



**M’thiringi v District Land Adjudication and Settlement Officer – Karama & another  
(Judicial Review E009 of 2021) [2022] KEELC 2814 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2814 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
JUDICIAL REVIEW E009 OF 2021**

**CK NZILI, J**

**MAY 18, 2022**

**BETWEEN**

**MARIQUETA NKOYAI M’THIRINGI ..... APPLICANT**

**AND**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER –  
KARAMA ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. Pleadings**

1. The ex parte applicant moved the court through a notice of motion dated 27/5/2021 seeking for an order of certiorari to call for and quash the 1<sup>st</sup> Respondents decision made on 24/11/2020 dismissing Objection No. 11478 relating to parcel No. 3085 and 3770 Karama Adjudication section.
2. The application was supported by a statutory statement filed on 7/5/2021 and a supporting affidavit sworn on 7<sup>th</sup> May 2021 annexing the copy of proceedings and a request for a consent from the 1<sup>st</sup> respondent.
3. The notice of motion is supported by a statement of parties and an affidavit all dated 27/5/202.
4. The law does not require a party while filing the notice of motion after leave has been granted to file anything else save the notice of motion. The statement and affidavit to be relied upon is ordinarily the one filed at the leave stage.
5. Therefore I reject the statutory statement filed dated 27.5.2021 as irregularly before the court.
6. Having said that the respondents oppose the chamber summons dated 27/5/2021. The court takes notice that there is no such chamber summons dated 27/5/2021. It must be perhaps a typing error.



7. The first ground is that the application offends Section 8 &9 of the Law Reform Act, Order 53 Rule 2 CPR and section 9 (1) of the Fair Administrative Action Act. Secondly the respondents aver the application has not disclosed the status of the adjudication process especially on whether the decision sought to be overturned has been implemented. Thirdly the respondents aver there has been delay which has not been explained in filing the chamber summons for a decision made on 24/11/2020.
8. Fourth ground is that Article 47 of the constitution is enforceable under the constitution of Kenya (Protection of Rights and Fundamental Freedoms) (Practice and Procedure Rules) 2013.
9. Lastly it is the respondents view mandamus was untenable given there was no public duty owed to the applicant to issue the demarcation map since it had not been demonstrated that the adjudication process was finalized, a remedy exists under the Access to Information Act 2016 and the order of mandamus subsists against a public duty which was not available in this case.
10. The interested party has opposed the notice of motion through a replying affidavit sworn on 29/11/2021 on the basis that he bought Parcel No. 11478 from Julius Kithinji as a subdivision of Parcel No. 1915 in 2013, took vacant possession, made developments thereon, some other people also bought the subdivisions and that the deceased did not object or complain over that same during his life time nor had he or the ex parte applicant sued the said Julius Kithinji.
11. Further the interested party averred his land did not border the ex parte applicant's land since there was a public road between them and a neighbor. Lastly the interested party averred that the ex parte applicant was given a fair hearing during the objection proceedings; that the proceedings herein are fatally defective for lack of a consent to sue, capacity to sue and the failure to file and serve the notice of motion.

## **B. Written Submissions**

12. In line with Order 51 rule 16 Civil Procedure Rules, parties filed written submissions dated 14/2/2022, 11/2/2022 and 14/2/2022 respectively.
13. The ex parte applicant has submitted on key issues namely whether she stands to suffer prejudice if the application is not allowed and the doctrine of exhaustion of remedies.
14. On the first issue, it was the ex parte applicant submission that Section 3 & 11 of the Fair Administrative Action Act binds the decision of the adjudication officer as concerns the hearing of objection under both Cap 283 and 284 including the right to be supplied with information related to the adjudication and allocation of her family land as provided for under Article 35 and 47 of the Constitution.
15. The ex parte applicant submitted that her objection was dismissed by the 1<sup>st</sup> respondent without the Adjudication Committee taking into consideration all the factors as provided for under Section 9 & 19 (2) of the Land Consolidation Act. Reliance was placed on Peter Kimendiu Vs Land Adjudication Officer Tigania West District and 4 others (2016)eKLR on the proposition that the adjudication officer ought to have looked into the merits of the case and involved the committee because the Objection No. 3084 and 3086 was over plot Nos. 11136 and 7770 where two people claimed ownership.
16. The ex parte applicant submitted the case involved the interpretation of the customary tenure system where the applicant sought to safeguard an ancestral land passed on from her grandfather and where her family had lived for over a decade.
17. Reliance was placed on Joshua Mithika & another Vs Kobia Kaugeri & 2 others (2021) eKLR, Land Adjudication Officer Tigania East Ex parte Simon Mugambi Nabea, Alexander Kanjoi (18) 2021 (eKLR).



