Republic v Cabinet Secretary Ministry of Lands & Physical Planning & 2 others; Musyimi (Exparte); Kilonzi (Interested Party) (Judicial Review E004 of 2022) [2023] KEELC 21857 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21857 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

JUDICIAL REVIEW E004 OF 2022

A NYUKURI, J

NOVEMBER 29, 2023

IN THE MATTER OF AN APPLICATION BY NZELI MUSYIMI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF KENZE ADJUDICATION SECTION APPEAL NO. 2 OF 2020 & PLOT NO. 585

AND

IN THE MATTER OF LAND ADJUDICATION ACT, CAP 284, LAWS OF KENYA

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT . 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

NZELI MUSYIMI ..... EXPARTE

AND

STANLEY TITO KILONZI ..... INTERESTED PARTY

JUDGMENT

Introduction

1. Pursuant to leave to seek judicial review orders of certiorari granted by this court on 23rd February, 2022, the ex parte applicant filed a substantive motion dated 8th March 2022 seeking the following orders;

    a. That by way of judicial review, an order of certiorari do issue to bring into this court and quash the entire order of the Cabinet Secretary 1st Respondent dated 26th June 2020 relating to land parcel No. 585 Kenze Adjudication Section in Appeal Case No. 2/2020, the previous decisions of the committee dated 12th October 2011, decision of the adjudication board dated 9th November 2012 and the decision of the land adjudication officer dated 11th February 2019.

    b. That the leave granted by the honourable court on 23rd February 2022 do operate as stay of execution of the impugned decisions.

    c. That the costs of this application be awarded to the exparte applicant in any event.

2. The motion is supported by the statutory statement of facts, and verifying affidavit sworn by Nzeli Musyimi attached to the application. The applicant's case is that she is a resident of Kenze Adjudication Section in Kitui County, which has been under the adjudication process since 2011. She stated that she was the second wife of the late Musyimi Masila and has lived on Parcel No. 585 (suit property) since she got married in 1960. She averred that until the demise of her husband Musyimi Masila, there was no dispute between him and Stanley Tito Kilonzi, the interested party in this suit or his family.

3. She further deponed that by a decision of the Adjudication Committee in Case No. 58 of 2011, between Stanley Tito Kilonzi and Nzeli Musyimi, the committee found that the suit property did not belong to any of the parties to the dispute but that it belonged to one Nguni, but nonetheless, the committee awarded the same to the interested party. That, aggrieved with that decision, the exparte applicant appealed to the adjudication board in Case No. 6 of 2011, but that the interested party changed his claim, contradicting his earlier averments before the committee, by alleging that he purchased the suit property from Nguni without presenting any evidence for that allegation.

4. She stated that the board relying on documents from the assistant chief, dismissed the applicant's appeal and found that the interested party had bought the suit property from Nguni. That subsequently, the exparte applicant filed Objection Cause No. 40 of 2017, challenging the decision of the board and the committee, and based on grounds inter alia of partiality and compromise of the members of the board and committee and that the interested party was allowed to change his case, but that his suit was dismissed leading to her filing appeal before the "Minister" but that the same was dismissed.

5. The ex parte applicant asserts that the entire process of adjudication from the committee to the "Minister" was marred with undue influence, partiality against her, procedural impropriety and consideration of irrelevant matters leading to a wrong conclusion.

6. According to the ex parte applicant, the decision of the committee dated 12th October 2011 awarding the suit property to the interested party was in contradiction to the findings of the committee that the suit property neither belonged to the applicant nor the interested party, but to one Nguni. She maintained that the decisions of the committee, the board and the land adjudication officer and the "Minister" were in utter disregard of the facts presented by the ex parte applicant. She averred that there

was bias due to undue influence by the interested party who is a senior police officer, who manipulated the entire process. She argued that the refusal by the adjudication board to visit the suit property breached the law and her legitimate expectations in ascertaining her interest in the suit property.

7. Concerning the decision of the land adjudication officer, she stated that the same considered irrelevant matters as the adjudication officer dismissed her case because the applicant had her son representing her.

8. She stated at all the stages of hearings between the parties, relevant facts were that there have never been a dispute between the family of Musyimi and Kilonzi. Further that part of the said property adjoining the suit property is still under occupation by the ex parte applicant's cowife, after their husband subdivided the land between the two wives. She also stated that all the decisions failed to consider decisions made by clan elders and the court in Kitui Criminal Case No. 74 of 1990, wherein the court dismissed a case against Wambua Musyimi noting that the same was motivated by a land dispute between the complainant, Nguli Kilango and Wambua Musyimi.

