



Simba & another v District Land Adjudication Officer & 3 others; M'Itonga & 2 others (Interested Parties) (Environment and Land Judicial Review Case E003 of 2022) [2022] KEELC 15050 (KLR) (23 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15050 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2022**

CK NZILI, J

NOVEMBER 23, 2022

IN THE MATTER OF MINISTER FOR LANDS AND SETTLEMENT

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

BETWEEN

BERNARD SIMBA 1ST EXPARTE APPLICANT

**GODFREY MBAE GITONGA (LEGAL REPRESENTATIVE OF JEREMY
GITONGA - DECEASED) 2ND EXPARTE APPLICANT**

AND

DISTRICT LAND ADJUDICATION OFFICER 1ST RESPONDENT

**CABINET SECRETARY MINISTRY OF LANDS AND SETTLEMENT 2ND
RESPONDENT**

DIRECTOR LAND ADJUDICATION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

JULIUS KIRIMI M'ITONGA INTERESTED PARTY

MUTHURI M'IKIARA INTERESTED PARTY



JUDGMENT

1. The court by a notice of motion dated March 24, 2022 is asked by the *exparte* applicants to issue writs of mandamus compelling the 2nd respondent to hear appeals that they lodged against the decision of the 1st respondent herein namely, Meru District Land Adjudication and Settlement Officer in 2014. The 2nd prayer is that the writ of mandamus do issue compelling the 4th respondent to register restrictions against LR No's Imenti South/Mweru/111/125, 126, 134, 135, 1159, 1315, 1414 & 1416 affected by the appeals pursuant to section 28 of the [Land Adjudication Act](#).
2. The notice of motion is supported by a statutory statement dated February 28, 2022 and an affidavit verifying the facts by Bernard Simba sworn on the even date, who has attached copies of the objections/decisions marked as BS (2), BS (3), BS (4), memorandum of appeals and receipts marked as BS 5 (a) and (b), BS 6 (a) & (b), BS 7 (a) & (b), confirmation letters by the minister over the pendency of the appeals marked as BS 8 (a), (b) & (c), sample copies of title deed issued by the 4th respondent marked as BS (9) and a copy of a plaint seeking for eviction filed as Nkubu ELC Suit No 19 of 2020 by the interested parties marked BS (10) respectively.
3. The grounds of the notice of motion are that the applicants and the interested parties were involved in various committee stage objections, arbitration board and lastly an adjudication record [A/R] cases before the 1st respondent. That the 1st respondent after hearing the cases whose outcomes was as follows; he allowed objection No 158 against parcel No 126 and objections No's 233, 236 & 237 but dismissed objections No's 234 & 235 against parcel No's 132, 133, 134, 135 & 1159 and lastly allowed objections No 718/10 and 719/10 against parcel No's 124, 1414 & 1416.
4. The applicants who lost objection No's 233, 236 & 237 against parcel No's 132, 135, 1159 and 1315 filed appeals to the Minister and paid fees for them on March 27, 2014 while those who lost in objection No 158 filed their appeal on October 7, 2014. Further the applicants who lost objection No 718/10 & 719/10 against P/No's 1414, 1416 & 125 prepared filed and paid for their appeals on April 11, 2014. It is averred the minister acknowledged receipt of the appeals by a letter dated June 18, 2014.
5. The applicants pleaded that the aforesaid appeals were filed within the statutory period of 60 days from the date of the decisions being made but have never been heard to date. The applicants averred that title deeds for Mweru II Adjudication Section in which the suit parcels are situate were issued in 2017.
6. It was averred that though no time limits are set out in the [Land Adjudication Act](#), the applicants' legitimate expectation was that there was going to be an expeditious hearing in line with article 47 of the [Constitution](#) as read together with the [Fair Administrative Action Act](#). On the contrary the 2nd respondent failed to carry out its statutory duties under sections 29 of the [Land Adjudication Act](#), while the 4th respondent failed to register restrictions over the titles on the parcels of land affected by the minister's appeal in line with section 28 of the [Land Adjudication Act](#) (cap 284) whereas the 3rd defendant failed to exercise its statutory duties under section 27 (3) thereof.
7. As a consequence, the applicants averred the adjudication register for the area was declared complete despite the pendency of their appeals and due to failure to register restrictions, the interested parties were issued with title deeds and were now pushing to evict them from the suit parcels affected by the appeals through Nkubu ELC No 19 of 2020.



8. The respondents opposed the notice of motion through grounds dated September 8, 2022 on the basis that:
 - i. Mandamus would not be the most efficacious remedy under the circumstances for the applicants have a civil remedy by dint of section 26 (1) (a) & (b) of the [Land Registration Act](#), based on fraud and illegality.
 - ii. The notice of motion is mischievous and an abuse of the court process since restrictions if issued would conclusively determine the issues yet they are not based on any suit.
 - iii. There has been inordinate delay which has not been explained at all.
 - iv. Issuance of titles as admitted has rendered the notice an academic exercise which is futile.
 - v. The 1st respondent is no longer seized of jurisdiction over the suit parcels.
9. The interested parties opposed the notice of motion through grounds of opposition dated May 23, 2022 and a replying affidavit sworn by Muthuri Mukira the 2nd interested party on June 23, 2022.
10. The grounds are that the court lacks jurisdiction to grant *mandamus* under section 9 (2) of the [Law Reform Act](#), the application is filed out of time after unreasonable delay; the orders sought are spent after the operation of the [Land Registration Act](#) on the suit parcels; it is a forum shopping exercise due to the pending Nkubu PM ELC No 19 and 14 of 2018; the applicants lack capacity to sue on behalf of the estate of the late Jeremy Gitonga and lastly it is bad in law incompetent, misconceived and an abuse of the court process.
11. Over and above the aforesaid ground the interested parties averred that PM ELC Nkubu 141 of 2018 was determined in their favour and that the applicants should just vacate the suit parcels of land as per the judgment therein. Additionally, the interested parties stated that there were no valid appeals before the minister; the applicants cannot resort to [Land Adjudication Act](#) when they have invoked the [Land Registration Act](#) in Nkubu Law courts hence the doctrine of estoppel ought to be invoked against them.
12. In a supplementary affidavit sworn on September 6, 2022, Bernard Simba the 1st applicant denied the alleged indolence or the existence of any judgments or decrees in favor of the interested parties. Further he stated that the appeals were filed regularly, on time and were acknowledged receipt of by the Minister. Lastly the applicants averred that the subordinate court lacked powers to issue prerogative orders of mandamus hence the reason they came to this court.
13. In compliance with courts directions, parties opted to dispose of the application through written submissions dated September 6, 2022 and September 8, 2022 respectively. The interested parties only filed written submissions on October 13, 2022 way outside the time lines and without leave of court.
14. The applicants submitted that a writ of mandamus compels the performance of a ministerial duty as held in *Republic v Principal Secretary Ministry of Internal Security and another v Exparte Schon Noorani & another* (2018) eKLR.
15. Therefore, the applicants submitted they have a right to be enforced by a prayer of mandamus after the minister failed to exercise its statutory duties under section 29 of the [Land Adjudication Act](#) within a reasonable time or at all.



