



**Republic v Ministry Of Lands & 3 others; M’mbetsa (Interested Party);  
Mtula (Exparte Applicant) (Judicial Review Miscellaneous Application  
E009 of 2022) [2023] KEELC 17516 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17516 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E009 OF 2022**

**AE DENA, J**

**MAY 23, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER KINANGO SUB COUNTY .... 1<sup>ST</sup>  
RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND ADJUDICATION AND SETTLEMENT OFFICER  
KINANGO ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**M’MBETSA NZAPHILA M’MBETSA ..... INTERESTED PARTY**

**AND**

**NYOTA MWERO MTULA ..... EXPARTE APPLICANT**

**JUDGMENT**

**Background**

1. The subject of this ruling/judgement is the Notice of Motion application dated 12/7/2022. To appreciate the dispute, I will give the background as deponed in the affidavit of the exparte applicant Nyota Mwero Mtula sworn on 19/7/22 in support of the Judicial Review application herein. The dispute revolves around plot 677 and involves the family of the said Nyota Mwero Mtula and that of Nzaphila M’Mbetsa the Interested Party who are members of the same clan which started way



back in the year 2006. In the year 2006 Nyota Mwero lodged a case before the Kilibole Group Ranch Committee against one Zuma Marunga & 2 others. The said committee in the same year found in favor of Nyota Mwero to the effect that he should build his house on the side of the road where his people were buried. He annexed the proceedings ‘NM1.’

2. Adjudication of the area commenced in the year 2007. The *ex parte* applicant depones that once the demarcation and adjudication process kicked off Nzaphila M’Mbetsas family registered the entire parcel in the names of Zuma Marunga. That this was done in the absence of Nyota Mwero. This prompted Nyota Mwero to lodge an objection with the Kinango/Mnyenzi Adjudication Section Board case No 3107-08 (or 31/07-08) against the said Zuma Marunga. From the records this case was filed on 13/11/07 and a decision rendered on 20/4/2010.
3. The Committee in the above case from the proceedings attached ‘NMM 2’ found that the parties were from the same clan. That there were graves belonging to Nyota Mwero’s relatives in the plot. That the Kinango Mazeras road cut through the plot and should be used as a boundary between Nyota Mwero and Zuma Matari. That Nyota Mwero be allocated the portion that had the graves. It was held that the plot should be subdivided accordingly and Nyota Mwero be issued with new plot No 2781.
4. Nyota Mwero avers that the decision above was never appealed and is thus final as it determined the boundary between the *ex parte* applicant family and Zuma Maringa family and which the Interested Party is a member.
5. Nyota Mwero further avers that to his dismay an objection No 45 of 2021 was filed by the Interested Party. That he raised objection that the matter was basically closed by the earlier determination of 20/4/2010. That at the hearing of the objection No45 of 2021 the Interested party basically acknowledged the suit filed on behalf of his family by his brother.
6. He deponed that pursuant to advise from his advocate that the land adjudication officer had neither jurisdiction nor mandate to sit and deliberate on a decision rendered on 20/4/2010, over 11 years ago, she had no jurisdiction to vary the boundaries of the plot No 2781 and award the objector more land whose effect was to review the decision made by the adjudication Board. That it was required of the adjudication officer to determine the jurisdictional issue raised before dealing with the objection before her.
7. It is deponed that in admitting the Interested Party’s case the Board was sitting on appeal in which they did not have powers to admit and deliberate for want of jurisdiction. That the timelines for any objection or appeal had lapsed and as such the board violated the provisions of sections 26 and 29 of the Land Adjudication Act (herein the Act). The deponent also stated that the Adjudication Officer and the Commissioner /Minister to consider his evidence both oral and documentary as well as his submissions and failed to accord him a decision on the issue of jurisdiction.
8. Further that being dissatisfied with the decision of the subcounty land & adjudication Officer the *ex-pate* Applicant filed an appeal to the Minister under section 29 (1) to exhaust the internal dispute resolution mechanism see ‘NMM 5’ which also attached the grounds of appeal.
9. The foregoing is basically the *ex-pate* Applicants account of the dispute to the point of his appeal to the Minister which was dismissed. In addition, I also gathered from the responses and pleadings that the Interested Party’s brother one Zuma Maruga Matari filed a land committee case No 1 of 2007 against the *ex-pate* Applicant claiming that plot No677 belonged to him and not Nyota Mwero. In a judgement dated 7/11/07, the Land Adjudication Committee found in favor of Zuma Maruga and ordered that Nyota Mwero’s name be deleted from the register and be replaced with that of Zuma Maruga. The Committee granted 14 days for appeal. From the *ex-pate* Applicants’ depositions this



