



Nzengu v Land Adjudication Officer, Kyuso Adjudication Section & 5 others (Environment & Land Petition E004 of 2022) [2023] KEELC 19348 (KLR) (30 August 2023) (Judgment)

Neutral citation: [2023] KEELC 19348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION E004 OF 2022**

LG KIMANI, J

AUGUST 30, 2023

**IN THE MATTER OF RULES 4 AND 10(1) OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE & PROCEDURE RULES, 2013**

BETWEEN

HON. ENG. PAUL MUSYIMI NZENGU PETITIONER

AND

**LAND ADJUDICATION OFFICER, KYUSO ADJUDICATION
SECTION 1ST RESPONDENT**

**CABINET SECRETARY, LANDS, PUBLIC WORKS, HOUSING & URBAN
DEVELOPMENT 2ND RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, KYUSO SUB-COUNTY ... 3RD
RESPONDENT**

SIMON MUTURI KANG'E 4TH RESPONDENT

**ANNA KASYOKA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE FRANCIS MWENDWA MUSEE) 5TH RESPONDENT**

ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. By a Petition dated 16th November 2022, the Petitioner claims that his rights under *the Constitution* of Kenya 2010 were violated during the *process of land adjudication of land parcel KYUSO/KYUSO “A”/14 formerly known as Plot Number 14 in Kyuso “A” Adjudication Section. In particular, the Petitioner claims violation of Article 50(1) on the right to be heard, Article 47 on fair administrative



- action, and Article 40 on the right to property. The Petitioner further complained that the 1st -3rd Respondents violated Article 10 on the national values and principles of governance.
2. The petition is supported by the affidavit of the Petitioner sworn on 16th November 2022. The Petitioner claims that he purchased the suit land from one Francis Mwendwa Musee (now deceased) the 5th Respondent herein vide an agreement dated 18th July 2008. He claims that the area was declared an adjudication section in the year 2009 and that upon ascertainment of rights, he was registered as the owner of the suit land though the said land was also claimed by the 4th Respondent.
 3. The two claims to the land led to the filing of two complaints to the land adjudication committee case numbers 10/2009 between Francis Mwendwa Musees versus Simon Muli Kang'e (hereinafter known as the 1st case) and 11/2009 between Simon Mutuli Kang'e versus Paul Musyimi Nzengu (Petitioner herein) (hereinafter known as the 2nd case).
 4. The 1st case was decided on 17th September 2009 and the property was awarded to Francis Mwendwa Musee. The 2nd case was heard on 10th March 2010 and the Committee decided in the Petitioners favour stating that having been satisfied that the property had been sold to the Petitioner herein, the property was to be registered in his name.
 5. The Petitioner avers that without notice to him and without his knowledge, the 4th Respondent appealed against the decision in the 1st case to the Arbitration Board in case number A/B 1/2010 Simon Mutuli Kang'e versus Francis Mwendwa Musee. That by a decision dated 25th November 2010; the Arbitration Board allowed the appeal and awarded the suit property to the 4th Respondent herein.
 6. The Petitioner claims that he was not a party to the case before the Arbitration Board; he was not served with any documents and was not called upon to represent his interests in the suit property.
 7. The Petitioner states that from the records available to him, Francis Mwendwa Musee filed Objection case number 29/2011 which was heard and the Land Adjudication Officer directed that the suit property be subdivided equally between the two parties. The Petitioner avers that he was not served with the Objection notice or the decision in the objection case.
 8. The decision of the Land Adjudication Officer in the Objection case gave rise to two appeals to the Minister, Appeal number 391/2011 by Francis Mwendwa Musee and Appeal 392/2011 by the 4th Respondent herein. The said appeals were heard by the 2nd Respondent and a decision was rendered in appeal 391/2011 on 13th August 2019 whereby the suit property was awarded to the 4th Respondent. According to the 2nd Respondent's comments, the buyer should have been the complainant or should have had an official request to be represented. Appeal 392 was heard and a decision rendered whereby the 3rd Respondent relied on the decision in 391/2011.
 9. The Petitioner reiterates that he was neither served nor notified of the two appeals and did not get an opportunity to be heard and the suit property was ultimately registered and the title deed issued in the name of the 4th Respondent.
 10. The Petitioner claims that he ought to have been included in the cases before the Arbitration Board, the objection proceedings, and appeals to the Minister, and the said failure was a violation of his constitutional rights



