Republic v Deputy County Commissioner Mutomo Subcounty (Acting as the Minister) & 2 others; Mwatu & another (Interested Parties); Yongo (Applicant) (Environment and Land Case Judicial Review Application E006 of 2021) [2022] KEELC 3569 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3569 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E006 OF 2021

A NYUKURI, J

MAY 11, 2022

IN THE MATTER OF AN APPLICATION BY MAMI YONGO FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284)

AND

IN THE MATTER OF IMPLEMENTATION OF THE MINISTER'S DECISION ON LAND APPEAL CASE NO. 154 OF 2002 RELATING TO PARCEL NO. 476 ITHUMULA/IKANGA ADJUCADICATION SECTION

AND

IN THE MATTER OF THE FAIR- ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTION 3A OF THE CIVIL PROCEDURE ACT (CAP 21), ORDER 53 CIVIL PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS OF LAW

BETWEEN

REPUBLIC ..... APPLICANT

AND

DEPUTY COUNTY COMMISSIONER MUTOMO SUBCOUNTY (ACTING AS THE MINISTER) ..... 1ST RESPONDENT

DIRECTOR LAND ADJUDICATION AND SETTLEMENT .. 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

KAVITHE MWATU ..... INTERESTED PARTY

KASYOKA MWATU ..... INTERESTED PARTY

AND

MAMI YONGO ..... APPLICANT

JUDGMENT

Introduction

1. Pursuant to leave obtained on May 3, 2021, the Exparte Applicant vide the Notice of Motion dated May 12, 2021, sought for Judicial Review orders as follows;

    a) That this honourable court does issue an order of certiorari to quash the Ministry's decision delivered on December 4, 2020 in *Land Appeal Case No 154 of 2002* relating to parcel No 476 Ithumula/Ikanga Adjudication Section.

    b) That this honourable court does issue an order of prohibition to stop the 2nd Respondent the interested parties, the Land Adjudication and Settlement Officer Mutomo and any other Land Officer or person from implementing the Minister's decision by registering the interested parties husband or themselves or any other person as the proprietor of the suit property delivered on December 4, 2020 in *Land Appeal Case No 154 of 2002* relating to parcel no 476 Ithumula/Ikanga Adjudication Section.

    c) That this Honourable Court in the best interest of resolving this issue in totality does order another Minister/District County Commissioner to be appointed to re-hear and determine this matter on merit by calling the critical witness which include but not limited to the area Chief, Sub Chief and village elders among others who understand this issue at hand.

    d) That the costs of this application be awarded to the exparte applicant.

    e) Such further or other reliefs as the Honourable Court may deem just and expedient to grant.

2. The application is based on the grounds set out in the statutory statement already filed herewith dated April 29, 2021 and the Affidavit of the Ex Parte Applicant dated May 12, 2021. It is the Exparte Applicant's case that he resided on the suit property as early as 1960's when he left for Yatta but returned therein in the 1970's, possessed and joined this land with his other parcel of land known as parcel Number 1592 adjoining the suit property and continued utilizing the same. He further contended that in an effort to award the suit land to the Interested parties' husband, the 2nd Respondent did survey the same as different parcels splitting the land into parcels 1592 and 476.

3. He also stated that the Applicant's first wife one, Musenya passed on in 1991 and it is when the suit property was partly cleared by 'Utethyo wa Mami' to constitute the Applicant's garden and the 1st Interested Party was involved in this activity. That the Applicant married his second wife Syombua Mami in 1992 with whom they continued to cultivate the suit property up to date which now extends to the road with their home at the edge of the suit property.

4. It was the Exparte Applicant's case that the 2nd Respondent proceeded to award the suit property to Mwatu Mutisya the 1st and 2nd Interested Parties' Husband without consulting the local authorities and taking in to account that the said Mwatu Mutisya never resided around this parcel of Land at any given time. Further that this family does not and has never lived within this vicinity and in fact their

home is across Koma River at Nduundune and there is no way they would claim the Applicant's land as their ancestral land when it is the Applicant who has lived here for the years and he is now aged almost 1oo years.

