IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APPL. NO. 48 OF 2012 (JR)

IN THE MATTER OF AN APPLICATION BY SAMPELAT OLE OLONDIKIR, SANTEYAN OLE TOME & MPOONO OLE KISOLEY FOR JUDICIAL REVIEW (PROHIBITION & MANDAMUS)

AND

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

AND

IN THE MATTER OF INTENDED CORRECTION OF MISTAKES/ERRORS WITHIN MASURURA ADJUDICATION SECTION

AND

IN THE MATTER OF SECTIONS 25, 26 AND 29 OF THE LAND ADJUDICATION ACT, CAP 284

AND

IN THE MATTER OF THE COMPLETION OF THE ADJUDICATION PROCESS, AT MASURURA ADJUDICATION SECTION

BETWEEN

REPUBLIC …… APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER,

TRANSMARA DISTRICT ……..…. 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT …… 2ND RESPONDENT

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

AND

DAVID NKOITOI OLEKIPINTOI

LEMPINYO OLE KILERAI

KISERIAN SAMWEL MOMBBOSHI

NARAMBEI OLE CHAMUSI

TEIYAI OLE NTUMURI

WILSON MEPUKORI CHERIKAT …… INTERESTED PARTIES

KAIKAI OLE NTOME

KIRERE OLE KISOKON

OLOINYEYIE OLENKOLIAI

LETEIPA CHERIKAT

EX PARTE

SAMPELAI OLE OLONDIKIR

SANTEYAN OLE TOME

MPOON OLE KISOLEY

JUDGMENT

1. **Introduction and matters arising;**

The facts of this case are to a large extent not in dispute. By a notice dated 28th May 1985 the 1st respondent declared Masurura sub-location of Siria West Location in Narok District to be an adjudication section. This declaration was made under the provisions of section 5 of the Land Adjudication Act, Cap 284 Laws of Kenya (hereinafter referred to only as **LAA**"). After this declaration, there were several aborted attempts to set up an adjudication committee for the adjudication section due to the disagreements between the area residents over the composition of the said committee. Ultimately, a thirteen (13) member committee was appointed through a highly contentious process to be the adjudication committee for the section. Following this appointment which was not approved by all the area residents, the adjudication process commenced in the section in earnest sometimes in 1989 under the supervision of the provincial administration who provided armed security to the committee members and the Land Adjudication Officers. The first round of adjudication process in Masurura section was completed in the year 1990 and by notice dated 16th November, 1990 the 1strespondent declared the adjudication register for Masurura Adjudication section complete and called for the inspection of the same and for those who considered the same to be incorrect or incomplete to raise objections within 60 days from the date of the notice. Those who were not satisfied with the said adjudication register raised their objections to the same which objections were heard and determined by the 1st respondent.

2. Another group of the area residents who were dissatisfied with the manner in which the whole process was carried out filed a judicial review application in the High court in Nairobi namely, **Nairobi High Court Misc. Civil Application No. 404 of 1990, Joseph Ole Naitipa &13 others –vs- The Narok District Land Adjudication & Settlement Officer & Another** (hereinafter referred only as "**the High Court Case**") challenging the appointment of the adjudication committee for Masurura Adjudication Section. Soon after the end of the objection period referred to herein above, the High Court issued an order in the High Court case on 17th January 1991 by which order the appointment of the adjudication committee for Masurura Adjudication section

was quashed and the 1st respondent was ordered to appoint a new committee from among the persons resident within Masurura Adjudication Section. In the meantime, following the determination of the objections that were raised against the adjudication register that I have referred to hereinabove, the 1st respondent forwarded to the 2nd respondent the finalized adjudication register for the 2nd respondent to certify the same as final and to forward the same to the 3rd respondent for registration and issuance of titles.

3. When the High Court order of 17th January 1991 aforesaid was issued, the adjudication process as stated above had been completed and what remained was only the certification of theAdjudication register as complete by the 2nd respondent and the registration of the said register by the 3rd respondent so that the area residents may be issued with titles for the land that had been demarcated and recorded in their favour. Apart from the said High Court order, there were several complaints lodged with the Ministry of Lands and the 2nd respondent over the manner in which the adjudication process in Masurura Section had been carried out. Upon being served with the High Court order aforesaid, the 1st and 2nd respondents interpreted the same to mean that they had to commence the adjudication process afresh. Consequently, by another notice dated 14th June 1996, the 1st defendant re-declared Masurura sub-location an Adjudication Section. Following this declaration, a new adjudication committee was appointed to carry out the adjudication exercise afresh.
4. The second round of adjudication process proceeded until the year 2001 when it stalled due to unending wrangles among the residents of Masurura. Just as there were complaints against the first adjudication process, the second adjudication process attracted complaints in equal measure. The 1st and 2nd respondents were now left with in their possession, a complete adjudication register that was prepared during the first adjudication process and an incomplete adjudicate process following the re-declaration of Masurura as an adjudication section. In the circumstances, the 1st and 2nd respondents had to find a way out of completing the adjudication process in the area so that the residents may be issued with titles for their parcels of land. The 1st and 2nd respondents had three (3) choices in their hands namely; finalizing the adjudication register from the first adjudication and having the same registered, completing the second adjudication process which they had initiated or starting the adjudication process afresh by re-declaration Masurura sub-location an adjudication section for the third time. The 1st and 2nd respondent's considered all these options internally and also sought the opinion of the Attorney General on the matter. The opinion of the Attorney General was sought twice, first on the interpretation of the High Court order of 17th January 1991 and on the way forward after the second adjudication process stalled. The 1st and 2nd respondent's internal investigations of the numerous complaints that were raised by the area residents over the adjudication process in Masurura Adjudication Section that was carried out by the first and second adjudication committees led them to conclude, first, that it was not possible to register the completed adjudication register which came from the first adjudication process.
5. According to the memorandum that was sent by the 2nd respondent to the Permanent Secretary, Ministry of Lands on 30th June 2010, he stated that **"work of the first committee cannot be registered as they used aerial photographs to plot but no actual demarcation was done on the ground. Moreover it was all by hypothetical as the drawings did not conform with the ground. Some of the boundaries are passing over roof tops"**. Secondly, the 1st and 2nd respondents found the work of the second adjudication committee unsatisfactory and as such it was not possible to continue with the second adjudication process. According to the same memorandum that was sent by the 2nd respondent to the permanent secretary Ministry of Lands, the second adjudication committee was said to have **"worked on sketches drawn on pieces of paper and only availed a list of beneficiaries as in the case of a settlement scheme which is not procedural".** The Attorney General had earlier advised the 2nd respondent that the court order dated 17th January 1991 did not quash the first adjudication process and as such the 2nd respondent could still proceed and finalize the first adjudication process.
6. However even with this advice, the 1st and 2nd respondents still had difficulties. Their difficulties arose from what I have already set out above. The first adjudication process had errors and as

such the 2nd respondent could not proceed with the registration of the adjudication register that arose from that process. Finding itself in this quagmire,the 2nd respondent sought another opinion from the Attorney General on 24th May 2011 on the way forward. It is not clear from the record what advice the office of the Attorney General gave to the 2nd respondent following this request. However, on 13th December 2011, the 2nd respondent wrote to the 1st respondent informing the 1st respondent that it was necessary that **"correctional measures be put in place**" to complete the work on Masurura adjudication section. The 2nd respondent made it clear to the 1st respondent that the 2nd respondent was neither re-declaring Masurura sub-location Adjudication Section again nor putting in place a new committee and that the new exercise was simply intended to "**correct any mistakes done**". Following this letter from the 2nd respondent, the 1st respondent designated two (2) officers on 18th April 2012 to undertake the correction of the mistakes that the 2nd respondent had alluded to above. This was followed by a letter to the area chief by the 1st respondent requesting him to convene a public *Baraza* on 4th September 2012 for the purpose of sensitizing the members of the public generally on the adjudication work in the area and the need to carry out whatever correctional measures as may be necessary so that the adjudication register for the section may be registered. The applicants herein were aggrieved by the step taken by the 1st and 2nd respondents to carry out the so called "correctional measures" on Masurura Adjudication Section and moved to this court to stop the process.

