



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC PETITION NO.8 OF 2021

In the matter of the alleged contravention of fundamental rights and freedoms as enshrined in Article 21(1), 25(c), 27(1) and 47(1) and (2) and 50(1) and 159(1) and (3) of the Constitution of Kenya (2010)

AND

In the matter of the Preamble to and Articles 1,2,3,4,10,12,19,20,21,22,23,24,159,258,259 and 260 of the Constitution of Kenya (2010)

AND

In the matter of the Land Adjudication Act CAP 284 and in the matter of Special Minister Lands and Physical Planning appointed for purposes of appeals under section 29 of the Land Adjudication Act CAP 284

AND

In the matter of the decisions/rulings in Appeals No.394 of 2011 relating to Parcel no. 24 Kyuso ‘A’ Adjudication Section and Appeal No. 386 of 2011 for Land Parcel No. 25 Kyuso ‘A’ Adjudication Section dated 22.3.2018 respectively.

BETWEEN

1. KALUNDI MUTUA.....PETITIONER

-AND-

1. SIMON MUTULI KANG’E.....1STRESPONDENT

2. MUSYIMI KUSIKIRA(Deceased)

(Representative-KITANI MUTIA MUSYIMI)..2ND RESPONDENT

3. THE DEPUTY COUNTY COMMISSIONER,

KYUSO SUB-COUNTY.....3RD RESPONDENT

4. THE LAND ADJUDICATION AND

SETTLEMENT OFFICER, MWINGI.....4TH RESPONDENT

5. THE ATTORNEY GENERAL

OF THE REUBLIC OF KENYA.....5TH RESPONDENT

JUDGEMENT

1. Before the court is a Petition dated 15th October 2019 seeking the following orders:

a) A declaration that the process of administrative action and the proceedings of the adjudication adopted by the 3rd and 4th Respondents in the appeals herein were and/or was inconsistent with and in contravention of the law and in violation of Article 25(c), 47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya 2010, hence invalid, null and void.

b) A declaration that the proceedings and the verdict of the 3rd Respondent were in violation of fundamental rights enshrined in Article 25(c), 47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya and Article 10 of the United Nations Universal Declaration of Human Rights and hence fore null and void.

c) A declaration that in so much as S.29 of the Land Adjudication Act does not provide or have a clear legal or institutional and financial policy framework to support the adjudicative functions of the Deputy Commissioners or the District Commissioners as they were then, so as to ensure independence, impartiality and the integrity and leadership of the adjudication then it was in conflict with the aspirations of Articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya.

d) A declaration that in so much as S.29 of the Land Adjudication Act has not been revised, amended, repealed and/or reformed or any other legal framework thereto promulgated to accord or reflect the aspirations of or expectations of or expectations of or demands of the citizens of a fair trial and hearing within a reasonable time and or a fair administrative actions and the values, principles and objectives of good governance as expected of all adjudicative functions, then, to that extent, it is in conflict with Article 10(1) and (2), 19, 20, 21,22,25(c), 47(1) and 50(1) of the Constitution of Kenya(2010)

Brief Facts

1. The Petitioner describes herself as an unschooled adult female of sound mind and a peasant farmer in Kyuso Sub-county within Kitui County in the Republic of Kenya. The two parcels of land in dispute are Kyuso/Kyuso 'A'/24 and Kyuso/Kyuso 'A'/25 situated within the Kyuso Land Adjudication Section.

2. By an agreement dated 6th November 2005, the 1st Respondent purchased a portion of unsurveyed land measuring approximately eight point one eight four six hectares from Mulaki Mutisya, Mutemi Mutisya and Mwendwa Mutisya who were members of the family of one Mutisya. The 1st Respondent claims that upon purchase of the land he was given vacant possession and he started developing the same and he has been in possession to date.

3. The Petitioner on the other hand claims that the land was part of communal ancestral land of the family of one Kusikira and the family of Mutisya was part of the said clan. She claims that the clan met on 17th July 2009 to deliberate on division of the ancestral land and awarded her land parcel No. 24A Kyuso Land Adjudication Section which land was the same land that had been sold to the 1st Respondent. The Petitioner claims that the sons of Mutisya were ordered by the clan to refund the money they had been paid by the 1st Respondent for purchase of the land. At the same time the Petitioner claims that she was awarded by the clan land parcel No. Kyuso A 25.

4. The land herein was part of land that was declared an adjudication section by a notice dated 23rd June 2009 issued by the District Land Adjudication and Settlement Officer (Kyuso Adjudication Area). During the adjudication process, land parcel No. A 24 was adjudicated in the name of the 1st Respondent while land parcel No. A 25 was adjudicated in the name of the Petitioner. The Petitioner lodged a dispute to the adjudication Committee against the award of land parcel No A 24 to the 1st Respondent while the deceased Musyimi Kusikira lodged a dispute in relation to the award of land parcel No A 25 to the Petitioner. Upon hearing of the disputes, the Adjudication Committee awarded both parcels of land to the Petitioner.

5. The 1st Respondent and the deceased Musyimi Kusikira were dissatisfied by the two decisions of the Adjudication Committee and they lodged separate appeals to the Arbitration Board being appeal Numbers 2 of 2010 for land parcel No. A 24 and appeal No. 3 of 2010 for land parcel No. A 25. Upon hearing the disputes, the Arbitration Board reversed the decisions of the Committee and awarded the land parcel No. A 24 to the 1st Respondent and land parcel No. A 25 to the deceased.

6. Being dissatisfied by the decisions of the Arbitration Board, the Petitioner lodged separate objections to the Kyuso Land Adjudication Officer (4th Respondent) as provided by the law. Upon hearing the objections, the Land Adjudication Officer dismissed the objections and the two parcels of land remained adjudicated to the 1st Respondent and the deceased respectively.

7. The Petitioner being dissatisfied by the decision of the Land Adjudication Officer Kyuso lodged two appeals to the Minister vide appeal No. 394 of 2011 for parcel No. A 24 and 386 of 2011 for parcel No. A 25. The appeals were heard by the 3rd Respondent and a decision was made on 23rd March 2018 whereby the appeals were dismissed and the two parcels were declared as adjudicated in favour of the 1st Respondent and the deceased respectively.

