



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC PETITON NO. 21 OF 2020

PATRICK KAVIU KITHUSI.....PETITIONER

VERSUS

THE DEPUTY COUNTY COMMISSIONER, KITUI WEST.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE COUNTY SURVEYOR, KITUI COUNTY.....4TH RESPONDENT

JANET NZENGULA MUSYOKA.....5TH RESPONDENT

JOB KIMWELE MUSYOKA.....6TH RESPONDENT

JUDGMENT

1. By a petition dated 13th August 2020, the Petitioner sought for the following orders against the Respondents;

(a) A declaration that the 1st Respondent violated Article 10 of the Constitution in the manner in which he conducted proceedings in his appeal number 10 of 1989 and consequently his subsequent decision was unconstitutional and a violation of the constitutional rights of the petitioner and the entire family of the late Kaviu Kithome.

(b) A declaration that the Respondents violated constitutional rights of the Petitioner and the family of the late Kaviu Kithusi to access to information, fair hearing, fair administrative action and protection of property as protected under Articles 35(1) , 47, 50(1) and 40 of the Constitution.

(c) An order of permanent injunction restraining the 1st, 2nd, 3rd and 4th respondents from implementing the 1st respondent's decision dated 20th February 2020 in its appeal number 10 of 1989 in respect of parcel number 603 in Nzalae/Mutonguni adjudication section.

(d) An order of certiorari removing to this court and quashing the 1st respondent's decision dated 20th February 2020 in its appeal number 10 of 1989 in respect of parcel number 603 in Nzalae/Mutonguni adjudication section.

(e) An order directing the 2nd, 3rd and 4th respondents to implement the decision of the Land Adjudication Officer in his objection number 57 of 1984 in which he confirmed the decision of Land Adjudication Committee in respect of parcel number 603 in Nzalae/Mutonguni adjudication section.

(f) The petitioners do pay damages to the petitioner and the estate of the late Kaviu Kithusi for violation of their constitutional rights.

(g) The respondents do pay the costs of this petition.

(h) Any other order and reliefs this honourable court may deem fit and just to grant.

2. The Petitioner averred that he brought this claim on his own behalf and on behalf of the family of the late Kaviu Kithusi. He stated that

between 1952 and 1976 the late Kaviu Kithusi and the late Musyoka Layu Ngunu acquired land in Kitui County which was later adjudicated in Nzalae/Mutonguni adjudication section. That the late Kithusi was allocated land parcel number 603, while the late Musyoka was allocated land parcel number 606 and the late Kithusi's brother one Kithome Kithusi was allocated land Parcel Number 605; all within Nzalae/Mutonguni adjudication area. That thereafter, Mr. Kithome Kithusi filed objection number 59 of 1984 against the late Musyoka before the Land Adjudication Officer, the late Musyoka filed objection number 131 of 1984 against Kithome Kithusi claiming part of Parcel Number 605 and the late Musyoka also filed objection number 57 of 1984 against the late Kithusi claiming a portion of land parcel number 603.

3. It is the Petitioner's assertion that upon hearing objection numbers 59 of 1984, 131 of 1984 and 57 of 1984, the Land Adjudication Officer dismissed objection number 59 of 1984, allowed objection number 131 of 1984 and dismissed objection number 57 of 1984 with the consequence that the entire parcel number 606 was awarded to the late Musyoka, a portion disputed, in parcel number 605 was made part of parcel number 606 and the disputed portion in Parcel 603 to remain as part of parcel 603.

4. That the late Musyoka passed on in 1990 and the 5th Respondent was appointed as the administrator of his estate. Further that the Petitioner's quest to obtain title for parcel number 603 was unsuccessful as the 3rd and 4th Respondents informed him to await appeals in respect of other parcels of land in the area. That there was an appeal number 21 of 1989 between the late Musyoka and Kithome Kithusi which was decided on 3rd September 2004 when the 5th Respondent consented to have a portion of parcel number 605 which was in dispute to remain as part of parcel number 605, thus parcel number 606 could not share the boundary with parcel number 603. Therefore that the petitioner had a legitimate expectation that the land in issue being part of parcel number 603 would remain part of the said parcel number 603.

