REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NUMBER 341 OF 2013

REPUBLIC…….…….....……..…….APPLICANT

VERSUS

CABINET SECRETARY, MINISTRY OF LANDS AND HOUSING…..……...…1ST RESPONDENT

THE ATTORNEY GENERAL…….....……..2ND RESPONDENT

AND

JOSEPH MUTUNDU KIOKO…….....……....1ST INTERESTED PARTY

ONESMUS NTHEI KOLI…..…….....……..2ND INTERESTED PARTY

MAVUTI MUANGE NTHEI..…….…….…….....……EX-PARTE

JUDGMENT

Introduction

1. These judicial review proceedings were commenced by way of a Motion on Notice dated 8th October, 2013, at the instance of the ex parte applicant herein, **Mavuti Muange Nthei**, pursuant to leave granted by this Court on 30th September, 2013.
2. The dispute the subject of these proceedings was provoked by the decision made on the 31st July 2013, on behalf of the Minister of Lands and Housing by the District Commissioner of Mbooni East District in the Appeal to the Minister Lands Case Numbers 337 and 338 of 1997 which set aside the decision of the Objection Adjudication Officer Usalala Adjudication Section made on the 26th of February, 1997 in favour of the ex-Parte Applicant.

Applicant's Case

3. It was the Applicant's case that he and close family members were lawfully entitled to the family's ancestral land which he averred they inherited from their grandfather. To the Applicant, there was a deliberate and well calculated confusion between what constitutes the ancestral land and what belonged to him which he was lawfully entitled to, to the exclusion of other family members.

4. According to the applicant, these proceedings related to his land which he alleged was deliberately confused as ancestral land and awarded or shared between him and the aforementioned family members under the guise that it was family land inherited from their grandfather. The Applicant averred that the properties in question are parcel numbers 1094 and 1095 which he claimed lawfully belong to him and had never been part of ancestral land. It was the Applicant's case that he had been in possession, use and occupation of the said parcels of land in excess of over 60 years.
5. The disclosed that in 1973 he sued two persons namely **Musau Mukoti** and **Ndetei Nthuku** in Civil Case Number L. 105 of 1973 at the District Magistrate's Courts at Uaani seeking *inter alia* the determination of the boundary to the said land and that the court not only determined the court boundary but also found that the Applicant had acquired ownership of the said parcels by way of prescription. It was the Applicant's case that this decision was never appealed against.
6. The Applicant's contention was at the time of occupation and the delivery of the aforesaid judgment the parcels in question had not been adjudicated and that adjudication took place in the said area in or about 1991. To him, after the adjudication all the ancestral land, except the aforesaid parcels of land, was divided among the family members as required. The Applicant emphasized that the ancestral land that was shared among family members constituted Plot Number 630 which was given to a **Kioko Sila**, Plot Number 921 which was given to a **Koli Muange** and Plot Number 922 which was given to the Applicant. The three parcels, according to the applicant, were the subject of arbitration proceedings though the said proceedings did not touch on the Applicant's land parcel numbers 1094 and 1095 because in his view that the two parcels of land did not constitute ancestral land. The Applicant's case was that in or about 1996 **Kioko Sila** filed objections at the Usalala Adjudication Section alleging that plot numbers 1094 and 1095 constituted ancestral land, which objections were dismissed based the court judgment in case number L. 105 of 1973. To the applicant, the Adjudication Officer was then supposed to prepare an Adjudication record in accordance with the provisions of Sections 23, 24 and 25 of the ***Land Adjudication Act*** Cap 284 Laws of Kenya (hereinafter referred to as "the Act"). However, the Interested Parties herein filed Objections to the Adjudication record being Objections Number OBJ/US/94/96 and OBJ/US/18/96 which objections were considered and by a decision made on 26th of February, 1997 the same were dismissed and the Interested Parties herein given sixty (60) days to Appeal.
7. However, Interested Parties herein filed their Appeal on the 15th of October, 1997 being Case Numbers 337 and 338 of 1997 to the Minister which according to the ex parte applicant was filed way out of time contrary to the provisions of Section 29 of the Act. Despite that, the then Cabinet Secretary for Lands and Housing proceeded to hear these appeals and determined them which action, the applicant contended was null and void as the Minister lacked the jurisdiction to entertain the same.
8. Apart from that the ex parte applicant contended that in the Minister's decision the District Commissioner of Mbooni East District considered evidence of persons whom he did not hear first-hand or summon to appear before him; especially the alleged clan members. To him, the entire record does not include the alleged decision of the clan such that there is no evidence that the alleged clan ever sat and made the alleged determinations in regard to the ancestral land. The Applicant therefore was of the view that the District Commissioner erred in law in accepting, introducing and relying on extraneous issues which did not form part of the appeal before him and as such the proceedings before the District Commissioner were fatally and incurably defective and therefore a nullity. He added that the District Commissioner heavily relied on the alleged decision of the clan which was not part of the record, and that he failed to appreciate that the alleged decision, even if it existed could not overrule the court decision rendered in case number 105 of 1973, District's Court Uaani which directed on where the boundary of the parcels 1094 and 1095 was to be.
9. To the applicant, the District Commissioner failed to consider the reasons forwarded by the Adjudication Officer in refusing the Interested Parties objection but instead went on to consider the decision of the Arbitration Board which was the not the decision that formed the subject of Appeal before the Minister.
10. In the result the ex parte applicant sought the following orders:

a. **A Certiorari Order quashing the decision of the Cabinet Secretary for the Ministry of Lands and Housing through the District Commissioner Mbooni East District delivered on the 31st July 2012 setting aside the decision of the Objection Committee and reinstating the decision of the clan elders who apportioned the Applicant's land parcel to the Ex-Parte Applicant and the Interested Parties herein.**
b. **An order of prohibition to stop further steps in enforcing the judgment of the District Commissioner Mbooni District delivered on the 31st of July 2013 in Appeal to the Minister for Lands Case Number 337 and 338 of 1997relating to Plot Number 1094 and 1095 Usalala Adjudication Section, Kisau/Waia Division, Mbooni East District.**
c. **Any other relief(s) and/or directions as this Honourable Court may deem necessary to serve the ends of justice.**
d. **An order that the Respondents pay the Ex-Parte Applicant the cost of this Application.**

11. On behalf of the ex parte applicant it was submitted that the decisions of the Adjudication Officer in which the appeals to the Minister were preferred were made on the 26th of February 1997 subsequent to which the Adjudication officer informed the objectors that they had 60 days right of Appeal which would have fallen on or before the 27th of April, 1997. However the Applicant contended that the appeals as per the records of the Minister were delivered on the 15th of October 1997 which the Applicant argued was way out of the 60 day window period. The Applicant averred that the Minister proceeded to determine these appeals despite no provision existing for the extension of time in the Act hence the Minister's decision was null and void due to lack of jurisdiction to entertain appeals out of time.
12. The ex parte applicant took issue with the alleged exhibits that were filed by the Interested Parties indicating that the date of 15th October 1997 as the date of filing the appeal was entered in error and that instead the appeal was filed within the 60 day window period. The Applicant urged that the documents were introduced irregularly because they were annexed to submissions as opposed to being annexed to an affidavit and as such they ought to be expunged from the court record because the Interested Parties did not also seek the leave of the court to introduce them. It was the submission of the Applicant that a further look at the purported receipts reveals that the documents that were annexed were totally suspect and may have been mischievously introduced to save the imminent collapse of the case of the Interested Parties.
13. To the ex parte Applicant, the handwriting in the documents and receipts that were previously on record and the ones that the Applicant alleged were mischievously introduced to rectify the error of the date of filing the appeal were conspicuously different. The Applicant also submitted that the purported receipt number 442819 was marked P/No. 1095 yet the previous documents do not refer to plot number 1095 because the two cases were heard separately under case number 337 and 338 of 1997. Further, the hand written document dated 18th April 1997 did not bear any official stamp to confirm the date it was filed and as such it was of little use in these proceedings. The Applicant contended that the certified record of the proceedings marked D in the ex-parte applicant's affidavit and which clearly showed the date the appeal was filed was not disputed or shown to be incorrect and this raised doubt as to the rather belated awakening which according to the Applicant confirmed bad faith in purporting to introduce highly suspect receipts.
14. The Applicant reiterated that in Civil Case Number L 105 of 1973 the court at Uaani not only determined the common boundary but also observed that the Applicant herein had acquired ownership by way of prescription which judgment was never appealed against. It was the Applicant's submission that by the Minister purporting to reverse the decision of the Adjudication Officer, s/he ignored a court judgment granting the said parcels of land to the Ex-Parte Applicant and as such ignored and reviewed the decision of the court yet he lacked the jurisdiction to do so.
15. According to the Applicant the courts are the supreme organs with dispute resolution and decision making (sic) and court decisions can only be reviewed by the courts making the decision or by a higher authority upon appeal by a party to the suit but not just any other body or person and as such by making the decision of 31st July 2013, the Minister reviewed and overturned the decision of the court yet the Minister had no jurisdiction to do so.
16. The Applicant argued that when land adjudication was carried out where the Applicant's parcels

of land are located, after adjudication all the ancestral land excluding parcels 1094 and 1095 were divided among the family members as required. It was the Applicant's argument that the ancestral land shared among the family members were plot Number 630 which was given to **Kioko Sila**, Plot Number 921 which was given to **Koli Muange** and plot Number 922 which he avers was given to him. He therefore submitted that parcels 1094 and 1095 were not the subject of the Arbitration proceedings because they did not form part of the ancestral land and as such by overruling the Arbitration decision, the Minister misdirected himself and confused issues for determination thus rendering the Minister's decision defective.

17. According to the Applicant under Section 29 of the Act the Minister can only entertain to Appeals arising out of the decision of the Adjudication officer. However, the Minister took into account the decision of the Arbitration Committee which she had no jurisdiction over. The Applicant also complained that the District Commissioner failed to consider the reasons forwarded by the Adjudication officer in refusing to allow the Interested Parties objection and instead went on to consider the decision of the Arbitration Board which was not the decision on appeal. It was reiterated that the Minister considered evidence of the alleged clan members who did not appear in person before the Minister and whose decision was not part of the record.
18. The Applicant submitted that taking into account the provisions of section 29 (2) of the Act, with respect to the finality of the Minister's decision if this court were to grant a judicial review order quashing the decision of the Minister then it should also grant an order of prohibition as a further measure to stop further steps in enforcing the said decision.

1st and 2nd Respondent's Case

19. The 1st and 2nd Respondents' case was that the matters at hand are matters arising from a delegated administrative function of the office of the Cabinet Secretary in charge of Lands, Housing and settlement on a dispute hinged on the land ownership and boundary. They contended that the suit was instituted at a time when the Environmental and Land Court was functional and as such the filing of this matter in the Judicial Review Division is an attempt to clothe the court with jurisdiction that it doesn't have courtesy of Article 162 (2) and 165 (5) (b) of the Constitution. The 1st and 2nd Respondents' view was that this matter can be handled competently by the Environment and Land Court whose jurisdiction is found in Section 13 of the ***Environmental and Land Court Act*** hence pursuant to Article 165 (5) (b) as read with Article 162(2) of the Constitution this Court has no jurisdiction to entertain the matter based on **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd 91989) KLR 1** and **Samuel Mutonga Thiru & Others vs. Colgate Palmolive (East Africa Ltd) 2013**.
20. The 1st and 2nd Respondents submitted that the objection to the adjudication officer in respect of parcel 1094 in Usalala adjudications section Makueni county was finalized on 26th February 1997 and an appeal to the Minister from the decision was lodged on the 20th of March 1997 and this was a period of one month which they contended is clearly within the statutory period of sixty days within which to appeal in line with the provisions of Section 29(1) of the Act. Further to the foregoing, the said Respondents submitted that the objection to the adjudication officer in respect to parcel 1095 in Kisau/Waia in Makueni County was finalized on the 26th February, 1997 and an appeal to the Minister from that decision was filed in 24th April, 1997 which the 1st and 2nd Respondents submitted was within the statutory requisite period of sixty days within which to appeal in line with the same provision.
21. To the said respondents, under the provisions of the Act, disputes are addressed through 4 bodies; the first being the Land Adjudication Committee which has original jurisdiction followed by the Arbitration Board which exercises appellate jurisdiction over the Land Adjudication Committee; at the 3rd tier there is a Land Adjudication officer who handles objections relation to Land adjudication disputes and exercises both original and appellate jurisdiction and then there is the Cabinet Secretary in charge of Lands and Housing who can delegate powers to the local administrators as was the situation in this case, and who exercise appellate jurisdiction. It was contended however that in all the above stages, whenever there are new issues emerging to be considered, a certificate of new issues is always prepared out in detail and the new issues are considered. The 1st and 2nd Respondent also submit that because the Minister in her delegated