9. She further complained that the decisions in the adjudication process considered irrelevant matters and failed to take into account relevant matters and that therefore those decisions cannot stand the test of natural justice. She stated that having used the land since getting married in 1960, she has acquired enforceable and legal rights over the suit property which were not enforced during the different levels of decision making. That therefore having had quiet possession of the suit property for 60 years and having developed and improved the same and her cowife being on adjacent property, the decisions made at all levels of adjudication, failed to take into account that fact and breached her legitimate expectations. She stated that the decision by the "Minister" took into consideration matters not canvassed by the parties at the hearings and matters irrelevant to the proceedings. She stated that no other remedy exists in law to quash decisions of the committee, the board, the land adjudication officer and the "Minister" to ensure that fresh hearings are undertaken in strict compliance with the law, procedure, principles of natural justice and legitimate expectation of parties to the process. She attached all the decisions referred to.

10. The application was opposed. On behalf of the 2nd Respondent, Peter Nduati, the Assistant Director, Land Adjudication & Settlement Kitui filed a replying affidavit sworn on 10th March 2023. He stated that a committee case was filed against the applicant on ownership of the suit property and that the same was decided in favour of the interested party. That the subsequent appeal to the arbitration board, the objection before the adjudication officer and the appeal to the "Minister" filed by the applicant were all dismissed. According to him, the decision by the "Minister" marked the end of the adjudication process as per the *Land Adjudication Act*.

11. He contended that the applicants complaints in the motion before court had no basis as the applicant appeared before all the tribunals in the adjudication process and neither did she raise the issue of favouritism or corruption. He maintained that at all stages of the adjudication process, due process was followed and that the application is defective and bad in law. He sought for the dismissal of the application. He attached proceedings of the committee, objection proceedings and proceedings of the appeal.

12. No response was filed by the interested party.

13. The application was canvassed by way of written submissions. On record are submissions filed by the ex parte applicant on 9th March 2022.

Ex parte applicant's submissions

14. Counsel for the ex parte applicant submitted that leave to file the instant application was sought timeously as it was sought five months after the "Minister's" decision which was made on 26th June 2020. Counsel argued that the challenge on the decision of the "Minister" goes to the root of the previous proceedings and that throughout those proceedings, the applicant raised the issues raised in this application which include breach of procedure, consideration of irrelevant matters, failure to consider relevant matters, favouritism, breach of rules of natural justice, undue influence and failure to consider the applicants accrued rights on the suit property. Counsel maintained that the culmination of the decision of 26th June 2020 is as a result of procedural improprieties, perpetuated through out the adjudication process up to and including the decision of the "Minister".

15. Reliance was placed on the case of Pricillar Minoo Nguyu v Samuel Matheka Mwongela & 2 Others [2021] eKLR for the proposition that where the law provides for redress of a particular grievance the same must be followed.

16. Counsel argued that this court has jurisdiction to hear and determine this matter and cited the case of Republic v Firearms Licensing Board & Another; Exparte Jimi Wanjigi [2019] eKLR for the proposition that where there is illegality, irrationality, or procedural impropriety, the court can exercise its power of judicial review in respect of an administrative action.

17. Regarding the decision by the adjudication committee, counsel summarised evidence adduced before the committee and submitted that it was admitted that there had been no previous dispute on the ownership of the suit property between Musyimi Masila and Kilonzi. That the only dispute that was there prior to the adjudication process was that between Musyimi and Nguni and that the interested party only raised a complaint at the committee after Waki Nguni withdrew his objection in favour of the applicant. Counsel argued that while the committee made a finding that the suit property did not belong to either the applicant or interested party, it was surprising when it awarded the land to the interested party. As regards the arbitration board, counsel submitted that in a clear change of case, the interested party conceded that the suit property belonged to Nguni, but that he purchased the same at Kshs. 40,000/=, whereof he paid Kshs. 20,000/=. He argued that the board held that the land was purchased from Nguni by relying on new evidence and allowing the interested party to avail more witnesses without granting the applicant a similar opportunity. Counsel also argued that therefore proceedings and the decision of the board was skewed towards the interested party by design of the committee and admission of new evidence was a breach of the principles of natural justice. Further that the board erred in refusing to visit the suit property.