5. The Petitioner further averred that on 18th February 2020 he was summoned by the 1st Respondent to appear before the latter on 20th February 2020 in respect of Appeal Number 10 of 1989. That without affording the petitioner sufficient time to prepare for the appeal, the 1st Respondent proceeded to hear the appeal on 20th February 2020. The Petitioner has complained that the 1st to 4th Respondents violated his constitutional rights by declining to allow the petitioner access to information in regard to Appeal No. 10 of 1989 in contravention of Article 35 (1) of the Constitution; violating the Petitioner's right to property under Article 40 (3) of the Constitution; failure to give the Petitioner and his family time, opportunity and adequate facilities to prepare for hearing of the appeal contrary to Article 50 (1) of the Constitution; failing to give the Petitioner reasons for revisiting a matter heard before a tribunal of the same rank contrary to Article 47 of the Constitution; failing to act impartially in breach of Article 10 (2) (a) of the Constitution; that the 1st Respondent arrived at a decision incapable of implementation; breaching the Petitioner's legitimate expectation; violating the law of succession; abuse of power by hearing an appeal in 2020 when the same was filed in 1989; that the 1st Respondent had no jurisdiction to sit on appeal filed six months after the decision of the adjudication officer and that the 1st Respondent acted without jurisdiction in breach of a consent between the estate of late Musyoka and the Petitioner.

6. The Petitioner further stated that had he been afforded sufficient time to prosecute the appeal, he would have presented evidence and information in his possession especially the decision in Appeal Number 21 of 1989, which according to the Petitioner, would have made the 1st Respondent to arrive at a different conclusion. That the 1st Respondent breached procedures in the Land Adjudication Act and that the 1st Respondent's decision has the effect of amending the survey and adjudication maps and boundaries of persons not parties to the dispute.

7. The Petition is opposed. The 5th Respondent filed a Replying Affidavit sworn on 6th October 2020 where she averred that the 6th Respondent is her son, and she had given him authority to plead, act and swear on her behalf; that she did not sign the affidavit dated 31st August 2004 and that the same is a forgery as she does not sign but thumb-prints her documents; that she has never been involved in this dispute and did not participate at all in matters concerning the dispute and therefore could not have signed the impugned affidavit.

8. The 6th Respondent filed a Replying Affidavit sworn on 6th October 2020 and averred that though his mother who is the 5th Respondent in this petition, is the administrator of the estate of the late Musyoka, she did not take part in any cases in court or tribunals or at all and therefore the Petitioner's allegations that the 5th Respondent took over cases filed in courts and tribunals was not correct; that the petition is premised on the appeal lodged to the minister by the late Musyoka in respect of a portion of parcel number 603; that the decisions of the Land Adjudication Officer in relation to parcel numbers 606 and 605 was final as none of the parties to those proceedings appealed and that it is only the late Musyoka who filed an appeal in relation to parcel number 603 claiming that the same is part of parcel number 606, in respect of objection No. 57 of 1984.

9. He also alleged that the original disputants before the minister, namely the late Musyoka and the late Kithusi passed on before the matter was determined and therefore when the matter was listed for hearing, the petitioner represented his father the late Kithusi while the 6th Respondent represented his father the late Musyoka, and therefore that the 5th Respondent is wrongly joined to these proceedings for bad intentions and her name should be struck out with costs to her.

10. Further that the 1st Respondent acted fairly and gave prior notice of the hearing of the dispute and each party received hearing notice on 29th January 2020. That when the 5th Respondent attended the hearing of the appeal, he was alone while the petitioner attended together with his brother and three sons were present. That the petitioner was ready to proceed on 20th February 2020 and was in fact the first person to pay the elders allowance of Kshs. 3,000/- while the 5th Respondent sought for time to enable him get the said funds.

11. The 6th Respondent averred also that the Petitioner's allegation that he was not accorded sufficient time, opportunity or documents is not true. That there was a restriction on title for parcel number 603 in respect of a pending appeal and that the same could not have escaped the petitioner's attention as he alleges to have been following up on the title for his parcel. That therefore the petitioner was aware of the pending appeal having been informed by the Lands Officer and therefore the allegations by the petitioner against the Land's Officer are not true.

12. The 6th Respondent further stated that the Petitioner's allegation that the 1st Respondent did not visit the disputed land are not true as the

Petitioner's exhibit No. PK4 are proceedings for the appeal before the 1st Respondent and the same clearly state that there was a site visit by the minister. That the minister established that the road was not the boundary but it is the river that is the boundary of plot numbers 606 with 605 and 603 and that it was clear that parcel number 606 crossed the road and borders parcel number 603 and that the disputed portion is between the road and the stream, which, according to the 6th Respondent was a fair finding of facts as per what was observed on the ground and the map. That the minister/1st Respondent overturned the finding of the Land Adjudication Officer, which decision he had jurisdiction to make. That the letter marked as PK3 together with an affidavit alleged to have been executed by the 5th Respondent is a forgery as the 5th Respondent is illiterate, and never signed documents by any other means except by thumb-prints.

