



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL APPLICATION NO 32 OF 2011

**IN THE MATTER OF OBJECTION NO. 5628 REGARDING LAND PARCEL NUMBER 5029
AKIRANGONDU "A" ADJUDICATION SECTION**

AND

**IN THE MATTER OF THE LAND CONSOLIDATION ACT, CAP. 283 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 OF THE
LAWS OF KENYA.**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER,

IGEMBE DISTRICT.....RESPONDENT

AND

REGINA KAILU.....INTERESTED PARTY

EX PARTE M'ACIITA M'MINGAINE

J U D G M E N T

1. This application by way of Notice of Motion is dated 9th June, 2011. The exparte applicant seeks:
 1. *An Order of Certiorari to remove to this Court for the purpose of being quashed the decision of the District Land Adjudication and Settlement Officer, Igembe District dated the 23rd day of March, 2011 regarding land parcel Number 5029 AKIRANGONDU'A' ADJUDICATION SECTION.*
 2. *The costs of this application be provided for.*
2. The application is based on the grounds and matters set out in the Statutory Statement and the

Verifying Affidavit sworn by the exparte applicant which was filed in Court on 27th May, 2011.

3. The Verifying Affidavit sworn on 27th May, 2011 brings out in some details the exparte applicants case. It states as follows:

“ I, M'ACCITA M' MINGAINE holder of National Identity Card number 7747892 and a resident of Akirang'ondu Location, LOCATION Igembe North District within Meru County in the Republic of Kenya do hereby make oath and states as follows:-

1. ***THAT I am the applicant herein and I am conversant with the facts of this matter.***
2. ***THAT I am the recorded owner of land parcel number 5029 AKIRNAGONDU 'A' ADJUDICATION SECTION on which I cultivate various agricultural crops. Annexed hereto marked 'MM-I' is a copy of my demarcation record endorsed by the relevant land demarcation office.***
3. ***THAT I was given the said parcel of land by my late father who shared out his land among my two brothers and which was transferred to us by my mother who is also deceased.***
4. ***THAT sometimes towards the end of March 2011 I was informed by my neighbour MICHUBU M'KAIBUALA that while he was attending proceedings of his land case at the land demarcation office in K.K. He heard that a portion of my said land had been given to my sister who is the interested party.***
5. ***THAT I thereafter made inquiries at the land demarcation office where I was informed that a decision had been made by the respondent affecting my land pursuant to an objection by the interested party.***
6. ***THAT I applied for copies of the proceedings and decision of the respondent in the objection case which were supplied to me and I discovered that the Interested Party had filed a claim regarding my said land parcel vide Objection No. 5628 which was heard and determined in my absence. Annexed hereto marked 'MM-II' is a copy of the proceedings and decision.***
7. ***THAT in his decision dated 23rd March, 2011 the respondent allowed the Objection and held that my land parcel be sub-divided and the interested party to get 0.30 acres thereof while I remain with 0.70 acres.***
8. ***THAT I was not informed of the hearing of the said Objection proceedings and it is not true that I had been summoned more than 3 times as indicated in the proceedings since I have never been served with any summons.***
9. ***THAT I have been greatly prejudiced by the said decision of the respondent which has effectively deprived me of a portion of my land without giving me an opportunity to be heard contrary to the rules of Natural Justice.***
10. ***THAT the land is my inheritance from my father which he bequeathed to me during his lifetime and I have lived there with my family all my lifetime.***
11. ***THAT the land did not belong to my mother and if she had any land to give the Interested Party she would have done so during her lifetime and would have transferred the same to her in the same way she transferred my father's land to me and my brothers.***
12. ***THAT I stand to suffer great and irreparable loss if the respondent's decision is implement since the subject land parcel is my main source of livelihood which I have extensively developed with miraa and other trees and cultivated various agricultural crops.***

13. **THAT** the decision of the respondent in effect deprive me of my land without any lawful justification or basis and the same was made in total disregard of my proprietary rights.
14. **THAT** the respondent acted ultra vires in entertaining and purporting to decide on a succession claim since he has no jurisdiction to do so.
15. **THAT** I swear this Affidavit in verification of the facts contained in the Statutory Statement filed together with my application herein and I humbly pray the honorable Court to allow the same.

16. **THAT** what is deponed herein is true to the best of my knowledge, information and belief.