must be the case that led the *ex-parte* Applicant to file case No 3107-08 (or 31/07-08) against Zuma Marunga on 13/11/07.

- 10 The adjudication register for the Mnyenzi Adjudication Section was completed and closed on 15/10/20 and written objections thereto were invited to the Adjudication Officer Kwale within 60 days as required by section 25 & 26 of the Land Adjudication Act. (see NM3).
- 11 On 19/10/20 the Interested Party M'mbetsa Nzaphila M'mbetsa said to be Zuma Matari's brother filed an objection No45 of 2021 in respect of plot 2781 above. From the proceedings attached it was his evidence that his land was within the said plot and should be curved out. Narrating the history culminating into the decision to hive off plot 2871 he stated the Adjudication Committee did not visit the suit property 677 from which the said plot was curved out. After hearing both parties and their witnesses the Land Adjudication Officer on 26/10/2021 allowed the objection and created the new plot No 2932 in favor of the Interested Party.
- 12 Nyota Mwero the *ex-parte* Applicant herein being dissatisfied with the above decision lodged an appeal to the Minister see NMM5) raising several grounds of appeal including a determination whether the Land Adjudication Officer was seized with jurisdiction to hear the matter when it had been concluded in 2010. The appeal was dismissed by the Deputy County Commissioner precipitating the present application for judicial review after exhausting the dispute resolution mechanisms laid out in the Act.

### **The Application**

- 13 The *ex-parte* Applicant seeks an order of *certiorari* to call for and quash
  - a. the decision of the Kinango Sub County Land Adjudication & Settlement Officer made on October 26, 2021 with regard to Plot No 2781 Kinango Mnyenzi Adjudication Section
  - b. the subsequent decision of the Minister through the Kinango Deputy County Commissioner dated 21/3/2022 affirming the decision of October 26, 2021 allowing objection No 45 of 2021 which was allowed and created plot no 2932 in favour of Mmbetsa Nzaphila Mmbetsa ID No 31377437 a brother to Zuma Marunga Matari who was a respondent in adjudication case no 3107/08[31-07-08].
- 14 The *ex-parte* Applicant also seeks an order of *mandamus* directed at the respondents to enforce the decision delivered on 20/4/2010 in Land Adjudication Board Case No 3107-08 [31-07-08] Nyota Mwero Vs Zuma Marunga Matari whence it was determined that; -The road be used as the boundary between Zuma Marunga's family and Nyota Mweros family and title No 2871 was carved out of title No677 the same being final in respect of the dispute between Zuma Marunga and Nyota Mweros family.The plaintiff (*ex-parte* Applicant) be issued with a new plot number 2781.That the leave so granted for filing of judicial review proceedings to act as stay of the decision of the Kinango Sub County Land Adjudication and Settlement Officer of 21/1/2021 and the minister's decision of 21/03/2022.
- 15 The application is grounded on the supporting affidavit of Nyota Mwero Mtula sworn 12/7/22 whose content together with grounds of the application has already been set out.