13. It was the 6th Respondent's assertion that the 1st Respondent's decision clearly shows that the Petitioner attended the hearing while in possession of a map, and this was also done during the site visit, hence the 1st Respondent considered and referred to the Petitioner's map, in his findings. That there were no violation of the constitution as alleged by the petitioner or at all. That the petitioner's allegation of the existence of appeal number 21 of 1998, was not proved by way of evidence. That on the day this matter was heard before the 1st Respondent, the Petitioner never sought for time to prepare for hearing or for any copies of any appeal or records or any document from the 1st Respondent, but that when he came, he was in possession of maps and records of the objection proceedings, ready to proceed on behalf of his father. That the 1st Respondent did not flout any rules or procedures of fair trial, but that he was candid, fair, patient, careful and cautious in conducting the hearing.

14. In a rejoinder the Petitioner stated in his supplementary affidavit sworn on 13th April 2021 and filed on 27th April 2021 where he deposed that the appeal in respect of parcel 606 and 605 was settled by compromise; that he was not served with the hearing notice but only received a phone call in February 2020 on a date he cannot remember; that the hearing notice was addressed to deceased parties; that if the 1st Respondent had granted him ample time to prepare for the appeal he would have demonstrated that allowing the appeal was illogical.

15. The 1st to the 4th Respondents did not file any responses to the petition, despite service.

16. By the order of this court made on 14th October 2020, the parties were directed to canvas the petition by way of written submission. The petitioner filed his submissions on 27th April 2021 while the 5th and 6th respondents filed their submissions on 7th September 2021.

THE PETITIONER'S SUBMISSIONS

17. The Petitioner reiterated the averments contained in his petition and submitted that his right to access to information as provided for under Article 35 (1) of the Constitution was violated as he was not served with the appeal before the 1st Respondent. That despite demanding to be served with the appeal documents on the date of hearing, his request was ignored by the 1st Respondent. He contended that denying him the right to information compromised his right to prepare for hearing and prejudiced his family's right to own land. The Petitioner further contended that he was not served with the memorandum of appeal as exhibited by lack of evidence of service.

18. It was the Petitioner's contention that any institution with a judicial or quasi judicial functions must comply with Article 50(1) of the Constitution. He argued that the 1st Respondent in his decision was performing both quasi-judicial and administrative functions. The Petitioner contended further that he was never granted a fair hearing contrary to Article 47 of the Constitution. He argued that he was not given adequate opportunity to present his case. He opined that the right to a fair hearing includes service of notice and adequate notice of the hearing and an opportunity to state one's case, which he states were not granted to him by the 1st Respondent. He argued that when he was summoned by the 1st Respondent by a telephone call, he contacted the 5th Respondent who informed him that she was not aware of the said appeal and that her family was not interested in pursuing parcel number 603.

19. Counsel for the Petitioner further submitted that on the hearing date before the 1st Respondent, the Petitioner sought for more time to prepare for the appeal, which prayer was rejected by the 1st Respondent. He argues that the Petitioner proceeded to argue the appeal, despite not being served with the appeal and notwithstanding that his family had not met to decide who should represent the estate of his father. Counsel argued that this court had jurisdiction to review the 1st Respondent's decision under Section 7 (2) (a) (v) of the Fair Administrative Action Act No. 4 of 2015. Counsel also stated that the Petitioner's evidence at page 29 of the Petition shows that he was not aware of the appeal.

20. It was also contended for the Petitioner that Section 29 of the Land Adjudication Act provides on how appeals should be heard. Counsel relied on the case of *Matwanya Kilonzo vs. District Commissioner Kitui & Another [2021] eKLR*, where it was held that the Minister's mandate under Section 29 of the Land Adjudication Act is to consider the grounds of appeal, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision. Counsel argued that the decision of the 1st Respondent does not show that he considered any grounds of appeal. Counsel also argued that the minister's decision can be reviewed by this court on the merit of the decision. Reliance was also placed on the case of *Republic vs. Kenya Revenue Authority, Ex parte Shake Distributors Ltd [2012] eKLR* where it was held as follows;

“The Respondent is a public body created by statute. It is therefore expected to perform its duties within the mandate donated to it by law..... It must comply with the rules of natural justice. Failure to do so will see its decision quashed for procedural impropriety. The decision of the Respondent must also be reasonable and rational otherwise the court may find them to be unreasonable in the Wednesbury sense as enunciated in *Associated Provincial Picture House vs. Wednesbury Corporation [1947] A11 E R 680.*”

21. Counsel argued that the 1st Respondents decision was unreasonable and unimplementable because in his opinion, awarding the disputed portion to the late Musyoka's family when the dispute between Kimotho and the late Musyoka led to parcel number 605 separating 606 and 603 is illogical and unreasonable.