4. In response to the Verifying Affidavit, the Interested Party , filed a Replying Affidavit sworn on 25/7/2011 which states as follows:-

“I, REGINA KAILU of P.O Box 245 MAUA make oath and state as follows:-

1. **THAT** I am the Interested Party herein hence competent to make and swear this affidavit.
2. **THAT** the application dated 9/6/2011 along with other supporting documents have been read and explained to me by my advocates on record and I have duly understood the contents thereof.
3. **THAT** the applicant is not sincere and honest when he says the land was given to him by our father and again saying that it was transferred given to him by our mother.
4. **THAT** land parcel No 5029 AKIRANGONDU “A” Adjudication Section is family land and actually our late mother had intended to have its shared equally between the ex-parte application and myself.
5. **THAT** the ex-parte applicant was duly served with the summons to appear before the District Land Adjudication and Settlement Officer but he declined three summons and the objection had to proceed in his absence.
6. **THAT** the exparte applicant having refused to appear despite being served 3 times can be construed to mean he waived his right to be heard and cannot now cry that he was deprived and/or denied audience contrary to rules of natural justice.
7. **THAT** the District Land Adjudication and settlement officer had jurisdiction to hear my objection since I have a valid claim over the parcel of land being a child of the deceased original owner and deprived a share of the same.
8. **THAT** our late father had shared out his land between his 2 wives families and my mother had the exparte applicant and myself as her children for whom she intended to share the land.
9. **THAT** indeed the exparte applicant had conceded that I am his sister and land parcel No. 5029 AKIRANGONDU “A” ADJUDICATION Section is family land and has not given any reason why I am not entitled to any portion thereof.
10. **THAT** after my mother transferred the land to the ex-parte applicant with the aim of having him share the same with me, the ex-parte applicant neglected our aged mother and I solely took care of her when she was admitted at Maua Methodist Hospital and subsequent transfer to Meru General Hospital (Annexed and marked RK “1” is a copy of discharge abstract from Meru General Hospital).
11. **THAT** even after our mother passed on I had to bury her at my matrimonial home since the

ex-parte applicant refused to bury her at his home.(Annexed and marked MK "2" is a copy of the burial permit).

12. ***THAT*** respondent herein was very fair on the *ex-parte* applicant because he only offered me 0.30 acres and the *ex-parte* applicant was left with 0.70 acres despite the fact that it was family land I was demanding an equal share.
 13. ***THAT*** the land being under adjudication and since the register was not closed I had an option of claiming before the respondent who had the jurisdiction to hear my objection which was valid had merits.
 14. ***THAT*** the *ex-parte* applicant's application has no merit and is an abuse of the Court process.
 15. ***THAT*** if the *ex-parte* applicant's is allowed, I stand to suffer irreparable damages since I will lose a share of the family land.
 16. ***THAT*** I am praying that this Honourable Court do dismiss the *ex-parte* applicant's suit with costs to me.
 17. ***THAT*** what is deponed herein is true to the best of my knowledge and belief.
5. THE STATUTORY STATEMENT: The grounds in the Applicant's statutory statement state as follows: -
- a. *The respondent has ordered the applicant's land parcel number 5029 AKIRANGONDU'A' ADJUDICATION SECTION to be sub-divided and the Interested Party to get 0.30 acres thereof pursuant to an objection by the Interested Party claiming a share of the said land.*
 - b. *The applicant was not given an opportunity to be heard before the said decision was made contrary to the rules of Natural Justice.*
 - c. *The subject land parcel number 5029 AKIRANGINDU'A' ADJUDICATION SECTION was bequeathed/given to the applicant by his father prior to his death and subsequently transferred to him by his mother who is also deceased prior to her death.*
 - d. *The decision of the respondent was made arbitrarily and contrary to the rules of Natural Justice since the applicant was not given any opportunity to be heard before being deprived of his land.*
 - e. *The decision of the respondent is ultra vires and amounts to an abuse of the powers and/or authority conferred to the respondent by statute.*
 - f. *The interested party now intends to forcefully take over 0.30 acres of the applicant's land which is extensively developed with miraa, assorted trees and various agricultural crops for her own use and evict the applicant therefrom which will be detrimental to the applicant who will suffer irreparable loss as he will illegally lose his land and developments which are his main source of livelihood.*
 - g. *The respondent took into account irrelevant matters in arriving at his decision.*
 - h. *There is no justification or any valid reason given for depriving the applicant of his land.*
 - i. *The Interested Party has no legal right and/or interest in the applicant land.*
 - j. *The respondent acted unfairly and unreasonably in a manner that did not give due regard to the factual circumstances of the matter regarding the ownership of the subject land in the*

exercise of his statutory powers. He exhibited both substantive and procedural unfairness in his conduct.

