Republic v Attorney General & 2 others; Longorkemer (Exparte Applicant) (Environment and Land Miscellaneous Application 2 of 2023) [2025] KEELC 2916 (KLR) (18 March 2025) (Ruling)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 2 OF 2023

FO NYAGAKA, J

MARCH 18, 2025

IN THE MATTER OF AN APPLICATION BY LINGAKIN LONGORKEMER FOR AN ORDER OF CERTIORARI TO BRING INTO THIS HONOURABLE COURT AND QUASH THE DECISION OF 24/12/2012 BY THE DISTRICT COMMISSIONER POKOT SOUTH AND WHICH WAS MADE ON BEHALF OF THE MINISTER OF LANDS AND HOUSING

BETWEEN

REPUBLIC .... APPLICANT

AND

THE HON. ATTORNEY GENERAL .... 1ST RESPONDENT

THE DISTRICT COMMISSIONER POKOT SOUTH .... 2ND RESPONDENT

JOSEPH PKERKER NGOLEPUS .... 3RD RESPONDENT

AND

LINGAKIN LONGORKEMER .... EXPARTE APPLICANT

RULING

1. The Ex Parte Applicant filed an Ex Parte Notice of Motion dated 14th February 2023. He brought it under Order 49 Rule 1 and Order 51 Rules 1 and 3 of the Civil Procedure Rules. He sought the following order:-

> That the Deputy Registrar of this honorable court be authorized to sign a mutation form prepared by the National County Surveyor, West Pokot over land parcel number West Pokot/Chepkono/209 and 833 in order to facilitate the rectification of the Registry Index Map (RIM) for the two parcels and thereby give effect to the court judgment.

2. The application was based on grounds set out in its body. Briefly, they were that through the (consent) judgement dated 17th March 2015, the court issued an order which quashed the decision of 24th December 2012 made by the District Commissioner, Pokot South, on behalf of the Minister of Lands. The Minister had, by the decision, directed that part of parcel No. 209 belonging to the Ex Parte applicant be made to comprise part of parcel number 883 owned by Ngolepus Appetanyang, now deceased.

3. He added that although the Court had ordered that the grant of Leave to file the Judicial Review does operate as a stay of the Minister's decision, the County Surveyor reflected the decision on the RIM. But on account of the stay of execution, the Ex Parte Applicant had remained on the same option meant to be added to parcel number 883 to date. There was a need to rectify the RIM in order to perfect the decision of the court that quashed the Minister's decision. The owner of parcel number 883, that is, Mr. Ngolepus died by the time the appeal was heard by the Minister. Therefore, he could not sign the mutation form to have the RIM amended. The National County Surveyor, West Pokot had since prepared the mutation form but since the proprietor of parcel No. 209 was long dead and there was no known administrator of his Estate, the Deputy Registrar should be authorized to sign the mutation form on behalf of the deceased proprietor so that the court judgment may be perfected.

4. The application was supported by the affidavit of the Ex Parte Applicant, Lingakin Longorkemer. He repeated the contents of the grounds in support of the application but in deposition form. He added by annexing as LL1 a photocopy of the final order made by the Court on 17th March 2015 and LL2 a copy of the decision of the Minister dated 24th December 2012. Also, he annexed and marked as LL3 and LL4 copies of the green cards of the two parcels of land, namely 2009 and 883 and LL5 the photocopy of the order granting leave to appeal against the decision of the Minister.

5. He stated that notwithstanding the order of stay of execution against the decision of the Minister, the Survey office amended the RIM and confined his parcel, being No. 209, to one side of the road. Upon service of the court order quashing the decision of the Minister, it was necessary for the County Surveyor to reverse the position on the maps so that parcel No. 209 crosses the road (as before) to make the part he occupied still part of his plot. He added that he had occupied the parcel of land ever since the stay order was granted and the final decision of the Court was made. He added as annextures LL6, 7 and 8 photocopies of the letter dated 20th September 2022, the mutation form and the map.

6. The application opposed by the 3rd Respondent. On their part, the 1st and 2nd Respondents did not oppose the application. They indicated to the Court, on 14th February 2024, that the issues in the controversy did not affect them, hence they left it to the court to decide on them.

