



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC PETITION NO. 23 OF 2020

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND

FREEDOMS OF INDIVIDUALS UNDER ARTICLES 2, 10, 27, 28,

40, 43 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF RIGHTS TO USE AND

OCCUPY L.R. NO. KYUSO/NGOMENI 'A'/337-1096

BETWEEN

KIMWELE KITHOKA.....1ST PETITIONER

PETER MUSYA SYENGO.....2ND PETITIONER

ESTHER KINGOLA MUSYOKA.....3RD PETITIONER

MASYUKI MUSYOKA.....4TH PETITIONER

MUSYOKA KITHEKA.....5TH PETITIONER

MUTIE MUNEENI.....6TH PETITIONER

JOHN MULYUNGI MUNEENI.....7TH PETITIONER

SAMUEL KIMANZI MUNEENI.....8TH PETITIONER

ISAAC KYALO MUNEENI.....9TH PETITIONER

SOLOMON MUSYOKS MUNEENI.....10TH PETITIONER

JUDE MUSYIMI.....11TH PETITIONER

MUTIE MUNEENI.....12TH PETITIONER

JOELI KATUA MUNEENI.....13TH PETITIONER

THE BOARD OF MANAGEMENT

NGOMENI SECONDARY SCHOOL.....14TH PETITIONER

MUSILA MUNEENI.....	15 TH PETITIONER
ELIJAH KILONZO KITEME.....	16 TH PETITIONER
MUSYOKI NZUMBU.....	17 TH PETITIONER
MBUKILYE NGUKILYE S.H.G.....	18 TH PETITIONER
GLOBAL VISION CHURCH.....	19 TH PETITIONER
ELIJAH MUKINDA.....	20 TH PETITIONER
TITUS MUNYASYA.....	21 ST PETITIONER
NGUI MAKUTHU.....	22 ND PETITIONER
MWEMA MUTUNGA.....	23 RD PETITIONER
JOEL MAITHYA SYENGO.....	24 TH PETITIONER
RACHEL M. MWASI.....	25 TH PETITIONER
DICKSON KYALO MUSILI.....	26 TH PETITIONER
NDUU KITHONGO.....	27 TH PETITIONER

VERSUS

DEPUTY COUNTY COMMISSIONER KYUSO SUB-COUNTY.....	1 ST RESPONDENT
DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....	2 ND RESPONDENT
CHIEF LAND REGISTRAR.....	3 RD RESPONDENT
LANDS REGISTRAR KITUI COUNTY.....	4 TH RESPONDENT
OFFICE OF DIRECTOR OF PUBLIC PROSECUTION.....	5 TH RESPONDENT
THE OFFICER IN CHARGE OF KYUSO POLICE STATION.....	6 TH RESPONDENT
ITAVWA MULI MAANGI.....	7 TH RESPONDENT

JUDGMENT

1. The Petitioners, vide a Petition dated 19th August 2020, have sought for the following orders:

- a. A declaration that the 1st Respondent violated Article 10 of the Constitution in the manner in which he conducted proceedings in his appeals number 89 of 2013 and 90 of 2013 and consequently his subsequent decision was unconstitutional and a violation of the constitutional rights of the Petitioners herein.
- b. A declaration that appeals numbers 89 of 2013 and 90 of 2013 filed before the 1st by the 7th Respondent in respect of parcel numbers 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089, 1090, 1091, 1095, 1096 and 1098 in Ngomeni ‘A’ adjudication section do not lie and were filed in violation of the law and as such they were incompetently before the 1st Respondent and the same are null and void *ab initio*.
- c. A declaration that the 1st Respondent’s decision dated 29-10-2019 and any other decision emanating in or from appeal number 89 of 2013 and 90 of 2013 were given in violation of the law and the process thereof and therefrom was unconstitutional and unlawful and the said decisions are null and void *ab initio*.
- d. An order of certiorari do issue to remove to this court and quash the 1st Respondent’s decision dated 29-10-19 and actions arising therefrom in his appeals numbers 89 of 2013 and 90 of 2013 touching on parcel numbers 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089, 1090, 1091, 1095, 1096 and 1098 in Ngomeni ‘A’

adjudication section.

e. A declaration that the 5th and 6th Respondents have violated Articles 157(11) and 238 (2) of the Constitution in the manner they received the 7th Respondent's complaints, investigated, summoned the Petitioners and acted in respect of the said complaints in relation to parcels of land described as Kyuso/Ngomoni numbers 385, 387, 483, 488, 489, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089, 1090, 1091, 1095, 1096 and 1098.

f. A declaration that the Respondents violated the Petitioners' constitutional rights to fair hearing, fair administrative action, to protection of the law, adequate housing and protection of property as protected under Articles 27, 40, 43, 47,50(1) and 50(2)(o) of the Constitution.

g. A declaration that the Petitioners are the respective owners and proprietors of the parcels of land known as 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089, 1090, 1091, 1095, 1096 and 1098 in Ngomeni 'A' adjudication section as decided and allocated by the Land Adjudication Officer in his decision dated 12-10-2012 in objection numbers 7, 8, 9, 10,11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of 2011.

h. An order of mandatory injunction directing the 1st, 2nd, 3rd and 4th Respondents to cancel all title deeds or instruments issued in favor of the 7th Respondent in respect of all those parcels of land known as Kyuso/ Ngomeni/385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089, 1090, 1091, 1095, 1096 and 1098.

i. An order of mandatory injunction directing the 1st, 2nd, 3rd and 4th Respondents to process and issue title deeds and other documents of ownership in favour and in the name of the Petitioners in respect of all those parcels of land known as Kyuso/Ngomeni/ 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089, 1090, 1091, 1095, 1096 and 1098 in compliance with the decision of the Land Adjudication Officer dated 12-10-2012 in objections numbers 7, 8, 9, 10,11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of 2011.

j. A Permanent injunction restraining the 5th and 6th Respondents from arresting, charging, prosecuting or filing any criminal proceedings in any court against the Petitioners in relation to ownership and occupation and use of all those parcels of land known as Kyuso/Ngomeni/385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089, 1090, 1091, 1095, 1096 and 1098.

k. The Respondents do pay damages to the Petitioners for violation of their constitutional rights.

l. The Respondents do pay the costs of this Petition.

m. Any other order and reliefs this Honourable court may deem fit and just to grant.

2. In their Petition and the supporting affidavit sworn by the 24th Petitioner, Joel Maithya Syengo, the Petitioners pleaded that they are residents of Ngomeni, Kyuso, Kitui County; that their parents settled in the area in the 1940s and that the area, named Ngomeni 'A', was declared an adjudication section on 24th June 2009 and each of the Petitioners identified and proved their interests in the parcels of land they occupied, and which they were allocated as follows:

<u>Petitioner</u>	<u>Parcel Number</u>
1 st	387
2 nd	385
3 rd	499
4 th	501
5 th	839
6 th	774
7 th	775
8 th	776
9 th	777
10 th	778

11 th	779
12 th	779
13 th	773
14 th	483
15 th	781
16 th	781
17 th	518
18 th	489
19 th	488
20 th	514
21 st	510
22 nd	513, 520 and 1090
23 rd	1089
24 th	1091
25 th	1098
26 th	1095
27 th	1096

3. The Petitioners averred that the 7th Respondent was allocated parcel numbers 475, 479, 511, 515 and 517; that being dissatisfied with this allocation, the 7th Respondent raised objections to the above allocations through objection numbers 7 to 15 and 17 to 29 of 2011 and that the objections by the 7th Respondent were dismissed by the Land Adjudication Officer in a consolidated decision delivered on 11th October 2012.

4. The Petitioners have averred in the Petition that they received notices for appeals numbers 89 and 90 of 2013 on 17th May 2013; that the hearing in respect to the appeals were conducted on 16th July 2013 before the office holder of the 1st Respondent and that the 7th Respondent however declined to proceed with his appeals stating that he did not trust the 1st Respondent. The Petitioners deponed that the 1st Respondent thereafter informed them that he would dismiss the appeals and forward the report to the 2nd and 3rd Respondents for implementation.

5. It was deponed by the Petitioners that in September 2013, they received summons and suit papers in ELC case number 44B of 2013 where the 7th Respondent had sued all Petitioners herein and the 1st and 6th Respondents claiming all the parcels allocated to the Petitioners indicated above; that the said suit is still pending hearing before this court and was last in court on 29th October 2019 when the Deputy Registrar certified the case as ready for hearing and that the 7th Respondent also filed an application being Miscellaneous Application No. 220 of 2015 on the same subject matter and against the same parties. This application was dismissed for lack of prosecution on 4th October 2019.

6. It was averred by the Petitioners that in August 2015, they discovered that the 3rd and 4th Respondents had registered them as proprietors of their respective parcels, which led the 7th Respondent to amend his Plaintiff in ELC No. 44B of 2013 to have their titles cancelled.

7. The Petitioners assert that on 8th August 2020, the 6th Respondent summoned them and their adult family members to its police station to record statements with respect to their parcels of land; that when they honoured the summons, it is only John Ndemwa, the grandson to the 27th Petitioner, who was required to record a statement for an alleged offence of forcible detainer and was ordered to report to the Senior Resident Magistrates Court on 13th August 2020 to take plea.

8. It was averred by the Petitioners that the 7th Respondent is the complainant in the case which involves parcel no. 1096, which is a subject of ELC No. 44B of 2013, Miscellaneous application No. 220 of 2015 and this Petition; that the 5th Respondent has been postponing and

extending Mr. Ndemwa's bond since it was granted with the aim of harassing and intimidating him and the Petitioners and that the 6th Respondent warned the Petitioners to leave their respective lands, failure to which they would be arrested and charged with forcible detainer.

9. The Petitioners have averred that that they thereafter discovered that the 2nd, 3rd and 4th Respondents had processed titles for parcel of land numbers 1089, 1090, 1091, 1095, 1096 and 1098, belonging to the 23rd, 22nd, 24th, 26th, 27th and 25th Petitioners respectively in favor of the 7th Respondent; that they learnt that the Respondents were registered as proprietors of the suit properties pursuant to a decision by the 1st Respondent dated 29th October 2019, after dealing with appeal no. 90 of 2013 and that the 1st Respondent did not conduct a hearing for the appeal no. 90 of 2013 and had no authority to conduct investigations, which he allegedly undertook, as indicated in his decision.

10. Although they have followed up on the position of the other parcels under appeal no. 89 of 2013, the Petitioners aver that the 2nd, 3rd and 4th Respondents have failed to divulge any information on the same; that they fear that appeal no. 89 of 2013 would be handled like appeal no. 90 of 2013 and that the 7th Respondent is a vexatious litigant who has filed several cases against the Petitioners.

11. In addition to the cases already mentioned, it was averred by the Petitioners that the 7th Respondent had also filed several cases against the 27th Petitioner and his family claiming parcels no. 1095, 1096 and 1097 being Kyuso SRMCC No. 3 of 2013 against Maithya Ndemwa & 2 others; Kyuso SRMCC No. 2 of 2019 against Nduu Kithongo & 3 others; Kyuso SRMCC No. 5 of 2020 against John Ndemwa and Kyuso SRMCC No. 6 of 2020 against John Mutemi Ndemwa & another. The Petitioners have argued that the 7th Respondent has conspired with the 5th and 6th Respondents to bring fresh criminal charges against the Petitioners and their family members, which is an abuse of the police powers as well as the court process.

12. The Petitioners have deponed that the Respondents' individual and collective conduct are a violation of the constitutional principles of good governance and national values under Article 10, which they are bound by as public officers; that the Respondents have also violated the Petitioners' constitutional rights with the real threat of future violations and that the push by the 5th and 6th Respondents to arrest and charge the Petitioners and their families is driven by malice and ill will.

13. The Petitioners averred that the 1st Respondent had no jurisdiction to hear and determine appeal numbers 89 and 90 of 2013 as they were filed outside the time prescribed under Section 29 of the **Land Adjudication Act Cap 284**; that there were pending cases in competent courts filed by the 7th Respondent in respect to the same issues and subject matter and that even if the 1st Respondent had jurisdiction, he violated the Petitioners' rights by not conducting a hearing, conducting unlawful investigations, and denying the Petitioners adequate notice and the opportunity to be heard before making his decision, thus violating **Articles 10(1)(c), 47, and 50 (1) and (2)(c) of the Constitution**.

14. The Petitioners averred that the 7th Respondent has violated the spirit of **Article 159 (2) (b) of the Constitution** by filing multiple cases in courts and using the 5th and 6th Respondents to harass, intimidate and attempt to evict the Petitioners from their homes; that attempts to force the Petitioners to leave their homes violated their right to accessible and adequate housing under **Article 43(1) (b)** and that the actions of the 5th and 6th Respondents in coming up with trumped up charges of forcible detainer shows lack of impartiality and violates the Petitioners' rights to equal treatment under **Article 29 of the Constitution**.

15. It is the Petitioners' case that preferring charges against the family of the 27th Petitioner similar to those already prosecuted before the same court also violated their right under **Article 50(2) (o) of the Constitution** not to be charged for the same offence for which they have been acquitted or convicted.

16. It is only the 7th Respondent who entered appearance and responded to the Petition.

The 7th Respondent's Case

17. The 7th Respondent responded to the Petition by way of a Replying Affidavit. He deponed that Petitioners numbers 16,17 and 21, were all dead and could not be interested in the proceedings; that Petitioners numbers 1 and 26, did not sign the authority to allow the 23rd Petitioner to plead or file the Petition on their behalf and were thus not interested in these proceedings and that Petitioners numbers 26th and 27th do not exist.

18. The 7th Respondent stated that this dispute was litigated in court before 2009 with the Petitioners making similar claims; that this was before the land adjudication process was conducted; that Judgement was entered against the Petitioners herein and that the eviction process was to begin when the land adjudication process was initiated. The 7th Respondent deponed that the suit was concluded and is now being raised fresh again.

19. The 7th Respondent deponed that the Petitioners invaded the suit land on 24th June 2009; that he filed an appeal on 14th November 2012 and paid for the Memorandum of Appeal within the requisite 60 days provided by the law and that having received hearing notices for Appeal Nos 89 and 90 on 17th May 2013 which were to come up for hearing on 16th July 2013, he attended the hearing.

20. The 7th Respondent conceded that he filed ELC No. 44B of 2013 but that the court had no jurisdiction as there were appeals before the Minister that had not been heard; that plot no. 1096 has a title deed in his name; that six Petitioners were summoned, attended and presented their case before a decision was made on 29th October 2019 in Appeal No. 90 of 2013 and that there was a proper hearing in Appeal No. 90 of 2013 and notices were issued. The 7th Respondent deponed that with respect to Appeal number 89 of 2013, the Petitioners have made presumptions and no decision has been attached to be challenged.

21. It was deponed by the 7th Respondent that the 27th Petitioner entered his land parcel numbers 1096 and 1097, to which he has title deeds; that he filed multiple suits because he has title deeds; that the 5th and 6th Respondents are doing what they should do to protect his properties and that plot numbers 484 and 519 are in the names of the Government bodies who are to compensate him.

22. The 7th Respondent deponed that no provision of the Constitution was violated and that rather, it was the Petitioners who violated the constitution by invading his land; that the Petition has no merits and is time barred, as it was filed to avoid the six (6) months period for filing judicial review proceedings and that the Petition should thus be dismissed for being a non-starter.

Submissions

23. The Petition proceeded by way of written submissions. The Petitioners' advocate submitted that the 1st Respondent did not have jurisdiction to hear the appeals as they were filed in 2013, outside the 60-day window to file appeals provided by Section 29 of the Land Adjudication Act and that the copy of the receipt dated 14th November 2012, produced by the 7th Respondent is not authentic and is not sufficient proof of an appeal.

24. It was submitted that a memorandum of appeal ought to be filed with the Minister; that no such memorandum has been exhibited by the Respondent and that the receipt exhibited by the 7th Respondent was issued by the Land Adjudication Officer and not the Minister, drawing the inference that the receipt was for extraction of proceedings, since filing of an appeal would attract no costs. Counsel relied on the Ruling of Onyancha J in **Republic vs Special District Commissioner and Another (2006) eKLR** where the Judge held that a memorandum of appeal should be filed with the Minister.

25. The Petitioners' counsel argued that the 1st Respondent ought not to have accepted the appeals as they were lodged out of time. Counsel relied on the case of **Republic vs The Minister of Lands and Settlement, Kisumu High Court civil application number 270 of 2004 (2010) eKLR** where the court granted an order of certiorari to quash the decision of the minister on grounds that the appeal before him was filed out of statutory time.

26. Counsel submitted that the 1st Respondent did not have jurisdiction to hear the appeals as they were disposed of by his predecessor when they came up for hearing on 16th July 2013; that the appeals were dismissed after the 7th Respondent refused to be heard by the officer holding the office of the 1st Respondent, rendering the office *functus officio* and that two months later, the 7th Respondent filed ELC No. 44B of 2013 against the Petitioners herein, the subject matter being the same parcels of land.

27. The Petitioners' advocate submitted that title deeds were issued to them, resulting in the 7th Respondent amending his Complaint in ELC No. 44B of 2013 seeking revocation of the titles; that the 7th Respondent should therefore have pursued his rights in ELC number 44B of 2013 and that the 1st Respondent's act of presiding over the appeals is a violation of **Article 162(2) of the Constitution**.

28. The Petitioners' advocate submitted that the 1st Respondent's decision violated Article 47 of the Constitution and the rule of natural justice. Counsel relied on the case of **Matwanga Kilonzo vs District Commissioner, Kitui & Another (2021) eKLR** where the court restated the position of how appeals to the minister should be conducted. It was submitted that the 1st Respondent also denied the Petitioners their right to be heard. The Petitioners relied on the case of **Kenya Human rights Commission & Another vs Non-Governmental Organisations Co-ordination Board, Nairobi High Court Petition number 404 of 2017 (2018) eKLR**, where Mwiita J. held that;

“Administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness.”

29. The Petitioners urged the court to find that the 5th and 6th Respondents' acts were an abuse of the powers and the process of the court and that the Petitioners were declared owners of the disputed parcels of land in a lawful process. They relied on the case of **Republic vs Director of Public Prosecution Ex, Parte Joshua Kilonzo (2018) eKLR**, where Muriithi J held that:

“In such circumstances a criminal prosecution for the offence of forcible detainer of land of the person in possession of land pursuant to his claim to the land and who has been adjudged right owner by a saturator process under the Land Adjudication Act is an unadulterated abuse of the process.”

30. The 7th Respondent's counsel filed written submissions dated 5th May 2021, in which he averred that the Petition was a non-starter; that they filed Appeals No. 89 and 90 of 2013; that Appeal No. 89 of 2013, which had 22 Respondents was not heard and determined as the Deputy County Commissioner disqualified himself as one of the plots at issue was where their offices were located and that as there was no determination in Appeal 89 of 2013, there is no decision attached to the Petition to be subject to judicial review.

31. The 7th Respondent's counsel denied that the appeal filed before the Minister was time barred because the decision of the Land Adjudication Officer was given on 11th October 2012 and the appeal filed on 14th November 2012, as proved by receipts issued when the Appeals were filed and that the Deputy County Commissioner had absolute discretion to conduct the appeal provided the principles of natural justice were followed, which responsibility he undertook constitutionally.

32. The 7th Respondent's counsel contended that the Applicants were served with hearing notices, which hearing they attended and were given a chance to defend their positions; that the Petitioners have failed to show any bias or illegality of the decision of the 1st Respondent or error on the face of the record or any ultra vires action and that the Petition has been overtaken by events, as the 7th Respondent won the Appeal and title deeds were subsequently issued.

33. It was submitted by the 7th Respondent's counsel that no proceedings or judgement of the Deputy County Commissioner have been attached to the Petition and that with respect to the land cases filed in court, they were null and void as they were filed without the Land Adjudication Officer's consent and that the said suits were not necessary as the appeal machinery set out in the Land Adjudication Act had not been exhausted. It was submitted that in accordance with **Section 199A** of the **Criminal Procedure Code**, a party can pursue a criminal case and a civil case at the same time.

Analysis and Determination

34. The issues for determination in this Petition are as follows:

- a. Whether this Petition seeking judicial review orders was filed out of time.
- b. Whether the 1st Respondent conducted Appeal numbers 89 of 2013 and 90 of 2013 in accordance with the law.
- c. Whether the 5th and 6th Respondents carried out their lawful mandate in receiving and investigating the 7th Respondent's complaints.
- d. Whether the 7th Respondent has abused the court process by instituting multiple suits over the same subject matter.

35. The 7th Respondent has argued that this suit is a non-starter as it seeks orders of certiorari against a decision made more than six (6) months before this Petition was instituted. The statutory limitation period of 6 months for filing of judicial review proceedings for an order of certiorari is provided for under **Section 9(3)** of the **Law Reform Act** as read with **Order 53 Rule 2** of the **Civil Procedure Rules**.

36. Courts have however considered the constitutionalization of administrative justice as a right under **Article 47**, and its removal from the clutches of common law. Ngugi J in **Republic vs Kiambu County Executive Committee & 3 others ex parte James Gacheru Kariuki & 9 others [2017] eKLR** held that the six (6) months statutory timeline was inapplicable in a suit brought under **Article 47** of the Constitution as the **Fair Administrative Actions Act** does not have any set time limits on when an aggrieved party can bring an action. The court held that it would be inappropriate for one to apply the rigid rules set under common-law style judicial review of administrative action.

37. Similarly, Mrima J in **Peter Odoyo & another vs Kenya National Highways Authority & 2 others [2021] eKLR** held that proceedings for enforcement of human rights and fundamental freedoms seeking a judicial review order of certiorari brought either under **Articles 22** and **258** of the **Constitution** or under any law have no limitation of time. However, the Judge stated that where proceedings seeking a judicial review order of certiorari do not concern the enforcement of rights and fundamental freedoms, then the provisions on limitation of time apply accordingly.

38. The court in the **Peter Odoyo** case (*supra*) relied on the Court of Appeal decision in the case of **Chief Land Registrar & 4 others vs Nathan Tirop Koech & 4 others [2018] eKLR** where it held that:

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional Petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.”

39. This suit having been filed as a constitutional Petition, the court finds that it is not subject to the six (6) months statutory timeline set out in the **Law Reform Act** and the **Civil Procedure Rules** for the filing of Judicial Review proceedings for orders of certiorari.

40. **Sections 26** and **29** of the **Land Adjudication Act Cap 284** sets out the legal provisions on objections during the adjudication process and appeals to such objections respectively. The two sections provide as follows:

“26. Objection to adjudication register

(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

29. Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

- (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and***

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.”

41. The Court in Republic vs Special District Commissioner & another Machakos Civil Miscellaneous 124 of 2004 [2006] eKLR set out the mandate of the Minister or his official in conducting appeal proceedings under Section 29 of the Land Adjudication Act as follows:

“It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower court record that will assist him to, “...determine the appeal and make such order thereon as he thinks just” It is fashionable in this kind of applications, for Interested Parties to argue that the District Commissioner has a free hand to conduct the appeal in any manner he wishes. That the Act has not specified a procedure for him to follow in determining the appeal so long as he finally makes such orders thereon as he thinks just. That might be so but only to a point, in my view. With great respect, it might be time to reexamine Section 29 (1) aforesaid more closely. If the provision requires that the aggrieved party who wishes to appeal to the minister, will file a statement of written grounds of appeal, then the method of appeal is in that way, defined. It is also provided that the Minister shall determine the appeal and make such order on the appeal as he thinks just. My understanding of the method of determining the appeal then, is receiving the written grounds of appeal and perusing them before determining it by making such an order on it as he thinks just. This means to me that the District Commissioner (Minister) has to examine the written grounds of appeal along with the Land Adjudication Officer’s proceedings, judgment, ruling or award, and from it, he will, make a just order or judgment. Can the District Commissioner refuse to read the substance of the evidence and the decision of the Land Adjudication Officer from whom the appeal came” Should he on the other hand have totally disregarded the grounds of appeal of the aggrieved party.” In my view, he should not have ignored the Land Adjudication Officer’s lower tribunal’s record of evidence and decision. He could however have considered the Land Adjudication Officer’s decision and have accepted it or rejected it. But it was improper to have ignored the written grounds of appeal since without them there was seriously no appeal before him as envisaged by Section 29(1) (a) of the Land Adjudication Act. Nor can it be seriously argued that the appellant’s appeal was effectively put before that tribunal or argued before it, contrary to the cardinal rule of fairness that an appellant like any party before the court, has a right to put his case before the court, squarely. In conclusion on this issue, this court sees a clear procedure laid down by Section 29(1) aforesaid to be followed when a District Commissioner is conducting and determining an appeal under the Section. That is to say, that the District Commissioner will receive a written appeal containing grounds of appeal together with the Land Adjudication Officer’s record and will then determine the appeal upon those grounds of appeal. It would be unreasonable to think that the Legislature intended that the aggrieved party would file the grounds of appeal to the Minister without those grounds being intended to serve any purpose in helping the District Commissioner arrive at a fair and just decision. In that regard I am aware of the prevailing popular procedure under which the District Commissioner, before he makes his decision, records fresh evidence from the parties and their witnesses. Such procedure has all along been tolerated on the basis that Section 29 (1) aforementioned gives the District Commissioner freedom to use any lawful method to arrive at his decision. While I am not presently prepared to state that the recording of fresh evidence is not authorized by the Act, I am on the other hand clear in my mind that the District Commissioner will not choose to rely on such freshly recorded evidence alone without regard to the grounds of appeal filed by the appellant. That is to say, that the evidence he records should be considered along with the evidence in the District Land Adjudication Officer’s records of proceedings and ruling that is appealed from, and on which the grounds of appeal arise. On the other hand, my understanding of Section 29 (1) aforesaid, is that there is no part of that section that authorizes the taking of fresh evidence by the District Commissioner before he arrives at the decision. This means that he has open room to do so and is in fact expected to rely on those records to come to his decision except where he needs particular additional evidence for clarification.”

41. This court considered the above decision in Matwanga Kilonzo vs District Commissioner, Kitui & another [2021] eKLR and aligned itself with its finding that the Minister’s mandate under Section 29 of the Act is to consider the grounds of appeal raised by any person appealing against the decision of the Land Adjudication Officer, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision.

42. While the Minister need not take fresh evidence while dealing with the appeal, he may do so to seek clarification on certain issues. The said decision must give reasons as to why he agrees or disagrees with the decision of the Land Adjudication Officer.

43. The courts have also held that administrative actions must now meet the constitutional test of legality, reasonableness and procedural fairness. This new standard was well articulated by the court in Kenya Human Rights Commission & another vs Non-Governmental Organizations Co-ordination Board & another [2018] eKLR:

“Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

44. The facts in this case are that the Petitioners and the 7th Respondent were parties in the objection proceedings in respect of Ngomeni ‘A’ Adjudication Section in Kitui County, the area having been declared an adjudication section on 24th June 2009 pursuant to the provisions of the Land Adjudication Act.

45. Aggrieved with the adjudication process, the 7th Respondent filed objections with the Land Adjudication Officer being objection numbers 7 to 15 and 17 to 29 of 2011. Pursuant to Section 26 of the Land Adjudication Act, the Land Adjudication Officer conducted hearings and entered a finding for the Petitioners herein on 11th October 2012.

46. The 7th Respondent has averred that he appealed against the decision of the Land Adjudication Officer vide Appeals No. 89 and 90 of 2013, which appeals, according to him, were filed within the statutory timeline of 60 days. The 7th Respondent has exhibited a receipt of Kshs. 18,850/- dated 14th November 2012, issued by the District Land Adjudication and Settlement Officer as proof of having filed the appeal within 60 days.

47. The Petitioners have challenged the validity of the receipt and its adequacy as evidence that the two appeals were ever filed, and if so within 60 days. They argue that a Memorandum of Appeal is what the law provides to be proof of an appeal, which the Respondent has failed to adduce to date. Further, they assert that as the appeals were issued with 2013 case numbers, the same must have been filed in that year and not 2012, which is outside the 60-day window to appeal.

48. **Section 29** of the Land Adjudication Act is clear on how an appeal to the Minister ought to be filed: by delivering to the Minister an appeal in writing specifying the grounds of appeal and sending a copy of the appeal to the Director of Land Adjudication. As correctly stated by the Petitioners, the 7th Respondent ought to have exhibited the written grounds of appeal or memorandum of appeal as proof that the appeals were filed within the statutory window, which he has failed to do.

49. Indeed, this court takes notice of the fact that the appeal case numbers were issued in the year 2013 and not 2012. Having failed to provide a copy of the memorandum of appeal which will have shown when the same was filed, or a receipt clearly showing the date the said memorandum of appeal was filed, it is my finding that the 7th Respondent has failed to show that indeed he filed appeal numbers 89 and 90 of 2013 with the requisite 60 days.

50. The Petitioners have presented evidence showing that Appeals No. 89 and 90 of 2013 were heard on 16th July 2013 while Appeal No. 90 of 2013 was heard on 29th October 2019, in which the 1st Respondent rendered its decision on the same day. There is no evidence on record to show that these appeals were heard on any other day. While the 7th Respondent averred that the 6th Petitioner was summoned and gave evidence, he has not exhibited proceedings to show that indeed the 6th Petitioner appeared before the Minister in the two matters.

51. Further, the 6th Petitioner, who was allocated Parcel No. 774, was not even a party in Appeal No. 90 of 2013 in which the impugned decision was rendered by the minister. In fact, no evidence was led to show that the Petitioners were personally served with hearing notices in respect to appeal number 90 of 2013 to enable them make presentations before the minister could make his decision.

52. The 7th Respondent has asserted that the decision of the 1st Respondent was final and cannot be challenged in a court of law. That may be so. However, as stated in the case of **Re Marles' Application, (1958) 153** at 155, referenced **in Republic vs Special District Commissioner & another [2006] eKLR**, it was stated as follows:

"It is well settled law that the jurisdiction of this court to exercise its power of supervision over inferior courts and tribunals will not be taken away unless there are express words clearly defining the intention of the legislature to do so. The expressions that decisions of tribunals shall be final and without appeal or final and conclusive, have effectonly so far as an appeal on the facts are concerned, but do not preclude the issue of certiorari for excess of jurisdiction or for error of law (Re Gilmore's Application (1) (1957) All E.R. 796)."

53. It trite that the decision of the Minister under the Land Adjudication Act are subject the supervisory jurisdiction of this court. The rules of natural justice, which the Minister ought to have complied with, are well articulated in **Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para. 639** as follows:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

54. This has position has been upheld by the Court of Appeal in **Pashito Holdings Limited & Another vs Paul Nderitu Ndungu & 2 Others [1997]eKLR**. In **Judicial Service Commission vs Mbalu Mutava & another [2015] eKLR**, the Court of Appeal stated that natural justice comprises the duty to act fairly:

"Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with "acting fairly". The term "procedurally fair" used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to the right to fair administrative action....Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

55. The failure by the 1st Respondent to give the Petitioners an opportunity to be heard before rendering its decision in Appeal No. 90 of 2013 was an infringement of their right to fair hearing under **Article 47** of the **Constitution** and his duty to uphold the national values set out in Article 10 of the Constitution. In addition to the 7th Respondent having filed appeal numbers 89 and 90 out of time, the 1st Respondent's decision dated 29th October 2019 should be quashed on the ground that the Petitioners were not afforded an opportunity to be heard.

56. **Article 157 (11)** provides that the Director of Public Prosecution and by extension, the police, shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. The courts have held that for the court to interfere with the prosecutorial mandate of the DPP or with the antecedent investigatorial powers of the Police, the applicant must show that the criminal process was being used in an unreasonable and malicious manner to serve motives ulterior to the objectives of the criminal justice to investigate, prevent and punish crime, or that the prosecution is an infringement of the rights or fundamental freedoms of the individual or otherwise against public interest. (see **Republic vs Director of Public Prosecution & another & Exparte Joshua Kilonzo Mutisya [2018] eKLR**).

57. The Court of Appeal in **Commissioner of Police & The Director of Criminal Investigation Department & another vs Kenya Commercial Bank Limited & 4 others [2013] eKLR** comprehensively addressed the jurisdiction of the court in interfering with police investigations as follows:

“By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain the power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.”

58. It is undisputed that the 6th Respondent summoned the Petitioners and their families in August 2020 and that they initiated proceedings against a relative to the 27th Respondent with respect to forcible detainer of a parcel of land that is subject to this suit. The 7th Respondent conceded that the 6th Respondent while prosecuting some of the Petitioners, was exercising reasonable efforts to protect his right to property.

59. The Petitioners have pleaded that officers from the 6th Respondent have issued threats against them, urging them to vacate from their respective parcels of land, because the parcels of land belonged to the 7th Respondent. The 5th and 6th Respondents have also preferred charges against John Ndemwa for forcible detainer in respect of Parcel No. 1096, in Kyuso Senior Resident Magistrates' Court Case No.5 of 2020.

60. Indeed, other than the proceedings that were before the Land Adjudication Officer, the evidence before this court shows there are numerous proceedings that have been filed by the 7th Respondent in respect to the suit properties, including Machakos HCCC No. 44 of 2013. The other suits which are still pending in courts include Kyuso SRMCC Nos. 2, 3, 5 and 6 Of 2013.

61. That being so, and considering that some of the Petitioners have title documents in respect to the suit properties, the 5th and 6th Respondents should allow the civil courts to determine with finality the issue of ownership of the parcels of land in dispute between the Petitioners and the 7th Respondent.

62. Having regard to the evidence that has been presented to this court, it is the finding of the court that the Petitioners have proved their claim on a balance of probabilities. The Petitioners' claim is therefore allowed as follows:

a) A declaration be and is hereby issued that the 1st Respondent violated Article 10 and 47 of the Constitution in the manner in which he conducted proceedings in appeal numbers 89 and 90 of 2013 in respect of parcels of land known as 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089,1090, 1091, 1095, 1096 and 1098 in Ngomeni 'A' Adjudication section and consequently his decision was unconstitutional, null and void *ab initio*.

b) An order of certiorari be and is hereby issued to remove to this court and quash the 1st Respondent's decision dated 29th October, 2019 and actions arising therefrom in appeal numbers 89 and 90 of 2013 touching on parcels of land known as 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089,1090, 1091, 1095, 1096 and 1098 in Ngomeni 'A' Adjudication section.

c) A declaration be and is hereby issued that the 5th and 6th Respondents have violated Articles 157 (11) and 238 (2) of the Constitution in the manner they have received the 7th Respondent's complaint, investigated, summoned the Petitioners and acted in respect of the said complaints in relation to parcels of land described as Kyuso/Ngomeni/ 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089,1090, 1091, 1095, 1096 and 1098 in Ngomeni 'A' Adjudication section.

d) An order of mandatory injunction be and is hereby issued directed to the 1st, 2nd, 3rd and 4th Respondents to cancel all

title deeds issued to the 7th Respondent on the basis of the decision of the 1st Respondent's decision dated 29th October, 2019.

e) An order of mandatory injunction be and is hereby issued to the 1st, 2nd, 3rd and 4th Respondents to comply with the findings of the Land Adjudication Officer in Objection numbers 07 – 29 of 2011 dated 11th October, 2012.

f) All the pending suits in respect to the suit properties to be heard and determined expeditiously.

g) A permanent injunction be and is hereby issued restraining the 5th and 6th Respondents from arresting, charging, prosecuting or filing any criminal proceedings in any court against the Petitioners or their agents in relation to ownership, occupation and use of land known as Kyuso/Ngomoni/ 385, 387, 483, 488, 489, 499, 501, 510, 513, 514, 518, 520, 774, 775, 776, 777, 778, 779, 773, 781, 839, 1089,1090, 1091, 1095, 1096 and 1098 in Ngomeni 'A' Adjudication section.

h) The 7th Respondent to pay the costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 3RD DAY OF FEBRUARY, 2022.

O. A. Angote

Judge

In the presence of:

No appearance for the Petitioners

Mr. Masika for the 7th Respondents

Court Assistant: Okumu