The applicants' application;-

7. The applicants moved this court on 13th September 2012 by way of a Notice of Motion application of the same date seeking the following prayers:-

1. **That the application herein be heard on priority basis owing to the obtaining special and/or peculiar circumstances.**
2. **That the honourable court be pleased to grant an order of judicial review in the nature of prohibition, to issue to prohibit the 1st and 2nd respondents from purporting to revert to Masurura Adjudication (sic) with a view to carrying out and/or conducting correction of mistakes and/or errors, allegedly existing in the records of Masurura Adjudication and/or re-declaring Adjudication process at Masurura Section and thereby interfering with the Adjudication process, records and register, that was undertaken and lawfully completed in the year 1990, without due regard to the provisions of section 25, 26 and 29 of the Land Adjudication Act, Chapter 284, Laws of Kenya.**
3. **That the honourable court be pleased to grant an order of judicial review in the nature of mandamus, to issue to compel the respondents either jointly and/or severally to complete the process of checking the adjudication register and records, which were transmitted in the year 1990 and thereby issue the title documents, accordingly to the allottees and/or owners of the respective plots.**
4. **That the costs of this application be borne by the respondents jointly and severally.**
5. **Such further and/or other orders be made as the court may deem fit and expedient.**

8. The application was brought on the grounds set out in the affidavits sworn by the 1st applicant on 7th September 2012 and 13th September 2012 and on the statement of facts dated 7th September 2012. In summary, the applicant's application was brought on the grounds that the 1st respondent having declared Masurura sub-location an Adjudication section in the year 1985 and the adjudication process having been undertaken to conclusion resulting in the completion of the adjudication register in 1990, the 1stand 2nd respondents had no jurisdiction or power to carry out the correction of any mistakes or errors existing in the records of Masurura Adjudication Section and that the only duty that remained for them to perform was to present to the 3rd respondent the completed adjudication register for registration and issuance of titles under section 27 and 28 of

the LAA. The 1st respondent annexed to his affidavit sworn on 7th September, 2012, a copy of a notice by the 1st respondent dated 26th April, 1989 concerning the appointment of adjudication committee members for Masurura Adjudication Section, a copy of a letter dated 22nd April, 1993 addressed to the District Commissioner, Narok by the 1st respondent on the progress of adjudication at Masurura, a copy of a letter dated 13th December, 2011 from the 2nd respondent to the 1st respondent informing the 1st respondent of the decision to carry out the correction of mistakes and errors at Masurura Adjudication Section and a copy of a letter dated 2nd August, 2012 addressed to the Chief Masurura Location by the 1st respondent calling upon him to arrange for a public *baraza* to sensitize members of the public on the adjudication in Masurura Adjudication Section. The application was opposed by the interested parties. The respondents were served but they neither filed a replying affidavit nor appeared in court to oppose or support the application. In opposition to the application, the interested parties filed two (2) replying affidavits both sworn by the 1st interested party on 11th February 2013 and 9th September 2013. The interested parties opposed the applicant's application on their own behalf and on behalf of other 460 persons who are said to ordinarily reside within Masurura Adjudication Section. The interested parties opposed the application on several grounds. The interested parties contended that the application is fatally defective incompetent and amounts to an abuse of the process of the court.