### **Responses To The Application**

#### **Respondents Response**

- 16 In response to the application the 3<sup>rd</sup> Respondent filed a replying affidavit sworn by one Davis M Njeru the Sub County Land Adjudication & Settlement officer Kinango. He avers that according to their records initially during demarcation parcel no 677 was demarcated and recorded under the name of



Nyota Mwero the *ex-pate* Applicant. That on 7/22/2007 a land committee case no 1/2007 touching on parcel 677 filed by one Zuma Matari against the *ex-pate* Applicant and which was determined in favour of Zumas Matari. The *ex-pate* Applicants name was deleted and replaced accordingly. The rest of the depositions confirm the subsequent events as laid out hereinbefore up to the Appeal to the Minister. According to Mr Njeru st all due process was followed in determination of the matter as per the mandate bestowed on him. Attached to the affidavit were certified copies of all the proceedings enumerated herein including the publication dated 15/10/20 calling for inspection of the adjudication register.

### **Interested Party Response**

- 17 The Interested party filed a replying affidavit dated 31/10/22 wherein he reiterated the history of the dispute and the various determinations as enumerated herein before. This included his objection No 45/2021 filed after the publication of the calling for inspection of the adjudication register. He deponed that the objection was filed within the statutory time on 19/10/2020. He stated that the Adjudication Board which was the only forum responsible for hearing any land disputes resulting from the process did not sit until the year 2020. That it was the only legal avenue available to lodge objections where one was dissatisfied during the entire adjudication process. It is stated that this being the case the objection No 45/2021 was properly before the Board and the decision was legally binding.
- 18 The deponent further averred that Mr Nyota Mwero was given a chance to argue his case and the Board duly declared the Interested party the rightful owner of plot No 2932. The application is termed as frivolous and an abuse of court process, and the orders sought were ambiguous and capable of being abused. It is urged the same be struck out. Attached to the replying affidavit were certified copies of most of the documents produced by Mr Davis Njeru.

### **Submissions**

- 19 The application was canvassed by way of written submissions which all the parties filed and exchanged.

### **The *ex-pate* Applicant Submissions**

- 20 The *ex-pate* Applicant submissions are dated 4/11/2022. On jurisdiction it is submitted that while Section 29(1) of the [Land Adjudication Act](#) (herein the Act) is to the effect that the determination of the Minister on appeal was final this court has supervisory jurisdiction over inferior tribunals and quasi-judicial bodies to ensure they comply with the law in discharge of their functions. Reference was made to the Court of Appeal decision in [Nicholas Njeru suing for himself and as representative of Mukera Clan of Mbeere](#) (2013) eKLR. Reliance is also placed on section 7 of the [Fair Administrative Action Act](#).
- 21 It is submitted that the provisions of sections 5 and section 13 of the Act having been fully complied with the process formed the basis of the *ex-pate* Applicant's objection 3107/08 on plot 677 against the Interested Party family then represented by Zuma Marunga Matari a brother to the Interested Party. That the interests of the parties were determined once and for all by the decision of 20/4/2010 and would only be challenged by way of appeal under sections 21(3) read together with section 22 of the [Act](#). Reliance was placed on [Republic v Commissioner General Kenya Revenue Authority ex-pate Sanofi Aventis Kenya Limited](#) (2019) eKLR on the need to strictly adhere to any special procedure for redress of grievances set under the constitution or an Act of parliament.
- 22 It is urged that the import of an objection under section 26 of the [Act](#) is to challenge a mistake from the determination of interests carried out under sections 5 and 13 of the Act and not to establish a fresh



- claim or reopen claims already dealt with under Part III of the Act. That the register having been closed the Interested Party's claim was barred by section 7 of Limitation of Actions Act.
- 23 On the objection 45 of 2021 it was submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents illegally sat to adjudicate an appeal disguised as an objection since they had no jurisdiction to do so. There was no record to show that an appeal was lodged and the decision of 20/4/2010 overturned.
- 24 On whether the exparte applicant right to fair hearing was compromised, citing article 50 of the Constitution it is submitted that the 3<sup>rd</sup> respondent failed to consider the exparte applicants' grounds of appeal when he was bound to do so and considered factors not pleaded. To buttress this point the holding in R vs. Director of Lands & Adjudication & 5 Others Exparte Geofrey Mutie Mbule (2013)eKLR is cited.
25. Referring to the case of Pastoli v Kabale District Local Government Council & others (2008) 2 EA 303 on what is to be demonstrated by an applicant for judicial review orders, it is submitted the orders of the 1<sup>st</sup> respondent issued through the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in objection 45/2021 and the subsequent Appeal No 5 of 2022 were illegal, improper, and irrational and warrant the grant of the reliefs being sought by the *ex-pate* Applicant herein.