16. The applicants relied on *Republic v Land Adjudication Officer Kitui Exparte Sylvester Ndima Wambua & 5 others* (2014) eKLR on the proposition that whereas sections 29 of the *Land Adjudication Act* lacked timelines under article 47 of the *Constitution* an expeditious hearing is envisaged and the failure by the Minister to do so within a reasonable time amounted to abuse of power as held in *Keroche Industries Ltd v KRA & 5 others* (2007) KLR 240.
17. It was submitted that the appeals were filed in 2014 and given the inordinate delay of 8 years was contrary to article 47 thereof and hence the court ought to intervene. Reliance was placed on *Mjomba v county Government of Taita Taveta & 4 others* (2019) eKLR, *Republic v Principal Secretary State Department of Interior & 2 others* (2018) eKLR & *Republic vs KNEC* Civil Appeal No 234 of 1996.
18. The respondents submitted that mandamus was not the most efficacious remedy in the circumstances and under section 26 (1) (a) & (b) of the *Land Registration Act*, the applicants have a civil remedy to challenge the titles. Reliance was placed on *Republic v Dudsbeath, Exparte Meredith* (1950) 2 ALL ER 741.
19. Further, the respondents submitted that the issues raised in verifying affidavit to the notice of motion raised a civil claim requiring evidence to be taken *viva voce* which fell outside the remit of judicial review.
20. Therefore, the respondents submitted that an order of mandamus would not serve any useful purpose given the facts and there would be need for another suit to challenge the titles. Reliance was placed on *Jacinta Wanjiru Raphael v William Nangalu DCI Makandara & 2 others* (2014) eKLR. The respondents urged the court to withhold the issuance of an order for mandamus due to inordinate delay, lack of reasonable explanation for it and lastly since the 1st respondent no longer had jurisdiction over the title deeds.
21. As regards the restrictions, the respondents submitted it was mischievous to seek for the registration of restrictions in perpetuity whose effect would be determining the issue with finality.
22. The court has gone through the pleadings and the submissions by the parties. The issues for the court's determination are:
 - i. If the delay by the Minister to hear and determine the appeals filed by the *exparte* applicants offends the applicants right to fair administrative action.
 - ii. If the breach of the aforesaid right by the respondents entitles the *exparte* applicants to a remedy before this court.
 - iii. If the remedy of mandamus is the most appropriate in the circumstances.
 - iv. If the issuance of title deeds in favour of the interested parties notwithstanding the pendency of the appeals leaves the applicants without a remedy.
 - v. If the prayer for registration of restrictions against the titles is unreasonable, in perpetuity and or academic.
 - vi. If the court has jurisdiction to hear and determine the application.
 - vii. If the applicants are guilty of laches, indolence and have failed to explain the delay.
23. The bill of rights as provided under article 20 of the *Constitution* applies both vertically and horizontally. It binds all law, state organs and persons. While applying the bill of rights, a court is obligated to develop the law to the extent that it gives effect to the right and adopts an interpretation



that most favors the enforcement of the right or fundamental freedoms and promotes the values underlying an open and democratic society based on human dignity, equality, equity, freedom and promotes the spirit, purport and objects of the bill of rights. While implementing the bill of rights and fundamental freedoms, article 21 thereof provides that it is a fundamental duty of the state and every state organ to observe, respect protect, promote and fulfil the bill of rights z.