18. The *exparte* applicant submitted she was only told they had been moved without being shown to where, the parcel number and the reasons.
19. On the doctrine of exhaustion the *exparte* applicant submitted the guiding principle for a party seeking to challenge an adjudication decision as provided for under Section 26 of the [Land Consolidation Act](#) was whether quasi – tribunal body followed the law or not. It was stated the 1<sup>st</sup> respondent had the power to look into the register and rectify any errors related to the adjudication of the applicant’s ancestral land, before the summary dismissal of the objection hence this court while exercising Judicial Review powers ought to find the proceedings were not fair or procedural.
20. On the other hand the respondents submitted the *exparte* applicant has failed to demonstrate she has the capacity to file the suit on behalf of an estate of a deceased person and in absence of a letter of administration the proceedings are defective and should be struck out.
21. Secondly the respondents submitted the application was an afterthought, an abuse of the court process and an attempt to circumvent the laid down procedures provided under the law, since she approached the court after the decision of the 1<sup>st</sup> respondent.
22. Thirdly it was submitted that *exparte* applicant had failed to disclose the status of the adjudication process especially if the decision complained about had been implemented given she had delayed in filing for leave to quash the decision.
23. As regards Article 47 of [the Constitution](#) the respondent relied on *JSC vs Mbula Mutava & another* (citation) on the proposition that administrative actions of public officers, state organs and other administrative bodies were now subjected by Article 47 (1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.
24. Concerning the prayers for mandamus the respondents submitted there must be a legal duty to act owed to the applicant requiring a clear right to performance of that duty, a prior demand for performance a reasonable time to comply, express refusal, and no other remedy available. Reliance was placed on [Republic Vs National Employment Authority and 3 others Exparte Middle East Consultancy Services Ltd](#) (2018) eKLR.
25. The interested party submitted there were five issues for this court’s determination namely whether the proceedings were fatally defective for being filed without a consent to sue; whether the applicant exhausted the mechanism under the [Land Consolidation Act](#), whether the applicant lacked capacity to sue, whether the application was time barred and lastly whether the order of mandamus was tenable in the circumstances.
26. On the first issue it was submitted under Section 30 of the [Land Adjudication Act](#), a consent to sue was mandatory and the letter dated 21/4/2021 was not enough, since there was no appeal filed against the refusal to the minister.
27. Reliance was placed [Republic vs L.A.O Tukurung Adjudication Section Elgeyo Marakwet & another exparte Biyaa Clan](#) (2021 eKLR).
28. The interested party submitted under Section 29 of the [Land Adjudication Act](#), the *exparte* applicant should have filed an appeal after the objection under Section 26 thereof whose failure was fatal as held in *exparte Biyaa Clan* (supra)
29. On the issue of lack of capacity to sue it was submitted that there is no dispute M’Thiringi M’Anampiu was deceased and that the *exparte* applicant needed to seek for and obtain letters of administration.



Reliance was placed on *Tugura Munya represented by Kithaka Ikuthi Vs Minister for lands and 2 others* (2018 eKLR).

30. Regarding the case being time barred it was submitted Section 9 (3) of the *Law Reform Act* required a decision to be challenged within 6 months yet the application was filed outside six months.
31. The interested party relying on *KNEC VS Rep Exparte Geoffrey Njoroge & 9 others* ( 1997 eKRL took the view that mandamus was untenable in this case since there was no public duty owed to the exparte applicant given also an alternative remedy existed under the *Access to Information Act* 2015.

### **C. Issues for determination**

32. The issues commending themselves for my determination are-;
  - i. Whether the application is time barred and brought by a person lacking capacity to sue.
  - ii. If the applicant ought to have exhausted the internal mechanisms under the relevant law before resorting to court.
  - iii. If the proceedings and decision by the respondent meet the statutory and constitutional threshold.
  - iv. Whether the applicant is entitled to the reliefs sought.

### **D. Determination**

33. The exparte applicant filed a chamber summons dated 7<sup>th</sup> May 2021 describing herself as legal representative under Article 47 of *the Constitution* Section 8 & 9 of the *Law Reform Act* and Order 53 rule 1(1) (2) and (3) *Civil Procedure Rules* seeking for leave to commence Judicial Review proceedings regarding the respondents decision dated 24/11/2022 over to objection No. 11478 over parcel No. 3085 Karama Adjudication Section.
34. The court on 7/5/2021 granted leave and directed the notice of motion to be filed and served within 21 days and the matter was listed for pretrial directions on 15/7/2021. The exparte applicant complied and filed the notice of motion dated 27/5/2021. Order 53 Rule 2 *Civil Procedure Rules* requires the application to be made within 6 months. The applicant came within the six months period.
35. In the supporting affidavit the exparte applicant averred his deceased father was demarcated and allocated the land by the Land Adjudication Committee on 16/10/1969 and registered as such. She averred she filed Objection No. 3085 against Parcel No. 1147, which was unprocedurally heard and unfairly dismissed by the 1<sup>st</sup> respondent and sought for a consent to sue by a letter dated 21/4/2021 which was not supplied.
36. She attached the proceedings and copy of the letter marked as (MM “1) and (MM “2”).
37. Looking at the proceedings, it is quite evident the dispute was governed by the *Land Consolidated Act* and not the *Land Adjudication Action Act*. The objector was M’Thiringi M’Anampiu (deceased) represented by the exparte applicant whereas the interested party was the respondent. The list of the committee members is indicated as six whereas the law requires minimum of 10 members. As at the time the proceedings were heard, no objection was raised that the exparte applicant lacked capacity. The interested party was given an opportunity to cross examine the applicant but the proceedings show he did not do so.