22. On the issue of the Petitioner's legitimate expectation, it was submitted for the petitioner that the decision of the Land Adjudication Officer was made on 19th July 1988 while the appeal was filed on 25th August 1988. This means that the same was filed 33 years ago. The Petitioner argued that he was not aware of the appeal and that the said appeal was filed before the Land Adjudication Officer and not the 1st Respondent. Counsel argues that the late Musyoka had 60 days from 19th July 1988 to file his appeal. He contends that annexure Doc – R1 which is the appeal was received by the Land Adjudication Officer on 25th August 1988, and wonders how the same translated to appeal number 10 of 1989, because if it was filed in 1988 it should be a 1988 appeal. It was further argued that from the documents on record, the appeal was in respect of objection numbers 59 of 1984 and 131 of 1984 and that ultimately the decision made by the 1st Respondent was in relation to parcels 603 and 606. He further argued that the decision in objection number 57 of 1984 has no date of the decision.

23. Counsel argued that there was a compromise of the appeal involving the late Musyoka and Kimotho in respect of parcel 605 and 606 as demonstrated by the affidavit signed by the 5th Respondent, which states that it is a road that separates parcel number 605 and 606, and that there is no mention of a river. That this compromise gave the Petitioner an expectation that there was no claim against his family's parcel of land number 603. He argued further that having been informed by the 2nd to the 4th Respondents that there was no appeal in respect of land parcel number 603, the Petitioner and his family acquired legitimate expectation that the disputed portion belonged to them and that there was no dispute. Counsel relied on the case of **Republic vs. Kenya Revenue Authority, ex parte Shake Distributors Ltd [2012] eKLR** where the court described legitimate expectations as follows;

“Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken). It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner.”

24. The Petitioner also relied on the case of **Jane Kiongo & Others vs. Laikipia University [2019] eKLR**, which this court has considered. He argued that the Respondent's conduct of delaying the hearing of the appeal for 33 years; failure to serve a memorandum of appeal; representing to the petitioner's family that there was no appeal and that the decision of the Land Adjudication Officer will be implemented; and that the family of the late Musyoka was not interested in the disputed portion, the petitioner acquired legitimate expectation that the dispute portion belonged to him. He further argued that the Respondents' conduct influenced the petitioner's actions and therefore any change of the circumstances by the Respondents required them to give the Petitioner sufficient notice and adequate time to argue their case.

25. It was further the Petitioner's contention that since his rights under the constitution had been violated by the Respondents, he was entitled to an award of damages. He cited the case of **Reuben Njuguna & Gachoke & Another vs. Inspector General Police Service & Others [2019] eKLR** for the proposition that an award of damages for violation of constitutional rights, need not be for compensatory purposes, but to vindicate the violated rights, and deter future infringement.

26. Counsel also argued in conclusion that the 1st Respondent had breached Article 10 of the Constitution by not granting the Petitioner a right to be heard. He argues that there was no site visit when the appeal was heard and that the 1st Respondent acted without integrity. Counsel relied on the case of **Katiba Institute vs. President Delivery Unit & Others [2017] eKLR** where the court held that by denying the petitioner his right to access to information, the Respondent violated article 10. Counsel stated that the Respondents breached Articles 35, 47 and 50 of the Constitution and sought for the petition to be allowed as prayed with costs.

THE 5TH & 6TH RESPONDENT'S SUBMISSIONS

27. The 5th and 6th Respondents submitted that they have a right to acquire and own property peacefully without any disturbance from the petitioner. They cited Article 40 of the Constitution as the basis of their submissions. They argued that they have documents to show that the suit property belongs to them as per the orders of the 2nd Respondent. They contended that it is not true that the boundary of the three plots 603, 605 and 606 is a road. They insisted that the boundary between the three plots is a river, as was confirmed by the 2nd Respondent. They also argued that they are the rightful legal proprietors of the suit property and hence the Petitioner's claim is fraudulent, fictitious, null and void, and that the latter's encroachment and trespass thereon was contrary to their rights. They relied on Section 25 of the Land Registration Act for the proposition that their rights as proprietors of the suit property cannot be defeated except as provided in the Act.

28. Counsel for the 5th and 6th Respondents argued that the Petitioner's averments in the petition were false allegations which was contrary to law. They stated that according to the surveyor's expert report, the shaded part which is encroached land shows that the same belongs to the 5th and 6th Respondents.

29. On the question of whether the Respondents breached Article 50, counsel argued that at the time of the appeal hearing, the petitioner was ready to proceed and the person who sought for time was the 6th Respondent. He therefore argued that the Petitioner was granted a fair hearing. It was his view that the petitioner was dishonest and sought to benefit from equity yet he had come to court with unclean hands.

