



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

JUDICIAL REVIEW 2 OF 2021

REPUBLIC.....APPLICANT

-VERSUS-

THE DEPUTY COUNTY COMMISSIONER KITUI WEST SUB-COUNTY.....1ST RESPONDENT

THE LAND REGISTRAR KITUI COUNTY.....2ND RESPONDENT

THE COUNTY SURVEYOR KITUI COUNTY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

-AND-

BENRODGERS MWENDWA MILAI.....INTERESTED PARTY

-AND-

WILLIAM MULWA MAKITI.....EX-PARTE APPLICANT

JUDGEMENT

1. The proceedings herein were commenced by Ex-Parte/Applicant's Notice of Motion dated 8th October 2020 brought under Section 9 of the Law Reform act, Order 53 Rule 1 of the Civil Procedure Rules seeking the following Orders:

A. THAT an order of certiorari do issue to remove into this Honourable Court for purposes of quashing the judgment of the 1st Respondent, Deputy County Commissioner, Kitui West sub-county delivered on 12/2/2018.

B. THAT an order of prohibition do issue directed to the 2nd Respondent restraining him from issuing the interested party with a title deed or cancelling the said title deed for land number MUTONGUNI/MUSENGO/3344 in line with the judgment of the Minister delivered on 12/2/2018.

C. THAT an order of mandamus do issue directed to the 2nd Respondent compelling him to re-issue the Exparte applicant with the Title Deed for land number MUTONGUNI/MUSENGO/3344.

D. THAT the costs of this application be paid by the Respondents.

2. The application is supported by several affidavits of the Ex-parte Applicant and the Statement of Facts dated 5th October 2020. The Respondent and the Interested Parties filed replying affidavits opposing the application.

3. A brief background of this case is that the Exparte Applicant's father by the name Makiti Mitau and the Interested Party's father, by the name Milai Katithi, had cases arising out of the adjudication process over land parcel Nos 802 and 804 within Musengo Adjudication Section. Makiti Mitai was awarded land parcel 804 while Milai Katithi was awarded land parcel 802.

4. Subsequent to the award the brother of Makiti Mitau one Kitiki Mitau filed a claim to the Arbitration Board case No. 56 of 1975 claiming

a portion of land parcel 802 from Milai Katithi. In the course of the hearing, the Ex parte Applicant William Mulwa Makiti, took over the case from his uncle as a family representative. The Arbitration Board heard the dispute and by a judgement dated 23rd August 1979 dismissed the claim by Kitiki Mitau and ordered the land to remain in the name of Milai Katithi.

5. The Ex-parte Applicant then filed an objection to the Land Adjudication Officer being Objection number 414 of 1984. The said objection was heard and by the finding of the Land Adjudication Officer dated 14th April 1987 the Committee and Arbitration Board decisions were set aside and the Plaintiff in that case being the Ex-parte Applicant herein was awarded what was described as **“only one portion he claimed on the North Eastern of the original land of the Defendant, and also adjoining the North side of the original land of the father of the Plaintiff parcel No. 804.”**

6. Being dissatisfied by the decision of the Land Adjudication Officer the Interested Party filed an appeal to the minister being Appeal No. 221 of 1991 while the Ex-parte Applicant filed appeal number 226 of 1991. The two appeals were consolidated and heard together by the Deputy County Commissioner Kitui West Sub County and by a judgement delivered on 12th February 2018, appeal No. 226 of 1991 was dismissed and appeal 221 of 1991 was allowed in the following terms;

- a. That the parcel or portion awarded to William during objection ruling case no. 414 of 1984 from plot no. 802 to be taken back and be registered as plot no. 802.
- b. That plot no. 802 remains the property of Milai Katithi.
- c. That the sub county surveyor goes to the ground and rectify the boundary as it was during demarcation period between plot no. 802 owned by Milai Katithi and 804 owned by Makiti Mitau.

7. It is the above decision of the Deputy County Commissioner Kitui West Sub County delivered on 12th February 2018 that is the subject of the proceedings herein.