11. The Petitioner is seeking the following orders:
- a. A declaration does issue that the Respondents herein have jointly and severally breached the Petitioner's brought to be heard, right to a fair administrative action, and right to own property.
 - b. A declaration does issue that the proceedings carried out by Kyuso Arbitration Board in AB 1/2010, 1st Respondent in Objection 29 of 2011, 2nd and 3rd Respondents in Appeals 391/2011 and 392 of 2011 were un-procedural, unlawful, unreasonable, and procedurally unfair and thereby null and void.
 - c. An order in the nature of Judicial review remedy of certiorari does issue calling into this court and quashing the proceedings and decision of the Kyuso Arbitration Board in AB 1/2020, 1st Respondent decision in Objection 29 of 2011, 2nd and 3rd Respondents in Appeals 391/2011 and 392 of 2011 were unprocedural, unlawful, unreasonable and procedurally unfair and thereby null and void.
 - d. A declaration that the proceedings and decision of the Kyuso Adjudication Committee in land in Case No.11 of 2009 has not been appealed against, objected to, have not been set aside, and therefore intact.
 - e. Following (d) above, a declaration does issue that the Petitioner is the lawful and legal owner of all that property registered as Kyuso/Kyuso "A"/14 pursuant to the proceedings and findings of the Kyuso Adjudication Committee in Case 11 of 2009.
 - f. An order does issue in the nature of mandatory injunction directed to the Land Registrar, Kitui, to revoke and cancel the title deed issued to the 4th Respondent herein and its place issue a title deed in favour of the Petitioner.
 - g. An order of permanent injunction restraining the Respondents from entering, cultivating, developing, transferring, or in any way interfering with the Petitioner's title and possession of the suit property.
 - h. Costs of the Petition.

The 1st, 2nd, 3rd and 6th Respondents' Replying Affidavit

12. J.K. Lessan, the Land Adjudication & Settlement Officer Kyuso, swore a replying affidavit on behalf of the Respondents herein, deposing that the petition is misconceived and an abuse of the process of the court. He stated that the petitioner and the 4th Respondent were registered jointly as owners of land parcel Kyuso/Kyuso "A"/14 during demarcation. That a 60-day public notice was issued by the office of the 1st Respondent on 30th December 2010, inviting the public to inspect the register for the Kyuso Adjudication Section and raise any objection to it but the Petitioner never raised any objection.
13. The 5th Respondent Francis Mwendwa Musee (deceased) filed an objection case number 29/2011 against the 4th Respondent where it was determined that the land be subdivided into two between Simon Mutuli Kang'e and the objector Francis M Musee. The decision gave rise to two appeals to the Minister numbers 391 and 392 of 2011 filed by Francis M. Musee and Simon M. Kang'e respectively.



14. The two appeals were heard by the 2nd Respondent and the land was awarded to Simon M. Kang'e the 4th Respondent. The deponent stated that the Petitioner's claim that Land Committee case No. 11 of 2009 was never reviewed was incorrect since the same was reviewed and vacated by Arbitration case No. 1 of 2010. He stated that the Petitioner failed to file an objection which would have allowed him to be enjoined in the appeal to the Minister. He further stated that the decision in the appeals to the Minister marked the end of the adjudication process as per the *Land Adjudication Act* CAP 284 Laws of Kenya, therefore the due process was followed and the Petitioner cannot claim anything to the contrary. The deponent attached to his affidavit documents in support of the claims made in the affidavit.

The 4th Respondent's Replying Affidavit.

15. The 4th Respondent swore an affidavit in response to the Petition, deposing that he bought the suit land from Mulaki Mutisya, Mutemi Mutisya, and Mwendwa Mutisya vide Agreement for sale dated 6th November 2005 and that he occupied the suit property until May 2006 when the now deceased Francis Mwendwa Musee began claiming it. The 4th Respondent was stopped from developing the land but was surprised to see the land fenced with barbed wire. After being stopped from using the land, the 4th Respondent instituted a case at Mwingi Law Courts No.17 of 2009 which did not proceed to hearing as the area was declared an adjudication section.
16. He stated that during adjudication the suit property was registered in the name of Francis Mwendwa Musee. He complained to the Land Committee in case number 10/2009, which awarded the suit property to Francis Mwendwa Musee, deleting both the Petitioner's name and his from the land owners register. During the proceedings, Francis Musee claimed to have sold the suit property to the Petitioner herein. He further stated that the said Francis Musee was the chair of the proceedings.
17. In the second case, 11/2009 the Petitioner was awarded the suit property. The 4th Respondent appealed against the decision of the Committee to the Arbitration Board and he was awarded the suit property.
18. When the register was closed, Francis Mwendwa Musee proceeded to file Objection 29/2011 and the Land adjudication Officer directed that the land be subdivided equally between the 4th Respondent and the deceased Francis Mwendwa Musee.
19. Both parties were displeased with the outcome of the objection case and Francis Mwendwa Musee and the 4th Respondent each filed appeals to the Minister Cases No.391/2011 and 392/2011 respectively. The decision in the appeals to the Minister resulted in the 4th Respondent being awarded the suit property, and the District Land Registrar was notified through a letter dated 12th August 2021.
20. The 4th Respondent's position is that he came into lawful possession and ownership of the suit property in 2005 and followed due process to acquire it while the Petitioner claims to have purchased the suit property in 2007.
21. According to the 4th Respondent, the Petitioner was aware of the case between him and Francis Mwendwa Musee but failed to follow up on the proceedings despite claiming to have an interest in the matter.
22. The 4th Respondent has applied for subdivision of the land. He states that the proceedings in committee Case No.11/2009 were tainted with bias and procedural impropriety because the deceased Francis Mwendwa Musee was the chairperson during those proceedings and there was clear collusion to ensure that the Petitioner was awarded the suit property.
23. On the right to be heard and fair administrative action, the 4th Respondent deposed that the Petitioner applied and had an opportunity to be heard in the dispute that involved him. He states that the



Petitioner's ownership was tied to that of Francis Mwendwa Musee (Deceased) and that if he did not have good title he could not give good title to the Petitioner and his rights could not have been violated if he was not entitled to the right to be included in the proceedings to begin with.

