Republic v Deputy County Commissioner Nzambani Sub-County & another; Musembi (Interested Party); Mulu (Exparte) (Environment and Land Judicial Review Case E001 of 2022) [2023] KEELC 18749 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18749 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022

LG KIMANI, J

JULY 11, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER NZAMBANI SUB-COUNTY ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

ENDRICO KATUTU MUSEMBI ..... INTERESTED PARTY

AND

FADHILIA WAMBUA MULU ..... EXPARTE

JUDGMENT

1. The Ex parte Applicant filed a Notice of Motion Application dated 31st of January 2022 seeking 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 and quash and /or set it aside for being null and void.

    2. THAT this Honourable Court be pleased to grant the applicant costs of these proceedings.

2. In support of the Notice of Motion, the Ex parte applicant filed a statement of facts, verifying affidavit and supplementary affidavit. In his pleadings the applicant stated that the suit parcel of land number 330. The Applicant's were initially one whole parcel of land that belonged to Mulu Nzioka,

the patriarch of their family. Upon declaration of an adjudication area, the disputed portion was adjudicated in favour of Thomas Kitenge as a part of parcel number 330 and the Applicants family lodged an appeal to recover that portion seeking to have it joined, included and/or resurveyed as part of number 331. According to the applicant the two parcels are intertwined and cannot be separated.

3. The Applicant claims that at the time of filing the appeal he erroneously indicated that he was appealing against parcel number 331 but throughout the proceedings, the dispute related to parcel number 330 and the DCC had the discretion to proceed with the appeal and determine it as parcel number 330. He claims the mistake in the parcel number was because he is unschooled and illiterate.

4. The Ex parte applicant stated that the family patriarch Mulu Nzioka subdivided his land to his children one of who was a daughter Kalundu Mulu. When Kalundu died her husband Juma sold the land to Thomas Kitenge who started encroaching the whole of parcel number 330. He stated that his family has been in actual use, occupation and possession of the disputed portion of land. The Ex parte Applicant accused the interested party, who is Thomas Kitenge's son, of selling part of the disputed portion to total strangers who are trying to evict his family members.

5. The Ex parte Applicant contends that the adjudicator ought to have used his powers and determine whether the disputed portion is part of parcel number 330 or part of 331 without looking at the technical aspect of the parcel numbers because it was clear what the parties' dispute was. He complained that the adjudicator failed to decide on the critical question of ownership of the portion in dispute and as a result, implementation of the decision entails evicting the ex-parte applicant and his family members from their ancestral land which they have lived on for over 42 years.

6. The Ex parte applicant accused the Deputy County Commissioner of delegating the powers conferred to him to visit the land for inspection to his secretary, one Paul Wambua and the adjudication officer, one Mugambi and states that the involvement of the adjudication officer gave rise to conflict of interest and apparent bias.

7. During the intended boundary verification and establishment exercise that was to take place on 7th October 2021, the ex parte Applicant states that the District Surveyor Kitui found it impossible to carry out verification since the area was fully occupied by the Applicant's family and the exercise was halted midstream. The Ex parte Applicant is apprehensive that if the decision of the 1st Respondent is implemented all their family members will be left homeless, landless and facing eviction.

8. The Ex-parte Applicant relies on the grounds of irrationality fettering of discretion by the administrator who failed to take into account relevant consideration that the applicant and his family have been in use, occupation and possession of the land for over 42 years, and that the respondent's decision is unreasonable and not proportionate to their rights, was unfair and unjust and violated the legitimate expectation of the ex parte applicant.

Interested Party's Case

9. The Interested Party filed a Notice of preliminary objection on the following grounds:

    a. The application is bad in law and improperly before the court.

    b. The subject parcel of land number Nzambani/Kyanika/330 is registered in the name of Thomas Kitenge (now deceased) and his estate is pending final distribution in Kitui H.c. Succession Cause No. 7 OF 2017.

    c. The application be dismissed with costs to the Interested Party.

10. Further to the preliminary objection, the Interested Party swore a replying affidavit deposing and confirming the grounds raised in the preliminary objection above and further claimed to be a beneficiary of the estate of Thomas Kitenge. According to the Interested Party, his family has been in continuous/constant use and occupation of the land parcel Nzambani/Kyanika/330 even before adjudication, while the Applicant and his family have been in continuous/constant use and occupation of the land parcel Nzambani/Kyanika/331, which is adjacent to their land.

11. The Interested Party accused the ex parte applicant of encroaching onto their land and stated that they both actively took part in the proceedings before the Land Adjudication officials including the Appeal to the Minister. He termed the claim of occupation and use of a portion of parcel number 330 as misplaced and misleading since ownership of both parcels is not in dispute and the issue of boundaries was going to be determined during the implementation of the Minister's decision.

The Respondents' Case

12. The Respondents filed their Grounds of opposition dated 2nd February 2022 and claiming that the application herein is unmerited, misconceived, vexatious, bad in law and an abuse of the process of the court. The Respondents further stated that the application offends the mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules on time limits for filing an application for leave.

13. The Respondents claim that the Applicant has not shown that the decision by the Minister was tainted with illegality and procedural impropriety. That if the Applicant was aggrieved by the decision he ought to have filed an Appeal and not take out judicial review proceedings.

14. The Respondents also filed a replying affidavit sworn by Njuguna Kiarie the 1st Respondent herein, deposing that there is no evidence that the Ex-parte Applicant had been denied the opportunity to be heard in the appeal even through a representative if, as claimed, he is illiterate.

15. The 1st Respondent denied delegating some of his powers to his "secretary" and stated that the person referred to was a senior clerical officer attached to his office and has knowledge in local customary law and handles appeals to the Minister and requests for technical advice from the land adjudication department to facilitate faster processing of files. In addition, he stated that the officer referred to as a "land adjudication officer" is a land adjudication assistant whose role is limited to extending general technical advice to the Deputy County Commissioners tribunal and further that he was not the one who heard the objection proceedings. He contends that there was no irregularity in the site viewing since it was conducted with the right officers in the presence of the parties. He further challenges that the Applicant does not claim that the land viewing session misrepresented facts on the ground.

16. According to the 1st Respondent, the Deputy County Commissioner's tribunal discharged its responsibilities according to law regardless of the parties educational backgrounds and the decision was not influenced by an error of law, there was no irrational indiscretion, and neither was the decision unreasonable or disproportionate.

The Ex-parte Applicant's submissions

17. Counsel filed written submissions highlighting the legal provisions relied on in particular Articles 165 (6) and (7) and Article 40 of *the Constitution* of Kenya 2010, the *Law Reform Act*, The *Judicature Act*, The Fair Administrative Actions Act and the *Land Adjudication Act*.

18. He highlighted the fact that the reason he lost the appeal to the Minister was that he filed an appeal against his own parcel of land No.331 instead of Parcel no.330. He insists that Thomas Kitenge father

to the Interested Party has encroached onto Parcel No. Nzambani/Kyanika/331, which portion was surveyed to include Nzambani/Kyanika/330, becoming part and parcel of the said parcel of land.

19. The ex-parte Applicant submitted that the 1st Respondent was guilty of irrational indiscretion by failing to determine whether the disputed portion belonged to the Ex-parte or to the interested party given that the disputed portion was fully developed under his use, occupation and possession. The failure to determine what would happen to the occupants, users and possessors of the portion of land was irrational and unreasonable in the eyes of counsel for the Ex-parte Applicant because the decision was not made with finality and closure. He relied on the surveyors report attached as proof that his family occupied the disputed portion of land.

20. Counsel challenged failure by the 1st Respondent to visit the suit land in person and claims that it would have assisted him to exercise the discretion conferred upon him properly to rationally, reasonably, fairly and justly determine the case. Counsel claimed that the 1st Respondents decision was irrational, unreasonable, disproportionate use of discretion and against his legitimate expectation.

21. Counsel submitted that the principle of proportionality must be considered when making a verdict and the effect on fundamental human rights in the implementation thereof. According to him, Section 29 of the *Land Adjudication Act* cannot be used to deprive people of their right to protection of property or sanitize an illegality.

The Respondents' Submissions

22. State Counsel for the Respondents relied on Sections 4, 5 and 29 of the *Land Adjudication Act* submitting that the Minister may delegate his functions to the Deputy County Commissioner as stipulated under the law. It was further submitted that the Applicant has not satisfied the court that the decision of the Deputy County Commissioner was tainted with irrationality or unreasonableness or there was any procedural impropriety as stipulated in the case of Pastoli vs Kabale District Local Government Council & others (2008)2EA 300.

23. State counsel reiterated that the so called 'secretary' was actually a clerical officer and that the purported 'land adjudication officer' was a land adjudication assistant whose role is limited to extending general technical advice to the Deputy County Commissioner's tribunal and that he had not handled the case during the objection proceedings as it would have constituted conflict of interest. It was submitted that the officer's roles in viewing of the land was necessary in assisting the 1st Respondent make an informed decision and did not tamper with the final decision and was not tantamount to delegating his powers

24. In the Respondents' view, the Applicant failed to show that the decision of the 1st Respondent was bad for unreasonableness, irrationality, unfairness, illegality and failure to meet the Applicant's legitimate expectation and prayed that the application be dismissed with costs.

The Interested Party's written submissions

25. Submitting on the preliminary objection, counsel for the Interested party stated that the suit property Nzambani/Kyanika/330 is also the subject in Kitui High Court Succession Cause no.7 of 2017. He opines that the Applicant should have raised his concerns in the succession proceedings.

26. Regarding the substantive judicial review application, the Interested Party noted that the Applicant made an appeal against his own parcel of land and that an arbiter will not dwell on matters not before him/her save in special circumstances.

27. Further, the Interested Party submitted that the ex-parte Applicant has failed to give reasons why he did not seek review of his appeal and why he slept on the matter until 28th December 2021 when he sought leave to file this application.

28. According to the Interested Party, the application at hand is only intended to invoke sympathy which is not provided for by the law and to justify illegal actions of encroachment, occupation and use of a portion of Land Parcel 330 without it being clear as to why he decided to put up structures on the border when they had the whole of parcel number 331.

29. Counsel for the Interested Party concluded that the Ex-parte Applicant has not demonstrated clearly how the rights and interests that he wishes to protect were acquired, therefore he has no rights and interests to protect. Further that the Applicant does not recognize that the Interested Party will be greatly affected if the boundary is altered as he proposes.

Analysis and Determination

30. I have considered the Notice of motion herein, the statement of Facts, verifying affidavit and supplementary affidavit. I have also considered the replying affidavits, preliminary objection and grounds of opposition and formed the opinion that the following issues arise for determination;

    A. Whether the Judicial review application be struck out for being time barred.

    B. Whether the issues in this suit should be dealt with in Kitui H.c. Succession Cause No. 7 OF 2017 since the suit land number Nzambani/Kyanika/330 is registered in the name of Thomas Kitenge (now deceased)

    C. Whether the 1st Respondents decision was unlawful, irrational and failed to meet the applicant's legitimate expectations and was an unfair, unjust and improper exercise of discretion.

31. The Interested Party's Preliminary Objection as well as the Respondents' grounds of opposition raise the question of whether the Judicial review application ought to be struck out for being time barred. A look at the impugned decision by the Deputy County Commissioner Nzambani Sub- County shows that the judgement was certified a true copy and date stamped on 18/11/2020 while the Applicant's Chamber Summons Application for leave was filed on the 28/11/2021, a period of over one year which is outside the 6 months limitation period prescribed by Order 53(2) of the Civil Procedure Rules and Section 9 of the *Law Reform Act*.

32. The test of the true definition of a preliminary objection was well set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696.

> " So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

33. The Interested Party's objection that the Chamber Summons Application is time barred and consequently the substantive Notice of Motion is a point of law as it stems from statutory and subsidiary law provisions.

34. Order 53(2) of the Civil Procedure Rules (2010) provides as follows:

> " Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the

application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave."

35. Justice Mativo in the case of Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR(Supra) strictly applied the provisions for limitation of time and found as follows:

> " In conclusion, it is my finding that the provisions discussed above are couched in mandatory terms and must be complied with. Further, Order 50 Rule 6 which permits for extension of time being a subsidiary legislation cannot override the provisions of sections 8 and 9 of the *Law Reform Act*. Article 159 (2) (d) of *the constitution* of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. I must however point out that Article 159 of *the Constitution* is not a panacea for all problems. It is not lost to this court that the provisions of Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010 are couched in Mandatory terms. The applicant cannot seek refuge under Article 159 (2) (d) of *the constitution* under the present circumstances in view of the mandatory and express provisions cited above."

36. However, the Court of Appeal in Stephen Kibowen v Chief Magistrate's Court Nakuru & 2 others [2017] eKLR took a completely different approach and held that if a decision is a nullity, then time was incapable of running against it. The Learned Judges held thus:

> " Did the learned Judge so wrongly exercise his discretion as to warrant our interference" We are afraid so. It is clear from the brief ruling that the learned Judge took a strict approach to the 6-month limitation period and concluded that the application before him was incompetent. Ordinarily, such a conclusion would be unimpeachable but, in the matter before the learned Judge, what was being challenged was not a decision properly made within jurisdiction against which time could run. Rather it was a nullity which amounted to nothingness. It was therefore incapable of commencing a reckoning of time and was definitely incapable of triggering a statutory bar, being in every respect barren and of no effect."

37. However, there has been a shift in jurisprudence that a party who files an application under the provisions of *the Constitution* of Kenya 2010 or the Fair Administrative Actions Act need not seek leave to commence judicial review proceedings or file the application within 6 months of the making of the impugned decision. In Republic v Deputy County Commissioner Baringo Central & 5 others Ex parte Gideon Kandagor & another; Charles Kigen (Interested Party) [2022] eKLR the Court emphasized the importance of the provisions of the law under which a party approaches the court and held;

> " ...That had the Exparte Applicants moved the court under Articles 22, 23(3) and 47 of *the Constitution*, section 7 of the Fair Administrative Actions Act, 2015, and section 13(7) of the *Environment and Land Court Act* 2011, they probably would not have been caught up with the issues of limitation, and the need to seek for leave first being raised by the Interested Party now in objection to their application. That the foregoing provision of *the Constitution* and the Statutes do not require leave to be sought before application for judicial review orders. They also do not limit parties to move the court within only six months from the date of the impugned decision..... That from the foregoing the court finds merit in the Interested

Party's preliminary objection, and the application for judicial review orders herein is hereby struck out with costs."

38. The Court notes that the Ex-parte Applicant anchored the application herein on Article 165(6) as read with (7) of *the Constitution* of Kenya and Sections 7, 9 and 10 of the Fair Administrative Act among other statutory provisions. In this case it is the court's view that the provision of Okong'o J in National Social Security Fund v Sokomania Ltd & another [2021] eKLR stated as follows: -

Order 53 (2) of Civil Procedure Rules and Section 9 Law Reforms Act do not apply.

> " Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of *the Constitution* of Kenya, 2010 and *Fair Administrative Action Act*, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under *the Constitution* of Kenya 2010 and/or the *Fair Administrative Action Act*, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court."

39. The second objection raised by the Interested Party is that the subject parcel of land number Nzambani/Kyanika/330 is registered in the name of Thomas Kitenge (deceased) and his estate is pending final distribution in Kitui H.C. Succession Cause No. 7 of 2017. The Interested Party contends that the Ex-parte Applicant should raise his concerns in that case and should not have filed this application.

40. It is the Court's view that issues of ascertainment and recording of rights and interests in community land formerly trust land is provided for under the *Land Adjudication Act* and the process and procedure is provided under the said Act. The process culminates in the appeal to the Minister under section 29. Thereafter the Ministers decision is subject to judicial review under the relevant provisions of the law. It is the Courts view that the rights the Ex parte Applicant seeks to assert in this suit are capable of being determined by the application before this court. Further, succession proceedings involve beneficiaries to the estate of the deceased and it is not clear whether the Exparte Applicant is a beneficiary of the estate of the registered owner of land parcel Nzambani/Kyanika/330, Thomas Kitenge. The Applicant herein may not have any recourse in contesting the distribution of the parcel of land. The *Law of Succession Act* describes itself as:

> " An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto."

41. It is the Courts view that the issues raised by the Ex-parte Applicant in this suit could not have been raised in the succession cause and the preliminary objection fails on the two grounds.

Whether the 1st Respondents decision was unlawful, irrational and failed to meet the applicant's legitimate expectations and was an unfair, unjust and improper exercise of discretion.

42. The Ex-parte Applicant claims that the 1st Respondent's decision was unlawful, irrational and unreasonable and failed to meet the Applicant's legitimate expectations was unfair, unjust and improper exercise of discretion for failure to overlook the error made in lodging the appeal against parcel number 331 instead of parcel 330. He stated that the 1st Respondent failed to take into account the merit of the appeal and the fact that his family was in occupation, use and had developed the

disputed portion of land parcel 330 and thus make a finding on what would become of the said occupation and the developments thereon.

43. The Court has considered 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 or irrational. 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 maters 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"

44. 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 K.B. 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."

45. The question for determination is whether the 1st Respondents decision can be said to have satisfied the above test of unreasonableness and irrationality. A careful consideration of the 1st Respondent's decision shows that the 1st Respondent made several findings of facts and one of them was that he acknowledged the error made by the Ex parte Applicant in numbering the parcel of land he was claiming and he stated that "the Appellant had inadvertently filed his appeal against parcel no. 331 which is registered in his name though he was pursuing an interest in parcel 330."

46. At the same time, the 1st Respondent considered the fact that none of the parties before him were present when the transactions for sale of the land in dispute were made and both relied on available documents. He stated the ex parte applicant had not shown any evidence that the deceased Thomas Kitenge did not buy the whole of parcel no. 330 having confirmed that he did indeed buy the land from Juma Mutwa. The 1st Respondent concluded that "this was a case of willing seller and willing buyer and that the Plaintiff encroached on the land of the defendant Thomas Kitenge as an afterthought."

47. From the foregoing findings, it is clear that the 1st Respondent considered the question of who between the Ex parte Applicant and the Interested Party owned the disputed portion of land parcel 330. The contention that the decision of the 1st Respondent was based entirely on the fact that the ex parte applicant had made an error in citing the wrong parcel number is therefore not correct.

48. Further, the contention that the ex parte applicant filed an appeal against his own parcel of land instead of filing against the correct land parcel is not in dispute. It is not also in dispute that the ex parte applicant did not apply to amend the form of appeal in order to correct the said number. I have

perused the land adjudication dispute resolution proceedings attached to the interested party's replying affidavit and the same show that citation of land parcel no. 331 as the subject of the proceedings started at the arbitration board stage when the plaintiff was Wambua Mulu (deceased) who is now represented by the ex parte applicant. The said error persisted during the objection proceedings and to the appeal to the Minister. The said error can therefore not be attributed to the lack of schooling or illiteracy of the Ex parte Applicant since the error existed before he took over conduct of the suit on behalf of the initial party, Wambua Mulu yet he never corrected the same.

49. It is further the courts view that as shown earlier, the 1st Respondent did not base his decision entirely on the fact that there was an error in the citation of the parcel number. The judgement itself was an analysis of the factors taken into account in arriving at the final conclusion that land parcel number 331 would remain the property of the ex parte applicant and land parcel number 330 which included the portion under dispute would remain the property of the defendant Thomas Kitenge represented by the interested party. It further noted that the 1st Respondent made his decision having considered that during the visit to the disputed land the parties had an opportunity to show which portions they claimed was being encroached.

50. It is the courts finding that the decision of the 1st Respondent was not unreasonable or irrational and it has not been shown that he misdirected himself in law. In the courts view the 1st Respondent did indeed call to his own attention the matters which he is bound to consider and did not include for his consideration matters which were irrelevant to what he had to consider.

In the Courts view it cannot also be said that the decision of the 1st Respondent was 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: This is as stated in the case of Council of Civil Service Unions v Minister for the Civil Service (supra).

51. It is further the courts view that power to ascertain and record rights and interests in land within an adjudication area is granted under the *Land Adjudication Act* and the court's role is supervisory over the adjudication process. This position has been restated in many legal authorities emphasizing that the court cannot 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. In Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others (2013) eKLR Okong'o J held that:

> " 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."

52. The court notes that in determining the suit herein it is not mandated to re-hear the Minister's Appeal. In granting an order of certiorari or any other judicial review order, the court is mandated to consider the process followed and if the decision is aligned to the considerations under Article 47 of *the Constitution* of Kenya 2010 and Section 7 of the Fair Administrative Act. It is trite law that Judicial Review is ill equipped to consider issues of fact that are contested. In this present case the issues in contest includes whether the occupation of the Ex-parte Applicant on the suit property, if any, is to be interpreted to mean that he owns the property. Further, the affidavits filed by the exparte applicant and the Interested Party shows that the question of who between the two is encroaching the others land is under dispute since both parties claim encroachment by the other. It was held by Hon. Mativo J. in the case of Republic vs Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johaness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [2020] eKLR

> " It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been up held by our superior courts on numerous occasions. In Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo it was held: -
>
> ... 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 and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."
>
> Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction."

53. Another issue that the Ex-parte Applicant has raised is that the 1st Respondent did not attend the site visit himself but sent an 'adjudication officer' which creates a conflict of interest and a 'secretary' which he states amounted to delegation of powers. However, the 1st Respondent's clarified that the "secretary" referred to is a senior clerical officer who has knowledge about local customary law who handles appeals to the Minister and also requests for technical advice from the land adjudication department to facilitate faster processing of files. In addition to this, he stated that the officer referred to as a 'Land Adjudication officer' is actually a Land Adjudication Assistant whose role is limited to extending general technical advice to the Deputy County Commissioners Tribunal.

54. The Minister can appoint assessors to help him out under the Land Adjudication Regulations Rule 11 which states that:

> " The District Commissioner of a district within which an adjudication area lies shall, upon the request of the adjudication officer, appoint for that adjudication area a panel of fifty assessors from which the Minister may appoint not less than three assessors to advise him on matters relating to customary land law during the hearing of an appeal under section 29 of the Act.

55. Since the Minister is not a customary law expert, he is allowed by the Regulations to appoint assessors to advise him on such matters. In the end it is the Minister alone who makes the final decision. In this present suit, it has not been shown that the participation of the senior clerical officer and the land adjudication assistant compromised the decision making process. The Ex parte Applicant has also not challenged the factual findings on the ground of the site visit. Upon reading the proceedings of the Appeal, there is no indication that the Deputy County Commissioner was helped or directed by the two officers in making the final decision on the appeal. Rule 11(3) of the Land Adjudication Regulations provides that:

> " The Minister shall, after consultation with the assessors, determine the appeal as he thinks fit."

56. It has also not been shown that there is a legal requirement that the Minister must conduct a site visit and that he must be present at that site visit in person.

57. For the foregoing reasons the court finds that the Notice of Motion Application dated 31st of January 2022 lacks merit and the same is hereby dismissed with costs to the Respondents and the interested Party.

DELIVERED, DATED AND SIGNED AT KITUI THIS 11TH DAY OF JULY, 2023.

HON. L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT - KITUI

Judgment read in open court and online in the presence of-

Musyoki Court Assistant

Kilonzi for the Ex Parte Applicant

Kariuki for the Respondents

J. M. Kariuki for the interested party