5. The Applicant also averred that if the court wished they would produce the map of that area and illustrate that there is no such name as the interested parties' husband or themselves around that area and they are only interested in grabbing the Applicant's Land since he is old.

6. He stated that after the said unlawful demarcation the Applicant objected by Objection No 16 of 2002 which was never heard but dismissed without hearing the local authorities, including the local Chief and Sub-Chief, which prompted the filing of the appeal before the Minister. He stated that he moved from parcel No 1592 and constructed in the suit land in 2006, and hence the interested parties' assertion that the Applicant built on their land when their late husband died is false as he was utilizing what was his all along.

7. He claimed that he was summoned on November 27, 2020 vide a letter dated November 23, 2020 through the Senior Chief to appear before the Deputy County Commissioner on December 4, 2020 for hearing of the appeal and was advised to avail witnesses and prepare submissions. That he entered appearance and requested to bring witnesses which prayer was ignored by the 1st Respondent. He complained that the notice to attend the Minister was short bearing in mind his age. That no witnesses were called to clarify issues, but the 1st Respondent proceeded to award the land to the interested parties without considering the relevant facts.

8. The Applicant also stated that the actions of the 1st Respondent are unprocedural and unlawful as he failed to take into account the applicant's age and the fact that the Interested parties and their husband never resided near the suit property. He also argued that having been in occupation of the suit property from 1960s to 2002, he had acquired the suit property by adverse possession having stayed thereon for over 12 years.

9. It was contended by the Applicant that the Minister's decision was tainted with illegality and was contrary to Article 40 of the Constitution that guarantees protection of the Applicant's right to property, and that the Applicant ought not be deprived of his property contrary to the law. He also argued that the Minister's decision was marred with procedural impropriety for failure to scrutinize the available witnesses and evidence available, to confirm the Applicant's right to the suit property.

10. He further asserted that the Minister's decision was unreasonable, irrational, irregular, unfair, biased and made in bad faith, in denying the Applicant the right to the suit property without due process as the Minister failed to consider full facts and evidence as the Applicant was not given an opportunity to fully state his case.

11. He also asserted that the Minister exceeded his jurisdiction in declaring substantive rights to the land and declaring the same in favor of the 1st and 2nd Interested Parties' Husband where non-existed.

12. In response, the 4th Respondent filed Grounds of Opposition dated May 12, 2021 where the 4th Respondent's counsel stated that the Applicant had not met the conditions for granting injunctive orders. Further that the Applicant had not established a prima facie case with a probability of success and has also failed to adduce evidence to support his claim. He concluded that the Notice of Motion dated May 12, 2021 is not merited and the same should be dismissed with costs.

13. The application was canvassed by way of written submissions and on record are the Exparte Applicant's submissions dated October 15, 2021.

Applicant's submissions

14. Counsel for the Applicant submitted that the 1st Respondent's decision was unlawful, unprocedural, an improper use of power, made in ignorance of relevant considerations, unreasonable, made in bad faith, an inflexible application of policy and an outright denial of natural justice. It was also submitted that the 1st Respondent did not accord the Exparte Applicant enough time to prepare for the hearing.

15. Counsel referred to the cases of *Zacharia Wangunza & Another v Office of the Registrar, Academic Kenyatta University & 2 Others* (2013) eKLR, *Republic v Nairobi City County Exparte Gucharn Singh Sihra & 4 others* (2014) eKLR and *Republic v Cabinet Secretary Ministry of Lands & Physical Planning & 3 Others Exparte Phares Mugambi; Rauni Nkari (Interested Party)* [2021] which generally outline the import of Judicial Review as being concerned not with the merit of the decision but whether the decision making process was in accordance with the law and that notice should be sufficient to afford the Exparte Applicant sufficient time to prepare for the hearing.