24. Regarding the property right, the 4th Respondent averred that since the Petitioner did not gain a good title, then it follows that he does not have a legitimate claim to the suit property and that one cannot be deprived of private property that does not belong to them.
25. The 5th Respondent did not file any reply to the petition.

The Petitioner's written submissions.

26. Counsel for the Petitioner filed written submissions reiterating the facts summarized above stating that he was not made a party or notified of Arbitration Board Case 1/2010 Simon Mutuli Kang'e vs Francis Mwendwa Musee, notwithstanding that he was the owner of the suit property and was mentioned severally in the proceedings.
27. Counsel submitted that the right to be heard is a hallmark of natural justice, is non-derogable, and cannot be limited by any person, authority, or the law itself. He relied on the case of *Egal Mohammed Osman vs Inspector General of Police & 3 others* (2015) eKLR where Korir J, as he then was, cited the case of *Management of Committee of Makondo Primary School & Another v Uganda National Examination Board* where the Supreme Court of Uganda held that it is a cardinal rule of natural justice that no one should be condemned unheard. The Petitioner also relied on Article 50(1) of *the Constitution* of Kenya, and the case of *Judicial Service Commission vs Gladys Boss Shollei & Another* (2014) eKLR.
28. Where there is a violation of the rules of natural justice, the Counsel for the Petitioner submits that the decision is void regardless of whether the same decision would be arrived at. Counsel relied on the holding in the case of *Onyango Oloo vs. Attorney General* (1986-1989) EA 456 and the case of *R vs. Vice Chancellor JKUAT Misc Appl. 30 of 2007*.
29. The Petitioner submitted that at the time of the conclusion of the second committee case, the Petitioner was registered as the proprietor of the suit property, he had obtained an interest in the suit property and his right could not be taken away without him being heard in any subsequent matter.
30. Counsel for the Petitioner relied on several cases on the right to be heard, citing the cases of *Lekinyot Ole Lanke v Attorney General & 2 others* (2015) eKLR, *Wanyoike Mungai v Beatrice Karanja & Another* (2021) eKLR, *Alton Homes Limited & Another vs Davis Nathan Chelogoi & 2 others; Joshua Omondi Hallonda & 2 others (Interested Parties)* (2019) eKLR.
31. Having submitted that the decision was null and void ab initio due to the violation of the right to be heard, the Petitioner relied on the case of *MacFoy vs. United Africa Co. Ltd* (1961) 3 ALL ER 1169.
32. Regarding the Petitioner's right to fair administrative action, his counsel quoted from Article 47 of *the Constitution* and relied on the case of *Judicial Service Commission vs Mbalu Mutava* (2015) eKLR and stated that he was treated to inefficient, unlawful, unreasonable, and procedurally unfair administrative action by failing to serve the Petitioner with the suit papers and to notify him of the cases.
33. Also pointing out that the 2nd Respondent failed to appreciate that the Petitioner had illegally been excluded from the proceedings, counsel submitted that the public notice of the objection register did not meet statutory edicts as they relied on Section 24 of the *Land Adjudication Act* and Section 69 of the *Interpretation and General Provisions Act* stating that there is no evidence furnished to show how the alleged notice was disseminated to the public.



34. Further, counsel for the Petitioner submitted that owing to the above violations of the law, the Petitioner was deprived of his property arbitrarily and unlawfully and prayed for the Petition to be allowed.
35. The 1st, 2nd, 3rd, and 6th Respondents did not file any written submissions and sought to rely entirely on the replying affidavit and the annexed documents.

4th Respondent's Submissions.

36. Counsel for the 4th Respondent commenced submissions by reiterating the matters contained in the replying affidavit as summarized herein. He submitted that the suit property was erroneously registered as belonging to the Petitioner when the area was declared an adjudication section, which action was a catalyst for the disputes within the adjudication and arbitration process leading to this Petition.
37. Counsel reiterated that the 4th Respondent bought the suit property in 2005 from one Mulaki Mutisya and that the Petitioner could not have bought the same land from a different party 3 years later in 2008 without his consent. The 4th Respondent relied on the decision in the cases of Diamond Trust Bank Kenya Ltd v. Said Hamad Shamisi & 2 others(2015) eKLR and Daniel Kiprugut Maiywa v Rebecca Chepkurget Maina(2019) eKLR where the Courts stated the principle of Nemo dat; that one cannot give what he does not have title to. It is, therefore, the 4th Respondent's submission that having not acquired any title to the land, the Petitioner's right to the property does not exist.
38. Regarding fair administrative action, the 4th Respondent submitted that the procedures under the [Land Adjudication Act](#) were followed and avenues to appeal against decisions that one is aggrieved are put in place under the Act. Counsel submitted that the Petitioner was not a party to the first case and his ownership was contingent on that of the deceased and the bone of contention was between the two and not the Petitioner.
39. On whether the Petitioner's right to fair hearing was infringed upon, the 4th Respondent relied on Justice G.V Odunga's holding the case of Republic v. Speaker of the National Assembly & 4 other ex parte Edward R. O. Ouko (2017) eKLR where the Court held that if decision-making bodies other than courts achieve the degree of fairness appropriate to their task then it is for them to decide how to proceed and there is no rule that there must be an oral hearing.
40. Since the Petitioner was not party to Case 10/2009 the 4th Respondent submitted that it follows that he would not be a proper party to Arbitration Case No. 1 of 2010. They also submitted that the hearing of the appeals was public information following the gazettment of the Deputy County Commissioner to hear and determine the Minister's appeals.
41. Further, the 4th Respondent submitted that the decision in Case 10/2009 was marred by irregularities and bias because Francis Mwendwa Musee sat as a judge in his cause being the chairperson of the committee, and prayed that the Petition be dismissed with costs to him.