30. Counsel argued that it is the Petitioner who had encroached on the 5th and 6th Respondents' property. That the 2nd Respondent, the Land Adjudication and Settlement Board summoned both the Petitioner and the Respondents and that both were accorded a fair hearing. That they also visited the site and prepared a report dated 20th February 2020. That therefore the Petitioner and his agents should be permanently restrained from trespassing on the sit land. Counsel relied on the case of **Mbira vs. Gachuhi [2002] 1 EA page 138** where the court held as follows;

“Where there were two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser.”

31. It was contended further for the 5th and 6th Respondents that the 5th and 6th Respondents had provided evidence, a report and recommendation by the 2nd Respondent to show that they were absolute owners of the suit property, while the Petitioner had no evidence of ownership thereof and that even the Petitioner's documents on record supported the Respondents' case. They argued that the Kitui Land Surveyor visited the suit property and found that the disputed portion belongs to the 5th and 6th Respondents and that the same is part of parcel number 606. Counsel relied on the case of *Shadrack Kuria Kimani vs. Stephen Gitau Nganga & Another [2017] eKLR* for the proposition that a person who encroaches on land owned by another is a trespasser.

32. Counsel further argued that since the Petitioner was a trespasser, he ought to be evicted from the suit land. He pleaded that his court ought to protect the 5th and 6th Respondents from the Petitioner's fraudulent conduct. He cited the case of *Makula International Limited vs. His Eminence Cardinal Nsubuga & Another [1982] HCB 11* which was cited with approval in the case of *Board of Trustees National Social Security Fund vs. Michael Mwalo*, where the Court of Appeal of Uganda held as follows;

“A court of law cannot sanction what is illegal and illegality once brought to the attention of the court, override all questions of pleadings including admission made thereon.”

33. Counsel argued that the Petitioner's claim was illegal as he has never owned the suit property, and he is only a trespasser thereon. Counsel argued that it is only fair and in the interests of justice that this court grants eviction orders against the Petitioner from the suit property as the 5th and 6th Respondents are entitled to vacant possession of the suit land by dint of Article 40 of the Constitution in accordance to prayers sought in the Response to the Petition.

34. The 1st, 2nd, 3rd and 4th Respondents did not file any submissions in respect of the Petition.

ANALYSIS AND DETERMINATION

35. I have considered the Petition, the affidavit in support, the replying affidavits and the rival submissions of parties. I am of the considered view that the following issues arise for determination.

- (a) Whether the minister acted lawfully by allowing persons not administrators of the estates of deceased parties to conduct the appeal.
- (b) Whether the minister heard the appeal in violation of the Petitioner's right to access to information.
- (c) Whether the minister violated the Petitioner's right to a fair hearing.
- (d) Whether the minister violated the Petitioner's right to fair administrative action.
- (e) Whether the minister acted without jurisdiction.
- (f) Whether the Respondents acted contrary to the Petitioner's legitimate expectation.
- (g) Whether the Petitioner is entitled to the orders sought.
- (h) Who should bear the costs of the Petition.

36. The Petitioner has complained that the appeal was heard in contravention of the Law of Succession Act as none of the parties that appeared before the Minister was a legal representative of the estate of the original parties to the dispute. He stated that he was not the administrator of his father the late Kaviu Kithusi while the 6th Respondent is not the administrator of the late Musyoka Layu Ngunu, yet the minister summoned them and asked them to prosecute and defend the appeal respectively. I note that indeed, the 6th Respondent is not the administrator of his father the late Musyoka while the Petitioner is not the administrator of his father the late Kithusi. The question therefore is whether, the two were competent to conduct the appeal before the minister.

37. Section 13 (5) of the Land Adjudication Act provides as follows;

“Where several persons claim separately as successor of a deceased person, and one or more of those persons, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.”

38. It is therefore clear from Section 13 (5) of the Land Adjudication Act that the Act recognises successors and not necessarily administrators of the estate of the deceased persons as defined under the Law of Succession Act. In so far as the Land Adjudication Act and the process of adjudication is concerned, the applicable law is the customary law applicable within the adjudication section and not necessarily Order 24 of the Civil Procedure Act and Section 82 of the Law of Succession Act.

39. In the case of *Dominic Musei Ikombo vs. Kyule Makau [2019] eKLR*, confronted with the issue as to whether letters of administration were mandatory for persons appearing for deceased parties for purposes of conducting proceedings under the Land Adjudication Act, the Court of Appeal had this to say at paragraphs 19 and 20 of its judgment;

“(19)our view is that proceedings conducted under the Land Adjudication Act are not strictly speaking a kin to proceedings under the Civil Procedure Act. The District Commissioner acting on behalf of the Minister has wide latitude to conduct the proceedings in a manner that meets the substantive ends of justice. Section 13 of the Land Adjudication Act talks of “guardian” or “representative according to African Customary Law.” It does not refer to legal representatives. The strict rules of civil litigation as relates to capacity to sue and be sued do not apply to proceedings before the committee or the minister. It is not therefore necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant. The parties therefore had locus standi to appear before the adjudication committee, lack of letters of administration notwithstanding.

