



**Nkonyai (Suing as the legal representative of the Estate of M’Thiringi M’Anampiu (Deceased) & 2 others v District Land Adjudication and Settlement Officer Karama Adjudication Section & another; Munya & another (Interested Parties) (Environment and Land Judicial Review Case E010 of 2021) [2022] KEELC 2614 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2614 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E010 OF 2021**

**CK NZILI, J**

**MAY 18, 2022**

**BETWEEN**

**MARIQUETA NKONYAI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M’THIRINGI M’ANAMPIU (DECEASED)) ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH M’THIRINGI THIRINGI ..... 2<sup>ND</sup> APPLICANT**

**ROSEMARY KARIMI ..... 3<sup>RD</sup> APPLICANT**

**AND**

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

**OFFICE OF THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KOBIA STEPHEN MUNYA ..... INTERESTED PARTY**

**ANDREW GITIRIME ..... INTERESTED PARTY**

**JUDGMENT**

**A. Pleadings**

1. By a notice of motion dated 27<sup>th</sup> May 2021 the ex parte applicant pursuant to leave granted on 10<sup>th</sup> May 2021, seeks for an order of certiorari to call for and quash the 1<sup>st</sup> respondent’s decision made on November 25, 2020 dismissing objection no’s 3084 and 3086 regarding Parcel No’s Karama Adjudication Section 11136 NS 7770. The application is based on the statutory statement filed on May 7, 2021 which is undated and an affidavit sworn on 7<sup>th</sup> May 2021 by Mariquetta Nkonyai M’Thiringi.



2. The facts are that the applicant brought the proceedings as the legal representative of the estate of M’Thriirngi M’Anampiu (deceased) who had acquired Parcel No 3866 during adjudication was tilling the land and had planted gravellia and Miangua trees whereat the interested party unlawfully occupied the said land leading to a protest from the deceased in 2001.
3. The exparte applicant avers she filed Objection No. 3094 against the recording of Parcel No. 3866 in favour of the interested party which objection was unfairly and/or unprocedurally heard and dismissed by the 1<sup>st</sup> respondent.
4. She averred she sought for a consent and copies of the demarcation maps by a letter dated April 21, 2021 but the same were not availed on time or at all.
5. The exparte applicant maintained the 1<sup>st</sup> respondent exercised its decision without giving her a fair hearing; or considering her evidence, purported to super impose new parcel of land over her land which was out rightly unreasonable, given she and the rest of the beneficiaries had occupied the disputed land all their lives. Further the exparte applicant averred the decision of the 1<sup>st</sup> respondent was ultra vires, an attempt to dispose her of the land, cause prejudice and harm to her.
6. The exparte applicant prayed for orders of certiorari to quash the decision and proceedings and mandamus directed at the 1<sup>st</sup> respondent to issue her with demarcation maps and a consent.
7. In support of the application, the exparte applicant attached the proceedings and a copy of the demand letter dated April 21, 2021.
8. The exparte applicant had brought the proceedings under Article 47 of *the Constitution*, Sections 8 & 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*.
9. The notice of motion was opposed by the respondents grounds of opposition dated December 3, 2021, on the basis that the chamber summons offended Section 8 & 9 of *Law Reform Act*, Order 53 *Civil Procedure Rules* section 9 (5) of the *Fair Administrative Actions Act*, there had been non-disclosure of the status of the adjudication process especially on whether the decision sought to be overturned had been implemented; delay in filing the chamber summons had not been explained; Article 47 of *the Constitution* was only enforceable through *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) (Practice and Procedure Rules* 2013; the order of mandamus was untenable given that there was no specific duty owed to the applicants to issue the demarcation map which is part of the adjudication record, there existed a remedy under the *Access to Information Act* 2016 and that an order of mandamus only subsisted as against a public duty which was not available in this case.
10. The 1<sup>st</sup> interested party opposed the chamber summons through a replying affidavit sworn on November 29, 2021. He averred he bought Parcel No. 11136 which was transferred to him by Julius Kithinji from parent file No. 1915, took vacant possession in 2015 while the exparte applicant’s father was still alive and that there was no objection from him at the time.
11. The 1<sup>st</sup> interested party averred he constructed a semi-permanent shop, cultivated on the land and had rented out the shop which brought him monthly income of Kshs.1,000/=
12. Further, the 1<sup>st</sup> interested party averred that the said Julius Kithinji upon subdividing the land he also sold to the 2<sup>nd</sup> interested party and others. He stated the exparte applicants had never sued the said Julius Kithinji or the other beneficiaries over the subdivision of Parcel No. 1915 which parcel did not even border the deceased land which were separated by a public road and that the two are 100 metres away.