7. On his part to the 3rd Respondent filed a Replying Affidavit, which he swore on the 31st of May 2023. He deposed that the application was fraudulent and unlawful, malicious, misconceived, littered with untruth, and a concealment of material facts which would aid the court. He contended that on 28th August 1992, the late Ngolepus Appetanyang brought an objection before the Chepkono Land Adjudication Section - West Pokot District as Land Adjudication Case No. 15, against the Ex Parte applicant. He annexed and marked JNK1 a copy of the proceedings before the Adjudication Section. In the claim, the late Ngolepus alleged that the Ex Parte Applicant had demarcated a part of his land without his knowledge. He had complained to the chief of the area and the elders, and the land had been given back to him.

8. The Adjudication Section deliberated the claim and on 28th August 1992 the Committee made a decision allowing the objection by Ngolepus Apetanyang and directed that the portion be curved from parcel number 209, so that he (Apetanyang) owns the fenced piece of land where it borders with his parcel No. 210 down to the valley and it be given a new number and registered in his name. The.

Ex Parte Applicant was dissatisfied with the decision. He filed an appeal to the Minister for Lands, Settlement and Housing under Section 29 of the *Land Adjudication Act*. He listed the five rounds of appeal given then. He annexed and marked JNK2 a copy of the Form of Appeal dated 15th October 1992. The appeal case number was 201 of 1994 which was litigated before the Commissioner. He determined the Appeal on 24th December 2022, dismissing the appeal and directing that all that parcel constituting plot No. 883 be awarded to 3rd Respondent on behalf of the late Ngolepu Apetanyang who was then deceased, and the braces showing that parcel No. 209 crossed to parcel number 883 be removed, and plot number 883 to goes all the way to the river. He annexed as JNK3 a copy of the proceedings before and the decision of the Commissioner on behalf of the Minister.

9. The District Commissioner added in the decision that the boundary of Plot Nos. 209 and 883 were the road that passed through the road shown, and the portion added to plot number 883 be removed from plot number 209, which had crossed to the other side of the road to plot number 883. The District Commissioner directed that anyone not satisfied with his decision to appeal to the High Court within 30 days. No such appeal was preferred.

10. Instead, on 26th March 2013, the Ex Parte Applicant filed a Judicial Review Application before the High Court in Miscellaneous Civil Application No. 17 of 2013 in which he sought several reliefs, amongst which were to bring into Court and quash the Minister's decision. He annexed and marked as JNK4 a copy of the Judicial Review Application. On 17th March 2015, the judicial review application was allowed by the consent of the parties. He annexed and marked JNK5 a copy of the consent order.

11. He deposed that the effect of the consent order was only limited to allowing the application dated 27th March 2015, by bringing into the Court the decision of 24th December 2012 and quashing the same.

12. He deposed that the Ex parte Applicant must have imagined the import of the consent order of 17th March 2015 and brought the instant application over aspects which were not part of the order. He went on to add that the consent order was a negative order incapable of being executed. Further, the consent order had the effect of maintaining the status after the decision by the Land Adjudication Officer, as no appeal was ever preferred against it. By the decision of the Land Adjudication Officer, it was that a portion of land was to be carved from parcel number 209 that the late Apetanyang owned and was fenced, and it bordered parcel No. 210 down to the valley, and given a new number. The ruling was duly effected when the late Ngolepus' land was carved and given a new number, West Pokot/Chepkono/833, and registered in his name on 3rd October 1997.

13. Further, the Land Registrar registered a restriction on the said parcel of land until the appeal by the Ex Parte Applicant was to be finalized, as it was by the order quashing the decision of the appeal. The applicant misunderstood the consent order or was making a deliberate attempt to mislead the court that it had the aspect that required execution.

14. The intention of the applicant was to set aside the decision of the land adjudication officer of the 24th August 1992 through unlawful, illegal and fraudulent means because that was the decision that stood after the consent order of 17th March 2015. The applicant had concealed from the court material information from the Court. A party seeking justice must place before the Court material evidence and facts which, when considered in light of the law, would enable the court to arrive at a decision. As to whether the relief sought was available, the application was without merit and only with the mission of engaging the Respondent in endless litigation. The applicant would not be prejudiced if the application was disallowed.