8. The Petitioner claims that the action and adjudication proceedings by the 3rd Respondent were inconsistent with and in violation of the law and the constitution of Kenya and in particular Articles 21(1), 25(c), 27(1) and 47(1) and (2) and 50(1) and 159(1) and (3). The Petitioner's claim is based on the grounds that;

A) At the time of hearing the appeals, the 3rd Respondent incorporated the 4th Respondent as a "technical Officer" while knowing that the appeals before him were against the decision of the said 4th Respondent. The Petitioner claimed that the presence of the 4th Respondent in the proceedings compromised the 3rd Respondent's independence and impartiality due to obvious conflict of interest.

B) The 3rd Respondent incorporated three elders as part of the proceedings whose presence was not provided for in law.

C) The 3rd Respondent asked the Petitioners to pay Kshs, 5,000/- to facilitate a site visit to the suit land.

D) The 3rd Respondent did not visit the suit land and only the three elders visited the land yet the 3rd Respondent referred to and relied on the said visit in making his decisions.

E) As a result of the above, the Petitioner claims that the 3rd Respondent abdicated his duty by delegating the statutory duties that had been delegated solely to him by the Minister.

F) That the 3rd Respondent was dishonest and untruthful in evaluation of the evidence before him he failed to consider the Petitioner's evidence especially the determination of the land dispute by the clan.

9. The Petitioner further complained that in so much as S.29 of the Land Adjudication Act does not provide or have a clear legal or institutional and financial policy framework to support the adjudicative functions of the Deputy Commissioners or the District Commissioners as they were then, so as to ensure independence, impartiality and the integrity and leadership of the adjudication then it was in conflict with the aspirations of Articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya.

10. The Petitioner further claims that in so much as S.29 of the Land Adjudication Act has not been revised, amended, repealed and/or reformed or any other legal framework thereto promulgated to accord or reflect the aspirations of or expectations of or demands of the citizens of a fair trial and hearing within a reasonable time and or a fair administrative actions and the values, principles and objectives of good governance as expected of all adjudicative functions, then, to that extent, it is in conflict with Article 10(1) and (2), 19, 20, 21,22,25(c), 47(1) and 50(1) of the Constitution of Kenya(2010).

The Petitioner's Submissions

11. The Petitioner filed submissions dated 16th June 2021 and 1st March 2022, List of Authorities dated 16th June 2021 and 2nd March 2022 and highlighting in court on 11th of November 2021 and compressed issues for determination.

12. The Petitioner claims that the petition is grounded on fundamental complaints against the conduct of the 3rd Respondent of violation of the constitutional rights and fundamental freedoms in what the Petitioner alleges to have been conflict in exercise of power given under the constitution and other laws. The Petitioner reiterated the various provisions of the Constitution on the supremacy of the Constitution, national values and principles of governance that are binding to all state organs, state officers, public officers and all persons.

13. The Petitioner claims that the 3rd Respondent, as an adjudicator, authority body and/or tribunal was under an obligation to observe, respect, protect, uphold and defend the Constitution and fundamental freedoms in the Bill of Rights.

14. Counsel for the Petitioner submitted that under Section 29 (1) of the Land Adjudication Act, the Minister of Lands and Physical Planning is mandated to hear and determine appeals and the Deputy County Commissioner (3rd Respondent) was exercising this delegated authority. Consequently, under the maxim "*Delegates non potest delegare*" the delegated power is to the Deputy County Commissioner alone and cannot be delegated further to another person. According to Learned Counsel, the inclusion of the elders and the Adjudication Officer was a surrender or abdication of this power. Further that the empowered party was not present at the site visit yet the visit was included in his final decision.

15. The Petitioner submitted that there was an element of bias, conflict and a likelihood that the 4th Respondent would compromise the independence and impartiality of the 3rd Respondent and influence the appeal to uphold his own decision. That in the circumstances the 3rd Respondent ought to have been guided by the Latin principle *Nemo Judex in Causa Sua*(no one is judge in his own cause).

16. The Petitioner's Counsel submits that her right to fair trial under Article 25(c) and 50 (1) of the Constitution was violated and she lodged a challenge under Section 7 of the Fair Administrative Act. That the hearing before the 3rd Respondent did not meet the threshold of Article 50 (1) for failure to be an independent and impartial tribunal as envisaged under the law.

17. Further on the issue of bias the Petitioner claims that the 3rd Respondent failed to consider her evidence and especially the decision of the clan made on 17.7 2009 that awarded the suit land to her. She further claimed that the 3rd Respondent relied heavily on the evidence of the deceased and thus violated her right to natural justice.

18. Counsel quoted several legal authorities **H. W. R Wade, Administrative law, 5th Edition, Selvaragan v. Race Relations Board (1976) 1 ALL ER, Keroche Industries Ltd V. Kenya Revenue Authority & 5 Others (207) eKLR, Sugumar V. Pengraph (2000) 1 LRC** to support the proposition that discretion conferred by parliament if exercised by the wrong authority is ultra vires null and void. Counsel further stated that rules against bias provides that any action by a public body must be justified by law. The Petitioner relied on other legal authorities submitted to court in support of her case.

19. Counsel for the Petitioner submitted that Section 29 of the Land Adjudication Act does not give the Commissioner the right to have agents or part of the trial on his behalf and cited several authorities on this. He further contends that Section 29 of the Land Adjudication Act is in conflict with the Constitution of Kenya (2010) to the extent that it does not make any rules and regulations to ensure that parties shall be entitled to a fair trial and urges the court in exercise of its supervisory and constitutional jurisdiction to examine whether an Act of Parliament dealing with quasi-judicial authority conforms to Constitutional expectation.

20. It is the Petitioner's submission that Section 29 of the Land Adjudication Act has no congruence and proportionality to Articles 10(1) and

(2), 19,20,21,22,25(1),47(1) and 50(1) of the Constitution and cited several authorities in support of the submissions as listed in the List of Authorities dated 16th June 2021.

21. While highlighting submissions, counsel submitted that the Constitutional Petition is properly before the Court since judicial review is provided for as a relief by the Constitution. He also submitted that traditional dispute resolution mechanisms are useful and hence the Minister's decision not to consider the clan decision was irrational.

22. The Petitioner submitted that contrary to the submissions by the 3rd, 4th and 5th Respondents the Petition is not an appeal against the decision of the 3rd Respondent but a call upon the Court to exercise its jurisdiction powers under Article 165 of the Constitution. The Petitioner submitted that her fundamental rights and freedoms were breached and violated and this is why they have invoked the court's supervisory jurisdiction.

