



**Republic v Cabinet Secretary for Land Housing and Urban Development  
& 2 others; Musili & 2 others (Exparte); Maundu (Interested Party)  
(Environment and Land Judicial Review Miscellaneous Application  
6 of 2021) [2022] KEELC 15591 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15591 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION 6 OF 2021**

**LG KIMANI, J**

**DECEMBER 20, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CABINET SECRETARY FOR LAND HOUSING AND URBAN  
DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY SURVEYOR, KITUI ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ONESMUS KIMANZI MUSILI ..... EXPARTE**

**BENEDICT MWANGANGI MUSILI ..... EXPARTE**

**HARON MUSEMBI MUSILI ..... EXPARTE**

**AND**

**FRANCIS NZELI MAUNDU ..... INTERESTED PARTY**

**JUDGMENT**

1. The *exparte*/applicants filed judicial review proceedings by way of the notice of motion application dated January 3, 2017 seeking the following orders:



1. An order of *certiorari* to remove into this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent dated February 10, 2016, whose effect was to overturn a decision of the Land Adjudication Officer, Mutonguni Adjudication Section delivered on October 7, 1986 allowing the subdivision of Mutonguni/Nzala/50.
  2. An order of Prohibition to bar the Respondents, their servants and agents from implementing or enforcing the decision of the 1<sup>st</sup> Respondent, the Cabinet Secretary for Land, Housing and Urban Development, delivered on February 10, 2016, whether through a resurveying of the original Mutonguni/Nzala/50, revocation of the 1988 subdivision, or alteration of the Adjudication records or in any other way howsoever.
  3. Costs of and incidental to the application be provided for.
  4. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.
2. The Grounds relied on are contained in the Statutory statement and the verifying affidavit by the 1<sup>st</sup> *ex parte* Applicant filed on behalf of all other applicants. The *ex parte* Applicants claim that the decision by the 1<sup>st</sup> Respondent delivered on February 10, 2016, was illegal and a nullity as the Appeal to the minister was filed out of time and was taken without jurisdiction. They contend that by the time the appeal was heard, the original title to the suit land Mutonguni/Nzala/50 had already been sub-divided and fresh titles issued to third parties without any restrictions having been filed.
  3. According to the *ex parte* Applicants, the hearing of the appeal was unfair and unreasonable for the following reasons;
    - i. Notice did not issue to all parties who would be affected by the outcome of the hearing of the appeal which was against the provisions of article 47 of the Constitution on fair administrative action.
    - ii. The owner of Mutonguni/Nzala/50 died in 1999 and there was no lawful substitution by the legal representative of the deceased before further proceedings were taken.
    - iii. That the first Respondent failed to provide sufficient notice to the Applicants of the existence of the Appeal or the date set for hearing. At no time did the first Respondent communicate the fact of the existence of the Appeal.
    - iv. Following the hearing of the purported appeal, the first Respondent had the duty to communicate the decision to the Applicants but did not.
  4. According to the *ex parte* Applicants, the process and the decision breached the rules of natural justice, the 1<sup>st</sup> Respondent took into account irrelevant matters especially in applying the Land Control Act which was outside his jurisdiction and did not have a sound factual basis.
  5. The *ex parte* Applicants claim that their father Musili Muyumya (Deceased) was the registered proprietor of Land Parcel Nzala/Mutonguni/50, the suit property. He stated that his late father allocated a portion of his land to his sister, one Kaumo Nzeli the Interested party's mother to grow food crops. That the *ex parte* Applicants had a dispute with the Interested Party herein as they claim that he started encroaching into the parcels of land belonging to their siblings. During the time of adjudication, the Interested Party filed an Objection No. 6 of 1984 against allocation of parcel No 50 to the 1<sup>st</sup> *ex parte* Applicant's father which was dismissed and that his father was permitted and he subdivided the land among his children and gave a portion measuring 28 acres to the Interested Party.



