REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 304 OF 2013

IN THE MATTER OF AN APPLICATION BY KAKUI MUTISO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITIONS DIRECTED AT DISTRICT

COMMISSIONER MACHAKOS

AND

IN THE MATTER OF THE DECISION OF THE MACHAKOS MINISTERS LAND APPEAL NO. 181 OF 1988

BETWEEN

REPUBLIC ……..APPLICANT

VERSUS

DISTRICT COMMISSIONER MACHAKOS…….....…….. RESPONDENT

JOEL NZUKI NZIOKA…….....……INTERESTED PARTY

(For the appellant ESTHER NTHENYA NZIOKA)

KAKUI MUTISO.....*EX-PARTE*

JUDGEMENT

Introduction

1. The prayers the subject of this judgment are contained in the Notice of Motion dated 23rd August, 2013 in which the *ex parte* applicant, **Kakui Mutiso** seeks the following orders:

a. **Certiorari directed at the Respondent to remove and bring to the High Court to be quashed proceeding and ruling/judgment of the District Commissioner Machakos undated and disclosed to the parties therein on 6th August 2013 in Machakos Ministers Land Appeal No. 181 of 1988.**
b. **Prohibition directed at the Respondent, its servants and or agents or any land officer/surveyor or whomsoever acting on the basis of the aforesaid ruling/judgment from enforcing the order by way of execution, implementation or causing to be implemented the ruling/judgment made in Machakos Ministers Appeal No. 181 of 1988 or in any other**

manner.

c. **The osts of this Application be provided for.**

2. The application is supported by a statutory statement filed on 21st August, 2013 and a verifying affidavit sworn by the applicant on 20th August, 2013.
3. According to the applicant, the issues of ownership of land in dispute had been determined by District Officer, Iveti North by a ruling dated 16th March 1983 and 24th November 1983 in African Appeal Court C.C.I 296/51 in which the District Officer, Iveti North ruled that the land belonged to the applicant having purchased the same from **Kaloki Ngwae**.
4. Therefore when **Esther Nthenya Nzioka** started interfering with the disputed parcel in the applicant's plot 1312 the applicant lodged an objection before the Land Adjudication Officer and the Land Adjudication Officer in relying on the previous rulings ruled that the applicant should get the portion of the disputed land on the upper side of Mitaboni Kathiani road and be combined to his parcel of land number 1312. Being dissatisfied with the decision at the objection stage the said Esther made an appeal to the minister being Appeal No. 181/1988 which came for hearing on 30th November 1999 but did not proceed. When on the second occasion the matter came up 8th August 2000, **Esther Nthenya Nzioka** requested for an adjournment to enable her bring witnesses which was granted. However on 22nd August 2000 when the appeal was to be heard again although both sides brought witnesses, after the applicant had cross-examined the witnesses of **Esther Nthenya Nzioka** who had passed away by then, the District Commissioner ruled that he could not handle the matter any further and the parties went away.
5. However, on 17th December 2001 the applicant was served with a hearing notice for 19th December 2001 and when he went to the District Commissioner office on 18th December 2001, he was given another hearing date by the District Commissioner whereupon the applicant being unhappy with the manner in which the appeal was being handled requested the District Commissioner disqualify himself from hearing the appeal.
6. It was the applicant's case that from that date, 18th December 2002, he never received any communication or notice from the District Commissioner of when the appeal would be heard.
7. On 30th July 2013 the applicant received a summon from the Deputy County Commissioner Kathiani Sub County requiring him to appear before his office on 6th August, 2013 and on doing so, was told that records held in that office showed that proceedings and judgment in the aforesaid appeal had been sent to the Lands Office/Minister's Office in Nairobi and that he should go to the office and get copies of the same. Upon going to Nairobi, on 7th August 2013, he was given a copy of the appeal proceedings and ruling from which it transpired that the Respondent had set down the dispute for hearing on unspecified consecutive days in the applicant's absence and purportedly held that the piece of land which was earlier combined on parcel No. 1312 should be reverted back to parcel No. 1300 which was **Esther Nthenya's**.
8. It was the applicant's case that since he was never heard in the appeal it is clear that the Respondent perjured the evidence and purported to take away his land unprocedurally and that the Respondent condemned him unheard contrary to the cardinal rules of natural justice.
9. Further, the purported proceedings also reveal that the said District Commissioner purported to "substitute" the long deceased Appellant **Esther Nthenya Nzioka** with a person who was not a legal representative and continued to hear such person as though he was a party to the appeal.
10. The applicant's case was that the District Commissioner has no power to order that the parcel of land Plot No. 1312 Kathiani adjudication section be subdivided and a portion thereof be given to a person who is not a party to the appeal **Esther Nthenya Nzioka** who died long time ago when the appeal was still pending determination. Further, that the Respondent tribunal under the leadership of District Commissioner**, S. O. Warfa** having on unspecified date purported to exercise jurisdiction not conferred upon them and in utter disregard of the subsisting court orders, *sub judice* rule and the cardinal rules of natural justice, the Court should declare its purported decision null and void *ab initio*.
11. It was contended that the forwarding notice attached to the purported proceedings made by District Commissioner **S.O. Warfa** does not indicate date when the appeal was heard and when it was determined and though it indicates that the Appellant was **Joel Nzuki Nzioka,** his identity

