Republic v Cabinet Secretary Ministry of Lands & Physical Planning & 3 others; Mitambo (Exparte); Njiru (Interested Party) (Environment and Land Judicial Review Case E001 of 2022) [2022] KEELC 3255 (KLR) (8 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3255 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022

CK YANO, J

JUNE 8, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT . 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

ATTORNEY GENERAL OF KENYA ..... 4TH RESPONDENT

AND

ALEXANDER NYAGA MITAMBO ..... EXPARTE

AND

HENRY MWANIKI NJIRU ..... INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted by the court on 20th January, 2022 the Applicant herein filed a substantive notice of motion dated 24th January 2022 seeking orders that:

    a. An order of Certiorari do issue to remove into the honourable court for the purpose of it being quashed a decision made by and or award by the 1st respondent in respect of land parcel 544 Kamwimbi "A" Adjudication Section in minister appeal case no. 194 of 2019 dated 20th December 2021 between the Interested Party, appellant and ex-parte applicant (Respondent).

b. An order of prohibition be issued prohibiting the 2nd and 3rd respondents from implementing the decision of the 1st Respondent judgment award or decision which is dated 20th December, 2021 in regard to Land Parcel No.544 Kamwimbi "A" Adjudication Section in the minister's appeal No. 194 of 2019.

c. The costs of this application be provided for.

2. The application is based upon the statutory statement dated 18.1.2022 and the affidavit of Alexander Nyaga Mitambo sworn on 24.1.2022.

3. The grounds advanced by the exparte applicants are:

a. That the judgement/ruling of the minister dated 20th December 2021 was tainted with the issue of jurisdiction on account of the fact that the deputy county commissioner of Meru South Sub County issued notices for hearing of appeal while the hearing proper was conducted by the Assistant County Commissioner (1) of Igamba Ng'ombe Sub County and all what the Deputy County commissioner Meru South date was to endorse the judgement by signing it.

b. That the judgment/ruling of the minister was against the established policy and principles in adjudicating land under cap 284 which requires that a person have the land he or she was in occupation, adjudicated and recorded under that person.

c. That the deputy county commissioner on behalf of the 1st respondent put into consideration, extraneous matters (some completely irrelevant) thereby making him to arrive at wrong decisions) which was unjust and unfair to the ex-parte applicant.

d. That the judgement/ruling of the minister completely ignored the important document that was produced by the ex-parte applicant i.e a letter by the chief dated 6th April 2001 and 5th October 2010 thereby making the minister to arrive at a wrong decision that was against the interest of the applicant.

e. That the minister entertained a hearing on appeal instead of analyzing and interrogating the evidence already on record (the decision of DLASO appealed against).

f. The minister did not visit the suit land as he had intimated before the commencement of the hearing.

g. That the hearing/ruling of the minister demonstrates bias on the part of the minister in favor of the interested party.

4. These Judicial Review proceedings are in relation to the judgment of the 1st Respondent dated 20th December, 2021 in respect of Land Parcel No. 544 KAMWIMBI "A" Adjudication Section in Appeal to the minister Appeal No. 194 of 2019, a copy of which has been exhibited by the ex-parte Applicant.

5. The ex-parte Applicant contends that the said judgment/ruling of the minister was tainted with issue of jurisdiction on account of the fact that the Deputy County Commissioner of Meru South Sub County issued notices for hearing of the appeal while the hearing proper was conducted by the Assistant County Commissioner (1) of Igamba Ng'ombe Sub County and that all what the Deputy County Commissioner Meru South did was to endorse the judgment by signing it.

6. The ex-parte Applicant avers that the judgment/ruling of the minister was against the established policy and principles in adjudicating land under Cap 284 which requires that a person has the land he or she was in occupation, and same be adjudicated and recorded under that person.

7. The ex-parte applicant contends that the Deputy County Commissioner on behalf of the 1st Respondent put into consideration extraneous matters, and some completely irrelevant thereby making him arrive at a wrong decision which was unjust and unfair to the applicant. He contends that the judgement/ruling of the minister completely ignored the important documents that the ex-parte applicant produced, for example letters by the chief dated 6th April, 2001 and 5th October, 2010 thereby making the minister to arrive at a wrong decision that the applicant alleges was against his interest.

8. The ex-parte applicant contends that the minister entertained a hearing on appeal instead of analyzing and interrogating the evidence already on record (that is the decision of DLASO appealed against) thereby arriving at a decision that was against the ex-parte applicant's interest in the suit land.

9. The ex-parte applicant stated that it was within his knowledge and information that the minister did not visit the suit land as he had intimated before the commencement of the hearing thus depriving the minister the advantage of noticing that all the properties and development of the applicant were on the suit land.

10. The ex-parte applicant contends and avers that through mistake, one Charles Nyaga Mutua during adjudication was recorded with the suit land on account of the said Charles Mutua and the ex-parte applicant sharing a common name and that thereafter the said Charles Nyaga Mutua sold the suit land to the Interested Party despite clear instruction by the adjudication officer directing maintenance of status quo, a fact the applicant states that the minister did not note. That the status quo meant by the adjudication officer in his letter dated 5th October, 2010 meant that the said Charles Nyaga Mutua to allow the ex-parte applicant to remain on the land as the adjudication process was taking place. Consequently, that the said Charles Nyaga Mutua was not in order and within the law to dispose of the suit land to the Interested Party.

11. The ex-parte applicant avers that the minister failed to find out that he was dealing with an issue of mistake that required correction.

12. The ex-parte Applicant avers that the Interested Party and his entire family lineage have never lived on the suit land, adding that he has lived on it with his family from 1962 and has various properties and development. That it was only in the year 2002 when the Interested Party issued a notice to the ex-parte Applicant to migrate from the suit land. The ex-parte applicant argues that when purchasing the land, the Interested Party could have noticed the Applicant's improvement and development thereon, and that had the minister visited the suit land before judgment, he could find these facts.

13. Relying on legal advice, the ex-parte Applicant argues that the 1st Respondent conducted a hearing instead of an appeal and that on appeal, new evidence is not usually tabled, instead the evidence recorded by the authority from which the appeal is preferred is analyzed and that the person presiding the hearing of the appeal either agrees or disagrees with the decision. The ex-parte Applicant further contends that the minister ignored his documents, particularly a letter by Elisius Ireri Gicheru, former Chief of Kamwimbi Location. The ex-parte Applicant states that the minister misguided himself over lands that were allegedly held by the ex-parte Applicant in Kamwimbi "B" Adjudication section and which he states he purchased and inherited.

14. It is the ex-parte Applicant's contention that the Judgment is couched as though the Deputy County Commissioner of Meru South was present during the hearing of the appeal whereas the hearing was conducted wholly by the Assistant County Commissioner (1) of Igamba Ng'ombe Sub County. The ex-parte Applicant states that unless the prayers sought are allowed, the ex-parte applicant and his family shall suffer irreparable loss and be rendered landless and destitute. He urged the court to allow the application.

15. The exparte applicant filed his submissions on the 22nd March 2022. The exparte applicant submits that he was aware that in matters judicial review the court will not involve itself on the merit or demerit of the judgement/award of the Minister but rather the impropriety of the minister in arriving at the judgement.

16. The exparte applicant cited the case of Misc.Civil Application (JR) No. 59 of 2014 *Republic versus Nairobi City County & 4 others* and Sorej Kumari Bharji (2014) eKLR in which G.V. Odunga Judge summarized the ingredients that must be proved in a judicial review case, and also provided what a Judicial Review is and what the judge in a Judicial Review should concern himself with. At paragraph 43 of the judgement Justice Odunga quoting a judgement in *Municipal Council of Mombasa versus Republic &Umoja Consultants Ltd* Civil Appeal No.185of 2001 he said:-

> ''Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.''

17. The exparte applicant pointed out that the 1st,2nd,3rd and 4th respondents have not opposed the Notice of Motion despite being duly served. That they have not filed either grounds of opposition or a replying affidavit and therefore that the court can assume that they are not opposed to the motion and they do not intend to respond thereto.

18. Regarding the response by the Interested Party, the ex-parte applicant submission was that the issue for determination in this Judicial Review application is whether there is or there are improprieties in the minister's decision that would make this court to strike out or set aside the judgment.

19. The exparte applicant submits that in all instances it is common knowledge that the Deputy County Commissioner is the person who represents the minister (1st Respondent) in all appeals to the Minister originating from the adjudication process under the *Land Adjudication Act* Cap 284 Laws of Kenya. The exparte applicant contends that there are no instances where an Assistant County Commissioner formerly known as District Officer can deputize the DCC in matters hearing of the appeals to the minister. That in appeal to the minister No.194/2019 dated 20th December 2021 in reference to a Land Parcel 544 Kamwimbi "A" Adjudication section as it was then, the hearing proper was conducted by the Assistant County Commissioner Igambang'ombe.

20. The exparte applicant contends that it is true that the invitation letters for hearing of the appeal were drawn by the Deputy County Commissioner. That, however when it came to the hearing it was the Assistant County Commissioner who conducted the hearing. The exparte applicant submits that parties to the appeal could not mistake the Deputy County Commissioner and the Assistant County Commissioner and that it is for that reason that he submits that the hearing was conducted by a person not authorized to hear the appeal to the minister and as a result his findings were null and void.

21. The ex-parte Applicant submitted that it was improper for the Assistant County Commissioner to conduct the hearing instead of the Deputy County Commissioner. That the judgement/ruling of the minister was against the established policy and principles in adjudicating land under cap 284 which requires that a person should have the land he or she was in occupation, adjudicated and recorded under that person. That unlike adjudication of land, under the land Consolidation Act Cap 283 Laws of Kenya, Land Adjudication under the Land Adjudicating Act Cap 284 requires that after compiling

a register of existing rights, (RER) a person should be adjudicated the land he had been occupying prior to the adjudication process starting. That demarcation could move a person slightly from RER, but not to dislocate that person from what the person has been occupying from time immemorial.

22. The exparte applicant also submitted that the Deputy County commissioner on behalf of the 1st respondent put into consideration extraneous matters thereby making him to arrive at wrong decision which was unjust and unfair to the exparte applicant.

23. The exparte applicant further submitted that the minister entertained a hearing on appeal instead of analyzing and interrogating the evidence already on record. The exparte applicant further contend that when the minister is hearing an appeal to the minister under the Adjudication Act, he is constituted as a quasi-Judicial body and cannot run away from the general procedure of law unless it is clearly provided by statute that he is not bound by the rules or procedure. That there is no known law or rule that indicate that the minister is not bound by the rules of adducing evidence in afresh hearing or appeal.

24. The exparte Applicant has cited the case in the High court of Kenya at Meru Civil Appeal No. 106 of 2008 Meru Catholic Diocese (Magundu Parish Priest versus Lawrence Gitonga Njeru wherein Justice Mary Kasango pronounced herself as follows regarding an appeal from and award of the Dispute Tribunal Case, that "the appeals committee is not supposed in that case to subject the matter to fresh hearing as it happened here. The appeals committee therefore erred in subjecting the matter to fresh re-hearing."

25. The exparte applicant has also submitted that the minister did not visit the suit land as he had intimated before the commencement of the hearing that he would visit the disputed land to satisfy himself regarding the status as far as occupation, settlement and use of the suit land is concerned.

26. The exparte applicant submits that that the visit was necessary granted that the interested party dismissed the notion that the exparte applicant was in the land from 1962 and he had a house-hold, mature gravellier trees, mango trees and mature pawpaw trees.

27. The exparte applicant submits inter alia that had the minister visited the disputed land he would not have erred in finding that the exparte applicant had his homestead and development on one part of 544 Kamwimbi A Adjudication Section and a neighbouring land parcel. That this omission by the minister made him to arrive at an erroneous finding and decision that was injurious to the interest of the exparte applicant in and over 544 Kamwimbi A Adjudication Section and that this was an omission and impropriety that made the minister to serve injustice instead of justice to the parties.

28. The exparte Applicant submits further that the hearing/ruling of the minister demonstrated bias on the part of the minister in favor of the interested party. The exparte applicant averred that there are many instances indicating biasness against the exparte applicant in favor of the interested party perpetrated by the minister. That with no evidence tabled, the minister describes in his concluding remarks that the exparte applicant is a vicious neighbour...his house sits in two different plots that do not belong to him 544 and 545) and having been a chief Mr.Alexander Mutambo should be highly knowledgeable and well informed about current happenings within his local area." The exparte applicant questions how the minister described the exparte applicant as a vicious neighbour, trouble rouser and wonders where the minister got the information that the ex-parte applicant has ever been a chief let alone a village manager.

29. Regarding the contents at paragraph 18 of the interested party's replying affidavit where it is deposed that the exparte applicant's application merely challenges the merit of the minister's decision and not the procedure applied in arriving at the same, the exparte applicant submits interalia from the onset they are in agreement that Judicial Review does not concern merit or demerit of a decision rather

it concerns the impropriety of the presiding officer and have not digressed from that principle. The exparte applicant submit that there was nowhere in the Judicial Review that he has challenged the merit or demerit of the judgement of the minister.

30. The exparte applicant further submits he lodged the appeal to the minister on 29th October 2013 before 60 days from the reading of the award of AR objection were over and contrary to the Interested Party's averments. The exparte applicant argues that upon filing the appeal on 29th October 2013 he was served with an official receipt serial no. 2847340 of Kshs. 650 only and dated 29th October 2013.

31. The exparte applicant submits that the interested party is further being dishonest with himself by deposing that the appeal to the minister was dishonest by deposing that the appeal to the minister was lodged in 2009 when for sure nothing would have prevented the interested party to lodge in 2019 when for sure nothing would have prevented the interested party from acquiring the registration and subsequently the title deed of 544 Kamwimbi Adjudication Section if there was no appeal to the minister.

32. The exparte applicant submits that it was out of expediency of the minister and a purely administrative undertaking to register afresh all the pending appeals to the minister so that it appears that they were all filed in 2019 when many of them were filed almost 10 years earlier and they have been pending for determination. In light of the foregoing the exparte applicant submits that he has made his case to warrant the minister's judgement/award dated 20th December 2021 in the appeal to the minister case no.194 of 2019 to be set aside or vacated.

The respondents' case

33. Whereas the Applicant submitted that the application is not opposed, the Respondents opposed the application and filed grounds of opposition dated 1st of March, 2022 as follows:

    i. That the application has not disclosed the status of the adjudication process especially on whether the decision he seeks to overturn has been implemented.

    ii. That jurisdiction is a key aspect in any judicial or quasi-judicial process.

    iii. That the minister has authority to delegate his powers to any public officer as per section 29(4) of the *Land Adjudication Act*.

    iv. That the minister only handled the matter on appeal and was not conducting a hearing.

    v. That the orders of certiorari and prohibition are untenable as;

        a. There exists a remedy under the Access to Information Act,2016 available to the applicant.

        b. That the alleged letters by the chief are not binding on the minister.

    vi. That the suit land has been sold to third parties and the titles held by third parties have not been challenged

34. The Respondents did not file any written submissions.

The Interested party case

35. The interested party filed his replying affidavit on 25th of February 2022 wherein he stated that the impugned judgement was arrived at after the conduct of proceedings by Deputy County Commissioner, Meru South Sub-county in the presence of Assistant County Commissioner,

Igambang'ombe and that it is not true to state that the Deputy County Commissioner only appended his signature to the decision and did not conduct the proceedings.

36. The interested party stated that the Deputy County Commissioner presided over the hearing of the Appeal on 14/09/2021 at the Chief's camp under a shade and in any case paragraph 5 of the exparte applicant supporting affidavit unequivocally admits that the proceedings were conducted by the Deputy County Commissioner.

37. The interested party contends that it is false for the exparte applicant to claim that the Appeal was heard without the Minister visiting the disputed land since the Deputy County Commissioner and his entire team visited the suit land in the presence of the litigating parties and retreated back to the chief's camp to continue with the hearing of the Appeal on 14/09/2021 and that in any case he is advised that the Minister has a wide discretion in the manner he chooses to conduct the Appeal provided that the same adheres to procedure.

38. The interested party contends in the same vein that the minister has the discretionary power to admit evidence, and hear parties as the manner of hearing such appeal is neither cast in stone nor bound by the formal rules of procedure provided by statute.

39. The interested party argues that it is actually contradictory for the exparte applicant to claim on one hand that a visit to the disputed land is mandatory while on the other he complains that a hearing of evidence was conducted instead of an analysis of the record of the District Land Adjudication and Settlement Officer.

40. The interested party avers that the complaint that extraneous and irrelevant matters were put into consideration is misplaced especially in light of the fact that the same is a general statement lacking in particularity and clarity.

41. The interested party in the response to the allegation that there was a mistake during the process of adjudication resulting from a similarity of names, he categorically states that the names Alexander Nyaga Mitambo and Charles Nyaga Mutua are so dissimilar that the argument of a mistake between the two is ridiculous.

42. The interested party avers that the allegation that he or his family has never lived on the suit land has no bearing whatsoever on the present proceedings as he acquired his interest as a purchaser for value with notice of the exparte applicant's claim and the issue of customary interest should have been litigated with the initial owner Charles Nyaga Mutua and that it must be noted that the ex parte applicant has never lodged any objection to challenge the proprietorship of Charles Nyaga Mutua from whom he purchased the suit property and as such it follows therefore that the content of paragraph 17 of the exparte applicant's supporting affidavit is a complete misrepresentation of the uncontested facts of this dispute.

43. The Interested Party avers that the exparte applicant's application merely challenges the merits of the Ministers decision and not the procedure applied in arriving at the same.

44. The interested party avers that indeed the Appeal was itself improperly before the Minister having been instituted in the year 2019 against a decision that was made on 25/09/2013 and the information stated in the preceding paragraph can be discerned from the registration number of the Appeal (194 of 2019) and the date of the award of the District Land Adjudication and Settlement Officer attached to the exparte applicant supporting affidavit and marked 'AMM6'.

45. In conclusion affidavit the Interested Party states that the exparte applicant's application has no merit and prays that the same be dismissed.

46. The interested party filed submissions dated 14th April 2022 wherein he submits that the application before court seeks to have the decision made by the Minister on 20/12/2021 in Appeal to the Minister Case No. 194 of 2019 quashed.

47. It is the interested party's submissions that as correctly submitted by the exparte applicant, the purview of judicial review proceedings is limited to the procedure applied at arriving at the impugned decision and not the merits of the decision.

48. The interested party pointed out that the submissions tendered by the exparte applicant, seem, to a very large extent, an attack on the merits of the decision of the Minister. Further, he took issue with the introduction of evidence through the exparte applicant's submissions which he deems completely unprocedural.

49. On whether the Appeal was heard by a person without jurisdiction on an allegation that the Appeal was heard by the Assistant County Commissioner and not the Deputy County Commissioner, the Interested Party submitted that he has through his replying affidavit denied this suggestion and provided a detailed account of what transpired on the date of the hearing.

50. The interested party submits that the proceedings provided by the exparte applicant demonstrate expressly, that the Appeal proceeded before both officers while at the tail end it is indicated that the ruling was delivered before the Deputy County Commissioner.

51. The interested party further submits that it is a cardinal principle of law that he who alleges must prove. That the document provided by the exparte applicant does not support his allegations and there is no indication howsoever that an objection was raised on the composition of those adjudicating on the Appeal.

52. The interested party submits that nothing much turns on that complaint and urged the court to reject the same.

53. On the issue of Policy and principle under the *Land Adjudication Act*, and the expate applicant contention that the said piece of legislation demands, as a matter of policy, that a person shall "have the land he or she was in occupation, adjudicated and recorded under that person", the interested party submits that though the exparte applicant has not expressly indicated where to find that policy and principle, it is his considered opinion that this ground raises a direct challenge against the merit of the decision of the Minister.

54. The interested party further contends that the alleged failure of the Minister to adhere to the policy and principle of a statute can only go to the merit of the decision, which is not the concern of these proceedings. The interested party submits that this particular ground is hence misplaced.

55. Regarding the issue of alleged consideration of extraneous matters, and in particular that the Deputy Commissioner on addressing his mind to the dispute before him took into consideration factors that are extraneous to the issue at hand, the Interested Party submits the exparte applicant did not deny these allegations in his affidavit in support of the motion, but rather attempts to explain himself through his written submissions.

56. The interested party submits that the introduction of a rebuttal to findings of fact in the submissions is absolutely unprocedural and implored the court to reject the invitation to take any consideration of the same.

57. The interested party contends, that when the Minister is adjudicating on the Appeal, he is not only guided by the evidence adduced by the parties at the hearing before him, but also all other available

evidence, including the proceedings before the Land Adjudication Officer and that all such material is relevant in determining the dispute and cannot therefore be wished away as being extraneous.

58. The interested party has cited the case of Matwangwa Kilonzo vs District Commissioner, Kitui & Another [2021] eKLR which cited with approval a passage made in *Republic vs Special District Commissioner & Another* [2006] eKLR to the effect that: -

> " That is to say, that the evidence he records should be considered along with the evidence in the District land adjudication officers record of proceedings and ruling that is appealed from, and on which the grounds of appeal arise."

59. The interested party submits that the exparte applicant has not sufficiently demonstrated that irrelevant material was considered prior to the making of the decisions.

60. On the issue of Crucial documentary evidence being ignored the interested party pointed out that the exparte applicant has in his submissions stated that he abandons ground (d) of his notice of motion and has hence, omitted making any submissions on the same.

61. The interested party submits that it is without doubt that the decision to abandon that particular ground is specifically informed by the interested party's analysis of the subject letters at paragraph 13 of his replying affidavit.

62. The interested party submits that it is his view that it would be imprudent to ignore those letters whereas they formed a critical part in the evidence of the exparte applicant during the hearing of the appeal hence it can be easily deduced from the proceedings that when the exparte applicant commenced his testimony, he began with those letters, and therefore, as stated in paragraph 13 of the replying affidavit, the letters dated 06/04/2001 and 05/10/2010 are actually unfavorable to the exparte applicant's claim and expose him as a dishonest litigant.

63. The interested party submits that in the findings by the representative of the Minister, it is expressly stated that the interested party was a purchaser for value having obtained the land from the then registered owner Charles Nyaga Mutua after having conducted due diligence. That interestingly, these findings were derived from the letter dated 06/04/2001 produced in evidence by none other than the exparte applicant. The interested party submits that ground (d) on the notice of motion lacks merit and should be construed in favour of the interested party.

64. On the hearing by taking fresh evidence versus analyzing and interrogating the evidence already on record on this complaint, the Interested Party submits that the Minister has latitude to conduct the hearing of the Appeal in the manner he finds suitable provided that he observes rules of natural justice and adheres to the rule of law.

65. The interested party has cited the case of *Republic vs Minister of Land And Housing* [2009] eKLR where the court observed: -

> " The exparte applicant did not expect the Minster or his delegate to act like a court and strictly follow the rules of procedure prescribed for courts".

66. The same court proceeded to cite with approval the following passage from *Makenge vs Ngochi* C.A 2.5 [1978].

> " But no such duty (as under Section 12 of the Act) to follow the procedure laid down for the hearing of civil suit is prescribed in respect of the Minister. He is not bound to follow

the prescribed procedure. His duty, by Section 29 of the Act is to determine the appeal and make such orders as he thinks just".

67. The interested party has further cited the case, of *Republic vs Mwingi District Commissioner & 2 Others Exparte Mutindi Mwangangi* [2014] eKLR where the court made the following finding: -

> " One of the issues raised by the applicant is that the District Commissioner deviated from the procedure expected in the hearing of appeals. The applicant has however not demonstrated what constitutes the correct procedure for the hearing of appeals by the Minister. Section 29 of the *Land Adjudication Act* CAP 204 Laws of Kenya does not set out the procedure to be followed in such appeals. However, the order must be just. There is no legal requirement for the Minister to only review the proceedings and decisions made by the land adjudication officer, arbitration board or adjudication committee. Nothing set out in the Act bars the Minister from hearing evidence afresh".

68. The Interested Party has further cited the case of Timotheo Makenge vs Manunga Ngochi 1979 KLR 53 in which the Court of Appeal of East Africa held: -

> " But no such duty to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the minister. He is not bound to follow the prescribed procedure".

69. It is the Interested Party submissions that the Minister's delegate did not in any way flout any rules of procedure by taking the evidence of the parties afresh. The interested party wonders why the exparte applicant would complain about the adoption of evidence afresh and at the same time complain about an alleged failure by the Minister's delegate to visit the locus in quo. That the visit to the disputed land amounts, in all probability, to admitting evidence afresh

70. Regarding the contention by the exparte applicant that the Deputy County Commissioner did not visit the disputed property, the Interested Party insists that indeed a visit was conducted prior to the commencement of the hearing and that if at all the commissioner had made intimation that he would visit the suit property prior to the hearing but failed to do so, then the exparte applicant has failed to demonstrate that he raised that particular complaint prior to the commencement of the hearing. It is the Interested Party's submissions that, the Minister or his authorized agent have a wide discretion on how to conduct the proceedings and a visit to the suit land is not mandatory considering that the Minister is bound to rely on evidence and findings of the Adjudication officer or arbitration board.

71. The interested party has cited the case of *Matwanga Kilonzo vs District Commissioner, Kitui & Another* [2021] eKLR in which the court observed: -

> " That being the case, the 1st Respondent was not under any obligation to visit the land. All he had to do was to rely on the findings of the land adjudication officer on what he observed when he visited, and arrived at an independent decision. That is what he did".

72. The interested party submits that notwithstanding the foregoing the exparte applicant has not refuted the assertion put forth in paragraph 8 of the interested party's replying affidavit.

73. On the issue of bias, based on the claims that the Deputy County Commissioner exercised his powers in a manner that favoured the Interested Party, the Interested Party pointed out that in the applicant's supporting affidavit it is not discernible what actions or omissions amount to bias. It was submitted that, the Minister's delegate had at his disposal the proceedings and findings of the earlier cases and it would be expected that he would discern all necessary information therefrom without necessarily

making express reference to the source of information in his ruling. That it does not help the exparte applicant's cause to make reference to AR proceedings in his submissions when he has not attached the same to his application to demonstrate that certain issues did not arise or were not captured therein.

74. The Interested Party has cited the case of *Republic vs The Minister For Lands & Another Exparte Boniface Njeru Ngari & Another* [2013] eKLR where the court stated: -

> " On the allegation that the Minister as represented by the District Commissioner was openly biased and did not observe the rules of natural justice, I see no evidence of that. The District Commissioner while hearing the appeal had the discretion of who to believe and who not to believe. That was his decision based on the evidence before him and the demeanour of witnesses. It is not suggested, for example, that he refused to give a hearing to any of the parties. The complaint of bias is a mere allegation not based on any facts. I similarly reject it."

75. The interested party's submission is that no concrete evidence has been adduced by the exparte applicant to support the allegation of bias.

76. In conclusion the interested party submits that the entire application does not satisfy the threshold necessary to trigger the exercise of discretion of this court in favour of the applicant. That the exparte applicant's claim is a challenge on the merits of the decision of the Minister's concealed as one against the procedure adopted and pray that the entire application be dismissed with costs to the interested party.

Analysis and Determination

77. The court has carefully considered the evidence on record, the submissions made and the relevant law. The issues that call for determination are:

    i. Whether the person who heard the appeal on behalf of the 1st Respondent had jurisdiction.

    ii. Whether the Respondents exercised their statutory duties as envisaged in the law.

    iii. Whether the orders of Judicial Review are available.

78. The ex-parte applicant contends that the judgment/ruling of the minister was tainted with the issue of jurisdiction on account of the fact that the Deputy County Commissioner of Meru South Sub-County issued notices for hearing while the hearing proper was conducted by the Assistant County Commissioner (1) of Igamba Ng'ombe Sub-County.

79. In this case, it is not in dispute that there was an appeal case No. 194 of 2019 to the minister pursuant to the provisions of the *Land Adjudication Act* Cap 284 Laws of Kenya. The appeal was filed by the ex-parte Applicant. The appeal was against an award of Land Parcel No. 544 Kamwimbi "A" Adjudication Section. The ex-parte applicant and the Interested Party received notices and appeared before the minister's representative for the hearing of the appeal. Thereafter, the minister's representative made a ruling in favour of the Interested Party and against the ex-parte Applicant. It is clear from the material on record that the ex-parte Applicant had therefore subjected himself to the jurisdiction of the officer to whom the minister had delegated the apposite responsibility. You cannot have your cake and eat it. You cannot willingly subject yourself to a jurisdiction and when the matter goes against you, you seek to disown that jurisdiction. Indeed the issue of jurisdiction should be raised at the earliest possible time. At that earliest time, the ex-parte applicant subjected himself to the jurisdiction he is now seeking to impugn. In any case, pursuant to the provisions of Section 29(4) of the *Land Adjudication Act*, the minister had authority to delegate his powers to any pubic officer. This in my view incudes an Assistant County Commissioner.

80. The other complaint raised by the ex-parte applicant is the manner in which the appeal before the minister was conducted. It should be noted that under the said Act, there is no prescribed procedure that the minister is to follow. No such duty as laid down for the hearing of civil suits has been prescribed in respect of hearings before a minister. The minister (or his representative) was therefore not bound to follow the procedure prescribed under the Civil Procedure Act. His duty, by Section 29 of the Act is to determine the appeal and make such orders as he thinks just. The ex-parte applicant has not demonstrated what constitutes the procedure for the hearing of appeals by the minister considering that section 29 of the *Land Adjudication Act* does not set out the procedure to be followed in such appeals. I am not persuaded that the minister was only required to review the proceedings and decisions made by the Land Adjudication Officer, arbitration board or adjudication committee. Therefore, nothing set out in the Act bars the minister from hearing evidence afresh. That being the case, the 1st Respondent was not under any obligation to visit the suit land, if at all he did not.

81. On the allegation that the 1st Respondent as represented by the Assistant County Commissioner was openly biased, I see no evidence of that. The Deputy County Commissioner or Assistant County Commissioner while hearing the appeal had the discretion of who to believe and who not to believe and that was his decision based on the evidence before him. The ex-parte applicant has not suggested for example, that he was not given a hearing. The allegation of bias is therefore a mere conjecture not based on any facts and I reject it.

82. The other issue for determination is whether the judicial orders sought in the application herein are available or not. As rightly submitted by all the parties herein, Judicial Review proceedings is concerned with the decision making process, not the merits of the decision itself. See the case of Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd [2002] eKLR cited hereinabove. It was also held in *Republic –vs- Kenya Revenue Authority ex-parte Yaya Towers Ltd* [2008] eKLR that the remedy of Judicial Review is concerned with reviewing not the merits of the decision of which the application for Judicial Review is made, but the decision making process itself. The purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted law to decide the matter in question. Accordingly, this court will only concern itself with the process followed by the Respondents in arriving at the impugned decision and therefore will not dwell whether the decision arrived at was the correct one or otherwise. That is an issue which can only be resolved in a merit hearing before a court.

83. In this case, the ex-parte applicant avers that an appeal was lodged in appeal Case No. 194 of 2019 to the minister pursuant to the provisions of the *Land Adjudication Act*. The appeal was against an award of Land Parcel No. 544 Kamwimbi "A" Adjudication section to the Interested Party. The ex-parte applicant and the Interested Party appeared before the minister's representative and the appeal was decided against the ex-parte applicant. The application clearly challenges the merits of that decision. I do find that there is no iota of evidence that indicates that the decision was illegal, unlawful, irrational and unreasonable and devoid of legal propriety. The allegation of bias on the part of the 1st Respondent or that he trampled upon the rules of natural justice has also not been proved. I also do not find any wrongful and unfair reference to extraneous matters which would persuade me to overturn the minister's decision. I find that the minister's decision was not arbitrary, irrational or in any way unreasonable. Accordingly, this Judicial Review application lacks merit.

84. Consequently, the notice of motion dated 18th January, 2021 is dismissed with costs to the Respondents and the Interested Party.

85. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 8TH DAY JUNE, 2022 IN THE PRESENCE OF:

CA: Ann

I.C. Mugo for Ex-parte Applicant

Ms. Kendi for Respondents

Muriithi for Interested Party

C. K. YANO,

JUDGE.