Analysis and Determination.

42. The Petitioner challenges the process of adjudication over the suit property, Land Parcel KYUSO/ KYUSO "A"/14 claiming that the Petitioner's constitutional rights as enumerated in the petition were violated and the land awarded to the 4th Respondent.
43. The Court has considered the petition, the supporting affidavit, and the affidavits by the Respondents. The Court has further considered the written submissions filed by Counsel for all the parties. Counsel for the Petitioner and the 4th Respondent have listed the issues they consider as arising



for determination in this petition. The court has taken into account the issues as drawn, the replying affidavit of the 1st -3rd, and 6th Respondents, and considered the following as the issues for determination;

- A. Whether the Petitioner's constitutional right to be heard was violated.
- B. Whether the Petitioner's constitutional right to fair administrative action was violated.
- C. Whether the Petitioner's constitutional right to property under Article 40 of *the Constitution* of Kenya was violated.
- D. What relief the court should grant?
- E. Who will bear the costs of this petition

44. Constitutional Petitions are premised on Articles 22, 23, and 165 of *the Constitution* of Kenya. Article 22(1) provides that;

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Whether the Petitioner's constitutional right to be heard was violated

45. The Petitioner claims violation of his right to be heard as provided for under Article 50 of *the Constitution* of Kenya, 2010. He claims that he was not made a party to the Arbitration Board case number 1/2010 Simon Muli Kang'e Versus Francis Musee when he had been a party to case number 11/2009 which involved the suit land. He complained that he was not notified of the existence of the case and the decision.

46. In addition, the Petitioner claims violation of his right to be heard when Francis Mwendwa Musee, the 5th Respondent who did not notify or make him a party to objection number 29/2011 filed before the 1st Respondent. In the said objection the Land Adjudication Officer directed that the suit property be subdivided equally between the two parties.

47. The decision in the Objection case gave rise to two appeals to the Minister being No. 391/2011 by Francis Mwendwa Musee and Appeal No. 392/2011 by the 4th Respondent, Simon Kang'e. The Petitioner complains that he was not aware of the proceedings or the decision in the appeals until he learned of the 4th Respondent's intention to subdivide the suit property.

48. The court agrees with the submissions of Counsel for the Petitioner that the right to be heard is the hallmark of natural justice and is enshrined in the maxim audi alteram partem restating that no one should be condemned unheard and a person against whom there is a complaint must be given a just and fair hearing. The constitutional right to be heard is a fundamental human right guaranteed under the Bill of Rights chapter four of *the Constitution* of Kenya 2010. Article 50(1) states that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”



49. The Court of Appeal in the case of *Kiai Mbaki & 2 others v Gichuhi Macharia & another* [2005] eKLR held as follows regarding this right:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being allowed to be heard. This Court has indeed reiterated that principle on many occasions.”

50. The Petitioner avers that he was not accorded an opportunity to be heard thus violating his Constitutional right under Article 50(1) before the Arbitration Board, the Land Adjudication officer and in the Ministers Appeal heard by the 3rd Respondent.

51. The appeal to the arbitration board from the is mandated under Section 21(3) and (4) of the [Land Adjudication Act](#) CAP 284 as follows:

“

“(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.

(4) Upon receipt of a complaint under subsection (3) of this section, the executive officer of the committee shall refer it with all the particulars of the case to the executive officer of the board, who shall submit it to the board.”

Section 22 provides that the function of the arbitration board is to hear and determine any matter referred to or complaint made to it under section 21 of the Act.”

52. The history of the dispute relating to the suit land since the declaration of the area as an adjudication section commenced with the Petitioner herein and the 4th Respondent being registered jointly as owners. This registration was done under the provisions of section 13 of the [Land Adjudication Act](#) which provides for lodging of claims to land under adjudication and states that:

“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.”

53. Section 19 (2) of the Act provides that if there are two or more conflicting claims to an interest in land and the recording officer is unable to resolve the conflict, he is required to submit the dispute to the committee to decide. Consequently, and since the competing claims of the Petitioner and the 4th Respondent were not resolved by the recording officer, the dispute was referred to the committee for hearing and determination.