The Ex-parte Applicants case

8. The Ex-parte Applicant states that at the Objection stage he was awarded land which was to be excised from Land Number 802 and which came to be given Plot number 3344 and a title deed issued as No. **MUTONGONI/MUSENGO/3344** and that no appeal was preferred against the said parcel of land. He stated that he settled on that particular piece of land in 1958. He further stated that the Interested Party's father filed Appeal No. 221 of 1991 against plot number 802 while he also filed an appeal against plot number 802 since he felt that there was a portion he was not given. He claims that he never heard from the Minister on the hearing of the Appeal. The Interested Party then took over the case after the death of his father.

9. That sometime in the year 2018, the Ex-parte Applicant claims he was called by his family members who informed him that the Interested Party had entered Land number **MUTONGONI/MUSENGO/3344**, destroyed trees and were putting boundaries up with a Surveyor. Upon inquiry, the Interested Party informed them that the appeal had been heard and the said parcel of land awarded to the Interested Party and registered in his name.

10. The Ex-parte applicant stated that he was not served with any summons to attend the hearing thus the Appeal was heard without giving him a chance to be heard. Upon obtaining the proceedings, he found that the Minister had indicated that he was served with summons but failed to attend the hearing which is untrue according to him. He stated that the Minister heard and allowed the appeal over **MUTONGUNI/MUSENGO/3344** when the appeal was actually filed over plot number 802 only. The Ex-parte Applicant stated that the Minister also lacked jurisdiction to hear the purported appeal over **MUTONGUNI/MUSENGO/3344** when the same had already been registered and title issued in his name. He claimed that the Minister had no jurisdiction to cancel title, which is a preserve of the court.

11. The Ex-parte Applicant further complained that after the Minister's decision, the Interested Party entered into his land and destroyed crops whose value was assessed at Ksh.892,600 by the Field Extension Officer Mutonguni ward. He stated that if the Minister's decision is allowed to stand, he stands to suffer irreparably as he will lose his land illegally.

12. The Ex-Parte Applicant stated that his right to a fair hearing contained in Article 50 of the Constitution was violated and he was condemned unheard contrary to the rules of natural justice.

13. The Ex-parte Applicant confirmed that his uncle KITIKI MITAU filed an appeal at the committee stage and during the hearing he indicated that he had handed over the case to him to prosecute, which is allowed in adjudication. After the appeal was dismissed, he appealed to the Arbitration Board and that his appeal to the Minister was on Land Parcel 802 only and there was no evidence of appeal over Land parcel 3344.

14. That sometime in 1996, the Ex-parte applicant stated that he obtained consent to sue the Interested Party's father for blocking the access road leading to land number 3344 and to vacate 3344 and lower portions of Land number 804 and for him to replant the sisal plants on the boundary of the parcels of land that he had uprooted. In addition to this, the Ex parte Applicant filed an application in 1998, seeking injunction over land parcel 3344 claiming that he had filed an appeal but could not prove that he had appealed and the application was dismissed with costs and he was paid costs of Ksh.70,000.

15. He further stated that Appeal Number 221 of 1991 filed by Milai Katithi, the Interested Party's Father was filed out of time and that there is no return of service to indicate that he was served with summons to attend the hearing of the Appeal.

16. The Ex-parte Applicant stated that it is not true that the Minister's decision was implemented on 23rd July 2018, instead the Interested

Party visited his land sometime in September 2018 when he had filed an application to stop him from doing so. He stated that even though the Minister's Decision had been implemented, it did not stop the court from examining its legality.

17. In response to the claim that the judicial proceedings were filed outside of the six months required under Section 9 of the Law Reform Act and Order 53 of CIVIL Procedure Rules, the Ex-parte Applicant insisted that as long as the decision of the Minister is a nullity, this court has the requisite jurisdiction to quash it and the time limit does not apply.

18. In conclusion the Ex-parte Applicant stated that he has lived on land parcel MUTONGUNI/MUSENGO/3344 for over 60 years and his family has lived there for over 90 years.

The Respondents' Case

19. The Respondents' Replying Affidavit was sworn by Patrick Meso, a Deputy County Commissioner attached to Kitui West Sub-County. He stated that all parties were invited to appear and present their cases in the appeal to the Minister, the Applicant was issued with notices to attend and even called through his private phone number.

20. In addition, the Respondent stated that the determination by the Minister was a well-articulated decision that took into consideration all the facts presented and fairly considered the rights of all the parties and rules of natural justice. He further stated that the Applicant's Judicial Review application offends the provisions of Order 53(2) of the Civil Procedure Rules for being brought more than 6 months after the Minister's decision was made.

21. The Respondent further claimed that rules of natural justice provide for finality of matters and that Section 29 Land Adjudication Act provides that the Minister's order shall be final. Further that the present proceedings were an appeal against the Minister's decision disguised as judicial review, it was an attempt by the Ex-parte applicant to relitigate a matter already heard and determined.

The Interested Party's Case

22. The Interested Party swore and filed a Replying Affidavit stating that at the Committee Stage of the adjudication process, the Ex-parte Applicant's father was given land parcel number 804 while his late father was given land number 802, which border each other and that both parties were satisfied with the land adjudication officers' decisions.

23. He stated that after the determination of this dispute, the brother to the Ex-parte Applicant's father MAKITI MITAU by the name KITIKI MITAU lodged a complaint over the lower part of parcel number 802 which had been registered in the Interested Party's father's name, MILAI KATITHI. This case was dismissed and the entire land parcel number 802 was ordered to remain the property of MILAI KATITHI, his father. The Ex-parte Applicant then lodged a complaint to the Arbitration Board, acting in place of his father. The Arbitration Board dismissed the case and upheld the earlier decision.

24. The Ex-parte Applicant then filed an objection and after hearing the parties he was awarded a portion of the upper part of Land Parcel 802 which was registered as land parcel number 3344. The interested Party claims that the claim by the Ex parte Applicant and the entire proceedings were not about the upper portion of land parcel 802 but the lower part.

25. Aggrieved by the decision of the Objection Board, the Interested Party states that his father appealed to the Minister and that the Ex parte Applicant also appealed against the dismissal of his claim and that the two appeals were consolidated and heard by the Minister where he represented his father since he was now deceased. His father's appeal was then allowed on 12.2.2018 to reclaim the upper part of the Land parcel 802 which had been issued with parcel number 3344 but the Ex parte Applicant's Appeal was dismissed.

26. After the implementation of the said decision by the Minister, the Ex parte Applicant filed Machakos ELC case number 161 of 2018. The Interested Party states that since the Minister's decision was delivered on 12th February 2018 and implemented on 23rd July 2018, the present Judicial review Application is bad in law for having been brought outside of the statutory period of six(6) months.

The Ex Parte Applicant's Submissions

27. The Ex parte Applicant submitted on the following 5 issues for determination;

- a. Whether the Judicial Review application is incompetent and should be struck out for being filed outside the statutory six months period.
- b. Whether the Ex parte Applicant's right to fair hearing was violated and he was condemned unheard.
- c. Whether there was an appeal over land number 3344 or not.
- d. Whether the Appeal number 221 of 1991 filed by Milai Katithi (Interested Parties father) was incompetent having been filed out of time.
- e. Whether the Minister had jurisdiction to hear the matter.

28. Regarding whether the Judicial Review is incompetent and should be struck out for being filed outside the statutory six months period, counsel for the Ex parte Applicant submitted that the application is properly before the court because the strict position of adherence to the

six months has changed. He relied on the cases of **Stephen Kibowen v Chief Magistrate's Court at Nakuru & 2 others(2017) eKLR** and **Republic vs Judicial Commission of Inquiry into the Goldenberg Affair & 3 others Ex parte Malulu & 3 others** where the judges in both cases held that where the decision being challenged was against the law or made without jurisdiction then it is not a decision against which time could run. That nullities are not covered by the six-month rule.

29. Secondly, the Ex parte Applicant submitted that his right to fair hearing enshrined in Article 50 of the Constitution was violated and he was condemned unheard. He insists that he was not served with summons to appear during the hearing of the Appeal and that the family member who was served with the summons was not stated. He also added that there is no affidavit of service to prove that he was indeed served and failed to attend. He submitted that this was a violation of his right to be heard and rules of natural justice while citing the case of **Pashito Holdings Limited & Another v Paul Nderitu Ndungu & 2 others(1997)Eklr** where the court held that if the principles of natural justice are violated, it is immaterial whether the same decision would have been arrived at and there is therefore no decision.

30. Thirdly, the Ex parte Applicant submitted on whether there was an appeal over land parcel number 3344 or not and stated that the Interested Party's father filed an appeal with respect to number 802 and the Minister had no basis to hear an appeal touching on number 3344. He prayed for the court to find that there was no appeal.

31. The Ex parte Applicant also submitted that the Interested Party's Father's Appeal 221 of 1991 was incompetent because it was filed out of time since the decision he was appealing from was issued on the 14th April 1987 with 60 days right of appeal. The Appeal was however filed in 1991, contrary to Section 29(1) of the Land Adjudication Act.

32. Finally, the Ex parte Applicant submitted that the Minister had no jurisdiction to hear an alleged appeal over land number MUTUNGO/MUSENGO/3344 because Title had already been issued. He submitted that the courts have held that once title has been issued, it is a preserve of the Court to cancel the same. He relied on the case of **Republic v Chairman Meru Central Land Disputes Land Tribunal & 4 others(2018)eKLR** where the court held that the Tribunal dealing with registered land exceeded its jurisdiction contrary to Section 3 of the Land Disputes Tribunal Act and prayed for their Application to be allowed.

The Respondents' submissions

33. The Respondent submitted on three issues namely;

- a. Whether the Minister followed due process in determining the appeal.
- b. Whether the orders made by the Minister's in land adjudication is final.
- c. Whether the applicant has locus to lodge a judicial review application after lapse of the statutory prescribed time.

34. On the first issue they submitted that all the parties involved in the proceedings were invited to present their cases including the Ex parte Applicant and that the determination of the Minister was well articulated with adherence to the provisions of the law and to the rules of natural justice. According to the Respondents, the ex parte applicant wishes to reopen the case in form of an appeal under the guise of a judicial review application.

35. Secondly, the Respondents submitted that under Section 29 of the Land Adjudication Act, the Minister's decision is meant to be final and cited the cases of **Samuel Gaichu Rinjeu v Mitambo Mangaara(2019)eKLR** and **Onesmus Daniel Masumbuko & others v Augustino Baya Thotho(2019)eKLR** where the courts held that they have no jurisdiction to sit on appeal against the Minister's decision.

36. Thirdly, the Respondents submitted that under Section 9(3) of the Law Reform Act, for an application for an order of certiorari, the application must be made no later than six months after the date of judgment and relied on Justice Mativo's finding in **Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR** where he found that sections 9(3) of the Law Reform Act and Order 53 Rule 2 Civil Procedure Rules are couched in mandatory terms. They submitted that the Applicant has filed the judicial review proceedings way out of time and did not seek for an extension of time and prayed that the Ex parte Applicant's application be dismissed with costs.

Interested Party's Submissions

37. Counsel for the Interested Party submitted that the award to the Ex parte Applicant of a portion a portion of land out of parcel 802 which was not subject of the Objection proceedings was surprising and this is what prompted the Interested Party's father to lodge an appeal to the Minister. In allowing his appeal and dismissing the Ex parte Applicant's appeal the Minister followed due process.

38. Further, the Interested Party submitted that the Ex parte Applicant was served thrice through summons delivered to his family through the area chief and also through telephone calls through his private phone line but failed to appear.

39. That the Ministers decision was implemented with notice to the Ex parte applicant and it was after implementation of this decision that the Ex parte Applicant filed Machakos ELC Case Number 161 of 2018.

40. The Interested Party submitted that this was an appeal disguised against the decision of the Minister disguised as a judicial review. Such an appeal does not lie by virtue of Section 29 of the Land Adjudication Act.

41. Counsel for the Interested Party further submitted that the present judicial review application was not made within the required 6 months

period in contravention of Section 9 (3) of the Law Reform Act. and that the Applicant locked himself out of this relief when he filed Machakos ELC case number 161 of 2018. They therefore submitted that the application is incompetent and improperly before the court and prayed that it be dismissed with costs.

Analysis and determination

42. Having considered the Notice of Motion dated 8th October 2020, the supporting affidavits and the submissions, I opine that the following issues arise for determination:

- A. Whether the Judicial Review Application was filed out of time.
- B. Whether the Appeal to the Minister was filed out of time.
- C. Whether the Appeal to the Minister was conducted in accordance with the law.

43. On issue number A) whether the Judicial Review Application was filed out of time, Prayer 1 of the Notice of Motion seeks “*an order of certiorari to remove into this court for purposes of quashing the judgement of the 1st Respondent, Deputy County Commissioner, Kitui West Sub County delivered on 12/2/2018.*” The application for leave herein was filed on 6th October 2020 about thirty-two months after the 1st Respondents decision. Section 9(3) of the Law Reform Act provides that;

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

Order 53(2) provides as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave.”

44. The parties have challenged leave granted by the Honorable Justice Angote at Machakos on 7th October 2020 and the said issue now stands for determination. My observation is that Courts have taken different approaches to interpretation of the provisions Section 9 (3) Law Reform act and Order 53 Rule 2 of Civil Procedure Rules. On one hand, some judges have applied them strictly and others have exercised their discretion and granted leave to file judicial review proceedings. Justice Mativo in the case of **Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR(Supra)** strictly applied and found as follows regarding the above provisions:

“In conclusion, it is my finding that the provisions discussed above are couched in mandatory terms and must be complied with. Further, Order 50 Rule 6 which permits for extension of time being a subsidiary legislation cannot override the provisions of sections 8 and 9 of the Law Reform Act. Article 159 (2) (d) of the constitution of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. I must however point out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010 are couched in Mandatory terms. The applicant cannot seek refuge under Article 159 (2) (d) of the constitution under the present circumstances in view of the mandatory and express provisions cited above.”

45. On the other hand, the Court of Appeal at Nyeri sitting in Nakuru took a different approach in **Stephen Kibowen v Chief Magistrate’s Court Nakuru & 2 others [2017] eKLR(Supra)** where they found that if the decision is a nullity, then it is incapable of triggering a statutory bar.

“Did the learned Judge so wrongly exercise his discretion as to warrant our interference? We are afraid so. It is clear from the brief ruling that the learned Judge took a strict approach to the 6-month limitation period and concluded that the application before him was incompetent. Ordinarily, such a conclusion would be unimpeachable but, in the matter before the learned Judge, what was being challenged was not a decision properly made within jurisdiction against which time could run. Rather it was a nullity which amounted to nothingness. It was therefore incapable of commencing a reckoning of time and was definitely incapable of triggering a statutory bar, being in every respect barren and of no effect. Had he given full consideration to the nature of the order being challenged before him he would likely have arrived at a different decision.

We agree with the opinion of a 3-Judge bench of the High Court in **REPUBLIC vs. JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDERNBERG AFFAIR & 3 OTHERS EX PARTE MALULU & 3 OTHERS** that “nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle to the nature of nullities”. We agree further that courts are possessed of an inherent jurisdiction not confined to order 53 (now order 54) that can be invoked, whenever the courts are moved, to quash any nullities and illegalities. It would be an abdication of its duty for the court to which acts that are such nullities are exposed to fail to invalidate and quash them by appropriate orders and declarations.”

46. In my opinion, the question of whether or not the decision of the 1st Respondent was a nullity was a question that would have to await determination after full hearing of the substantive matter. If the decision in the Minister's Appeal is found to be illegal or a nullity, then applying the finding in the case of **Stephen Kibowen (supra)**, the decision would be *incapable of commencing a reckoning of time and was definitely incapable of triggering a statutory bar, being in every respect barren and of no effect*. I am bound by the Court of Appeal decision above and find that leave was properly granted for the reason that the challenge to the decision of the 1st Respondent was on questions of jurisdiction and whether or not the said decision was a nullity.