15. Before the Application could be disposed of, the 3rd Respondent, an Applicant, agreed to have the County Surveyor visit the site and do a report on the ground occupation in relation to the decision of the Land Adjudication officer as made in August 1992.

16. The Surveyor in charge of the West Pokot County, one Raymond Kiptabut Rutto, visited that parcels of land and filed a report. He also filed an Affidavit he swore on 21/8/2021. Briefly, the depositions in the Affidavit were that he visited the site, carried out the survey, and established a number of facts regarding the status of the parcel of land in issue.

17. In the Affidavit, he swore on 21st March 2024 he deposed in that he was the current surveyor for West Pokot, with effect from September 2024 but had been stationed in Kapenguria Station from 2012. He deposed that he swore the affidavit according to the directions of the judge in the matter. He had access to the maps in relation to the suit parcel numbers 209 and 883. He had the decisions that emanated from the two parcels of land. One was the "Objection Judgment" of 28th August 1992 by the land adjudication officer. The other was the judgement of the Minister of December 2012. He also had the Order of 17th March 2015 issued by the High Court in Kitale Miscellaneous Civil Application No. 17 of 2013, which quashed the decision of the Minister.

18. Further, the "Objection Judgment" was perfected thereby giving rise to the creation of parcel number 883 measuring 11.06 hectares. It was registered in the name of Ngolepus Apetanyang. Parcel number 209 remained with 17.05 hectares, and it spread across both sides of the road. It had braces on the RIM showing that it lay on both sides of the road, but the same parcel number. He annexed as RKR-1 and 2 photocopies of the green cards for the two parcels of land.

19. He was aware that the judgment of the Minister on the Ex Parte Applicant's appeal against the objection judgment was dismissed. But the Minister directed that the parcel No. 883 be enlarged to include the portion of parcel No. 209 which lay on the other side of the road. The boundary of the two parcels of land was now to be the road between the two parcels. The Minister's decision was effected and the survey office amended the RIM on 4th April 2013. Parcel No. 209 was now shown as lying on one side of the road only. He annexed and marked as RKR – 3 and 4 the RIM and Mutation. After the decision of the Minister was quashed, there was needed to revert to the position as reflected by the objection decision. Thus, there was a need to have a mutation prepared and registered so that parcel number 883 could be reduced (on the RIM) and the braces be reintroduced so that parcel No. 209 now crosses both sides of the road.

20. He annexed as RKR-5 a copy of the mutation form showing the braces over parcel No. 209 and the boundary between 209 and 883 on the same side of the road. The changes introduced would switch to the position and accurate sizes that reflected the objection decision.

21. The 3rd Respondent moved the Court to cross-examine the Surveyor on the Report and Affidavit. He swore and was cross-examined on the Affidavit. He adopted it as evidence in chief. He stated that he had been in Kapenguria since 2012. He stated that on visiting the parcel of land in question, he had a copy of the decision of the Chepkono Land Committee (herein referred to as "the Decision") to which he referred at paragraph 6 of his Affidavit. He added that the last paragraph of the "Decision" read that 'the objection is allowed. The plaintiff is to be curved for a parcel from 208 ... down to the valley'.

22. He added he had severally visited the site of the two parcels of land. Further, from the information he (the Surveyor) provided, one could not see the fence or the valley. According to the records, the Objection introduced plot 883. At the time of the Decision, the Committee referred to physical features. He did not include them in his Affidavit. There is no document in the Survey Office that had captured the said physical features referred to in the decision. Nevertheless, the Decision of the committee had never been set aside.

23. He stated that if one inserted braces between parcel 209 and 883 in the current Registry Index Map, the effect would not be to combine the two parcels. It was the Decision that created parcel number

883. In the RIM current at the time of testimony, parcel Nos. 883 and 209 were divided by a road. There was no brace between them. Insertion of a brace would mean parcel No. 209 crosses the road, but parcel No. 883 would remain as it is.