k. *The respondent did not give due consideration to the applicant right and/or interest in land parcel number 5029 AKIRANGONDU 'A' ADJUDICATION SECTION before making his decision dated 23rd March, 2011.*

• *The applicant's Constitutional right to acquire, own and utilize property has been violated and/or contravened.*

m. *The decision of the respondent is unfair, unjust, unlawful and unconstitutional.*

6. On 28th May, 2015, the Respondent filed grounds of Opposition dated 26th May, 2015 which had the following grounds: -

1. *The application is misconceived and lacks merits.*

2. *Judicial Review matters are concerned with the decision making process and not the merits of the decision.*

3. *Judicial Review Orders are discretionary hence not guaranteed even in merited situations.*

4. *The Respondent has not exhausted all available methods before filing Judicial Review proceedings.*

5. *Orders sought are not tenable against the Respondents.*

7. In his Submissions the exparte applicant says that he is the recorded owner of land parcel No 5029 AKIRANGONDO "A" ADJUDICATION SECTION. He tells the Court that he instituted this suit to challenge the Respondent's decision dated 23rd March 2011 in respect of a land Adjudication Register (A/R) Objection No. 5628 which was lodged by the Interested Party Claiming a share of his land.

8. He submits that in allowing the apposite Objection, the Respondent ordered the Applicant's land measuring 1.00 acres to be sub-divided so that the Interested Party got 0.3 which left the applicant with 0.70 acres. He says that he prays for an Order of Certiorari to remove to this Court for the purpose of being quashed the decision of the Respondent.

9. The exparte applicant on the grounds in his statement of Facts (op cit) to support his case. He says that he was denied an opportunity to be heard and trashes the Interested Party 's claim that he had been summoned by the Respondent 3 times to attend the proceedings which spawned this suit. He submits that the Interested Party has proffered no proof that the applicant was served with the summons to attend the apposite hearing.

10. The Applicant tells the Court that Objection No. 5628 in which the Respondent made the impugned decision was lodged, heard and determined pursuant to the provisions of Section 29(1) of the Land Consolidation Act. This being the case, he takes issue with the Interested Party's claim that the suit land was bequeathed to the Applicant by his father prior to his death and that it was subsequently transferred to him by his mother, prior to her death, He says that the Interested Party is his sister.

11. The Applicant Submits that the Respondent clearly violated his Constitutional rights and, in particular the right to fair administrative action guaranteed under Article 47, the right to fair hearing guaranteed under Article 50 and security of land rights guaranteed under Article 40(1) and 60 of the Constitution of Kenya, 2010. The Applicant therefore submits that the Respondents impugned decision is arbitrary, unlawful, unreasonable, unfair, unjust and Constitutional.

