thereof since purchase of the same but now the respondents have threatened those tranquil conditions he has been accustomed to. In particular, the 1st respondent appears to have done something that irked the ex parte applicant and provoked the present suit: he wrote a letter dated 26/7/2021 directing the 2nd, 3rd, 4th, 5th and 6th respondents to expunge the lease and lease documents in the ex parte applicant's name from their records, allegedly without granting him an opportunity of being heard and without observing the provisions of the *Constitution* and the *Fair Administrative Action Act* as well as natural justice. That letter reads in part as follows:

> " From: Cabinet Secretary
>
> To: Ag. Director of Surveys
>
> Land Registrar, Koibatek
>
> Date: July 26, 2021
>
> Subject: Eldama Ravine Township Block 1/656
>
> The above matter and our memo dated April 29, 2021 refer.
>
> We have received all necessary reports from the Land Administration and Physical Planning departments over the authenticity of the various records relating to the subject property. The Land Administration department through the attached memo dated June 10, 2021 confirm that the subject parcel is the property of Ms. Ruth Chelagat who was allocated the plot in 2004. She subsequently accepted the offer by paying the prescribed fees. Further, the memo finds the allocation to one Raymond Kiplagat as suspicious for several reasons enumerated therein.
>
> The National Director, Physical Planning through his memo dated July 21, 2021 confirms that the part development plan (PDP) used to prepare the lease is not authentic.
>
> It is against this background that you are directed to expunge the fraudulently registered lease from the records.
>
> By a copy of this memo, the Ag. Director of Surveys is directed to also expunge from the record all documents supporting the impugned registration.
>
> Copies of the memoranda are enclosed for your information and record.
>
> Farida Karoney, EGH"

4. According to the applicant, he obtained the lease after adhering to all laid down procedures and conduct of due diligence, until the lease was transferred to him on 8/4/2021 His narrative is as follows: he found a property on sale in Eldama Ravine in March 2021; it was known as Eldama Ravine Block 1/656 (hereinafter "the suit property;") it was registered in the name of Raymond Kipkemoi Kiplagat. He conducted due diligence. The vendor gave him the following documents:

    i. The allotment letter dated 8th February 1996;

    ii. Acceptance letter of the allotment letter;

    iii. A copy of bankers cheque dated 10th January 2020;

    iv. A copy of approved Survey Plan dated 20th November 2019;

    v. A copy of authentication slip dated 9th January 2020;

    vi. A copy of payment receipt dated 21st January 2020;

    vii. Rent clearance for the year 2021;

    viii. A copy of lease dated 27th January 2021;

    ix. An original certificate of lease dated 27th January 2021 – issued by the 6th respondent;

    x. A payment receipt in support of the survey plan.

5. He states that it is clear that all the documents originated from the lands office for the following reasons: his advocate made a visit to the lands records office in Nairobi (SPRO) and requested for the land records for the property and its card and its file were both found; that it was also found that there were good grounds to believe that the lease for the said property was prepared in Nairobi and dispatched to Koibatek for execution by the Land Registrar; that his advocate's visit to Ruaraka Survey office also elicited a survey plan, a payment receipt, an authentication slip and an RIM amendment letter addressed to the Chief Land Registrar and copied to the County Land Registrar Baringo; and the Survey office confirmed that the documents originated from that office; that a letter confirming the authenticity of the letter of allotment for the suit land; was issued that one officer even confirmed that she is the one who had effected the RIM amendments for the suit land; that his advocate thereafter went to the Eldama Ravine lands office where the Land Registrar authenticated the certificate of lease as having emanated from his office; that he successfully applied for and obtained a rent clearance certificate; he then had his advocate do a sale agreement; that valuation was conducted by a government valuer based at Nakuru and stamp duty was assessed and duly paid; that executed transfer forms were prepared after the consent to transfer was successfully obtained; that the transfer forms were registered at the Koibatek land registry and a certificate of lease was issued in the ex parte applicant's name and a search was successfully done reflecting the success of the transfer; that he first got wind of the 1st respondent's interest in information regarding the suit land in June 2021; that he became apprehensive and sought an official search which was denied by the District Land Registrar Koibatek; that not even a court order issued by the Senior Principal Magistrate Eldama Ravine could compel her to issue the search and the applicant therefore took out contempt proceedings against that District Land Registrar; that it was at that juncture that the applicant obtained information that the 1st respondent had written the letter complained of dated 26/7/2021 whose effect has been described herein before hence the present suit.

6. In the statutory statement dated 6/8/2021 the grounds on which the motion is brought can be distilled as follows:

a. The 1st respondent's action of writing the letter dated 26/7/2021 is ultra vires;

b. That the ex parte applicant was not granted a hearing before the impugned action was taken/ breach of natural justice.

7. The judicial review notice of motion aroused the attention of the 1st and 2nd interested parties who successfully applied to be joined to the suit in that capacity vide a motion dated 10/9/2021 which was granted by this court on 22/11/2021.

The Response

Response by the respondents

8. The respondents filed no response to the judicial review notice of motion.

Response by the interested parties

9. The 1st interested party filed a response to the judicial review notice of motion on 2/2/2022 on behalf of both interested parties by way of a replying affidavit dated 31/1/2022. In that affidavit it is deponed that the 1st interested party acquired unsurveyed residential plot "A" in Eldama Ravine vide a letter of allotment dated 14/7/1997; that she paid Kshs.27,090/= to the government; that a correspondence file number 243141 was opened; that she did not conclusively process her lease; that instead, a lease was prepared in favour of one Thomas Tuikong and the deponent complained and the offending lease was cancelled; that the 2nd interested party acquired Uns Residential plot B and Uns Residential plot "C" - Eldama Ravine vide an allotment letter dated 10/12/1995; that he accepted the offer and made the requisite payment of Kshs.21,370/=; that her family and that of the 2nd interested party has been having a dispute over the same land parcel which went before a panel of elders and who resolved that the two families share the plots to avoid future conflicts; that upon that award the interested parties began to live in harmony; that the 2nd interested party's father had applied for conversion of the temporary occupation licence into a lease and this became successful and the 2nd interested party was issued a lease for a parcel number Eldama Ravine Township Block 1/638 and 640 both dated 14/10/2016 from the County Government of Baringo; that the 1st interested party made land rates and rent payments on unsurveyed parcel no "A" Eldama Ravine from 1998 -2021 as she awaited her title; that however in 2021 her fence was destroyed by a group of persons acting at the behest of a person who claimed to be the new owner and she reported to the police; that the 2nd interested party's plot "B" was also affected by similar encroachment and the fence thereto was destroyed in 2020 whereupon the invaders erected their own fence; that upon follow up it was discovered that some essential documents regarding the 2nd interested party's land, including original documents, were missing; that the deponent wrote a complaint letter dated 26/4/2021 to the 1st respondent; that the deponent was misled into placing some advertisements in the press on the basis of claims that there was another person with interest in her property; that the Deputy Director Land Administration found the 1st interested party's allocation to be authentic and advised the 1st respondent as much and a memo dated 10/6/2021 issued and recommended that her allocation be upheld and the records at Eldama Ravine relating to Raymond Kiplagat be expunged; that before the decision was made the respondents had carried out an extensive investigation and the decision the respondents made is the correct one which did not infringe on any of the ex-parte applicant's constitutional or statutory rights; that the allocation to one Raymond Kiplagat claimed to be genuine by the applicant was suspicious for a number of reasons and the applicant did not acquire a clean title from the said Raymond Kiplagat since the latter had merely encroached onto the interested parties' land and acquired title using fake and fraudulent documents; that the applicant's property No 656 is an illegal amalgamation of two properties and their conversion into that land

reference number; that the court should not direct the respondents on how to perform their statutory duties unless bad faith is evident or they are acting ultra vires; that an order of prohibition cannot issue as the directions of the 1st respondent have already been executed in that the ex parte applicant's lease and lease documents have already been cancelled and an order of certiorari would also be also vain in the circumstances; that no wrongdoing has been demonstrated on the part of the respondents and that the application dated 25/8/2021 lacks merit and is for dismissal.

The applicant's further affidavit

10. In response to the Interested Party's replying affidavit the ex parte applicant filed a further affidavit on 1/12/2022. The document is unpaginated and the pages rather chaotically arranged and the annextures thereto are not properly labelled; it is quite unworthy of these solemn proceedings. What the court can laboriously distil therefrom is as follows: the deponent stated that the letter cancelling his lease was not brought to his attention, and that it only came to light following Magistrates' Court's proceedings and a consequential warrant of arrest issued against the Land Registrar by the Eldama Ravine Magistrate's Court; that upon interrogation by the Eldama Ravine court it was found that the Land Registrar had commenced the process of expunging the lease; that the 1st respondent and the interested parties jointly engaged in fraudulent conduct; that the applicant was only given a certificate of official search after a court order was issued at Eldama Ravine and he subsequently obtained an order of this court to halt the process of expunging the lease on 6/8/2021; that it is true that there are three letters of allotment over the land claimed by the 1st interested party, including to Thomas Tuikong who was in actual possession thereof and who gave vacant possession to Raymond Kiplagat who sold to the applicant. The applicant raises a barrage of attacks against the claim by the interested parties, indicating that the plot claimed by the 2nd interested party belongs to a third party known by the name Musa Maiyo; that the 1st respondent had commended the rest of the respondents into secrecy in respect of the matter. The rest of the contents therein resembled those in the verifying affidavit and the statutory statement earlier filed by the ex-parte applicant save that he has added the denial that he engaged in fraud and the further claim that the respondents' failure to defend the judicial review notice of motion was evidence of guilt. He also asserts that his lease has not been cancelled at the Eldama Ravine lands registry and on the registry index map (RIM). He blames the 1st respondent for having, in his opinion, stooped too low from her high position to write a letter over such a small parcel and insinuated that she may be having a personal interest in his land parcel.

Hearing

11. On 31/10/2002 the court ordered that the motion should be disposed of by way of written submissions and I have noted that the ex parte applicant filed submissions on 9/12/2022 and the interested parties also complied on 6/2/2023 while no submissions were filed on behalf of the respondents. I have considered the filed submissions in the present judgment.

Determination

12. The ex-parte applicant claims that there are multiple letters of allotment to the same land which is the subject matter of the present suit. From what he states the allotment said to have been in respect of one Raymond Kiplagat appears to have been processed to the final stage and a lease was issued which was transferred to him. The respondents have not spoken by way of a filed response in the present proceedings but the documents exhibited by the applicant and the interested parties speak volumes as to what their stand in the matter is: they are of the view that the interested parties are the rightful allottees of the suit land and that the ex parte applicant does not deserve the property. The necessary question that arises in these proceedings therefore whether it can be ascertained in these proceedings

which among the multiple letters of allotment is valid against all the rest and if the certificate of lease issued to the ex parte applicant is valid. However, this court must restrict itself to determining of issues which are strictly crafted in accordance with the Judicial Review nature of these proceedings.

Issues for determination

13. The principal issues for determination in the present litigation are as follows:

    a. Whether the jurisdiction of this court has been properly invoked;

    b. Whether orders of certiorari, prohibition and mandamus should issue in favour of the ex parte applicant;

    c. Who ought to bear the costs of the present suit?

14. In respect of the issue as to whether the jurisdiction of this court has been properly invoked it is apt to remember that the usual manner of conduct of judicial review proceedings is by way of a statement of facts in support of the application, grounds for seeking the remedies, and evidence by way of a verifying affidavit.

15. There is no room for contentious matters to be handled in judicial review proceedings. Claims that are fit for determination in an ordinary suit are, due to their contentious nature, recommended to be filed in the appropriate manner that will allow for the trial by way of viva voce evidence, examination of documents and cross-examination of witnesses to authenticate and corroborate their evidential statements.

16. In the present case there is clear evidence that the respondents considered the process by which the applicant obtained his title and decided that it should be cancelled and that the interested parties were the proper allottees thereof. It is clear that both the civilian sides involved in the present dispute have some sort of recognition at the respondents' offices in that at least some of their documents appear there and, whether by way of right, fraud or forgery and with or without connivance of state officials, those documents have been somehow acted on. A heavy load of documentation requires to be examined and addressed in the present dispute and there is certainty that very many persons may need to testify as to what their role in the allotment or processing of title documents was. In brief what this court is stating here is that the present dispute boils down to the question as to whose title to the suit lands is valid; evidently a grant of judicial review remedies sought by the applicant would leave the issue unresolved. That issue can only be determined on the basis of the discharge of the burden of proof.

17. Regarding burden of proof, the provisions of Section 106 of the *Evidence Act* are as follows:

> " 107. Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

18. The court in the case of *A. M. v Premier Academy* [2017] eKLR (as Per Mwita J.) observed as follows:

> " To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden

of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA v Edmunds* [9] remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd* [10] :-

" The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

19. Before me are two sets of persons with diametrically opposed claims, probably yet to be joined in the current conflagration by several others whose claims are alluded to in this litigation, all seeking recognition of their claim to ownership of the suit land. Before me also are the respondents whose duty is to process land documents to the point where title is finally issued to citizens of this republic, and who are mandated with exercise of administrative discretions in the process, some of which are weighty and only to be exercised after critical deliberations and others which may be effected on the basis of plain common sense considerations. It is clear that the respondents' offices have the mandate, as any government office does in its scope, of ensuring that errors, irregularities and outright illegalities do not encroach into the process of issuance of title and other documents from their offices. It is clear that their offices may be vested with power to correct some errors that my crawl into the process, whether by design or by default. It has not been possible for the applicant or the respondents or indeed the interested parties, owing to the restrictive scope of these proceedings to prove their respective claims on a balance of probability as would be required for this court to uphold any of the claims to ownership of the suit lands. A decision of this court merely quashing the decisions and actions of the respondents in those circumstances where burden of proof has not been discharged may have the undesired effect of giving the erroneous impression that the dispute regarding title between all the parties involved has been settled in favour of the ex parte applicant.

20. In the case of *Republic v Zacharia Kahuthu & another (Sued as Trustees and on behalf of and as officials of the Kenya Evangelical Lutheran Church); Johaness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another* [2020] eKLR the court observed as follows:

" It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions.[9] This position has been up held by our superior courts on numerous occasions. In *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo*[10] it was held: -

“55. ... where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”(Emphasis supplied)

57. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.

58. The applicants are simply inviting this court to determine contested issues of facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. The core dispute as stated above is: - (a) the validity of the nomination process, (b) the validity of elections and its outcome, and; (c) the suitability or otherwise of the candidates who were elected. How can this court determine issues of fact without hearing oral evidence? This case falls totally outside the province of Judicial Review jurisdiction. It is simply a misconceived shortcut designed to obtain orders in an otherwise civil dispute.”

21. In the case of *Republic v Ministry of Roads & another Ex-Parte Vipingo Ridge Limited & another* [2015] eKLR my brother Hon Justice Muriithi observed as follows:

“ 29. It is trite law that judicial review does not deal with the merits of the decision but the decision-making process. In Judicial Review by Peter Kaluma, cited by the counsel or the 2nd Respondent at p.47, the learned author, sets out a statement of the Supreme Court Practice on the nature and scope of judicial review as follows:

> “The remedy of judicial review 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. ‘It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question’ (*Chief Constable of North Wales Police v Evans* (1982) 1WLR 1155), page 1160; [1982] 3 ALL ER 141, page 143, per Hailsham, LC). Thus a decision of an inferior court or public authority maybe quashed (by an order of certiorari made on an application for judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or

failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury's sense. The Court will not, however, on a judicial review application act as a 'Court of Appeal' from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty of usurping power."

22. The interested parties cited the case of *Republic v Director of Immigration Services & 2 others Ex Parte Olamilekan Gbenga Fasuyi & 2 others* 2018 eKLR (per Mativo J) regarding the proposition that judicial review does not address merits of an administrative of quasi-judicial decision but rather only the procedure. The foregoing are High Court decisions relating to Judicial Review. This court too should not be perceived to be acting outside the scope of judicial review in the present matter since as seen above the judicial review process can only be used to determine the propriety of the process employed to arrive at a given administrative or quasi-judicial decision or result. The Court of Appeal has also taken the same approach. In the case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR the Court of Appeal observed as follows:

> " (49) We are also of the view that it has now become a settled principle that judicial review remedies are not available in matters where facts are disputed. See the case of *Funzi Island Development Ltd & 2 Others v County Council of Kwale & 2 Others* [2014] eKLR succinctly stated that-.
>
> "It is true that generally speaking, judicial review procedure is not well suited for resolving disputes on material fact."

Karanja, JA in the aforementioned case also expressed that-

> " It is common ground that the subject matter herein is property worth a substantial amount of money. There were also serious and weighty arguments, for instance, whether the property in question was Trust Land or not; whether it was forest land or not; whether it formed part of Funzi Island or it formed part of the foreshore which could not be set aside for allocation.
>
> In my view, a matter such as this ought to have been fully heard as a civil claim where all the parties would have had an opportunity to bring all their legal ammunition in support of their claim. That way, issues of fraud as envisaged under the Registration of Titles Act (RTA), and other disputed facts would have been fully canvassed and conclusive determinations made on the same"
>
> [50] To the extent that the learned Judge despite cautioning himself delved deep into the evidence to consider letters dated 12th January, 2018 and 29th January, 2018 which were authored way after the decision contained in the letter dated

22nd November, 2017 was made and during the litigation, we find that he acted beyond the scope of his jurisdiction" (emphasis mine).

23. It is quite evident that the validity of the applicant's title cannot be determined in such proceedings as these and an ordinary suit may be needed if the processes of land allocation, surveying and processing of the registry index map and lease and certificate of lease and all the vital considerations concomitant to those processes are to be effectively interrogated. The proper approach by a court in such a case as the present is to eschew the granting of any orders of Judicial Review as sought as seen in the foregoing case law.

24. The applicant relied on the case of *Kuria Greens v the Registrar of Titles and another* Petition No 107 of 2010 and quoted that decision as follows:

> " The 1st respondent ought to have given the petitioner an opportunity to state its case before reaching the decision that has such far reaching ramifications. The petitioner ought to have been called upon to explain how it had acquired the suit land, considering that the 1st respondent had himself issued a Certificate of Title to the petitioner."

25. However, the case of Kuria Greens (*supra*) can be distinguished as there is greater leeway for a court of law to decide on issues raised in a petition than in a judicial review application the latter which I still view as more restrictive. Also the case of *Kongowea Market Estate Ltd v Registrar of Titles* [2011] eKLR may be distinguished in that the same resulted from a sale of a property that had already been granted to a public body and which was allegedly sold by way of a tender notice to the ex parte applicant and therefore a result of a commercial transaction between two parties; there were no competing documents during the process of issuance of title as there is in the present instance; consequently, it is clear that the facts are quite different from those of the present case where it is evident that different parties claimed right to allocation of the same land. The same situation of existence of a commercial transaction existed in the case of *R v Kisumu District Land Registrar and another* [2010] eKLR relied upon by the ex parte applicant. On the other hand, the interested parties have cited the case of *Gordon Metropolitan* 1920 2 KB 1080 at Page 1098 and *Scott v Brown* [1892] 2 QB 724 at page 1128 for the proposition that "…no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract of transaction which is illegal if the illegality is brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality." In the light of what is stated hereinbefore, I am of the view that the position taken by the interested parties is correct.

26. In the case of *Super Nova Properties Ltd and another v the District Land Registrar Mombasa and others* 2018 eKLR it was observed as follows by the Court of Appeal:

> " Many cases have been determined regarding allocation of public land for private use, yet the issue has remained unresolved as courts, being a bastion of justice, have been called upon on a case by case basis to determine the competing public versus private rights over public land that is allocated for private use. The decisions are on case by case basis, therefore, the ratio decidendi that seems germane in most of the decisions is that a merit evaluation of all the surrounding circumstances can best be litigated in the Environment and Land Court."

27. The court finalized by adding as follows while dismissing the appellant's appeal:

> " However, he declined to exercise his discretion in favour of the appellants, in our view, not because of any misapprehension of the law or precedent as every case is unique in its own

way. In our view, the Judge appreciated the guiding principles that guide courts on when to dis-entitle a party of a relief. These are, inter alia, unreasonableness or unmeritorious conduct, acquiescence in the irregularity or illegality complained about or waiver of the right to object may result in the court declining to grant the relief. Other considerations, of course, include; whether granting the remedy is a futile exercise as in this case, the suit premises is now registered under the Trusteeship of the Permanent Secretary Treasury for the Judiciary…Although we sympathize with the appellants who perhaps fell prey to unscrupulous public officers and in the process lost their money and time chasing the suit land that is occupied by the Judiciary, that appears like chasing the wind; we are of the view that equity suffers no wrong without a right; the appellants' claim (if any) lies before the Environment and Land Court where they can ventilate all their grievances and that court will have an opportunity to interrogate all the merits and demerits and issue appropriate compensation to the deserving party."

28. It is the position of the ex parte applicant who cites the case of *Emfil Limited v the Registrar of Titles Mombasa and 2 others* 2014 eKLR that allegations of fraud were not properly placed or proved before the respondents and that the respondents did not have a guided procedure to enable them conclude that there was such fraud. However, the citation of that case in the present dispute goes further to emphasize the position held by this court that where there are seriously contested issues of fact the proper manner of commencement of a suit is by way of an ordinary plaint where the issues can be appropriately resolved.

29. It would appear from the foregoing that the ex parte applicant has quite laboriously squeezed his oversized claim to title over the suit land into a very restrictive and ill-fitting garment of judicial review proceedings. For the reason that the substantive judicial review notice of motion application dated 25/7/2021 has improperly invoked the jurisdiction of this court, I hereby dismiss it with costs to the respondents and the interested parties. I also note that his substantive motion for Judicial review was wrongly intituled and had the issue been raised it may have afforded a further ground for rejecting the motion.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH DAY OF FEBRUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU