



Republic v Deputy Commissioner Nzambani - Sub-County & another; Kawee Moki (Exparte); Mueke (Interested Party) (Judicial Review Miscellaneous Application E004 of 2022) [2022] KEELC 13392 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E004 OF 2022
LG KIMANI, J
SEPTEMBER 27, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COMMISSIONER NZAMBANI - SUB-COUNTY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

AND

STEPHEN KAWEE MOKI EXPARTE

AND

FRANK MUTINGU MUEKE INTERESTED PARTY

JUDGMENT

1. The *Ex Parte*/Applicant's Notice of Motion application dated March 15, 2022 is brought pursuant to Article 165 (6) as read with (7) of the Constitution of Kenya 2010 and Order 53 Rule 1(1), (2), (3), and (4) of the Civil Procedure Rules and S 8(2) Law Reform Act and S 3 of the Judicature Act and S 7, 9 and 10 of the Fair Administrative Actions Act and seeks the following ORDERS:-
 1. That this Honourable court be pleased to issue an order of certiorari to call and remove to the High Court the records, proceedings and the impugned decision of the 1st Respondent dated September 22, 2021 and quash and/or set it aside for being null and void.
 2. That this Honourable Court be pleased to issue an order of prohibition to prohibit the implementation of the decision of the 1st Respondent, Deputy County Commissioner,



Nzambani Sub-County awarding Land parcel No 1887 Kaluva Adjudication Section to the interested party.

3. That this Honourable Court be pleased to grant the Applicant costs of these proceedings.
2. The *Ex parte* Applicant hails from Kaluva Sub-location of Nzambani Location, within Kitui County. In the Statement of Facts and in his supporting affidavit, he states that he, his mother and brothers shared out their inheritance before his father died, whereof the *ex parte* was given Land Parcel No 1887 Kaluva Adjudication Section, long before the adjudication process was declared. His claim before this court is that:-
 - i. During the demarcation process, the demarcation officer one Dunstan Muinde Kilonzo, to whom the interested party is an uncle also appeared as his representative in the adjudication proceedings thus raising a complaint of bias and conflict of interest.
 - ii. The Interested Party, who was then working in the United States of America, commissioned the said demarcation officer, to source for land on his behalf and approached the *ex parte* applicant's mother and brother who agreed to sell their portions of land. The sale was reduced into writing but the *ex parte* applicant claims he did not sell his land and was not party to the said agreement.
 - iii. The demarcation officer caused the *Ex parte* Applicants land to be fraudulently adjudicated and recorded in the name of the interested party instead of only the portions sold to him by the mother and the brother. The applicant states that he did not realize that his land had been so adjudicated and recorded and thus failed to lodge any case before the committee and the appeals board. When he discovered the fraud, he started agitating before the adjudication office but all his attempts were thwarted by the demarcation officer until he left the said office.
 - iv. According to the *Ex parte* Applicant, the District Officer arbitrated over the dispute and the interested party admitted being aware that he did not buy parcel No 1887 Kaluva Adjudication Section belonging to the *ex parte* applicant and would transfer it back to him.
 - v. Further, the Applicant states that he was denied an opportunity for a site visit when he could have shown the trees he had planted on the land in 1970 and his occupation, use and possession, or works on the disputed land. This was because the 1st Respondent did not visit the suit land when he was scheduled yet he went on to find that there were no trees planted on the land.
 - vi. It is alleged that the proceedings before the 1st Respondent were biased towards awarding the disputed land to the interested party in contravention of Section 7(2)(iv) of the Fair Administrative Action Act.
 - vii. The *Ex parte* Applicant also claims that the 1st Respondent's determination was taken with an outright ulterior motive, and that he failed to take into account relevant considerations and that it was done in an error of fact, there was an abuse of discretion, the determination was unfair and unjust to the applicant. The administrative action or decision not to visit the disputed land was unreasonable and violated the legitimate expectations of the Applicant and the decision or use of discretion not to visit the land in dispute was done as an abuse of power.
 3. The *Ex parte* Applicant filed written submissions stating that the decision of the 1st Respondent is subject to this Court's supervisory jurisdiction and urged the court to look into the soundness of a finding of fact in the impugned verdict that: "the *Ex-parte's* mother and brother sold his land to the interested party, and so, he had no cause to complain about the matter" for the reason that when it was the Interested Party's turn to testify before the 1st Respondent, he confirmed that the land he was



- buying belonged to Mukeke Moki, the *Ex parte* Applicant's brother, and that the *Ex parte* Applicant did not sell any land to him.
4. Further, that in the objection proceedings by the *Ex parte* Applicant's brother Mukeke Moki it was pointed out where he stated that: "He came to learn that, the defendant, (the interested party) had adjudicated his brother's portion (*ex-parte* applicant) herein and that of Muthembwa Moki (his mother) and Mulatya Moki(brother) all in his name." He further stated that: "I am claiming.....the three portions of my brothers and one for my mother." Despite this evidence, the 1st Respondent went on to find that the *Ex parte* Applicant had no grounds since his brother sold the two parcels to the Defendant. He further found that the applicant had witnessed the sale Agreement which was not true. It is therefore their submission that the verdict by the 1st Respondent is not sound in fact and in law as it is based on ignorance and misunderstanding of established material facts that had been presented and as such is liable for review. (*E v SSHD*(2004) QB1044 *Supra*) They also submit that the decision was irrational.
 5. Secondly, the *Ex parte* Applicant submits that there was ulterior motive and bias given that there was enough evidence on record that the Interested Party did not purchase the *Ex Parte* Applicant's portion of land but the 1st Respondent went ahead and decided to award him the land. He submits that the decision was deliberate in order to give the disputed land to the Interested Party.
 6. The *Ex Parte* Applicant then submitted that the 1st Respondent failed to consider the fact that no one has authority to validly sell another person's land. Further, the *ex parte* applicant submits that the decision was arrived at in a manner or basis not rationally connected to the facts and information presented before him and therefore the determination is overtly unsound and irrational, because given the same circumstances and facts, no reasonable tribunal could still uphold the same. He relied on the authority in *Cannock Chase DC v Kelly* (1978) 1 ALL ER 152 and *Queen vs Secretary of State of Health*(2010)EWHC 765 among other authorities.
 7. In the case of *R vs Criminal Injuries Corporation Board, Ex-parte* P(1994) EWCA Civ 34,(1995), WCR 845, (1945) I ALL ER 870 cited by the *Ex parte* Applicant, Justice Lord Neill stated that if a question arises as to the legality of any action taken by the executive the court as a general rule has jurisdiction to entertain the questions unless restricted by parliament. Similarly, in the case of *Simplex GE Holdings Ltd. V Secretary of State for the Environment*(1989) 57P & CR 306, *E v SSHD* (2004) the Court held that a decision can be set aside because of errors of fact and that a decision can be challenged on the basis that as a result of the error of fact, the Minister had taken into account matters which he was not entitled to consider because the error would undeniably be significant in the decision making process or may have been material.
 8. There was no appearance on the part of the Respondents and the Interested Party.

Analysis and Determination

9. Judicial Review is the law concerning control by courts of the powers, functions and procedures of administrative authorities and bodies while discharging public functions. The court exercises supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies that perform public functions. The right to fair administrative action is anchored under Article 47 of the *Constitution* of Kenya 2010 and the Fair Administrative Actions Act. The courts supervisory powers are anchored under Article 165 (6) (7) of the *Constitution* of Kenya 2010.
10. I have considered the Notice of Motion application dated March 15, 2022, supporting affidavit and the annexed documents and the statement of facts filed by the *ex parte* applicant. I have also considered



the written submissions by Counsel and the authorities relied. In my opinion, the following issues arise for determination:

- A. Whether the 1st Respondent's decision was made in error of facts
- B. Whether the 1st Respondent's decision was tainted with bias negative ulterior motive or purpose
- C. Whether the 1st Respondent failed to take into account relevant circumstances and therefore made an error of fact?
- D. Is the *Ex parte* Applicant entitled to the orders as sought?

A. Whether the 1st Respondent's Decision Was Made In Error Of Facts

11. At the heart of this ground of review is whether the *ex parte* applicant owned the suit land before the same was adjudicated in favour of the Interested Party. The *ex parte* applicant claims that the land in dispute was inherited from his father, that his mother and brother shared out the inheritance and he (the *ex parte* applicant) was given land parcel No 1887, Kaluva Adjudication Section. I find that the *ex parte* applicants claim to the entire land parcel No 1887 is misleading and is not supported by the evidence he has produced in court. The Objection proceedings before the Land Adjudication Officer shows that land parcel No 1887 was the subject of various objections by persons claiming the same parcel of land which was allegedly wrongly registered to the Interested party herein. I note that before the LAO were objections relating to the said parcel of land namely Objection numbers 55, 68, 128, 129, 130, 142, 147, 148, 152, 153, and 198. The Plaintiffs in the above objections were 1) Nyamai Musyoka, 2) Kalumu Musyoka, 3) Kalunga Kasumba 4) Thomas Mulatya, 5) Kula Kimanzi 6) Mukeke Moki 7) Stephen Kawee Moki (Exparte Applicant herein) 8) Mulatya Kimanzi, 9) Jonathan Mathuku Kamwalo 10) Jacob Mbulo Mwandikwa (Ngumbau Mbua 12) Josia Mwema 13) Musyoka Kithuku versus Frank Mweke 2) Juiana Ngoa Matungo Mueke.

