Maingi v Kyumbwa & 2 others (Constitutional Petition 11 of 2021) [2022] KEELC 3925 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3925 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

CONSTITUTIONAL PETITION 11 OF 2021

LG KIMANI, J

JULY 27, 2022

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 21 (1) ,25 (C), 27 (1) AND 47 (1) AND (2), 50 (1) AND 159 (2) (A) (B) AND (C) AND (E) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PREAMBLE TO AND ARTICLE 1, 2, 3. 4. 10, 19, 20, 23, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLE 10 OF THE UNITED NATIONS UNIVERSLA DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284, LAWS OF KENYA AND IN THE MATTER OF THE SPECIAL MINISTER FOR LANDS AND PHYSICAL PLANNING APPOINTED FOR PURPOSES OF APPEALS UNDER SECTION 29 OF THE LAND ADJUDICATION ACT CAP 248 LAWS OF KENYA

AND

IN THE MATTER OF THE DECISION /RULING IN APPEAL NO. 175 OF 1987 DELIVERED TO THE PARTIES HEREIN ON 31.8. 2018

BETWEEN

JACOB MUTUA MAINGI ..... PETITIONER

AND

PETER MUEMA KYUMBWA. ..... 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER, KITUI CENTRAL ... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

1. Before the court is a Petition dated 29th October 2018 seeking the following orders:

    a. A declaration that the proceedings and the verdict of the 2nd Respondent were fundamentally in breach of the law and/or violation of the guaranteed fundamental rights to a fair hearing as per Articles 25(c), 27(1) and (2), 47(1) and 50(1) of *the Constitution* of Kenya and Article 10 of the United Nations Universal Declaration of Human Rights and hencefore null and void.

    b. A declaration that the dispute ought to be referred to the Deputy Commissioner to be heard afresh by another Independent Deputy County Commissioner.

    c. The Costs of this Petition be awarded to the Petitioner.

2. The court gave directions on 17th November 2020 that the Petition would be proceed for hearing by way of viva voce evidence. On 7th December 2021 when the Petition was for hearing Counsels for the parties further agreed that; i) The parties would adopt their respective affidavits filed in Court ii) The parties would only testify on key pillars of their cases iii) All documents attached to the respective affidavits to be adopted as exhibits iv) All exhibits attached to the notice to produce dated 18th October 2021 to be admitted as exhibits v) The Petitioners name on the supporting and verifying affidavits to read as Jacob Mutua Maingi instead of Peter Mutua Maingi.

The Petitioner's Case

3. The Petitioner describes himself as a Kenyan citizen, resident in Kitui Central sub-county, aged 73 years and suffered mild stroke affecting his memory and speech and in Appeal to the Minister of Land case No. 175 of 1987- Kaveta Adjudication Section he represented Maingi Maliti, the deceased Appellant in the appeal lodged on 27.11. 1978.

4. The Petitioner claims that the 2nd Respondent herein by virtue of powers conferred upon him under Section 29 *Land Adjudication Act* CAP 248 Laws of Kenya exercises quasi-judicial powers and authority within the meaning of Article 25 (c) and 50 (1) of *the Constitution* of Kenya 2010 and was obliged to exercise the said powers as provided under Article 21 (1) of *the Constitution*.

5. The Petitioner avers that he exercised his rights under Section 29 of the *Land Adjudication Act* by lodging an appeal No. 175 of 1978 but he claims his Constitutional right to fair trial under Article 25 (c) and 47 (1) of *the Constitution* was violated since the 2nd Respondent failed to take any proceedings or accord the Petitioner's witnesses the opportunity to testify. He averred that he had a legitimate expectation that the appeal would be heard and determined within a reasonable period of time but was delivered after a period of about thirty nine (39) years, that the 2nd Respondent would be fair, just and neutral to all parties.

6. The Petitioner also avers that he had a legitimate expectation that the 2nd Respondent would exercise the delegated powers and/authority in accordance with *the Constitution* Article 1,23(c), 2(1), 2(2) and that he would uphold the observe the natural values and principles of governance as per Article 10 of *the Constitution*. He also expected that the 2nd Respondent would handle the proceedings fairly, independently and without being influenced or biased and that he would be handled equally as per Articles 27(1) &(2) and 50(1) of *the Constitution* but unfortunately what he got was what he termed as a pre-determined verdict.

7. The Petitioner contended that the following persons named Fr. Peter Muema, Fr. Nicholas Maanzo and Fr. Peter Kiteme Muvea who were not related to any of the parties but were present during the hearing were meant to influence determination of the case in favour of the 1st Respondent, their colleague. He further stated that one Boniface Muthengi Musyoka, a former principal of Kitui High School and a member of the Land Control Board (LCB) Kitui where the 2nd Respondent also sits and who is personally familiar to the 2nd Respondent was also present for the purpose of influencing the outcome of the verdict as it was not clear why he was there. The Petitioner further mentioned one Kalavi, a land dealer (broker) who had purchased a small portion of land adjacent to the one in dispute and was a friend to the 2nd Respondent and the 1st Respondent wanted/intended to sell the parcel of land to him if he won the dispute.

8. The Petitioner stated that as a result of the presence of the aforesaid persons during the proceedings, the 2nd Respondent was biased, partial and lacked independence, hence the proceedings were a mere sham lacked legitimacy or legality and only carried out with the aim of awarding the land in dispute to the 1st Respondent.

9. The Petitioner averred that as evidence of this predetermination and as demonstration of the motive of the Respondents in this case and their handlers, the 1st Respondent immediately filed a case in Kitui Law Courts seeking to evict the Petitioner from the land that he has been in occupation in for the last sixty two (62) years or thereabouts.

10. In response to the averments made in the Replying Affidavit, the Petitioner filed a Supplementary affidavit stating that in Minister's Appeals, it is the duty of the Deputy County Commissioner to notify and summon parties for hearing or mention of their appeals; hence Maingi Maliti the Appellant was not to blame for the delay in the hearing. The Petitioner further stated that since the tribunal's rules are not like those of a court, thus the requirement to take out letters of administration to the estate of the deceased Maingi Maliti did not arise before the Minister and in this Petition since he was the party who represented the Appellant and is entitled to access this court.

11. He further stated that he is not a trespasser at all but a member and representative of the family of the late Appellant Maingi Maliti, hence the proper part and person to claim and follow up the dispute.

12. In reply to the Respondents submissions the Petitioner filed supplementary submissions citing Article 159 of *the Constitution* terming the matter of locus standi as a technical matter. The Petitioner relied on Section 13(1) of the *Land Adjudication Act* CAP 284 and which provides that, "every person who considers that he has an interest in land within an adjudication section shall make a claim.....and point out his boundaries to the...."He submitted that he has an interest in the suit land having been in occupation, use and possession of the suit land for over forty (40) plus years.

13. In addition to this, the Petitioner submitted that the *Land Adjudication Act* did not envisage the application of the *Law of Succession Act* as they relied on the authority in the case of *Tobias Achola Osindi & 13 others vs Cyprianus Otieno Ogalo & 6 others* (2013) eKLR where the Court held that a claim under Section 13 of the Act can be made by successors of a deceased person and not necessarily the deceased legal representative.

14. The Petitioner pointed out that he was a party in the proceedings in question and that no one has challenged that issue in any other forum. He submitted that if the 1st Respondent is saying that the proceedings before the 2nd Respondent were a nullity, then so be it that the court declares the proceedings null and void.

The Petitioners Submissions

15. In his written submissions, the Petitioner reiterated that there were flagrant fundamental violations and infringements of the bill of rights and freedoms guaranteed in *the Constitution* namely the prolonged delay, the sham proceedings, biasness and influence and failure to uphold the law.

16. The Petitioner submitted that the prolonged delay was a contravention of Article 50(2)(e) of *the Constitution* which provides that disputes should have the trial begin and conclude without unreasonable delay and Article 47 on fair administrative action. He stated that a period of forty years without the appeal being heard and determined is not fair, reasonable, efficient, lawful, and expeditious and/or procedurally fair.

17. The Petitioner's Counsel submitted that the duty bearer of the Bill of Rights and fundamental freedoms is the government and the 2nd and 3rd Respondents herein ought to have given an explanation to justify the prolonged delay in setting the case down for hearing. He relied on the case of *Shameem vs State* (2008)2LRC 258(2007) CA 19 where the court held that if failure of the court to conduct a trial caused delay, the court would more readily accept it as unreasonable. The Petitioner submitted that the fact that the original disputants died and the Petitioner herein suffered stroke and memory lapse shows this delay as the original disputants died with the history and evidence.

18. On the Petitioners expectation that the conduct or the action of the 2nd Respondent would be efficient, lawful, reasonable and procedurally fair Counsel relied on the cases of Republic vs National Police Service ex parte, *Daniel Chacha and Msagha vs Chief Justice & 7 others* Nairobi HCMCA No.1062 of 2004, HCK(2006) 2 KLR 663 where the court stated that quasi-judicial tribunals must exercise the rules of natural justice as well as several other authorities on the conduct of such tribunals and public officers.

19. The Petitioner concluded his submissions by expressing that the 2nd Respondent conducted the proceedings of the Appeal in a manner that was in violation of the law, *the constitution*, due process, rule of law and that the verdict arrived at in such vitiated proceedings is null and void.

The 1st Respondent's case

20. The 1st Respondent filed a Replying Affidavit stating that the Minister's Appeal was filed by Maingi Maliti on 16/11/1978 and the same was heard by the 2nd Respondent on 28th July 2018. The said Maingi Maliti died on 2/11/2014 during the pendency of the appeal. The 1st Respondent stated that the said Maingi Maliti (Deceased) made no effort to prosecute the appeal during his lifetime. The 1st Respondent noted that the Petitioner herein is not an administrator of the estate of the late Maingi Maliti since the administrator is one Teresia Kavili Maingi and that the Petitioner cannot claim to have been aggrieved by the outcome.

21. The 1st Respondent accused the Petitioner of being a trespasser on the suit property Land Parcel Number Kyangwithya/Kaveta/942 and that he there illegally, unlawfully, wrongfully and without his consent.

22. It is the 1st Respondent's averment that the 2nd Respondent is not expected to take proceedings like a judicial officer in a court of law. Further, that the 2nd Respondent reached his decision on the basis of the evidence after each party was given an opportunity to be heard. He further stated that the proceedings before the 1st Respondent were not a private session but a public court where members of the public were free to attend. He confirmed that Boniface Muthengi Musyoka is a neighbour and the other

priests are his colleagues since he is also a priest. He also identified Joseph Muli Kalavi as his classmate at Mwingi Seminary and friend who he had invited to hear the dispute.

23. The 1st Respondent added that the hearing before the 2nd Respondent was not a trial where witnesses are required to be called but an appeal which is decided upon already recorded evidence. After the decision in the Minister's Appeal, the 1st Respondent filed a land case for eviction of the Petitioner and it is at that point that the Petitioner proceeded to file this petition after he was served with an eviction suit.

24. The 1st Respondent concluded by stating that the Petitioner, having not been a party to the claim over the suit property is a stranger to the suit and his petition is unmaintainable.

The 1st Respondents Submissions

25. The 1st Respondent's Counsel filed written submissions and stated that the Petitioner lacks the requisite locus standi to bring these proceedings because he was not the legal representative of the deceased Maingi Maliti the Appellant in the proceedings before the 2nd Respondent. He submitted that there was no substitution in the Court of the 2nd Respondent to bring the Petitioner properly on record and cited the case of Robert Muli Matolo-vs- Director of Land Adjudication and *Robert Muthiani Muli and Peter Nzesya Maithya* 2014 eKLR where the court held that the Applicant lacked locus standi to bring the application without substitution with the deceased. He also quoted from the case of *Republic-vs District Commissioner Makueni & 2 others ex parte Cyrus Muli Kula* 2017eKLR where the Court found that the District Commissioner acted illegally and without jurisdiction as he had no authority to purport to appoint personal/legal representative of the estate of Nzuve Maithya which power vests in the High Court or Magistrate's Court.

26. Secondly, the 1st Respondent's Counsel submitted that it was the duty of the Appellant to follow up on the Appeal and if it took too long to be heard, it was because of his indolence. Counsel further submitted that the Petitioner was given a right to be heard and was indeed heard and that there is nothing on record to show that he was denied an opportunity to call a witness. He also stated that the Petitioner did not show that the presence of his friends had the capacity or influenced the 2nd Respondent in making his decision.

27. The 1st Respondent reiterated that the Petitioner was a stranger in the proceedings and could not have had any legitimate expectation as he was not a legal representative of the deceased Appellant. He concluded by submitting that the 2nd Respondent did not violate any of the rights confirmed in *the Constitution* and there is no evidence of such violation. The 1st Respondent stated that the Petitioner's case is based on speculation and that the Petition ought to be dismissed with costs.

28. There was no appearance from the 2nd and 3rd Respondents.

Analysis and Determination

29. I have considered the Petition and the affidavits in support thereof, the replying affidavit, the oral evidence adduced in court and the supporting documents produced in court. I have also considered the written submissions by Counsels for the Petitioner and the 1st Respondent and the cited legal authorities. I have considered that this petition relates to a dispute heard and determined through the process of adjudication under the *Land Adjudication Act* Cap 284 Laws of Kenya. I find that the following issues arise for determination;

    A. Does the Petitioner have the requisite Locus Standi to bring this Petition before the Honourable Court?

B. Did the 2nd Respondent contravene the Constitutional rights of the Petitioner under Article 21 (1), 25 (c), 27 (1) and 47 (1) and (2), 50 (1) and 159 (2) (a) (b) (c) and (e) of *the Constitution* of Kenya 2010 and Article 1, 2, 3. 4. 10, 19, 20, 23, 258, 259 and 260 of *the Constitution* of Kenya 2010 and Article 10 of the United Nations Universal Declaration of Human Rights while hearing the Adjudication Appeal between the parties?