13. It was averred by the interested party that the exparte applicant had prior to this suit filed a case against his immediate neighbour Kamatha based on the same issues and lost the suit. He attached the proceedings and decision dated November 25, 2020.
14. The 2<sup>nd</sup> interested party opposed the chamber summons through a replying affidavit sworn on 29.11.2021. He averred he was the owner of Parcel No. 7770 Karama Adjudication Section, which he bought and was transferred to him by Julius Kithinji a subdivision of Parcel No. 1915, in 2005, took vacant possession erected a semi-permanent structure and a block of three rental house, pit latrine , Kitchen, and a canteen as per the attached photographs.
15. The interested party further avers the said Julius Kithinji had subdivided the land and sold to other beneficiaries and the exparte applicant had not sued the seller as well as the other beneficiaries to the subdivisions. He insisted his land did not boarder the deceased's parcel of land since it was separated by a public road. Further, he averred that the exparte applicant was given all the opportunity to prosecute his objections and call for the evidence. Lastly, he averred the proceedings were fatally defective for lack of a consent to sue, letters of administration and the failure to serve the notice of motion.

## **B. Written Submissions**

16. With leave of court parties opted to dispose of the proceedings through written submissions whose deadline was on February 7, 2022.
17. Only the interested parties complied with the directives by filing their written submissions dated February 14, 2022.
18. It is the 1<sup>st</sup> and 2<sup>nd</sup> interested parties submission that the exparte applicant was accorded fair hearing, a scene visit was conducted in which there was confirmation of occupation by the interested parties, hence the inference was that the exparte applicant was only dissatisfied with the decision but not the decision making process.
19. It was submitted that the proceedings offended Section 30 of the [Land Adjudication Act](#) and there was no evidence that the letter dated April 21, 2021 had been delivered to the 1<sup>st</sup> respondent and an appeal over the refusal made to the Minister. Reliance was placed on [Republic vs Land Adjudication Officer Tutung Adjudication Section Elgeyo Marakwet and another exparte Biyaa clan](#) (2021) eKLR.
20. Secondly it was submitted the exparte applicant ought to have appealed against the decision of the 1<sup>st</sup> respondent to the Minister, instead of coming to court in line with the [Land Adjudication Act](#). Reliance was placed on [Exparte Biyaa clan case](#) (supra) citing with approval [Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others](#) (2015) eKLR on the doctrine of exhaustion.
21. As regards lack of capacity to sue on behalf of the estate the interested parties submitted there was no dispute the said M<sup>r</sup>Thiringi M<sup>r</sup>Anampiu was deceased but the exparte applicant lacked no letters of administration. Reliance was placed on [Itugura Munyi represented by Kithaka Ikutbi vs Minister for Lands and 3 others](#) (2018) eKLR.
22. On whether the application was time barred under Section 9 (2) (3) [Law Reform Act](#) it was submitted the decision sought to be quashed was made on November 25, 2020 but the chamber summons was dated May 27, 2021, which was filed outside the six months period.
23. The interested parties submitted that an order for mandamus was untenable since there was no public duty owed to the exparte applicants by the 1<sup>st</sup> respondent. Reliance was placed on [KNEC vs Republic \(exparte Geoffrey Gathenji Njoroge & 9 others\)](#) (1997) eKLR.



24. The interested parties urged the court to find an order of mandamus would not issue as there was no public duty to supply the demarcation maps and that an alternative remedy existed under the [Access to Information Act](#) 2016.

### C. Determination

25. Having gone through the pleadings and submissions the issues for determination are:-
- i. If the exparte applicant has the capacity to institute the proceedings herein on behalf of the estate of the deceased.
  - ii. If the proceedings were filed within the set timelines under Order 53 Civil Procedure Rules.
  - iii. If the exparte applicant should have exhausted the internal dispute mechanism under the [Land Adjudication Act](#) before coming to court.
  - iv. If the exparte applicant is entitled to the reliefs sought.

### D. Determination

26. The exparte applicant came before this court by filing chamber summons dated 7.5.2021, seeking for leave to commence Judicial Review Proceedings under Article 47 of [the Constitution](#), Sections 8 & 9 [Law Reform Act](#), Order 53 Rules 1(1) 1(2) and 1(3) [Civil Procedure Rules](#), regarding a decision made on 26.11.2020.
27. The court on 10.5.2021 exercising its mandate under Order 53 Rule 1 (1) (2) (3) (4), (2) (3) [Civil Procedure Rules](#) allowed the application and directed that the substantive notice of motion to be filed within 21 days and be served upon the parties.
28. The decision sought to be quashed was made in 25.11.2020. The six months deadline was on May 25<sup>th</sup> 2021. Judicial Review proceedings are commenced by filing a notice to the registrar a day prior to filing the application for leave. Order 53 Rule 2 provides the application for leave to be filed not later than six months after the date of the proceedings or such other period as may be provided by any Act and that where the proceedings were subject to appeal and a time limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing expires.
29. In this instance, the chamber summons was allowed and became spent. No appeal has been preferred against that order by either the respondents or the interested parties.
30. The exparte applicant complied with the orders made on May 10<sup>th</sup> 2021 and filed a notice of motion dated 27.5.2021. This was within the 21 days granted by the court to do so. Similarly, the respondents and the interested parties were duly served with the notice of motion dated 27.5.2021. What they were served with must have been the notice of motion dated 27.5.2021 since the chamber summons was dated 7.5.2021.
31. In any event, none of the parties disputed that they were served with incomplete documents. My finding therefore is that both the chamber summons and the notice of motion were filed within the statutory timelines.
32. Coming to the 2<sup>nd</sup> issue whether exparte applicant had the requisite capacity to sue for the estate of M'Thiringi M'Anampiu, the exparte applicant describes herself on the title of notice of motion as a legal representative of the estate of the deceased.



33. She also stated she was the one who had filed the objections before the 1<sup>st</sup> respondent. This was confirmed in the proceedings and decision made on 25.11.2020. She did not however attach a copy of the grant from court giving her capacity to represent the estate of the deceased.
34. The proceedings herein related to a land falling under the provision of the [Land Consolidation Act](#) Cap 283 Laws of Kenya on to A/R objection.
35. In [Tobias Achola Osindi and 13 others vs Cyprian Otieno Ogallo and 6 others](#) Okongo J, held under Section 13 of [Land Consolidation Act](#), any person with an interest in land within an adjudication section and who was a successor of a deceased and not necessarily a legal representative could bring a claim. (See [Lydia Kuri Silas vs Land Adjudication Officer Tigania Districts and 2 others](#) (2017) eKLR.
36. Judicial Review proceedings are *sui generis*. They are neither criminal nor civil proceedings. In my view, and in line with Section 13 [Land Consolidation Act](#), a party is only required to demonstrate interest to the land. He or she is not bound to acquire a grant from court so as to advance any claim concerning an interest in land under the provision of both Cap 283 and 284 see JR 17/12 Kisii Antina Mohammed Hamis *ex parte* Applicant vs Suba District & others B and M Mining Co. Ltd, applicant Minister Of Environment and Mineral Resources, Commissioner for Mines and Geology JR No. 20/11 Kisumu, [Domenica Kalotia Kalalu vs Tigania East District Land Adjudication Officer & another Shadrack Muthee M'Imanja \(interested party\)](#) (2019) eKLR.
37. Further, the *ex parte* applicant has invoked [the Constitution](#) particularly Articles 40 and 47 on the infringement of her rights while the 1<sup>st</sup> respondent was handling the objection proceedings.
38. Article 22 (1) 2(a) 3(d), 23 3(f) as read together with Article 258 of [the Constitution](#) provides the court should not unduly restrict a party seeking constitutional reliefs from accessing the seat of justice.
39. My finding therefore is that the *ex parte* applicant under the circumstances obtaining in this matter did not require letters of administration to advance her claim before this court for a decision and in proceedings in which she took part of under Cap 283 and 284 Laws of Kenya.
40. As regards the issue of consent to institute judicial review proceedings the proceedings attached are clear that the governing law to the adjudication section was Cap 283. The said Act does not expressly state a party seeking to institute a judicial review proceedings must seek and obtain a consent to sue.
41. In [Domenica Kalotia Kalalu vs Tigania East District Land Adjudication and Settlement Officer and another](#) supra Mbugua L. J, while citing with approval Antina Mohammed Hamisi supra held a consent to sue was not a requirement when one was filing a judicial review case. Similarly, the court held under adjudication processes, the rights and interests of parties are still being ascertained hence Sections 2 (1) and 54 of The [Law of Succession Act](#) Cap 160 was not applicable.
42. The respondents and the interested parties takes the view the *ex parte* applicant had not exhausted the internal dispute mechanism.

## **E. The land Consolidation Act**

43. Cap 283 has three stages of the processes of land registration. The first one relates to the ascertainment of each individual holding by the process of chain survey and recording of the same in a book called the record of existing rights. The second one is hearing by the committee of all disputes arising from the first process during which stage no dispute arising from the first process is allowed to be heard by ordinary court of law except with the consent of the land adjudication officer.



44. The third stage is the demarcation and consolidation of the individuals several holdings into one single whole, thus is called the adjudication record stage because individual rights are recorded in a book called the adjudication record register. One of the grounds by the respondents is that the *ex parte* applicant has not disclosed the status of the adjudication process especially whether the decision they seek to overturn has been implemented.
45. Once the Land Adjudication Officer decision that after gathering is completed, a 60 days' notice of the completion of the record of existing rights is issued and anybody affected is at liberty to lodge objection to Record of Existing Rights under Section 17 of the *Land Consolidation Act*.
46. Under cap 284, the decision of the adjudication officer is final, save that he is mandated to hear the objections with the aid of a committee.
47. It is the 1<sup>st</sup> respondent who should have responded to the judicial review and demonstrated there was full compliance with the law.
48. In *Republic vs Land Adjudication Officer Igembe/Tigania District* (2009) eKLR the court made a finding that the 1<sup>st</sup> respondent was continuing to display a lack luster attitude as compliance with the law was concerned, resulting into untold misery to the parties and waste of judicial time and resources. In this matter, the respondents were given a chance to file a response as to facts and the law. Instead of clarifying the factual status of the decision and its implementation to the court the respondents feign ignorance and/or awareness of the status of the proceedings. If the 1<sup>st</sup> respondent who is the custodian of the record did not know when the decision was made, who else would know better?
49. In the proceedings aforesaid the land adjudication officer took the view there was no record to show the deceased had made an objection under Section 17 *Land Consolidation Act* which governs objections to Record of Existing Rights meaning the record was deemed as true and complete under Section 19 thereof.
50. Section 21 of the *Land Consolidation Act* relates to consolidation of and the powers of the committee as they handle consolidation matters. Further, section 24 of the *Land Consolidation Act* relates to the adjudication register which is normally prepared by the adjudication committee whose notice of completion under section 25 thereof also attracts objection under Section 26 after its publication within 60 days, which objection have to be heard and determined by the committee. The committee may dismiss and rectify the matter or exercise any of its powers under Section 21 of the Act thereof and if necessary, order for compensation.
51. Section 26(3) of the *Land Consolidation Act* provides that no appeal shall lie against the decision by adjudication officer to dismiss an objection or an order for rectification or award compensation except on the issue of the amount of compensation given, before a subordinate court.
52. In this matter, the proceedings do not indicate if the committee actively participated in the proceedings except by having their names on the minutes. There is no indication if the committee sought for any clarification or ever attended the site visit. The observation or minutes for the site visit are not included in the proceedings. The names and the signatures of the committee members are not included at the end of the final verdict.
53. Under Section 7 of the *Fair Administrative Action Act* the court while exercising Judicial review powers has to establish if the decider had the authority to decide, acted in excess of jurisdiction or powers, contravened any law, was biased, denied a party an opportunity to be heard, failed to follow mandatory and material procedure, was unfair, erred in law, was being directed by an unauthorized person, made



- the decision in bad faith, was irrational, abused discretion, was unreasonable or disproportionate, abused power and violated legitimate expectation of the parties.
54. Looking at judicial review post 2010, the court has wider powers and is merely not restricted to the decision making process. The court has to look at the merits and demerits of the decision as well as the legitimacy of the process.
  55. Article 47 of *the Constitution* grants a person right to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair including the right to be given written reasons for the decision.
  56. The decision of *KNEC vs Republic Exparte Geoffrey Gathenji Njoroge & 9 others* supra was made pre 2010. It is no longer good law since under Article 47 of *the constitution* there are specific rights and obligations governing quasi-judicial powers exercised by state organs, state officers and institution undertaking administrative duties as defined under Section 3, 4, 5 & 6 of *Fair Administrative Actions Act*.
  57. In absence of a reasonable explanation or justification, that the 1<sup>st</sup> respondent followed or substantially complied with *the constitution* and the statutory, I find the rebuttable presumption that the 1<sup>st</sup> respondent had no good reasons in the process leading to and after the decision was made unchallenged.
  58. Further, the exparte applicant had no right of appeal to the minister. Therefore, her only recourse was to file a judicial review. Consequently, I find the proceedings and decision by the 1<sup>st</sup> respondent to have failed to satisfy both the statutory and constitutional threshold.
  59. The same is brought before this court and is hereby quashed. The objections are remitted to the 1<sup>st</sup> respondent in line with Section 11 of *Fair Administrative Actions Act* for reconsideration by a different land adjudication officer and a committee within 6 months from the date hereof. Costs to the exparte applicant.

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

**THIS 18TH DAY OF MAY, 2022**

**In presence of:**

Aketch for applicant

Kieti for respondents

Materi for interested party

**HON. C.K. NZILI**

**ELC JUDGE**