During the trial the Plaintiffs Kula Kimanzi and Mukeke Moki confirmed having sold their land to the Defendant then (Interested party herein).

12. The jurisdiction that the 1st Respondent exercises in determining the dispute subject matter of these proceedings is granted under Section 29 of the *Land Adjudication Act*. This power is to hear and determine an appeal lodged by any person aggrieved by the determination of an Objection under section 26 of the *Act*. Section 29 provides that the Minister upon receipt of the appeal is to determine the appeal, make a decision and make orders as he thinks just and the order shall be final.
13. Determination of a claim of ownership of land that falls under an adjudication area is clearly provided for and set out under that *Land Adjudication Act*. The purpose of the said Act is to provide for ascertainment and recording of rights and interests in community land and for purposes incidental thereto. The *Ex parte* Applicant had a right to make a claim to the suit land once the area in which the land was located was declared an adjudication area and to participate in the entire process in order to have his rights ascertained and recorded.
14. The law provides a very elaborate and comprehensive process of ascertainment of rights and interest to land falling under an adjudication area. The *ex parte* applicant confirms that he did not make a claim to the land through the adjudication process and neither did he lodge a complaint to the land adjudication officer or take his claim through the dispute resolution process before the adjudication committee and the appeals board prior to his objection to the Land Adjudication Officer.



15. Under Section 5(2) (c) of the *Land Adjudication Act* the adjudication officer issues a notice fixing a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer. Under Section 13

“Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.”

16. The applicant did not show that he made a claim for the land to the recording officer, demarcation officer or to the Land adjudication officer. The applicant's assertion that he was unable to make his claim or that his efforts were thwarted by the demarcation Officer Dustan Muinde Kilonzo who was related to the Interested party is not convincing since the land adjudication office consists of many processes and officers through whom the claim would have been processed. The *ex parte* applicant further did not show that he complained to any officer that he was being frustrated in lodging his claim. It is noted that the demarcation officer is not the one who is in charge of the adjudication process but the Adjudication officer who is appointed under section 4 of the Act and he appoints the other officers who are subordinate to him. The section which provides:-

“Where an order is made under section 3(1) of this Act, the Minister shall, by notice in the Gazette, appoint a public officer to be the adjudication officer for the adjudication area, and the adjudication officer may in writing appoint such demarcation officers, survey officers and recording officers, being public officers, as may be necessary for demarcating, surveying and recording interests within the adjudication area, and they shall be subordinate to him”

17. Sections 9, 10 and 11 of the *Act* provides for the duties and powers of the adjudication officer. Further to the right to lodge a claim for his land the *ex parte* applicant had a right under Section 9 to lodge a petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording office for hearing and determination. The *ex parte* applicant did not lodge such a petition. Further to this, Section 19(2) of the Act provides that:-If there are two or more conflicting claims to an interest in land and the recording officer is unable to resolve the conflict, he shall submit the dispute to the committee to decide.”

18. Section 20 (a) of the *Act* provides that “The committee appointed for an adjudication section shall— adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer;”

In the case of *Speaker of National Assembly Versus Karume* (1992) KLR 21 the court of Appeal held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

19. Even though the *ex parte* applicant failed to take his claim through the dispute resolution process before the adjudication committee and the appeals board prior to his objection to the Land Adjudication Officer the *ex parte* applicant still had an opportunity to have the dispute heard during the objection stage. A close look at the *ex parte* applicant's 1st instance claim during the hearing of the objection shows that



he claimed that he had two portions of land one he got in 1970s and which he did not tell his father or his grandfather and the 2nd was his share he got from his father. He stated that-

“I was annoyed when my brother sold his parcel to the defendant ie. Mukeke but I never got from him even a single cent. During demarcation period I was told that there was an area where demarcation was not to be done. Then I was not satisfied I accused the...before the asst chief: because he was the surveyor by then and they had hidden the truth about the mountain. That is why I am casing today with the registered owner of P/No 1887. That is all”

20. On cross examination as to why he did not lodge a claim with the committee and the appeals board the *ex parte* applicant claimed that he took the dispute to the assistant Chief even though he was aware that the disputes were to be lodged through the adjudication process. At this point the *ex parte* applicant did not mention the demarcation officer Dunstan Kilonzo or his involvement with the process.