24. He added that one could not determine where to place the fence or part of parcel 883 when the brace is placed because the physical features were not reflected on the map. He added that for the court to determine where the boundary was to be placed as per the decision of Chepkono, one must establish the physical features. But he came up with the mutation proposed in the application using the chronology of the parcel No. 883. In so doing, he used the High Court Order in Misc. Civ. Appl. 17 of 2013. The consent order of 17/3/2015 in it had quashed the decision of the judgment of the Minister read on 24/12/2012. It followed a consent recorded between the Applicant and the 1 – 3rd Respondents in it. It allowed the Judicial Review Application and quashed the decision of the Minister. Therefore, the decision that remained was that of the Chepkono Adjudication Section Committee, in which the objection was challenged. The Chepkono decision does not stand. The decision of 1992 was appealed against in 2012. He admitted he had not seen the Memorandum of Appeal to the Minister, but the appeal was by the owner of parcel 209. He stated that 40 acres of his land had been taken from him unfairly. That was the appeal quashed by the High Court consent.

25. He stated he had never seen any other order allowing the claims by the claimer of the Ex-parte Applicant on the Memorandum of Appeal.

26. Further, the proposed Mutation was prepared after the order allowing the appeal. He prepared the Mutation form because the meaning of the word “quashed” the decision of the Minister allowed the County Surveyor to effect braces. He agreed that the 2015 consent quashed the decision of the Minister, which amended the RIM.

27. He gave the process of adjudication. He stated that during the process, there are a number of cases by stages. There is the Committee stage. If one is aggrieved (by the decision), they move by appeal to the Minister. When all the mechanisms of appeal are exhausted, the RIM is prepared.

28. In the instant case, when the court decision of 17/3/2015 was made, it meant the adjudication process had been exhausted. When the appeal decision was quashed, it meant the adjudication process was quashed. He understood that a Judicial Review decision deals with only the procedure and not the merits of a decision. The consent order was a Judicial Review decision. To him, the entire process was quashed, but he did not know if the Judicial Review was not heard on merit. The consent order made no reference to the Committee case or decision.

29. The Committee decision of 1992 does not refer to acreage or even beacons, but after adjudication, records were prepared parcel No. 883 was found to be 11.3 acres.

30. The entitlement of the 3rd Respondent is to be found in the Adjudication records.

31. From the Committee decision, there was no reference to acreages. He could not tell whether the fence referred to by the Chepkono Adjudication Section was along the road or any other place on the Map. He added that if the fence were along the road, the braces ought to be removed. Further, when the Minister sat and heard the appeal he appreciated the decision of Chepkono and ordered the removal of the braces. He could not tell where the boundary was to be placed according to the Chepkono Land Adjudication Committee decision. But the proposal in the current Mutation was not advancing the Ex Parte Applicant’s claim. The court’s ruling of 2013 (the consent order) removed the appeal decision of the Minister hence it reversed all decisions before the decision of the Minister. The parcels in place would have to remain as they were before appeal to the Minster.

32. In re-examination he stated that Parcel No. 883 was created after the objection decision of 1992 was made. Initially, it was part of parcel No. 209. The demarcation officer of the Adjudication Section was the one who carried out the acreages after the objection stage. To arrive at that the officer referenced the physical features referred to by the Chepkono Committee.

33. He added, the green card for parcel No. 883 showed the acreage of 11.06 Ha. If that was to be effected parcel No. 209 would cross the road to the other side. The feature on the RIM to show that the parcel crossed the road was a brace. Parcel No. 209 of 17.9Ha was to comprise a road passing between it. Parcel No. 209 crossed the road and shared a boundary with 883.

34. Regarding the Appeal to the Minister by the Ex Parte applicant, he stated that the Minster dismissed it. He proceeded to order that the portion 209 which was across the road and bordering plot 883 be made part of 883. That was the decision which was quashed by the Court. The plot 883 was not to cross the road. (By the Minister's decision), Plot 883 thus became bigger and Plot 209 was reduced. The braces were removed. The acreages of 883 became 18.4Ha. Parcel No. 209 became 9.0 HA. He added that Annexture No. 4 of his Affidavit was the decision made in 2013. The Mutation was prepared in 2013.