12. The Applicant disputes and denies the Interested Party's claim that she was given her share of land by her mother. He submits that Land parcel No. 5029 AKIRANGONDU 'A' ADJUDICATION SECTION was not owned by the mother of the Interested Party. He submits that he owned the land which he had inherited from his father. He says that the land was recorded in his name in the land adjudication register. He says that record of the Objection proceedings showing that the Respondent had found that the Interested Party had a right to her mother's land was erroneous.
13. The Applicant reiterates that the suit land was not the property of the Interested Party's mother and that the decision of the Respondent to sub-divide the land in order for the Interested Party to get 0.30 acres was unlawful and that the Subdivision lacked any lawful basis as the Interested Party has no legal right or interest in the Applicants land.
14. The Applicant submits that the provisions of Section 26 of the Land Consolidation Act mandatorily requires the Respondent to consider Objections with a Committee. He says that he did not consider the Objection with a Committee and for that reason his decision was unlawful, ultra vires, and null and void ab initio.
15. The Applicant consider that the respondent took into account extraneous and irrelevant matters in arriving at his decision. He argues that issues as to whether the Interested Party paid their mothers hospital bills and that the Applicant and his family refused to bury her whereupon she was buried where the Interested Party has her matrimonial home were irrelevant to the determination of the Objection. He submits: " Even assuming that the allegations that the Interested Party took care of her mother when she was sick and buried her at her matrimonial home are true, we submit that those matters were totally irrelevant in the determination of the Objection to the land Adjudication Register".
16. The Applicant submits that there is no evidence that land parcel No 5079 AKIRANGONDU "A" ADJUDICATION SECTION was family land. He also says that there is no evidence that their late mother, as alleged in paragraph 4 of the Replying Affidavit, had intended that they share the suit land equally.
17. The Applicant proffers that this is a proper case where the Judicial Review of Remedy is appropriate. He says that the provisions of Section 26 (3) of Cap 283 indicate that no appeal should lie against the decision of the Adjudication Officer to dismiss an Objection or order rectification or to award compensation in lieu of rectification as the case may be which implies that the administrative machinery Under the Act had been exhausted.
18. The Applicant concludes that he has demonstrated that he was not accorded fair administrative action and was not afforded fair hearing. He says that this is Contrary to Natural Justice and is also in contravention of Constitutional provisions. He also says that the Respondent's decision dated 23rd March 2011 is ultra vires the apposite law and is thus rendered null *ab initio*. He submits that his Notice of Motion dated 9th June 2011 has merits and the order of Certiorari prayed for should be granted.
19. The Applicant proffers the following authorities:-
1. **Judicial Review No. 58 of 2011 at Eldoret-Republic *versus* Land Registrar Uasin Gishu District & 2 Others Ex-parte Jeremiah Kiprotich Rono [2015] eKLR.**
 2. **Miscellaneous Application No 59 of 2010-Republic & 2 others *Versus* Ebuthania Retere & 5 Others Ex-Parte Lydia Munyatta M'Aruyaru [2015] Eklr.**
20. The Respondent submits that from his understanding, after perusing the Applicants pleadings, he has premised his suit on the following grounds:-
- a. ***That objection No. 5628 was heard and determined in the absence of the ex-parte applicant.***

- b. *The ex-parte applicant had never been summoned contrary to the indication in the proceedings.*
- c. *The Respondent's decision deprived the ex parte applicant of his land without lawful justification or basis.*
- d. *The Respondent acted ultra vires in entertaining and purporting to decide on a succession claim since he had no jurisdiction to do so.*

21. The Respondent says that he opposes the application vide his ground dated 26th May, 2015 and his supporting arguments in his Submissions. He terms the application as being misconceived and lacking merit. He opines that the claim before the Respondent was related to Sub-division of family land as opposed to ascertainment of interests in land. He submits that it is only determination of interests in land that invites the wisdom of a Committee to deal with African Customary Law. He argued that a purposeful interpretation of Section 26 of the Land Consolidation Act lends Credence to this view. He further says that once disputes are past the gathering stage, issues or rights and interests are well settled.

22. The Respondent argues that rights and interest are settled, what follows is the process of allocation and its reflection in the register. He says that this view is supported by the use of the “ word “ consider which implies a process of consultation where issues relating to interests in land arise.

23. The Respondent says that the Land consolidation Act, Cap 283, is deficient in particulars as to what procedure is to be adopted when dealing with objections not necessarily related to rights and interest in land as is the situation in this case, he submits that guidance can be sought from the provisions of Section 10 of the Land Adjudication Act which provides General Powers of the Adjudication Officer. It states: -

“ 10(1) The Adjudication Officer shall have jurisdiction in all claims made under this Act relating to interest in land in the Adjudication are with power to determine any question that needs to be determined in connection with such claims.....”

24. The Respondent argues that past the gathering stage, and in view of deficiencies evinced by the provisions of the Land Consolidation Act, the procedure provided for in the Land Adjudication Act is complementary. He says that yawning gaps in the Land Consolidation Act are filled. Hence, he proffers that the Land Adjudication Officer is empowered to deal with issues incidental to rights and interests in land. He opines that this practice has facilitated the record preparation object of adjudication and consolidation. He concludes that this practice cures the jurisdiction issue regarding offending of Section 26.