21. The Land Adjudication Officer who heard the objection proceedings and the 1st Respondent did not find that the suit land belonged to the *ex parte* applicant. The Land Adjudication Officer found on the on ownership of the suit land:-

“That all these cases were not before the LCC or A/Board cases. These shows that the Plaintiffs in these cases through incitements. That there is a group of six persons who sold their land parcels as per the sale agreements present before this court namely:-

1. Nyamai Musyoka, 2. Kalumu Musyoka, 3. Kula Kimanzi, 4. Mkeke Moki, 5. Stephen Kawee Moki, 6. Mulatya Kimani

22. That the Plaintiff Mr Stephen Kawee Moki has no grounds to complain because his brother sold the two parcels to the defendant though he claims he refused to receive the money”

The 1st Respondent on the other hand found concerning the ownership of the suit land that:-

“That the defendant has proved that he bought the disputed land from the right people ie Mukeke Moki and witnessed by his two brothers together with their mother. The defendant produced the sale agreement before the court which was confirmed by the seller of the land to be genuine. When the court visited the disputed land on 18/8/2021 the appellant did not show any development as he had indicated to the court. The court did not find any guvella trees as he had told the court. As a result this court did not find any reason to overturn the decision of the Land Adjudication Officer”

23. Section 7 (2) (d) of the *Fair Administrative Actions Act* provides that:-A court or tribunal under subsection (1) may review an administrative action or decision, if-

(d) the action or decision was materially influenced by an error of law;

24. The *ex parte* applicant argues that the error of fact led to a conclusion that was legally erroneous and he submits that the court is entitled to exercise its jurisdiction to review a decision if it is found to have



been made through an error of fact. They rely on the case of *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR where the Court quoted the following decisions:

“One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of *Bracegirdle Vs Oxley* (2) [1947] 1 ALL ER 126 at p 130

“The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the *Road Traffic Act*, 1930, s 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.”

In *Ag Vs David Murakaru* [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also *Patel Vs Uganda* [1966] EA 311 and *Shah Vs Aguto* [1970] EA 263.”

25. In my view the present case presented before the 1st Respondent the question of ownership of the suit land before the adjudication process commenced and whether the land was rightfully sold to the interested party. These are primary facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. According to the findings in the above quoted legal authorities, the determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. In this case the Land adjudication officer and the 1st Respondent heard the witnesses and visited the suit land and were best placed to make conclusions on matters of fact and I find that the said conclusions and findings were not made in error.
26. I further find that the conclusion made by the 1st Respondent on the questions of facts before him was not unreasonable or irrational such as to call for review by way of an order of certiorari. This conclusion is arrived at while considering the provisions of Section 7 (2) (k) of the *Fair Administrative Actions Act* which gives power to a court or tribunal to review an administrative action or decision if the administrative action or decision is unreasonable. The most succinct definition of unreasonableness



is found in the English case of *Associated Provincial Picture Houses Ltd Vs Wednesbury Corporation* (1948) 1 KB 223 where Lord Greene stated

“It is true that discretion must be exercised reasonably. Now what does that mean? It has frequently been used and is used as a general description of the things that must not be done. For instance a person entrusted with discretion must, so to speak direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may be truly said to be acting “unreasonably.” Similarly there must be something so absurd that no sensible person could ever dream that it lay within the power of the authority.”

27. In the case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 ALL ER 935 case, the Court stated the grounds for grant of judicial review as follows:

“By “irrationality” I mean what can by now be succinctly referred to as “*Wednesbury unreasonableness*” (*Associated Provincial Picture Houses Ltd, v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.”

28. It is my finding that taking into account the above decisions and the finding by the 1st Respondent that the defendant (the interested party herein) bought the disputed land from the right people ie Mueke Moki and the sale was witnessed by his two brothers together with their mother was not an unreasonable or irrational finding of fact. In my view the 1st Respondent was right in arriving at the conclusion of the legal question that the seller of the land had a right to sell the said land as he did to the interested party.

B. Whether the 1st Respondent’s Decision Was Tainted With Bias Negative Ulterior Motive Or Purpose.

29. The test of what constitutes bias is succinctly put in the case of Supreme Court of Canada *R Vs SCRD* [1977]. 3SCR 484 cited by the Court of Appeal in *Kalpana H Rawal & 2 others v Judicial Service Commission & 3 others* [2016] eKLR it 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].