35. Once the decision of the Minster was quashed, what remained was the decision of the Adjudication Section Committee. According to the decision the acreages 883 would be 4.06Ha and 209 would be 17.05Ha. His evidence was that according to the current RIM, the size of 209 was 9.80Ha and 883 is 18.34Ha. When he (the Survey office) prepared the Mutation after the Appeal the Minster in the appeal the acreages were 18.34Ha for 883 and 9.80Ha for 209 and the RIM was amended accordingly and braces removed. That reflected the decision of the Minster. After the Court quashed it, the acreages of 209 should go to 17.05Ha and 883 to be 11.06Ha. That was what he had presented to the court as Annexture No. 6. It meant that the RIM had to be re-corrected by preparing the Mutation and the court endorses it. The Mutation was only reintroducing the braces removed. In order to make plot 209 to have the correct acreage the brace has to be introduced. The acreages for 883 would remain 11.80Ha which was the acreage as per the decision of the Chepkono Land Adjudication Committee. It the brace was reintroduced, it means the position goes back to the decision as was at the Objection stage. The Mutation he prepared was to take the position at the time of the Committee decision.

36. Upon cross-examination by learned counsel Mr. Wanyama for the 3rd Respondent he stated that during the exercise, directed by the court, he used the following documents, namely, the decision of the land adjudication officer dated 28.8.1992, a copy of Registry Index Map (RIM) made after the Land Adjudication Committee of August 1992, the current RIM, and the Adjudication Rough Book.

37. Further, from the documents the ground acreage of West Pokot/Chepkono/209 was 18.87Ha. It tallied with the size of the boundary shown by Longorkemer, the Applicant. But as per the boundaries shown by Joseph Ngolepus the ground acreage was 10.46 Ha. Thus, the assertion by Joseph Ngolepus was that he was claiming half of the land Mr. Longorkemer showed.

38. He added that he had the sketch drawing, whose entry No. 9 of the rough book showed that interest by Longakin Longorkemer.

39. At the Remarks Section, it read that there were two objections, the first one being Objection No. 4, which was allowed and a portion of land awarded, creating a new parcel number 883. The second Objection No. 238 which was dismissed. Further, he never came across the details of objection No. 238, hence, he could not tell whether the claim in it by the Ex Parte applicant was that Ngolepus took away half of his parcel. He added that the entry where it indicated interest, showed that the adjudication officer wrote that there was a 10-metre road passing through the plot. The entry was cancelled and indicated "Objection 4".

40. He added that the effect of the cancellation on the map was to remove the braces. The (rough) book also had a sketch map. On it, the boundary of 883 is somewhere in between the land parcel No. 209. It was not directly corresponding with the boundary between 210 and 209. When referred to Drawing 1 of his report, he said there were boundary Bd2 and Bd1. It was placed by Lingakin Longorkemer. Boundary Bd2 was directly proportional to Bd1. Boundary Bd2 is the boundary between 210 and 209.

41. The entry step done by the land adjudication officer to enforce the Objection No. 4 was the removal of the road that passed through parcel 209. The 10-metre road passing through the plot was cancelled. It was again written that a 10 metre road passes through this plot. He stated that to showed the writings on the rough sketch map were done by one author. The new entry shows the re-insertion of a 10 metre road was done, but he could not know if it was by the same author since he was not a handwriting expert. He added, both entries of the cancellation and re-entry did not bear the dates when they were done. He could not tell whether, when the Minister indicated that the braces be removed, it was in line with the land adjudication officer's decision.

42. He added that when an entry is cancelled and countersigned, there is no error or wrong entry. In the instant case there was no contradiction in the entries because the 1st Entry had been cancelled and the new still explained the presence of a 10 metre road. The Surveyor could not ascertain when and pursuant to what directions the re-entry of the 10 metre road was inserted. He did not think there could be any more information as to who re-inserted the 10-metre road.

43. He could not confirm the current registered acreage of plot 209 because I did not have the road, but from the documents, it was 17.05 Ha. Further, when he visited the ground, the Ex parte Applicant showed him the portion he had claimed before the objection case of 1992. He drew the same as shown on drawing No. 3. The claim was for 30.4 Ha which is approximately 75.11 acres. He added that a claim (currently) of 40 acres would be more than half of the land shown as 75.11Ha. The sketch as appearing in the rough book showed the boundary, but it was a rough sketch. It could not yield to a claim of more than half of the land. It was only to guide the surveyor when drawing the map. His further oral evidence was that the Ex Parte Applicant was okay with placement of boundary – Bd1. The said party was comfortable with that being the boundary after losing the objection case. Further, during the visit, the party pointed out the portion he claimed as 40 acres. It was the 883 that he lost at the objection. It was shown as 11.53 Ha and was to the left of Bd1.

44. He added that during the site visit he went alone: no one from the land adjudication office accompanied him. He added that the land adjudication officer first gave him the records from his office before he went to the ground.

45. On further cross-examination by Mr. Kiarie for the Ex Parte Applicant, he stated that drawing No. 3 showed the ground position after the objection decision of 1992. By then, the parcel No. 209 was measuring 30.4Ha. It had braces showing that it crossed to the other side of the road. After the implementation of the decision of the objection, the position as shown as per drawing No. 5. The boundary Bd 1 was the boundary for paddocking the Ex Parte Applicant's animals before the objection case came. When it came about, the land adjudication adopted the boundary. The Ex Parte Applicant stated literally during the site visit survey, "nilishindwa kutoka hapa na kuenda huko", meaning "I was defeated/ lost (to have my land) from here to there". He added that the boundary for paddocks existed because the whole parcel was his. The boundary was adopted after the objection and was thus enforced.

46. He added, the acreage for 883 was shown as 11.53Ha. Parcel 209 was left to lie on both sides of the road and that was shown by the brace: that it was on both sides of the road. By then the acreage then for parcel 209 was 18.87Ha. The Surveyor added that when he visited the site the boundary Bd1 had never changed its position. He indicated it at paragraph 4 of his report that Bd1 was fenced by Lingakin and

had never changed. Both the Ex Parte applicant and the 3rd Respondent agreed on who fixed it. The surveyor added that he could not fix it again because it already existed on the ground.

47. Regarding drawing No. 2, he stated that it represented the position after the Minister's decision. The boundary was not shown on the drawing No. 2, but on the ground, it was there. In the RIM the boundary was removed. Further, drawing No. 2 represented the current status on the map (RIM). He added that the portion of land which was on the same side as parcel No. 883 was, now after the decision of the Minister, incorporated to parcel No. 883. Thus, as per drawing No. 2 the brace that shows the parcel 209 extended past the road was removed. The acreage of 883 was increased from 11.53 Ha to 19.94 Ha parcel No. 209 was reduced from 18.87 Ha to 10.46Ha.

48. He added that the decision of the Minister (that led to the above situation) was subsequently quashed by the Court. It was thus necessary to put back the boundary Bd1. Further, drawing No. 5 showed how the map (RIM) is to be after returning the brace. The acreage would change a bit in that for parcel 883, it would increase from 11.06Ha to 11.53Ha – an increment of exactly one acre. He explained this discrepancy that in a survey exercise, the measurements were normally approximate. It was up to the owner of the land to (apply to) rectify it on the maps. When effecting the proposal, in the instant case, the physical boundary would remain the same.

49. He added that the RIM as it existed was as per drawing No. 2, which happened upon effecting the Minister's decision. The position should be changed to drawings No. 5 and No. 1, hence drawing a mutation and its registration while returning the boundary Bd1 on the map. He added that on the drawings he made, the river (referred to in the 1982) Land Adjudication Officer's decision) was the zig-zag line opposite or parallel to the road as one moves along boundaries Bd4 and Bd1. It cut the two boundaries. Lastly, if the mutation was done as per the proposal the ground position would not change in any way. He produced his Report as PExh 12.