25. The Respondent submits that the Jurisdiction issue concerning Section 26 of the Land Consolidation Act was only brought in the submissions and was not pleaded anywhere else and that leave was not granted for the introductions of the same. He submits that this late introduction of a jurisdiction challenge offends Order 53 rule 4 of the Civil procedure Act.

26. Concerning the issues apposite to the rules of Natural Justice raised by the Applicant, the respondent submits that the Objection proceedings showed that the applicant failed to appear after being summoned more than 3 times. He says that the official record of the proceedings has not been contested as to their authenticity and argues that this non contestation is supported by the reliance upon them by the Applicant as his basis for the claim that rules of Natural Justice were not observed:-

27. The respondent submits that the applicant was given fair treatment. He was summoned more than 3 times. He refused to honour the apposite summons. He says that the respondent had no option but to proceed in his absence. The Applicant can not, therefore, claim that he was not accorded fair treatment after he refused to participate in the proceedings. The respondent terms this claim as an afterthought and states that there is no evidence of any bad faith on his part.

28. The Respondent submits that some of the issues set out in the Applicant's Verifying Affidavit go to the merits of the Respondent's decision. He says that the ex-parte applicant purports to depone on who was the rightful owner of the suit parcels and how the same ought to have been distributed, among other issues. He contends that such averments fly against elementary principles concerning Judicial Review which includes that issues of private rights amongst person where viva voce evidence has to be taken are not best determined through the Supervisory jurisdiction of the Court.
29. The respondent opines that the exparte applicant is seeking to draw the Court to second guess on what would have been the best decision the respondent should have arrived at. He further says that Judicial review remedies are discretionary and the Court should look at the efficacy of the remedy sought. He proffers that that the dispute which was before the respondent was in the nature of succession. He submits that if the Court was persuaded to grant the order sought, the finality of the issue would not be achieved.
30. The respondent submits that he did all that was possible to hear and determine the apposite issues. He laconically states that a Civil Suit would have been better placed to conclusively resolve the contentious issues pertinent to this suit. He concludes that the orders sought, if denied, would not prejudice what is available in law to resolve the dispute. The respondent seeks dismissal of the suit.
31. The Interested Party in her brief Submissions submits that the statement of facts and the verifying fact do not demonstrate that the respondent acted outside the scope of his jurisdiction by awarding the Interested Party 0.30 acres of land parcel No. 5029 AKIRANG'ONDU ADJUDICATION SECTION. He states that the exparte applicant is only challenging the respondent's decision and not his lack or usurpation of jurisdiction.
32. The Interested Party reiterates that Judicial Review deals with the process and not the merits of the decision. He proffers that the Interested Party rightly lodged an objection as provided by Section 26 of the Land Consolidation Act (Cap 283 Laws of Kenya)> He says that the respondent was properly clothed with apposite jurisdiction to hear the Objection. He points out that the ex-parte applicant was given several chances to appear before the respondent to defend himself but squandered that opportunity 3 times.
33. The Interested Party submits that challenging the merit of the respondent's findings is not a ground for Judicial Review but is a matter for a civil dispute. He opines that the Adjudication Officer is the only legally mandated officer to deal with AR Objections when they are raised.
34. The Interested Party states that AR Objections mostly raise issues of rights to land or other claims where parties are given opportunities to canvass their cases after which findings are made. He says that if the ex-parte applicant felt aggrieved by the respondent's decision, he ought to have appealed to the Minister. He reiterates that the Respondent handled the Objection within his jurisdiction.
35. The Interested Party submits that, in his grounds, the exparte applicant does not raise the Question of the Respondent's Jurisdiction. In any case, he states, the Respondent had not exceeded his mandate. He also says that the exparte applicant has not shown the law was breached or misapplied or if the Interested Party had lodged her claim before the wrong forum.
36. The Interested Party submits that the ex-parte applicant's claim has no basis, is incompetent and lacks merit and ought to be dismissed.
37. I have carefully examined the averments proffered by the parties, their Submissions, the two authorities tendered by the ex-parte applicant and all materials filed in this matter. I consider the following to be main issues that need to be considered for this suit to be determined:-

