



**M'Maraa & another (Suing on behalf and in their capacity as officials and representatives of Mwokamu Saba Self Help Group) v District Land Adjudication and Settlement Officer, Igembe North & 4 others (Environment and Land Case E005 of 2025) [2025] KEELC 6652 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6652 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND CASE E005 OF 2025**

**JO MBOYA, J  
OCTOBER 3, 2025**

**BETWEEN**

**SAMWEL M'MARAA AND JOSEPH RWITO MUNGANIA (SUING ON ON BEHALF AND IN THEIR CAPACITY AS OFFICIALS AND REPRESENTATIVES OF MWOKAMU SABA SELF HELP GROUP) ..... PETITIONER**

**AND**

**THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, IGEMBE NORTH ..... 1<sup>ST</sup> RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER MUTUATI SUB-COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING ..... 3<sup>RD</sup> RESPONDENT**

**JOSHUA KAUNYANGI M'ACIITA ..... 4<sup>TH</sup> RESPONDENT**

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

**JUDGMENT**

1. The Petitioner[s] herein mounted the instant suit vide a Petition dated 4<sup>th</sup> April 2025; seeking the following orders [reliefs]:
  - i. A declaration that the decision of the 2<sup>nd</sup> respondent made on 28<sup>th</sup> February 2025 in appeal case number 276 of 2023 in respect to parcel number 8226 formerly parcel number 2196 violates



the provisions of article 10, 40, 47, 48 and 159 (2) and (3) of the constitution and therefore is null and void.

- ii. An order of certiorari do issue to bring into this court and quash the decision and findings of the 2<sup>nd</sup> respondents in the appeal to the minister case number 276 of 2023 delivered on the 28<sup>th</sup> February 2025.
  - iii. An order of prohibition to issue against the respondents, prohibiting them from implementing or enforcing the offensive recommendations and the decision contained in the proceedings of the appeal to the minister NO. 8226 of 2023 made on the 28<sup>th</sup> February 2025 in relation to parcel No. 8226 Naathu B Adjudication Section formerly 2196 Naathu B Adjudication Section.
  - iv. A declaration that parcel number 8226, formerly parcel number 2196 belongs to the petitioners.
  - v. General damages for the violation of the petitioner's right and fundamental freedoms.
  - vi. Costs of this petition.
2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents [through the Honorable Attorney General] opposed the petition vide replying affidavit sworn on 12<sup>th</sup> May 2025 and wherein same [the named respondents] contended that the petition beforehand was prohibited by the doctrine of res judicata; constituted an abuse of due process of court; and failed to disclose the violations/ infringements [if any] with the requisite particularity. Furthermore, the named respondents contended that the petition beforehand failed to meet the established threshold in the manner espoused in the Annarita Karimi Njeru case.
  3. The 5<sup>th</sup> respondent filed a replying affidavit sworn on 23<sup>rd</sup> June 2025 and wherein the same provided a chronology of the facts underpinning the dispute. Moreover, the 5<sup>th</sup> respondent highlighted the circumstances leading to the subdivision of Plot No. 2196 NATHU B adjudication Section. For coherence, the 5<sup>th</sup> respondent clarified that the suit property arose from the decision of the land adjudication officer [ the 1<sup>st</sup> respondent] upon the hearing and determination of the objection proceedings.
  4. Additionally, the 5<sup>th</sup> respondent has averred that following the delivery of the decision by the 1<sup>st</sup> respondent, the petitioners herein felt aggrieved and thereafter filed proceedings vide meru ELC JR No. E003/2024; and which judicial review proceedings were heard and disposed off by this court [differently constituted]. Furthermore, it has been posited that the judicial review proceedings were allowed; the decision of the minister was quashed and the matter was remitted to be heard de-novo by the 2<sup>nd</sup> respondent. Moreover, it was posited that the 2<sup>nd</sup> respondent duly notified the parties, namely; the petitioners and the 5<sup>th</sup> respondent of the scheduled date of the hearing.
  5. The subject petition came up for directions on the 25<sup>th</sup> June 2025; whereupon the advocates for the parties covenanted to dispose off the petition on the basis of affidavit evidence and written submission. To this end, the court proceeded to and issued directions pertaining to the filing and exchange of written submissions.
  6. The petitioner filed two [2] sets of written submissions dated 10<sup>th</sup> July 2025 and 23<sup>rd</sup> July 2025, respectively; and wherein the petitioners have highlighted four [4] salient issues for consideration by the court. The issues highlighted by the petitioners are namely; that the 2<sup>nd</sup> respondent was biased in his decision and thus the impugned decision is fraught with illegality; the petition is not barred by the



- doctrine of res judicata; the petitioner has satisfied the threshold for a constitutional petition; and the petitioner has established and proved the breaches/ violations complained of.
7. Regarding the first issue, learned counsel for the petitioner has submitted that upon the delivery of the decision of the court vide Meru ELC JR No. 3 of 2024, the court ordered that the appeal to the minister be reheard. To this end, it has been posited that the appeal thereafter reverted to the 2<sup>nd</sup> respondent who was obligated to rehear the appeal; and make a determination in respect thereof.
  8. In addition, it has been submitted that the appeal indeed reverted to the 2<sup>nd</sup> respondent, who thereafter notified the petitioner and the 5<sup>th</sup> respondent of the date for rehearing of the appeal. In particular, it has been submitted that the parties were notified that the appeal was to be heard on 26<sup>th</sup> February 2025; however, learned counsel for the petitioners has submitted that when the parties appeared before the 2<sup>nd</sup> respondent same declined to conduct a rehearing of the appeal.
  9. On the contrary, it has been submitted that the 2<sup>nd</sup> respondent intimated to the parties that same was not going to take fresh evidence but would proceed on the basis of proceedings on record and thereafter render a determination.
  10. Furthermore, it has been submitted that the 2<sup>nd</sup> respondent commissioned a site visitation on 28<sup>th</sup> February 2025 and upon visiting the site [locus in quo] the 2<sup>nd</sup> respondent proceeded to and rendered a determination. In this regard, it has been submitted that the decision which was rendered by the 2<sup>nd</sup> respondent appeared to have been pre-meditated/ pre-conceived; and hence same was wrought with bias. In addition, it has been submitted that the manner in which the 2<sup>nd</sup> respondent conducted the proceeding and thereafter rendered the decision on the same date of visitation to the locus on quo demonstrates biasness, lack of impartiality and procedural impropriety.
  11. Additionally, it was submitted that by failing to conduct fresh hearing and take evidence from the parties, the 2<sup>nd</sup> respondent denied and or deprived the petitioners of their entitlement to fair hearing; and breached the Rules of Natural Justice. To this end, it has been posited that the petitioners right to fair administrative action was breached/ infringed.
  12. Other than the forgoing, learned counsel for the petitioners has also submitted that the 2<sup>nd</sup> respondent also proceeded to adopt and duplicate the proceedings that were undertaken before the 1<sup>st</sup> respondent and thus failed to exercise his mind to the various facts, including the evidence that had been tendered before the objection tribunal, showing that it is the Petitioners who have been using the disputed Land.
  13. Arising from the foregoing, learned counsel for the petitioner has therefore contended that the manner in which the 2<sup>nd</sup> respondent conducted the proceeding[s], rendered the decision; and disregarded crucial evidence demonstrates bias; and partiality.
  14. Secondly, learned counsel for the petitioners has submitted that the petition beforehand is not barred and or prohibited by the doctrine of res judicata. In particular, it has been submitted that the judicial review proceedings vide Meru JR E003 of 2024 touched on and concerned the decision of the deputy county commissioner Igembe North; whereas the current proceedings relates to the decision of the deputy county commissioner Mututi Sub-County.
  15. Furthermore, it has been submitted that the current proceedings touch on and concern the decisions of the 2<sup>nd</sup> respondent which were made on 28<sup>th</sup> February 2025; and which are separate and distinct from the proceedings which were the subject of the previous suit namely; Meru ELC JR E003 of 2024.
  16. The other issue that has been canvassed by learned counsel for the petitioners turns on whether the constitutional petition meets/ satisfies the threshold of reasonable precision in terms of highlighting



the provisions of *the constitution* which have been infringed upon; the persons accused of breaching same; and the manner of breach. In this regard, it has been submitted that the petition beforehand complies with the provisions of Rule 10 of the Mutunga Rules. Further and in addition, it has been submitted that the petition has espoused and highlighted the manner in which the 2<sup>nd</sup> respondent breached and violated the petitioners' rights.