6. Upon determination of the objection, the Interested Party herein filed an appeal to the Minister in 1989 which according to the *ex parte* Applicants was outside the statutory period of sixty days. The *ex parte* Applicants contended that the 1<sup>st</sup> Respondent lacked jurisdiction to admit and hear the appeal challenging the 1986 decision of the Adjudication Officer.
7. The *ex parte* Applicants claim that they were not heard during the Appeal, no notice was given to their father Musili Muyumya who was named as Respondent and a restriction was inserted in the Title with respect to an appeal to the Minister, whose details were not provided and they were unaware of. They claim that on January 25, 2016, the 1<sup>st</sup> *ex parte* Applicant received a call from the area chief informing him that there were letters at his office intended for him. He found a letter addressed to his father of the hearing of the Appeal on January 28, 2016, two days later. He informed the Deputy County Commissioner that he could not participate in the case since his father was deceased, but his brother Haron Musili was forced to participate in the case yet he was not the administrator of his father's estate. The 1<sup>st</sup> *ex parte* Applicant claims that at the time it was heard, it was close to 30 years since the filing of the Appeal and subdivision of the land was already done and they were awaiting titles.
8. The *ex parte* Applicant further claimed that the 1<sup>st</sup> Respondent took into account the provisions of the [Land Control Act](#) which was not applicable as the dispute at the time was dealing with adjudication.
9. Further, he stated that the decision of the 1<sup>st</sup> Respondent amounts to cancellation of title yet he did not have the jurisdiction to cancel title under the [Land Adjudication Act](#). He has also claimed that the decision was not communicated to the land owners.

### **The Interested Party's Case**

10. In his Replying Affidavit sworn on the 5<sup>th</sup> of November 2018, the Interested Party stated that judicial review is not concerned with the merit of the case or decision being challenged but with the decision-making process. He pointed out that the 1<sup>st</sup> Respondent's decision was delivered on February 10, 2016 and the Application for leave was filed on November 28, 2016, 9 months after the decision was made, which is outside of the six-month statutory limit. Further, the Interested Party stated that leave to file the substantive motion was granted on December 8, 2016, while the substantive motion was filed on January 4, 2017, more than the required 21 days.
11. It is the Interested Party's averment that the 1<sup>st</sup> Respondent has been conferred jurisdiction to determine appeals under Section 29 of the [Land Adjudication Act](#). He also contends that all the interested parties were granted an opportunity to canvass their respective cases before the 1<sup>st</sup> Respondent made the final determination which was in accordance with the law.
12. The Interested party is of the view that the ex-parte Applicant challenges the legality and/or substance of the decision which can only be done by lodging an appeal and not through judicial review.

### **Ex-parte Applicants' submissions**

13. Counsel for the ex-parte Applicants submitted and reiterated the contents of the statutory statement and verifying affidavits and claimed that failure to notify parties before the Minister's decision was issued was contrary to article 47(2) of the [Constitution](#). That failure to notify all the persons likely to be affected by his decision and avail them an opportunity to state their case before a decision was made was unlawful since no man should be condemned unheard. They relied on the case of Sceneries Limited v National Land Commission [2017] eKLR where the court held that it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case. The Ex-parte Applicants relied on article 50 of the [Constitution](#) that guarantees a right to fair hearing.



- They stated that they only learnt of the decision months later after their Advocates for had written to the 1<sup>st</sup> Respondent on numerous occasions. He also cited Article 35 of the Constitution on access to information.
14. Secondly, the Ex parte Applicants stated that the Ministers decision sought without legal authority, to revoke and cancel the title deeds already issued to them. They claimed that the decision contravened Article 40 of the Constitution of Kenya and constituted arbitrary acquisition of property without compensation to the Applicants who legitimately and lawfully hold titles. They relied on the case of Republic v Registrar of Titles & 2 others Ex parte Redcliffe Holdings Limited [2016] eKLR where the court held that a person can only be deprived of the right to property under Article 40 under the Constitution. They also relied on the holding in the case of Shimoni Resort v Registrar of Titles & 5 others (2016) eKLR where the Court held that the Petitioner was not given a fair chance to defend his title contrary to Article 50(1) of the Constitution.
  15. They also quoted Section 26, 27 and 28 of the Land Registration Act, 2012 on title being indefeasible unless under the circumstances provided for in the Act.
  16. The *ex parte* applicants also submitted that the Minister's Appeal was filed out of the required 60 days after the decision of the objection board in 1986, while the Appeal was filed in 1989. Finally, the *ex parte* Applicants submitted that the Minister's Appeal was heard in the year 2016 when the late Musili Muyumya (Deceased) was already dead and his estate was not represented. They quoted from Order 24(4) and order 24(9) of the Civil Procedure Rules, 2010 on substitution and Section 45 of the Law of Succession Act and the case of Ongeri Geni, Evans Boera Mwabora & Alfred Nyambegea Ombusrov Denish Otieno Oyugi & Land Registrar, Rachuonyo District (2013) eKLR.
  17. The *ex parte* applicants urged the court to find that they have proved that the 1<sup>st</sup> Respondent did not take into consideration the rules of natural justice and the law in making his decision.

#### **Interested Party's written submissions**

18. The Interested Party quoted Section 9(2) of the Law Reform Act cap 26 and Order 53(2) of the Civil Procedure Rules [2010] on the six month time limitation in filing judicial review proceedings as well as Order 53(3) (1) on the period allowed to file an application from the date leave was allowed, submitting that the *ex parte* Applicants were out of time on both accounts.
19. Regarding the *ex parte* Applicants allegation that the estate of their late father Musili Muyumya was not represented, they submitted that one Haron Musembi Musili, one of the *ex parte* applicants was allowed an opportunity to participate on the proceedings on behalf of his father.
20. Counsel for the Interested Party relied on the cases of Republic v Kahindi Nyafula & 3 others JR No 3 of 2013 Malindi, Eldoret Misc Application No 5/2014 and the case of Republic v Minister for Lands and Settlement & 2 others [2007] eKLR, all of which the courts declined judicial review applications filed out of time. Counsel also cited the holding in Republic v Minister for Lands and Settlement & 2 others (supra) where the court held that judicial review remedies should not be made to indolents who sleep on their rights.
21. Lastly, the Interested Party submitted that it is clear that the *ex parte* applicants challenged the validity and/or the legitimacy of the decision rendered by the 1<sup>st</sup> Respondent contrary to the mandate of judicial review which does not concern itself with the merits of the case or decision but the way the decision was arrived at. Further, they added that the *ex parte* applicants were fully aware of the decision as one of them participated in the proceedings, was given an opportunity to be heard and therefore accorded a fair hearing. He urged the court to dismiss the case with costs.



## Analysis and Determination

22. I have considered the Notice of Motion herein, the statutory statement, verifying affidavits and all written submissions filed and I find that the following issues arise or determination;
- A) Whether the appeal to the Minister was filed out of time
  - B) Whether the Judicial Review proceedings herein as commenced by way of the chamber summons dated November 25, 2016 and filed in court on November 28, 2016 were filed out of time.
  - C) Whether the Notice of Motion application dated January 3, 2017 was filed out of time.
  - D) Whether the issuance of title deeds to the *ex parte* applicants was a bar to the hearing and determination of the appeals to the minister
  - E) Whether the proceedings in the appeal to the Minister were conducted and decision arrived at in accordance with the law.
23. On whether the appeal to the Minister was filed outside of the statutory period of six months as provided under section 29 of the [Land Adjudication Act](#), I do find that this issue was determined by the Courts ruling of January 31, 2022 where the court found that there was proof that while the Land Adjudication Officers decision on the objection proceedings was made on October 7, 1986, the appeal to the Minister was filed on October 22, 1986 which was within the statutory period of six months.
24. On whether the Judicial Review proceedings herein as commenced by way of the chamber summons dated November 25, 2016 and filed in court on November 28, 2016 were filed within the statutory period under Section 9 (3) [Law Reform Act](#) and Order 53 Rule (3) (1), I do find that there is uncontroverted claim that the *ex parte* applicants were not notified of the decision of the 1<sup>st</sup> Respondent until September 28, 2016. I find that time could only start running when the parties were made aware of the decision of the 1<sup>st</sup> Respondent. The proceedings were therefore commenced within time.
25. On whether the Notice of Motion date January 3, 2017 and filed on January 4, 2017 was filed outside of the statutory period of 21 days, I do find that the same was filed within time considering the excluded days during the December vacation of the High Court between 21<sup>st</sup> December to 13<sup>th</sup> January.

### **D. Whether the issuance of title deeds to the *ex parte* applicants was a bar to the hearing and determination of the appeals to the minister and whether the determination violated the rights of the *Ex parte* Applicants**

26. On whether issuance of title deeds to the *ex parte* applicants was a bar to the hearing and determination of the appeals to the minister and whether the determination violated the rights of the *ex parte* Applicants, the proceedings before the Land Adjudication Officer shows that the father to the *ex parte* applicants, Musili Muyumya had filed before the Land Adjudication Officer objection No 14 of 1984. The said objection was allowed and he was allowed to subdivide the suit land parcel No. 50 into seven portions which were to be given new numbers. The beneficiaries of the said subdivision Muindi Musili, Munyambu Musili, Kimanzi Musili, Muthui Musili, Mutha Musili, Munyambu Musili and Maundu Nzeli. Maundu Nzeli is the Interested Party herein and he was to get 28 acres out of the 150 acres.
27. On this issue it is noted that the [Land Adjudication Act](#) provides for the process that is to be followed after the determination of an objection filed under Section 26. Section 27 provides for finalization of the adjudication register, subject to appeal and provides power to the Adjudication Officer to alter the adjudication register to confirm to any determination of objecting under Section 26.



Under Section 27(3) it provided that:

“When all objections have been determined and the time for appeal under Section 29 of the Act has expired, the Adjudication Officer shall send the adjudication register to the Director of Land Adjudication – together with particulars of all determinations of objections and the Director shall;

alter the duplicate adjudication register and register accordingly; and then certify the adjudication register and on the duplicate adjudication register a that it has become final subject to the outstanding appeals and forward the adjudication register to the Chief Land Registrar together with a list of the appeals.”

28. Section 28 provides for the action of the Chief Land Registrar on receiving the documents provided under Section 27 (c) and the Chief Land Registrar is to cause registration to be effected in accordance with the adjudication register. The proviso to the section states:

“Provided that, where the land is affected by an appeal under Section 29 of the Act, a restriction shall be made and is 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.”

29. In this particular case the decision of the Land Adjudication Officer under Section 26 was made on October 7, 1986. The appeal to the Minister was filed on October 22, 1986. The correct procedure ought to have been as provided under Section 27 and 28 and the Chief Land Registrar ought to have caused registration of the land in dispute to be effected in accordance with the adjudication register as altered in accordance with the decisions of the Land Adjudication Officer in objection No’s 6 and 14 of 1984. Consequently, the registration ought to have been accompanied by a restriction to be made and registered in respect of all the parcels of land registered.
30. The restriction entered on the register could only have been removed after determination of appeals to the Minister. Failure by the Land Registrar to register the restriction was therefore in contravention of direct and clear provisions of the law.
31. The evidence adduced by the ex parte applicant shows that subdivision of the land in dispute was carried out in 1988 and registration of the subdivision was purported to have been done in accordance with the decisions of the Land Adjudication Officer. Subsequent to the subdivisions title deeds were issued. Does the issuance of the title deeds while the appeals to the Minister were pending stop and/or interfere with the proceedings before the Minister and determination thereof? In my view registration and issuance of title deeds did not in any way affect the hearing and determination of the appeal pending before the Minister. The said registration of the sub-divisions of the initial parcel of land parcel No. 50 was made subject to the restrictions and further subject of the hearing and determination of the appeal.
32. Section 28 of the *Land Adjudication Act* provides that the register is to be altered in accordance with the determination of the appeal. Indeed, Section 29 provides that the appeal is the one that gives rise to the final determination of the dispute and leads to a close to the process of ascertainment and recording of rights and interests of the parties to the land under dispute. In my view, therefore, unrestricted registration cannot be a bar to the hearing and determination of an appeal.
33. In the case before this court, it is not indicated that the fact that title deeds to the subdivisions of the suit land had been issued was raised as an objection to the hearing of the appeal. Though the ex parte applicant challenges the decision of the 1<sup>st</sup> Respondent on the ground that the same was filed out of



time, it is to be noted that the ex parte applicant's father was alive at the time when the appeal was lodged as it is stated that he died on August 12, 1999. There is thus likelihood that he was aware of the existence of the appeal. It has been clearly stated that sub-division of the suit parcel of land was carried out in 1988 when the appeal was pending. The certificates of official search provided by the applicants show that registration was done in 2001 and title deeds were issued between 2001 and 2008. It is noted that the only parcel of land where a restriction was registered was LR Nzalae/mutonguni/50. While all other titles were unrestricted. It is noted that the fact of registration of a restriction against LR. Nzalae/mutonguni/50 was an indication that the Chief Land Registrar was aware of the existence of the appeal to the Minister but failed to register the same restrictions against the other titles.

34. In the case of *Euton Njuki Makungo v Republic & 2 others* [2014] eKLR the Court of Appeal declared null and void the action of the Land Registrar in issuing a title deed while the land adjudication process was still ongoing and stated as follows;

“The appellant contend that because the Registrar of Lands had already issued a title deed in favour of Mwaniki Mwige; the 2<sup>nd</sup> respondent acted in excess of jurisdiction to cancel the title which had been issued as a first registration. The disputed parcel of land was within an adjudication area and at the time when the Registrar purportedly issued the title deed, appeal to the Minister was pending. The evidence on record reveals that the appellant and the registered proprietor had knowledge that appeal to the Minister was pending. A person who has knowledge of a pending appeal cannot come to court and submit that because there were no restrictions entered in the register, he could deal with the land as he pleases. He who comes to equity must come with clean hands. The appellant and the registered proprietor knew there was a pending appeal and the disputed parcel of land was still undergoing the adjudication process. We find that the 2<sup>nd</sup> respondent had jurisdiction to hear the appeal relating to the parcel of land. In the case of *R v Lancashire County Council Ex p Gayer*, [1980] 1 WLR 1024 it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in *R v Lancashire County Council Ex p Gayer*, (supra) and observe that it is not the duty of the Registrar of Land to determine adjudication disputes; the evidence on record is clear that an appeal to the Minister was pending and the Registrar had no jurisdiction to issue the title deed in favour of Mwaniki Mwige while the appeal was pending. The disputed property was still subject to the adjudication process and the action by the Registrar was null and void. It is our view that the judicial remedy of certiorari was neither created nor established to settle ownership disputes, nor to create and confer title to land and the learned Judge did not err in declining to grant the order for certiorari.”

35. In the case of *Kipkobel Arap Misoi v Proscila Chepkorir* [2016] eKLR the court held as follows concerning the same issue that:

“To the extent that the plaintiff was irregularly registered and issued with a title to the land the title held by the plaintiff is liable to challenge under the provisions of Section 26 (1) (b) of the *Land Registration Act, 2012*. Section 26 (1) provides thus:-

- (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions



and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except -

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.

In the present case the process and procedure outlined in the *Land Adjudication Act* was not followed in issuing the title to the plaintiff with the result that the title was not validly issued and the same is therefore null and void as the law was not complied with in the issuance of the same.

There is ample judicial authority that an act that is made without jurisdiction and/or authority is null and void and cannot confer any rights and/or interest. In the English case of *Macfoy v United Africa Co. Ltd* [1961] TALL ER 1169, Lord Denning put succinctly as concerns an act which is a nullity when he stated thus:

“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado though sometimes convenient to have the court to declare it to be so. And every proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there it will collapse.”

36. The Court went further and stated that;

“In our Kenyan context the court of appeal has had occasion to express itself in a situation where property was held to have been unlawfully acquired in the case of *Henry Muthee Kathurima v Commissioner of Land s & another* [2015] eKLR where they stated as follows:

“Article 40 (6) of the *Constitution* clearly stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired. The appellant relied on the doctrine of estoppels urging that the commissioner of lands is estopped from denying that he had good title. It is our view that estoppels cannot be used as shield to protect unlawfully acquired property, estoppels cannot be used to circumvent constitutional provisions and estoppels cannot over ride express statutory procedures; there can be no estoppels against a statute.....”

The *Land Adjudication Act*, cap 284 of the Laws of Kenya as I have illustrated and demonstrated in the foregoing analysis sets out an elaborate process that is all inclusive. The process does not permit any omission of any procedural step. The adjudication process under the Act is completed when appeals before the



Minister have been determined and the Director of Land Adjudication certifies the duplicate adjudication register that it has become final and sends the certified copy incorporating any alternations in conformity with the Minister's decision to the Chief land Registrar, who then alters the adjudication register accordingly. Where this process is not adhered to, the adjudication process is flawed and any registration of title on the basis of the flawed process in my view would be liable to be annulled. The plaintiff's title to the suit property was a product of a flawed process as he clearly got registered when the defendant's appeal was pending before the Minister. The land registrar under the Adjudication Act can only register the adjudication register and issue titles after the process of adjudication is finalized in regard to any affected parcels. The process of objection and any resultant appeal must be allowed to take its full course and determinations made. Otherwise the process which is so meticulously set out in the Adjudication Act would be rendered superfluous. The procedure must be honoured."

37. From the foregoing, I am of the view that failure to make and register restrictions against all the subdivisions of the entire suit parcel of land was meant to defeat the ends of justice and cannot form the basis for questioning the decision of the 1<sup>st</sup> Respondent. In my view the issuance of title deeds to the parcels of land subject to the appeal to the Minister was not a bar to the hearing and final determination of the appeal to the Minister as provided under Section 29 of [Land Adjudication Act](#). I further find that the decision of the 1<sup>st</sup> Respondent does not contravene or violate the *ex parte* applicant's rights to land under Article 40 of the [Constitution](#) or Section 26, 27 and 28 of the [Land Registration Act](#) since the said rights and interests in the land had not been ascertained and recorded with finality as envisaged under the [Land Adjudication Act](#) and the said rights had not crystallized.

**E. Whether the proceedings in the appeal to the Minister were conducted and decision arrived at in accordance with the law.**

38. The *ex-parte* applicants contend that they were not served with any notice of the existence of the appeal itself, the hearing of the appeal and delivery of the Minister's decision contrary to article 47(2) and 50 of the [Constitution](#). They stated that the 1<sup>st</sup> Respondent did not issue notice to all the persons who were likely to be affected by their decision so that they could have had an opportunity to state their case before a decision was made.
39. However, in the same breath, the 1<sup>st</sup> *ex parte* applicant stated that he received a call from the area chief on the January 25, 2016, informing him about a letter and he found a letter addressed to his father of the hearing of the Appeal on January 28, 2016. I have earlier found that based on the fact that the *ex parte* Applicants' deceased father was alive at the time when the appeal to the Minister was filed, there is a great likelihood that he was aware of the existence of the appeal. Based on the averments of the *ex parte* Applicants I do find that they were informed of the hearing of the said appeal and indeed they attended the same and the 3rd *ex parte* applicant Haron Musembi Musili participated and gave evidence as the representative of their father Musili Muyumya (Deceased).
40. Further, the *ex parte* Applicants claim that their father, the Respondent in the appeal to the Minister Musili Muyumya was deceased at the time of the hearing and determination of the said appeal and no legal representative to his estate had been appointed and thus there was no person competent to proceed with the said appeal. On this basis they submit that the said proceedings before the 1<sup>st</sup> Respondent were irregular and ought to be nullified. On this issue I am guided by various court decisions and provisions of the law. In the case of [Dominic Musei Ikombo v Kyule Makau](#) [2019] eKLR which was determined by the Court of Appeal on July 19, 2019. One of the issues for determination



was whether it was mandatory for persons representing deceased persons in proceedings under the [Land Adjudication Act](#) (Cap 284) to take out letters of administration before representing them. In answering the issue in the negative, the court held as follows:

“On the second issue, our view is that proceedings 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 of conducting 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 Law.” It does not refer to legal representatives. The strict rules of civil litigation as relates to capacity to sue or be sued do not apply to proceedings before the committee or the Minister. It is therefore 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. The parties therefore had locus standi to appear before the adjudication committee lack of letters of administration notwithstanding.”

41. The same question was under consideration in the case of [Republic v District Commissioner Machakos ex parte Kakui Mutiso](#) Nairobi High Court JR Miscellaneous Application No 304 of 2013 where Odunga, J held as follows:

“In my view, under the Land consolidation and adjudication processes, the issue before the relevant tribunals is the determination of interest in land rather than individual ownership since individual land tenure only comes into being on registration... Therefore, before registration, the land in question is either ancestral or falls under any other form of communal ownership. In such instances, it is my view that the application of the strict succession legal regime does not apply since in my view the issue of estate may not be readily applicable to ancestral or communal property as such.”

42. I am in agreement with the above holdings and find that in proceedings under the [Land Adjudication Act](#) it is not necessary for a deceased person to be substituted by the legal representative of his estate as envisaged under the [Law of Succession Act](#) or [Civil Procedure Rules](#). I find that representation of the deceased’s family by the 3<sup>rd</sup> *ex parte* applicant Haron Musembi Musili was acceptable and within the provisions of the [Land Adjudication Act](#) and that the 1<sup>st</sup> Respondent was right in allowing the family to be represented by the said 3<sup>rd</sup> *ex parte* applicant.

43. The Exparte Applicants further contended that the 1<sup>st</sup> Respondent was wrong for taking into account irrelevant matters in coming to his decision in that he relied on Section 6 of the [Land Control Act](#). I have considered the 1<sup>st</sup> Respondent was sitting on appeal against the decision of the Land Adjudication Officer in Objections No 6/84 and 14/84 brought under Section 26 of the [Land Adjudication Act](#). The said section deals with objections by persons who consider the adjudication register to be incorrect or incomplete.

44. I have considered the definition of Agricultural Land under Section 2 of the [Land Control Act](#) which states that

“In this Act, unless the context otherwise requires—“agricultural land” means—

- (a) land that is not within—
  - (i) a municipality or a township; or



- (ii) an area which was, on or at any time after the July 1, 1952, a township under the Townships Act (Cap 133, 1948 now repealed); or
  - (iii) an area which was, on or at any time after the 1st July 1952, a trading centre under the Trading Centres Act (Cap 278, 1948 now repealed); or
  - (iv) a market;
- (b) land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agricultural purpose;

45. Controlled transactions are provided for under Section 6 of the [Act](#) and it is noted that there are exemptions to the application of the said section under Section 6 (3) (b) which provides that;

This section does not apply to—

- a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or
- b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party

46. On the question of the applicability of the provisions of the [Land Control Act](#) to transactions in land which is under Adjudication, the court in the case of [William Odongo Guya v George Otiato Mbaye & another](#) [2021] eKLR was of the view that land under adjudication is agricultural land and as such is subject to the [Land Control Act](#). The Court held that:

“It is a fact that the suit land was subject to the [Land Adjudication Act](#) at the time of the sale in 1990. The letter dated 26/10/15 produced by the defendant as DEXH-2 clearly indicates that the subject land is under Bondo/Nyangoma Adjudication section and was still under adjudication process under Cap 284 Laws of Kenya as at 26/10/15. It is my opinion that the transaction required the consent of the Land Control Board on the basis of the finding of the Court in [Jeremiah Kiilu Maitha v Agnes Ngeki Mutie](#) [2018] eKLR where the court stated;

‘The Agreement that was entered into between the Appellant and the Respondent shows that plot number 190 was within Malunda Land Adjudication Section.’

It is therefore obvious that the suit land was in an adjudication area by the time it was sold. All land under an adjudication area falls within what used to be trust land under the repealed [Trust Land Act](#) or Community land under the [Community Land Act](#). Invariably, all Trust Land/Community land is agricultural land. According to the definition of “agricultural land” by Section 2 of the [Land Control Act](#), all land that is not within a Municipality or a Township or a Market is agricultural land. However, the Minister may declare any land in the Nairobi Area or in any Municipality, Township or Urban centre “agricultural” for the purposes of the Act. Considering that the suit land was within an



adjudication area, and in view of the fact that the Defendant never produced evidence to show that the suit land was within a Municipality, Township or Market, it follows that the suit land was agricultural land...

47. From the foregoing, I do find that consideration by the 1<sup>st</sup> Respondent that Land Adjudication Officer allowed objection No 14/84 seeking subdivision of the disputed land a function reserved for land control board under the *Land Control Act* and at a time when there was an appeal pending, was not an irrelevant consideration.
48. I further find that the 1<sup>st</sup> Respondent's decision took into consideration the provisions of the *Land Adjudication Act* Sections 13 and 26 and found that the land Adjudication Officer did not "critically analyze the question of "ascertainment interest" in parcel No 50 in relation to the appellant and the defendant." but instead allowed objection No 14/84 lodged by the Defendant Musili Muyumya. The 1<sup>st</sup> Respondent further considered other relevant considerations and concluded that the Land Adjudication Officer did not give appropriate consideration to the Appellants claim to an equal share of the disputed parcel of land through objection No 6/84.
49. The final conclusion that formed the decision of the Minister in the appeal under consideration in my view cannot be faulted on the grounds raised by the Ex parte applicants under the judicial review jurisdiction of the court. This was aptly captured by Okongo, J in *Tobias Achola Osidi & 13 others v Cyprianus Otieno Ogalo & 6 others* [2013] eKLR held as follows;

"It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act. It is for this reason that, there is injunction under section 30 of the Act to any civil suit being instituted over an interest in land in an adjudication area save with leave of the Land Adjudication Officer. The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. (Emphasize added). As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. (Emphasize added). The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land."

- 50 For the above reasons, I find that the notice of motion application dated January 3, 2017 lacks merit and the same is dismissed with costs to the interested party.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON LG KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

**Judgement read virtually in the presence of-**

Musyoki: Court Assistant



Maingi Advocate for the ex parte Applicant

No attendance for the Respondents

Mwendwa Advocate for the Interested Party