9. The interested parties contended further that the adjudication process at Masurura Adjudication Section was marred by protracted disputes, disagreements and violence. The interested parties contended that the adjudication, demarcation and allocation process was not carried out in accordance with the law more particularly the LAA. The interested parties contended that the first adjudication committee that was appointed upon the declaration of Masurura as an adjudication section in 1985 carried out its work with malice, bad intention and arbitrarily as a result of which several bonafide residents of Masurura were not allocated land while equal number of non-residents were given land within the Adjudication section. This resulted in several complaints that led to the filing of the High Court case and subsequent quashing of the appointment of the adjudication committee. The interested parties contended that although the 1st and 2nd respondents appointed a new committee and started the whole process afresh, the new committee was not able to execute its mandate professionally in accordance with the law. This left the process in limbo. The interested parties contended that the 1st and 2nd respondents detected several defects in the adjudication work done by the first and second adjudication committees which rendered the adjudication registers prepared by them unregisterable. The interested parties contended that in the circumstances, there is need to correct Masurura Adjudication Register in a transparent and fair manner. The 1st interested party annexed to his said affidavits among others, a copy of a notice dated 28th May, 1985 that declared Masurura Sub-location an Adjudication Section for the first time, copies of letters dated 13th March, 1990, 23rd January, 1989, 22nd December, 1989, 12th January, 1990 that were exchanged between the permanent secretary Ministry of Lands, the 2nd respondent and the provincial commissioner Rift Valley Province over the constitution or appointment of the adjudication committee for Masurura Adjudication Section, a copy of the court order that was issued in the High Court case on 17th January, 1991, a copy of a notice dated 14th June, 1996 that declared Masurura Location an Adjudication Section for the second time, a copy of a letter of advice dated 18th November, 2005 addressed to the 2nd respondent by the Attorney General, internal memoranda exchanged between the Minister for Lands, the permanent secretary Ministry of Lands and the 2nd respondent dated 4th March, 2009, 2nd April, 2009, 8th May, 2009, 17th September, 2009 and 30th June, 2010 detailing how the adjudication process was carried out at Masurura Adjudication Section, the difficulties faced by the 2nd respondent in concluding the process and the proposals on the way forward and a copy of a letter dated 24th May, 2011 from the 2nd respondent to the Attorney General seeking legal advice on how to deal with the legal issues that had arisen at Masurura Adjudication Section.

10. Due to the foregoing,the interested parties supported the decision by the 1st and 2nd respondents to correct mistakes and errors in the Masurura Adjudication Register which is challenged herein by

the applicants. On 29th July 2013, the advocates for the parties agreed to argue the applicants' application by way of written submissions. The applicant's filed their submissions on 4th November 2013 while the interested parties filed their written submissions on 23rd September 2013. I have considered the applicants' application, the two (2) affidavits filed in support thereof and the statements of facts. I have also considered the replying affidavits filed by the interested parties in opposition to the application. Finally, I have considered the parties' respective written submissions and the case law cited. The applicants' and the interested parties' advocates had each framed what they considered as issues for determination in the present application. I have summed up the issues for determination as follows:

i. **Whether the application herein is competent.**
ii. **Whether the applicationdiscloses valid grounds that would justify the grant of the orders of prohibition and mandamus sought.**
iii. **Whether the applicant is entitled to the orders sought.**

11. **Issue No. I.**

The interested parties have contended that the application herein is incompetent on account of the fact that the same was filed contrary to the provisions of section 30(1) of the LAA in that the applicants did not obtain consent of the adjudication officer prior to the filing of this application. On this issue, I am in agreement with the submission by the applicants' advocate that no consent was required from the adjudication officer before the institution of these proceedings. A similar issue was raised in Kisii JR. No. 17 of 2012, **R –vs- The District Land Adjudication and Settlement Officer & Another** ex parte **Antina Mohamed Hamisi**. In that case, I cited the Court of Appeal case of,**The Commissioner of Lands –vs- Kunste Hotel Ltd [1998] E. A 1**and stated that:

> **"In the present case, what are barred by the Act under section 30 (1) are, Civil proceedings. Since judicial review proceedings are neither civil nor criminal in nature, it is my finding that judicial review proceedings are not subject to the provisions of section 30 (1) of the Act. No consent was therefore required from the land adjudication officer before the institution of these proceedings. The application herein is therefore not bad in law for want of such consent as contended by the interested party".**