23. Regarding Section 29 of the Land Adjudication Act, the Petitioner submitted that the Act does not have adequate provisions to guide the proceedings before the Minister and no procedures are prescribed. These powers are, in the Petitioner's view, overbroad and too wide and subject to abuse or misuse by the adjudicator.

24. Finally, the Petitioner submitted that the Constitution has subjected issues of administrative bodies or tribunals under the principle of constitutionality, rather than the common law doctrines of administrative law.

1st and 2nd Respondents Response And submissions

25. The 1st Respondent, on the other hand denies any wrong doing on his own part and on the part of all the other Respondents. He claims that after the judgement of the 3rd Respondent was delivered, a letter was written by the Chief Land Registrar dated 25th March 2019 declaring the register for Kyuso land adjudication section relating to land parcel No. A 24 to be final and removed the restriction placed on the title. The same letter confirmed that the 1st Respondent was the owner of land parcel Kyuso/ Kyuso A /24 and subsequently a title deed was issued.

26. The 1st Respondent claims that this petition is overtaken by events and is an afterthought. The land herein had been subdivided into 136 parcels which were registered in his name. He states that the adjudication proceedings were properly carried out through the committee stage, arbitration stage, objection stage and the appeal to the minister. The 1st and 2nd Respondents claim that the Petitioner was all along accorded an opportunity to be heard and she was given a fair hearing. They claim that the issues raised by the Petitioner are not true and, in any event, the same ought to have been raised in the course of the hearing before the 3rd Respondent and not at this Petition. They deny that there was any wrong doing in including the elders and the technical Officer from the Adjudication department. The 1st Respondent denies the claim that there was a requirement for payment of Kshs. 5,000/- for visit to the suit land and if any payment was made by the Petitioner he ought to provide a receipt for the same. The Respondents further deny that the 3rd Respondent abdicated his responsibilities as claimed or that there was any decision arrived at by way of balloting as alleged by the Petitioner.

27. The 2nd Respondent opposed the Petition and stated that his official name is Daniel Mutua Musyimi and not as described in the Petition and his father Musyimi Kusikira (deceased) who was the owner of Parcel No. A 25 Kyuso was the first uncle to the Petitioner herein and that he passed away on 26th August 2018. He stated that he is not the legal representative of the estate of his deceased father since no one in the family has applied for letters of administration. He therefore claims that he ought not to have been made a party to this suit and his name ought to be removed and/or struck out.

28. In response to the Petition the 2nd Respondent states that he was aware that his father Musyimi Kusikira (the deceased) was a party to the adjudication proceedings referred to in this suit and the same culminated in the decision of the 3rd Respondent made on 23rd March 2018. That the Petitioner did not challenge the said decision until 18th October 2019 when the present Petition was filed and the petition is therefore overtaken by events. That by a letter dated 15th January 2019 the Director land Adjudication & Settlement wrote to the Chief Land Registrar directing that the restriction on land parcel Kyuso/Kyuso A/25 be removed and the same be registered in the name of Musyimi Kusikira (deceased).

29. The 1st and 2nd Respondent's also filed Grounds in opposition to the Petition dated 26th February 2021 summarized and paraphrased that the Petition has been brought too late in the day and the same ought to have been brought by way of an application for Judicial Review. They further claimed that the decision being challenged has already been effected, and the Petition had therefore been overtaken by events.

30. The Respondents claimed that the Petitioner was accorded a fair hearing and there was no breach of her constitutional rights. The Petitioner's case was challenged further for failure to annex the decisions that she wishes to challenge and that she failed to substantiate the allegations made in the petition.

31. The Respondents claim that the Petition is an attempt to circumvent the law and that the Petition raises issues beyond the scope of the court as to conflicts of law that the Petition is an abuse of the court process and the prayers sought are not supported by the Petition and that the Petitioner has concealed material facts and documents.

32. The 1st Respondent reiterated the fact that he bought the suit land from the sons of one Mutisya namely, Mulaki Mutisya, Mutemi Mutisya and Mwendwa Mutisya and they as well as the Petitioner were witnesses to the sale and after going through the land adjudication process the land was declared to be his land.

33. The 1st and 2nd Respondents submitted that Section 29 of the Land Adjudication Act provides that the Minister's order "shall be final" The

said Section does not explicitly state that the Minister's Appeal must be exclusively handled by the officer in charge and are allowed to consult individuals who can enable them to arrive at the decision. The 1st Respondent further states that the Petition herein is an attempt to re-litigate the case contrary to law see **Mwangi Njangu-v- Meshack Mbogo Wambugu & Another HCCC No. 234 of 1991 (unreported)**.

34. Counsel for the 1st and 2nd Respondent also submitted that there is no conflict between Section 29 of the Land Adjudication Act and the Constitution which actually gives effect to it and that the Act gives detailed methods of appeal. Counsel submitted that the entire process of appeal was fair, each party presented witnesses and had an opportunity to cross-examine the other parties' witnesses. That the claims of bias were not substantiated. Further, the Counsel raised issues with the manner in which the Petition was brought to court since the matter arises from an adjudication area. It was her submission that the right forum would be through Judicial review.

35. She urged the court apply the principle of deference and judicial restraint since the experts are there to resolve the disputes under the land adjudication.

The 3rd, 4th and 5th Respondent's Submissions

36. Counsel for the 3rd, 4th and 5th Respondents filed Grounds of Opposition dated 26th January 2021 and submitted that the decision of the Minister is final and can only be overturned through an application for the judicial review order of *Certiorari*. They relied on the cases of **John Masiantet Saeni vs Daniel Aramat Lolungiro & 3 others (2017)eKLR Lepore Ole Maito vs Letwat Kortom & 2 others(2016)eKLR Kanampiu MRimberia-vs-Julius Kathane & 3 others, Meru HCCC No.6 of 2009**.

37. Secondly, they submitted that Section 29 of the Land Adjudication Act CAP 284 does not stipulate the form in which the decision of the Minister should take and that the Minister's Appeal is not bound by the rules of procedure as they quoted from the cases of **Makenge vs Ngochi C.A 25(1978)(unreported)** and **Republic v Minister of Lands and Housing(2009)eKLR**.

38. Regarding the Petitioner's allegation that they were asked to pay the three elders Ksh.5,000 to enable them to visit the land, they submitted that the Petitioner did not complain during the proceedings and that he is now estopped from complaining now just because the decision was not in her favour.

39. The 3rd, 4th and 5th Respondents further submitted that Section 29 of the Land Adjudication Act CAP 284 is not inconsistent with the Constitution and stated that a citizen's right to fair hearing according to the rules of Natural justice are not ousted by the finality of the Minister's decision as they are still entitled to these rights. It is their submission that the court must bear in mind other cases and that the issues raised are personal to the Petitioner's case.

Analysis and determination

40. I have considered the Petition herein, supporting affidavits and all the replies filed. I have further considered the submissions by Counsel and the authorities relied upon. In my opinion, the following issues arise for determination:

- A) Is the 2nd Respondent properly joined as a party to this petition?
- B) Is the Petition properly before this court?
- C) Was the form of procedure adopted by the 3rd Respondent, the Deputy County Commissioner Kyuso Sub-County in hearing the appeal to the Minister contravene the law by appointing and delegating the powers delegated to him by the Minister to hear and determine the Appeals herein under Section 29 of the Land Adjudication Act Cap 284?
- D) Were the Petitioner's Constitutional and statutory rights infringed during the process of Appeal?
- E) Is Section 29 of the Land Adjudication Act Cap 284 in conflict with and/or in contravention of the provisions of Articles 10(1) and (2), 19, 20, 21, 22, 47 (1) 50 (1) and 159 (1) and (2) the Constitution of Kenya(2010)?
- F) Has the Petition been overtaken by events?

A) Is the 2nd Respondent properly joined as a party to this petition?

41. The title to the Petition herein shows that the 2nd Respondent is Musyimi Kusiskira (deceased) (Representative- Kitani Mutia Musyimi). It is trite law that a suit cannot be instituted against a deceased person, the Petitioner has not shown in what way the 2nd Respondent Kitani Mutia Musyimi is a representative of the deceased Musyimi Kusikira. Under Section 79 of the Law of Succession Act Cap 160 all the property of a deceased person vests in the executor of his will or personal representative of his estate. Legal action taken relating to the said property can only be taken and/or maintained against the said personal representative or executor and not the deceased or a person who has not taken out letters of administration.

42. The Petitioner makes a detailed description of the other parties to the Petition and in what way they are related to the dispute herein but does not make a description of Kitani Mutia Musyimi, the alleged representative of the deceased 2nd Respondent. Daniel Mutua Musyimi filed a response to the Petition, it is to be presumed that this was after he was served with the petition, and stated that he was not the person described in the Petition. He further stated that even though the deceased was his father he was not the administrator of his estate. The Petitioner did not contest this fact.

43. The Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 provides as follows:-*“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of a party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the court may be necessary necessary in order to enable the court adjudicate upon and settle the matter, be added.*I therefore find that the claim against the 2nd Respondent cannot be sustained, the same is not properly before the court and the names of the said 2nd Respondent and the alleged representative are struck out from the suit with costs.

B) Is the Petition properly before this court?

44. The 1st and 2nd Respondents have submitted that the Petition is not properly before this court as the Court is only allowed to go into the question of how the decision was made and that this is not a Judicial Review Application. However, I find that this Court is clothed with jurisdiction to ascertain the fundamental rights and freedoms of individuals and potential infringement of those rights and even grant orders of Judicial Review. Article 23 of the Constitution of Kenya provides as follows:

“The High court has jurisdiction in accordance with Article 165 to hear and determine Applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.

Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine Applications for redness of a denial, violation or infringements of or threat to a right or fundamental freedom in the Bill of Rights.

In any proceedings brought under Article 22, a Court may grant appropriate relief including -

(a) A declaration of rights

(b) An injunction

(c) A conservatory order

(d) A declaration of an invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill or Rights and is not justified under Article 24.

(e) An order for compensation

(f) An order of Judicial Review.

45. Further to this, Article 165(3) provides as follows:

“Subject to clause (5) the High court shall have –

(a) Unlimited original jurisdiction in criminal and civil matters.

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office other than a tribunal appointed under Article 144.

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including determination of-

(i) the question whether any law is inconsistent with or in contravention of this Constitution,

(ii) the question whether anything said to be done under the authority of this Constitution if any law is inconsistent with or in contravention of this Constitution,

(iii) any matter relation to constitutional powers of state organs in respect of county governments and any matter relative to the Constitutional relationship between the levels of government and

(iv) a question relating to conflict of laws under Article 191,

(v) any other jurisdiction, original or appellate conferred on it by legislation

It is thus the courts finding that this petition is properly before this court for consideration and determination

C) Did the 3rd Respondent, appoint and delegate the powers delegated to him by the Minister to hear and determine the Appeals

herein under Section 29 of the Land Adjudication Act Cap 284?

46. Under Section 29 (4) of the Land Adjudication Act the powers of the Minister to hear and determine an appeal under Section 29 are delegated to the 3rd Respondent. Section 29 (4) provides that: -

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

The Petitioner complains that the delegated power was to the Deputy County Commissioner alone and cannot be delegated further to another person. According to the Petitioner the inclusion of the elders and the Adjudication Officer was a surrender or abdication of this power.

47. The Court agrees with the position taken by the Petitioner that the power of the Minister to hear appeal was delegated to the 3rd Respondent in accordance with Section 29 (4). However, it is noted that by virtue of Section 35 of the Land Adjudication Act, Land Adjudication Regulations 1970 were promulgated for the purpose of prescribing fees for anything to be done under the said Act and generally for carrying into effect the provisions and purposes of the Act. Under Regulations 10 the Minister has the power to appoint interpreters. Rule 10 provides that: *“The district commissioner of a district within which an adjudication area lies, shall, upon the request of the adjudication officer, appoint for the adjudication area a panel of ten interpreters who are fluent in the language of the parties to an appeal made under section 29 of the Act.*

(2) The Minister may appoint any of the interpreters appointed under paragraph (1) to interpret any appeal proceedings before him into the language which a party to an appeal understands.

48. Further, the Minister can appoint assessors under Regulations 11 which states that: *“The District Commissioner of a district within which an adjudication area lies shall, upon the request of the adjudication officer, appoint for that adjudication area a panel of fifty assessors from which the Minister may appoint not less than three assessors to advise him on matters relating to customary land law during the hearing of an appeal under section 29 of the Act.”*

49. It is thus the Courts finding that the claim by the Petitioner that the presence of the three elders during the hearing of the appeal was an unlawful delegation or abdication of duty or authority by the 3rd Respondent as untrue and find that the law allows the said inclusion.

50. With regard to the presence of the 4th Respondent in the proceedings before the 3rd Respondent, it is noted that the Petitioner mentions the said presence in the petition itself when she states at paragraph B (e) *“ The Petitioner did not expect the 4th Respondent, the adjudication officer, who heard the objection proceedings appealed against, to be a technical officer, assisting the 3rd Respondent, the Commissioner to determine an appeal against (adjudication officer’s) own decision, for obviously there is high chances of conflict of interest, bias, partiality and influence purposed to sustain his own decision in the outcome of the appeal”*. In the supporting affidavit the Petitioner states: - *“THAT when it came to the time our case was to be heard, the 3rd Respondent incorporated the 4th Respondent in the proceedings as a “technical officer and three elders in the proceedings”*.

51. I wish to point out that the 4th Respondent herein is described as **“The Land Adjudication Officer, Mwingi”**. The adjudication section where the suit land is located called “Kyuso “A” Adjudication Section within Ghai/Kimangao Sub-locations- Kyuso/ Kimangao Locations- Kyuso Division- Kyuso District. The area was declared a land adjudication section by a notice dated 23rd June 2009 issued by the District Land Adjudication and Settlement Officer Kyuso Land Adjudication Area.

52. Further, the proceedings complained of before the 3rd Respondent was an *“Appeal against the decision of the Sub County Land Adjudication Officer for Kyuso Sub County”*. Further a close look at the proceedings shows that the quorum is indicated as follows;

Quorum: The parties are before me ready for the case Deputy County Commissioner-Kyuso Technical Officer Adjudication Department-Kyuso Interpreter Kyuso Sub County”

53. Clearly the above quorum does not include the 4th Respondent, the Land Adjudication Officer & Settlement Officer, Mwingi. I do not find that the “Technical Officer Adjudication Department” is equivalent to “the Land Adjudication Officer & Settlement Officer, Mwingi.” The land Adjudication Officer is a formal office created by an appointment by the Minister of an adjudication Officer for an area declared an adjudication section under Section 3 of the Land Adjudication Act. The appointed officer then appoints technical Officers such as the demarcation officer, survey and recording officers who are subordinate to him. Further under Section 3 (2) the Land Adjudication and Settlement Officer can appoint additional adjudication officers having limited powers and confer on them all or any of the powers conferred by sections 9(2), 10, 11(b), 12, 20(b), 21(2), 26 and 34 of this Act, and an adjudication officer so appointed shall have the powers so conferred on him and no more.

54. I find that the Petitioner has not proved that the 4th Respondent was incorporated in the proceedings before the 3rd Respondent since the 4th Respondent does not appear on the quorum or in the body of the proceedings. Further, the Petitioner has not shown that the 4th Respondent, being the Land Adjudication Officer, Mwingi heard and determined the objection proceedings emanating from the Kyuso Adjudication Section. I further find that inclusion of the technical officer adjudication department as shown in the proceedings did not violate the Petitioner's constitutional rights and that there was no conflict or apparent and/or actual bias by such an inclusion. It is not shown by way of evidence that the Land Adjudication Officer Kyuso Sub County who heard the objection proceedings which formed the subject matter of the proceedings before the 3rd Respondent participated in the proceedings before the 3rd Respondent. It has further not been shown that the presence of the 4th Respondent, not being the land adjudication and settlement officer, whose decision was appealed against would prejudice

the rights of the Petitioner as claimed.

55. Upon reading the proceedings of the Appeal involving the suit land, there is no mention that the Deputy County Commissioner balloted together with the elders and the Adjudication Officer as alleged by the Petitioner to make the final decision on the appeal.

D) Was the process of appeal adopted by the 3rd and 4th Respondents and the verdict of the 3rd Respondent in contravention of and in violation of the Petitioners rights under Articles 25(c), 50 (1) 159 (1) and (2) of the Constitution?

56. In the preceding findings, the court has determined that the 3rd Respondent did not breach the provisions of Section 29 of the Land Adjudication Act by appointing a team of assessors/elders. The court further found that the proceedings before the 3rd Respondent do not support the allegation by the Petitioner that the 4th Respondent, the Land Adjudication and Settlement Office, Mwingi, participated in the hearing of the appeal. Further that the Petitioner has not shown that the 4th Respondent is the one who heard the objection proceedings the subject matter of the appeal before the 3rd Respondent.

57. However, the Petitioner complained that the procedure adopted by the 3rd Respondent in conducting the appeal was in violation of her rights in that when it came to visiting the suit land the Petitioner was asked to pay and she did pay the sum of Kshs. 5,000/= for the visit but only the three elders namely Muema Kimweli chairman, Ioli Muthengi and Musyoka Muviku went for the site visit in the absence of the 3rd Respondent. That the said elders did not take down any notes or draw any sketch maps. This claim is not denied by any of the Respondents. The record of the hearing before the 3rd Respondent does not indicate that there was any site visit made by either the 3rd Respondent or the three elders that the Petitioner claims visited the suit land. However, the judgement by the 3rd Respondent referred to the site visit and specifically stated “during the site visit, the court established that Mutisya’s land and Mwanzia’s lands were separate and so the Mutisyas did not error in selling their portion of land”. The 1st Interested Parties stated that he was not privy to any payment for the site visit. On the other hand, counsel for the Respondents stated that the Petitioner, having not complained about the site visit during the proceedings is estopped from raising the issue late in the day just because she did not agree with the decision made by the 3rd Respondent.

58. The Petitioner claims that 3rd Respondent by incorporating the three elders and having them attend the site visit in his absence, the 3rd Respondent violated the Petitioners right under Article 20 (1) and Article 159 of the constitution. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. However, it is my observation that the operative section 29 of the Land Adjudication Act and the regulations thereunder provide a procedure for filing and hearing of the appeal to the Minister. In my view the said section and the regulations thereunder give guidance on how the appeal to the Minister is to be conducted and further guidance has been given by courts. In the case of **Matwanga Kilonzo v District Commissioner, Kitui & another [2021] eKLR** the court dealt with the manner in which proceedings should be conducted by the Minister and held that:

“The manner in which proceedings should be conducted by the Minister “was captured in the case of **Republic vs. Special District Commissioner & another [2006] eKLR** as follows:

“It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower...court record that will assist him to, “... **determine the appeal and make such order thereon as he thinks just**” It is fashionable in this kind of applications, for Interested Parties to argue that the District Commissioner has a free hand to conduct the appeal in any manner he wishes. That the Act has not specified a procedure for him to follow in determining the appeal so long as he finally makes such orders thereon as he thinks just. That might be so but only to a point, in my view. With great respect, it might be time to re-examine Section 29 (1) aforesaid more closely. If the provision requires that the aggrieved party who wishes to appeal to the minister, will file a statement of written grounds of appeal, then the method of appeal is in that way, defined. It is also provided that the Minister shall determine the appeal and make such order on the appeal as he thinks just....”

I am in agreement with the above decision. The said decision must give reasons as to why he agrees or disagrees with the decision of the Land Adjudication Officer.”

59. Similarly, in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the Court held:

“I would at this stage adopt the observations made in the **Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77** where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best.....”.

60. The court of appeal in **Dominic Musei Kombo v Kyule Makau [2019] eKLR** stated

“On the second issue, our view is that proceedings conducted under the Land Adjudication Act are not strictly speaking akin to proceedings under the Civil Procedure Act. The District commissioner acting on behalf of the Minister has wide latitude to conduct the proceedings in a manner that meets the substantive ends of justice.”

61. From the foregoing, the procedure adopted for hearing and determination of an appeal must ensure that the Minister determines the

appeal and make such order on the appeal as he thinks just. The Minister must do his/her best to act justly and reach just ends by just means to ensure substantive ends of justice.

62. In the present case the Petitioner states in her supporting affidavit paragraph 21 and 22. *“THAT after hearing our evidence, it was decided that, the lands in dispute would be visited, so, he called us in his office and in presence of his clerk, he asked us to pay each Kshs.5,000/= so that the said three elders may visit our lands and report to him, as soon as possible.”* That the 3rd Respondent informed us that we had a choice of whether to wait as long as the Deputy County Commissioner’s office will get funds to visit the land or to pay and he will do the visit very fast, so we had no option, we paid the money but no receipts were issued”.

63. From the foregoing account by the Petitioner of what transpired, the Petitioner knew and was aware of the procedure that the 3rd Respondent intended to adopt in carrying out the site visit. The elders were to visit the land and report back to the 3rd Respondent. The Petitioner was given an option of paying an unreceipted amount of money to facilitate quick site visit and another option of waiting until the 3rd Respondent’s office had funds to visit the site. She opted to make the payment. It will be noted that the 1st Respondent denies knowledge of the payment of Kshs.5,000/=. In my view, the Petitioner, having participated in deciding the manner in which the site visit proceedings would be conducted and actively participated in promoting that procedure as the best option cannot then turn around and complain that the said procedure was a violation of her constitutional rights.

64. I do not find that having the Elders conduct the site visit was an abdication of the 3rd Respondent’s duties and/or powers as claimed or that it violated the Petitioner’s constitutional rights as claimed for the further reason that in the end the final decision was made by the 3rd Respondent being the person to whom the duty to hear the appeal is delegated as Regulation 11(3) of the Land Adjudication Regulations provides that:

“The Minister shall, after consultation with the assessors, determine the appeal as he thinks fit.”

65. The other issue raised by the Petitioner was that the conduct of proceedings by the 3rd Respondent was biased and that he failed to consider evidence that she adduced before him. I am of the view that the 3rd Respondent exhaustively considered the evidence by the Petitioner and her witnesses and the Respondents before him. It must be appreciated that the suit before this court is not an appeal. In the case of Lepore **Ole Maito –vs- Letwat Kortom & 2 Others [2016] eKLR** the court considered the application of the provisions of the Land Adjudication Act with particular regard to the dispute resolution mechanism. The court stated: -

“The Land Adjudication Act, sets an elaborate procedure through which the rights and interests of all persons is to be established and once that process and procedure is followed and completed the determination of such rights and interests is final. The Act provides an appropriate mechanism for resolution of any disputes. The Minister is the apex in that dispute resolution mechanism and once an appeal is made to the Minister and determined under the provisions of Section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister’s decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction.”

66. I have also considered the Petitioner’s complaint that the 3rd Respondent did not consider the decision of the elders dated 17th July 2009 for the reason that the decision was arrived at after the area had been declared an adjudication section was a violation of her rights. I find that after the area was declared an adjudication section all issues of ascertainment and determination of rights and interests in the land within the adjudication section were to be determined through the adjudication process under the Land Adjudication Act. I find that the 3rd Respondent did not err in this respect.

67. From the foregoing it is my conclusion that the proceedings before the 3rd Respondent were not in contravention of and in violation of the Petitioner’s rights under Articles 25(c), 50 (1) 159 (1) and (2) of the Constitution.

E) Is Section 29 of the Land Adjudication Act in conflict and contravention with the Constitution of Kenya (2010) and the Fair Administrative Act No. 4 of 2015?

68. In prayer C of the Petition, the Petitioner complains that S.29 of the Land Adjudication Act does not provide or have a clear legal or institutional and financial policy framework to support the adjudicative functions of the Deputy County Commissioners or the District Commissioners as they were then, so as to ensure independence, impartiality and the integrity and leadership of the adjudication and for that reason the section is in conflict with the aspirations of Articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya.

69. In my view the challenge raised above cannot be considered in isolation from the legal, policy and institutional framework for the Land Adjudication Act as a whole. The Land Adjudication Act was first enacted in 1968. The said Act is said to be *“An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto”*. From the outset, the process of registration of titles to land through the Land Adjudication Act had constitutional underpinnings by virtue of Chapter IX of the Repealed Constitution of Kenya which dealt with trust land. In particular Section 116 provided for registration of individual titles to trust land. Ultimately it was intended that when the title to any parcel of land within trust land area is registered under the Land Consolidation Act and/or Land Adjudication Act otherwise than in the name of the county council it would cease to be trust land.

70. While in the process of determining rights and interests in trust land, the Land Adjudication Act provides an elaborate and detailed process of dispute resolution. Section 29 is at the apex of the said process and for clarity the section is set out as follows: *“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.”

