REPUBLIC OF KENYA

High Court of Kisii

17 of 2012

REPUBLIC……..……..……APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION & SETTLEMENT

SUBA DISTRICT ……1T RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION

& SETTLEMENT……..…….2ND RESPODNENT

AND

CELESTINE MASIWE MASIWE & 26 OTHERS…….……..INTERESTED PARTIES

EXPARTE

ANTINA MOHAMMED HAMISI

JUDGMENT

1. Introduction:

The exparte applicant, **Antina Mohammed Hamisi**(hereinafter referred to only as **"the applicant"**) sought and obtained leave of this court on 27th March, 2012 to institute the present application for judicial review which seeks orders of certiorari and prohibition. The judicial review application was filed on 2nd April, 2012. The same was brought on the grounds set out in the Verifying affidavit of the applicant sworn on 27th March, 2012 and the Statement of the same date which were both filed pursuant to the provisions of Order 53 Rules 1 and 2 of the Civil Procedure Rules, 2010 in support of the application for leave. The application seeks the following reliefs;

i. an order of certiorari to remove to the High Court and quash the proceedings, order, directive and/or decisions of the 2nd Respondent made through letter reference number

COMP/2/45/TPYII/48 dated 1st February,2012 touching and/concerning determination of and/or adjudication of objection proceedings over and in respect of Plot Nos. 3653, 4126, 4122, 4199, 4200, 4320, 4209, 4629, 4614, 4119, 4214, 4204, 4201, 4215, 3189 and 3273, Kaksingri Adjudication Section, respectively, belonging to the Applicant (hereinafter referred to as "the suit properties" where the context so admits), which decisions were rendered without jurisdiction and in breach of the rules of natural justice.

ii. **an order of prohibition to prohibit the Respondents from enforcing, executing and/or implementing the decision on the objection proceedings touching and or concerning Plot Nos. 3653, 4126, 4122, 4199, 4200, 4320, 4209, 4629, 4614, 4119, 4214, 4204, 4201, 4215, 3189 and 3273, Kaksingri Adjudication Section, belonging and registered in the name of the Applicant ("the suit properties") which decisions**

were granted in contravention of sections 25,27 and 30(4) of the Land Adjudication Act, Chapter 284, Laws of Kenya.

2. The grounds on which the application has been brought;

In the application herein, the Applicant is seeking the review and quashing of the decision of the 2nd Respondent contained in its letter dated 1st February, 2012. The Applicant has also sought to review and prohibit the execution of the decision of the 1st Respondent made on 22nd March, 2011 in which the 1st Respondent dismissed the objections that had been mounted by the Applicant against the decision of the arbitration board made of 26th February, 2010 namely, objection Nos. 155-167 & 179-181 of 2010, Kaksingri Adjudication Section. In summary, the application has been brought on the following main grounds;

i. **That the Respondents had no jurisdiction to make the decisions aforesaid;**

ii. **That the said decisions were made in breach of the rules of natural justice;**

iii. **That said decisions were illegal null and void the same having been made in contravention of express provisions of the law;**

iv. **That the said decisions were made in violation of the Applicant's legitimate expectation;**

v. **That the said decisions were arbitrary and oppressive;**

3. The facts giving rise to the application;

In summary, the facts giving rise to this application as can be glimpsed from the various affidavits filed herein by the parties are as follows. Sometimes in the year 1990, the applicant and one, **Okode Masiwe** (hereinafter referred to as "**Okode**" where the context so admits) had a dispute over the ownership of a parcel of land situated at West Kaksingri, Sub-Location which dispute was taken before the area panel of elders for determination. This I presume was done under the former Part IIIA of the Magistrates' Courts Act, Cap.10 Laws of Kenya. The said panel of elders made an award in favour of the Applicant in, Land Case No.1 of 1990. The said award was filed at the Principal Magistrate's Court, Kisii, in Civil Case No.630 of 1990 for adoption as a judgment of the court. On 24th April, 1992, the said court "**confirmed**" the said award. It is not clear to me why the court did not enter judgment in accordance with the said award as required by section 9E of the Magistrates' Court Act, Cap.10 Laws of Kenya. According to the Applicant, once the said award was confirmed by the court as aforesaid, it became a judgment of the court (hereinafter referred to only as **"judgment of the court"** where the context so admits). Sometimes in the year 2006, Kaksingri was declared an adjudication section. The Applicant claims that during the ascertainment of interests in land in the area pursuant to the said declaration, the parcel of land that was the subject of the aforesaid dispute between the Applicant and Okode was recorded and demarcated in his name in accordance with the judgment of the court aforesaid and assigned Parcel No.3583, Kaksingri