### **1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents Submissions**

- 26 State counsel filed submissions dated 23/11/22. Reiterating the content of the replying affidavit of Davis Njeru it is submitted that the process was done in accordance with the laid down procedure under sections 25 and 26 of the Act. Referring to Kenya Re-Insurance Corporation vs. National Land Commission (2018)eKLR and the case of Republic v Attorney General & 4 others ex-pate Diamond Hashim Lalji And Ahmed Hasham Lalji [2014] eKLR it was submitted that the exparte applicant was moving the court to look into the merits of the decisions made and which is not the preserve of judicial review. Further that all the parties were accorded a fair chance of being heard before a determination was made in appeal No 5 of 2022. That the *ex-pate* Applicant participated in the proceedings before the Deputy County Commissioner where each party called a witness. The court is urged to dismiss the application with costs to the respondents.

### **Interested Party's Submissions**

- 27 The Interested Party filed submissions on 21/11/21 and identified four issues for determination. On jurisdiction it is submitted that the Adjudication Board had appellate powers to determine disputes from the Land Adjudication Committee under sections 20-22 of the Act and on demarcation and boundaries the same as those handled by the Lands Adjudication Committee but on appeal.
- 28 With regard to objections under section 26 it was urged that the Adjudication Board did not sit for 11 years after the adjudication process was completed neither did it publish a notice of completion of the adjudication register during the said period. That there was no avenue for lodging the objection. That the Interested Party had to wait for the Adjudication Board to publish the notice under section 25 of the Act. That objection No 45 of 21 was filed within the statutory time and limitation when the adjudication period was over. The Adjudication officer being the only one mandated to hear all disputes arising from the adjudication process had the requisite jurisdiction to hear and determine the objection and the decision was legally binding.
- 29 On whether there was a violation of the right to be heard on the part of the *ex-pate* Applicant the Interested party position is the same as reiterated by the respondents.



30 whether the judicial review orders sought avail to the *ex-parte* Applicant it was urged that the same were not merited since the *ex-parte* Applicant was challenging the merits of the decision of the Land Adjudication Officer and not the decision-making process. Reliance was placed on *Republic v Mount Kenya University & Another* (2017) eKLR. The court was urged to find that the application is an abuse of the court process and not merited.

### Discussions And Determination

31 Having considered the pleadings, the materials placed before this court, submissions of the parties and the authorities referred to in buttressing the rival positions the main issue for determination stands as whether the *ex-parte* Applicant is entitled to the orders sought.

32 The application is brought under the provisions of section 7,8,9,10 and 11 of the Fair Administrative Actions Act and Order 53 of the Civil Procedure Rules 2010. Order 53 of the Civil Procedure Rules is on the grant of the prerogative orders of *certiorari*, *mandamus* and prohibition. The *ex-parte* Applicant seeks the first two. I'm also aware that the Fair Administrative Actions Act operationalizes article 47 of the Constitution of Kenya 2010. It establishes the framework for the exercise of judicial review. Sections 7-11 of the Fair Administrative Actions Act touch on interalia commencing of judicial review proceedings, procedure, jurisdiction and the nature of orders that can be granted in judicial review proceedings.

33 The purpose of judicial review has already been highlighted by the parties as concerning the process that led to administrative action. It is settled judicial review is not an appeal from a decision, but a review of the manner in which a decision was arrived at. The Court of Appeal in *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No185 of 2007(2002) eKLR, guided that a court should look into how the decision was arrived at; whether the decision maker had the power or the jurisdiction, whether the persons affected by the decision were heard before it was made and if the decision maker took into account relevant matters or deployed irrelevant matters.

34 The following rendition in *Republic v Mount Kenya University & another supra* is fitting; -

40. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.'

Applying the test laid out by the Court of Appeal above I will proceed to express myself on the two decisions sought to be quashed by the *ex-parte* Applicant.