(20) Further, the Act allows every person who considers that he has an interest in the land in question to lodge a claim to the recording officer. In this case, the parties did not need to obtain letters of administration to protect their interest in the land in question. Furthermore, the two qualified as representatives of the deceased under Customary Law to represent their respective families in the adjudication proceedings.”

40. It is therefore my finding that there was no illegality in the minister’s action of allowing the Petitioner and the 6th Respondent to represent their family interests in the disputed parcel of land as they had capacity to do so, being the children of their deceased’s fathers respectively under customary law. See also *Republic vs. the Minister of Lands & 2 Others, Ileri Ngiri & 10 Others Ex parte [2013] eKLR* and *Misc. Application No. 63 of 2004, Machakos High Court, Republic vs. The Special District Commissioner.*

41. On the issue as to whether the Petitioner was accorded the right to access to information, the Petitioner argued that he was not aware of the appeal having been filed. He asserted that on the date of the appeal hearing, he sought to be supplied with documents in respect of the appeal but was ignored and ordered to proceed with the hearing. He further argued that he saw the appeal documents for the first time when his advocates were served with the Replying Affidavit. It was his contention that he was never served with the appeal, the notice of the appeal hearing nor was he accorded time and opportunity to prepare for the hearing. The 6th Respondent on his part responded that the Petitioner was dishonest and that his averments in his affidavits were false and in contravention of the law. He stated that the person who sought for time was the 6th Respondent, as he even did not have the Kshs. 3,000/- meant for the appeal fees. He argued that the Petitioner was ready and even brought the map and the proceedings before the Land Adjudication Officer. That he proceeded with the appeal without any complaint of lack of time or opportunity to prepare for the appeal. Counsel for the 6th Respondent also argued that in paragraph 18 of the Petitioner he stated that he was following up on the release of the title for land parcel number 603 from the 2nd, 3rd and 4th Respondents, and therefore it could not have escaped his attention that there was a pending appeal registered against the said title as per the certificate of official search marked as Doc – R5.

42. I have considered the record of proceedings before the minister. I do not see any complaint by the Petitioner that he was not afforded adequate notice or opportunity to prepare for the appeal. He did not seek for more time. There is also no other evidence in form of correspondence or otherwise before the minister to show that the Petitioner requested for information and the same was declined or that he sought for time to prepare for the appeal and his request was rejected. What is on record are merely the Petitioner’s allegation with no evidence in support. I have considered annexure marked Doc – R5, presented by the 6th Respondent, which is a search certificate in respect of Land Parcel Number Nzalae/Mutonguni/603. The same shows that the said parcel was registered on 15th January 2001 in favour of Kaviu Kithusi, but with a restriction by the Chief Land Registrar to the effect that no dealings should be registered on the title until the appeal of the minister is finalized. I therefore agree with the 6th Respondent that if indeed the Petitioner was following up on the issuance of title of the said parcel, he could not have missed to note the status on the search certificate and the registration of a restriction by the Chief Land Registrar pending hearing of the appeal.

43. In addition, the 6th Respondent has demonstrated that he was informed of the hearing of the appeal by summons from the minister, while the Petitioner states on oath that he received a call from the minister sometimes in February 2020 when he was asked to attend the appeal hearing. I do not find the Petitioner’s assertions as honest and it is my finding that the petitioner was aware of the appeal and was duly summoned to attend. Lack of an affidavit of service as alleged by the Petitioner does not mean that there was no service. Proceedings under the Land Adjudication Act are not governed by the Civil Procedure Act and Rules. What is required under Section 13 (3) of the Land Adjudication Act is that as long as a party is made aware that their presence is required and they are ordered to attend, they must attend either in person or by an authorized agent or succession, notwithstanding lack of filing of a return of service.

44. Article 50 (1) and (2) (a) (b) and (c) of the Constitution provides as follows;

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

2. Every accused person has the right to a fair trial, which includes the right –

(a)

(b) To be informed of the charge, with sufficient detail to answer it

(c) To have adequate time and facilities to prepare a defence”

45. Article 35 (1) of the Constitution of Kenya 2010 provides as follows;

“Every citizen has the right of access to

(a) Information held by the state; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.”

46. Article 47 (1) and (2) of the Constitution provides as follows;

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

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

47. In view of the provisions of Articles 35, 47 and 50 of the Constitution, it behooves the minister to be guided and act within those provisions while exercising his mandate under Section 29 of the Land Adjudication Act. Essentially the minister ought to ensure that the parties to the appeal are given sufficient notice of the appeal, they are aware of the appeal, they are given sufficient facilities to prepare to prosecute and or defend the appeal and that his decision is reasonable, lawful and procedurally fair and that he gives reasons for his decisions. The right to a fair trial is a fundamental right, which if violated would undermine all other rights. In the case of *Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367*, the Supreme Court of India observed as follows;

“It has to be unmistakably understood that a trial which is primarily arrived at ascertaining the truth has to be fair to all concerned. There can be no analytical or comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted.”

In my view Article 50 binds all judicial and quasi judicial bodies like the minister to ensure that any dispute before such bodies is determined in a fair and just manner both in the process/procedure and in substance. Fairness in a trial has to be done to both parties in a dispute. Parties to a dispute must know the case against them and must be availed opportunity to argue their case or defend themselves.

48. Section 29 of the Land Adjudication Act provides as follows;

1. “Any persons who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the minister by –

(a) Delivering to the minister an appeal in writing specifying the grounds of appeal; and

(b) Sending a copy of the appeal to the Director of Land Adjudication and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

2. The minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

3. When the appeals have been determined, the Director of Land Adjudication shall –

(a) Alter the duplicate adjudication register to conform with the determinations; and

(b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

4. Notwithstanding the provisions of Section 38 (2) of the Interpretation and General Provisions Act (Cap 2) or any other written law, the minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this Section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination; order and acts of any such public officer shall be deemed for all purposes to be that of the minister.”

49. It is therefore clear that under Section 29 of the Land Adjudication Act, the Minister has latitude in the determination of appeals brought before him to make orders that he thinks just. The minister’s orders on appeal are final. Even as the minister makes orders that he deems just, the same must be in compliance with Articles 35, 47 and 50 as argued by the Petitioner. I have considered the minister’s decision. The same states as follows;

“This appeal case was brought to this court by Mr. Musyoka Layu Ngunu against the decision of Land Adjudication Officer who awarded the portion in dispute to Kaviu Kithusi. During deliberations Job Kimwele Musyoka represented Musyoka Layu Ngunu who is now deceased.

According to Job Kimwele Musyoka, the river marked the boundary of the plots 606, 605 and 603 in the area of Mutonguni/Nzala. In his deliberation the defendant Patrick Kaviu Kithusi representing Kaviu Kithusi informed court that the road is the boundary between 606, 605 and 603.

SITE VISIT

At the site we identified that 605 encroached into 606 and made the boundary with 603 on the other side of the river and we found portion on the land cultivated with maize plantation owned by 605.

FACTS FROM THE MAP

The map presented to me inform of tracing and a copy of the map owned by the defendant as an evidence, both indicate that the river marks the boundary of plot 606 with 605 and 603 and it is clear from the map that 606 crossed the road and borders 603 and disputed portion.

DECISION

The appeal allowed and the disputed portion is part of Plot 606.”

50. The proceedings before the minister show that both parties were granted opportunity to state their case. It also shows that there was a site visit by the minister and he also considered the map that was presented by the petitioner before arriving at his decision. The decision is to the effect that the disputed portion is part of parcel number 606. It is my considered view therefore that the petitioner was accorded an opportunity to be heard. The allegation that there was no site visit by the minister are not correct. There is no evidence that he sought for more time to prepare for the appeal, which request was denied. Further, the decision of the minister contained reasons upon which it was premised and therefore I find and hold that the minister complied with Articles 35, 47 and 50 of the Constitution.

51. The petitioner further complained that the minister acted without jurisdiction. He stated that the appeal was filed six months out of time. I have perused the appeal, which was filed in the prescribed form as shown by annexure to the 6th Respondent's affidavit marked DOC – R1. The same was received in the Land Adjudication Department on 25th August 1988, while the decision of the Land Adjudication Officer was made on 19th July 1988. Under section 29 (1) of the Land Adjudication Act, an appeal to the minister ought to be made within sixty days after the decision appealed against was made. It is therefore clear that the appeal was filed within time. The argument that the appeal was registered as a 1989 appeal and therefore filed out of time cannot be of assistance to the Petitioner as the registration of appeals was not the function of the Appellant. His obligation was to ensure the appeal is filed within time, which he did. I am therefore satisfied that the minister had jurisdiction to determine the appeal as it was filed in time. Page 2 of the appeal shows that the appeal was premised on four grounds of the appeal, which have been listed. I am therefore satisfied that the appeal was in compliance with the law and the minister had the jurisdiction to determine the same.