1. ***Whether or not the Respondent had jurisdiction to handle the dispute which spawned the decision which is under challenge in these Judicial proceedings.***
2. ***Whether or not the respondent in making the impugned decision acted in contravention of the rules of Natural Justice. This includes if not he was given an opportunity to be heard, if he considered irrelevant matters and if he exhibited substantive and procedural unfairness.***
3. ***Whether or not the applicant's Constitutional rights to acquire, own and utilize property had been violated. I do note that this aspect of the issues to be considered before determination of the suit has been introduced at the Submissions' stage.***

38. Consideration of the above three areas will subsume all the issue canvassed by the parties in this suit.

39. I will deal with the issue of jurisdiction first. I find that the Interested Party, being a person affected by the Adjudication Register, had a right to file her objection. There can be no need for arguing about this. It is pelucidly provided for in Section 26(1) of the Land Consolidation Act. A priori, the Respondent had power to hear the Objection. That settles the issues concerning the jurisdictional challenge.

40. I now turn to the Submission by the ex parte applicant that the Respondent had in the process of arriving at his decision acted in contravention of the rules of Natural Justice.

41. I will first of all address the claim by the ex-parte applicant that he was not given an opportunity to be heard before the respondent made his decision. The Respondent and the Interested Party have contested this claim and said that the ex parte applicant had been summoned to participate in the apposite Objection proceedings at least 3 times but he refused and/or failed to honour the Summons for that reason, the respondent had no choice but to proceed ex-parte without his presence.

42. Regarding if or not the ex parte applicant had been given an opportunity to be heard, the disputants have proffered diametrically opposed assertions. In Judicial Review proceedings, I opine that the Court is unable to determine the integrity of the contesting assertions. This can only be done through tendering of evidence viva voce and this is best suited to be determined in a normal Civil Suit. He who alleges must prove and in this case I cannot find the ex-parte applicant had not given an opportunity to be heard during the Objection proceedings.

43. In paragraph 4 of his Verifying Affidavit the ex parte applicant states: "That sometimes towards the end of March, 2011, I was informed by my neighbour MICHUBU M'KAIBUALA that while he was attending proceedings of his land case at the land demarcation office in K.K he heard that a portion of my land had been given to my sister who is the interested party herein". This fortuitous happening may be true that the ex-parte applicant was aware of the Objection proceedings and had sent some human feelers to keep track of the proceedings.

44. I turn to the claim that the Respondent, in arriving at his decision, considered irrelevant matters. The ex-parte Applicant takes issue with the Interested party's claim that she had solely looked after their mother when she was alive. This claim suggests that the ex-parte applicant did not care about the health and the well-being of his mother. He also takes issue with the Interested Party's claim that their mother, instead of being buried in their ancestral land was buried where she was married.

45. To use the ex-parte applicant's Submissions he says: " Even assuming that the allegations that the Interested Party took care of her mother when she was sick and buried her at her matrimonial home are true we submit that those matters were totally irrelevant in the determination of the Objection to the Land Adjudication Register". I do not agree with this assertion. The claim by the Interested Party was relevant in that it showed her nexus to the ancestral land through her having a

mother who was the wife of the father the ex-parte applicant claims gave him the land. The ex-parte applicant does not even attempt to contest the Interested party's claim that she, to his full exclusion, took care of their mother before she died and that she was not buried in the ancestral land where she should have been buried. If she had no nexus with the land in dispute, she would have had no business to file objection proceedings.

46. Before dealing with the question of whether or not the applicant's Constitutional right to acquire, and own property had been violated, I elect to consider the two authorities proffered by the ex-parte applicant. Judicial Review No 58 of 2011 Republic *Versus* Land Registrar Uasin Gichu District Jeremiah Kiprotich Rono [2015] e KLR concerned a challenge to the decision of the Land Registrar, Uasin Gishu District, to cancel a title. Of course he had no jurisdiction to do so even assuming that he had heard and given the wronged party a chance to be heard. The opinions concerning rules of Natural Justice and the constitutional need for the constitutional right to fair administration are correct law. But in this case, I do find that the Respondent had jurisdiction to handle the apposite Objection. I have also found that there is no evidence that the ex-parte applicant had not been given an opportunity to be heard.

47. In the Second case; Misc Application No. 59 of 2010-Republic & 2 others *Versus* Ebuthama Retere & 5 others Ex-parte Lydia M'Aruryaru [2015] e KLR, , the ex-parte applicant has highlighted some paragraphs where I said as follows:-

1. ***A perusal of the proceedings conducted by the 1st Respondent evinces little or no evidence that a Committee took part in the impugned proceedings. The Committee members present are not recorded. The hand written proceedings are presumably written by the Land Adjudication Officer whose signature is appended at the end.***
2. ***I do take particular interest in 2 portions of the proceedings headed as (1) Findings and (2) judgment/Order. In both of them there is no suggestion that the apposite Committee is making the findings and the judgment/order. It is clear that the 1st Respondent is alone in charge of the proceedings at this stage. I find that in doing so, he is acting beyond the jurisdiction conferred by law. Regarding jurisdiction. I wish to quote the Supreme Court of Kenya in the case of Samuel Kamau Macharia and Another Versus Kenya Commercial Bank and 2 others (Petition No. 2 of 2011) as having opined as follows:-***
3. ***A Courts jurisdiction follows from the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law***

Mutatis Mutandis, the 1st respondent should not have arrogated to himself jurisdiction which had not been conferred by law.

4. ***The 1st respondent can not be allowed, by a mere sleight of his hand, to contrive jurisdiction for himself. On the ground that he lacked authority to act as he did, this application will be found to have merit.***
5. ***Although I find that the 1st Respondent acted solely in hearing the subject objections, I need to point out that he did not have any business in adjudicating and determining the apposite objections even together with the relevant Committee. Section 11(1) of the Land Consolidation Act decrees that the Committee appointed for an adjudication section shall adjudicate upon and determine in accordance with African Customary law the claim of any individual person to any right or interest in any land within the adjudication Section. The language of this Section is couched in veritably pellucid mandatory terms. The adjudication and the determination is by the Committee. Not by any other person or body! .***
6. ***The non-adjudication and non-determination by the Adjudication Officer is buttressed by the mandatory requirement by Section 9(2) of the Land Consolidation Act for the Adjudication Officer to appoint an Executive Officer for each Committee. The Executive Officer is***

mandatorily required to attend meetings of the Committee. He is allowed to speak but is not allowed to vote. This allows the Committee to be fully in charge of determinations.

48. I opine that my ruling was correct and the findings contained therein are valid in the particularities and circumstances of that case. In that case, I was considering adjudication by the Committee in accordance with the provisions of Section 11 of the Land Consolidation Act which states: -

“11 (1) :- The Committee appointed for an adjudication Section shall adjudicate upon and determine in accordance with African Customary Law the claim of any individual person to any right or interest in any land within the adjudication section.

(2) if a Committee is unable to reach a decision in accordance with African customary law it shall refer the matter to the Arbitration Board which shall decide the matter and shall inform the Committee of its decision”.

49. Section 9 provides for the appointment of a Committee and states as follows:-

“ Section 9 (1) :- The Adjudication Officer within whose district an adjudication Section is situated shall appoint a Committee for each adjudication section is situated shall appoint a Committee for each adjudication section and each Committee shall consist of not less than twenty five members.

(2) The Adjudication Officer shall appoint an Executive Officer for each Committee within the District and such Executive Officer shall attend and may speak, at any meeting of the Committee, but shall not vote”.

50. It is clear from the above quoted provisions of the law that the Adjudication Officer is excluded from participating in Section 11 proceedings. I will now consider the provisions of Section 26.

51. I reproduce herebelow in full Section 26 of the Land Consolidation Act: It states: -

26(1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.

52. The Section says that the Adjudication Officer “ shall Consider the matter with the Committee. “ I agree with the ex parte Applicant's assertion that this makes it mandatory for the Adjudication Officer must involve the Committee. The same Section say that the Adjudication Officer “ May dismiss the objection, or if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter”. It is clear that the Committee has no choice. It has to do what is ordered by the Adjudication Officer.

53. I opine that the role of the Committee Under Section 26 is merely advisory and the Adjudication Officer need not take their advise and he has powers to order them, where an objection is valid, to take such action as he considers necessary. Under Section 11 of the Land Consolidation Act, the Adjudication officer has no role and that is why the Committee has an Executive Officer. Under Section 26 he is fully in charge. I find that the authority of Misc Application 59 of 2010 at Meru (supra) is not relevant to the particularities and circumstances of this suit.