50. The Application was disposed of by way of written submissions. The applicant filed his dated 11th September 2023. In them he submitted that the Respondent lodged an objection with the land adjudication officer. By a decision dated 28th September 1992 the objection was allowed. It was to the effect that the Objector was to get a part or a portion of land from the Ex Parte Applicants' parcel No. 209 and the new parcel it be given a new number. That was done. Parcel No. 883, measuring 11.06 hectares, was given to the objector while the applicant's parcel number 209 remained 17.05 hectares. Parcel No. 209 comprised of a plot that was on both sides of the road. The applicant preferred an appeal to the Minister. The appeal was heard and dismissed. Upon that dismissal, the District Commissioner, Pokot South, acting on behalf of the Minister, ordered that the brace showing that plot No. 209 crossed the road to parcel number 883 be removed and that the boundary between plot 209 and 883 be the road. By the decision, the Ex Parte applicant was deprived of the portion that crossed the road. When he applied for judicial review and a consent recorded the decision should have been reversed.

Issue, Analysis And Determination

52. I have considered the application, the law, the evidence by way of affidavits and oral testimony of the Surveyor in charge of the West Pokot County, Mr. Raymond K. Rutto, who visited the suit parcels of land not once, and the submissions by the rival parties. Only two issues lie before me for determination. One is whether the application is merited. The other is who to bear the costs of the application.

53. On the first issue, it is not in dispute that the two parcels of land in issue were the subject of an adjudication process in the then Adjudication Section. The objection proceedings in that process were carried out between the Ex Parte Applicant and the father of the 3rd Respondent. In the proceedings before the land adjudication committee whose decision was given by the land adjudication officer on

28th of August 1992, as evidenced from the Annexture JNK-1 to the Replying Affidavit of Joseph Pkerker Ngolepus sworn on 31st May 2023, the decision was that the Ex Parte Applicant lost the Objection, thereby losing the portion of land he claimed. Following that decision that Committee directed that:

> "The Objection is allowed. The Plaintiff to be carved a portion from p/no. 209 so that he owns the fenced piece of land where it borders with his p/no. 210 down to the valley; and it be given a new parcel number and be registered in his name - Ngolepus Apetanyang."

54. Following the decision, parcel No. 209 was subdivided and parcel number 883 was created and registered in the name of Ngolepus Apetanyang. The said parcel of land created and exists to date. This was also confirmed by both the Ex Parte Applicant, the Respondent in paragraphs 8 and 9 of his Replying Affidavit, and the County Surveyor in his Supplementary Affidavits to the application, respectively.

55. Further, the Ex Parte Applicant was dissatisfied with the decision and appealed to the Minister. By the time he appealed, Parcel No. 209 was shown in the Registry Index Map (RIM) as crossing the road. This was shown on it by a brace that crossed the road on the map. When the decision of the Minister was arrived at, he ordered that the brace be removed. When that was done, the RIM indicated and showed that the road now became the boundary between Parcel Nos. 209 and 883.

56. The Ex Parte Applicant, being aggrieved by the decision of the Minister, applied for Judicial Review of the same through s Miscellaneous Application Number 17 of 2013. The Application was compromised by way of a consent by which the decision of the Minister was quashed. Prior to the filing of the Application for judicial review, the Ex Parte Applicant had applied for leave to file the same through a Chamber Summons in Kitale High Court Miscellaneous Civil Application No. 13 of 2013 and an order was granted by the learned Judge n 11th March 2013. Among the Orders granted was that the Leave to file the Judicial Review to operate as a stay the execution of the decision of the Minister, as made by the District Commissioner of Pokot South.

57. It is not in dispute that notwithstanding the Order of the Court the Minister's decision was perfected and the brace was removed from the RIM. It is this act that the Ex parte Applicant seeks to correct by the prayer for the return of the same through the signing and use of the Mutation Form, which the instant application seeks an order therefor.

58. With the facts as summarized above, the question then is whether the Application is merited. The first issue to consider is whether the Survey Office acted within the law when it removed the braces while there was an order staying the implementation of the decision of the Minister and what the effect would be if the same would not have been removed. The answer to the first limb of the issue is, the Office did not act legally. It therefore follows that the fruit of a poisonous tree is poisonous (an easier reference hereto is Matthew 7:17-18 of the Holy Bible).

59. In the legal field, the decision of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169 gives a clear implication of such. Lord Denning delivering the opinion of the Privy Council at page 1172 (1) stated:-

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

60. Therefore, it simply means that when the survey office amended the RIM contrary to the order of the Court, it was a nullity in law. A party cannot benefit from a nullity or illegality. The step should be reversed.