18. Counsel argued that due to the applicant's failing health, age and illiteracy, she appointed her son Nicholas Kaluki Musyimi to represent her before the adjudication officer and that the latter did not visit the suit property. Counsel faulted the conclusion by the adjudication officer to the effect that by choosing to be represented by her son, the applicant was engaging in a trial and error process and argued that that position contradicted the provisions of section 13 (2) of the *Land Adjudication Act* which authorizes a party to appoint a representative in adjudication proceedings. Counsel maintained that before the adjudication officer, the interested party changed his claim alleging that the land was two pieces in one, one belonging to his father and another piece belonging to him which he purchased from Nguni, without any evidence to that effect. Counsel pointed out that the adjudication officer relied on earlier decisions made when those decisions were made in complete disregard of procedure, ultra vires, and skewed in favour of the interested party including allegations of purchase of the suit property by the interested party.

19. Regarding the "Minister's" decision, counsel submitted that the delegation of the appeal to the "Minister" pursuant to section 29 (2) of the *Land Adjudication Act* was not formerly made as no gazette notice was published appointing the said officer to deal with the appeal, and that therefore the decision reached was unlawful and ultra vires. Counsel argued that the appointment of the subcounty commissioner to handle the appeal was improper as the interested party is a senior police officer holding the position of county commissioner and that therefore the sanctity of the process and the resultant decision was questionable. To buttress this argument, counsel relied on the case of Republic v Non Governmental Organization Exparte Linda Bonyo & 4 Others and Philip Opiyo Radja & 5 Others (Interested Parties) [2020] eKLR on the application of the reasonableness test. Counsel maintained that the process of determining the appeal was flawed as the sub-county Commissioner conducted a fresh hearing and refused to address the issues raised by the applicant.

20. Counsel argued that although the applicant raised the impartiality of the Committee as the chairman was a relative of the interested party, the "Minister's" decision that the applicant should have raised the issue was contrary to strict provisions of the law that require any committee member who had a conflict of interest to declare the same before the hearing. Counsel argued that failure by the applicant to challenge suitability in the committee did not waive the obligation of the chairman to disclose his relationship with the interested party. Counsel submitted that the applicant's argument that the other tribunals failed to visit the suit property was overlooked on the basis that the committee visited the suit property and drew a sketch map when the same did not show that the disputed land was two parcels in one. Counsel maintained that the "Minister" failed to interrogate the period of the applicant's occupation, the decision of the clan, evidence from the locals, grounds of undue influence, bias and procedural improprieties and chose to conduct a fresh trial on the matter. Further that the "Minister" held that the mango trees planted on the suit property were contrary to existing orders when he had not been supplied with such orders and therefore basing his decision on irrelevant matters.

21. Counsel argued that the applicant had presented evidence before this court to show that the suit property belongs to her as per the decision of the clan and that the adjudication proceedings were contrary to the provisions of the *Land Adjudication Act*, and that there was bias, undue influence and favouritism against the applicant. Counsel argued that the decision of the committee was escalated to the last decision of the "Minister". Counsel submitted that the applicant with her children had been on the suit property for over 60 years and have rights thereon which ought to have been upheld during the adjudication process.

Analysis and determination

22. This court has carefully considered the application, statutory statement, verifying affidavit, the reply thereto, the evidence from the parties and the ex parte applicant's submissions. The view of the court is that the issues that arise for determination are;

    a. Whether the decisions made in the adjudication process regarding Parcel No. 585 Kenze Adjudication Section are bereft of procedural propriety, legality or rationality to warrant this court's intervention by way of judicial review orders of certiorari.

    b. Who should bear the costs of this suit.

23. The jurisdiction of this court to review administrative actions or decisions of quasi-judicial agencies is donated by virtue of Articles 162 (2) (b) and 165 (5) (b) of *the Constitution* that vests determination of disputes concerning environment and land in the Environment and Land Court. Under Article 47 of *the Constitution*, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, which right is expounded in section 4 of the *Fair Administrative*

Action Act No. 4 of 2015. Section 7 of the Act provides for the jurisdiction of this court to hear judicial review application, while section 9 (2) and (4) thereof provides that this court shall not review a decision unless internal mechanisms for appeal or review and all available remedies under the law are first exhausted. However, in exceptional circumstances where the applicant obtains exemption from the obligation to exhaust internal mechanism in the interests of justice, the requirement for exhaustion of internal mechanisms may be waived.