24. Article 22 (1) stipulates that every person has a right to institute proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. The High Court under article 23 has the sole mandate to hear and determine such claims under article 27 and grant remedies including declarations of rights, compensation and an order of judicial review.
25. The *ex parte* applicants' complaints before this court are that they exercised their right and filed minister's appeals in 2014, pursuant to section 29 of the [Land Adjudication Act](#) which the 1st, 2nd and 3rd respondents acknowledged receipt of but unfortunately have up to date, sat on them and have failed to dispose them of one way or the other.
26. As a result of the delay and notwithstanding the pendency of the appeals, the 1st respondent issued a certificate of finality and transmitted the adjudication register to the 4th respondent who proceeded to issue the interested parties with title deeds without even registering any restrictions as required of it for any pending minister's appeals.
27. In answer to the clear pleadings, the respondents opted to file grounds of opposition as opposed to affidavits as required under order 53 rule 4 (3) of the [Civil Procedure Rules](#).
28. That notwithstanding, the respondents have taken the view that the claim by the applicants was brought after an unexplained inordinate delay; there has been indolence, the subject parcels of land are no longer governed by the law on adjudication of interests to land but the law on registration of titles; there was an alternative remedy to civil claims; that the proceedings are moot or academic in nature and that the issuance of mandamus would not be the most appropriate in the circumstances.
29. The interested parties have taken the same view as the respondents save to add that the court lacks jurisdiction under sections 9 (1) [Law Reform Act](#), the claim is spent; it is sub-judice and or *res-judicata* and that the applicants lack capacity to institute the claims for the estate of the late Jeremy Gitonga.
30. The regime of judicial review following the [Constitution](#) of Kenya 2010 has undergone tremendous change. Prior to 2010 the procedure and substantive law on judicial review was governed by the [Judicature Act](#), the [Law Reform Act](#), the [Civil Procedure Act](#) and the rules made thereunder.
31. Under the English common law, the position of judicial review looked into the process through which a decision was made as opposed to the merits of the decision. This was captured by the court in the [Municipal Council of Mombasa v Republic & another](#) (2002) eKLR.
32. After 2010, the scope, mandate and the procedure of judicial review was expanded by the new constitutional order such that the court could venture into not only the procedure but also the merits of the decision made by the inferior tribunals. Similarly, right to fair administrative action was elevated into a constitutional right. Article 47 of the [Constitution](#) provides that every person has the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and with an entitlement to be given written reasons for the action.
33. Article 47 (3) (a) & (b) provides that parliament shall legislate on the review of administrative action by a court and for the promotion of efficient administrative action by a court. In line with article 261 (1) and the fifth schedule of the [Constitution](#), Parliament passed the [Fair Administrative Action Act](#) No 4 of 2015 which was assented on May 27, 2015.



34. Under section 2 thereof, an administrator is defined. Failure is also defined in relation to the taking of a decision to include a refusal to take the decision. As to the application of the Act, section 3 provides that it applies to all state and nonstate organs who exercise administrative authority, perform judicial and quasi-judicial functions and whose actions or omissions or decision affects the legal rights or interests of any person to whom the decision relates.
35. Section 4 thereof governs the rights and duties of the administrator as well as the person to be affected by the decision including the rights to challenge any administrative action or decision; apply for review and apply for remedies by way of legal proceedings; seek for written reasons and documents and to institute proceedings.
36. The court under section 7 of the Act has the mandate to review an administrative action or decision and make appropriate orders including making a finding that there was an abuse of discretion, unreasonable delay or failure to act in discharge of duty imposed under any written law or violation of the legitimate expectation of the person to whom it relates or that the decision was taken in abuse of power.
37. Section 7 (3) thereof provides that the court shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that; an administrator is under duty to act in relation to the matter in issue; the action is required to be undertaken within a specified period under such law; and that the administrator has refused, failed or neglected to take action within the prescribed period.
38. As regards the orders which the court can grant, section 11 of the [*Fair Administrative Action Act*](#) provides that a court may issue prayers/orders; restraining against a continuing breach of a duty imposed upon the administrator; directing the giving of reasons, prohibition against such action; compelling performance of a public duty; granting temporary reliefs and awarding costs.
39. On proceeding's relating to the failure to take an administrative action, section 11 (2) of the [*Fair Administrative Action Act*](#) provides that a court may grant an order which is just and equitable including; - directing the taking of the action, declaring the rights, and orders directing parties to refrain from certain actions. Section 12 of [*Fair Administrative Action Act*](#) also clearly states that the Act is in addition to and not in derogation of the principles of common law and the rules of natural justice.
40. Turning now to this matter, the appeals by the applicants were lodged with the Minister in 2014. This was a year before the Act came into operation. Section 14 of the [*Fair Administrative Action Act*](#) on transition on provisions provides that all proceedings pending, whether preparatory or incidental to or consequential upon any proceedings in court at the time of the coming into force of the Act shall be governed by the Act but without prejudice to the validity of anything done previously. As regards other proceedings outside court sub-section (2) thereof provides that if and in so far as it is impracticable in any proceedings to apply provisions of this Act, the practice and procedure obtaining before the enactment of the Act shall be followed.
41. Section 29 of the [*Land Adjudication Act*](#) as at May 27th 2015 was the law governing the appeals. As at the filing of the appeals, article 47 of the [*Constitution*](#) was already in operation. Therefore section (29 herein had to be read in line with article 262 and section 7 of schedule 6 of the [*Constitution*](#) which requires that it be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the [*Constitution*](#). Section 7 (1) thereof is clear that in case of conflict the [*Constitution*](#) shall prevail. Further the section 7 states that a responsibility bestowed on a state organ or public officer shall conform to the [*Constitution*](#).