47. On issue number B) whether the Appeal to the Minister was filed out of time, it is noted that the Ex-parte Applicant claims that the Interested Party's Appeal to the Minister was filed out of the required 60 days allowed under Section 29 of the Land Adjudication Act. Objection proceedings were heard and determined and judgement entered on 14th April, 1987 whilst the appeal was lodged in 1991. The Interested Party's appeal bears the number Appeal 221 of 1991, while the appeal by the Ex parte Applicant is Appeal number 226 of 1991. From the documents filed by both parties it is not clear the date of filing of the appeals. However, from the serialization of the case numbers, it is clear that the appeals were filed in 1991. None of the parties filed their Grounds/Memorandum of Appeal or receipt showing the date on which the appeals were lodged. It would thus mean that both parties lodged their appeals out of time in 1991.

48. The verifying affidavit of the Ex-parte Applicant sworn on 5th October 2020 at paragraph 10, raised the issue of the late filing of the appeal to the Minister where the Applicant states: **"That however the Interested father filed an appeal number 221/1991 though late against plot number 802 while I also filed an appeal against the same plot number 802 since I felt there was a portion I was not given by the arbitration board but I was contented with plot number 3344."** The Applicant's further affidavit sworn on 12th April 2021 at paragraph 13 states **"And the appeal number 221 of 1991 filed by Milai Katithi was incompetent having been filed out of time and the Minister had no business determining the same. The ruling was given on 14/4/1987 partially in my favour and granted the interested parties father 60 days right of appeal but he did not do so until 1991 when his appeal for a different land number 802 was recorded as 221 of 1991 which is way out of time"**

49. Section 29(1) of the Land Adjudication Act Cap 284 Laws of Kenya provides that;

"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."

50. Angote J in **Kimwele Kithoka & 26 others v Deputy County Commissioner Kyuso Sub-County & 7 others [2022] eKLR** found that the case numbers in the Minister's Appeal indicated that the Appeals were filed out of the requisite 60 days because the parties had not attached a Memorandum of Appeal or receipt to show when they were actually filed. The Hon Judge held that:

"Indeed, this court takes notice of the fact that the appeal case numbers were issued in the year 2013 and not 2012. Having failed to provide a copy of the memorandum of appeal which will have shown when the same was filed, or a receipt clearly showing the date the said memorandum of appeal was filed, it is my finding that the 7th Respondent has failed to show that indeed he filed appeal numbers 89 and 90 of 2013 within the requisite 60 days."

51. Based on the provisions of Section 29 of the Land Adjudication Act I find that the two appeals to the Minister number 221 of 1991 and 226 of 1991 were filed out of time and for that reason the Minister lacked jurisdiction to hear and determine them. Consequent to that finding I do declare that the proceedings before the Minister were a nullity and the same ought to be quashed on that ground alone.

52. The above determination on jurisdiction would bring this matter to an end. However, I will address the other issues raised by the Applicant as hereunder.

53. On issue number C) whether the Appeal to the Minister was conducted in accordance with the law, the Ex parte Applicant submitted on the illegality of the proceedings on the ground that he was not served with Summons to appear and be heard in the Appeal. He further stated that there is no affidavit of service to confirm service. He claims that his right to a fair hearing under Article 50 of the Constitution was violated.

54. Going through the proceedings before the Deputy County Commissioner, I find that before commencement of the hearing he did make observations that the two parties were served three times to appear for hearing. This is what is stated in the said proceedings;

"The two parties were summoned three times to appear before the Deputy County Commissioner for the hearing of their cases on 1st November 2017, 2nd on 21st December 2017 and the 3rd time which was the final summon on 28th December 2017 but the Plaintiff in appeal no. 226 of 1991 never appeared in any of the three dates alleging work commitment did not allow him to appear while the other party appeared. The summons were served to him by the Sub county clerk who informed him of the dates and he agreed. It was therefore interesting after the Plaintiff in appeal case no. 226 of 1991 when he did not turn up for the hearing and he is the one who was proposing when he was free to attend court then his dates were the ones which were fixed. When the cases came up came up for hearing on 28th December 2017..."