A. Does the Petitioner have the requisite Locus Standi to bring this Petition before the Honorable Court?

30. The 1st Respondent claims that the Petitioner lacks the Locus standi to bring this Petition in his own capacity because he is not the legal representative of the estate of Maingi Maliti (Deceased), the original Appellant in the Adjudication Appeal that the 2nd Respondent conducted. Since capacity is of utmost importance, I am of the opinion that this issue should be addressed first. In the case of *Law Society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-

> " Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in a Court of Law". Further in the case of *Alfred Njau and Others ..Vs.. City Council of Nairobi* (1982) KAR 229, the Court also held that;-
>
> "the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

31. In this case, the Petitioner stepped in for Maingi Maliti (Deceased) who had filed the appeal before the 2nd Respondent. A claim for an interest in land made under the *Land Adjudication Act*, Cap. 284, Laws of Kenya following the declaration of an area as an Adjudication Area or an Adjudication Section cannot be equated to a claim before a court. A claim under the Act pursuant to section 13 of the *Land Adjudication Act* can be made by "every person who considers that he has an interest in land within an adjudication section".

32. The Court of Appeal in *Dominic Musei Ikombo v Kyule Makau* [2019] eKLR determined that it is not necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant.

> " 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. Section 13 of the *Land Adjudication Act* talks of "guardian" or "representative according to African Customary Law". It does not refer to legal representatives. The strict rules of civil litigation as relates to capacity to sue and be sued do not apply to proceedings before the committee or the minister. It is not therefore necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant. The parties therefore had locus standi to appear before the adjudication committee, lack of letters of administration notwithstanding.
>
> 20. Further, the Act allows every person who considers that he has an interest in the land in question to lodge a claim to the recording officer. In this case, the parties did not need to obtain letters of administration to protect their interest

in the land in question. Furthermore, the two qualified as representatives of the deceased under customary law to represent their respective families in the adjudication proceedings. That ground meets the same fate as the first ground."

33. Having successfully and legally appeared as a family representative before the 2nd Respondent in the appeal I find that the Petitioner has the necessary locus standi to also present this petition. I have further considered constitutional provisions relating to locus standi. The question of locus standi to institute a constitutional petition is dealt with by *the Constitution* itself under Article 3 which provides for Defence of this Constitution and states that

> " Every person has an obligation to respect, uphold and defend this Constitution."
>
> Article 22 provides for Enforcement of Bill of Rights and states that:-
>
> " Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
>
> 1) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> a) a person acting on behalf of another person who cannot act in their own name
>
> b) a person acting as a member of, or in the interest of, a group or class of persons.
>
> c) a person acting in the public interest; or
>
> d) an association acting in the interest of one or more of its members"

34. Under *The Constitution* of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 (Mutunga Rules), Rule 4 on Contravention of rights or fundamental freedoms it is provided:-

> " Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules."

35. The Petitioner has stated in his Petition that he has lived on the suit property almost all his life. He is the descendant of the Deceased Appellant and as such had rights and interests over the suit land. A close look at the adjudication proceedings shows that the deceased Maingi Maliti the father of the Petitioner was claiming his ancestral land. In the objection proceedings he states as follows;

> " I have filed this case against Mwema because of the land which was acquired by my father. I took occupation of the disputed land in 1936. When I came here I came there to live in my grandfather's land"

36. The Petitioner herein rightly represented the deceased Appellant in the appeal to the Minister in the adjudication proceedings, it was his right to bring this petition and I do find he possesses the capacity to lodge this Petition.

B Did the 2nd Respondent contravene the Constitutional rights of the Petitioner while hearing the Adjudication Appeal between the parties?

37. The Petitioner has contended that his rights to fair hearing under Articles 25 and Article 50 of *the Constitution* were violated as well as his right to fair administrative action under Article 47 due to the fact that he was not given a chance to present witnesses or question witnesses during the hearing, that the 2nd Respondent did not record or take down proceedings and the possibility of bias in the decision-making because of the presence of people who were known to the 1st Respondent.