54. The record shows that the deceased Francis Mwendwa Musees filed case number 10/2009 against the 4th respondent Simion Kang'e while the 4th Respondent filed case number 11/2009 against the Petitioner Paul Musyimi Nzengu. It will be noted that at this point the Petitioner did not file any dispute against the 4th Respondent who is said to also have been registered as owner of the suit land. This is important since in the Court's view the Petitioner seems to have been satisfied by his claim to the suit land being advanced by the deceased Francis Musee who is said to have sold the land to him.



55. Nothing prevented the Petitioner from lodging a claim to contest the inclusion of the 4th Respondent as a joint owner of the suit land. In the court's view the Petitioner's claim as a purchaser fits the description of a person who "has an interest in land within an adjudication section" as provided under section 13 of the *Land Adjudication Act*.
56. It will be further noted from the proceedings in committee case number 10/2009 that the deceased Francis Musee did not state that he had sold the land to the Petitioner herein. Indeed, in his testimony, he stated that "I filed this case to make it clear to the defendant that the land in dispute is my land, not Mutemi's land." The committee proceeded to award the land to the said Francis Musee. In the 2nd Committee case number 11/2009, the committee found that since they had in the 1st case awarded the land to Francis Musee and that he had proved that he had already sold the land to the Petitioner; they awarded the land to the Petitioner.
57. The testimony of Francis Musee in the two committee case and the decision in case number 11 /2009 fortifies the court's conclusion that the said Francis Musee was advancing the Petitioners claim with the intention of later transferring the land to him.
58. It will be noted that the 4th Respondent made a claim that was not refuted that the 5th Respondent Francis Musee was the chairman of the Lands Committee in case number 11 /2009. This seems to have been the position since the decision in case number 11/2009 was signed by F.M. Musee. This was clearly in contravention of Section 8 (1) of the Act which states that;
- "If a member of a committee or board has any interest, direct or indirect, in the determination of a claim to an interest in land which is before the committee or board (as the case may be), and is present at a meeting of the committee or board at which the determination of that claim is under consideration, he shall at the meeting, as soon as practicable after it begins, disclose his interest and not take part in the consideration or discussion of the claim, nor shall he vote on any question with respect to the determination of the claim."
59. The 4th Respondent was dissatisfied with the decision of the committee and chose to complain to the Arbitration Board. Such a complaint is provided for under section 21 of the Act which gives a right to any person named in or affected by a decision of the committee and considers the decision to be incorrect to complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect. The board is empowered under section 22 to hear and determine any matter referred to it or complaint made to it.
60. The Petitioner claimed that the decision in committee case number 11/2009 which awarded the suit land to him superseded the decision in committee case number 10/2009. In submissions to the court Counsel for the Petitioner seemed to suggest that the decision in Committee Case Number 11/2009 reviewed the decision in Committee Case Number 10/2009 and thus a complaint against the decision in case number 10/2009 did not lie. However, Counsel did not point to any provisions of the law that allow one committee case to review the findings and decisions of another committee case.
61. As stated earlier, the arbitration board hears and determines disputes in the adjudication process after the Committee stage as mandated under Section 21(3) and (4) of the *Land Adjudication Act*.
62. In the present case, the Petitioner and the 4th Respondent had the right to complain to the executive officer of the committee if they were of the view that any of the two decisions of the committee were incorrect. From the proceedings, it appears that the Petitioner was satisfied with both decisions in case numbers 10 and 11 of 2009 while the 4th Respondent was not satisfied by the decision in committee case number 10/2009 and he referred the same to the arbitration board. The petitioner herein was not



- a party to the said case and as stated before the court is of the view that the Petitioner allowed Francis Musee to argue the case on his behalf.
63. The Petitioner had stated in his evidence in case number 11/2009 that “I have just bought the land so I can’t give any evidence about the history of the land so the dispute would be between the Mutisya family and Musees family.” This statement could explain the reason why the Petitioner did not lodge any complaint to the committee or the arbitration board even when the land was awarded to Francis M. Musee in case number 10/2009.
64. In case number 10/2009 before the committee Francis Musee stated in his evidence “The plaintiff Mr. Francis Mwendwa Musee ID. N. 2247491b sworn states, the land in dispute is mine. I inherited it from my father. Mutemi Mutisya encroached and sold a portion of it to the defendant Mr. Simon Mutuli Kang’e.” He went on further to state that “I filed this case to make it clear to the defendant that the land in dispute is my land, not Mutemi’s land.”
65. In committee case number 11/2009, the 4th Respondent testified that he bought the suit land from Mutisya’s sons namely Mutemi Mutisya, Mulaki Mutisya and the late Mwendwa Mutisya in the year 2005. The Petitioner on the other hand claimed that he bought the land from Francis Musee and started paying for it on 31st October 2007. At the time of hearing of the suit, he stated that he had not yet cleared the balance of the purchase price but he claimed that the land belonged to him. He confirmed that he was aware of the existence of the dispute before the Chief, Assistant Chief, D.O and D.C but he confirmed that according to the documents he was shown, he was satisfied that the land had been awarded to the seller Francis Musee.
66. Francis Musee confirmed having sold the land to the Petitioner herein. The Committee made the following findings:
- “Initially the committee heard a land case over the same parcel No. i.e parcel No. 14 LCC No. 10/2009 between the plaintiff (Simon Kang’e). Who the defendant alleges to have bought the plot from him. During the hearing, the committee heard the evidence and awarded the parcel No. 14 to Francis M. Musee. Francis M. Musee did not give evidence that he sold the plot to the defendant but in this case, he made it clear to the committee that he wanted to defend the ownership of the plot first and later in this case give the evidence of the sale transaction.”
67. The committee went on to state that
- “Since the committee had earlier on awarded the land to Francis M. Musee. In this case, the committee wishes to transfer the ownership of the land to Paul Musyimi Nzengu because he bought the land from Francis M. Musee based on the new evidence in this case.”
68. From the above extract of the proceedings, evidence and findings, it is clear that the rights and interests of the Petitioner to the suit land were contingent to and dependent on the rights of the seller Francis Mwendwa Musee. It also comes out clearly that the two parties had devised the process they would follow in obtaining ownership of the land by having the seller prosecute the claim of ownership and once the same was secure, have the land confirmed and transferred to the purchaser Paul Musyimi Nzengu, the Petitioner herein.
69. The 4th Respondent taking the queue from the two parties challenged the decision which awarded the land to the seller Francis Musee and consequently to the Petitioner herein.