55. Further, while writing his findings and judgement the 1st Respondent made the following finding;

"The Plaintiff in appeal case no. 226 of 1987, William M. Makiti did not appear in any of the three times summoned to do so although he was very much aware of the hearing dates because he was the one requesting for the dates and postponement of the hearing citing work commitment. On 28th December 2017, the final time to appear before the Deputy County Commissioner for

the hearing of the two appeal cases, William sent a text message which read (with all due respect let the land panel not my plot is no. 804 which has no appeal case according to records titles available if they sued another plot 802 there cant be case o mention land not sued by them let land board advice my case be stood.”

56. The summons said to have been served on the applicant were attached to the Respondents replying affidavit.

57. From the above excerpts from the proceedings before the 1st Respondent, I am satisfied that the Applicant was aware of the hearing of the Appeals as detailed in the findings and judgement of the 1st Respondent but failed to attend the hearing. I find that the Applicant has not shown that there exists a legal requirement under the Land Adjudication Act to file an Affidavit of service to prove service as requirement in Civil cases. Section 12 of the Land Adjudication Act provides for the procedure before the Land Adjudication officer and states:

“In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord”

However, the requirement to follow the procedure in civil suits is only applicable in proceedings before the Land Adjudication Officer and not applicable in an appeal before the Minister. This was found to be so in the case of **Timotheo Makenge v Manunga Ngochi [1979] eKLR** the Court of Appeal said as follows;

As regards res judicata, section 12(1) of the Act imposes on the adjudication officer a duty, when hearing an objection, “so far as is practicable” to follow the procedure directed to be observed in the hearing of civil suits.....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, by section 29 of the Act, is to, “determine the appeal and make such order thereon as he thinks just.”

58. The Ex parte Applicant further raised the issue of whether the Minister had jurisdiction to cancel his title to land parcel **MUTONGUNI/MUSENGO/3344** which was curved out of Land Parcel 802. He challenges the cancellation on two grounds, first that there was no appeal in relation to the said title and secondly that the Minister has no power or jurisdiction to cancel a title deed since the said power is only reposed in the courts.

59. Upon perusal of the pleadings, I have not found a copy of the Title deed or an Official search for the said parcel of land. I am of the view that the existence of the said title to **MUTONGUNI/MUSENGO/3344** has not been proved and I would hesitate to make any orders in relation to it. Further even if the said title deed did exist, I find that the ruling of the Land Adjudication Officer dated 14th April 1987 in Objection No. 414 of 1984 awarded the Exparte applicant a portion of the land parcel number 802. According to the Applicant the said land is the one that was given the number **MUTONGUNI/MUSENGO/3344**. In that case my view is that the land would fall for consideration in the appeal to the Minister since the appeal was against the Land Adjudication Officers judgement which included the portion awarded to the exparte applicant by the said Land Adjudication Officer.

For the foregoing reasons I find that prayer 1 of the Notice of Motion dated 8th October 2020 has merit and I make the following orders;

A. THAT an order of certiorari do issue to remove into this Honourable Court for purposes of quashing the judgment of the 1st Respondent, Deputy County Commissioner, Kitui West sub-county delivered on 12/2/2018.

B. Prayer 2 and 3 are hereby dismissed

C. Each party to bear its own costs

DELIVERED, DATED AND SIGNED AT KITUI THIS 16TH DAY OF FEBRUARY, 2022

HON. L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT

Judgement read in open court in the presence of-

C. Nzioka.....Court Assistant

B.M.Mungatia advocate.....for the Ex-Parte Applicant

M/s Karanja holding brief for Njagi.....for the Respondent

Mwalimu advocate.....for the Interested Party