card and his witnesses present, it does not say anything on the part of the Respondent hence the purported subdivision of the plot is arbitrary, *ultra vires*, without and/or in excess of jurisdiction and contrary to the rules of natural justice.

Interested Party's Case

12. On the part of the interested party, **Joel Nzuki Nzioka**, a replying affidavit sworn by himself on 4th November, 2013 filed on 5th November, 2013.
13. According to him, the Applicant was fully aware of the proceedings and judgment made in the Appeal to the Minister and the Applicant was given a fair hearing and fully participated in the proceedings as is evident from the proceedings.
14. According to him, the decision made by the District Commissioner in the Minister's Appeal that is now being challenged by the *Ex-parte* Applicant was delivered prior to 20th December 2012 since as at that date certified proceedings copies of the proceedings and judgment in the Ministers Appeal were as available hence the *Ex-parte* Applicant's notice of motion is time barred as it was filed well over the 6 months statutory period in violation of Order 53 of the ***Civil Procedure Rules*** 2010.
15. Based on his advocate's advice, the interested party believed that the Minister had full jurisdiction and mandate to hear and determine the dispute/appeal under the provisions of the ***Land Adjudication Act*** Chapter 284 Laws of Kenya. In his view, in determining rights to land issues under the ***Land Adjudication Act*** the applicable law is customary law under which substitution of parties can be made without taking out letters of administration under Chapter 160 Laws of Kenya and that where an Act of Parliament (such as Chapter 284) expresses a contrary intention in a matter then the provision of the ***Law of Succession Act*** do not apply as per the provision of Section 2 of the ***Law of Succession Act***.
16. The interested party's view, based on the same advice was that once the subject area in dispute was declared an adjudication area then all earlier decisions touching on ownership of the land in dispute were not binding on the Tribunals (objection stage/Ministers Appeal) established under the ***Land Adjudication Act*** in resolving the dispute.
17. To the interested party, the *Ex-parte* Applicant in the motion before the court is only challenging the merits of the Ministers decision which is not the province of Judicial Review application hence the Motion has no merits and does not meet the requirements for granting of the orders sought.

Applicant's Submissions

18. On behalf of the Applicant it was submitted that the undated decision which purported to deprive the applicant of his land was unconstitutional as it violated Article 40 of the Constitution.
19. It was submitted that since the District Commissioner was acting in quasi-judicial capacity he was bound to follow the rules of natural justice and accord the parties the right to be heard before making his decision which it never did. In support of this submission, the applicant relied on **Fahim Yasin Twaha & Another vs. District Land Registrar – Lamu [2011] KLR** and **De Souza vs. Tanga Town Council [1961] EA 377.**
20. It was further submitted that since the appellant before the Minister was **Esther Nthenya Nzioka** who passed away before the appeal was heard and was not substituted, the Respondent acted wrongly in proceeding to hear the appeal hence the proceedings were null and void and reliance was placed on **Najeno vs. Serwanga [1974] EA 322**. On the same vein it was submitted that the Respondent had no jurisdiction to decide issues of a deceased appellant and give the applicant's land to a deceased person.
21. According to the applicant, the land having been given to the applicant by the District Officer, Iveti North and confirmed by the District Commissioner, the issue was res judicata and the Respondent had no jurisdiction to give the applicant's land to a deceased person.
22. It was submitted that since the impugned decision was undated and does not show when the ruling was delivered, the interested party cannot rely on the date of certification of the proceedings to support his contention that the Motion is time barred. Based on the decision in **Ako vs. Special District Commissioner Kisumu & Another [1989] KLR 163**, it was submitted that the date to be considered is the date of judgement and not the date of certification thereof.

23. Since he Respondent made a decision without following the due process of the law, it was submitted on the authority of **Commissioner of Lands vs. Kunste KLR (E&L) 249** that his decision is subject to judicial review.

Interested Party's Submissions

24. According to the interested party, the record shows that the applicant participated in the proceedings before the Minister and even cross-examined the appellant hence the contention that he was not heard cannot stand.
25. It was the interested party's case that the application is time barred under sections 8 and 9 of the ***Law Reform Act*** as read with Order 53 rule 2 of the ***Civil Procedure Rules***. Since the proceedings were typed and certified on 20th December, 2012, it was submitted that it was clear that the judgement was made prior to that date. In support of this submission the interested party relied on **Republic vs. Principal Magistrate's Court Muranga and 4 Others ex parte Milka Nyambura Wanderi [2013] KLR**.
26. According to the interested party in this case since the appellate process provided under section 28 of the Land Adjudication Act was not followed this Court cannot interfere and relied on **Republic vs. District Land Adjudication and Settlement Officer Kilifi District & Others ex parte Munga Alfred & Another [2013] eKLR** and **Republic vs. Machakos District Land Disputes Tribunal and 2 Others ex parte Stephen Kimeu Nguku and Another** and urge the Court to disallow the application with costs.

Determinations

27. 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."

28. 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."

29. The High Court, on the other hand, in **Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa High Court Miscellaneous Application No. 40 of 2000** pronounced itself as follows:

"Individual ownership of land is guaranteed in the constitution. The policy of Government is evidenced in the passing of Land Consolidation and Land Adjudication and Registration programme resulting in individual tenure, which is the opposite of communal tenure. There is no tenure based on ancestral claim and or ethnicity where land has been registered as the registration of land ownership individualizes tenure and results in eradication of communal or any other tenure."

30. In my view, under the land consolidation and adjudication processes, the issue before the relevant tribunals is the determination of interest in land rather than individual ownership since individual land tenure only comes into being on registration. The preamble to the ***Land Adjudication Act***, Cap 284, Laws of Kenya states that it is *"An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto."* Therefore, before registration the land in question is either ancestral or falls under any other form of communal ownership i.e. Trust land. In such instances, it is my view that the application of the strict succession legal regime does not apply since in my view the issue of estate may not be readily applicable to ancestral or communal property as such. My view is supported by the provisions of the ***Law of Succession Act***, Cap 160 Laws of Kenya. Under section 79 of the Act:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

31. Therefore the property which vests in the personal representative of the deceased is the property of the deceased. Under section 3 thereof "estate" is defined to mean "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death".
32. In my view communal property cannot therefore be said to form part of the estate of the deceased. It would therefore follow that before the land is registered in the name of a person and thus bestowed with individual tenure thereof, the land in question cannot form part of the estate of the deceased in order to require a person claiming the same to obtain letters of administration before making such a claim.

33. To apply strict succession legal regime to such property would render the process of land adjudication and consolidation loose its purpose and meaning. It ought to be noted that by section 13 of the ***Land Adjudication Act***, every person who considers that he has an interest in land within an adjudication section may make a claim to the recording officer and point out his boundaries to the demarcation officer. It follows that the person claiming an interest in land within an adjudication area need not to have letters of administration in order to be entitled thereto. I therefore associate myself with **Wambuzi, JA** in **Timotheo Makenge's Case** (supra) that:

"there is no question of anyone bringing a land action before the committee. The functions of the committee are clearly laid down in section 20 of the Act. As far as is relevant to this case the section provides that the committee shall, "adjudicate upon and decide in accordance with recognised customary law any question referred to it by the demarcation officer or the recording officer".

34. It is therefore my view that it was not necessary that the interested party obtain letters of administration and be substituted in place of the deceased appellant before the appeal could proceed.
35. The next issue is whether these proceedings are time barred under Order 53 of the ***Civil Procedure Rules*** as read with sections 8 and 9 of the ***Law Reform Act***. Section 9 of the said Act***:***

9. (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—

(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;

(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) 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.

36. However, in **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 Of 1998** it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else. A decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under

Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.

37. I am further of the view that a Court of law ought not to drive a litigant from the seat of justice unless the law is clear that the cause of action is time bared under the relevant limitation statute. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

38. In the premises it is my view and I so hold that the six months limitation period was inapplicable to the present proceedings more so as none of the parties was able to state with certainty when the impugned decision was delivered.

39. It was contended that the District Commissioner ought to have been bound by the doctrine of *res judicata* in arriving at his decision since the dispute had been heard and determined by the District Officer and the District Commissioner. 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. Therefore the only issue for consideration is whether the fact that a determination had been made was taken into account since it was a relevant factor. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…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."

40. Similarly, in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

41. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must

direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters.

42. In his findings the respondent alluded to a previous case between the respondent and the seller in the Kangudo case in which boundaries were fixed. However, the Respondent does not seem to have considered the previous proceedings before the District Officer and the District Commissioner and this Court is unable to tell what decision the Respondent would have arrived at had he considered the same.

43. It was further contended that the Respondent by his decision in effect awarded the disputed land to a deceased person. As I have already stated hereinabove the purpose of the adjudication process is to determine rights and interest in a Trust land. It would therefore be erroneous to confer rights and interests in such land on a deceased person. However, in this case what the Respondent found was that "the piece of land which was earlier combined on parcel No. 1312 should be reverted back to parcel No. 1300 which was **Esther Nthenya's** as per the demarcation ruling". I do not construe this finding to mean that the Respondent awarded the disputed land to a deceased person.

44. The applicant further contended that he was never afforded an opportunity of being heard after he cross-examined the deceased appellant before the Respondent. The Respondent unfortunately did not, for reasons best known to it, participate in these proceedings. The interested party on the other hand while averring that the applicant cross-examined the deceased appellant did not enlighten the Court as to the nature of the proceedings which took place thereafter.

45. That a party is entitled to fair hearing cannot be overemphasized. In fact that requirement is a constitutional requirement. Article 47 of the Constitution provides as follows:

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

46. Article 50 of the same Constitution on the other hand provides:

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

47. In the absence of the evidence to the contrary emanating from the Respondent, this Court is left to determine the matter based on the material on record which does not show that the applicant was afforded an opportunity to be heard after the said cross examination. Since the applicant is alleging a negative i.e. that he was not notified of the proceedings if any which took place after the cross-examination, it was not possible for him to go further than that. This was the position taken by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991** in which he held:

"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons..... As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson at Para 95.**

48. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh**

Hussein Rajab Kakooza and 6 Others SCCA No. 9 of 1990 was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

49. Therefore with respect to the issue whether or not a notice was duly given to the applicant the onus lay on the Respondent to prove the same since the applicant could not prove a negative. It was sufficient for the applicant to aver that no such notice was given to him. In this case there is no evidence that the Respondent notified the applicant of the dates when the matter allegedly came up for hearing. Accordingly, this Court finds that on the basis of the evidence on record the applicant was never afforded an opportunity of presenting his case before the Respondent. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** it was held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

50. In the absence of clear evidence that the Respondent afforded the applicant an opportunity to be heard in the appeal before it, this Court is left with no option but to find that the Respondent's action was tainted with procedural impropriety.

51. In **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004**, the Court expressed itself as follows:

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…Although the courts have for a long time supplemented the

procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated….."

52. It follows that this Court has the powers to interfere with the decision of the Respondent arrived at in the exercise of its statutory mandate where the Respondent's powers are not validly exercised. To make a decision adversely affecting the applicant without affording the applicant an opportunity of being heard is in my view such invalid exercise of power warranting this Court to interfere.
53. In **De Souza vs. Tanga Town Council [1961] EA 377** was cited it was held that:

"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."

54. Having considered the matters raised herein it is my view that the Respondents decision was tainted by procedural impropriety in that the applicant was not afforded an opportunity of being heard before the decision was made. Apart from that the Respondent failed to take into account relevant matters i.e. past determinations in respect of the suit land. This does not necessarily mean that the respondent was bound by the same but they were relevant matters to be considered.

Order

55. In the premises the orders that commend themselves to me and which I hereby issue are as follows:

1. **An order of Certiorari is hereby issued removing into Court for the purposes of being quashed proceedings and ruling/judgment of the District Commissioner Machakos undated and disclosed to the parties therein on 6th August 2013 in Machakos Ministers Land Appeal No. 181 of 1988 which decision is hereby quashed.**
2. **Prohibition directed at the Respondent, its servants and or agents or any land officer/surveyor or whomsoever acting on the basis of the aforesaid ruling/judgment from enforcing the order by way of execution, implementation or causing to be implemented the ruling/judgment made in Machakos Ministers Appeal No. 181 of 1988 or in any other manner.**
3. **The costs of this Application are awarded to the Applicant to be borne by the Respondent.**

Dated at Nairobi this 25th July, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyimi for Mr Mulinda for the Applicant

Mr Odhiambo for Miss Cheruiyot for the Respondent

Miss Mudai for Mr Kitonga for the Interested Party