70. It is the court's view that there was no legal bar to the 4th Respondent taking this action and since the Petitioner was not a party to the said case, he could not be made a party to the appeal against the Committee decision.
71. Considering the totality of the proceedings in the two committee cases, the Court is not persuaded that the Petitioner was not aware that the rights of Francis Musee, the seller were being challenged before the Arbitration Board. In the Court's view, the Petitioner had an opportunity to personally institute a case challenging the inclusion of the 4th Respondent on the ownership of the suit land or to be joined in the case before the arbitration Board had he been inclined to personally defend or advance his rights to the suit land.
72. The Petitioner asserts that Committee case number 11/2009 reviewed the findings in case number 10/2009 and awarded the land to him in place of the Francis Musee and thus despite the Arbitration Board awarding the land to the 4th respondent his award was left standing.
73. However, this court does not agree with the Petitioner's assertion on this point for the reasons that have been stated before in this judgment and the conclusion of the court that Francis Musee was advancing his claim to the land on behalf of the Petitioner and after the claim was confirmed he would transfer the land to the Petitioner. Secondly, the court has stated that the Petitioner's claim to the land was contingent on the claim by the said Francis Musee against the Mutisya family who sold the land to the 4th respondent. It is the court's view that there was no violation of the Petitioner's right to be heard during the hearing before the arbitration board.
74. When the Arbitration Board heard the case and awarded the land to the 4th Respondent, the form normally prepared for every parcel of land by the recording officer under Section 19 (1) of the Land Adjudication Act was rectified in accordance with the decision of the Arbitration Board. The forms as rectified by the recording officer together comprise what is known as the adjudication record. And they contain particular information such as the number of the parcel as shown on the demarcation map and its approximate area; The Adjudication record also contains a record of the name and description of the owner, with particulars of any restriction on his power of dealing with it. The demarcation map referred to under Section 19 and the adjudication records referred to under Section 23 of the Act are collectively known as the adjudication register and they are the ones that are subject to objection under Section 26 of the Act.
75. The Petitioner complained that his right to be heard was also violated during the filing, hearing and final determination of Objection case number 29/2011 filed by the 4th Respondent against the deceased Francis Musee.
76. The law provides for the procedure to be followed when the adjudication register has been completed. The adjudication officer certifies the register as having been completed on the adjudication record and demarcation map. Under section 25 (a) (b) and (c) take the following action:
- (a) Deliver the duplicate adjudication record (bearing a copy of the certificate) to the Director of Land Adjudication;
 - (b) display the original adjudication register for inspection at a convenient place within the adjudication section; and
 - (c) Give notice that the adjudication register has been completed and may be inspected at that place during a period of sixty days from the date of the notice.



77. Section 26 of the Act provides that:

- “(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.”

78. The adjudication officer is empowered from time to time to alter the adjudication register to conform to any determinations of objections.

79. As can be seen from the above provisions of the law the Petitioner herein had an opportunity to inspect the Adjudication register once the same was certified as being completed. Had he carried out the inspection, he would have realized that the suit parcel of land had been awarded to the 4th Respondent by the Arbitration Board and consequently filed an objection. This would have been the right action to take since the Petitioner ce he claims to have been a person affected by the entry in respect of the suit land in the adjudication register and that he considered the register to be incorrect for showing the 4th Respondent as owner of the land. Further, even a person who was not a party to the Committee and Arbitration Board proceedings has a right to file an objection to the register as long as he/she can show that he/she was affected by the entry in the register or considered the entry to have been incorrect. The Petitioner did not give any reasons as to why he failed to file the objection.

80. All Respondents except the 5th Respondent took the position that a 60-day public notice was issued by the office of the 1st Respondent on 30th December 2010, inviting the public to inspect the register for the Kyuso Adjudication Section and raise any objection to it. The deceased Francis Musee objected but the Petitioner never raised any objection to the register. Having been given an opportunity to object to the Adjudication register and having failed to take any action and to follow the process clearly set out in law that would have facilitated the right to be heard, it is the court's view that the Petitioner cannot turn around and blame the Respondents for his own failure.