71. It is the Courts view that land adjudication is provided for under the existing land policy through Sessional Paper No. 3 of 2009 on National Land Policy. The said policy confirms the need to ensure that adjudication and consolidation processes are speedy, transparent and accountable. Under the policy the Government undertook to enact a “Land Registration Act” to recognize and protect all legitimate rights and interests in land and to harmonize the statutes dealing with the registration of land right. The Government further undertook to repeal the Land Adjudication Act and Land Consolidation Act and repeal the land registration provisions of the Registration of Titles Act (RTA) (Cap 281), the Land Titles Act (LTA) (Cap 282) and the Registered Land Act (RLA) (Cap 300).

72. On the question of trust land, the policy provided for the repeal of the Trust Land Act and proposed to have a clear framework for recognition, protection and registration of community land and land-based resources incorporating mechanism for a land management and dispute resolution and for reviewing and harmonizing the Land (Group Representative) Act.

73. Subsequent to the promulgation of the Constitution of Kenya 2010 and in harmonizing of existing laws with the constitution, the Land Registration Act No. 3 of 2012 repealed the

Indian Transfer of Property Act 1882, the Government Lands Act, (Cap 280), the Registration of Titles Act, (Cap 281), the Land Titles Act, (Chapter 282), The Registered Land Act, (Cap. 300).

74. The Community Land Act No.27 of 2016 was also enacted as “*An Act of Parliament to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes*”. Under the Act, the Land (Group Representatives) Act Cap 287 d the Trust Lands Act Cap 288 were repealed.

75. However, when it came to the issue of ascertainment and recording of rights and interests in community land or trust land the Land Adjudication Act was left intact with only a few amendments made through statute law (Miscellaneous Amendments) Act No. 7 of 2016 which amendments consisted of substituting expressions “Trust Land” wherever the same appeared with the expression “Community Land” and substitution of the term “Minister” for Cabinet Secretary and “County Council” with “County Government”.

76. In my view the legislature amended, reviewed, revised, repealed and/or enacted new laws in order to make them conform with the Constitution of Kenya 2010. From a look at the few amendments made to the Land Adjudication Act, it is clear that the said act was reviewed and revised but only a few amendments were found to be necessary. In my view the Petitioner has not placed before the court evidence and/or arguments showing that the said section does not conform with the provisions of the constitution or alternatively that the issues complained of are as a result of any failure of the law to conform with the cited constitutional provisions.

77. From the foregoing, I find that the at the time when the Land Adjudication Act was being considered for revision, amendment, and/or reform after the promulgation of the Constitution of Kenya 2010, Section 29 was considered and no substantial amendment was found to be necessary. It has not been shown to the court that the said section and the Act does not accord or reflect the aspirations of or expectations of or demands of the citizens of a fair trial and hearing within a reasonable time as claimed by the Petitioner. It has also not been shown that it does not conform with the requirement for fair administrative actions and the values, principles and objectives of good governance as expected of all adjudicative functions, and that in its present form it is in conflict with Article 10(1) and (2), 19, 20, 21, 22, 25(c), 47(1) and 50(1) of the Constitution of Kenya (2010).

78. In the Petitioner's submissions she further claims that although Section 29 provides for the right of appeal it does not make rules and regulations to ensure that parties shall be entitled to a fair trial and hearing before the Minister. However, I do find that the said Section 29 provides for a procedure of filing of the appeal by delivering to the Minister an appeal in writing specifying the grounds of appeal and the Minister is mandated to determine the appeal and make such order thereon as he thinks just and the orders made shall be final. Further, and as discussed elsewhere in this judgement, I have found that by virtue of Section 35 of the Land Adjudication Act, Land Adjudication Regulations 1970 were enacted. Under Regulations 10 and 11 the Minister has the power to appoint interpreters and Assessors.

79. It is thus the Courts finding that the rules and regulations do exist, they may not be as comprehensive and detailed as may cover every possible procedure but the lack of detail is not such as would render the section unconstitutional.

80. Further, courts have also given directions on the manner in which proceedings should be conducted by the Minister and in the case of **Matwanga Kilonzo v District Commissioner, Kitui & another [2021] eKLR (supra)** it was held that:

*“The manner in which proceedings should be conducted by the Minister was captured in the case of **Republic vs. Special District Commissioner & another [2006] eKLR** as follows:*

“It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower...court record that will assist him to, “... determine the appeal and make such order thereon as he thinks just”

81. Similarly, in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587 (supra)** the Court adopted the decision *the Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity and determined that the procedure to be adopted is one that will enable the tribunal fairly to determine the question at issue and it must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides

82. As the above cases held, all quasi-judicial bodies must follow laid down procedure and in the absence of procedure they must still exercise the principles of fair hearing. In my opinion, the procedure adopted by the 3rd Respondent in exercising his powers under section 29 did not violate or contravene the provisions of the Constitution of Kenya (2010).

83. It is further the courts finding that constitutional safeguards exist and are available for a party appearing in an appeal before the Minister under Section 29 in that the provisions of the Constitution of Kenya 2010 are binding to all persons. In particular Article 2 of the constitution decrees that the constitution is the supreme law and binds all persons, state organs and public officers. Article 3 of the constitution obligates every person to respect, uphold and defend the constitution. Every person here includes the National Assembly as a state organ., all state and public officers are bound by the constitution and the principles therein especially when making decisions of a judicial or quasi-judicial nature. It matters not that the Land Adjudication Act does not have these provisions specifically stated but the 3rd and 4th Respondents were still bound to them under Article 10 which expressly sets out the National Values and Principles of Good governance.

84. Article 47 of the Constitution provides that, “Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair,” which provision is reiterated at Section 4(1) of the Fair Administrative Action Act No. 4 of 2015. In my opinion, Section 29 of the Land Adjudication Act is not in conflict with the Constitution because it still requires the Minister and all officers, committees and boards within the Land Adjudication process to be bound by the Constitution while making the decision on appeal and to follow a laid down procedure.

85. Further, courts have held that administrative actions must now meet the constitutional test of legality, reasonableness and procedural fairness. This new standard was well articulated by the court in **Kenya Human Rights Commission & another vs Non-Governmental Organizations Co-ordination Board & another [2018] eKLR**:

“Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

86. It is further the courts view that protection of any person appearing before the Minister under Section 29 of the Land Adjudication Act is guaranteed by virtue of the provisions of the Fair Administrative Actions Act for the reason that any person can institute proceedings for review of proceedings if aggrieved. Under Section 7 (2) A court or tribunal under subsection (1) may review an administrative action or decision, if– the person who made the decision inter alia –was not authorized to do so by the empowering provision, acted in excess of jurisdiction or power conferred under any written law; acted pursuant to delegated power in contravention of any law prohibiting such delegation the action or decision was procedurally unfair, the administrative action or decision is unfair.