52. Counsel for the Petitioner argued that the Petitioner's legitimate expectation was violated. He argues that the 2nd, 3rd and 4th Respondents informed the Petitioner that there was no appeal, and that the 5th Respondent signed the affidavit in respect of the dispute between parcel 605 and 606. Apart from alleging that the 2nd, 3rd and 4th Respondents told him there was no appeal in respect of Parcel 603, no evidence has been tendered by the Petitioner to support that allegation. I have also perused the impugned affidavit. It is signed by both parties. The 5th Respondent swore an affidavit stating that she is illiterate and does not know how to read and write. Having denied signing the said affidavit, it was upon the Petitioner to prove that indeed the signature or the affidavit belonged to the 5th Respondent. The Petitioner failed to prove the said allegations.

53. Principles on legitimate expectation are well settled. In the case of *Communication Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others SC. Petition Nos. 14, 14A, 14B and 14C of 2014*, where the Supreme Court stated as follows;

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its powers to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is expected to fulfil the expectations.”

54. Similarly in the case of *Republic vs. Principal Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR* the court cited with approval the words of H. W. R. Wade & C. F. Forsyth in *Administrative Law* by H. W. R. Wade C. F. Forsyth, Oxford University Press 200 as follows;

“It is not enough that an expectation should exist; it must in addition be legitimate....first of all, for an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation second, clear statutory words, of course, override an expectation however founded....Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy ...”

“An expectation whose fulfilment requires that a decision maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions and express in several, that the expectation must be within the powers of the decision maker before any question of protection arises. There are good reasons why this should be so; an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.”

55. It therefore follows that for an expectation to be said to be legitimate, there ought to be representation from a public body that is clear and unequivocal and it ought to be reasonable in the eyes of a reasonable person. The public body must have induced the expectation and then it must have been lawful for the public body to make such representation. Therefore the legitimacy of the expectation is premised on the legality or lawfulness of the expectation induced by the public body. If the expectation is contrary to clear provisions of any law, such expectation has no legitimacy and the same cannot be enforced.

56. With the above legal principles in mind and viewed against the Petitioner's allegation that he was informed by the 2nd, 3rd and 4th Respondents that there was no appeal and therefore legitimately expected that there would be no determination of an appeal in respect to parcel number 603. It is obvious that that expectation was contrary to Statute. Section 28 of the Land Adjudication Act provides as follows;

“Upon receiving the adjudication register under Section 27 of this Act, the Chief Land Registrar shall cause registration to be effected in accordance with the adjudication register; provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination, the register shall if necessary be altered in accordance with the determination.”

57. As the official search certificate for land parcel number 603 clearly indicate that the said title was restricted by the Chief Land Registrar pending determination of the appeal, it means that the adjudication process in respect of the aforesaid parcel was yet to be finalized until the appeal is determined and the register altered in accordance with the determination of the appeal. Thus expecting that the appeal will not be determined when the adjudication process was not finalized, lacked legitimacy and the expectation was contrary to the provisions of Section 28 of the Land Adjudication Act. I therefore find that the Petitioner's expectation was contrary to clear provisions of statute hence unenforceable and untenable.

58. The Petitioner had sought for declaratory orders that his constitutional rights under Articles 35 (1) 47 and 50 (1) and 40 for the Constitution had been violated. He also sought for injunctive orders to restrain the 1st to 4th Respondents from enforcing the decision dated 20th February 2020 in respect of appeal no. 10 of 1989. Further he sought for orders of certiorari to quash the 1st Respondent's decision and an order directing the 2nd to 4th Respondents to implement the decision of the Land Adjudication Officer in objection number 57 of 1984 plus damages and costs of the petition. Having found that the Petitioners constitutional rights to fair hearing, fair administrative action and right to access to information were not violated, I am satisfied that there are no valid reasons presented by the Petitioner to fault the decision making process of the minister in respect of the appeal. The allegation that the decision of the minister is not capable of being implemented lacks merit and basis. The portion in dispute is only between owners of parcels number 606 and 603. The minister decided that the disputed portion is part of parcel number 606. That decision does not touch on any other parcel beyond parcels 606 and 603. The Petitioner cannot be heard to argue that if the portion in dispute is held to be part of Parcel 603 then the decision is implementable but if the same is held to be part of parcel number 606 then it is unimplementable. In my considered view the decision by the minister is reasonable and implementable. As the decision of the minister is final under the provisions of Section 29 (1) of the Land Adjudication Act, this court cannot interfere with the same on grounds of the merits of the decision. I therefore find and hold that the Petitioner is not entitled to the orders sought.

59. The upshot of the foregoing is that this petition lacks merit and the same is dismissed with costs to the 5th and 6th Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF JANUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. B. M. Musyoka for the Petitioner

Mr. Katunga Mbuvi for the 5th and 6th Respondents

Ms Josephine Misigo – Court Assistant