81. Objection case number 26/2010 proceeded for hearing and during the hearing Francis Musee stated that the land belonged to him having inherited the same from his father. In such a hearing as envisaged under Section 26 of the Adjudication Act, the adjudication officer has leeway where he/she considers the objection made and “after such further consultation and inquiries as he thinks fit he shall determine the objection.” The Court is of the view that the Land Adjudication Officer does not have to follow or agree with the findings before the Committee of the Arbitration Board. In this case the Land Adjudication Officer did not follow the decision taken by the Arbitration Board but directed that the land be divided into two and awarded the two parcels to the parties.

82. The decision in the objection case gave rise to two appeals to the Minister numbers 391 and 392 of 2011 filed by Francis M. Musee and Simon M. Kang'e respectively. The two appeals were heard by the 2nd Respondent and the land was awarded to Simon M. Kang'e the 4th Respondent.



83. Appeals to the Minister are provided for under Section 29 of the *Land Adjudication Act* which states as follows: -

“(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

- a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
- b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

84. The Petitioner herein complained that his rights were violated for not having been made a party to or made aware of the filing, hearing and determination of the appeals to the Minister. The Petitioner states that he was not given notice and that he was not made aware of the final decision of the Minister's Appeal.

85. The provisions of Section 29 clearly show that the appeal to the Minister is a product of the objection proceedings and only relate to the cases heard and determined by the Land Adjudication Officer. The Petitioner failed to heed the notice issued and as stated earlier that a public notice was issued by the office of the 1st Respondent on 30th December 2010, inviting the public to inspect the register for Kyuso Adjudication Section for 60 days and raise any objection to it but the Petitioner never raised any objection and was therefore granted the opportunity to do so.

86. The decision in Minister's Appeal Case 391/2011 reads as follows in part:

“According to the Appellant's claim that he had sold the land, then there was no justification for her to claim over the land that was allegedly sold. The buyer should have been the complainant or should have had an official request to be represented.”

87. The Petitioner averred that he was a necessary party to the adjudication proceedings having been the one who was registered and acquired interest in the suit property at the initial stage of adjudication and should have been the one representing himself over his interest in the suit property. However, as found elsewhere in this judgement, the Petitioner had all the opportunity to file an objection. He also had an opportunity to give evidence in the objection proceedings as well as the appeal to the Minister which opportunity he failed to take advantage of.

88. The court finds that the dispute resolution process set out under the *Land Adjudication Act* is very elaborate and ought to be followed in the process of determination and recording of interests in land declared an adjudication section. Courts have taken the position in law that here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. This was restated in the case of *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* [2015] eKLR, where the court held that:

“This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. Speaker Of The National Assembly V. Karume (supra), was a 5(2)(b) application for a stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition



as required by *the Constitution*. In granting the order, the Court made the often-quoted statement that:

“[W]here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

The Court went on to state that:

“However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of *the Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost-effective manner. In *Rich Productions Ltd. V. Kenya Pipeline Company & Another*, Petition No. 173 Of 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

“The reason why *the Constitution* and the law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.”

89. The same position was taken by the Court of Appeal, in *Republic V. The National Environmental Management Authority*, Ca No 84 Of 2010 where the Court upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in *Vania Investment Pool Ltd. V. Capital Markets Authority & 8 Others*, Ca NO 92 OF 2014 the Court of Appeal also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an



applicant who had failed to first refer its dispute to the Capital Markets Appeals Tribunal established by the Capital Markets Act.

90. It is thus this court's finding that the dispute resolution mechanism provided under the Land Adjudication Act, if followed, has adequate safeguards and measures that ensure that a party who avails and subjects himself to the said process has an opportunity to be heard and enjoys a fair administrative action. The Court thus finds that the Petitioner's right to be heard was not violated.

Whether there was violation of the Petitioner's right to fair administration Action under Article 47 of the Constitution?

91. The Petitioner avers that his rights under Article 47 of the constitution on Fair administrative action were violated. The said Article provides that;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

92. The right to fair administrative action is closely tied to the right to a fair hearing and relates to administrative actions by quasi-judicial bodies such as the decisions made during an adjudication process of land. Section 4 (3) of the Fair Administrative Action Act provides that:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials, and evidence to be relied upon in making the decision or taking the administrative action.”

93. The Court in the case of *Safaricom Limited v Josenga Company Limited & 4 others* [2021] eKLR which the Ex parte Applicant has relied upon noted and quoted as follows:

“On the issue of fair hearing, the Court notes that the right to fair hearing is a principle of Natural Justice and the same cannot be limited and or derogated as per the provisions of Article 25 of the Constitution of Kenya 2010. The Constitution, in Article 50(1), provides for a fair hearing with regard to any dispute that has to be resolved in accordance with the law.”