87. On the question of whether or not the provisions of the Section 29 complained of are in conflict with the constitution the law is that there is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples’ representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In **Ndynabo v Attorney General of Tanzania [2001] EA 495** it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country. In that case the said court presided over by the Hon. Chief Justice Samatta Stated as follows:

“.....Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative.”

88. In trying to determine constitutional validity of a statute the law provides guiding principles and one of them is by examining the purpose or effect of the law under challenge. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the constitution. In **Olum and another v Attorney General [2002] EA**, it stated that;

“To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”

89. In **the Queen v Big M. Drug mart Ltd, 1986 LRC (Const.)332**, the Supreme Court of Canada stated that;

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation’s object and thus validity.”

90. From the foregoing it is necessary to apply the mirror test by looking at the impugned section 29 of the Land Adjudication Act as against

the constitutional test of Articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya 2010. In my view the purpose for the said section is apparent from a literal reading of the section. The section is part of a dispute resolution process in the ascertainment of rights and interests in community land formerly trust land and it stands at the apex of that process. It provides a person aggrieved by the determination of an objection by the Land Adjudication and Settlement Officer under Section 26 an opportunity to appeal to the Minister. The Minister receives the appeal, hears it and decides of the dispute and makes such order as he thinks just and the order shall be final. In my view the Petitioner has not shown that the said purpose violates the national values and principles of governance under Article 10 of the Constitution. It has also not been shown to the satisfaction of the court that the purpose violates the provisions of Article 19,20,21,22 on Rights and fundamental freedoms, Application of Bill of Rights, Implementation of rights and fundamental freedom and Enforcement of Bill of Rights. Indeed, as discussed earlier the Bill of Rights applies to all law and binds all State organs and all persons including the Minister under Section 29 of the Land Adjudication Act and his delegates. It is the courts view that the said section provides an avenue for determination of disputes in the process of ascertainment of rights and interests in formerly trust land and now community land and the said process does not derogate rights to a fair trial under Article 25 (c), 50 and the right to fair administrative action under Article 47 of the Constitution of Kenya 2010.

91. It is indeed the courts view that the issues raised by the Petitioner giving rise to the challenge herein are personal to her specific case for example the question of the Kshs. 5,000/- she states was demanded from her in order to facilitate the site visit cannot lead to the conclusion that a financial framework does not exist to facilitate site visits or the other conclusions made. Indeed, the contention by the Petitioner that she paid the money sought from her is an indictment on her since she was willing to pay unreceipted money in order to jump the queue of other litigants who were waiting to have sites visits to their land. Indeed, I would agree with Counsel for the Respondents that if such payment was demanded it ought to have been raised at the time with the Minister.

92. I have further considered the effect of the said section 29 of the Land Adjudication Act and find that the Petitioner has not shown that the effect of the said section violates the cited Articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya 2010.

93. The Petitioner claims that the effect of the application of section 29 in its current form leads to abuse through surrender or abdication of duty, failure to act as an independent and impartial tribunal and leads to unfairness. The Petitioner further claims that the effects of the section leads abuse and misuse and can lead to bias. In my view these claims are not supported by the evidence placed on record and relied on by the Petitioner.

F) Has the Petition been overtaken by events?

94. It has been established by the 1st Respondent that the 3rd Respondent's decision has already been implemented and that the suit land no longer exists under the name Parcel no. 24 Kyuso 'A' Adjudication Section "Orders may not be made which cannot be enforced or which may be ineffective for practical purposes. This was the position reiterated in **Kalya Soi Farmers' Cooperative Society v Paul Kirui & Another** where it was held inter alia;

As is said, "Equity, like nature, will do nothing in vain." On the basis of this maxim, Courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."

95. However, I will agree with Counsel for the Petitioner that the court is not barred from making declaratory orders even without coercive force. In the case of **Johana Nyokwoyo Buti v Walter Rasugu Omariba (Suing through his attorney Beutah Onsomu Rasugu) & 2 others [2011] eKLR** the court referred to Order III Rule 9 of the Civil Procedure Rules and held: -

" A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter."

96. I am therefore of the opinion that if the orders sought were merited nothing would prevent the court from making declaratory declaration orders.

Final Orders:

In conclusion and based on the above findings the court declares that:

A) That the claim against the 2nd Respondent is incompetent for having been filed against a deceased person and a representative who has not been shown to be a personal representative of the estate of the deceased or an executor of his will.

B) That the Petitioner has failed to prove that the process of administrative action and the proceedings of the adjudication adopted by the 3rd Respondent in the appeals herein were inconsistent with and in contravention of the law and in violation of Article 25(c), 47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya 2010, and were therefore invalid, null and void.

C) That the Petitioner has failed to prove that the proceedings and the verdict of the 3rd Respondent were in violation of fundamental rights enshrined in Article 25(c), 47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya and Article 10 of the United Nations Universal Declaration of Human Rights and therefore null and void.

D) The Petitioner has not proved that S.29 of the Land Adjudication Act does not provide or have a clear legal or institutional and financial policy framework to support the adjudicative functions of the Deputy Commissioners or the District Commissioners as they were then and that the said section does not ensure independence, impartiality and the integrity and leadership of the adjudication process. She has further not proved that the section was in conflict with the aspirations of Articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya 2010.

E) That the Petitioner has not proved that S.29 of the Land Adjudication Act has not been revised, amended, repealed and/or reformed or any other legal framework thereto promulgated to accord or reflect the aspirations of or expectations of or demands of the citizens of a fair trial and hearing within a reasonable time. She has further not shown that the section does not accord a parties fair administrative actions and the values, principles and objectives of good governance as expected of all adjudicative functions or that the section is in conflict with Article 10(1) and (2), 19, 20, 21,22,25(c), 47(1) and 50(1) of the Constitution of Kenya(2010)

I therefore find that the Petition herein has no merit and the same is dismissed with costs to the Respondents.

Delivered, Dated and Signed at Kitui this 26th Day of April, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court in the presence of-

C. Nzioka: Court Assistant

No attendance for the Petitioner

Mercy Mutemi Advocate for the 1st and 2nd Respondents

M/S Ndundu State Counsel for the 3rd, 4th and 5th Respondents