42. Section 29 (1) of the [Land Adjudication Act](#) required the applicants within sixty days of the decision to lodge the appeal to the minister and send a copy of it to the Director of Land Adjudication. Under section 29 the Minister shall determine the appeal and make such orders thereon as he thinks just and the orders shall be final. The Minister is mandated to cause copies of his orders to the Director of Land Adjudication who under section 29 (3) shall alter the duplicate register to conform to the determination and certify the duplicate register as final and send the same to the Chief Land Registrar. Section 29 (4) [Land Adjudication Act](#) allows the Minister to delegate by notice to the gazette his powers to hear appeals to any public officer.
43. Section 28 of the [Land Adjudication Act](#) provides that where the land is affected by an appeal, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal and on such determination, the register shall if necessary be altered in accordance with the determination.
44. Having set out the law on the hearing and disposal of Minister's appeal, the respondents take the view that the applicants have no right to seek for mandamus, the right if any has expired or is overtaken by events and that the court has no teeth to exercise any mandate for there exists a civil remedy.
45. It is now trite law that the right to seek redress for a constitutional right is not governed by the Limitation of Action Act and where a reference to effluxion of time is raised, courts have held that a party cannot by acquiescence, consent or by estoppel or delay undergo the right to enforce a constitutional rights and freedoms. [Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others](#) [2018] eKLR.
46. Similarly, a party seeking to enforce a constitutional right or freedom cannot be met with a defence that though the right exists there exists no corresponding remedy. Indeed, there can never be a constitutional right or fundamental freedom whose breach attracts no legal or constitutional remedy. See Ronald Dworkin [Taking Rights Seriously](#) 26 Cathu U.L. Rev [1977]908, [Kenya Hotels Properties Ltd v AG & 5 others](#) 2020 EKL, [Marbury v Madison](#) 5US137
47. This is the reason that the framers of our Constitution left the list of remedies capable of being granted open. This is also the reason the court in CCK v Royal Media Services LTS Sc petition No 14 of 2014 and [Mitu-bell Welfare Society & 2 others v Kenya Airports Authority](#) {2021} KESC 34 [KLR]11 January 2021} [Judgement] held that a constitutional court under article 23{3} of the [Constitution](#) may issue structural interdicts, supervisory orders or any other orders in furtherance of the constitutional rights and freedoms.
48. Counsel for the respondents has submitted that sections 29 [Land Adjudication Act](#) lacks time frames to hear and dispose Ministers appeals. As indicated above, this section has to be read in conformity with article 47 of the [Constitution](#) read together with article 359 (8) thereof on what the framers of the [Constitution](#) envisaged to be reasonable period of time. By any stretch of imagination 8 years without making or initiating the process of the hearing of the Minister's appeals cannot be said to be what the [Constitution](#) expected of the respondents.
49. The respondents who upon receiving the appeals had the mandate to process them and issue notices to the applicants and the interested parties on the date, time and place of hearing the appeals. Nothing more was required of the applicants to trigger the process apart from the filing, paying for them and serving the appeals within the statutory period of 60 days. Once the applicants accomplished their duty, the 1st, 2nd and 3rd respondents had to undertake not only a statutory but also a constitutional duty under article 47 of the [Constitution](#) to hear and determine the appeals expeditiously, lawfully, reasonably and in a fair manner.