16. On the issue of irrationality, Counsel submitted that Land adjudication is all about who has been utilizing the land before the land is identified and demarcated; Counsel stated that the 3rd Respondent relied on false allegations from the interested parties to demarcate and survey the Exparte Applicant land into two parcels of land, that is Parcel 1592 and 476 giving the Exparte Applicant a smaller parcel and allocating the bigger parcel to the Interested parties. Counsel submitted that the Exparte Applicant made an objection which he lost because he was never heard and went on to appeal. Counsel was of the view that the 1st Respondent was wrong to state that the Exparte Applicant never appealed after the demarcation, which was irrational and unreasonable. Counsel placed reliance on the case of *Republic v Kenya Revenue Authority Exparte Cosmos Limited* (2016) eKLR for the proposition that an administrative decision ought to be reasonable.

17. On whether the 1st Respondent acted in ignorance, Counsel submitted that the 1st Respondent decision making process did not take it into account relevant facts like the fact that the interested parties nor their husband did not reside in the suit property and that the only time the 1st Interested party came near the suit property was when she was chased away by her husband and later went to her home in Nduundume when her husband died. Counsel also contended that the 1st Respondent failed to consider the fact that the 1st Interested party participated in clearing this land during "Utethyo wa Musenya" when the Exparte Applicants first wife was deceased.

18. Counsel referred to Article 47 (3) of the *constitution*, and sections 4 and 11 of the *Fair Administrative Action Act* No 4 of 2015 and argued that an administrative action ought to be procedurally fair, efficient, expeditious, lawful and reasonable. It was counsel's view that the applicant was given a Notice of six days and that was not sufficient to prepare for hearing, and was not enough to get legal representation. Counsel also stated that the Minister did not visit the suit property. Counsel relied on the case of *Republic v Cabinet Secretary Ministry of Lands & Physical Planning & 3 Others Ex parte Phares Mugambi; Rauni Nkari (Interested Party)* (supra) and sought the court to quash the minister's decision and prohibit the respondents from effecting the said judgment and appoint another Minister to determine the appeal.

Analysis and Determination

19. I have considered the Notice of Motion, the affidavit in support, the Statutory statement, the verifying affidavit, the grounds of opposition and the submissions. The issue that arise for determination is whether the applicant is entitled to the judicial review orders sought.

20. Judicial review is only concerned with the decision making process and not the merits of the decision. It is concerned with whether persons exercising administrative power have complied with the tenets of the rule of law, such as legality, procedural fairness, reasonableness, rationality and propriety. In the case of *Republic versus Director of Immigration Services & 2 Others Exparte Olamilekan Gbeng Fasuyi & 2 Others* [2018] eKLR, the court held as follows;

    It is common ground that the prayers sought are judicial review remedies and the rules governing grant of judicial review orders do apply. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High Court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision maker are proper, and the decision is within the confines of the law, a court will not interfere.

21. Similarly, in the Ugandan case of *Pastoli v Kabale District local Government Council and Another* (2008)- 2 EA 300, the court restated the principles that guide the court in the exercise of judicial review jurisdiction as follows;-

    In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is, tainted with illegality, irrationality, and procedural impropriety.

    Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are- instances of illegality...

    Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

    Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non- observance of the rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision- it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

22. Essentially therefore the role of the court while exercising judicial review jurisdiction is to subject the decision-making process to the tenets of the rule of law and constitutionality which include asking questions like whether the process was contaminated with illegality, unreasonableness, impropriety, procedural unfairness, improper use of power and rationality. This is because decisions of persons exercising administrative or public power are discretionary and therefore the focus of the court in judicial review application is to evaluate whether that discretion met the threshold of accountability which must always accompany exercise of public/administrative power.

23. While the Notice of Motion is essentially not opposed. The grounds of opposition filed by the Attorney General did not attempt to address the application; only stating that the applicant had not established a prima facie case with a probability of success and that there was no evidence to support

the Applicant's claim. Besides, the Interested Parties never appeared in this matter, despite evidence of them being served. That notwithstanding, the Applicant is under duty to demonstrate that he deserves the orders sought. As I have stated elsewhere before, I take the position that even where a party's claim is not controverted, the court must interrogate the matter and ascertain whether the Claimant has proved their case on the required standard. In the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another* [2016] eKLR, the court held that even where the evidence is uncontroverted, the court should not take it as truthful without interrogation just because it is uncontroverted. The Plaintiff must prove its case to the required standard.

24. The Exparte Applicant's appeal was to the Minister in accordance to section 29 of the *Land Adjudication Act*. Section 29 of the *Land Adjudication Act* provides that;

    1) 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 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.

    2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

    3) .....

    4) .....

25. Section 29 of *Land Adjudication Act* places on the Minister the duty to determine appeals placed before them as they think just. This means that the Minister ought to exercise discretion in determining appeals before them. The fact that the law relies on his sense of justice does not give them a free hand to decide in any manner they so wish. As they employ that which they think to be just, their sense of justice must bear the marks of legality, reasonableness, propriety, procedural fairness, rationality and all that the rule of law would beckon them to do. A decision maker has to ensure that they treat persons affected by their decision fairly. That means that they ought to ensure they have accorded such persons the right to be heard and a fair administrative action.

26. The right to be heard is a fundamental right which is protected under the law which guarantees that no one should be condemned unheard. Article 50 provides for a right to a fair hearing as follows;

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

27. The right to a fair administrative action is intertwined with the Right to a fair hearing. Article 47 of the *Constitution* provides as follows;

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

    2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

28. In the case of *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR, it was held as follows;

> Article 47 marks an important and transformative development of administrative justice, for it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are 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.

29. Section 4 of the *Fair Administrative Action Act*, *2015* restates the provisions of Article 47 of the Constitution by protecting every person's right to an administrative action that is lawful, expeditious, efficient, procedurally fair and reasonable. Therefore, a public officer like the 1st Respondent while exercising their power under section 29 of the *Land Adjudication Act*, they have a duty to act expeditiously, fairly, lawfully, reasonably and to give written reasons for his decision. The applicant contends that the Minister's decision was unreasonable, irrational, irregular, unfair, biased and made in bad faith as the same denied the Applicant the right to property without due process. I have evaluated the said decision in light of the complaints raised by the Applicant.

30. The applicant's complaint is that the 1st Respondent's actions were unprocedural and unlawful as he failed to consider the applicant's age and the fact that the Interested Parties and their late husband never resided near the suit property. And because the applicant resided on this land between 1960s to 2002, he had acquired the property by adverse possession, having lived there for over 12 years. As exhibited in paragraph 15 of the supporting affidavit, the Applicant's view is that the Interested Parties' evidence at the appeal was a fabrication and the Minister ought to have believed his evidence and not that of the Interested Parties. While the Applicant is entitled to argue in a Judicial Review application that the Minister considered irrelevant matters and failed to take into account relevant matters, I do not think that believing the Interested Parties' evidence and not believing the Applicant's evidence per se, was sufficient proof that the Minister took into consideration irrelevant matters and failed to take into consideration relevant matters. This is because the Applicant has not placed material before me to show that the Interested Parties' assertions were irrelevant while his allegations were relevant in the circumstances of the case. By simply attacking the veracity of the Interested Party's evidence, the Applicant is leading the court to the appellate course which this court is unwilling to take, as this court cannot sit on appeal of the decision of the Minister, by dint of the provisions of section 29 of the *Land Adjudication Act*, which provides that the Minister's decision is final.

31. The Applicant also argued that the Minister's decision was unreasonable, irrational, irregular, unfair, biased, tainted with procedural impropriety and made in bad faith; as the same denied the Applicant the right to property without due process and that the applicant was not given an opportunity to fully state his case. The applicant complained that he is aged about 100 years and that the notice of 6 days was not sufficient for him to prepare submissions and get witnesses to attend the appeal. He complains that both the 1st and 2nd Respondent did not hear the evidence of his witnesses.

32. The Applicant argued that he had not been given an opportunity to be heard, because he alleges that on November 27, 2020, when he received the Summons to attend the Minister for the hearing of the appeal, he was advised to prepare submissions and witnesses. He alleges that he was given insufficient notice. I note that the Notice was served on November 27, 2020, while the hearing was slated for 4th December 2020, that is a period of 6 clear days. The applicant argues that due to his advanced age,

6 days were insufficient. First, there is no evidence to show that the Applicant sought from the 1st Respondent for extension of time to avail witnesses. There is nothing in the proceedings of that date to show the applicant's desire to call the Chief and Assistant Chief or a complaint that since demarcation he has been denied the opportunity to call the local administration. Besides, there is no evidence that the applicant sought for the attendance of the Chief and Assistant Chief in the 6 clear days he had before the appeal hearing.

33. What constitutes sufficient notice? In the case of *Mwangi Stephen Muriithi v National Land Commission & 3 Others* [2018] eKLR, the court cited with approval the decision in *R v Ontario Racing Commissioners* (1969) 8 DLR (3d) 624 at 628 (Ont. H.C) where Mr. Justice Haines emphasized that a notice that complies with the principles of natural justice means;

A written notice setting out the date and subject matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing.

34. I have considered the *Land Adjudication Act*, and I note that the period within which a party should have notice of hearing of their dispute is not stated. What comes close to the issue at hand is the provision of section 14 of the Act, which provides that a Notice in respect of warning of demarcation and recording for a demarcation section, shall not be less than 7 days.

35. The *Black's Law Dictionary* defines adequate Notice as "notice that is legally adequate given the particular circumstances" In determining what amounts to adequate notice the court may consider the circumstances of each case, as no particular period of time can be said to be adequate across the board. On whether notice of six clear days that the applicant was accorded was short, the applicant argued that the same was not sufficient for him to attend the Minister for the hearing of the appeal. He stated further that that the time was not sufficient for preparing submissions as well as getting witnesses to attend.

36. I do not think that a notice of six clear days can be termed as insufficient in the circumstances of this case. The Applicant has not stated clearly what he needed to do for purposes of preparing submissions and procuring his witnesses' attendance that could not be done in six days. The matter before the Minister was administrative and as can be seen from the proceedings, what was expected of the Applicant was to give his version of the story on why he did not agree with the decision made in the objection. The applicant's main complaint is that he ought to have been given opportunity to call the evidence of the Chief and Assistant Chief. I note that he stated that the summons for attending the appeal were served on him by the Chief. So what was difficult in getting the Chief and Assistant Chief to attend the Minister?

37. The Applicant's complaint that he was not allowed to call the Chief and Assistant Chief is a complaint that cuts across, from the decisions of the demarcation and recording officer, the Adjudication Officer and now the Minister. He has not attached the decisions of the demarcation officer and the objection to show that he sought to have the Chief and Assistant Chief testify before demarcation and during the objection and that his requests were declined. I have perused the summons to attend the appeal. The same was very clear that each party was to prepare submissions and witnesses in regard to the appeal and that the appeal was scheduled to be heard on December 4, 2020. The Minister having indicated that he expected submissions and witnesses on December 4, 2020, it is not conceivable that he would not be willing to allow witnesses to testify. The applicant has not stated that he availed his witnesses and that the same were not allowed to testify. I am not persuaded that the Minister asked the Applicant to bring witnesses and denied the witnesses an opportunity to testify.

38. In addition, I note that the Applicant in his statement before the Minister stated that the suit property was ancestral and that he left that land and later came and built a house for his wife and buried

his brother there. He also stated that the Interested Parties got the land during the survey process. The question of the evidence of local administration or chief being declined to testify at the survey process and the Objection proceedings never arose in the appeal before the Minister. It is clear that the Applicant having lost the objection and the appeal, intends to have a second bite at the cherry by bringing witnesses he did not earlier consider to be necessary, peradventure it would change his fortune. Judicial Review orders are equitable orders and he who comes to equity must do so with clean hands. I do not think that the applicant has approached this court with clean hands. His contentions are not honest.