35 Two decisions made under the auspices of the Land Adjudication Act Chapter 284 of the Laws of Kenya (the Act) are proposed by the *ex-parte* Applicant for such review. The Land Adjudication Act is

“An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto.”

These are

- 1) the finding in the objection No 45 of 2021 filed on October 26, 2021 by the Interested Party and
- 2) the decision on the appeal to the Minister filed on November 16, 2021 by the *ex-parte* Applicant.

36 It is not in dispute that the decisions sought to be quashed are administrative decisions. The Constitution itself does not define an administrative action. However, section 2 of the Fair Administrative Actions Act defines an ‘administrative action’ to include: -

- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

The decisions sought to be reviewed were exercised under quasi-judicial proceedings pursuant to the Land Adjudication Act and therefore qualify to be administrative actions.

37 Briefly the land adjudication process is initiated after the Minister has declared certain trust land an adjudication area under section 3 of the Act. The process is steered by the Adjudication Officer appointed by the Minister under section 4 of the Act. The Adjudication Officer then appoints a team of officers both technical and general to assist him in administering the adjudication. The land is then subdivided into adjudication sections as provided under section 5 of the Act followed by the appointment of Adjudication Committee for each section under section 6 of the Act by the Adjudication Officer. There is also appointed an Arbitration Board under section 7 which seats on a particular question arising in an adjudication section.

38 The stage having been set under section 5 and 7 of the Act and all administrative structures in place, Part III of the Act kicks in. This is the Ascertainment of Interests in the land. Section 13 of the Act is where the ascertainment of rights is undertaken and anybody having a claim to the land must be present or represented to show their boundaries to the demarcation officers. I find it necessary to reproduce the provisions of section 13 which provide as follows; -

13. Claims and attendance

- (1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.
- (2) Every person whose presence is required by the adjudication officer, demarcation officer, recording officer, committee or board shall attend in person or by a duly authorized agent at the time and place ordered.



- (3) If any person who is ordered to attend fails to attend in person or by a duly authorized agent, the demarcation, recording, adjudication or arbitration, as the case may be, may proceed in his absence.
- (4) If the demarcation officer or the recording officer considers that a person who has not made a claim has an interest in land within the adjudication section, he may, but is not bound to, proceed as if that person had made a claim.
- (5) Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.

39 I take it that the above process happened and that is why there was the first complaint against the first demarcation of plot 677 in the name of the *ex-parte* Applicant Nyota Mwero's Clan (see paragraph (3) of Davis M. Njeru the Sub County Land Adjudication & Settlement Officer, Kinango) affidavit. This complaint, Land Committee Case No 1/2007 was filed by Zuma Matari's clan which from the material placed before this court I gathered the Interested Party belonged to this clan and was actually Zuma Matari's brother- see the objection 45/21 proceedings on being asked whether he was present in the previous case the Interested party states in cross examination by Nyota Mwero that his brother Zuma Matari (who is now deceased) represented them. The judgement in respect of this complaint was delivered on 7/11/2007 and right of appeal given within 14 days. To me this complaint must have been filed under section 21 of the Act pursuant to the powers conferred under section 20 thereto where the Land Adjudication Committee appointed for an adjudication area adjudicates upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer.

40 What then should happen where anyone is aggrieved with the decision of the Land adjudication committee. Section 21 of the Act comes into play and provides as follows; -

21. Decisions of committee

- (1) If a committee is unable to reach a decision on a matter before it, it shall refer the matter to the arbitration board for decision.
- (2) The adjudication officer may require the committee to reconsider any decision which it has made.
- (3) Any person named in or affected by a decision of the committee who considers the decision to be incorrect may, within fourteen days after the decision, complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.

41 Based on what has been presented to this court the provisions of sections 21(1) and (2) do not apply as the Committee convened and rendered a decision on the matter and as to (2) there is nothing to show that the Adjudication Officer asked the Committee to reconsider its decision. The next relevant provision was then 21(3) above where any person named in or affected by the decision of the Committee is supposed to within 14 days of the decision complain to the incorrectness of the decision. This is then submitted to the Arbitration Board under the provisions of section 22 of the Act.

42 Nyota Mwero the *ex-parte* Applicant aggrieved by the Land Adjudication committee decision deleting his name from the register and replacing it with Zuma Marunga Matari lodged his complaint before the Arbitration Board being Arbitration case No 3/07-8 on 13/11/07 and which was heard on 20/4/2010 and on the same date the Board rendered its decision subdividing the plot 677 and the said Nyota



- Mwero was given a new number 2781. The Board's jurisdiction is not in issue and I find no issue either, the same having been derived from section 22 of the Act. In respect of time the same was filed within the 14 days for appeal given by the Adjudication Committee and which is in accordance to section 21(3) of the Act.
- 43 It appears there was quietness until about 11 years later when the closure/completion of the Mnyenzi adjudication section pursuant to section 25 & 26 of the Act was published on October 15, 2020 (see DMN 3'). Residents were to inspect the adjudication register at the Mnyenzi Assistant Chiefs office within 60 days. Within the same period any person named or affected was to file objections to its incorrectness or incompleteness. The objection was to be submitted to the Land Adjudication Officer, Kwale. This brings me to the first decision targeted by the *ex-parte* Applicant for review.
- 44 On October 21, 2021 the Interested Party filed an objection No 45 /21 on plot 2781 against Nyota Mwero. The nature of the objection was described as a dispute. The objection was allowed by the Kinango Sub County Land Adjudication Officer Lilian Ogola on 26/10/2021 where a new plot No 2932 was created off plot 2871 in favor of the Interested Party. According to the *ex-parte* Applicant the objection proceedings were illegal, improper, and irrational. It was the applicant's submission that i) the interests of both the applicant and the interested party were finally determined on 20/4/2010 where the Adjudication Board decided to subdivide plot 677 ii) that the same could not be re-opened by way of an objection but by an appeal under sections 21 and 22 of the Act. iii) That there was no appeal lodged and kicking in the principle of exhaustion and iv) that the objection was an appeal meaning it was barred by limitation.
- 45 I will render myself on whether the objection No 45 /21 was properly filed and in doing so I will have in mind the above points raised by the *ex-parte* Applicant, the process as set out in the Act and the guidance enumerated in authorities earlier cited by this court.
- 46 The above still takes me back to the provisions of section 21 and 22 of the Act where any person named or affected by a decision of the committee considering it to be incorrect was to within 14 days complain to the executive officer of the committee giving his reasons thereof and which compliant is then submitted to the Board. The Interested Party being aggrieved by the decision that subdivided the land into two did not lodge his complaint under this section and within the 14 days required. For all purposes the Interested Party was an affected party and it did not matter to me that he was represented by his brother. The section provides for any person named in or affected by the decision. Instead the Interested Party filed the objection 45/21 and this is confirmed in paragraph 5 of his replying affidavit sworn on 31/10/22 wherein he deponed 'that being dissatisfied with the decision in case No 3107-08(31/07-08, I filed an objection No45/2021'. From this statement it was clearly an appeal against the decision creating plot 2781 and therefore should have been filed as such under section 21 & 22 within the prescribed time. Additionally, my perusal of the content of the Interested party's testimony and evidence was reflective of the fact that he was dissatisfied with the Board decision.
- 47 I noted the Interested Party's deposition that the Board did not seat in the intervening period until after it published the notice under section 26 of the Act in October 2020 and which he stated he promptly filed his objection. I have already pointed the objection from its content was an appeal and ought to have been filed within the prescribed time. The firm of Luvuno Lung'anzi submitted that the Interested Party had no other legal avenue to lodge his claim other than the Board which did not convene. Infact this was to me an admission from counsel that the objection cannot have rightly been filed under section 26. It is my respectful view that this argument cannot hold water in view of my findings that the bottom line was that the Interested Party ought to have presented his claim under the provisions of Part III. I equate the Interested Party's predicament with that of a litigant who states that they were caught up by limitation because there was no sitting judge at the relevant court of territorial



jurisdiction. It behoved that litigant to file and be on record as having filed within the requisite period. As to whether there was a seating judge that is neither here nor there. Same with the current case, the claimant seats back for about 11 years because there was no board. All the Interested Party ought to have done was present his claim first and ensure it is duly received. Equity aids the vigilant and not the indolent.

48 The above brings me to the issue of exhaustion and based on the above analysis and admission by the Interested party the process under the Act was not exhausted. I have considered the authorities cited by Mr Nyabena for the *ex parte* Applicant and I need not belabor the point. I will be guided by the Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR put it in the following words;-

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

49 Alternatively and in my view if the Interested Party had an individual claim in 667 he would have lodged his own claim under section 20 of the Act within the ascertainment of rights as elaborated under Part III of the Act. Infact a look at the objection it is registered and described as ‘a dispute.’ The Interested Party ought to have exhausted the process under Part III of the Act which it is my finding he did not.

50 The *ex-pate* Applicant has urged that the import of an objection under section 26 of the Act is to challenge a mistake from the determination of interests carried out under sections 5 and 13 of the *Act* and not to establish a fresh claim or reopen claims already dealt with under Part III of the Act. Section 26 of the Act provides as follows; -

26. Objection to adjudication register

- (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection

51 Looking at the above provisions the main focus of the Land Adjudication Officer while determining an objection filed under the above provisions should be the words ‘incorrect and incomplete’. There is no other criteria that is provided under this section. The reasons cited by the objector must be geared towards demonstrating the extent to which the register is incomplete or incorrect. At this point in time of the adjudication process the process is as good as complete in terms of the ascertainment of claims, boundary demarcation and resolution of disputes that may have arisen during the exercise, thus the words ‘completion of the register’ except for the objections as to correctness or incompleteness. This therefore means in my view the Land Adjudication Officer in any objection should be confined to what has been determined within Part III of the *Act*. In the present case which revolves around plot 677 and its subdivision plot 2781 and where the emerging disputes were heard and determined up to the level of the Arbitration Board, the determination of the Board ought to have been the Land Adjudication Officers benchmark. The Land Adjudication Officer was to evaluate the reasons given by the objector against the determination of the Board and what was contained in the register and if the register was a true reflection of the said decision. If there was any departure, then amend accordingly. There is no



mandate under section 26 to go outside the confines of the decision of the Arbitration Board. There is no power to review and or change that determination of the Board. In the present case to curve out a portion, give it a new number in favor of the Interested Party was in excess of the powers of the Adjudication Officer because this never featured for determination during the Board proceedings and cannot have therefore been reflected in the proceedings. The Sub County Land Adjudication Officer could only correct an error just like a court would amend an error on the face of the record or add to the extent that something was left out and which was part of the determination, for completeness and to reflect the correct position as per the Arbitration Boards decision. Alternatively, that something was included which does not feature in the determination and remove it. I respectfully agree with the submissions of learned counsel for the *ex-pate* applicant. Clearly there are excesses here.

52 Additionally I found it disturbing that the Sub County Land Adjudication Officer could have jurisdiction to single handedly or alone adjudicate, receive evidence, attend site and review or vary the decision of the Adjudication Board. This is evident from the proceedings as recorded by the Sub County Land Adjudication Officer. This was a Board that was properly constituted under section 22 of the Act. And for the avoidance of doubt I'm looking at this from the point of view of administrative action/process in terms of good governance and not the merit of curving out the plot 2932. Clearly there is something wrong here, where is the transparency, where is the accountability as well as the checks & balances. It is urged by the respondents and Interested Party that the adjudication officer has jurisdiction under section 26(2) of the Act to determine any objection but I do not think it was the intention of the legislature to donate such excess of powers to sit and review a determination made by a Board properly constituted single handedly. In the eyes of an ordinary person this cannot create confidence of a fair administrative action in terms of process. For this reason, I would also fault the process.

53 In *Pastoli vs Kabale (supra)* the court elaborated on what an illegality would consist as follows; -

‘Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.’