West Adjudication, Section (hereinafter referred to as **"Plot No.3583"** where the context so admits). At the same time, the interested parties herein also lodged a claim over portions of the said Plot No.3583. The claims by the Applicant and the interested parties over Plot No. 3583 was referred to the area arbitration board set up under the Land Adjudication Act, Cap. 284 Laws of Kenya for determination. The arbitration board heard both parties and made its ruling in the matter on 26th February, 2010. The arbitration board made a decision that the land that was the subject of a dispute between the Applicant and Okode in the earlier case before the panel of elders measured, 2 ½ acres only and as such the Applicant was not entitled to the whole of Plot No.3583. The arbitration board ordered that 2 ½ acres of Plot No.3583 be recorded and demarcated in the name of the Applicant and the remainder thereof be divided among the Interested parties. The said order was executed accordingly. Plot No. 3583 was divided amongst the interested parties save for the portion that was reserved for the Applicant as aforesaid. The sub-division of Plot No. 3583 gave rise to land parcel Nos.3653, 4126, 4122, 4199, 4200, 4320, 4209, 4629, 4614, 4119, 4214, 4204, 4201, 4215, 3189 and 3273, West Kaksingri Adjudication Section which are now the subject of this application. The Applicant participated fully in the proceedings before the arbitration board. He was not satisfied with the said decision of the board and as such decided to lodge objections to its award of land parcel Nos.3653, 4126, 4122, 4199, 4200, 4320, 4209, 4629, 4614, 4119, 4214, 4204, 4201, 4215, 3189 and 3273, West Kaksingri Adjudication Section aforesaid to the interested parties. The Applicant lodged Objection Nos. 155-167 and 179-181 all of 2010 with the 1st Respondent challenging the said awards. The hearing of the said objections was adjourned on several occasions mainly on account of the Applicant not being comfortable with the land adjudication officer who was to determine the same. The said objections were ultimately heard on 22nd March, 2011 and were all dismissed on the same day. The same were heard *exparte* in the absence of the Applicant. The record of the proceedings of that day shows that the hearing date was taken with the consent of the Applicant but he failed to appear during the hearing of the objections because he was as I have mentioned above, not happy with the officer who was to hear the same. Once again, the Applicant was not satisfied with the dismissal of his objections. This time round however, he did not prefer an appeal as provided for under the Land Adjudication Act, Cap.284 Laws of Kenya but decided to engage the respondents herein in a chain of correspondence through which he complained about the manner in which his objections were handled. Sometimes in May, 2011, the Applicant and another person (not a party to this application) who had also lost an objection in a similar manner had a meeting with the 1st Respondent to explore possible ways in which their complaints could be remedied. At the said meeting, the Applicant, the said third party and the 1st Respondent reached an understanding that the Applicant and the said third party's objections that had been heard and dismissed *exparte* should be heard afresh *interpartes*. It was further agreed that the 2nd Respondent would appoint another land adjudication officer to hear the said objections. Neither the 2nd Respondent nor the interested Parties were parties to the said agreement or understanding between the Applicant, the 1st Respondent and the said third party. On 19th May, 2011, the 1st Respondent wrote to the 2nd Respondent informing him of the agreement that was reached at the meeting held with the Applicant and the said third party and requested the 2nd Respondent for authority to proceed with the cause of action that they had agreed upon. I did not see from the record, any response from the 2nd Respondent to this letter from the 1st Respondent. However sometimes on 16th June, 2011, a letter was addressed to the Applicant from the Ministry of Lands signed by an officer who indicated his designation as "ADI/Coordinator PCRC" to the effect that the 2nd Respondent would appoint another land adjudication officer to hear his objections. This letter, referred to a letter that had been written to the said Ministry by the Applicant on 20th April, 2011. Nothing seems from the record to have taken place after this letter until 1st February, 2012 when the 2nd Respondent referring to the Applicants various correspondence advised the Applicant that his objections against the decision of the arbitration board were heard in accordance with the law and if he was not satisfied with the same, he ought to have lodged an appeal as provided for under the Land Adjudication Act, Cap.284 Laws of Kenya. The 2nd Respondent advised the Appellant further that since the Applicant had failed to take the appeal route, he could still challenge the said decision by way of judicial review. The Applicant was aggrieved by the contents of this letter dated 1st February, 2012 from the 2nd Respondent. The Applicant has now brought the present application to challenge the 2nd Respondent's decision contained in the said letter and the decision of the 1st Respondent in the said objections.