24. Section 7 of the Fair administrative Action provides as follows;

> 7. Institution of proceedings
>
> 1. Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–
>
> (a) a court in accordance with section 8; or
>
> (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
>
> 2. A court or tribunal under subsection (1) may review an administrative action or decision, if–
>
> (a) the person who made the decision–
>
> i. was not authorized to do so by the empowering provision
>
> ii. acted in excess of jurisdiction or power conferred under any written law;
>
> iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;
>
> iv. was biased or may reasonably be suspected of bias; or
>
> v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
>
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
>
> (c) the action or decision was procedurally unfair;
>
> (d) the action or decision was materially influenced by an error of law;
>
> (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; (f) the administrator failed to take into account relevant considerations;
>
> (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
>
> (h) the administrative action or decision was made in bad faith;
>
> (i) the administrative action or decision is not rationally connected to–
>
> i. the purpose for which it was taken;
>
> ii. the purpose of the empowering provision;

iii. the information before the administrator; or

iv. the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

3. The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that–

(a) the administrator is under duty to act in relation to the matter in issue;

(b) the action is required to be undertaken within a period specified under such law;

(c) the administrator has refused, failed or neglected to take action within the prescribed period.

25. Section 11 of the *Fair Administrative Action Act* provides for equitable remedies that the court may grant in a judicial review application as follows;

11. Orders in proceedings for judicial review

1. In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order–

a. declaring the rights of the parties in respect of any matter to which the administrative action relates;

b. restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

c. directing the administrator to give reasons for the administrative action or decision taken by the administrator;

d. prohibiting the administrator from acting in a particular manner;

e. setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

f. compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

g. prohibiting the administrator from acting in a particular manner;

h. setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

i. granting a temporary interdict or other temporary relief; or

j. for the award of costs or other pecuniary compensation in appropriate cases.

2. In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

a. directing the taking of the decision;

b. declaring the rights of the parties in relation to the taking of the decision;

c. directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs and other monetary compensation.

26. Essentially, every administrative action or decision made by quasi-judicial agencies must be legal, fair, just, rational, reasonable, and pass the test of procedural propriety. It should also be devoid of bias, and reflect justice.

27. The jurisdiction to grant equitable orders of judicial review is exercised where there is illegality, procedural impropriety and irrationality in decisions made by agencies or bodies with power to make administrative or quasi-judicial decisions.

28. The *Land Adjudication Act*, provides for hearing and determination of disputes that may arise during the adjudication process which may be escalated right from the demarcation officer, survey officer, recording officer, to the adjudication committee, arbitration board, land adjudication officer and finally to the "Minister", as provided for in sections 9, 15, 16, 19, 21, 22, 26 and 29 of the Act respectively. Under section 29 (1) of the *Land Adjudication Act*, the "Minister's" decision is final and therefore that decision is not subject to an appeal or any merit based interrogation by the court. However, the same may be reviewed on its procedural propriety, rationality, legality, consideration of irrelevant matters, failure to consider relevant matters or other grounds challenging the decision-making process.

29. The jurisdiction to grant discretionary orders of judicial review is concerned not with the decision itself, but with the decision-making process. In the case of Zachariah Wagunza & Another v Office of the Registrar, Academic Kenyatta University & 2 Others 2013 eKLR, the court cited with approval the Ugandan case of Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300 and stated as follows;

> In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of law or its principles are instances of illegality ...

> Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision is usually in defiance of logic and acceptable moral standards.
>
> Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non observance of the rules of natural justice act or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

30. Similarly, in the case of Republic v Kenya National Examinations Council Exparte Gathenji & Others Civil Appeal No. 266 of 1996, the Court of Appeal stated as follows;

> An order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of judicial review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for judicial review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.

31. The applicant's complaint is that the process of decision making in the adjudication process concerning Plot No. 585, right from the committee stage to the "Minister's" decision was marred with procedural impropriety, bias, undue influence, consideration of irrelevant matters and failure to consider relevant matters.