39. Although Regulation 4 (4) of the *Land Adjudication Regulations, 1970*, provides that upon obtaining leave of the minister, a party in an appeal is entitled to call witnesses. There is nothing however in the Adjudication Act or Regulations that suggest that where witnesses do not testify on appeal, the same shall render the decision of the Minister unlawful.

40. I note that the Minister upon hearing the appeal made findings that the Appellant did not appeal after demarcation, but he only filed an objection which was dismissed and that the Respondent was the first to be registered in the suit property. The applicant has neither faulted those findings at all nor stated that they were based on an error of law or on irrelevant matters. It is true that the applicant did not contest the demarcation process. The applicant has complained that the 2nd Respondent in surveying the suit property as separate from parcel No 1592 belonging to the applicant, failed to consult the local authorities and failed to take into account that the Interested Parties husband never resided near the suit property. This argument is untenable as there is no evidence that the Applicant sought to provide the evidence of the local authorities during demarcation and was denied the opportunity. In addition, the allegation as to whether or not the Interested Parties husband's evidence that they resided on the suit property is a matter of evidence which goes to the merit of the decision and which cannot be entertained by this court in the exercise of its Judicial Review jurisdiction and by dint of section 29 of the *Land Adjudication Act* which provides that the Ministers' decision (on merit) shall be final. Further, the Applicant states that survey was done in the year 2002. Hence seeking to review the decision by the Demarcation and recording officer, which is 19 years old will be a claim out of time as Order 53 Rule 2 of the Civil Procedure Rules provides that a judicial review application may only be brought six months after the decision complained of. That applies also to the decision of the objection made in 2002 which led to the appeal herein being appeal No 154 of 2002.

41. The Applicant also contended that the Minister exceeded his jurisdiction because he declared substantive rights to the land in favour of the Interested Parties' husband where none existed. My view is that the Minister's decision in such disputes will touch on the substantive rights to land of members of a community. The Applicant did not state the manner in which the Minister exceeded his power. His argument is that the Minister should not make a decision that confers substantive rights to property. I disagree with this proposition because as can be seen from the preamble of the *Land Adjudication Act*, the purpose of the Act is to provide for the ascertainment and recording of the rights and interests in community land and for connected purposes. Right from the demarcation process, the committee, the Arbitration Board, the Adjudication Officer and the Minister, all the disputes determined by these persons are about interest in land touching on substantive rights to land. The Adjudication process itself is about conferring private land rights to individuals from Community land, hence no other body has jurisdiction to confer such rights apart from those stated in the *Land Adjudication Act*.

42. The Applicant also contended that the Minister acted in error in denying him the suit property contrary to the *Land Act* and the Land Registration Act. He further argued that the Minister's decision was tainted with illegality and offended Article 40, which protects the applicant's right to own property. I note that no particular provisions of the *Land Act* or the Land Registration Act were

referred to as having been breached by the Minister. The applicant's contention that the Minister's decision was illegal because it denied him his right to property under Article 40 of the *Constitution* is devoid of merit as at no time has the Applicant been pronounced as owner of the suit property and therefore, he had no rights which have been infringed by the Minister. In addition, the Minister's decision has the effect of conferring interests in land and cannot be said to be in contrary to Article 40 of the constitution. The applicant has not demonstrated that by exercising his jurisdiction under section 29 of the *Land Adjudication Act*, the Minister was acting contrary to the Provisions of Article 40 of the Constitution. In the premises, this ground must fail.

43. As the Applicant has failed to demonstrate that the decision of the Respondents was tainted with illegality, unreasonableness, impropriety, procedural unfairness and irrationality or in any way failed the constitutionality principle, he is not entitled to the orders sought. I therefore find no merit in the Notice of Motion dated May 12, 2021 and the same is hereby dismissed with no order as to costs.

44. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mrs. Mapesa for the Exparte Applicant

No appearance for the Respondents

No appearance for the Interested Parties

Ms Josephine Misigo – Court Assistant