capacity exercises appellate jurisdiction she is empowered to re-evaluate records as well as evidence relating to the matter and as such the position by the ex-Parte applicant that the Minister did not have an account of the clan elders is untrue. The 1st and 2nd Respondents submitted that the Minister in her delegated capacity considered the issues on the record and even from the appeal proceedings, a summary of the history of the case is shown to have been read and all parties present confirmed the contents to be true.

22. In the respondents' view, whereas a judicial review Court can call such proceedings before the quasi-judicial body within the Act, judicial review is not a court of appeal or evidence because the issues herein require *viva voce* evidence and can only be handled through an ordinary civil appeal suit.
23. They thus concluded their submissions by stating that the Applicants are not entitled to the orders sought for the reason that the application does not meet the basic tenets of a judicial review application and that it has been filed in utter disregard of the provisions of Section 30 of the Act. To them, the application is not fit for grant of orders of certiorari as no illegality or impropriety has been established by the ex-Parte Applicants. They also submitted that the order of prohibition cannot issue as the same would amount to curtailing the ability of public officers to perform their duties.

1st and 2nd Interested Parties' Case

24. The 1st and 2nd Interested Parties filed Grounds of Opposition dated the 10th of October 2013 in which they stated that the application is an abuse of court process. They also opposed the application by stating that the issue of the dispute of land parcels known as Number 630,921 and 922 were determined by the clan elders who presented their findings to the Minister who made the final decision in accordance with the ***Land Adjudication Act***. The 1st and 2nd Interested Parties asserted that the Minister endorsed the findings of the clan elders and as such this court has no jurisdiction to determine this matter. The 1st and 2nd Interested Parties contended that there was no notice of intention to sue them and added that since the cause of action arose in Makueni County this court does not have jurisdiction to hear this matter.
25. Apart from the said grounds, the 1st and 2nd Interested Parties also filed replying affidavits in which they averred that this matter revolves around the ancestral land at Mbooni East and particularly parcels 630, 921 and 922. To them, this matter was determined by the clan elders who gave land parcels 630, 921 and 922 to **Kioko Sila Nthei**, **Koli Muange Nthei** and **Mavuto Muange Nthei** respectively. They deposed that after the decision was made by the clan elders, the Applicant herein appealed the decision of the clan elders before the Usalala Board Members who overturned the decision of the clan elders without following the due process of law culminating in the Applicant being awarded parcels number 1094 and 1095. This decision led to an appeal to the Minister who overturned the board members decision and the land reverted to its original numbers i.e. 630, 921 and 922 and the apportionment done as per the clan elders' decision.
26. The said 1st and 2nd Interested Parties also contended that the Applicant had transferred Kisau/Usala/1095 which they alleged belongs to **Koli Muange Nthei** which is also referred to as Parcel 921. The 1st and 2nd Interested Parties alleged that the said parcel title was issued on the 1st August 2013 and that the Applicant was aware of the decision of the Minister which was made on 31st July 2013. The 1st and 2nd Interested Parties believed that this is an indication that the Applicant was in collaboration with the land officials to defeat the cause of justice.
27. Based on legal advice, they believed that application herein is an abuse of the court process because Judicial Review is concerned with the decision making process, not with the merits of the decision itself and they urged the Court not act as a Court of Appeal by going into the merits of the decision itself.
28. Even if this Court had jurisdiction the 1st and 2nd Interested Parties were of the view that this application is untenable both in law and facts for the following reasons:
    a. **That there is a deliberate attempt by the exparte Applicant to mislead the court on the true picture and issues herein.**
    b. **That the truth of the matter is, that this matter totally revolves around parcels of land in Mbooni East numbers divided into Nos. 630, 921 and 922 given to Kioko Sila**