94. Similarly, the Court in *Kimwele Kithoka & 26 others v Deputy County Commissioner Kyuso Sub-County & 7 others* [2022] eKLR quoted the case *Judicial Service Commission vs Mbalu Mutava & another* [2015] eKLR, the Court of Appeal where it was stated that natural justice comprises the duty to act fairly:

“Article 47(1) does not exclude the application of common law, particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to the right to fair administrative action...”

95. Justice G.V Odunga in the case of *Republic v Non-Governmental Organizations Coordination Board Ex-Parte Evans Kidero Foundation* [2017] eKLR cited with approval the following cases among which one was relied on by the Petitioner;

“Whereas the decision may well be justified on merits, once it is found to violate the rules of natural justice it cannot be permitted to stand.”

96. In the present case, the petitioner had the opportunity to participate in the proceedings before the 1st and 3rd Respondents but chose not to do so. In the Court’s assessment the Petitioner was aware of the adjudication process and the fact that the process was likely to affect the suit land and by his own volition he caused the dispute relating to the suit land to proceed in his absence. The deceased, Francis Musee was clearly aware of the completion of the adjudication register and he filed his objection. It cannot therefore be said that the process was done in secret.

97. In the case of *Kasiwa Gona v Attorney General & Another* [2018] eKLR, Ogola J held as follows in a case concerning the Land Disputes Tribunal where the Petitioner was served with summons to attend a hearing but opted not to:

“Was the Petitioner therefore condemned unheard? I do not think so. According to the proceedings, the Petitioner was duly served with the summons but failed to attend the hearing. A right cannot be said to have been violated if a Petitioner by his own doing caused the violation. Article 50 of *the Constitution* enshrines the right to a fair hearing and provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The Petitioner herein was accorded a fair hearing before the tribunal. The Petitioner by his volition failed to attend the proceedings before the Tribunal.”

98. Similarly, in the case of *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties)* [2021] eKLR the Court held that:

“A party who after being served and duly notified of the proceedings cannot plead of his violation of the right to a fair hearing to the same proceedings on his own failure to attend the said proceedings. A right to a fair hearing applies to all the parties and it is equally the duty of each and every party to attend court proceedings when duly notified.”



99. The Court finds that the Petitioner cannot claim that his right was violated if as found in this case by his own doing caused the lack of enjoyment of that right by failing to avail himself of the opportunity accorded to him.

Was the Petitioner's right to property under Article 40 of the Constitution violated?

100. The Petitioner has also claimed that his property right has been infringed. Article 40(1) of the Constitution provides that:

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

- (a) of any description; and
- (b) in any part of Kenya.”

101. It is the Petitioner's submission that the action to deprive him of the opportunity to be heard renders the decisions made during the adjudication process null and void ab initio and quoted the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169. He claimed that he gained proprietary rights to the suit property by way of purchase from the deceased Francis Musee and the said right ought to have been protected.
102. In the present case, the suit land was undergoing the process of land adjudication under the Land Adjudication Act CAP 284. Any rights and interests in the suit land were yet to be ascertained, determined and recorded and from the outset, the Petitioner knew that there was a dispute over the true ownership of the land between the seller Francis Musee and the family of Mutisya who had sold the land to the 4th Respondent. Until there was a final determination that the land was initially owned by Francis Musee and that he had rights and interests in the land, it is doubtful that it can be stated that he had rights he could pass to anyone. It is also clear that before the process of adjudication was completed, the said Francis Musee and the Petitioner herein had no rights to the land that was capable of enforcement or protection under Article 40 of the Constitution of Kenya.
103. The court therefore agrees with counsel for the 4th Respondent that even though Francis Musee had sold to the Petitioner the suit land he (the Petitioner) gained nothing unless the seller proved that he had rights in the land he sold. This is the position taken in *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others* [2015] eKLR.

“Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in *Bishopsgate Motor Finance Corporation Ltd V. Transport Brakes Ltd* (1949) 1 KB 322, at pp. 336-337 when he stated:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”



104. In the present case, the seller Francis Musee could only pass to the Petitioner title to the suit land if he indeed had any. The final decisions in the adjudication dispute resolution process found that he did not have any right or interest to the suit land and he therefore had no title to pass on. In the Court's view it was only the process of adjudication that could have been used to ascertain and determine the said rights to the land.
105. It is the Courts view that the Constitutional rights of the Petitioner were not violated during the process of adjudicating land parcel number parcel KYUSO/KYUSO "A"/14 formerly known as Plot Number 14 in Kyuso "A" Adjudication Section and the Respondents acts were not unlawful, unreasonable or unprocedural as claimed.
106. It is also the court's finding that the process of adjudication followed up to the appeals to the Minister overturned the findings in Committee case number 11/2009 and the said decision is not intact as claimed by the Petitioner.
107. It is thus the Courts view that the prayers sought in the petition cannot be granted.
108. From the foregoing it is the court's finding that the Petitioner has not proved that his Constitutional rights under Article 40, 47 and 50 of *the Constitution* of Kenya were violated by the Respondents. I therefore find that the petition herein has no merit and the same is hereby dismissed with costs to the 1st, 2nd, 3rd, 4th and 6th Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 30TH DAY OF AUGUST, 2023.

HON. L. G. KIMANI

JUDGE