32. She argued that the chairman of the adjudication committee was related to the interested party, a fact that was conceded, but which the "Minister" reasoned that it was for the applicant to have raised the issue with the committee which she failed to. She faulted the conclusions made by the committee on the basis that while the committee made a finding that the suit property did not belong to either the applicant or the interested party, it proceeded to award the land to the interested party. She also faulted the decision of the arbitration board for failing to interrogate the interested party's variation of the facts of the case where he stated that the suit property belonged to Nguni, but that he purchased the same. Further the applicant challenged the conclusion made by the adjudication officer that by choosing to be represented by her son, the applicant was engaging in a trial and error process and argued that that position contradicted the provisions of section 13(2) of the *Land Adjudication Act*, which authorizes a party to appoint a representative in adjudication proceedings. She also pointed out that the adjudication officer relied on earlier decisions made when those decisions were made in complete disregard of procedure, were ultra vires, and skewed in favour of the interested party including allegations of purchase of the suit property by the interested party. Her complaint against the "Minister's" decision was that the later failed to interrogate the period of the applicant's occupation, the decision of the clan, evidence from the locals, grounds of undue influence, bias and procedural improprieties and chose to conduct a fresh trial on the matter. Further that the "Minister" held that the mango trees planted on the suit property were contrary to existing orders when he had not been supplied with such orders and therefore basing his decision on irrelevant matters.

33. Having considered the challenge raised against the decisions arising in the adjudication process in regard to Parcel No. 585, the question that this court ought to address is whether what is raised has nothing to do with the merits of the case but everything to do with the decision-making process, as that

would be the only basis for this court's intervention in view of the provisions of section 29 (1) of the *Land Adjudication Act*. I have considered the decisions above and tested them against reasonableness, irrationality, procedural propriety and legality.

34. In every administrative decision made, justice must be seen to be done and fairness ought to be explicit. Justice is not just about fairness but perception of fairness. Where a decision maker is conflicted either by reason of being related to one of the parties or where they have an interest in the subject matter of the dispute or for any other reason, it is their duty and not that of the parties to declare the existing or perceived conflict. In that regard therefore, it was upon the chairman of the adjudication committee to declare his interest in the matter and withdraw from hearing the dispute.

35. Section 8 (1) of the *Land Adjudication Act* provides that where a member of the committee or board has a direct or indirect interest in the determination of a dispute, he must disclose his interest and not participate in the determination of the matter and should not vote therein. Therefore, as the chairperson of the committee failed to disclose the fact that he is married to the interested party's aunt and proceeded to determine the matter and sign the decision, that decision was tainted with an illegality for failure to comply with the law and breach of the principles of natural justice.

36. As regards the decision of the committee to award the suit property to the interested party, despite finding that the same neither belonged to the applicant nor the interested party, it is clear that that decision was irrational. It is the interested party who had laid claim on the suit property by filing the dispute before the committee and tenets of natural justice would require that the claimant proves their claim. It is contradictory and consequently unreasonable and irrational to find that the suit property does not belong to the interested party and to go ahead and grant him the same. That only means that there were other considerations that do not appear in the decision, upon which the award of the suit property to the interested party was based. One of them may have been because committee's chairperson was the interested party's relative. I therefore find and hold that the decision of the adjudication committee failed the reasonableness test, it is irrational and the same cannot stand.

37. As regards the decision of the arbitration board, the board agreed with the decision of the committee and went further to state that the suit property belonged to the interested party who purchased the same from Nguni. By upholding the findings of the committee, it is clear that the arbitration board upheld an irrational decision of the committee and also based its decision on assertions that the interested party purchased the suit property, which assertions were at variance with assertions made before the committee on the same matter. That being the case, I find and hold that the decision of the board was irrational for upholding an irrational decision of the committee and its failure to interrogate the variance of facts given by the interested party in awarding the suit property to the latter.

38. The basis for the adjudication officer's dismissal of the objection filed by the applicant was his finding that the applicant's case was a mere gamble because the applicant chose to be represented by her son, one Nicholas Kaliku Musyimi. The applicant deponed that she is elderly, sickly and illiterate, and that is the reason she sought her son's assistance. This assertion was not rebutted by the respondent or interested party. The right to access to justice envisages that the elderly, illiterate persons and all vulnerable persons appearing before courts, tribunals or any administrative or quasi-judicial agencies ought to be accorded a level playing field with other parties that are not vulnerable.

39. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to legal assistance as a means to achieve equality of arms between parties to a dispute to guarantee fair trial. The UN Human Rights Committee General Comment No. 32, Article 14: Right to equality before courts and Tribunals and to a fair trial (UN Doc. CCPR/C/GC/32 (2007) describes the right to equality before courts and tribunals and to a fair trial as a key element of human rights protection

and serves as a procedural means to safeguard the rule of law. It further explains that that right ensures that parties to any proceedings are treated without discrimination and ensures that no individual is deprived, in procedural terms of his/her right to claim justice. It is therefore upon a decision maker to be alive to the fact that many factors impede the right to access to justice and therefore deliberately employ available tools at their disposal to ensure that those appearing before them, meaningfully and effectively participate in the proceedings in question, and this includes allowing representation where applicable. At the heart of a fair trial is the assurance that the voices of both parties to a dispute are heard.

40. Section 13 (2) of the *Land Adjudication Act* allows a party to either represent themselves in person or through their duly authorized agent. This is intended to avail a platform to have the parties voices heard. In this case, the interested party who is said to be a senior police officer, and described by the "Minister" as a person of influence, just like any other litigant is entitled to both substantive and procedural justice, and to file and pursue a claim in the adjudication process; his rank, position or influence in society notwithstanding. However, in a dispute between the interested party being a person of influence, and the applicant who is an elderly and illiterate woman, the adjudication officer was under the law, obligated to facilitate procedural arrangement provided in law, by inter alia informing the applicant of her right to be represented by an agent of her choice and allowing such representation to be done. This would effectively enhance equality of arms between the parties in this dispute. Therefore, I find and hold that the decision of the adjudication officer to fault the appearance of a duly authorized agent of the applicant was an illegality which contravened section 13 (2) of the *Land Adjudication Act*. It appears, this decision eventually led the applicant to appear in person subsequently before the "Minister". In addition, the adjudication officer having upheld the committee's findings and decision was confirming an irrational decision, hence his decision was also irrational.

41. As regards the "Minister's" decision, I note that the applicant gave her evidence and was extensively cross examined by the interested party and the "Minister", while there is no record to show that the applicant was granted opportunity to cross examine the interested party and no question was posed to the interested party by the "Minister". This, in my view was unprocedural and contradicted the provisions of section 4 (3) (f) and (4) (c) of the *Fair Administrative Action Act*, which provides that a decision maker shall give a person affected by a decision, notice of the right to cross examine and opportunity to cross examine evidence against them. The "Minister" noted that the applicant was the one who had all along been in possession of the suit property and had planted mango trees thereon but found that the applicant's occupation was unlawful and contrary to some orders, although the alleged orders did not form part of the record. I find that, that finding was based on irrelevant considerations.

42. In an adjudication process, evidence of occupation and use of the disputed land is a key element in deciding land ownership, and therefore it ought to be given consideration in deciding disputes. In the "Minister's" decision, possession was not given any relevant consideration and therefore, I agree with the applicant that the "Minister" failed to consider relevant matters and put into consideration irrelevant matters. On the question of bias, the "Minister" placed the burden of proof of bias on the applicant when it was not disputed that the chairperson of the committee was the interested party's close relative having married his aunt. As stated earlier in this judgment, it is trite that justice must be seen to be done and therefore where a decision maker is aware of being related to one of the parties or having any interest in the subject matter, they need not wait for the opposing party to raise objection, but they are under duty to disclose the relation or interest in the suit and ought to withdraw from hearing the matter. Therefore, the "Minister" failed to address the question of fairness and in upholding previous decisions, upheld irrationality and bias set forth by the committee.

43. In the premises, I find and hold that the entire adjudication process herein from the adjudication committee to the "Minister's" decision was marred with illegality, procedural impropriety, bias, irrationality consideration of irrelevant matters and failure to consider relevant matters, and the same ought to be quashed.

44. Consequently, I find and hold that the notice of motion dated 8th March 2022 is merited and the same is allowed as follows;

    a. That a judicial review order of certiorari be and is hereby issued bringing into this court and quashing the entire order of the Cabinet Secretary 1st Respondent dated 26th June 2020 relating to land parcel No. 585 Kenze Adjudication Section in Appeal Case No. 2/2020, the previous decisions of the committee dated 12th October 2011, decision of the Adjudication Board dated 9th November 2012 and the decision of the land adjudication officer dated 11th February 2019.

    b. The dispute herein is hereby remitted for reconsideration by an adjudication committee, lawfully constituted, consisting of members other than those that previously heard this matter. The committee is directed to consider, among other relevant matters, the length of occupation and or use of the suit property by the parties.

    c. The costs of the suit are awarded to the applicant and the same shall be borne by the interested party.

45. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of: -

Ms. Wanjiru for respondents

Mr. Munywoki for exparte applicant

No appearance for interested party