Nthei, Koli Muange Nthei and Mavuti Muange Nthei respectively. See the proceedings and decision of Usalala Land Adjudication Committee annexed to ex parte Applicant's application, as Exhibit "B".

c. **That it is not correct that the proceedings in case no. 105 of 1973 mentioned in the above paragraph did not touch on parcels Nos. 1094 and 1095 as alleged at paragraph 10 of the ex parte Applicant's affidavit to the application. The truth of the matter is that the said parcels of land were excavated from the parcels Nos. 630 and 921 respectively given to Kioko Sila Nthei and Koli Muange Nthei respectively.**

d. **That if the allegations by the ex parte Applicant that the parcels of land to wit : 1094 and 1095 were not part of the ancestral land, nothing would have been easier than for him to give the history of how he acquired the same and or the original Nos. of parcels of land from which they were excavated.**

29. To them, it is not correct that the judgement in case No. 105 of 1973 bestowed ownership of the said parcels of land to the ex parte Applicant herein. Instead they averred that a careful reading of the said judgement would reveal that the subject matter was not the parcels the subject herein and that the said judgement did not allude to any parcel land reference number and further that no party won the matter as all that was done was restitution of a boundary and that from the findings thereat the applicant could not have been declared the sole owner of the said parcel of land because the whereabouts of the 2nd Plaintiff and his interest in the land are unclear.

30. Further, as admitted by the applicant, the subject thereof had not been adjudicated and it was only after adjudication that parcels 630, 921 and 922 were established that led to a myriad of objections and/ or appeals by the parties herein leading to the recent one, the subject of these proceedings. It was therefore their position that the pronouncement of the judgement in 105 of 1973, which they allege purely restored a boundary, was overtaken by the adjudication of the parcels of land and it is totally incorrect for the ex parte Applicant to mislead the court that the same gave him ownership of parcel Nos. 1094 and 1095 herein or that he was declared the sole owner of the said parcels.

31. The 1st and 2nd Interested Parties denied that the appeals to the Minister to wit Appeal no. s 337 of 1997 and 338 of 1997 were filed out of time. Instead they averred that they filed their appeals on 15thOctober, 1997. However the 2ndInterestedParty deposed that he came to learn that there was typographical error, which may have been deliberate as the proceedings thereof herein were obtained by the ex parte Applicant himself, written to the office that issued the same and there was a letter issued by a competent officer of the said office correctly stating that the indication of the date as 15thOctober, 1997 was an error and that the correct date of filing both the Appeals was 24thApril, 1997. To them it was not enough for the *ex parte* Applicant to allege that the receipts annexed as proof of payment for the Appeals, which are the same as those he has annexed in his own proceedings, are suspect without giving full particulars and reports of any alteration or forgery and also without offering contrary receipts and or evidence. It was the 1st and 2nd Interested Parties case that the same are genuine and suffice to say, the Interested parties are in possession of the original receipts and were ready to surrender them to court should the court deem fit to examine them or even establish their authenticity.

32. It was the 1st and 2nd Interested Parties' position that the body of the proceedings of the Appeals before the Minister was clear that the presiding District Commissioner read through a summary of case history and both parties confirmed the contents to be true as such it was not correct to state that the District Commissioner did not hear the clan members and also that the decision of the clan members was not part of the record. The said parties also believe that it is utterly incorrect to also state that the decision on appeal went on to consider the decision of the Arbitration Board which was not the decision on Appeal before the Minister because the decision was clear it took into consideration all the earlier decisions and what was set aside was the decision of the Objection Committee.

33. On behalf of the said interested parties, it was submitted that this Honourable Court has no jurisdiction to entertain the Application because this being a Judicial Review process, the court cannot be called upon to evaluate the evidence before the Minister as the same may amount to the reviewing the merits of the decision instead of the decision making process itself. In support of this submission, they relied on **Municipal Council of Mombasa vs. Republic & Umoja**

Consultants Limited , Civil Appeal No. 185 of 2001, Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR and ***Halsbury's Laws of England*** **4th Edition Vol. (1) (1)Para 60.**

34. According to the interested parties, based on **Republic vs. Secretary of State for Education and Science exp arte Avon County Council [1991] 1 All ER 282** and **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984[1985] KLR 954;[1986-1989] 1986-1986] EA 194,** judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process and that its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