38. The Petitioner in his submissions has set out the following issues for determination by the Court

i. The Prolonged delay

ii. The sham proceedings

iii. Biasness and influence

iv. Failure to uphold the law

i. Prolonged Delay

39. The Petitioner relies on the provisions of Section 77(9) of the Repealed Constitution of Kenya which provided

> " A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

40. The Petitioner further relies on Article 50 (2) (e) of *the Constitution* of Kenya 2010 which provides:-

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
>
> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (e) to have the trial begin and conclude without unreasonable delay;"

41. The Petitioner claims that the period between the filing of the appeal and the time when judgment was rendered was a period of 40 years and that period was an unreasonable delay that amounts to a violation of the Petitioners right.

42. The evidence on record shows that decision in the objections proceedings dismissing the objection were made on 21/9/1978. The grounds of appeal to the Minister were signed by the Appellant Maingi Maliti on 16/11/1978 Appeals fees were paid on 27/11/1979 and sketch map fees was paid on the same date 27/11/1978. The record further shows that the appeal was initially heard on 24/8/1990. However it appears no decision was rendered after the hearing ended. There is no evidence that has been placed before this court on what transpired between the periods 27/11/1978 and the date of the 1st hearing 24/8/1990. Further there is no record of what transpired between the period 24/8/1990 and 29th June 2018 when a letter of the same date was written by the Deputy County Commissioner Kitui Central

Sub County informing the parties to the appeal that their case was listed for hearing on 28th July 2018 and requiring them to attend the hearing. Judgement was finally rendered on.....

43. It is the Courts view that on the face of it a period of 40 years between the filing of an appeal and the hearing and determination of the same is a long period of time. However my view is that it is not prima facie the length of time that translates to a violation of the fundamental rights and freedoms complained of. The issue is what is the interpretation of the "fair hearing within a reasonable time." As per section 77 of the repealed constitution or "conclude without unreasonable delay" as per Article 50(2) (e) of *the Constitution* of Kenya 2010? According to Black's Law Dictionary the term unreasonable is defined as " Not guided by reason, irrational or capricious" while reasonable is defined as " Fair, proper or moderate under the circumstances, sensible"

44. In the case relied on by the Petitioner *Re Mlambo* (1993) 2 LRC the Zimbabwean Court states that "The concept of reasonableness is one which defies definition" It went on to state that "whether a period of delay complained of was unreasonable or not was a question of degree: that it might have been the practice in the past to tolerate such delays did not protect them from scrutiny under section 18 (2) of *the constitution*. The onus was on the accused to show that the delay complained of was prima facie unreasonable or presumptively prejudicial."

45. In the other case relied on by the Petitioner Shameen v State(2007) FJCA the court made the following findings:-

> " However where, as is all too clearly the case in the present appeal, the delay is principally and overwhelmingly the result of a failure of the court to conduct the trial the court will more readily accept it is unreasonable"

The court further stated that:

> " The reasonableness of the length of the proceedings coming within the scope of Article 6 (1) must be assessed in each case according to the particular circumstances. The court has to have regard, inter alia, to the complexity of the factual or legal issues raised in the case; to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition, only delays attributable to the state may justify a finding of failure to comply with the reasonable time requirement."

46. In the same case the Court found the Magistrate hearing the case was the cause of the delay and stated that

> " Time after time the magistrate simply adjourned the case for no stated reason. Such action was impossible to justify"

47. In the present case the Petitioner has not shown that the 2nd Respondent was the cause of the delay in setting down the appeal for hearing. He has further not shown by way of any documents that the deceased and even after the death of the deceased in the year 2014 he made any efforts to prosecute the appeal. Indeed the only evidence availed by the Petitioner as effort to prosecute the appeal came from the 2nd Respondent. In my view the onus was on the Petitioner

48. In the case of *Robert Muli Matolo v Director of Land Adjudication & 2 others* [2014] eKLR, Justice Mutungi observed that;

> " A party who files an appeal before the Minister against the decision of an Adjudication officer/committee in my considered view would have the obligation and/or duty to have such an appeal prosecuted and determined by ensuring there is the necessary follow up."

49. It is a principle of fair hearing that justice must be administered without unreasonable delay. But even then, 'equity aids the vigilant, not the indolent.' It should have been the Appellant's responsibility to follow up on the Appeal with the Adjudication officers having been the one who filed the Appeal but he failed to do so. Instead, he sat on it as he enjoyed occupation of the suit property for all those years since the filing of the Appeal in 1978 up to the time of his demise. The Petitioner herein also did not take any steps to have the Appeal heard until the time that the office of the 2nd Respondent summoned him for hearing of the Appeal. There is no evidence that the Appellant ever wrote a letter or took a step to have the Minister's Appeal set down for hearing.

50. In *Alice Mumbi Nyanga vs. Danson Chege Nyanga & Another* Civil Case No. 394 B of 2001 (2006) eKLR, the Court stated that:-

> " a Civil case once filed is owned by a Litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress."

Similarly, in the case of Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 the Court found that:

"it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case." Since the parties to adjudication can be likened to litigants with the process being quasi-judicial, then the Appellant had the duty to follow up on the hearing of the Appeal and cannot lay the blame solely on the 2nd Respondent for taking long to make the final determination. In the actual sense it seems that the Petitioner did not suffer prejudice as a result of the delay as he was still enjoying the occupation of the suit property during the 49 years that the Appeal was pending.

51. I have taken into account the fact that the Appellant and the Petitioner herein did not show efforts that they made in pursuing the hearing of the appeal itself save for what was stated during the hearing that the deceased used to check on progress of the hearing but he was always told to wait. It is noted that this evidence was not initially contained in the affidavits in support of the Petition. That being the case, I find that the Petitioner has not satisfied the court that delay in hearing and determining the appeal during the period between the filing of the appeal on 27.11.1978 and the first hearing on 24.8.1990 was caused by the 2nd Respondent. He has further not shown the efforts that he made in having the Appeal heard expeditiously.

52. However, I have considered the fact the appeal proceeded before the District Commissioner on 24.8.1990 and the parties were heard and the appeal was reserved for the decision of the said District Commissioner. The record does not show that any decision was ever rendered and no explanation has been given by the 2nd and 3rd Respondents for failure to render the decision as would have been required by the law. Section 29 of the *Land Adjudication Act* which 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

(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.

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

53. It appears that the office of the Minister that was responsible for hearing the appeals under the above section 29 went silent and nothing was done until the letter dated 29th June 2018 inviting the parties for hearing of the appeal. No explanation is given for the fresh hearing when the matter had proceeded for hearing previously. The delay for the period between 24.8.1990 and 29.6.2018 is a period of 28 years and that period called for an explanation since delivery of the judgment was the sole responsibility of the 2nd Respondent and there was nothing the deceased Maingi Maliti or the Petitioner could have done to expedite the said decision.

54. I therefore find that the failure to render the decision after the initial hearing on 24.8.1990 and/or rehear the appeal if that was necessary for a period of 28 years was an unreasonable delay to which there was no explanation given.

ii) The Proceedings

55. The next issue dealt with by the Petitioner is the manner in which the proceedings were conducted which he calls sham proceedings. An appeal to the Minister under the *Land Adjudication Act* is governed by Section 29 of the *Land Adjudication Act* CAP 284 Laws of Kenya. Section 29 mandates that:

> "…….the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."

56. Under Regulation 4 of the Land Adjudication Regulations, 1970 taking of further evidence during the hearing of an appeal to the Minister is subject to leave first being obtained. The said regulation states:-

> "Subject to the leave of the Minister being first obtained the appellant or any other party to an appeal may attend before the Minister either in person or by duly authorised agent, and shall be entitled to call witnesses."

57. The Minister's Appeal is an appeal like any other where the court or quasi-judicial authority considers the previous record before arriving at their own decision. The Minister or the Deputy County Commissioner in this case had the mandate to consider the grounds of appeal, consider previous evidence tendered and make his own determination as he deems just and fair under Section 29 of the Act. that I am of the opinion that the Minister's Appeal decision herein is evident of this since he considered both parties submissions and previous adjudication records. It was held in *Matwanga Kilonzo v District Commissioner, Kitui & another* [2021] eKLR that:

> "The Minister's mandate under Section 29 of the Act is to consider the grounds of appeal raised by any person appealing against the decision of the Land Adjudication Officer, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision. Indeed, just like what happens in an appellate court, the Minister need not take fresh evidence while dealing with the appeal, although he may do so to seek clarification on certain issues. However, he must consider the grounds of appeal and the evidence that was adduced before the Land Adjudication Officer before making his decision. The said decision must give reasons as to why he agrees or disagrees with the decision of the

> Land Adjudication Officer..... The 1st Respondent made the above finding after hearing the parties herein, and after considering the decision of the Land Adjudication Officer. Considering that the 1st Respondent heard both parties and considered the proceedings of the Land Adjudication Officer, I am not convinced that the 1st Respondent was biased while arriving at his decision."

58. As it was held in the above case, the 2nd Respondent did not need to take fresh evidence and hear witnesses from the parties. He only needed to consider the previous record and make his determination as he thinks just. Indeed the evidence on record shows that the 2nd Respondent heard the Petitioner and further asked for remarks from the persons who had accompanied the parties. Indeed the Petitioner has demonstrated that the deceased and his witnesses were heard in the Ministers appeal and the evidence was on record. I am of the view that the 2nd Respondent did not contravene *the Constitution* in the way he conducted the proceedings and that he did not fail to take down proceedings or allow the Petitioner to call witnesses to be questioned from both sides.

59. My review of the 2nd Respondent's decision is that he recorded statements from both parties and made his findings. In my opinion, this was a fair hearing since both parties were present and were accorded the opportunity to present their cases. There is nothing on the record to show that the people that the Petitioner mentioned that were likely to have influenced the 2nd Respondent's decision were even present during the hearing. The 1st Respondent admitted that they were present because the appeal was conducted in an open public court and that they were not there to influence the final determination.

iii) Biasness and Influence

60. In order for a claim of bias to succeed, there must be a reasonable apprehension of bias on a reasonable person, not just to the person on trial. In the case of Supreme Court of Canada R Vs. S.C.R.D.) [1977]. 3SCR 484 cited by the Court of Appeal in *Kalpana H. Rawal & 2 others v Judicial Service Commission & 3 others* [2016] eKLRit was held that:

> "The apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. This test contains a two-fold Objective element: - the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold.
>
> The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. The Jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence." [Emphasis added].

61. The Petitioner claims that the 2nd Respondent was not independent and/or impartial. The reason for the apprehension that the 2nd Respondent was not impartial was that he was under the influence of his

friend Boniface Muthengi Musyoka who they sat with as members of the local Land Control Board. I find that the mere fact that the 2nd Respondent sat with the said Boniface Muthengi Musyoka in the land control Board is not enough to show that there was a real likelihood of bias in the circumstances of this case. It has not been shown the two enjoyed a friendship going beyond their official relationship as members of the board. It is noteworthy that the said person was not sitting as an adjudicator and did not do anything to suggest as alleged that he had been brought in as an influence. In any event if that were the case nothing would have stopped him from influencing the 2nd Respondent without attending the hearing. The Petitioner further claims that the presence of one Kalavi a known land broker was indicative of a predetermined decision. No evidence was put forward to support this allegation.

62. It is noted that the Petitioner did not raise any objection to the presence of the named persons. The hearing of the appeal was a public hearing and was open to members of the public. In the case cited by the Petitioner Tumanini vs R it is noted that the accused person raised objection to his case being heard by the magistrate on the ground of bias but he was overruled. The circumstances in that case are completely different from those of the present case. The relationship between the Magistrate and the witness was described as "close intimacy and association" The case had been transferred from Mpwapwa to Dodoma where the magistrate was stationed.

63. I do find that the Petitioner has not in any way demonstrated that there was bias or likelihood of bias.

iv. Failure to uphold the law

64. In my view this issue has been addressed and it is the courts finding that the Petitioner of his own accord and as representing the deceased Maingi Maliti was given a fair hearing before the 2nd Respondent in the hearing of the appeal. The procedure adopted by the 2nd Respondent was in accordance with the law and the Petitioners fundamental rights and freedoms were not violated.

65. The Petitioner asks the court to make a declaration that the proceedings and the verdict of the 2nd Respondent were fundamentally in breach of the law and/or violation of the guaranteed fundamental rights to a fair hearing as per Articles 25(c), 27(1) and (2), 47(1) and 50(1) of *the Constitution* of Kenya and Article 10 of the United Nations Universal Declaration of Human Rights and hencefore null and void.

66. He further seeks a declaration that the dispute ought to be referred to the Deputy Commissioner to be heard afresh by another Independent Deputy County Commissioner.

67. In considering the consequences of a declaration that delay was unreasonable the court in *Andrew Kibet Cheruiyot & another v Medical Practitioners & Dentists Board & 2 others* [2014] eKLR stated:-

'I am persuaded in this view by dicta from various Courts in this and other jurisdictions to the effect that a delay such as is evident in the present case would not justify a prohibition of the inquiry before the 1st respondent. `In *Zanner vs Director of Public Prosecutions Johannesburg* 2006(2) SACR 45 (SCA) 2 ALL SA 588, the South African Supreme Court of Appeal had to deal with whether a ten year delay in instituting criminal proceedings for murder called for a stay of prosecution. Maya, AJA highlighted the importance of the nature of a crime in the balancing enquiry. She observed as follows;

> " The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It also instills public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime ....it is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe ...Clearly, in a case involving a serious offence such

as [murder], the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay."

68. The Court further stated;

> " Notwithstanding the delay in the matter, to quash the proceedings before the 1st respondent would be injurious to the public interest and should not be contemplated except in very exceptional circumstances, where serious prejudice has been shown as likely to occur to the defendant, which has not been shown to be the case here. As the Court observed in the Zanner Case (Supra):
>
> "Although the time period was central to the enquiry of whether it was unreasonable, the fact of a long delay cannot of itself be regarded as an infringement of the right to a fair trial but must be considered in the circumstances of each case. The accused must show definite and not speculative prejudice"."

69. The prejudice the Petitioner claims to have suffered due to the delay attributable to the 2nd Respondent is that the Appellant Maingi Maliti died while still waiting for conclusion of the hearing of the appeal while he (the Appellant) suffered a mild stroke affecting his memory and speech. As I have noted earlier and as provided there is no requirement for hearing of the parties to the appeal or their witnesses. The deceased had already testified and called witnesses at all levels of the adjudication dispute resolution process. Indeed the Petitioner herein was still given a further opportunity to be heard and he does not complain that his loss of memory affected the evidence that he gave. I will reiterate that the procedure of conducting an appeal to the Minister has been set out by the findings of various court cases. In *Republic vs Special District Commissioner & another* Machakos Civil Miscellaneous 124 of 2004 [2006] eKLR the court set out the mandate of the Minister or his official in conducting appeal proceedings under Section 29 of the *Land Adjudication Act* as follows:

> " My understanding of the method of determining the appeal then, is receiving the written grounds of appeal and perusing them before determining it by making such an order on it as he thinks just. This means to me that the District Commissioner (Minister) has to examine the written grounds of appeal along with the Land Adjudication Officer's proceedings, judgment, ruling or award, and from it, he will, make a just order or judgment. .....On the other hand, my understanding of Section 29 (1) aforesaid, is that there is no part of that section that authorizes the taking of fresh evidence by the District Commissioner before he arrives at the decision. This means that he has open room to do so and is in fact expected to rely on those records to come to his decision except where he needs particular additional evidence for clarification."

70. In my view the fact of a long delay cannot of itself be regarded as an infringement of the right to a fair trial but must be considered in the circumstances of each case. The Petitioner needed to have shown "definite and not speculative prejudice". I do find that the Petitioner was not prejudiced by the delay in delivery of judgment and/or re-hearing of the appeal. Indeed as noted earlier and as shown in the evidence of the Petitioner he has remained in possession of the suit premises throughout the period when the delay in the trial has occurred. The rights of the Petitioner and the deceased are to be considered alongside those of the 1st Respondent who has been made to stay away from the land that was adjudicated in his favour in 1978. The right of the Petitioner and to a fair trial requires fairness not only to him, but fairness to the 1st Respondent as well.

71. My conclusion concerning the issues raised in the Petitioner is that:-

i. The Petitioner herein rightly represented the Appellant Maingi Maliti (deceased) in the appeal to the Minister during the adjudication proceedings even though he had not taken out letters of Administration to his estate. Further I do find that the Petitioner possesses the capacity and/or locus standi to lodge this Petition.

ii. The Petitioner has not satisfied the court that delay in hearing and determining the appeal during the period between the filing of the appeal on 27.11.1978 and the first hearing on 24.8.1990 was caused by the 2nd Respondent. He has further not shown efforts that he or the deceased made in having the Appeal heard expeditiously.

iii. Failure by the 2nd Respondent to render a decision after the initial hearing on 24.8.1990 and/or rehear the appeal if that was necessary was within the sole mandate of the 2nd Respondent and the delay for a period of 28 years was an unreasonable delay to which no explanation was given.

iv. The proceedings and decision in the Appeal to the Minister which was finally heard by the 2nd Respondent were conducted in accordance with the law.

v. It is my finding that the fact of a long delay attributable to the 2nd Respondent cannot of itself be regarded as an infringement of the right to a fair trial but must be considered in the circumstances of each case. The Petitioner needed to have shown but did not show "definite and not speculative prejudice". I do find that the Petitioner was not prejudiced by the delay in delivery of the decision and/or re-hearing of the appeal and the proceedings in the Ministers appeal were not null and void.

vi. On the ground raised of bias, I do find that the Petitioner has not in any way demonstrated that there was bias or likelihood of bias.

vii. Taking into account my finding above the prayer sought by the Petitioner to remit the matter back for re-hearing is disallowed. I do indeed find that such an order would in fact exacerbate the question of delay complained of and would be injurious to the interests of justice.

72. The final order made in this Petition is that the same lacks merit and it is dismissed with an order that each party to bear its own costs of the suit.

DELIVERED, DATED AND SIGNED AT KITUI THIS 27TH DAY OF JULY 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read in open court in the presence of-

C. Nzioka Court Assistant