61. Further, there was evidence by the Ex Parte Applicant that even though the brace was removed, the parties settled on their respective parcels of land, they were settled by the Adjudication Committee to date. This is what the Surveyor also confirmed. The 3rd Respondent did not dispute that or bring evidence that the parties changed boundaries or settled on another's portion. He, indeed, found, according to his evidence, that the parties respected the decision of the officer and settled on the respective parcels of land as was decided by the land adjudication officer. This position was different from the reality on the ground and the acreages. That parcel number 883 was bigger by virtue of the inclusion of the portion of land which extended from the boundary the parties respected since 1992 to date while parcel No. 209 was reduced, by its boundary being restricted to extending only to the road and not beyond it to where it was when parcel No. 883 reached upon creation.

62. This Court has further carefully considered the evidence of the surveyor, the drawings he made upon visiting the parcels of land under the direction of the Court and the sketch annexed to the application herein. I have also carefully considered the evidence by way of affidavits of both the Applicant and 3rd Respondent. The 3rd Respondent insists that when he entered the consent that quashed the decision of the Minister, it was his intention that. The land included the one to the road, and if, indeed, it did not extend to the road, then he was misled or misrepresented to as to make him enter the consent.

63. He insists that the rough sketch and the preliminary index diagrams (RIM) differed from the final product, being the mutation form that is proposed by the County Surveyor for implementation if the orders herein were granted.

64. If it, indeed, is true that the Respondent was misled into entering consent, it has not been set aside. It is only a mere allegation that has not been proven or acted upon. For the 3rd Respondent to renege on the import and content of the consent and urge this Court to view it differently than it was, and still is it is an indirect, illegal and unprocedural way of applying to set it aside. The fact remains that the consent quashed the decision of the Minister. The parties resiled to the point where they were before the filing of the appeal. That was where on the ground they have been, physically, to date.

65. In any event the parties to the consent agreed that the Minister's decision was wrought with procedural illegalities hence the consent. The order to stay removal of the braces on the RIM has never been set aside. Therefore, it binds the parties. For the Respondent to argue that evidence be led as to which documents the land adjudication officer relied on to come up with the RIM now sought to be amended and identify the physical features used to arrive at that stage, for instance the Sketch, the PID used by the land adjudication office is go back to the merits of the decision of 28/08/1992. It would amount to relitigating the objection proceedings. Similarly, it would be another way of seeking to alter the parties' settlement positions as was done by the Land Adjudication Officer in the 1992 decision. By his decision, he directed that the boundary between the suit parcels run all the way to the river. In my view, the instant Application is merited because the evidence, particularly that of the surveyor, is cogent and consistent. It was not shaken by way of cross-examination.

66. Lastly, even if this Court were to be wrong in its analysis of the evidence of the parties as stated above and the finding thereof, it is a fact that the decision of the land adjudication officer was made on 28th August 1992. The parties were settled on their respective parcels of land where they occupied in full view and with the knowledge of the other for a period of more than 12 years. If indeed the 3rd Respondent knew that his parcel of land stretched to where he wanted to claim it to be, he ought to have sued for the eviction of the Ex Parte Applicant within a period of 12 years from the date the

Applicant was settled on the land. Failure to do so means that by virtue of Section 7 of the *Limitation of Actions Act*, he cannot claim that portion of land. His claim for it is time-barred.

67. It is for these reasons that I find that the application is merited. I allow it with costs to the applicant. The mutation form is to be signed forthwith by the Deputy Registrar of this Court, and the RIM be amended accordingly, together with the register in relation to the parcels of land, being West Pokot/ Chepkono/209 and 883.

68. Orders accordingly.

RULING DATED, SIGNED AND **DELIVERED** VIA THE **TEAMS PLATFORM THIS 18TH MARCH 2025.**

HON. DR. *IUR* F. NYAGAKA,

JUDGE

In the Presence of:

Kiarie Advocate for the Ex Parte Applicant.

D. Wanyama Advocate for the 3rd Respondent