I fully adopt my decision in the cited case. The interested parties have not cited any case law that would persuade me to depart from my decision in the above case. The cases of,**Republic –vs- Communication Commission of Kenya, ex parte East Africa Television Network Ltd (2001) KLR 82** and **Republic –vs- Commissioner of Co-operative Development & Another ex parte Gusii Farmers Rural Sacco (2004) 1 KLR 483** that were cited by the applicants support the same view that judicial review proceedings are not subject to the provisions of other statutes. Due to the foregoing, it is myfinding that the applicants' application herein is properly before the court.

12. **Issue No. II.**

The applicants have sought orders of prohibition and mandamus. The order of prohibition is sought to prohibit the 1st and 2nd respondents from reverting to Masurura Adjudication Section with a view to carrying out and/or conducting the correction of mistakes or errors which are said to exist in the records of Masurura Adjudication Register and/or re-declaring adjudication process at Masurura. In, **Halsbury's Laws of England, 4th Edition, page 137, paragraph 128**, an order of prohibition is defined as:

> **"An order issuing out of the High Court of Justice and directed at an ecclesiastical or inferior temporal court, or at the crown which forbids that court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land."**

For the applicants to be entitled to an order of prohibition, they must demonstrate that the 1st and 2nd respondents are in the process of acting either in excess of their jurisdiction or in contravention of any law. Have the applicants discharged this burden? From the summary of the facts that I had set out at the beginning of this judgment, it is clear that there have been two adjudication processes at Masurura sub-location. The first adjudication process was finalized and a completed adjudication register prepared and forwarded to the 2nd respondent by the 1st respondent for further action in accordance with the provisions of section 27 of the LAA. For reasons that I have stated above namely, disagreements and disputes over the said adjudication process and a High Court Order quashing the appointment of the adjudication committee, a second round of adjudication process was commenced. The same was carried out and stalled midway. Both adjudication processes were commenced following a declaration and a re-declaration of Masurura as an Adjudication Section under the provisions of section 5 of the LAA and was carried out by two different adjudication committees that were appointed under the LAA. The reasons that led to the abandonment of the first adjudication process and the commencement of the process afresh are the same reasons that affected the second round of adjudication and led to the stalling of the same. As I have stated above, the 1stand 2nd respondents are now left with a completed adjudication process that was abandoned and an incomplete fresh adjudication process.

13. As I have already highlighted above, the first and second adjudication processes at Masurura have been found to be wanting by the 1st and 2nd respondents, by a section of the area residents and by the High Court. The end products of the two processes have been declared un-registerable by the 2nd respondent. The same are said to be full of errors and mistakes. Under the LAA the conclusion of an adjudication process is the registration of the adjudication register by the chief land registrar and the issuance of titles to the persons in whose favour land was demarcated and recorded during the process. The process once started must be brought to an end. With a view to finalize the adjudication process at Masurura, the 1st and 2nd respondents have decided to go back to the ground and correct the mistakes and errors which were committed during the adjudication process in the area. It is not clear whether the mistakes or errors that the 1st and 2nd respondents would wish to correct are those which arose from the first adjudication process or the second process. It is also not clear as to what these errors or mistakes are and the extent to which their correction would affect the two adjudication processes that have been conducted in the area. The question that begs for an answer at this stage is whether the 1st and 2nd respondents would be acting illegally or in excess of their powers under the LAA in correcting the said mistakes and errors. The applicants' contention and submission is that once the adjudication register for Masurura was declared complete, the objections taken and determined under sections 25 and 26 of the LAA, the 1st and 2nd respondents have no power bestowed upon them under LAA or under any law to carry out correction of any mistake on the said register.
14. According to the applicants, mistakes or errors if any ought to have been detected, raised and dealt with during the preparation of the register and more particularly through objections under section 26 of the LAA. Under section 27 of the LAA, the 1st respondent is supposed to send to the 2nd respondent the adjudication register after all the objections have been determined. The 2nd respondent is supposed to certify the said adjudication register as final and forward it to the 3rd respondent for registration. In the present case, the 1st respondent had forwarded to the 2nd respondent the completed register for certification and onward transmission to the 3rd respondent for registration. The 2rd respondent neither certified the said register as final nor forwarded the same to the 3rd respondent for registration. From the material before me, the reason given by the 2nd respondent for failure to act is that the adjudication register which was forwarded to him had errors and mistakes which require correction. I am of the opinion that the statutory power given to the 2nd respondent under section 27 of the LAA to certify the adjudication register as final confers upon the 2nd respondent some incidental powers for the better carrying out of that exercise. I am of the view that the power given to the 2nd respondent to certify the adjudication register and to forward the same to the 3rd respondent is a process and not an event. I believe that the 2nd respondent as the overall in charge of adjudication has a duty to ensure that the adjudication process is carried out properly in accordance with the law. Section 48 of the Interpretation and

