



**Republic v Chairman National Land Commission & another; Chogo & another (Exparte Applicants); African University Trust of Kenya (Interested Party) (Miscellaneous Application 52 of 2022) [2024] KEELC 13684 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13684 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 52 OF 2022  
NA MATHEKA, J  
DECEMBER 11, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CHAIRMAN NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KAZUNGU MOLI CHOGO ..... EXPARTE APPLICANT**

**CHANGA MOLI CHOGO ..... EXPARTE APPLICANT**

**AND**

**AFRICAN UNIVERSITY TRUST OF KENYA ..... INTERESTED PARTY**

**JUDGMENT**

1 The application is dated 24<sup>th</sup> August 2022 and is brought under section 8 & 9 of the *Law Reform Act* and Order 53 Rule 1 and 3 of the Civil Procedure Rules seeking the following orders;

1. That an order of Mandamus do issue at the instant of the exparte applicants to compel the Chairman National Land Commission and the National Land Commission to issue and Addendum and Corrigendum to Gazette Notice Number 1995 dated 1<sup>st</sup> March 2019 and correct names of the parties under Table 3 Item No. 14( Page 881) and show the parties correct names in respect to the determination dated 1<sup>st</sup> March 2019 allowing the applicants claim over the land known as to Plot No.5141IMN situated at Utange area of Mombasa within fourteen



(14) days of delivery of judgment or such other period this honourable court may deem fit and just.

2. That costs of this application be awarded to the ex parte applicants.
- 2 The interested party stated that they are other suits touching on the subject matter namely, Mombasa HCC Misc. Civil Application No. 103 of 2012 (JR) Republic -v- The Town Clerk Municipal Council of Mombasa (Ex-parte Bronson Hare Chogo & 3 others) and African University Trust of Kenya (Interested Party), which the ex-parte Applicants allude to at SUBPARA graph 5 and 6 of the Verifying Affidavit. This suit was dismissed on 30/10/2018 for want of prosecution. (Annexed and marked as "F-5" is a copy of the dismissal order made on 30<sup>th</sup> October 2018). Mombasa ELC No. 134 of 2013 (O.S) Kazungu Moli Chogo & 6 others -v- Perhan } Torun & 6 others, where the ex-parte Applicants herein are the Applicants and the Interested Party herein is the 5<sup>th</sup> Respondent and marked as "F-6" is a copy of the Originating Summons dated 27<sup>th</sup> June 2013). This suit is scheduled for hearing on 14<sup>th</sup> October 2024 and 28<sup>th</sup> October 2024. That in Mombasa CMCC (ELC) No. 10 of 2021 Kazungu Moli Chogo & Another vs Feisal Sherman & 3 others, where the ex-parte Applicants herein are the Plaintiffs and the Interested Party herein is the 4<sup>th</sup> Defendant. (marked as "F-7" is a copy of the Plaint dated 21<sup>st</sup> April 2021). This suit was stayed on 17<sup>th</sup> March 2023 pending the hearing and determination of the foresaid ELC No. 134 of 2013 (O.S). That owing to the multiple suits filed by the ex-parte Applicants, this Court or the Court in ELC No. 134 of 2013 (O.S) may make conflicting findings touching on the suit property, which creates a risk of embarrassment of either or both courts.
- 3 The interested party submitted that granting the prayers sought in the Judicial Review Application would be tantamount to making orders in vain because, the part of the gazette notice that the ex-parte Applicants seek to compel the 2<sup>nd</sup> Respondent to correct was not in respect of the ex-parte Applicants' Claim No. NLCHLI0072017, but a totally different claim by a different party. The purported determination of the NLC dated 7<sup>th</sup> February 2019, in accordance with which the ex-parte Applicants seek the gazette notice to be corrected, is a forgery, was never issued by the NLC and does not exist at all. Compelling the 2<sup>nd</sup> Respondent to correct part of a gazette notice that is in respect of a totally different claim from the ex-parte Applicants' claim, so as to reflect the contents of a forged non-existent determination is a recipe for catastrophe.
- 4 That granting the prayers sought in the Judicial Review Application also poses a great risk of causing judicial embarrassment because, the suit property subject of the instant proceedings is also the subject of the previously instituted suit Mombasa ELC No. 134 of 2013 (O.S), which is still pending before the ELC at Mombasa and is scheduled for hearing on 14<sup>th</sup> October 2024 and 28<sup>th</sup> October 2024. There is a likelihood that this Court and the Court in ELC No. 134 of 2013 will make different findings with respect to the same suit property, which would greatly embarrass this Court, the Court in ELC No. 134 or both, and prejudice the fair trial of the matter(s).
- 5 This court has considered the application and the submissions therein. The purpose of judicial review was enunciated 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 make the decision have the power i.e. the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of



Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

- 6 It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. vs Wednesbury Corporation* (1947) 2 All E.R. 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (2013) eKLR, while citing the *Associated Provincial Picture Houses Ltd. vs Wednesbury Corporation* (supra) namely:

where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is ‘so unreasonable that no reasonable authority could ever come to it.’”

- 7 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 as was held by Mumbi Ngugi J in the case of *Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (supra),

That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question.”

- 8 It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the 1<sup>st</sup> Respondent acted ultra vires in making the impugned decision. In the case of *Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* (2014) eKLR, the court held that;

Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on 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.”

- 9 Similarly, in the case of *Commissioner of Lands vs Kunste Hotel Limited* (1997) eKLR (E & L) 1 at page 249, the Court of Appeal stated that;

But 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 individual is given fair treatment by the authority to which he has been subjected”.

In Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 2 Page 508 where it is stated that;

Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not



the remedy is the most efficacious in the circumstances obtaining. The judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles”.

10 Be that as it may, the interested party has raised a preliminary issue that of sub-judice. Before going into the merits or merits of the judicial review this court will determine the same. He stated that there is a suit, Mombasa ELC No. 134 of 2013 (O.S) Kazungu Moli Chogo & 6 others v Perhan {}Torun & 6 others, where the ex-parte Applicants herein are the Applicants and the Interested Party herein is the 5<sup>th</sup> Respondent and marked as "F-6" is a copy of the Originating Summons dated 27<sup>th</sup> June 2013). This suit was scheduled for hearing on 14<sup>th</sup> October 2024 and 28<sup>th</sup> October 2024. We note that this suit was instituted in 2022.

11 Section 6 of the *Civil Procedure Act* provides that;

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they are any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

12 I am not persuaded by the Respondent’s counsel that the suits are distinct and different. They are similar. A determination of either of them, will obviously render the other spent and of no further use. The law requires that in a situation such as this, a subsequent suit is stayed under Section 6 of *Civil Procedure Act* because of the rule of Res sub-judice. In the case of Kenya Bankers Association versus Kenya Revenue Authority, 2019 eKLR the court had this to say on the issue of Res sub-judice;

“in addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.

A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub-judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. In *Re the matter of the Interim Independent Electoral Commission*, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court...”

12 The rationale behind sub-judice rule is to prevent situation of having conflicting orders emanating from the same subject matter. In the case of *David Ndi & others vs Attorney General & Others* 2021 eKLR, a bench of five Judges inter alia stated;

“The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”



13 I have perused annexure F-6 a copy of originating summons in Mombasa ELC No. 134 of 2013 (O.S) Kazungu Moli Chogo & 6 others -v- Perhan {}Torun & 6 others, where the ex-parte Applicants herein are the Applicants and the Interested Party herein is the 5<sup>th</sup> Respondent. According to the interested party the suit was scheduled for hearing on 14<sup>th</sup> October 2024 and 28<sup>th</sup> October 2024. The ex parte applicants do not dispute this fact. I find this matter is sub judice and it is struck off with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