38. Section 13 of the [Land Consolidation Act](#) provides every person claiming any right or interest in any land within an adjudication section shall attend in person or by representation according to African Customary Law as required by the committee or arbitration board. Sub-rule (4) provides that where one or more of several the heirs claiming a separate interest from another group or groups, appears his or their appearance shall be deemed to be the appearance of all such heirs.
39. Section 15 of the [Land Consolidation Act](#) provides a notice of completion of record of existing rights shall be given for inspection. Under Section 17 thereof any person named in or affected by Part 1 of the Record of Existing Rights considering the same to be inaccurate or incomplete is required within 60 days upon the publication of notice to lodge an objection stating the alleged inaccuracy or incompleteness.
40. Under Section 18 [Land Consolidation Act](#) the Executive Officer is required to refer the objection to the committee who shall consider it and make a finding and submit it to the adjudication committee, which decision shall be final as regards the Records of Existing Rights.
41. Section 20 [Land Consolidation Act](#) provides that after the expiry of 60 days the Record of Existing rights shall be deemed to be true and complete record of all existing rights and interests in the adjudication section to which the Record relates.
42. With regard to consolidation, under Section 21 thereof the committee is mandated to set aside out of land in the adjudication section for community needs and any detriment to any land owner caused by such setting aside would be divided as equitably as possible between all land owners in the allocation of parcels within the adjudication section.
43. In allocating the land the committee shall have regard, so far as possible to the site, quality, nature and extent of land to which any land owner was entitled to and to any interest, lease, right of occupation charge or other encumbrances affecting the land, whether by African Customary Law or otherwise, subject to the liability of each such land owner to bear a share of the detriment caused by the setting aside of land for the community.
44. The committee is also mandated to determine any compensation to be paid to any person on account of the detriment suffered by him as a result of such exercise of its powers including requiring such land owner(s) who have profited therefrom to pay such persons such compensation as may think proper either in money or in kind and on such time as directed. Section 24 thereof provides an adjudication register shall be prepared by the committee and a notice given for its completion. Unless Section 26 thereof, any person named or affected by an adjudication register has 60 days after its publication to do so by stating the grounds of objection. The section provides that the adjudication officer and the committee shall consider the matter and if it thinks the objection to be valid, order the committee to take action and rectify the matter under its powers as per section 21 and if the adjudication officer considers such rectification would incur unreasonable expenses, delay or inconvenience, award such compensation as he deems appropriate.
45. Section 25 (3) [Land Consolidation Act](#) provides no appeal shall lie against any decision by an adjudication officer to dismiss an objection or order rectification as the case may be but the minister or any person awarded compensation and who is dissatisfied with the amount may apply to a subordinate court for its revision.
46. Applying the aforesaid provisions, it is quite clear matters or disputes falling under land adjudication do not strictly speaking require a party to have letters of grant so as to advance claims for and on behalf of deceased estate. Odunga J in [Republic vs District Commissioner Machakos and another exparte Kakui Mutiso](#) (2014) eKLR held under the land consolidation and adjudication processes, the issue before



- the relevant tribunal is the determination of interests in land rather than individual ownership since individual land tenure only comes into being on registration and before such registration the land in question is either ancestral or falls under communal ownership, where the strict succession legal regime does not apply, since the issue of an estate may not be applicable to ancestral or communal property.
47. Angote J. in *Peter N. Ngandi & 2 others Vs John Muthomi & another* 2022 eKLR took the view that proceedings under the *Land Adjudication Act* do not require one to have letter of administration.
  48. The interested party and the respondents raise such objections in the objection proceedings. This case arises out of the objection proceedings where the ex parte applicant participated and hence my finding is that she does not require to demonstrate letters of administration in order to bring the proceedings herein. In her statutory statement of facts, she described her capacity and interest in this matter. I find her a proper party in line with Article 159 and 258 of *the Constitution*, whose rights should not be denied simply because she does not possess letters of administration. More especially while seeking constitutional reliefs under the Bill of Rights.
  49. As regards the consent to sue and the issue of non-exhaustion of the internal mechanism, under the *Land Consolidation Act* Order 53, the *Law Reform Act*, the *Fair Administrative Action Act* and the *Land Consolidation Act* do not expressly provide that one has to possess a consent under Section 8 of the *Land Consolidation Act* to mount Judicial Review Proceedings which are neither civil nor criminal proceedings but sui generis (see *Domenica Kalotia Kalalu Vs Tigania East District Land and Settlement Officer & another Shadrack Muthee M'Imanja (Interested Party)* (2019) eKLR and *Commissioner of Lands vs Kunste Hotel Ltd* (1997) eKLR.
  50. In *Julius Ntogatiti Methang'athia & Settlement officer Meru North (Nyambene District) & 3 others* 2000 eKLR the Court of Appeal held the *Land Consolidation Act* unlike the *Land Adjudication Act* was silent about the application of the *Civil Procedure Act* and Rules on its proceedings See *Timotheo Makenga vs Maunga Ngodi* (1979) KLR 53.
  51. The court held the process in the *Land Adjudication Act* ends with the appeals to the minister while the decision of the Land Adjudication Officer and the Committee under *Land Consolidation Act* was final. In *Reuben M' Iteleka* the court held objection under Section 26 *Land Consolidation Act*, the decision of the objection officer was final unless the minister or magistrate court can intervene on account of compensation.
  52. The applicant herein is questioning the legitimacy and the constitutionality of the process. She did therefore need to go anywhere else except this court or require a consent to sue before filing the Judicial Review, see *Republic vs Musanka Ole Kuyioni & 2 others* and *Joseph Lesulol Lekitio and others ex parte application*. The *Muthaara Njuri Ncheke Council of Elders and another Vs the Committee Ngare Mara Gambella Adjudication Section and 2 others* (2019) eKLR.
  53. As to whether the proceedings and decision met statutory and constitutional test, Section 26 (1) of the *Land Consolidation Act* provides that the objection shall be heard and determined by the land adjudication officer in conjunction with the land adjudication committee members. This being an administrative body or organ, it has to comply with Articles 25 & 47 of *the Constitution* as read together with Section 456 of the *Fair Administrative Action Act*. Under section 6(3) the 1st respondent has a public duty to supply the decision and whatever other material or information requested from it within 30 days of the receipt of the request, in absence of which in any proceedings for the review of such action or decision shall be presumed to have been taken without good reason.



54. In *Sbollei vs ISC & another* (petition 34 of 2014) 2022 KESC 5 (KLR) (CIV) 17 February, 2022 (Judgment) the Supreme Court of Kenya held the delivery of a demand letter requesting for written reasons and copies was enough to comply with Article 47 (2) of *the Constitution*
55. The respondents herein have taken the view that they had no public or legal duty owed to the applicant and perform their obligations within a reasonable time, and that an alternative remedy exists under the *Access to Information Act* 2016.
56. In my view, that cannot be the law, in view of the clear Constitutional right and duties spelt by Article 25 & 47 of *the constitution* and which have been operationalized by the *Fair Administrative Action Act*.
57. The 1<sup>st</sup> respondent is the one who is obligated to handle the objection in line with the law. There is no indication in the proceedings if the adjudication committee members ever participated in the hearing, the scene visit and disposal of the objections.
58. The committee members have a central role to play as held in *Peter Kimandiu vs Land Adjudication Officer Tigania West Distrcit & 4 others* (2015) eKLR and cannot therefore delegate their powers to the Land Adjudication Officer. Further under Section 7 *Fair of the Administrative Action Act* the court has powers to look at not only the merits/demerits of the decision but also the decision making process. The exparte applicant grounds are that she was not given a fair hearing, the decision superimposed a new parcel of land over her parcels of land, and it was unreasonable, ultra vires and has caused more harm to her.
59. The applicant averred the new parcels of land where she was moved to and the reasons thereof were not communicated and or supplied to her.
60. The respondents have not denied the factual issues in this petition stated by explaining out the process, procedures, manner and justification, for the decision. The duty to act within the law is owed to the exparte applicant and the interested party. The interested party cannot assume the statutory role of the 1<sup>st</sup> respondent to explain out whether or not the statutory and constitutional requirement were complied with in hearing and determining the objection.
61. In the premises, I find the notice of motion dated 27/5/2021 with merit. The proceedings and decision made on 24/11/2020 regarding Objection No. 11478 over Parcel No. 3085 and 7770 Karama Adjudication Section are hereby brought to this court and quashed.
62. The objection is remitted for re-hearing by 1<sup>st</sup> respondent through another Land Adjudication Officer and Land Adjudication Committee within 6 months from the date herein.
63. Costs to the exparte applicant.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 18<sup>TH</sup> DAY OF MAY, 2022**

**In presence of:**

Miss Aketch for Applicant

Kieti for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Materi for interested party

**HON. C.K. NZILI**

**ELC JUDGE**