54 I think I have said enough to demonstrate that the decision of the Kinango Sub County Land Adjudication Officer has met the above test though negatively and cannot stand. Having made the said finding then I see no need to go into the arguments raised about the subsequent decision of the Minister since it affirmed a decision that was illegal. Nothing comes out of an illegality. What then is the fate of the two decisions that are sought to be quashed.

55 The Court of Appeal in the case of *Kenya National Examination Council v Geoffrey Gathenji Njoroge & 9 others*, Civil Appeal No 266 of 1996 stated that only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

56 Based on the above it is my view the orders of *certiorari* as prayed by the *ex-pate* Applicant should issue.

57 Is the *ex-pate* Applicant entitled to the order of *mandamus*. The *ex-pate* Applicant also seeks an order of *mandamus* directed at the respondents to enforce the decision delivered on 20/4/2010 in Land Adjudication Board Case No 3107-08 [31-07-08] Nyota Mwero vs Zuma Marunga Matari. The only objection raised by the Interested Party attributable to this prayer is that the orders sought were ambiguous and capable of being abused. The order sought to me seeks to compel for the enforcement of the decision delivered on 20/4/2010 which is very specific to the plot 2781 and the decision of the Kinango Sub County Land Adjudication Officer having been impugned by this court for the reasons



cited herein. Learned Counsel for the Interested Party did not make any presentations as to how this could be abused and by who.

58 Court of Appeal in the case of *Kenya National Examination Council v Geoffrey Gathenji Njoroge & 9 others* (*supra*) stated thus with regards to an order of *mandamus*

‘What is the scope and efficacy of an order of *mandamus*? Once again we turn to Halsbury’s Law Of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: -

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

59 Guided by the above dictum and having found that the decision of the Kinango Sub County Land Adjudication Officer was illegal for the reasons cited in my discussions then the decision of the Land Adjudication Board delivered on 20/4/2010 remains the only valid determination in terms of the process. In my view this court cannot direct that the Interested Party should go back and exhaust the process by dint of the laches herein following the indolence of the Interested Party. It would not serve justice anyway and there must be an end to litigation. Based on the totality of my discussions and finding it follows then that the interest and claims for plot 677 and its subdivision 2781 are now determined as per the decision of 20/4/2020 and there is a need to remedy the defects of justice. In my view then the Sub County Land Adjudication Officer for the time being incharge of the Mnyenzi adjudication section should in accordance with the Act apply the relevant provisions of the Act as to no objection register and submission to the Land Registrar. This court cannot direct specifically what the Sub County Land Adjudication Officer should do. It is this courts view that yes, the order should be enforced but with a rider that such enforcement be in accordance to the Act and let the process take its cause in tandem with what has happened with all those plots that did not have disputes. For the avoidance of doubt this court is not directing that that this decision should be fast tracked in any way outside the natural cause of the implementation of the Mnyenzi Adjudication section process.

60 The upshot of the foregoing is that the Judicial review application is merited and the following orders shall issue to dispose of the same; -

- i. An order of *certiorari* shall issue calling into this court and to quash the decision of the Kinango Sub County Land Adjudication & Settlement Officer made on October 26, 2021 with regard to Plot No 2781 Kinango Mnyenzi Adjudication Section.
- ii. An order of *certiorari* shall issue calling into this court and to quash the decision of the Minister through the Kinango Deputy County Commissioner dated March 21, 2022 affirming the decision of October 26, 2021 allowing objection No 45 of 2021.
- iii. An order of *mandamus* hereby issues directed at the 1st, 2nd & 3rd respondents to implement the decision delivered on April 20, 2010 in Land Adjudication Board Case No 3107-08 [31-07-08] Nyota Mwero v Zuma Marunga Matari in accordance to the Land Adjudication Act.



- iv. Each party shall bear their own costs taking into account the relationship between the parties to these proceedings.

61 Orders Accordingly.

**DELIVERED AND DATED AT KWALE THIS 23<sup>RD</sup> DAY OF MAY,2023**

**A.E. DENA**

**JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr Nyabena for *ex-parte* Applicant

No appearance for the Interested Party

No appearance for the Respondents

Mr Mazerah - Court Assistant.