General Provisions Act Cap. 2 Laws of Kenya provides as follows:

> **"Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be so conferred as are necessary to enable the person to do or to enforce the doing of the act or thing."**

15. The 2nd respondent has been empowered to ensure that the adjudication process is completed in accordance with the law and that the completed adjudication register is forwarded to the 3rd respondent for registration. I am of the opinion that it must be implied in this power, the power to correct any mistakes or errors apparent in the adjudication register before the same is certified as final and sent to the 3rd respondent for certification. In his book, **Public Law in East Africa, published by Law Africa,** Ssekaana Musa, has stated as follows regarding incidental powers at page 97, " **The powers of an authority include not only those expressly conferred by statute but also those, which are reasonably incidental to those expressly conferred by the statute**." The incidental powers are, to quote Ssekaana Musa, "*those powers which may be necessary and helpful for the discharge of the primary function or power*". In the circumstances, I am not in agreement with the contention by the applicants that the 2nd respondent has no power to correct any mistakes or errors in the adjudication register before it is certified as final and forwarded for registration by the 3rd respondent. In my view, the issue should not be whether the 1st and 2nd respondents have the power to correct mistakes or errors in the Adjudication Register but which errors or mistakes can corrected by the 1st and 2nd respondents after the Adjudication Register has been declared complete and all objections determined.
16. In the instant case, it is not clear as to what mistakes or errors exist in the Adjudication Register for Masurura which the 1st and 2nd respondents intend to correct. It is also not clear or certain whether the said correction will affect the interest of anyone leave alone the applicants before the court. It cannot be said at the moment therefore that the 1st and 2nd respondents intend to act outside the powers conferred upon them by law or in breach of any law. What the 1st and 2nd respondents have set out to do is not yet clear. What is unknown cannot be illegal or irregular. I am of the view that the application before the court for an order of prohibition is premature. The same is based on conjecture. The applicants are speculating that the mistakes or errors sought to be corrected by the 1st and 2nd respondents would interfere with the interests which have already accrued to them under the first adjudication process in breach of the provisions of sections 25, 26 and 29 of the LAA. It is my finding that the applicants have failed to demonstrate that the correction of mistakes or errors which the 1st and 2nd respondents intend to carry out are outside their jurisdiction or are in breach of any law. In the premises, the order of prohibition sought is not available to the applicants.
17. The disposal of this issue takes me to the order of mandamus which has also been sought by the applicants. The applicants have sought an order of mandamus to compel the respondents jointly and/or severally to complete the process of checking the adjudication register and records which were transmitted in the year 1990 and proceed to issue the title documents to the allottees and/or owners of the respective plots in Masurura Adjudication Section. In **Halsbury's Laws of England, 4th Edition at page 111 paragraphs 89 and 90** the authors have explained the nature and mandate of mandamus as follows:-