30. The *Ex parte* Applicant states that the 1st Respondents finding and verdict that this mother and his brothers appended their signature to the sale agreement to the selling of the disputed land to the interested party and so leading to the conclusion that the interested party bought the land from the right people, coupled with his failure to give a satisfactory answer as to why he did not file cases before the other tribunals among other flows led to the conclusion that the 1st Respondents verdict was unsound, unfounded or was influenced by ulterior motives or purpose and was biased.
31. In my view the claimed ulterior motive is not elaborated. It is of prime importance that tribunals and all decision making bodies be free from bias and be impartial when discharging their duties. The applicant has not shown that the three elements of what could prevent the tribunal from making an objective determination of issues were present in this case in relation to the 1st Respondent. The elements are pecuniary bias, personal bias or bias as to the subject matter. The mere fact that the 1st Respondent did not agree with the ex parte applicant and made findings that did not support his case does not support the conclusion that he was biased or influenced by ulterior motive or purpose.

C. Whether the 1st Respondent Failed To Take Into Account Relevant Considerations And Took Into Account Irrelevant Considerations And His Decision Was In Bad Faith And Irrational.

32. The ex parte applicant relies on the same facts considered previously stating that the 1st Respondent was wrong in failing to find that his brother and mother rightly sold their own portions of the suit land and could not be presumed to have sold the exparte applicants land as they had no right to sell his land. The ex parte applicant claims that failure to make the said conclusion was in bad faith and rendered the decision made irrational.
33. Further he claims that the 1st Respondent took into consideration that *ex parte* applicant failed to lodge a claim before the adjudication committee and the appeals board and that the ex parte applicant did not offer an acceptable reason for not doing so. The Applicant claims that the explanation given was a reasonable one and the consideration given was irrelevant in any case. On this issue I have considered the provisions of Sections 7 (2) (c) and (f) of the Fair Administrative Action Act provide the right to review an administrative action or decision, the action or decision, the action or decision was procedurally unfair or the administrator failed to take into account relevant considerations.
34. In the case of Republic v Kenya Revenue Authority & another; Shapi & 3 others (Exparte) (Judicial Review E038 of 2021) [2021] KEHC 401 (KLR)

“A decision which fails to give proper weight to a relevant factor may also be challenged as being unreasonable. It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.”

35. Having looked at the proceedings before the 1st Respondent, I find that the 1st Respondent took into account all the relevant considerations as to the facts of who owned the suit land, who sold the same to the interested party, who was involved in the execution of the sale agreement and the presence of the *ex parte* applicant when the interested party was purchasing the land. Indeed, the 1st Respondent



visited the suit land and made specific findings and conclusions on what he saw on the land and the said considerations were in my view relevant to the dispute before him.

36. The *Ex Parte* Applicant submitted that the 1st Respondent failed to consider the fact that no one has authority to validly sell another person's land, therefore failed to take into account relevant circumstances. However, as found earlier, the *Ex parte* Applicant failed to prove that the suit land belonged to him. This Court cannot adjudicate such contested matter that goes to the core of evidence produced in an independent quasi-judicial process. It is imperative that the Court does not usurp the mandate given to the adjudication process in establishing land rights in Adjudication sections. The *exparte* applicant had the opportunity of bringing in witnesses and other evidence to show that he owned either the whole or part of Land Parcel 1887 Kaluva Adjudication Section and that his portion was sold without his consent. The Land Adjudication Officer who heard the objection proceedings and the 1st Respondent did not find as a matter of fact that the suit land belonged to the *ex parte* applicant and thus the legal question of whether or not his brother had the capacity to sell the said land without his consent did not arise.
37. In *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* {2015} eKLR it was held: -

“It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute...”

D. Is the Ex parte Applicant entitled to the orders as sought?

38. One of the other issues that the *Ex parte* Applicant has brought forth is that the 1st Respondent did not make it to a visit to the land so that he would show the trees that he had planted on the land as a boundary. Nevertheless, the record shows that on 18/08/21, a site visit was conducted and Appellant did not show any development as he had indicated to the court and there were no gruvellia trees as he had told the court.
39. Having considered the proceedings before the 1st Respondent, it is clear that the said proceedings were properly conducted as provided under Section 29 of the *Land Adjudication Act* CAP 284 and the grounds upon which the application herein is brought have not been proved. 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.”
40. I therefore find that the Notice of Motion application dated March 15, 2022 has no merit and the same is hereby dismissed with no order as to costs.

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

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE



Ruling read in open court in the presence of-

Musyoki: Court Assistant

Kilonzi Advocate for the Ex parte Applicant

No attendance for the Respondent.

No attendance for Interested Party