35. The Interested Parties also submitted that the appeals to the Minister were filed on 15th October, 1997 but that since learning of the said typographical error, which may have been deliberate as the proceedings thereof herein were obtained by the ex parte Applicant himself, they wrote to the office that issued the same and there was a letter issued by a competent officer of the said office correctly stating that the indication of the date as 15th October, 1997 was an error and that the correct date of filing both the Appeals was 24th April, 1997. They further reiterated the contents of the replying affidavit on the same issue and cited **AAT Holdings Limited v Diamond Shields International Ltd [2014] eKLR** for the holding that:

"... an allegation of forgery is serious and imputes a criminal conduct on the part of the Plaintiff; it must, therefore, be pleaded with full particulars and details as to bring to the attention of the Plaintiff of the kind of defence his case is faced with. Equally, that information is necessary for purposes of filing subsequent pleadings by the Plaintiff, particularly reply to defence. In the absence of such particularities of the alleged defence, the proposed defence of forgery is a mere sham and is only contrived to pass for a triable issue".

36. Similarly, it is the submission of the Interested Parties that in the Court of Appeal case of **Zakayo Michubu Kibuange vs. Lydia Kaguna Japheth & 2 others [2014] eKLR** the court held:-

"Forgery is a very serious allegation to make and more so, if it involves one's signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1st respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all"

37. In their view, the ex parte Applicant has undeniably failed to adduce any evidence in support of this allegation of forgery or the documents being "suspect' and relied on **R. G. Patel vs. Lalji Makani (1957) E.A. 314**, where the Court at page 317 held:

"Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

38. The Interested Parties concluded that the receipts adduced by them were genuine and truly reflect the date of filing the Appeals herein and the allegations of forgery and suspicion are merely self-serving and without any basis at all. Their contention was that it is untenable both in law and in fact for the ex parte Applicant to allege that they ought to formally apply for amendment of the error in the proceedings for parties to make representations.

39. To the Interested Parties, this Honourable court has special jurisdiction to oversee the conduct of public bodies in the exercise of their statutory obligations and ensuring fairness, equity and justice is observed cannot be gain said as such the jurisdiction of the court in this respect is a special one because it is neither civil or criminal**.** From the foregoing, the Interested Parties submitted that it is

clear that the reliefs sought cannot be granted to the ex parte Applicant as the Judicial Review Court cannot act as an appellate court and the allegation of filling appeals out of time is not only baseless but also untenable both in law and in fact and the decision of the Minister was clearly based on the real picture of the issues in contention, to wit the said parcels of land were excavated from Nos. 630 and 921.

Determination

40. I have considered the foregoing matters and this is the view I form of the matter. Section 29 of the ***Land Adjudication Act*** Cap 284 Laws of Kenya provides:

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

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication,

and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(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 provision of section 38 (2) of the Interpretation and General Provision Act or of 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 officer 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.

41. In order for the Court to resolve some of the issues raised in this application it is important to understand what the process of land adjudication entails. This was extensively dealt with by the East African Court of Appeal in **Timotheo Makenge vs. Manunga Ngochi Civil Appeal No. 25 of 1978 [1979] KLR 53; [1976-80] 1 KLR 1136** where **Law, JA** expressed himself as follows:

"Section 12(1) of the Act imposes on the adjudication officer the duty, when hearing an objection, "so far as is practicable" to follow the procedure directed to be observed in the hearing of civil suits. Section 7 of the Civil Procedure Act precludes any court from trying an issue, which has been heard and finally decided, by another court. Order 20, rule 4, of the Civil Procedure Rules lays down that a judgement shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. But no such duty to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, under section 29 of the Act is to "determine the appeal and make such order thereon as he thinks just" and that is exactly what the Minister did in this case. He had in mind the previous litigation, but gave no effect to it and he was justified in doing so since the