4. The opposition to the application;

The application is opposed by the Respondents and the interested parties. The interested parties' affidavit in opposition to the application was sworn by Thomas Onyango Olunga, the 4th interested party on 11th December, 2012. The Respondents on their part put in a replying affidavit sworn by John Amayo, the 1st Respondent on 28th December, 2012. In summary, the interested parties' have contended that the decision of the panel of elders in Land Case No.1 of 1990 between the Applicant and Okode that was confirmed in Kisii PMCC No. 630 of 1990 concerned a portion of land that measured, 2 ½ acres only. In the circumstances, it was not open to the Applicant to apply the said decision during the adjudication exercise to land that was owned by the interested parties which was not part of the said 2 ½ acres. The interested parties were therefore within their rights in lodging claims to the same parcel of land which the Applicant also claimed albeit wrongfully on the strength of the said decision by the elders. They contended that the arbitration board was right in its decision on the dispute that they had with the Applicant. The interested parties contended further that the dismissal of the Applicant's objections against the decision of the arbitration board was equally proper as some of the interested parties' parcels of land are situated far away from the parcel of land that was the subject of the dispute between the Applicant and Okode and furthermore, the Applicant was given adequate time to prosecute his objections but refused deliberately to do so. It was the interested parties' further contention that the application herein offends the provisions of the Land Adjudication Act, Cap.284, Laws of Kenya in that the Applicant did not exhaust the dispute resolution machinery set up under the said Act before coming to court and that the Applicant did not obtain the requisite consent from the Land Adjudication Officer under section 30(1) of the said Act, before instituting these proceedings. The interested parties have denied that any right of the Applicant was infringed by the Respondents. The Respondents have opposed the application on grounds similar to some of those put forward by the interested parties. In addition, the Respondents have contended that the Applicant was afforded every opportunity to present his case and/or to participate in the proceedings complained of but he refused to do so. It is the Respondents contention that when the Applicant's objections came up for hearing on 22nd March, 2011, the Applicant was present but chose not to participate in the proceedings. The Respondents have denied that they violated the rules of natural justice while handling the Applicant's objections or that they agreed to nullify the decision dismissing the said objections. The Respondents have maintained that they acted within the law and did not violate any of the Applicant's rights.

5. The submissions by the parties;

On 13th December, 2012, the court directed that the application herein be disposed of by way of written submissions. The Applicant filed his written submissions on 11th February, 2013 while the interested parties filed theirs on 7th February, 2013. The Respondents did not file any submissions. In his submission, the Applicant reiterated the contents of his affidavit and further affidavit that he had filed in support of the application. The Applicant maintained that the issue of ownership of Plot No.3583 was settled and as such was not open to further determination by the arbitration board. The Applicant submitted further that he was not given an opportunity to be heard before the said decisions adverse to him were made. The Applicant submitted further that the decision dismissing the Applicant's objections having been nullified, there was no decision of 22nd March, 2011 that could be implemented by the Respondents. The Applicant submitted further that the Respondents decisions complained of herein were ultra vires their powers. The Applicant denied the Respondent's and the interested parties' claim that the Applicant is guilty of forum shopping and that the application is bad in law for having been brought after the expiry of six (6) months from the date of the decision complained of and for want of consent from the land adjudication officer. The Applicant referred to a number of authorities in support of his submissions. It was the Applicant's case that he has shown a reasonable cause to warrant the granting of the orders sought. In their submissions, the interested parties also reiterated the contents of their affidavit in opposition to the application that was sworn by the 4th interested party. It was the interested parties' submission that although the Applicant's entire case is premised on the decision of the elders in Land Case No.1 of 1990 between the Applicant and Okode, the Applicant has not shown or brought out any nexus between the said Okode and theinterested parties that would make the said decision binding upon the interested parties. It was further submitted by the interested parties that, from the proceedings before

the arbitration board up to the objection proceedings before the 1st Respondent, the Applicant was accorded full opportunity to present his case and in some instances was even indulged to choose officers to handle his cases. It was submitted by the interested parties that the Applicant's Objections were heard and dismissed *exparte* when the Applicant declined to prosecute his objections before the Land Adjudication Officer who was designated to handle the same. It was submitted further by the interested parties that in an adversarial judicial system, a party to a dispute cannot be allowed to choose an arbiter in his own cause. In the circumstances, the interested parties found no basis in the Applicant's claim that the rules of natural justice were not followed by the Respondents with regard to the cases he had before them. The interested parties submitted further that the application herein is bad in law for failure by the Applicant to furnish the court with the proceedings and decision that he wants to be quashed. According to the interested parties, the proceedings and decision sought to be quashed which has been annexed to the Affidavit of the 4th interested party shows clearly that the said proceedings took place on 22nd March, 2011 on which date the decision complained of was also made. It was submitted by the interested parties that the application herein that was instituted by the Applicant on 27th March, 2012 is time barred as the orders of certiorari sought are only available under Order 53 Rule 2 of the Civil Procedure Rules where proceedings are taken within six (6) months from the date when the proceedings or decision complained of was made. It was submitted by the interested parties that since the remedy of certiorari is not available to the Applicant, an order of prohibition cannot issue in the circumstances. It was also submitted that the Application herein is bad in law for want of consent from the 1st Respondent pursuant to the provisions of section 30(1) of the Land Adjudication Act, Cap.284 Laws of Kenya.

6. The issues for determination;

Arising from the foregoing, the issues that present themselves for determination in this application are as follows;

i. whether the arbitration board had the jurisdiction to entertain and determine the interested parties' claim over portions of Plot No.3583 in light of the provisions of section 30(4) of the Land Adjudication Act, Cap.284 Laws of Kenya;

ii. **Whether the 1st Respondent had jurisdiction to entertain and determine the Objections that had been lodged with it by the Applicant;**

iii. **Whether the 1st Respondent's decision on the Applicant's objections aforesaid was made in breach of the rules on natural justice, was arbitrary, null and void;**

iv. **Whether the Respondents had nullified the decision of the 1st Respondent on the Applicant's Objections that was made on 22nd March, 2011;**

v. **Whether the 2nd Respondent had jurisdiction to notify the Applicant as it did through a letter dated 1st February, 2012 that the Applicant's objections were** heard in the normal manner and that since the Applicant had failed to lodge an appeal as required by law, he was at liberty to challenge the outcome of the decision in the said objections through judicial review if he was not satisfied with the same;

vi. **Whether the 2nd Respondent through his letter dated 1st February, 2012 aforesaid violated the Applicant's legitimate expectation that the decision on his objection proceedings had been nullified and that the same would be heard afresh;**

vii. **Whether the Applicant's application is bad in law for being time barred and for want of consent from the Land Adjudication officer pursuant to section 30(1) of the Land Adjudication Act, Cap.284, Laws of Kenya;**

viii. **Whether the Applicant is entitled to the reliefs sought against the respondents.**

7. Determination of issues;

I have considered the application herein and the affidavits filed in support thereof. I have also considered the submissions by the advocates for the Applicant and the case law relied on in support of those submissions. Equally, I have considered the affidavits in opposition to the said application, the submissions of the advocates for the interested parties and the case law relied on by them in support of the same. I set out hereunder my views on the various issues framed herein for determination.

Issue No.I:

The Respondents derive their powers from an act of parliament namely, The Land Adjudication Act, Cap. 284 Laws of Kenya (hereinafter referred to as "**the Act**"). The Respondents cannot therefore exercise or assume powers outside those conferred by the Act. The Act has also established quasi-judicial bodies for the purposes of resolving disputes arising under the Act during the process of adjudication. Just like the Respondents, these bodies also derive their powers from the Act. These bodies are, the adjudication committee set up under section 6 (1) of the Act and the arbitration board set up under section 7 of the Act. The adjudication officer appointed under section 4 of the Act also has quasi-judicial powers all derived from the Act. The Powers of the 1st Respondent (adjudication officer) are set out in several sections of the Act more particularly, sections 9, 10, 11, 12, 25, 26, 27 and 30 thereof. The powers of the 2nd Respondent are more of administrative in nature. The same are set out in sections 26A, 27, and 29 of the Act. The powers of the adjudication committee and the arbitration board are set out in sections 20, 21 and 22 of the Act. The adjudication committee and the arbitration board operate under the supervision of the adjudication officer. Apart from the adjudication officer and those two quasi-judicial bodies there are also other officers given powers under the Act who also play a very important role during the adjudication process. These are the recording officer, demarcation officer and survey officer. They also have powers under the Act to make decisions in the course of performance of their duties.

8. The process of adjudication starts with the ascertainment of interests in land in the adjudication section. Once an adjudication officer has published a notice that interests in land in an adjudication section would be ascertained and recorded and fixed a time frame for that purpose, every person who has an interest in land in the adjudication section concerned must make a claim to the recording officer. The recording officer has power to consider and determine all claims presented to him. Where there is more than one claim to a parcel of land and the recording officer is unable to determine the same, he is supposed to refer the same to the adjudication committee for determination. If the arbitration committee cannot resolve the dispute, it is supposed to refer the same to the arbitration board. In this particular case, both the Applicant and the interested parties made a claim over Plot No.3583 or portions thereof. It is not clear from the record but it seems as if both the recording officer and the adjudication committee could not determine the conflicting claims and as such the same was referred to the arbitration board for determination. Under section 13 of the Act, anyone who considers himself to have an interest in land in an adjudication section has a right during the period given by the adjudication officer for the ascertainment of such rights to register his claim with the recording officer. Whoever has a claim is entitled to put it forward. It is up to the recording officer to determine such claims if they are more than one and if he is unable to do so, to escalate it to the other dispute resolution machinery provided for under the Act as aforesaid. The interested parties herein had every right in the circumstances to register their claim with the recording officer with respect to Plot No.3583 parallel to that of the Applicant. The fact that the Applicant had a previous case with Okode over the same parcel of land which case was determined in Applicant's favour could not be a bar to the interested parties' claim. It could also not divest the recording officer, the adjudication committee or the arbitration board of jurisdiction to determine the conflicting claims. The fact that the Applicant had had a court decision in his favour with respect to the said parcel of land could only form part of the Applicant's case or defence before whichever arbiter under the Act was to determine the claims. The claims by the Applicant and the interested parties over Plot No.3583 were heard and determined by the arbitration board. The Applicant had the opportunity to present his case and did so. He led evidence about the previous case before the elders between him and Okode over the said parcel of land which was determined in his favour and the fact that the said determination was confirmed by the court at Kisii. The arbitration board considered all the evidence presented before it and reached a finding that the interested parties were entitled to a portion of Plot No.3583. On the issue of the previous case that

the Applicant had with Okode, the arbitration board held that it only concerned a portion of Plot.3583 measuring 2 ½ acres. The board ruled that a portion measuring 2 ½ acres of Plot No.3583 be demarcated in favour of the Applicant and the rest be divided and demarcated in favour of the interested parties. The arbitration board may have reached a wrong decision but in my view, it had the jurisdiction to make the decision that it made. The argument put forward by the Applicant that the arbitration board should not have entertained the interested parties' claim in view of the provisions of section 30(4) of the Act does not hold water in my view. That section does not bar arbitration board from entertaining a claim brought over a parcel of land that has been the subject of an earlier dispute in court leave a lone where such dispute was not between the same parties before it. In my view, the section mainly authorizes a person who has a judgment in his favour over a parcel of land situated in an area which has been declared adjudication section to enforce such judgment without obtaining consent from the adjudication officer under section 30(1) of the Act. Section 30 of the Act must be read in its entirety to get the true meaning of each subsection thereof but not selectively as being done herein by the Applicant. Due to the foregoing, it is my finding that the arbitration board had jurisdiction to entertain and determine the claims over Plot No. 3583 by the Applicant and the interested parties. Its decision if wrong was subject to Appeal through objection proceedings under section 26 of the Act. The *res judicata* argument that was put forward by the Applicant in his submissions does not help his case either. The Applicant has not laid a basis for that plea. As submitted by the interested parties, the Applicant has not shown the nexus between the interests which Okode had on Plot No. 3583 and that which was being claimed by the interested parties. The cases that form the basis of the Applicants res judicata plea were between the Applicant and Okode. There is no way in which the decision in those cases can be held to bind the interested parties herein unless the Applicant establishes a nexus between Okode and the interested parties and the interests that both had on Plot No.3583. This nexus is lacking and no attempt has been made to show it if it exists. The plea therefore fails.

Issues No. II and No. III :

As I have stated above, the Applicant had the right to challenge the decision of the arbitration board under section 26 of the Act by way of objection proceedings after the completion of the compilation of the adjudication register. In exercise of his right aforesaid, the Applicant lodged objections against each plot that was demarcated in favour of each of the interested parties following the said decision of the arbitration board. Since the said objections were lodged by the Applicant, it was his duty to prosecute the same. From the record, it is apparent that once the Applicant lodged the said objections, he developed an apprehension that he would not get justice before the land adjudication officers in Suba District. Whether the said apprehension was well founded or not is not for determination in this judgment. However, arising from the said apprehension, the Applicant went out shopping for an ideal land adjudication officer to hear his objections. The Applicant was summoned to appear before the 1st Respondent on 9th March, 2011 to prosecute his objections but he failed to do so. He instead asked for the hearing to be adjourned to 22nd March, 2011 as he had petitioned the Ministry of Lands in Nairobi for another land adjudication officer to hear his objections. The 1st Respondent indulged the Applicant and rescheduled the hearing of his objections to 22nd March, 2011. From the proceedings of 22nd March, 2011, the Applicant appeared before the 1st Respondent for the hearing of the Objections but refused to participate in the proceedings on the grounds that he wanted the said objections to be heard by a different Land Adjudication Officer. The 1st Respondent refused to accede to the Applicant's demand which according to him was unreasonable and proceeded to hear the Applicant's said Objections *exparte* with only the interested parties participating. The 1st Respondent heard the interested parties and dismissed all the Objections on the same date namely, 22nd March, 2011. Section 13(2) and (3) of the Act provides that every person whose presence is required by the adjudication officer shall attend in person or by a duly authorized agent at the time and place ordered and if he fails to attend, the adjudication officer may proceed in his absence. Section 12(1) of the Act also provides that the proceedings before the adjudication officer shall as far as is practicable follow the procedure that is normally adopted in the hearing of civil suits. In civil cases, when a party is summoned by a court to appear for the hearing of his case and he fails to do so, the court is normally at liberty to proceed with the matter in his absence. The same applies where such a party takes a date for the hearing of his case and fails to appear. Again as submitted by the interested parties, in a civil suit, parties do not have the privilege of choosing

the court to hear their case. A party must present himself before the court assigned to hear his case and raise whatever issues he may have before that court and take up the matter with the appellate court if he is not satisfied. Even in cases where it may be necessary to ask a judicial officer to recuse himself, the case necessitating such recusal must be put before such officer for consideration. It is my finding that the 1st Respondent acted within his powers in proceeding with the Applicant's objections in his absence and that none of the Applicant's rights were violated in the process. The Applicant had the opportunity and was also afforded an opportunity to present his case and he voluntarily refused to do so. The Applicant's contention that the decision of the 1st Respondent dismissing his objections was made arbitrarily in breach of the rules of natural justice has no basis in the circumstances.

Issue No. IV:

The Applicant has contended that the 1st Respondent's decision made on 22nd March, 2011 dismissing the Applicant's objections aforesaid does not exist because it had been nullified by the Respondents who had at the same time ordered a re-hearing before a new land adjudication officer. This contention in my view lacks both factual and legal basis. On the factual side, there is no evidence that the Respondents had nullified the 1st Respondents decision of 22nd March, 2011. What the Applicant has put forward as evidence of such nullification and decision to have a re-hearing before another officer is a letter dated 19th May, 2011 in which the 1st Respondent had informed the 2nd Respondent of the discussions he had with the Applicant and a third party whose objections had been dismissed and what they had agreed on as the way forward. In that letter ("exhibit AMH 7"to the Applicants affidavit sworn on 27th March, 2012), the 1st Respondent asked for authorization from the 2nd Respondent if he could proceed with the cause of action that they had agreed upon with the Applicant and the said third party. The letter ends with the words "**Please allow**." There is no doubt from the tone of this letter that what was discussed between the Applicant and the 1st Respondent was subject to confirmation by the 2nd Respondent. Both Respondents have denied nullifying the 1st Respondents decision aforesaid. There is no evidence put forward by the Applicant to the effect that the 2nd Respondent responded to the letter aforesaid from the 1st Respondent allowing him to proceed with the arrangement that they had discussed with the Applicant. On the legal front, it has not been shown that the Respondents had the power to nullify the decision of the 1st Respondent made on 22nd March, 2011 without the consent of the interested parties and to order a re-hearing. Under section 29 of the Act, any party aggrieved by a decision of the 1st Respondent made in the objection proceedings brought under section 26 of the Act has only one remedy namely, an appeal to the Minister within sixty days from the date of such decision. Of course a party who feels that such a decision offends his rights under public law can pursue judicial review as an alternative remedy. There is however no room for review or setting a side of such decision by either of the Respondents. Any such decision even if it was made by the Respondents would be ultra vires their powers. It is therefore my finding that the decision of the 1st Respondent was not and could not be nullified by the Respondents neither could a re-hearing of the said objections be ordered or conducted by them without the consent of the interested parties who were parties to the said

Issues No. V and VI;

As I have mentioned herein above, the role of the 2nd Respondent in the adjudication process is mainly administrative. In the Act, the 2nd Respondent is defined as "**the person for the time being holding the public office of that name.**" The 2nd Respondent seems to be the executive head of the adjudication department in the Ministry of Lands. In that capacity, he oversees activities of land adjudication officers and other personnel in the department. It is in view of this role played by the 2nd Respondent in the adjudication process that the Applicant had addressed a number of correspondences to him on the adjudication exercise in West Kaksingri Location particularly on his claim to Plot No.3583, the objections that he had lodged and the determination thereof. The 1st Respondent also sought guidance and directions from the 2nd Respondent on the same issues. In the 2nd Respondent's letter to the Applicant dated 1st February, 2012, the 2nd Respondent notified the Applicant that his objections had been determined in the normal manner and since he had not filed an appeal against the said determination, he was at liberty to

pursue the matter by way of judicial review. The 2nd Respondent's letter dated 1st February, 2012 was advisory in tone and content. I have not seen any order or direction in this letter addressed to the Applicant or the 1st Respondent. Unless the Applicant is reading more into the letter than what is in the face thereof, I can't see anywhere in the said letter where the 2nd Respondent directed or ordered the implementation of the decision on the objection proceedings made by the 1st Respondent on 22nd March, 2011. The 2nd Respondent simply responded to the Applicant's complaints and advised him on what to do. In writing such a letter, the 2nd Respondent was performing administrative functions in line with the nature of his office. Since the Applicant had directed his complaints to the 2nd Respondent, I believe that the 2nd Respondent had the right to respond to such complaints. If follows therefore that he had the power to respond to the Applicant in the manner he did. The Applicant's contention that the 2nd Respondent acted in excess of his powers in advising the Applicant that the hearing of the objections he was complaining about was conducted in the normal manner in my view has no merit. It has also been contended by the Applicant that the decision contained in the said letter violated the Applicant's legitimate expectation that the 2nd Respondent would appoint a new land adjudication officer to hear his objections afresh. As I have already indicated above, I am not satisfied that the 2nd Respondent promised the Applicant that he will nullify the 1st Respondent's decision of 22nd March, 2011 and arrange for a re-hearing of the Applicant's objections by another land adjudication officer. There is no evidence of such promise put before the court by the Applicant. Secondly, the Respondents had no power to nullify the said decision and to order afresh hearing. As I have already stated herein above, if they were to do so, their action would be ultra vires. For these reasons, I am not convinced that the Applicant's expectation herein was legitimate. In their book, **Administrative Law, 10th edition, H. W. R. Wade & C. F. Forsyth** have commented as follows, at page 449, 450 and 451 on legitimate expectation;

"**It is not enough that an expectation should exist; it must in addition be legitimate……First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation……..…..Secondly, clear statutory words, of course, override any expectation howsoever founded (see R.vs. DPP exp.Kebilene [1999] 3 WLR 972(HL). An expectation, whose fulfillment requires that a decision maker should make unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions and express in several that the expectation must be within the powers of the decision maker before any question of protection a rises. There are good reasons why this should be so; an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting unlawful practice."**

As I had observed earlier, the Act gives a person aggrieved by the decision of the 1st Respondent in an objection only one remedy namely, an appeal to the Minister. Neither the 1st nor 2nd Respondents are clothed with any residuary power after such decision has been made to review it or set it aside. If the Respondents had promised the Applicant that they would nullify the earlier decision and conduct a re-hearing, the execution of such promise would be unlawful and ultra vires the Act. Due to the foregoing, I am not convinced that the Applicant had any legitimate expectation that was violated by the Respondents.

Issue No.VII;

Time Bar;

The interested parties have contended in their submissions that the Applicant is not entitled to the orders of certiorari sought herein because such relief is time barred under Order 53 rule 2 of the Civil Procedure Rules, the decision in the objections sought to be quashed having been made on 22nd March, 2011 while the proceedings herein were instituted on 27th March, 2012 outside the six (6) months period allowed by the rules. The order of certiorari sought by the Applicant is directed against the decision of the 2nd Respondent made on or about 1st February, 2012. From 1st February, 2012 to 27th March, 2012 is less than six (6) months. The order of certiorari was therefore sought within time to the extent that it was intended only to quash the said decision of 1st February, 2012. I have noted however that the prayers

sought by the Applicant are very wide in scope. The interested parties' apprehension that the order of certiorari may be extended to quash the decision on the objection proceedings that was made on 22nd March, 2011 is not therefore without basis. I am in agreement with the interested parties that an order of certiorari cannot issue to quash the said decision of 22nd March, 2011 in light of the provisions of order 53 rule 2 of the Civil Procedure Rules as read with section 9 (3) of the Law Reform Act, Cap.26 Laws of Kenya. However, since the order of certiorari has been directed at the decision of 1st February, 2012, I am unable to find that the application herein is time barred as far as the said prayer is concerned.

Want of consent under section 30 (1) of the Act;

Section 30(1) of the Act prohibits the institution of any civil proceedings and the court from entertaining any such proceedings concerning interest in land in an adjudication section until an adjudication register has become final save with the consent of the adjudication officer. The interested parties' contention is that since the Applicant did not obtain the requisite consent prior to the institution of this application, the same is incompetent and bad in law. In the case of **The Commissioner of Lands –vs- Kunste Hotel Limited, East African Law Reports [1995-1998] 1 E.A 1,** the Court of Appeal held that, "**while exercising the power to issue or not to issue an order of certiorari the court is neither exercising civil nor criminal jurisdiction."** In that case, an argument was advanced that the judicial review application was incompetent because the same had been filed by Kunste without first issuing the requisite notices under section 136 of the Government Lands Act, Cap. 282 Laws of Kenya (now repealed), and section 13A of the Government Proceedings Act, Cap. 40, Laws of Kenya. The Court of appeal expressed the view that in judicial review proceedings, the court was exercising special jurisdiction outside the ambit of the provisions of section 136 of the Government Lands Act and section 13A of the Government proceedings Act aforesaid. In the present case, what are barred by the Act under section 30 (1) are, civil proceedings. Since judicial review proceedings are neither civil nor criminal in nature, it is my finding that judicial review proceedings are not subject to the provisions of section 30 (1) of the Act. No consent was therefore required from the land adjudication officer before the institution of these proceedings. The application herein is therefore not bad in law for want of such consent as contended by the interested parties.

Issue No.VIII:

This issue concerns the question whether this is an appropriate case to grant the orders of certiorari and prohibition sought by the Applicant. Certiorari and Prohibition are public law remedies available to persons whose legally recognized interests have been infringed by public bodies or officers exercising statutory powers. In Halsbury's Laws of England, 4th Edition paragraph 46, the author has stated that;

"the courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognized interests. Powers must not be exceeded or abused".

9. The applicant has sought an order of certiorari to quash the decision of the 2nd Respondent complained of herein above and an order of prohibition to prohibit the Respondents from enforcing, executing and/or implementing the decision of the 1st Respondent made in the Applicants objections referred to herein above. **H.W.R Wade & C.F. Forsyth in their book, Administrative Law, 10th Edition** which I have referred to herein above have said this on the remedies of Certiorari and Prohibition at page 509,

"the quashing order and prohibiting order are complementary remedies, based upon common principles…….A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultra vires. A quashing order looks to the past, a prohibiting order to the future."

10. In the case of **Council for Civil Service Unions –vs- Minister for Civil Service [1985] A.C. 374 at 401D,** lord Diplock had this to say on the purview of judicial review;

"Judicial Review has I think developed to a state today when……one can conveniently classify

under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality". The second "irrationality" and the third "procedural impropriety"…….By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it…."

11. The court of Appeal also had an occasion in the case of **Kenya National Examination council – vs- Republic, Exparte Geoffrey Gathenji Njoroge & 9 others [1997] e KLR** to lay out the scope and efficacy of the remedies of certiorari, mandamus and prohibition. In that case the court described the remedies of prohibition and certiorari as follows;

"…….prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land……Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons…."

12. This court has power under section 13(7) (b) of the Environment and Land court Act, 2011 to grant the prerogative orders sought. As I have already found herein above, the 1st and 2nd Respondents acted within their jurisdiction with regards to the decisions complained of. The said decisions were therefore lawful. I have also found that the Respondents neither violated the rules of natural justice nor the Applicant's legitimate expectation. From the authorities and cases that I have cited above, I am of the view that this is not an appropriate case to grant the orders of certiorari and prohibition sought by the Applicant. The Applicant has failed to make out a case for orders of certiorari and prohibition to issue against the Respondents. Due to the foregoing, the Applicant's Notice of Motion application dated 29th March, 2012 is hereby dismissed. In view of the history of the dispute that gave rise to these proceedings, I am of the opinion that each party should bear its own costs. It is so ordered.

Dated, signed and delivered at Kisii this 10th day of May, 2013.

S. OKONG'O,
JUDGE.
In the presence of:-

Mrss. Sagwa holding brief for Oguttu for the Applicant

No appearance for the Respondents

Mr. Sagwe holding brief for G.S. Okoth for the Interested Parties

Mobisa Court Clerk

S. OKONG'O,
JUDGE.

HC.JR.NO.17 OF 2012