54. I now turn to the ex-parte applicant's Submission that his constitutional rights to acquire, own and utilize property were violated by the Respondent.

55. The ex-parte applicant and the Interested Party are a brother and a sister. The ex-parte applicant has not controverted the assertions by the Interested Party that she is a child of the original owner. He has not challenged the assertion, by the Interested Party that his father had two wives and shared out his land between his 2 wives. He only contests the assertion that the land shared to his mother was intended to be shared to him and his sister, the Interested Party.

56. In paragraph 10 of his Verifying Affidavit the Ex-parte applicant avers as follows: " THAT the land is my inheritance from my father which he bequeathed to me during his life time and I have lived there with my family all the time". In paragraph 11 he says: That the land did not belong to my mother and if she had any land to give the Interested Party she would have done so during her lifetime and would have transferred the same to her the way she transferred my father's land to me and my brothers".

57. The ex-parte applicant has not claimed that he bought the suitland . He admits that the land is family ancestral land. What is good for the goose is good for the gander. Paragraph 11 of his Verifying affidavit betrays the nitty gritty of the matter. He admits that his mother transferred his father's land to him and to his brothers. The other brothers are presumably the sons of his father's other wife. There is no mention of a daughter or daughters. Meru is an integral part of Kenya . I assert that Under Meru Customary Law women have equal rights as those enjoyed by men.

58. In accordance with the Constitution, there should be no discrimination on the basis of gender. In the Circumstance of this case I find that the Interested Party is entitled to a share of family land in accordance with Article 27 of the Constitution which states: -

1. ***Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
2. ***Equality includes the full and equal enjoyment of all rights and fundamental freedom.***
3. ***Women and men have the rights to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***
4. ***The state shall not discriminate directly or indirectly against any person or any ground, including race, sex, pregnancy, marital status, health status, ethic or social origin, colour, age disability, religion, conscience, belief, culture, dress , language or birth.***
5. ***A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***
6. ***To give full effect to the realization of the rights guaranteed under this Article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***
7. ***Any measure taken under clause (6) shall adequately provided for benefits to be on the basis of genuine need.***
8. ***In addition to the measures contemplated in clause (6), the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.***

59. I find it necessary to deal with the Submission by the Respondent and the Interested Party that the ex-parte applicant had not exhausted the remedies provided for under the Land Consolidation Act

since he failed to appeal to the Minister. The ex-parte applicant opposes this application and relies on Section 26 (3) which states:- ***No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.***

60.“26(3) :- No appeal shall be against any decision by the Adjudication Officer to dismiss an objection or order of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication officer may apply to a Subordinate Court held by a Resident Magistrate for its revision in such manner as may be prescribed”.

61.It is clear that that Section 26(3) does not preclude an appeal where an Objection has not been dismissed as in this case. But it does not say where the appeal should lie. It is clear from the provisions of Section 27 that the Land Consolidation Act may not have envisaged that parties would appeal to the Minister or to any other body . Where such an important remedy is not specifically allowed for, I opine that Judicial Review proceedings would be necessary to arrest abuse of the process. I find that these Judicial Review proceeding have been properly brought before this Court.

62.The upshot of all that I have said is that the respondent had jurisdiction to handle the apposite objection, that he did not fail to give an opportunity to the exparte applicant to be heard, he did not consider irrelevant matters and he did not exhibit substantive and procedural unfairness .

63.I also find that the exparte applicant's Constitutional right to acquire , own and utilize property had not been violated.

64.As a general comment, I, assert that Judicial review remedies are discretionary. The Court , in addition, to all other pertinent Considerations, looks at the efficacy of the remedy sought . In this case if the remedy sought is granted, it would amount to denying the Interested Party, a share of family land, perhaps only because she is a woman. This would bring about Unconstitutional ramifications. This Court would hesitate to do so as it would amount to entrenchment of atavistic and antiquated practices which promote discrimination against women. However, I am happy, this suit has been determined on its merits alone.

65.In the circumstances, this application is dismissed. Costs will follow the event. I award costs to the Respondent and the Interested Party.

It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 20TH DAY OF APRIL, 2016 IN THE PRESENCE OF:-

CC: Daniel /Lilian

Miss Ungu for Exparte Applicant

Kiongo present for Respondent

Gichunge present for Interested Party

P. M. NJOROGE

JUDGE