exact area was not precisely defined in the decisions, presumably because it could not be precisely defined. This lack of precision as to the extent of the claims means that *res judicata* could not have applied to the proceedings before the Minister, and no breach of the rules of natural justice resulted from the Minister's refusal to give effect to the decisions in earlier litigation. It is also arguable that the principles of *res judicata* have no bearing on disputes under the Act, except to the extent of showing whether a claimant has a *bona fide* claim or not. Interests in land within adjudication areas previously recognised by the Courts are not binding in land adjudication proceedings, and are only relevant as a factor to be taken into account. Where the interest relates to a disputed clan land, the question of the overriding interest in that land is an open question, at any rate so far as the Minister is concerned. No title to such land exists, it is the right of a particular clan to use that land as a clan, which is in question. In accordance with the preamble to the Act, that its object is to enable the ascertainment of rights and interests in trust, these rights and interests arise out of customary law, and are normally of an imprecise and vague character. The Minister is the final arbiter as to the extent of these rights. The Minister had the jurisdiction to entertain the appeal, and even if he has reached a wrong decision, which may well be the case, his jurisdiction is not destroyed since if he has jurisdiction to go right he has jurisdiction to go wrong."

42. In **Mukangu vs. Mbui Civil Appeal No. 281 of 2000 [2004] 2 KLR 256,** the Kenya Court of Appeal held:

"The very purpose of subjecting land, hitherto held under customary tenure, to the process of land consolidation under the Land Consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act is *ipso facto* to change the land tenure system which would have been ascertained and recorded before registration.…The registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act… In this case the land was ancestral land that devolved from the father. It was registered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of the succeeding generations."

43. The applicant contended that these proceedings relate to his land which he alleged was deliberately confused as ancestral land and awarded or shared between him and the aforementioned family members under the guise that it was family land inherited from their grandfather. The Applicant averred that the properties in question are parcel numbers 1094 and 1095 which he claimed lawfully belong to him and had never been part of ancestral land. In order for this Court to find in favour of the applicant this Court would have to re-evaluate the evidence on record, reassess the same and make its on findings on the merits thereof. That however is not the role of a judicial review Court. Neither is such investigation within the scope of judicial review proceedings. As was held in **Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 40-41** citing **Wednesbury Corporation [1948] 1 KB, 228**:

"**The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned."**

44. That position has been recognised locally in a number of cases. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited** (supra) it was held**:**

"Judicial Review is concerned with the decision making process, not with the merits of the decision: the Court would concern itself with such issues as to whether the decision makers

had the jurisdiction, whether persons affected by the decision were heard before it was made...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision."

45. Similarly in **Republic vs. Kenya Revenue Authority Exparte Yaya Towers Limited** (supra), the Court pronounced itself as follows:

"Judicial Review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power."

46. It follows that this Court cannot revisit the findings of the Cabinet Secretary with a view to making a finding of fact as to whether or not the suit land was ancestral land or not.
47. It was also contended that the appeal to the Minister was filed outside the statutory period hence the Cabinet Secretary lacked the jurisdiction to entertain the same. However, as was held in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1:**

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist." [Underlining mine].

48. In this case, there is conflicting material as to when the appeal was lodged. That finding is necessarily a finding of fact and where there is conflicting evidence and the Tribunal chooses one set of facts as opposed to another set, the Court in a judicial review cannot enter into a review of such findings unless there is no material to support the same. In this case, it is my view that there was material on the record on the basis of which the Cabinet Secretary could arrive at his decision as to the validity of the appeal. That this Court may have made a different finding is neither here nor there.
49. The applicant also contended that a decision had already been made by the Court with respect not only to the boundary of the parcels in question but also observed that the Applicant herein had acquired ownership by way of prescription which judgment was never appealed against. As rightly contended by the interested party, that decision was made before adjudication and as was held by a majority in **Timotheo Makenge Case** (supra), interests in land within adjudication areas previously recognised by the Courts are not binding in land adjudication proceedings, and are only relevant as a factor to be taken into account.
50. Having considered the issues raised herein, it is my considered view that the applicant would have been on a better ground had he challenged the decision in civil proceedings rather than in the instant proceedings. I however cannot speculate on the chances of success of such proceedings. What id however clear to me is that this application lacks merit.

Order

51. In the premises the Notice of Motion dated 8th October, 2013 fails and is dismissed with costs to the interested parties.
52. It is so ordered.

Dated at Nairobi this 28th day of April, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kamende for Interested Party and holding brief for Mr Odhiambo for Respondents

Mr Waballa for the ex parte Applicant

Cc Patricia