> **"The order of mandamus is of most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is**

imposed a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

18. In the Court of Appeal case of,**Kenya National Examination Council –vs- Republic, ex parte Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal No. 266 of 1996** (unreported), the court explained the principles pronounced in the foregoing passages from Halsbury's Laws of England as follows:-

"They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

It is not in dispute that the 1st and 2nd respondents have a public duty owed to the applicants to prepare an Adjudication Register and have the same presented to the 3rd respondent for registration and subsequent issuance of titles to the residents of Masurura adjudication section. What is in dispute is whether the respondents have failed and/or refused to perform that duty and if so whether this court can compel the respondents to perform the duty in the manner sought by the applicants. I have set out in detail at the beginning of this judgment the history of the adjudication process at Masurura and the challenges and intrigues that accompanied the same. From the challenges that the 1st and 2nd respondents have faced during the said process which I have highlighted above, I do not think that it would be correct to say that the 1st and 2ndrespondents have failed and/or refused to finalize the Adjudication Register that was completed in the year 1990 and to forward it to the 3rd respondent for registration and issuance of titles. To start with, there were two adjudication processes at Masurura. In both cases, the land in the area was demarcated and recorded in favour of the residents. The two processes had issues and the 2nd respondent found the Adjudication Registers which were produced through the two processes incapable of being registered by the 3rd respondent in the form in which they are. It is on account of this problem or difficulty that the 1st and 2nd respondents have proposed that the errors and mistakes in the said registers be corrected before the same is presented to the 3rd respondent for registration.

19. I am of the view that the duty imposed upon the 2nd respondent to certify the adjudication register as final and to forward the same to the 3rd respondent for registration is a general duty which carries with it some discretion. This court cannot therefore compel the 2nd respondent to perform the duty immediately more particularly when there is evidence before the court that the duty is incapable of being performed. An order of mandamus will not issue in vain. I am also of the view that this court cannot compel the respondents to complete and register the Adjudication Register that was prepared in the year 1990. As I have stated above, there have been two (2) adjudication processes at Masurura. During the two processes, some forms of adjudication registers were produced. I do not think that it is the duty of this court to decide for the 1st and 2nd respondents as to which of the two (2) adjudication registers should be presented to the 3rd respondent for registration. I am in agreement with the contention by the applicants that the first adjudication process was completed. However, the 1st and 2nd respondents decided to commence the process afresh. They had their reasons for doing so. Whether it was as a result of the order that was issued by the High Court or the errors and mistakes that they had detected is not for determination in these proceedings. The 1st and 2ndrespondents' decision to commence the adjudication process at Masurura afresh has not been challenged. In the circumstances, it would not be in order for this court to direct the 1st and 2ndrespondents in what manner they should perform their duty. That unfortunately is what the applicants have sought from this court in their prayer for mandamus. Due to the foregoing, I am of the opinion that the applicants have not made out a case for an order of mandamus.

20. I would wish to add that even if the applicants had shown cause for the grant of the order of

mandamus sought, I would still not have issued the order having regard to the special circumstances of this case. As a general rule, the grant of an order of mandamus is a matter for the discretion of the court. The order is not given as of right or as a matter of course. I have noted from the material before me that there is a bitter wrangle pitying two groups residing at Masurura area regarding the adjudication process in contention which if not handled properly may lead to breakdown of law and order. In the circumstances, I am of the view that the 1st and 2nd respondents should be given free hand to do what they can within the powers conferred upon them by law to try to bring the adjudication process in the area which commenced 29 years ago to an end in a manner which is acceptable to the majority of the area residents. This end would not be achieved if this court was to direct the 1st and 2nd respondents to forward a particular Adjudication Register to the 3rd respondent for registration and issuance of titles.

21. **Issue No. III**

In conclusion, I have found the applicants Notice of Motion application dated 13th September 2012 unmeritorious. The same is hereby dismissed. Due to the peculiar nature of this case, each party shall bear its own costs of the application.

Delivered, dated and signed at Kisii this 29th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu for the Applicants

N/A for the Respondents

Mr. G. J Masese for the Interested Parties

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE