



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 3 OF 2020**

**IN**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLE 2, 3, 10, 19, 20, 21, 22, 23(3), 27, 28, 35, 40, 47, 48, 50(1), 60(1)(b), 159, 162(2)(b), 165, 258 & 259**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015, SECTIONS 4, 7, 8, 9, 10 & 11**

**AND**

**IN THE MATTER OF SECTIONS 107, 111, 113 & 115 OF THE LAND CONSOLIDATION ACT**

**BETWEEN**

**LEAKEY MUTHINI MULONZI.....1<sup>ST</sup> PETITIONER**

**LUKE MUSYOKA MULONZI..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR, NAIROBI, MINISTRY OF**

**LANDS, HOUSING AND URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, MAKUENI..... 3<sup>RD</sup> RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER,**

**MAKUENI COUNTY..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF KENYA.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners herein claim ownership of land parcel number Makueni/Ikalyoni/2148 (*hereinafter referred to as the suitland*) which according to them was purchased in 1984 by their father, the late Dominic Mulonzi Ngovi from the late Edward Mulandi Kavanda.

2. They have averred that prior to his demise, Dominic Mulonzo Ngovi, in the presence of the late Edward Mulandi Kavanda, showed his wife and sons the land that he had purchased from the latter. The Petitioners have further averred that subsequently thereafter, their grandmother started using the suitland and continued to do so until 1998 when a third party, Mutuse Kimama, alleged that he had a problem with Edward Mulandi Kavanda’s use of it. The third party however died before he and the late Edward Mulandi Kavanda could resolve their dispute. Shortly thereafter both Edward Mulandi Kavanda and Dominic Mulonzi Ngovi died.

3. The Petitioners attempt to use the suitland were thwarted by Julius Kiio Mulandi, the son of Edward Mulandi Kavanda. The Petitioners tried to resolve the land dispute with Julius Kiio Mulandi but all was in vain and hence the proceedings that were filed before the Respondents.

4. The Petitioners accuse the Respondents of failing to discharge their mandate after the dispute was referred to them as is provided for under the law.

5. In their Petition dated 14<sup>th</sup> February, 2020 and filed in court on 17<sup>th</sup> February, 2020, the Petitioners seek the following reliefs: -

5) -

a) *The Petitioners were not given expeditious, efficient, lawful, reasonable and procedurally fair hearing.*

b) *The Respondents neither considered nor relied on the documents adduced during the appeal.*

c) *The Respondents erred in their judgment by issuing contradictory judgment and dismissing the appeal.*

d) *The Petitioners sought for rectification on the judgment instead the Respondents allowed appeal in their absence thus infringing on their right to information.*

e) *The Petitioners were denied the right to adequate notice and information on the mechanism and process to address their grievances. The Petitioners wrote numerous letters seeking both guidance and rectification of the Respondents errors without any cause or direction accorded to them.*

f) *The Petitioners were denied their right to information and reasons as to why the appeal was allowed and subsequently why the Respondents altered the judgment. Further, the Respondents delayed in issuing the judgments and relevant documentation to facilitate further action and rectification. Further, having failed to rely on the documents and the findings of the judgment, the Respondents did not act in good faith and their actions taken without good and justifiable reason.*

g) *The Respondents actions were unprocedural, discriminatory and in bad faith.*

6) **A DECLARATION** that the appeal and judgment of the appeal is a nullity for the reasons given.

7) **AN ORDER** that the proceedings in the appeal to be instituted and commence afresh.

8) **AN ORDER** compelling the Respondents to pay to the Petitioners the costs of this suit.

6. The Petition is supported by the affidavit of Leakey Muthini Mulonzi, the 1<sup>st</sup> Petitioner herein, sworn on 14<sup>th</sup> February, 2020 with the authority of Luke Musyoka Mulonzi, the 2<sup>nd</sup> Petitioner and filed in court on the 17<sup>th</sup> February, 2020.

7. The 1<sup>st</sup> Petitioner has deposed in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of his affidavit that the Petitioners herein are bringing this case as the sons of Dominic Mulonzi Ngovi (deceased) who purchased a parcel of Land No.MAKUENI/IKALYONI/2148 from Edward Mulandi Kavanda (deceased) in 1984 and upon the purchase, the parcel was shown to both Edward and him, that his father and Mr. Edward Mulandi Kavanda died a few years later but his family (1<sup>st</sup> Petitioner's) had continued to use the land until the year 1998 when a third party, Mutuse Kinama declined their use of the land, that following the death of his father, he sought to follow up on his father's parcel of land and approached Edward Mulandi's son, Julius Kiio Mulandi, to claim his father's land, that Julius Kiio Mulandi denied his request and further denied knowledge of the sale to his father and denied him access to the property, that aggrieved by the hostility and denial of rights, his brother and him then filed an objection to the Land Adjudication Board in Makueni District and were heard on the 9<sup>th</sup> of March, 2004, that the Adjudication Board in its findings acknowledged that they produced the original agreement of the sale and cash payment acknowledgment as evidence of his late father's purchase of the property, that the Adjudication Board having heard all parties, found that they be awarded their father's parcel of land and be issued with a new title number, that the Adjudication Board explained and allowed the right of appeal within 60 days from the date of determination, that following the Adjudication Board's findings and judgments, they were issued with a green card awaiting processing of the title deed to the parcel No.MAKUENI/IKALYONI/2148 in their names, that the Defendants; Edward Mulandi's sons and wife, being aggrieved appealed the decision more than 60 days after the appeal period had already lapsed and the green card having been issued, that the Adjudication Board, wrongfully overlooking the lapse period allowed hearing of the appeal on the 25<sup>th</sup> of May, 2017, that the Adjudication Board on the 28<sup>th</sup> December, 2017 issued judgment dismissing the appeal, ordered for the refund of amounts cumulated to current currency valuation and his name be erased from the register replacing it with that of Edward Mulandi, that the Adjudication Board failed to release the findings and judgment soon after the hearing and together with the assistance of their uncle, Daniel Mutuku Ngovi, sought to obtain the same within reasonable time to enable them appeal, that they followed up with the Makueni Deputy County Commissioner's office from about January 2018 via telephone calls, office visits and mail correspondence until March 2018 when they were informed that the file on the matter had been forwarded to the Registrar's office in Nairobi, that the Chief Land Registrar's office gave them a copy of the proceedings and judgment on the 18<sup>th</sup> of May 2018, upon which period for appeal had lapsed, that the judgment issued was clearly erroneous as it dismissed the presence of sale agreement documents which had already been adduced in the first hearing and acknowledged by the Adjudication Board and they had admitted to losing/misplacing. It further cited dismissal and erased his name from the register without due cause, that they were aggrieved by the errors and approached the Adjudication Board, the Land Registrar and Deputy County Commissioner seeking rectification of this error and guidance on how to proceed, that the offices of the Deputy County Commissioner and Lands Registrar frustrated their efforts in following up on the same as they neither advised nor guided them accordingly on how to recover the original sale agreement documents that they had misplaced/lost and how to proceed to seek redress for the unfair administrative action on their part, that upon further

prodding, the Land Adjudication Board and officer of the Deputy County Commissioner issued them with a copy of judgment stamped and dated 10<sup>th</sup> September, 2018, that the said judgment differed completely from the initial one issued on the 25<sup>th</sup> of May, 2017, that the judgment issued on the 10<sup>th</sup> September, 2018, contrary to the previous one, allowed the appeal and altered the refund amounts and retained the erasure of his name from the register, that citing the irregularities, together with their uncle, they sought further assistance from the administrative bodies herein for the proper rectification of these errors to no avail thus precipitating his seeking of recourse and justice from this Court, that he is aggrieved by the said decisions and actions of the Respondents of subjecting them to an act that takes away their right to property and denied them the right to fair hearing. He finds this to be unjustifiably and unfair as it amounts to discrimination, that he further believes that the Respondents did not observe the rules of natural justice in arriving at the said decision as they did it arbitrary; a) that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents did not take into account the evidence of the sale agreement that had been adduced in the first hearing, b) that the Respondents failed to take into account laws that governed fair administrative action when they made errors on judgment and failed to rectify these errors, c) that he was not accorded fair hearing as the Respondents frustrated all efforts to rectify their own errors and failed to be guided by a legal instrument (**Fair Administrative Action Act, 2015**) and thus feels that they were not treated fairly, that it is their constitutional right to fair hearing and fair administrative action having been infringed, they expect this Court to protect them and accord justice as they have turned to be victims of unprofessional and unfair actions by administrative bodies who have failed to understand their mandate to offer expeditious, efficient, lawful, reasonable and procedurally fair findings.

8. The Respondents have opposed the Petition through their grounds of opposition dated 22<sup>nd</sup> April, 2020 and filed in court on 15<sup>th</sup> July, 2020 as well as the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' replying affidavits sworn at Nairobi on the 26<sup>th</sup> and 28<sup>th</sup> August, 2020 respectively and both filed in court on 03<sup>rd</sup> September, 2020.

9. In her replying affidavit, the 3<sup>rd</sup> Respondent, Karen Kemunto Nyakundi has deposed in paragraphs 1, 3, 4, 5 and 6 that she is the District Land Registrar at District Lands Office Makueni, conversant with the matters herein and hence competent to sign the replying affidavit, that according to the records in their offices, Makueni/Ikalyoni/2148 was first registered jointly on 19<sup>th</sup> January, 2015 in the names of Leakey Muthini Mulonzi and Luke Musyoka Mulondi, that on 19<sup>th</sup> January, 2015, a restriction was placed to restrict any dealings with the land until hearing and determination of the appeal to the Minister and which is still in place, that the Petition is misconceived, mischievous and an abuse of the Court process, that the Petition lacks merit and the same should be dismissed with costs to the 3<sup>rd</sup> Respondent.

10. And in her replying affidavit, Florence Obunga, the 4<sup>th</sup> Respondent herein, has deposed in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21 and 22 that she is the Deputy County Commissioner, Makueni Sub County conversant with the matters herein and hence competent to sign the replying affidavit, that the appeal to the Minister No.289 of 2009 for plot number 2148 Ikalyoni Adjudication Section was heard on 25<sup>th</sup> May, 2017, that the said appeal was lodged by the Appellant one Edward Mulandi Kavanda who did not avail any witnesses, that the Respondent in this appeal was one Leakey Muthini Mulonzi (the 1<sup>st</sup> Petitioner herein) who availed one witness one Daniel Mutuku Ngovi, that the appeal arose from an objection lodged against the decision of the Adjudication Board by Leakey Muthini Mulonzi which was determined in his favour, that the objection was allowed and an order given by the Land Adjudication Officer that Leakey Muthini Mulonzi be awarded the portion he claims from Edward Mulandi Kavanda and get issued with a new number, that during the hearing of the Appeal to the Minister, both parties were to avail evidence that they wished to rely on before the Deputy County Commissioner, Makueni sub-county, that the Respondent requested for an adjournment in order to present his evidence and he was granted time to do so, that the Deputy County Commissioner, Makueni sub-county heard the matter on the ground and went ahead to determine the matter based on the testimony of the parties and witnesses as no evidence had been presented by the Respondent as he had intimated, that the said judgment was forwarded to the Cabinet Secretary, Ministry of Lands, Housing and Urban Development who in turn forwards (sic) the same to the Chief Land Registrar, and later on to the District Land Registrar for implementation, that the Cabinet Secretary, Ministry of Lands, Housing and Urban Development noted an error in the judgment and forwarded it back to the Deputy County Commissioner, Makueni sub-county for correction and also ordered that the amended judgment be read again to the parties, that summon letters **Ref: G.69 VOL.1 (248)** of 16<sup>th</sup> November, 2018 were issued by area Assistant Chief Kyamwalye Sub Location to both parties Appellant and Respondent to appear before the Deputy County Commissioner on 30<sup>th</sup> November, 2018 at 9:00 am but all failed to turn up on the material day, that the parties presented themselves a week after on 30<sup>th</sup> December, 2018 whereby a meeting was convened and the parties were informed the reasons why they had been summoned, that the amended judgment of case no.289 of 2009 heard on 25<sup>th</sup> May, 2017 and determined, was read to them again whereby the findings were that the Appellant in presence of the Respondent was ordered to refund amounts totaling to a tune of Kshs.42,466 (Kenya shillings Forty-Two thousand Four Hundred and Sixty-Six) to the Respondent within 30 days, that the name Leakey Mulonzi, the Respondent to be replaced with that of the Appellant Edward Mulandi, that the Respondent has the option of suing the Appellant for breach of agreement if the refund of Kshs.42,466/= is not adequate and/or acceptable to him, that the 4<sup>th</sup> Respondent accorded all parties a fair hearing and made a determination based on the testimonies of both parties and their witnesses, that the 4<sup>th</sup> Respondent in hearing and determining the appeal to the Minister, followed the laid out procedure of section 29 of the Land Adjudication Act, Chapter 284, Laws of Kenya, that the Petition is misconceived, mischievous and an abuse of the court process, that the Petition lacks merit and same should be dismissed with costs to the 4<sup>th</sup> Respondent.

11. In rejoinder, the 1<sup>st</sup> Petitioner deposed in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20 and 21 that in response to the affidavit sworn by the 4<sup>th</sup> Respondent, he wished to depone as follows; that the averments made by the Respondent in paragraph 2, 3, 4, 5, 6, and 7 of the Replying Affidavit are admitted in so far as they merely provide a background to the current suit, that in response to paragraph 8 of the Replying Affidavit, he reiterated the fact that the original documents to be tendered as evidence were handed over to the Land Adjudicating Officer and efforts to trace the same at the offices of the Land Adjudicating Officer were not successful. The existence of the original sale agreement however, can be gleaned from the proceedings of the Land Adjudication Board where it is quoted as having been furnished at the hearing, that in response to paragraph 9 of the Replying Affidavit, he wished to reiterate the contents of paragraph 6, that he is not privy to the information contained in paragraph 10 of the Replying Affidavit and put the Respondent to strict proof thereof, that in response to paragraph 11 of the Replying Affidavit, the contents thereof are denied in toto as it was their uncle Mr. Daniel Mutuku Ngovi who wrote to the Director of Land Adjudication after realizing the error apparent on the face of the judgment issued, that the contents of paragraph 12 of the Replying Affidavit are denied in toto and the Respondent put to strict proof thereof. He further reiterated that he and his uncle turned up for the judgment in conformity with the summons but were told that the Deputy County Commissioner was not available as she had gone to another function, that in response to paragraph 13 of the Replying Affidavit, the contents therefore are admitted in so far as the judgment was read out on 30<sup>th</sup> December, 2018, that the contents of paragraph 14 and 15 of the Replying Affidavit are denied as the

judgment as quoted by the deponent is erroneous. The amended judgment should have reflected the correct position as was decided by the Land Adjudication Officer and further buttressed by the dismissal of the case by the 1<sup>st</sup> decision of the Deputy County Commissioner. The error of the 1<sup>st</sup> decision was that it stipulated the deletion of the names of Leakey Mulonzi from the register and replacement with that of Edward Mulandi as opposed to the other way round, that in response to Paragraph 16 of the Replying Affidavit, he stated that this was not a contractual dispute but a dispute as to ownership of land. Therefore, the deponent should appreciate the fact that he is not interested in monetary compensation but rather, to safeguard their interests over the suit property as established by law, that the contents of paragraph 19 of the Replying Affidavit are denied in toto as a fair hearing also extends to justness in the delivery and implementation of the decision of the Court/Tribunal/Board. In this case, the decision issued was erroneous, the Respondent refused/neglected to expeditiously review the judgment thus interfering with his right under the Constitution to fair Administrative Action, that the contents of paragraph 20 of the Replying Affidavit are false and denied in toto. The judgment by the Deputy County Commissioner who heard the case, Mr. Wangombe Kavuyu, and the amended judgment by the 4<sup>th</sup> Respondent, are not consistent. While the former dismissed the appeal and ordered the Appellant to further pay Kshs.1400 to the Respondent, the later allowed the appeal and gave a different figure to be paid to the Respondent. The most important aspect to the decision is the judgment and not the obiter dicta, that further to the above, the Appeal was lodged by the Appellant out of time in contravention of Procedural Law that stipulates the timelines set by Statute have to be followed. The Appellant appealed after the 60 days set out in section 29 of the Land Adjudication Act, that he denies the contents of Paragraph 21 & 22 of the Replying Affidavit and puts the deponent to strict proof thereof, that in response to the Affidavit sworn by Karen Kemunto Nyakundi, he deponed that; the contents of paragraph 3 & 4 are admitted, that the averments in paragraph 5 & 6 of the replying Affidavit are denied and the Deponent put to strict proof thereof

12. The Petition was canvassed by way of written submissions.

13. In his submissions, the Counsel for the Petitioners framed the following 6 issues: -

***i) Whether the Petitioners have a cause of action against the Respondents and whether the Deputy County Commissioner acted within his powers as set out in section 29 of the Land Adjudication Act.***

***ii) Whether the Petitioners have utilized the statutory mechanism provided for in the Land Adjudication Act.***

***iii) Whether it is mandatory to refer disputes to ADR as per Article 159(2) of the Constitution of Kenya 2010.***

***iv) Whether executive privilege exists in this case and the implication thereof as far as section 34 of the Land Adjudication Act is concerned.***

***v) Whether the Appeal to the Minister was lodged out of time and the consequences thereof.***

***vi) Whether the judgment issued by the Deputy County Commissioner on 28<sup>th</sup> December, 2017 and the judgment amended on the 10<sup>th</sup> September, 2018 were contrasting and the consequences thereof.***

14. In answer to the issue of whether the 4<sup>th</sup> Respondent acted within her powers delegated by the Minister under section 29 of the Land Adjudication Act, chapter 284 of the Laws of Kenya, the Counsel for the Petitioner submitted that the 4<sup>th</sup> Respondent failed to accord the Petitioners a fair hearing as is provided for under Article 47 of the Constitution as well as the Fair Administrative Action Act No.4 of 2015 (*emphasis mine*). The Counsel added that the 4<sup>th</sup> Respondent failed/neglected/refused to allow the request that the Adjudication Officer Ikalyoni Adjudication section do avail the sale agreement that he had relied on in his determination. It was also submitted that the 4<sup>th</sup> Respondent disregarded the existence of the sale agreement in her decision.

15. On whether or not the Petitioners have utilized the statutory mechanism provided for in the Land Adjudication Act, the answer by the Counsel was in the positive.

16. As to whether the Petitioners should have pursued Alternative Dispute Resolutions (ADR) mechanisms provided for under Article 159(2) of the Constitution, the Counsel was of the view that ADR should not be imposed upon an unwilling party unless there are compelling reasons for doing so.

17. On the issue of whether section 34 of the Land Adjudication Act shields the 4<sup>th</sup> Respondent and the Land Adjudication Officer, the Counsel submitted that the Petition is not brought against the Respondents in their personal capacity.

18. On whether the appeal to the Minister was lodged out of time and further whether the judgments dated 28<sup>th</sup> December, 2017 and 10<sup>th</sup> September, 2018 contradicted each other, the Counsel submitted that the appeal was filed out of the 60 days window period provided for under the Land Adjudication Act. The Counsel went on to submit that the Act does not provide for discretion on the Minister to enlarge time for filing an appeal out of time. The Counsel pointed out that the appeal was filed 5 years after the determination by the Arbitration Board. The Counsel further submitted that the Minister's judgment issued on the 10<sup>th</sup> September, 2018 had material diversion from the one dated 28<sup>th</sup> December, 2017 and that the parties were not given a chance to make an input on the latter judgment.

19. The Counsel for the Respondents framed three issues for determination. These were: -

***i) Whether the Decision by the Deputy County Commissioner, Makueni Sub-County should be quashed and the proceedings commence afresh?***

**ii) Whether the Petitioners are entitled to the orders sought?**

**iii) Whether the Petition on its own can resolve the question of ownership?**

20. Regarding the first issue, the Counsel submitted that the Petition has been filed prematurely since the decision of the 4<sup>th</sup> Respondent in the Minister's Appeal No.289 of 2009 has not yet been upheld by the Cabinet Secretary, Ministry of Lands, Housing and Urban Development and that the same cannot be quashed nor set aside.

21. The Counsel further submitted that the 4<sup>th</sup> Respondent did not exceed her jurisdiction nor did she abuse the statutory provisions of the Land Adjudication regarding rules of natural justice while discharging her duties as alleged by the Petitioners.

22. On whether or not the Petitioners are entitled to the orders sought, the Counsel for the Respondent submitted that the 4<sup>th</sup> Respondent delivered the ruling in the appeal to the Minister twice after it was pointed out to her that the findings and the decision in the initial ruling were not in cohesion. The Counsel added that the initial ruling stated that the Appellant should refund money to the Respondents which they claim was paid by their late father and that the suit property to be registered in the name of the Appellant. The Counsel pointed out that the initial ruling made a finding in favour of the Appellant but dismissed his appeal and that the only amendment made by the 4<sup>th</sup> Respondent in their second ruling was to allow the appeal since the findings made in the initial ruling were made in favour of the Appellant.

23. The Counsel urged the court not to interfere with the exercise or discretion which has been conferred on a body unless it has been exercised in a way which is not within its jurisdiction or unreasonably.

24. It was further submitted that the Petitioners are not entitled to the orders sought as the same are not merited and that the Petitioners have not demonstrated in any way that the decision making process was not justified as they were given a fair hearing by the 4<sup>th</sup> Respondent.

25. On whether the Court can resolve the issue of ownership, the Counsel submitted that the appeal before the 4<sup>th</sup> Respondent was for purposes of resolving the ownership of land parcel No.Makueni/Ikalyoni/2148.

26. It was also submitted that the Petitioners did not enjoin the Appellants in the Minister's appeal. The Counsel pointed out the latter have an equal right to be heard in this suit and that making a decision in the absence of joinder of this party would amount to violating their constitutional rights under Article 51 of the Constitution.

27. The Counsel cited paragraph 34 of the judgment in **Misc. Application No.504 of 2003 Republic vs. Permanent Secretary of Public Works & Housing [2014] eKLR** where it was held;

*"..... in this case even if I were to grant the orders sought herein, the issue of validity of the applicant's title would remain unresolved. In my view, that issue ought to be determined before a proper forum in which viva voce evidence will be taken so that appropriate declaratory orders can be made and the matter brought to finality. To grant the reliefs sought without determining the ownership of the suit land would in my view be an exercise in futility."*

28. The Respondents relied on the cases of **Republic vs. The Permanent Secretary Ministry of Public Works & Housing Ex-Parte Tom Maliachi Sitima [2014] eKLR, Speaker of The National Assembly vs. James Njenga Karume [1992] eKLR, Patrick Kariungi v. The Commissioner of Police & Another [2014] eKLR, Republic vs. Judicial Service Commission Ex-Parte Pareno [2004] eKLR, Republic vs. Attorney General & 2 others Ex-Parte Onesmus Wambua Kasivo [2014] eKLR, Municipal Council of Mombasa vs. Republic & Another [2002] eKLR.**

29. Having read the Petition, the Respondents grounds of opposition as well as the replying affidavits by the 3<sup>rd</sup> and the 4<sup>th</sup> Respondents, I wish to state at the outset that even though the Petitioners have indicated that the Petition is brought pursuant to the provisions of Articles 2, 3, 10, 19, 20, 21, 22, 23(3), 27, 28, 35, 40, 47, 48, 50(1), 60(1)(b), 159, 162(2)(b), 165, 258 & 259 of the Constitution, a reading of the above articles together with sections 4, 7, 8, 9, 10 and 11 of the Fair Administrative Action Act No.4 of 2015 shows that the Petition is in effect a judicial review application. And even if one were to take it that it is a constitutional Petition as it is headed, it cannot amount to a constitutional reference and therefore it was not necessary to invoke the provisions of Article 258. Be that as it may, the Petitioners herein have complained of alleged contravention of their rights and fundamental freedoms under chapter four of the Constitution which provides for the Bill of Rights.

30. The Petitioners main complaint is that they were not given a chance to make their input before the 4<sup>th</sup> Respondent made the amendments in her judgment dated 10<sup>th</sup> September, 2018 which contrasted her judgment dated 25<sup>th</sup> May, 2017. They allege that they were not given a fair hearing and the Respondents and particularly the 4<sup>th</sup> Respondent did not observe rules of natural justice in arriving at the decision. The Petitioners further allege that the Land Adjudication Officer and the 4<sup>th</sup> Respondents ignored their pleas to produce the original sale agreement between their late father and the late Edward Mulandi concerning the suit property being reference number Makueni/Ikalyoni/2148 in a manner that was expeditious, efficient, lawful, reasonable and procedurally fair.

31. The Petitioners further allege that the 4<sup>th</sup> Respondent though referred to as the Arbitration board, the appeal before the Minister being case No.289/2009 was filed outside the 60 days window period provided for under Section 29 of the Land Adjudication Act, chapter 284 of the Laws of Kenya.

32. A perusal of the proceedings annexed by the Petitioners herein shows that the Respondents were given a hearing by both the Land Adjudication Officer and the Minister notwithstanding the amendments that were carried out by the Minister (4<sup>th</sup> Respondent) in her

judgment dated 10<sup>th</sup> September, 2018 which amended the judgment dated 25<sup>th</sup> May, 2017. The Petitioners therefore cannot be heard to accuse the Respondents of failing to follow rules of natural justice and also not being afforded the chance to make their input before the determination was made by the Respondents and particularly the 4<sup>th</sup> Respondent. Be that as it may, the determination by the Land Adjudication was made on the 26<sup>th</sup> March, 2004 while the appeal to the Minister was filed in the year 2009 based on the case file number. That being the case, it seems to me that the 4<sup>th</sup> Respondent acted in excess of jurisdiction conferred upon her by section 29 of the Land Adjudication Act. I say so because appeals to the Minister ought to be filed within 60 days. I see no justification for the 4<sup>th</sup> Respondent's decision to entertain the appeal 5 years after the determination of the Arbitration Board was made. Further, the 4<sup>th</sup> Respondent ought to have taken cognizance of the fact the suitland had been registered in the joint names of the Petitioners and green cards issued in their favour. The 4<sup>th</sup> Respondent also ought to have taken into consideration as to whether or not she had the jurisdiction to order for the cancellation of registration of the suit property before she proceeded with hearing the appeal because that is what she effectively did in her judgement. Had she taken this issue into consideration, she could have decided whether or not the dispute ought to have been referred to a civil court for determination.

33. From the affidavit of the 3<sup>rd</sup> Respondent, herein, and particularly paragraph 3 thereof, it emerges out that the interests of the Petitioners and those of Julius Kiiio Mulandi, the son of the late Edward Mulandi Kavanda had been determined and hence the registration of Land parcel number Makueni/Ikalyoni/2148 in the joint names of the Petitioners herein. Having been so determined, it was upon the parties to move the court over the issue of ownership of the suit property. The filing of the Petition shows that there is dispute over ownership of the said parcel of land. That dispute cannot be decided in this Petition where evidence was adduced by way of affidavits. It would require the filing of a civil suit where viva voce evidence would be adduced and witnesses cross-examined and re-examined. In the circumstances, it would be inappropriate to grant the orders sought in the petition.

34. It also emerges out that the said Julius Kiiio Mulandi was not enjoined in this Petition though he clearly has an interest in the said land parcel number Makueni/Ikalyoni/2148. It would be unfair and unjust for this Court to issue the declaratory orders sought by the Petitioners without affording the said Julius Kiiio Mulandi and any other person who may have an interest in the suitland which is the subject of this Petition the chance to be heard. It is for this reason that I agree with the Respondents that the Petition herein is premature. It should be noted that none of the parties to his Petition is innocent of blameworthiness and in the circumstances, it is only fair and just that each party should bear their own costs. Consequently, I hereby proceed to dismiss the Petition with an order that each party bears their own cost.

**Signed, Dated and Delivered at Makueni via email this 22<sup>nd</sup> day of December, 2020.**

**MBOGO C. G.,**

**JUDGE.**

Mr. Munyao – Court Assistant