50. The respondents in this notice of motion have failed to show any justification as expected of them why 8 years down the line the applicants appeals remain pending. Section 6 (4) of the *Fair Administrative Action Act* provides a presumption in law for the court to find that there is no good reason for not acting in an application of this nature. If the administrator fails to furnish the applicant with the reasons for the action.
51. Further, the law required that the respondents as a matter of duty to impose and register a restriction against the parcels of land affected by the pending appeals so that title deeds are not issued or if released to the interested parties until the appeals are heard and determined and if issued, to be restricted under the *Land Registration Act*.
52. The respondents neglected, ignored and or looked the other way and foresaw the issuance of the title's deeds in favor of the interested parties while aware of the pending appeals. These said statutory duties are not shared with the applicants. The dereliction of duty of that magnitude by the 1st, 2nd, 3rd and 4th respondents is a clear indication of abuse of discretion, failure to act on time or at all and a flagrant disregard of the right to fair administrative action owed to the applicants.
53. In my considered view the respondents knew the implications of not acting within a reasonable period of time. They cannot therefore be heard to suggest to the applicants that even though your rights were breached you have a civil remedy and not a constitutional remedy.
54. A wrong doer cannot suggest a solution more so when it has failed to mitigate the mistake, loss or damage arising from its side. The respondents failed to take a pre-emptive action by recalling the title deeds and or imposing the restrictions, however late it might have been, after the applicants raised concerns.
55. As to whether the remedy of restrictions through *mandamus* is the most efficacious under the circumstances, the law as set out above has widened the scope, mandate and the remedies a court can grant. The court is not bound by the prayers sought by a party while exercising its powers under articles 22 & 165 (7) of the *Constitution* and section 11 of the *Fair Administrative Action Act*. See *Mitu-Bell Welfare Society* (supra).
56. In *Chief Executive Officer the public service Superannuation Fund Board of Trustees v CPF Financial Services Ltd & 2 others* civil appeal E510 of 2022 (2022) KECA (982) (KLR) (September 9, 2022) (Judgment), the issue was whether the grant of mandamus by the High Court to compel for action was the most appropriate remedy. The court held the superior court was right since a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct which conduct was inimical to the constitutional principles on accountability in public procurement.
57. The court proceeded, guided by article 227 of the *Constitution*, to order the 1st respondent to grant the appellant a notification letter within 30 days to complete the tender process in favour of the 1st respondent from the date of the notification letter.
58. In *Enton Njuki Makungo v Republic & 2 others* (2014) eKLR, the Court of Appeal was dealing with a title deed purportedly issued while a Minister's appeal was pending which fact was well known by the two parties. The court held a person who has knowledge of a pending appeal cannot come to court and submit that because there was no restriction entered into the register, he could deal with the land as he pleased since he who comes to equity must come with clean hands.
59. The court further held that it was not the duty of the land registrar to determine an adjudication dispute and since a minister's appeal was pending the land registrar had no jurisdiction to issue a title



- deed while the appeal was pending, since the disputed property was still subject to the adjudication process hence the action by the land registrar was null and void.
60. The court was dealing with a situation where a Minister's representative heard the Ministers appeal and cancelled a title deed.
 61. The superior court had declined to quash the said decision. There was also the issue of a failure to impose a restriction which led to the Chief Land Registrar issuing a title deed while the appeal was pending and the element of lack of locus standi to represent the applicant by way of a power of attorney.
 62. In *Humphrey Irungu Macharia v Ngari Kiringa & 2 others* (2020) eKLR, the court made a finding that a title deed issued pending a Minister's appeal was irregular. Further the court held that even though the judicial review process may have been the most appropriate way to challenge the Minister's decision, a declaratory suit was also an option as held in *Nicholas Njeru v AG & others* Court of Appeal (2012) eKLR & *Johana Buti v Walter Omariba & others* (2011) eKLR.
 63. The court also held that a mere fact that an appeal had taken 19 years to be heard and concluded did not take away the jurisdiction of the Minister to determine the appeal. Further, the court said that even though it was desirable that such appeals be heard expeditiously, there were no time limits prescribed under the Act for the conclusion of the appeals. The court went on to state that under section 28 of Cap 284, the Chief Land Registrar was under an obligation to enter a restriction against the suit property the moment the appeal to the minister was filed. The court held a title deed issued during the pendency of an appeal was irregular and offensive to section 28 of the *Land Adjudication Act* and whether the omission to enter a restriction was deliberate or an oversight was inconsequential. The court cited with approval *Enton Njuki Makungo* (supra).
 64. The interested parties have raised the issue of legal representation and the capacity of the applicants to file this application. The Court of Appeal in *Dominic Musei Ikombo v Kyule Makau* (2019) eKLR, held that proceedings under Cap 284 are not akin to the *Civil Procedure Act* and that section 13 of the *Land Adjudication Act* talks of a guardian or representative according to the African customary law and not a legal representative as per the *Law of Succession Act*. Therefore, my finding is the applicants are properly before the court.
 65. As to the efficacy of restrictions, section 76 of the *Land Registration Act* provides for restrictions whose mandate to issue falls under the 4th respondent for a particular period or occurrence of a particular event or until further orders are made. A restriction prohibits or prevents all dealings on the land.
 66. In *Pashito Holdings Ltd & another v Paul Nderitu Ndungu & 2 others* (1997) eKLR & *JSC v Mbalu Mutava & another* (2015) eKLR, the Court of Appeal held that article 47 of the *Constitution* marks an important and transformative development of administrative justice by laying a constitutional foundation for control of the powers of state organs and other administrative bodies which are reflective of the national values under article 10 of the *Constitution* on good governance.
 67. In *Kimwele Kithoka & 26 others v Deputy County Commissioner Kyuso Sub County & 7 others* (2022) eKLR the court held a Minister's decision was subject to the supervisory jurisdiction of the court. The court made a finding that the failure by DCC to give the petitioner an opportunity to be heard infringed upon their right to fair administrative action and fell below its duty to uphold the national values under article 10 of the *Constitution*. The court proceeded to issue a mandatory injunction directed at the Chief Land Registrar and the Director of Land Adjudication to cancel all title deeds issued thereto.
 68. This court in *Republic v DCC Igembe sub county & 2 others ex parte Boniface Kangentu Kaibiru; JK & another (Interested parties)* (2022) eKLR held that the land adjudication regulations as revised in



- 2016 prescribe the manner of the disposal of a minister's appeal including the fees payable and the documents to be availed. The court held the minister was mandated to decide, touching on the law and rights over land, whose outcome was final since its decision had serious implications on the interest's holders to the land.
69. A failure to make the Ministers decision has equal implications on those who await the outcome of the decision to fashion their land affairs. Article 60 of the Constitution provides the principles of Kenyan land policy among them the security of land rights, equitable access to land, dispute settlement mechanism and the implementation of the principles through a national legislation.
 70. Counsel for the respondents has submitted that the judicial review was not the most appropriate method to consider the issues herein as *viva voce* evidence was required under sections 26 (1) of the Land Registration Act. There is no requirement under the Land Registration Act that any intended impeachment of title must be done through a civil claim and by way of *viva voce* evidence. Order 53 Civil Procedure Rules allows for judicial review proceedings to be heard by way of affidavits.
 71. Affidavits under order 19 of Civil Procedure Rules and the Evidence Act are recognized modes of offering evidence in court. The respondents were granted an opportunity to file affidavits to counter the claim by the applicants that the respondents neglected, omitted, refused, reneged and or flouted both the statutory and constitutional requirements to hear, and determine the appeals within a reasonable time. Similarly, they failed by design or otherwise, to impose restrictions and or withhold the issuance of title deeds to the impugned parcels of land until the appeals were heard and determined.
 72. The evidence under oath by the applicants has not been challenged by an affidavit and therefore no justification has been made for the breach, or acts of omission, commission, inordinate delay, inaction and failure to explain the same by the respondents.
 73. My finding therefore is the court has powers to uphold the law and remedy the situation without necessarily directing the applicants to file a civil claim since this court is clothed with the powers under sections 13 of the Environment Land Court Act, section 11 of the Fair Administrative Action Act and articles 22, 23, 40 (6), 47, 165 (2) (e), 232 (1) (e), 259 of the Constitution, to grant the appropriate remedies.
 74. In Jambo Fondo Gona & another v Minister or Lands & Settlement and 6 others (2021) eKLR, the court made a finding that the petitioners had not explained how they had acquired their title deeds while the appeal to the minister was still pending.
 75. In this notice of motion, neither the respondents nor the interested parties have attempted let alone given any satisfactory explanation on how they managed to issue and acquire title deeds to the parcels of land while the Minister's appeals were pending. The title deeds issued are subject to section 26 (1) (b) 28 (1), 68, 76, 80 of the Land Registration Act.
 76. Further to the above, 1st respondent by letters dated June 25, 2014 and June 9, 2016 confirmed the existence of the appeals and ordered for status quo to remain until the appeals were heard and determined to finality. The area chief and the interested parties were also notified about the pending appeal and for the need to maintain the status quo. The respondents have not denied the existence of the said directives. The doctrine of legality under the law therefore binds the respondents hence cannot escape from the scrutiny of this court for they can not be allowed to aprobate and reprobate at the same time. See Joseph Mbalu Mutava v Attorney General & another [2014] eKLR, Republic v KPLC and another, Gibb Africa Ltd v KRA (2017) eKLR.



77. Consequently, this court finds the notice of motion proved on a balance of probabilities. The court proceeds to issue the following orders in line with sections 11 (1) & (2) of the Fair Administration Actions Act:

1. Declaration that the failure to hear and determine the Minister's Appeal filed by the applicants against the interested parties on time or at all was contrary to the applicants constitutional and statutory rights as to fair administrative action, right to ownership of land and was an abuse of discretion, was prejudicial to the applicants and amounted to abuse of power on the part of the 1st, 2nd and 3rd respondents.
2. Declaration that the failure, omission or neglect to make, register and implement restrictions on the parcels of land affected by the appeals by the 4th respondent in line with sections 28 of the Land Adjudication Act and withholding the issuance and or release of the title deeds to the interested parties amounted to dereliction of duty, abuse of discretion and power and it infringed on the right to fair administrative action of the applicants hence was unlawful, unconstitutional, null and void.
3. Declaration that the actions by the 3rd respondent to forward the adjudication register for titling to the Chief Land Registrar and the Director of Land Adjudication and Settlement without compliance in line with sections 27 of the Land Adjudication Act by capturing the pending appeals against parcels numbers was contrary to law, amounted to abuse of discretion and infringed on the applicants right to fair administrative action.
4. An order of inhibition is hereby issued stopping any dealings on LR No's Imenti South/Mweru III/125, 126, 134, 135, 1159, 1315, 1314 and 1416 pending hearing and determination of the pending minister's appeal or until further orders of court.
5. An order do issue directing the 4th respondent to recall for cancellation title deeds for LR Nos Imenti South/Mweru 111/125, 126, 134, 1159, 1315, 1419 and 1416 which were irregularly and unprocedurally registered and issued despite the pending appeals before the 2nd and 3rd respondents.
6. An order do issue directed at the 2nd and 3rd respondents to hear and determine Minister's Appeal within 3 months from the date hereof in default of which each of the aggrieved parties shall be at liberty to move the court for further reliefs.
7. Status quo to remain as at the date hereof.

78. Costs for these proceedings to be paid by the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 23RD DAY OF NOVEMBER, 2022

In presence of:

C/A: Zamzam

Mr. Mwenda holding brief for Kieti for 1-5th respondents

Wambugu for interested party

Karanja for exparte applicants

HON. C.K. NZILI



ELC JUDGE

