



**Mohamed v Deputy County Commissioner Buuri East Subcounty &  
another; Kirimi & 3 others (Interested Parties) (Petition E008 of 2023)  
[2023] KEELC 21522 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21522 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**PETITION E008 OF 2023**

**CK NZILI, J**

**NOVEMBER 8, 2023**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 1, 3, 27, 28, 47 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**RHODAH KURI MOHAMED ..... PETITIONER**

**AND**

**DEPUTY COUNTY COMMISSIONER BUURI EAST SUBCOUNTY .... 1<sup>ST</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**HENRY KIRIMI ..... INTERESTED PARTY**

**FREDRICK MUTETHIA ..... INTERESTED PARTY**

**SOPHIA KIUNGA ..... INTERESTED PARTY**

**HELLEN KANYUA ..... INTERESTED PARTY**

**JUDGMENT**

1. Before the court is a petition dated 18.5.2023, where the petitioner averred that she was a granddaughter of the late Saleh Mohamed, the owner of Plot No. Ruiri/Rwarera Adjudication Section 464, whose size is approximately 20.60 acres. The petitioner averred that two sons, all deceased, had survived the deceased. The petitioner averred that the deceased grandfather had, before his death, shared the land among the following: Erick Kiogora (4 acres), Florence Kagwiria (2 acres), Rhoda Kuri (2 acres), Sophia Kiunga (2 acres) and Saleh Mohamed (3.65 acres).



2. The petitioner averred that in 2016, she learned 2 acres of the deceased land had been allegedly sold to the 1<sup>st</sup> interested party by one Zipporah M'Marete (deceased), who used to be an employee of the deceased grandfather and lodged a caution to stop the transfer. The petitioner averred that in 2019, the said Zipporah Kathambi lodged Objection No. 115 with the District Land Adjudication and Settlement Officer (DLASO) claiming 3.5 acres of the suit land, allegedly bequeathed to her by the deceased, which objection was dismissed on 5.4.2019.
3. The petitioner averred that the 1<sup>st</sup> interested party lodged a Minister's Appeal No. 119/2020 against the dismissed objection claiming a purchaser's right to two acres of the suit land. In the appeal, the petitioner represented the family of the deceased. The petitioner averred the appeal was determined in favor of the 1<sup>st</sup> interested party to the effect that parcel No. 464 be subdivided among Florence Kagwiria (2 acres), the petitioner (2 acres), Lucy Nkirote (2 acres), Sophia Kiunga (2 acres), Hellen Kanyua (2 acres) and Henry Kirimi (2 acres).
4. The petitioner averred that the 1<sup>st</sup> respondent breached her rights by allowing Hellen Kanyua to tender evidence without notice and in the absence of her or anyone representing the family of Saleh Mohamed. Further, the petitioner averred that Helen Kanyua was awarded 1.5 acres of land, yet she had no stake in the suit land and had never raised any such claim in the objection proceedings. The petitioner averred that the 1<sup>st</sup> respondent visited the land in question but refused to engage and listen to any of her input and proceeded to make partial findings that only Sophia Kiunga was utilizing two acres of the land. Yet, the late Saleh's family, including Florence Silas Kinoti and Erick Kiogora, have been on the land. The petitioner averred that the appeal hearing was tainted with irregularities and illegalities in that the 1<sup>st</sup> interested party was never a party to Objection No. 115 witnesses were allowed to testify in her absence; relevant facts were not established on the ground, no due diligence was conducted to verify the facts, and some witnesses' testimony was not recorded.
5. Additionally, the petitioner averred that the finding that Hellen Kinyua survived Silas Kinoti as a widow was not factual since the two had never married save for siring the 3<sup>rd</sup> interested party. Moreover, the petitioner averred her testimony was disregarded as opposed to that of Henry Kirimi, his witness, and Helen Kinyua, without proof of the regularity, legality, and validity of the alleged sale. The petitioner averred the findings and directives to subdivide the suit land into six portions totaling 11.5 acres was unjustified, since the source of an extra 2 acres on top of the total acreage of 9.5 acres was not explained.
6. It was the petitioner's averment that in hearing and determining the appeal, her legitimate expectation that the 1<sup>st</sup> respondent would discharge its mandate procedurally, reasonably, justly, and transparently was not met. Further, the petitioner averred that the suit land had initially been subdivided in line with the wishes of the deceased Saleh Mohamed title deeds issued save for a small portion that had remained in the name of the deceased, measuring 3.65 acres; otherwise had the 1<sup>st</sup> respondent conducted any due diligence, it would have known the land registrar had issued title deeds for the resultant subdivisions.
7. The petitioner averred that the land meant for the late Saleh Mohamed, measuring 3.65 acres, was at the risk of being subdivided and registered in the names of strangers, courtesy of the decision by the 1<sup>st</sup> respondent.
8. The petitioner based her petition on the Articles (1), 1 (3) (C), 2 (1), (4), 10 (19) (3) (a), 21 (1) and 22 (1) & (2), 23 (3), 25(c), 27, 35(b), 40(6), 50(1), 259 (1) and Section 13 (2) (3) & (7) of the Environment



and Land Act, claiming infringement of her right to fair hearing, access to information and right to property and prayed for:-

- a. A declaration that the proceedings before the 1<sup>st</sup> respondent were unprocedural, illegal, and unfair.
  - b. Declaration that the ruling was ultra vires and arrived at in an unprocedural manner.
  - c. Declaration that the appeal by the 1<sup>st</sup> interested party was improperly and illegally lodged.
  - d. Declaration that Henry Kinyua and Hellen Kanyua were not entitled to any portion of the suit land.
  - e. Nullification of the entire proceedings.
  - f. The decision by the 1<sup>st</sup> respondent be quashed.
  - g. An order that the balance of the resultant subdivision measuring 3.65 acres be retained as owned by the estate of Saleh Mohamed.
9. The petition was supported by an affidavit of Rhoda Kuri Mohamed, sworn on 1.5.2023. Briefly, the petitioner reiterated the contents of the petition and annexed copies of the proceedings and ruling as annexure marked R.K. – 1 objection proceedings and decision by DLASO as annexure marked R.K. – 2, copies of title deed marked as R.K. – 3 (a) (b) & (c) and lastly, copies of a letter from DLASO and a sketch map as annexure R.K. 4 a & b.
10. The respondents opposed the petition through a replying affidavit of Josephine Njenga, the 1<sup>st</sup> respondent sworn on 25.7.2023. The 1<sup>st</sup> respondent, on behalf of the respondents, denied that the petitioner was the only grandchild of the late Saleh Mohamed since Lucy Nkirote and Sophia Kiunga were also grandchildren of the deceased. The 1<sup>st</sup> respondent averred that the late Silas Kinoti had married Hellen Kanyua under Ameru customary marriage. Further, the 1<sup>st</sup> respondent averred that the Cabinet Secretary Ministry of Lands’ file sent to her office lacked information regarding the sale of 3.5 acres to James Gichuru and George Muriira but included the proposed subdivisions to Eric Kiogora 4 (acres), Rhoda Kuri – (2 acres), Florence Kagwiria (2 acres), Sophia Kiunga 2 acres and Zipporah Kathambi (3.65) acres. The 1<sup>st</sup> respondent averred that Zipporah Kathambi had cohabited with Saleh Mohamed as husband and wife for 20 years and that Zipporah Kathambi M’Marete was the owner of Plot No. 420 situated in Kathwene Sublocation.
11. The 1<sup>st</sup> respondent averred that the area assistant chief, Mr. David Mbiriti, together with the area elders had verified that the late Saleh Mohamed and his grandchildren, including the petitioner, had resided in Zipporah Kathambi’s residence as a family unit and that it was not true she was an employee but a wife to the deceased. Further, the 1<sup>st</sup> respondent averred that after Saleh Mohamed passed on, his grandchildren, including the petitioner, lived with Zipporah Kathambi as their guardian until differences arose, leading to the relocation of the children. The 1<sup>st</sup> respondent averred as an act of appreciation of nursing care during his long illness, the late Saleh Mohamed gifted Zipporah Kathambi with 3.65 acres of land in the presence of some elders, but eventually, she sold 2 acres of the land to the 1<sup>st</sup> interested party. Additionally, the 1<sup>st</sup> respondent averred that Hellen Kanyua, as the widow of the late Silas Kinoti, was allocated 1.5 acres of land out of her grievance that none was allocated to her, yet her late husband was buried on the said land. The 1<sup>st</sup> respondent averred that the scene visit was conducted on Parcel No. 464 with the primary objective of assessing and inspecting any developments,



- occupancies, and other pertinent matters of concern only to find a single house owned by Sophia Kiunga and four graves of her family members, as pointed out by her during the scene visit. The 1<sup>st</sup> respondent averred that a list of the attendance of the witnesses was kept for every meeting, and none was denied a chance to testify.
12. The 2<sup>nd</sup> interested party opposed the petition through a replying affidavit sworn on 21.9.2023. He averred that parcel No. 464 was approximately 20.60 acres, as recorded during the objection process. The 2<sup>nd</sup> interested party averred that he used to live on Parcel No. 420 with her aunt, the late Zipporah Kathambi, who was married to the late Saleh Mohamed. He confirmed that the deceased, Silas Kinoti, was married to Hellen Kanyua. The 2<sup>nd</sup> interested party averred that the late Zipporah had filed an objection to parcel No. 464 before DLASO, whom she represented since she was sick, and tendered evidence showing Parcel No. 464 as a balance due to Saleh Mohamed, had been gifted to her to which she sold 2 acres to the 1<sup>st</sup> interested party.
  13. In addition, the 2<sup>nd</sup> interested party averred that after the objection was dismissed, the 1<sup>st</sup> interested party was affected by the decision, hence the Minister's appeal, where all parties were given an opportunity by the 1<sup>st</sup> respondent to be heard. He termed the hearing and determination as fair, just and lawful. Further, the 2<sup>nd</sup> interested party averred that the only person who had built on the land was Sophia Kiunga, whose house is used by Hellen Kanyua, who used part of the land. He denied that the 1<sup>st</sup> respondent made any errors in awarding the parcels to the beneficiaries.
  14. The 4<sup>th</sup> interested party, through an affidavit sworn on 25.2.2023 and a witness statement dated 25.8.2023, opposed the petition. She averred that the petitioner was the daughter of her sister-in-law and a stranger since she was not a legal estate representative. In addition, the 4<sup>th</sup> interested party averred that she was a bonafide wife for seven years of the late Silas Kinoti Mohamed, a brother to the petitioner's late mother Florence Kagwiria Mohammed. The 4<sup>th</sup> interested party averred the 3<sup>rd</sup> interested party was her only daughter with the late Silas Kinoti, who died in 1991 while she was in maternity expecting her child. Similarly, the 4<sup>th</sup> interested party averred that when her husband passed on, nobody was at home to arrange for his burial; hence, he was buried at their father's homestead on Parcel No. 464. Since she was young, the 4<sup>th</sup> interested party averred that her father-in-law blessed her to remarry, which she did in 1996 with Joseph Muriki, but continued working on Plot No. 464. The 4<sup>th</sup> interested party averred that she continued having good relations with her sister-in-law until 2022, when she passed on, and hence, the petitioner was being unfair to take a lion's share of the land, since her brothers Erick Kiogora, Florence Kagwiria, and Rhoda Kuri had a total of 7.52 acres as opposed to 3.25 acres to herself and Sophia Kiunga. She denied that Zipporah Kathambi Marete was ever a wife of Saleh Mohamed but a herdsman. The 4<sup>th</sup> interested party averred that she was allowed to testify in the appeal after the 1<sup>st</sup> respondent found her on the land during the scene visit and desired to know her status since she had been sidelined. She wondered why a simple land dispute was elevated into a constitutional issue.
  15. With leave of court, parties opted to dispose of the petition through written submissions. The petitioner, by written submissions dated 18.9.2023, stated her claim was premised on Article 22 (1) & (2), 23 (3) of *the Constitution* since her rights have been violated. Reliance was placed on Meshack Moturi Siro vs National Land Commission 7 others (2021) eKLR Daniel N. Mugendi vs K.U & others (2013) eKLR.
  16. On the violated rights, the petitioner submitted the minister's appeal, its hearing and determination were wanting in procedural and substantive fairness, since it was marred by irregularities and illegalities. The petitioner submitted the 1<sup>st</sup> interested party was not a party to Objection No. 115 had not



- registered any dispute over the land lacked the capacity to appeal against the decision, given the representative of the late Zipporah at the objection dismissed on 5.4.2019, was the 2<sup>nd</sup> interested party.
17. The petitioner submitted that the appeal was lodged after a year and not within 60 days hence was stale, and the 1<sup>st</sup> respondent was not seized adequately with jurisdiction to entertain the same. The petitioner averred that the appeal was heard without jurisdiction since the land by the time was not governed by the *Land Adjudication Act* (Cap 283) & *Land Consolidation Act* (Cap 284), for title deeds had already been issued over the resultant subdivision, following the wishes of the deceased as confirmed by the letter of the DLASO dated 1.3.2023.
  18. The petitioner submitted that if the Minister's decision was implemented, it would cause grave injustice to the petitioner, and the rightful beneficiaries as per the owner's wishes. On the appeal the petitioner submitted, the ultimate objector received nothing except Hellen Kanyua and Henry Kinyua, whose basis of allocation was not justified or explained by the 1<sup>st</sup> respondent. Additionally, the petitioner submitted that the total acreage by the 1<sup>st</sup> respondent left out 1.5 acres unaccounted for and further, that the land subdivided among the beneficiaries by the 1<sup>st</sup> respondent was more than the land available, making it impossible to have the suit land subdivided. The petitioner submitted that part of her testimony was not recorded, she was ignored during the scene visit or denied audience, and that the 1<sup>st</sup> respondent has not rebutted averments or produced evidence to the contrary, especially the contents of the appeal file.
  19. Similarly, the petitioner submitted that the 1<sup>st</sup> respondent was out of order to jump to the conclusion that Zipporah had sold 2 acres to the 1<sup>st</sup> interested party without proof, contrary to the finding of the DLASO and, more importantly, when the late Zipporah waited until the late Saleh Mohamed passed on to lay a claim on his land but said nothing during his lifetime and for his land to be allocated to stranger's contrary to his death wishes. Relying on *Mwangi Stephen Murithi vs National Land Commission* (2018) eKLR, on the proposition that a party is entitled to an administrative action that is expeditious efficient, lawful, reasonable, and procedurally fair, the petitioner urged the court to find the scales of justice tilt in favor of allowing the petition since the proceedings and decisions by the 1<sup>st</sup> respondent were shambolic.
  20. The respondents by submissions dated 13.9.2023 raised two issues for the court's determination. On the first issue, the respondents urged the court to find the petition fell short of meeting the threshold of a constitutional petition, for it was not set out with a degree of precision as held in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. Secondly, the respondents submitted that the position discusses no discernable constitutional issues as held in *Republic vs Paul Kihara Kariuki (A.G.) & 2 others Ex parte Law Society of Kenya* (2020) eKLR and *Godfrey Paul Okutoyi & 2 others vs Habil Olaka & another* (2018) eKLR.
  21. The respondent submitted in paragraph 16 of the replying affidavit that there was a scene visit to the locus in quo to assess and inspect the development, accompanied by any pertinent matters of concern, and during the hearing, all parties were present and were allowed to testify, and call witnesses going by annexure marked R.K. "1", based on the appeal preferred by the 1<sup>st</sup> interested party. The respondents submitted the prayers in the petition and called for a review of the decision by the 1<sup>st</sup> respondent, in which case the petitioner should have approached the court by way of judicial review within the stipulated timelines.
  22. The respondent, therefore, took the view that the grievance by the petitioner did not call for this court's constitutional interpretative mandate under the Bill of Rights, though disguised as a constitutional petition seeking enforcement of the Bill of Rights. On whether the petitioner deserves the reliefs sought, the respondents submitted there has been no proof, denial, violation, or infringement of the



Bill of Rights to the required threshold warranting the orders sought for as the grounds in the petition were geared towards challenging the merits of the decision which was not a purview of a constitutional petition, on contested issues of facts without the court hearing the evidence. The respondents urged the court to find the petition falling short of meeting the threshold and an abuse of the court process.

23. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties, by written submissions dated 22.9.2023, submitted that the 1<sup>st</sup> interested party was affected by the dismissal of the objection due to his claim of 2 acres he had bought, whose rights were recognizable under the [Land Adjudication Act](#). The 1<sup>st</sup> interested party submitted Section 29 (1) of the Act allowed him to file a Minister's appeal, which he did; hence his appeal was properly before the minister. According to the 1<sup>st</sup> interested party, Section 29 (1) of the [Land Consolidation Act](#) protects parties that may have claims not necessarily related to the claim in the objection to be heard. As to whether the petitioner was accorded a fair hearing and trial by the 1<sup>st</sup> respondent, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties submitted such matters called for an application for judicial review and not a constitutional petition.
24. Further, it was submitted that paragraphs 35 – 51 of the petitions fell short of pleadings with a reasonable degree of precision as held in *Anaritia Karimi Njeru vs Republic* (1979) eKLR and demonstrated contravention of [the constitution](#) by the 1<sup>st</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties submitted that if the decision of the 1<sup>st</sup> respondent aggrieved the petitioner, she should have challenged the decision through other available avenues apart from a constitutional petition. Reliance was placed on *Lipisha Consortium Ltd and another vs Safaricom Ltd* (2015) eKLR and *Kweri vs Beehive Media Ltd and another, Capwell Industries Limited (I.P) Constitutional Petition 321 of (2021) (2023) KHKEHC 2684 (KLR) (Constitutional & Human Rights) (31<sup>st</sup> March 2023) (Judgment)*. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted the petition raises no constitutional issues; it was not justified, and the court was being called upon to determine the dispute without hearing evidence or granting reliefs without having an opportunity to hear all the interested parties while sitting on an appeal when the matter has not come by way of judicial review.
25. The court has carefully gone through the pleadings, evidence tendered by way of affidavits, written submissions, and the law. The issues calling for the court's determination are:-
  - a. If the petitioner has locus standi to file the petition.
  - b. If the petition offends the doctrine of exhaustion.
  - c. If the petitioner should have come before the court through judicial review.
  - d. If the petitioner has proved to the required standard any breach of the right to a fair hearing, [Fair Administrative Action Act](#), or right to property.
  - e. If the Minister had jurisdiction to hear and determine the appeal by the 1<sup>st</sup> interested party who was not privy to the A/R objection before the DLASO.
  - f. If the 1<sup>st</sup> respondent had jurisdiction to entertain a Minister's appeal touching on registered land.
  - g. If the 1<sup>st</sup> respondent's proceedings and decision met the constitutional threshold.
  - h. If the petitioner is entitled to the reliefs sought.
  - i. What is the order as to costs?



26. A constitutional petition is governed by Articles 21, 22, 23, 159, 162, 2 (b), 165 (3) (2), 258 & 260 of *the Constitution*, Section 13 of the *Environment and Land Court Act* and *the Constitution* of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure (Mutunga Rules) Rules 2013, Rule 4 of the Rules provide that a person so affected or likely to be affected by an alleged denial, violation or infringement or threat of any right or fundamental freedom may make an application for redress. Sub Rule 2 provides that such a person may act in their interest or on behalf of another person as a member of or in the interest of a group or class of person(s) in the public interest or an association acting in the interest of one or more of its members. Article 22 (1) of *the Constitution* repeats Rule 4 above.
27. In *Chief Land Registrar vs. Noah Tirop* (2018) eKLR, the court said that even if there were other persons with beneficial interests in the land, this did not disentitle the 1<sup>st</sup> – 4<sup>th</sup> respondents from pursuing individual claims since no rule says all the beneficiaries and in unison file a claim. As to the precision of pleadings, the court observed that from the replying affidavit, it was clear that the appellant understood with precision the grievance of the 1<sup>st</sup> – 4<sup>th</sup> respondents concerning the suit property. The court said the replying affidavit succinctly responded blow by blow to the allegations in the petition its extent, nature, and the claim.
28. In this petition, the respondents and interested parties have averred the petition lacked letters of administration to mount the petitioner and that she was not the only grandchild of the late Saleh Mohamed.
29. The petitioner has described herself as the granddaughter of the late Saleh Mohamed (deceased) and a beneficiary of two acres out of the L.R. No. 464 Ruiru/Rwarera alongside other beneficiaries such as the 3<sup>rd</sup> interested parties. Her beneficial interest is confirmed by the respondents and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties through title deeds annexed as FM “1” for L.R. No. Ruiru/Rwarera/6014, 6015, 6016, and 6017, which title deeds were the resultant subdivision of parcel No.464. In *Mumo Matemu vs Trusted Society* (supra), the court said that in the absence of bad faith, the standard guide on locus standi remains Article 258 of *the Constitution*. In *Jonathan Munene vs A.G. (KJWA) (I.P.)* (2021), eKLR the court cited with approval *Sollo Nzuki vs Salaries and Remuneration Commission* & another (2019) eKLR that courts in public litigation have opened doors to welcome every person with bonafide case on an alleged breach of his constitutional rights to approach the court for reprieve since Article 3 (1) of *the Constitution*, places an obligation on every person to respect, uphold and defend *the Constitution*.
30. Guided by *the Constitution* and the preceding case law, I think the petitioner has disclosed her stake in the deceased's estate. She does not need a letter of administration to commence constitutional proceedings on an alleged violation of her rights. She was a bonafide party in the Minister's appeal representing the deceased grandfather's estate. I hold that she is properly before the court.
31. The 2<sup>nd</sup> issue is whether the petition complies with the procedural and substantive law. Rule 10 of the Mutunga Rules lists the format a constitutional petition should take. The petition before the court has substantially complied with the format. It describes the parties, facts giving rise to it, particulars of the breach, its legal basis, the alleged violations, reliefs, and orders sought. The petition has also complied with Rule 11 of the Rules by annexing documents to the supporting affidavit of Rhodah Kuri Mohamed. It discloses a cause of action as described in *Carton Manufactures Ltd vs Prudential Printers Ltd* (2013) eKLR, on the acts or the part of the 1<sup>st</sup> respondent giving rise to the complaint. The respondents and interested parties cannot be heard to say that they did not know the facts, basis and grounds of the cause of action, yet each of them, without seeking better particulars, was able to answer the complaint through lengthy and extensive replying affidavits.



32. The next issue is whether the petitioner should have filed a judicial review application to challenge the decision instead of a constitutional petition. Article 47 of *the Constitution* grants every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Parliament has enacted the *Fair Administrative Action Act* 2016 to provide the procedural law for hearing and determining administrative actions. This law governs quasi-judicial and inferior tribunals. Article 23 grants the High Court while determining the petition brought under Article 22 thereof, to grant appropriate reliefs, including an order of judicial review.
33. Before 27.8.2010, the procedure to approach court challenging decisions of inferior tribunals or quasi-judicial bodies was through Order 53 of Civil Procedure Rules as read together with Sections 8 & 9 of the *Law Reform Act. The Constitution* of Kenya 2010 elevated the right to fair administrative action in the Bill of Rights; therefore, parties are at liberty to choose any of the avenues to challenge decisions or awards of quasi-judicial bodies or inferior tribunals. See *IEBC vs National Super Alliance Kenya & 6 others* (2017) eKLR. In *Mohamed Ahmed Khalid & others vs Director Land Adjudication & 2 others* (2013) eKLR, Angote J held that considering Cap 284 has an elaborate procedure on how complaints arising from planning, demarcation and survey of trust land are handled, the court could not be a substitute to those established bodies and the petitioner would only move to court after exhausting the set processes for declaratory orders or by way of judicial review. See *Justus Mugaa M'Impwi vs DLASO Tigania West /East District & another* (2018) eKLR.
34. In *Reuben Mwongela M'Itelekwa vs Paul Kigea Nabea & others* (2019) eKLR, the court found the dispute to be anchored under the statute and, therefore, raising no constitutional issues. In *Geoffrey Muthinja Kiburi & others vs Samuel Munga Henry & others* (2015) eKLR, the court held the doctrine of exhaustion served the purpose of ensuring there was a postponement of judicial considerations through a mechanism in place for resolution outside court. Similarly, in *Mutanga Tea & Coffee Company Limited vs Shikara Limited & Another* (2015) eKLR, the court said alternative dispute resolution mechanisms outside court as per article 159 2 (c) of *the Constitution* must be promoted.
35. In *Kenya Human Rights Commission vs NGO Board* (2016) eKLR, the court said that in exercising powers to superintend bodies and tribunals given Article 47 of *the Constitution*, the court is not limited to the traditional judicial review grounds and the Fair Administrative Actions Act must be viewed in that light. In *Communication Commission Kenya vs Royal Media Service Ltd* (2014) eKLR, the court observed that by clothing their grievance as a constitutional question, the respondents were entitled to do so and have the court resolve their grievance based on Articles 22 & 23 of *the Constitution*. The court cited with approval *Marbury vs Madison* 5 US 137 (1803) which established the principle of the possibility of judicial review of legislation and, the courts' key place in upholding *the Constitution*. The court further cited with approval from the Pharmaceutical Manufacturers Association of South Africa, another *exparte* President of the Republic of South Africa & another CCT 31/19(2000) ZACC 1, that the control of public power by the court through judicial review is and has always been a constitutional matter and the two were now intertwined.
36. In *Masai Mara (SOPA) Ltd vs Narok County Government* NRB HC Petition No. 336 of 2015, the court said that after 2010, administrative law actions and remedies were subsumed in *the Constitution*, since Article 47 forms part of the Bill of Rights. In *Child Welfare Society of Kenya vs Republic and 2 others exparte Child in Family Focus (K)* (2017) eKLR, the court concluded that judicial review was no longer confined to the traditional common law approach, for it had been elevated to a constitutional level. The two systems are one and not two mutually exclusive systems for they complement each other. See *CCK vs Royal Media* (*supra*).



37. In *Judges & Magistrates Vetting Board vs Centre For Human Rights and Democracy* (2014) eKLR, the court held that judicial review ensures decisions made by relevant bodies are lawful to safeguard the rule of law and individual rights and ensure that decision-makers are not above the law but take responsibility for making lawful decisions in the knowledge that they are reviewable.
38. Applying the preceding case law, the petitioner's complaint is the manner the Minister's appeal was admitted, heard, and determined in breach of her constitutional rights and fundamental freedoms. After a Minister's appeal, the petitioner elected to approach this court by way of a constitutional petition which is one of the two available avenues. Therefore, the petitioner is not guilty of the non-exhaustion doctrine.
39. Turning to whether the petitioner has proved the breach of her constitutional rights regarding fair hearing, property, and administrative action, Sections 107 – 112 of the *Evidence Act* places the burden on he who alleges. In *Bernard Kibor Kitur vs Alfred Kiptoo Keter & another* (2018) eKLR, the court observed that affidavit evidence was personal to the deponent and a petitioner cannot rely on evidence he was not privy to. Further, the court found that for a substituted petitioner to adopt word by word the averments of the original petitioner, it was tantamount to relying on facts not within his knowledge, violating rules of evidence, and admitting hearsay evidence. The court said an affidavit must state the substance of the evidence and be confined to facts that the deponent is able to prove of his own knowledge. The court cited with approval *Raila Odinga vs IEBC* (2013) eKLR on the balance of proof, especially since there was a presumption of regularity of acts of public bodies, and that where the public body departs from the prescription of the law, credible evidence must be produced to the contrary on a balance of probability.
40. In *Samson Gwer & 5 others vs Kenya Medical Research Institute* (2020) eKLR, the Supreme Court of Kenya held that a party making an averment in the validation of a claim is the one to establish the plain veracity of the claim so that the court can determine that it was more probable than not that the respondent bore responsibility in whole or in part. The court said the standard of proof with respect to constitutional safeguard assumes a higher level than in ordinary civil claims by laying substantial material that the respondent treated them unconstitutionally, after which the burden would shift to the respondent to prove the contrary. In *Veronica Njeri Waweru vs City Council of Nairobi and others* (2012) eKLR, the court cited with approval *Rashid Odhiambo & 245 others vs HACCO Industries C.A No. 110 of 2001* that the court, looking at the facts set out, has to determine if there was a violation of the petitioner's rights. In *Judicial Service Commission vs Mbalu Mutava & another* (2014) eKLR, the court observed that the administrative actions of public officer's, state organs and other administrative bodies were subject to Article 47(1) of *the Constitution* to the principle of constitutionality, rather than to the doctrine of ultra vires as to the legality, reasonableness and procedural fairness. In *AG & another vs Randu Nzai Ruwa & others* (2016) eKLR, the court observed that the law and enlightened common sense demanded that an action of the Minister be interrogated on the objective test of reasonableness.
41. In *Republic vs Firearm Licensing Board & another* (2019) eKLR, the court observed that the ratio of any decision must be understood in the facts of the particular case. The court observed further that an administrative action as per the *Fair Administrative Action Act* includes the powers, functions, and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates. The court said that all that an applicant is required to do under Article 47 of *the Constitution* is to demonstrate that the impugned decision, whether oral, or through a letter or an order or proceedings, violates or threatens his Bill of Rights. The court said procedural impropriety includes not following the procedures prescribed by statute or rules of natural justice being connected to the party, the



- appearance of bias, not granting fair hearing, and lack of reasons for the decision as contained in Section 4 of the *Fair Administrative Action Act*. On Irrationality, unreasonableness, and proportionality, the court said the tests would be on reviewing or justifying the connection made by the administrative decision-makers between the material made available and the conclusion.
42. On reasonableness, the court said the simple test was whether the decision in question was one that a reasonable authority could reach, as held by Lord Diplock. The court said justifiability depends on the reason for the decision. Further, the court said the test would be the Wednesbury one on whether the decision was devoid of any plausible justification was absurd, and was not transparent or intelligible.
  43. Applying the preceding case law to the instant petition, the 1<sup>st</sup> respondent had to refute the allegations that the appeal by the 1<sup>st</sup> interested party was not filed out of time and that the appellant therein was not an aggrieved party to the A/R objection. Similarly, the 1<sup>st</sup> respondent has not denied that when the A/R objection and the minister's appeal were filed, the suit land no longer fell under the *Land Adjudication Act* since the title deeds had already been issued to the beneficiaries of the estate of Saleh Mohamed in line with his wishes. These facts have been confirmed by the replying affidavit of the 2<sup>nd</sup> interested party sworn on 21.9.2023. Annexures marked FM "1" were copies of certificates of official searches for L.R. No's. Ruri/Rwarera/6014, 6015, 6016, and 6017 showing that the parcels were registered on 24.5.2017 and title deeds issued to Erick Kiogora, Florence Kagwiria, Rhoda Kuri, and Sophia Kiunga, respectively, on 5.12.2017. Annexures marked R.K. 3 (a) were copies of the respective title deeds marked R.K. 4 (a) being the resultant subdivisions out of land Parcel No. 464 Ruri Rwarera.
  44. The 1<sup>st</sup> respondent failed to confirm or plead whether there was a pending A/R objection or minister's appeal before the subdivisions, and the resultant title deeds were issued in June 2018, as confirmed by the letter dated 1.3.2023 attached as R.K. 4 (a). Ordinarily, if such a minister's appeal were in existence, there would have been a restriction by the chief Land Registrar under Section 28 of the *Land Adjudication Act* until the appeal was heard and determined. The effect of the minister's decision made on 26.9.2022 was to subdivide the land Parcel No. 464 as if the referenced title deeds were non-existent. From annexure marked R.K. 4 (a), what remained of Parcel No. 464 after the subdivisions was only 3.60 acres. The 1<sup>st</sup> respondent averred that the title deeds was irregularly issued during the appeal's pendency. The power to cancel, rectify, and or order a subdivision of a land title is bestowed solely on the court under Section 80 of the *Land Registration Act* after a titled land has been challenged and adjudged as fraudulently, illegally, and wrongly obtained under Sections 24, 25 & 28 of the Act.
  45. Jurisdiction is everything; if not available, the tribunal or court has to down its tools. The 1<sup>st</sup> respondent has, in her affidavit and writing submissions, avoided the question of whether she was adequately seized of the appeal. On pages 20, 21, and 22 of the annexure marked R.K. "1," it was brought to the attention of the 1<sup>st</sup> respondent that subdivisions had been effected on Parcel No. 464 as per a written will by the deceased dated 24.1.1993. In *Pastoli Kabale vs District Local Government Council and others* (2008) 2 E. A 300 the court cited with approval *Council of Civil Unions vs Minister for the Civil Service* (1985) A.C. 2 and an application by *Bukoba Gynkana Club* (1963) E. A 478 that for an applicant to succeed in judicial review, he has to show that the decision or act complained of was tainted with illegality, irrationality, and procedural impropriety. The court said acting without jurisdiction was an instance of illegality and irrationality where the decision taken or act done would not be done by a reasonable authority addressing itself to the facts and the law before it and where such a decision would be a defiance of logic or acceptable standards.
  46. In this petition, there is uncontroverted evidence that the title deeds for the resultant subdivisions of Parcel No. 464 were in existence before the objection was filed and before the filing, hearing, and determination of the Minister's appeal. In *Republic vs Chairman, Meru Central Land Dispute*



Tribunal and others (2018) eKLR, the court held that the tribunal was bereft of jurisdiction since it was dealing with registered land. The 1<sup>st</sup> respondent has not attached the memorandum of appeal or a receipt to show when the appeal was filed. The appeal before the Minister was No. 113 of 2020. There is nothing attached to show that the appeal was filed within 60 days from 5.4.2019, during a time when the suit land was within the jurisdiction of the minister under Cap 283 or 284. See Kimwele Kithoka & others vs. Deputy County Commissioner Kyuso Sub County and 7 others (2022) eKLR.

47. As to how the 1<sup>st</sup> respondent heard and determined the appeal in Republic vs Special District Commissioner and another (2006) eKLR, the court observed that the evidence recorded by the Minister should be considered alongside that taken by the DLASO and his ruling on which the grounds of appeal arise. In Republic vs Deputy County Commissioner Tigania West Subcounty & another Exparte Andrew M’Tbiri M’Mwirabua (2021) eKLR, the court cited with approval Law Society of Kenya vs Centre for Human Rights and Democracy & 11 others (2014) eKLR, that where a tribunal deviates from the established and set beacons or pathway or legal criteria as delineated for it or has run wild and amok out got worst gone on a frolic of its own, become an unruly horse and engaged in caprice, malice, witch hunting the court must pull the leash and firmly point the delineated legal pathway to tread and follow. The court cited with approval Suchan Investment Ltd vs Minister of National Heritage & Culture & others (2016) eKLR that proportionality means reviewing or assessing the decision to establish whether it was within the range of rational or reasonable decisions.
48. In this petition, the appellant was not a party to the objection proceedings. He did not file the appeal for and on behalf of the aggrieved party who had lost the objection. The 2<sup>nd</sup> interested party was the one who was representing the late Zipporah in the objection proceedings. The 1<sup>st</sup> interested party filed and argued the appeal regardless of being a non-party to the impugned decisions and proceedings. The prejudice to the petitioner is blatant. It was against the rules of natural justice and the law, for the 1<sup>st</sup> respondent to allow the appeal to be advanced by a different party and on new grounds and evidence different from what was appealed against. Secondly, there is evidence that the 1<sup>st</sup> respondent proceeded to subdivide the land to other beneficiaries who were not parties to the appeal before it. Additionally, the 1<sup>st</sup> respondent went ahead without inquiry to subdivide land, already titled without any justification. In my view, the proceedings and the decision by the 1<sup>st</sup> respondent cannot pass both the statutory and constitutional test set under Articles 40 (6) and 47 of *the Constitution*.
49. The upshot is that I find the appeal was incompetent, the proceedings and the decision maker was bereft of jurisdiction, the decision was ultra vires, and amenable to nullification. The proceedings and the decisions are hereby quashed and set aside with costs to the petitioner.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8<sup>TH</sup> DAY OF NOVEMBER 2023.**

**HON. CK NZILI**

**ELC JUDGE**