17. Moreover, it has been submitted that the petitioners have captured/ espoused incidents of biasness; lack of impartiality; and failure to afford the petitioners an opportunity to be heard. In this regard, it has been submitted that the petition meets and satisfied the rule of precision as espoused in the case of Anna Rita Karimi Njeru.
18. Turning to the fifth issue, learned counsel for the petitioners have submitted that the petitioner[s] have placed before the court plausible; compelling and credible evidence to demonstrate the breaches complained of. In particular, learned counsel has submitted that the 2<sup>nd</sup> respondent adopted and duplicated the proceedings of the 1<sup>st</sup> respondent; failed to hear the petitioners; acted without due regard to impartiality; and failed to properly appraise the totality of the evidence before him.
19. Flowing from the foregoing, it has been submitted that the petitioners have established the breaches/ violations on a balance of probabilities. To this end, learned counsel for the petitioners have invited the court to find and hold that the petition beforehand is meritorious.
20. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents [through the Attorney General] filed written submissions dated 22<sup>nd</sup> July 2025 and wherein same have highlighted and canvassed three [3] salient issues for consideration. The issues highlighted by the Honorable Attorney General are namely; whether the petition is barred by the doctrine of res judicata; whether the petitioners have satisfied the precision threshold required of a constitutional petition and whether the petitioners have established the infringement/ violations complained of or otherwise.
21. Regarding the first issue, the Honorable Attorney General has submitted that the petitioners herein had filed previous proceedings vide Judicial Review E004 of 2024 and which matter was heard and determined by this court[ differently constituted]. Furthermore, it has been submitted that the determination vide the said judicial review proceedings constitute a bar to the filing and prosecution to the instant petition. Simply put, the Honorable Attorney General contends that the subject petition is therefore barred by the doctrine of res judicata; and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
22. To buttress the following submission[s]; the Honorable Attorney General has cited and referenced the decision in the case of Kenya Commercial Bank versus Benjoe amalgamation limited 207 KECA and IEBC Versus Maina Kiae and 5 others 2017 eKLR, respectively.
23. In respect of the second issue, the Honorable Attorney General has submitted that following the conclusion of the adjudication process, the adjudication officer prepared the register in respect of plots No. 2193, 2194 and 2196 and thereafter, the register was published in the manner provided under the law. Furthermore, it has been submitted that upon the publication of the adjudication register, various objections were lodged, namely; objection[s] Nos. 89, 90 and 91, respectively.
24. In addition, it has been submitted that the said objections that were filed were thereafter heard and determined by the 1<sup>st</sup> respondents herein. Furthermore, it has been submitted that following the determination of the objections, the petitioners herein filed the judicial review proceedings, namely; ELC JR 004 of 2024, which was heard and determined. Besides, it has been submitted that upon the hearing of the said JR proceedings, the matter was remitted to the 2<sup>nd</sup> respondent for rehearing. To this



- end, the Honorable Attorney General has submitted that the appeal was reheard in accordance with the provisions of section 29 of the *Land Adjudication Act*.
25. Based on the foregoing, the Honorable Attorney General has submitted that the 2<sup>nd</sup> respondent followed and complied with the prescribed procedure in the hearing and determination of the appeal. Moreover, it has been submitted that the 2<sup>nd</sup> respondent did not breach; infringe upon; and or violate the rights of the petitioners, either as alleged or at all.
  26. Turning to the third issue, the Honorable Attorney General has submitted that the petition before hand is deficient and thus defective for non-compliance with the rule of reasonable precision. In particular, it has been submitted that it behooved the petitioner to plead with particularity the provisions of *the constitution* which are alleged to have been violated; the persons contended to have violated the named provisions and the manner of the violations of the alleged violations. However, it has been posited that the petition beforehand is lacking in material particulars and thus same does not meet the threshold required of constitutional petitions.
  27. To buttress the foregoing submissions, the Honorable Attorney General has referenced inter alia the holding of Anna Rita Kirimi Njeru versus Republic; Bernard Murage versus Fine serve Africa Limited and 3 others 2015 Eklr and Consumer Federation of Kenya versus Toyota Motors Corporation and 4 others High court petition 455 of 2018[unreported].
  28. Arising from the foregoing, the Honorable Attorney General has submitted that the petition beforehand is therefore bereft of merits; and same ought to be dismissed with costs.
  29. The 5<sup>th</sup> respondent filed written submissions dated 22<sup>nd</sup> July 2025; and wherein same has highlighted three [3] key issues, namely; whether the decision of the 2<sup>nd</sup> respondent was arrived at in the manner envisaged by the law; whether the petitioners have demonstrated any constitutional violations and whether the petition is merited as against the 5<sup>th</sup> respondent or otherwise.
  30. Regarding the first issue, learned counsel for the 5<sup>th</sup> respondent has submitted that the 2<sup>nd</sup> respondent herein heard and disposed off the appeal in accordance with the powers conferred upon him by dint of the powers conferred by provisions of section 29(4) of the Land Adjudications Act Chapter 284 Laws of Kenya. In particular, it was submitted that the 2<sup>nd</sup> respondent was not obligated to conduct a fresh hearing by calling and taking fresh evidence. On the contrary, it has been posited that the 2<sup>nd</sup> respondent was enjoined to review the existing records; proceeding[s]; undertake site visit [where necessary] and to evaluate available evidence and thereafter arrive at a considered decision.
  31. To this end, learned counsel for the 5<sup>th</sup> respondent has submitted that the manner in which the 2<sup>nd</sup> respondent conducted the proceedings was lawful and complied with the statutory provisions in terms of section 29 of the *Land Adjudication Act*.
  32. Regarding the second issue, learned counsel for the 5<sup>th</sup> respondent has submitted that though the petitioners have contended that the 2<sup>nd</sup> respondent was biased, same has neither particularized the incidence of biasness and neither have the petitioners tendered plausible; and compelling evidence to demonstrate biasness.
  33. Furthermore, it has been submitted that the petitioners have also failed to demonstrate the procedural impropriety and or irregularity which was committed by the 2<sup>nd</sup> respondent. In any event, it has been submitted that the 2<sup>nd</sup> respondent complied with the law and thereafter rendered a decision based on the existing record; Grounds of appeal; and available evidence.
  34. For good measure, it has been posited that the fact that the petitioners do not agree with; or aggrieved by the decision does not by and in itself amount to, or constitute bias.



35. The third issue that has been canvassed by learned counsel for the 5<sup>th</sup> respondent touches on whether the petitioners have established the complaints highlighted and averted to at the foot of the petition. In this regard, it has been submitted that the petitioners have failed to discharge the burden of proof. Further and in any event, it has been posited that the petition herein is a disguised appeal wherein the petitioners are seeking to re-open the factual findings and conclusions of the 2<sup>nd</sup> respondent.
36. In a nutshell, learned counsel for the 5<sup>th</sup> respondent has submitted that the petition before hand is not only premature and misconceived, but same is bereft of merit[s]. Furthermore, it has been posited that the petitioners have not proven/ established any breach/ infringement of their fundamental freedom[s] to warrant the intervention of the court.
37. Having reviewed the petition; supporting affidavit; the responses on behalf of the respondents and upon taking into account the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on three [3] key issues; namely; whether the subject petition is prohibited by the doctrine of res judicata; whether the 2<sup>nd</sup> respondent breached or violated the petitioners' constitutional rights or otherwise; and whether the 2<sup>nd</sup> respondent was biased [ if at all] against the petitioners.
38. Regarding the first issue, it is imperative to recall and reiterate that the Honorable Attorney General has contended that the petitioners herein had previously filed Meru ELC JR No. E004 of 2024 and wherein the petitioners impugned the decision of the Deputy County Commission- Igembe North Subcounty touching on appeal case No. 2876 of 2023. Furthermore, it was submitted that the said judicial review proceedings were heard and determined, culminating into an order remitting the appeal case for re-hearing before the 2<sup>nd</sup> respondent herein.
39. It was contended that pursuant to the orders/ judgment of the court rendered vide Meru ELC JR E004 of 2024, the 2<sup>nd</sup> respondent proceeded to and reheard the appeal in question.
40. Additionally, it has been submitted that the current proceedings seek to impeach the proceedings and the decision of the 2<sup>nd</sup> respondent arising from the rehearing of the appeal. In this regard, the Honorable Attorney General has contended that the subject matter touches on and concerns the same dispute and same parties. In addition, it has been posited that the matter was heard and determined by a court of competent jurisdiction.
41. Arising from the foregoing, the Honorable Attorney General has implored the court to find and hold that the subject proceedings [petition] is prohibited by the doctrine of res judicata; and by extension, the provisions of section 7 of the *Civil Procedure Act*.
42. I beg to state that even though the petitioners had previously filed Meru ELC JR No. E004 of 2024, and JR E003 of 2024, the said proceedings touched on and concerned the decision of deputy county commissioner, Igembe North Sub-County; rendered on 13<sup>th</sup> March 2024. It is the said decision that was quashed by the court differently constituted and thereafter culminating into the Ministerial Appeal being reverted for re-hearing.
43. Moreover, it is not lost on me that following the quashing of the decision by the deputy county commissioner, Igembe North which was rendered on 13<sup>th</sup> March 2024, the Court [differently constituted] directed appeal case No. 276 of 2023 to be reheard before the 2<sup>nd</sup> respondent herein. For good measure, the current proceedings relate to and concern the decision of the 2<sup>nd</sup> respondent rendered on 28<sup>th</sup> February 2025.



44. To my mind, there is no way that the Judicial review proceedings namely; Meru ELC JR No. E003 of 2024 and No. E004 of 2024 could have concerned and dealt with the decision which was not in existence at the point in time. Quite clearly, the JR proceedings which have been referenced by the Honorable Attorney General did not touch on and concern the same matter/ dispute. Suffice it to state that the Parties maybe the same, but the issue[s] in dispute are separate and distinct. The Decision maker is also different.
45. I am clear in my mind that though the parties in respect of the subject matter may substantially be same, the decision that is sought to be impeached is not same. Moreover, the nature of complaints; and allegations are not the same. In this regard, I am afraid that the plea of res judicata cannot be invoked and deployed to defeat the subject petition.
46. Furthermore, it is common ground that before the plea of res judicata can be sustained and or upheld, the claimant is obligated to satisfy the various ingredients espoused by sec 7 of the Civil Procedure Act. Notably, the ingredients must be satisfied sequentially; and conjunctively. This means that it must be demonstrated that each and every ingredient exists in the matter before the court can proceed to decree res-judicata.
47. In the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR; the Court of Appeal expounded on the doctrine in the following manner,

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR they rendered the elements as;

- “(a) the former judgment or order must be final;
- (b) The judgment or order must be on merits;
- (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- (d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an



endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.[Underlining Supplied].

48. The plea of res judicata and the necessity to prove/ establish the requisite ingredients underpinning same was re-visited and expounded by the Supreme Court of Kenya in the case of John Florence Maritme Services Limited versus Cabinet Secretary Transport, Infrastructure and Public Works 2021 eKLR, where the court stated thus[ Paragraphs 57, 58 and 59].
49. Turning to the second issue, namely; whether the 2<sup>nd</sup> respondent violated/ infringed upon the petitioners' constitutional rights and Fundamental Freedoms or otherwise, it is important to highlight that the 2<sup>nd</sup> respondent was commanded by the court to rehear the appeal, namely; appeal No. 276 of 2023 which had been filed by the petitioners.
50. Pursuant to orders of the court, the 2<sup>nd</sup> respondent proceeded to and undertook the rehearing exercise in accordance with the provisions of section 29(4) of the *Land Adjudication Act*. It is instructive to underscore that the 2<sup>nd</sup> respondent was hearing an appeal and not conducting a fresh hearing or trial. Furthermore, it is worthy to posit that in the process of hearing the appeal, the mandate of the 2<sup>nd</sup> respondent is circumscribed under the law. For coherence, the hearing of an Appeal before the Minister takes a near-similar trajectory like the hearing of an appeal before an Appellate Court.
51. I hasten to state that though the 2<sup>nd</sup> respondent was at liberty to call for further evidence, such further evidence could only be called for to clarify an area which was not adequately covered by the land adjudication officer. However, it suffices to posit that the mandate of the 2<sup>nd</sup> respondent is to hear the appeal and to determine same on the basis of the proceedings; and record that had been undertaken by the land adjudication officer. In addition, it behooves the 2<sup>nd</sup> respondent in exercise of its powers under section 29(4) of the *Land Adjudication Act* [supra] to review the proceedings of the land adjudication officer; the decision arrived at; the grounds of appeal filed and the applicable law, namely; the provisions of the *Land Adjudication Act*.
52. It is also instructive to highlight that the 2<sup>nd</sup> respondent while exercising his/her powers under the provisions of section 29(4) of the *Land Adjudication Act* [ which is appellant in nature] cannot arrogate unto himself the powers of the demarcation officer; the appeals board or better still, become a forum of first instance wherein fresh evidence is tendered and or adduced. Suffice it to state that the mandate of the 1<sup>st</sup> respondent is appellate and must therefore be exercised in an endeavor to correct the errors; mistakes; and or misdirection[s] [if any] committed by the land Adjudication Officer in the course of hearing; and determining the Objection proceeding[s].
53. Were it that the 2<sup>nd</sup> respondent were to hear the appeal by calling and taking fresh evidence, it would mean that the 2<sup>nd</sup> respondent is exercising the adjudicative powers of the offices stipulated under the adjudication act. Such kind of a scenario would bring the appellate process to disrepute because the 2<sup>nd</sup> respondent would have a free hand to call for, hear and take fresh evidence [including those that were never tendered before the officers below]. I am afraid that is not the trajectory fathomed by; and conceived vide the provisions of Section 29[4] of the LAA.



54. In this regard, I share and reiterate the sentiments of the Learned Judge in the case of Republic v Special District Commissioner & another [2006] KEHC 2698 (KLR) where the court stated as hereunder;

In my view, he should not have ignored the Land Adjudication Officer's lower tribunal's record of evidence and decision. He could however have considered the Land Adjudication Officer's decision and have accepted it or rejected it. But it was improper to have ignored the written grounds of appeal since without them there was seriously no appeal before him as envisaged by Section 29 (1) (a) of the *Land Adjudication Act*. Nor can it be seriously argued that the appellant's appeal was effectively put before that tribunal or argued before it, contrary to the cardinal rule of fairness that an appellant like any party before the court, has a right to put his case before the court, squarely. In conclusion on this issue, this court sees a clear procedure laid down by Section 29 (1) aforesaid to be followed when a District Commissioner is conducting and determining an appeal under the Section. That is to say, that the District Commissioner will receive a written appeal containing grounds of appeal together with the Land Adjudication Officer's record and will then determine the appeal upon those grounds of appeal. It would be unreasonable to think that the Legislature intended that the aggrieved party would file the grounds of appeal to the Minister without those grounds being intended to serve any purpose in helping the District Commissioner arrive at a fair and just decision. In that regard I am aware of the prevailing popular procedure under which the District Commissioner, before he makes his decision, records fresh evidence from the parties and their witnesses. Such procedure has all along been tolerated on the basis that Section 29 (1) aforementioned gives the District Commissioner freedom to use any lawful method to arrive at his decision. While I am not presently prepared to state that the recording of fresh evidence is not authorized by the Act, I am on the other hand clear in my mind that the District Commissioner will not choose to rely on such freshly recorded evidence alone without regard to the grounds of appeal filed by the appellant. That is to say, that the evidence he records should be considered along with the evidence in the District Land Adjudication Officer's records of proceedings and ruling that is appealed from, and on which the grounds of appeal arise. On the other hand, my understanding of Section 29 (1) aforesaid, is that there is no part of that section that authorizes the taking of fresh evidence by the District Commissioner before he arrives at the decision. This means that he has open room to do so and is in fact expected to rely on those records to come to his decision except where he needs particular additional evidence for clarification. I am not for a moment suggesting that the District Commissioner, deciding an appeal under Section 29 of the *Land Adjudication Act*, is bound to follow Civil Procedure Rules or strict rules of evidence as found in ordinary courts of law. Indeed such was clearly ruled out in the case of *Makege versus Ngochi* (Civil Appeal No. 25 of 1978, unreported ) where Law, J.A stated thus:

“But no such duty (as under Section 12 of the Act) 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. His duty, by Section 29 of the Act, is to ‘determine the appeal and make such order thereon as he thinks just’”

55. Back to the subject matter. The petitioner has complained that the 2<sup>nd</sup> respondent summoned the parties and thereafter intimated to the parties that same [2<sup>nd</sup> respondent] was going to review the proceedings of the 2<sup>nd</sup> respondent; consider the grounds of appeal and thereafter make a determination. Furthermore, it has been contended that the 2<sup>nd</sup> respondent posited that same was not going to take fresh evidence from the parties.



56. The petitioners have contended that by failing and or declining to take fresh evidence and in particular, the evidence of the petitioners, the 2<sup>nd</sup> respondent violated the petitioners' rights. I have indicated that the 2<sup>nd</sup> respondent's mandate is appellate in nature and hence same is not obligated to take fresh evidence save in exceptional circumstance[s] where there is need to clarify an aspect of the disputes. Something akin to additional evidence in appeal. For good measure, the 2<sup>nd</sup> respondent is to hear the appeal on the basis of the grounds of appeal; the proceedings; and record of evidence of the land adjudication officer and thereafter make a determination.
57. Arising from the foregoing, the contention by the petitioners that their rights were breached/ violated because same were not allowed to tender fresh evidence does not lie.
58. The other aspect of the complaint that has been mounted is that the 2<sup>nd</sup> respondent conducted a site visit on 28<sup>th</sup> February 2025; and thereafter proceeded to render a decision on even date. In this regard, it has been contended that the 2<sup>nd</sup> respondent had a premeditated; or formed position and decision.
59. I am afraid that the contention beforehand is not meritorious. To start with, the 2<sup>nd</sup> respondent was at liberty to render or deliver a decision either immediately upon the conclusion of the hearing of the appeal or on a date reserved for such delivery. To my mind, the instant delivery of the decision does not by and of itself denote bias; illegality or lack of impartiality. If anything, the provisions of Article 159[2][b] of *the Constitution*, 2010; commands expedition and timeliness.
60. Additionally, the petitioners have also complained that the 2<sup>nd</sup> respondent adopted, duplicated and based his decision on the proceedings of the 1<sup>st</sup> respondent herein and by so doing breached their[ petitioners'] rights. I have pointed out elsewhere herein before that by virtue of exercising an appellate jurisdiction, the 2<sup>nd</sup> respondent's primary responsibility is to consider the Grounds of appeal; review the record of evidence/proceedings recorded during the objection proceedings; review the decision; and consider the relevant provisions of the *Land Adjudication Act*.
61. In this respect, it cannot be said that by adopting, duplicating and reviewing the proceedings of the 1<sup>st</sup> respondent, same [2<sup>nd</sup> respondent] breached the petitioners' rights. I beg to reiterate that the 2<sup>nd</sup> respondent exercises an appellate jurisdiction and just like the appellate courts, the respondent must demonstrate a level of deference to the proceedings and factual findings of the land adjudication officer made during the objection proceedings.
62. Flowing from the foregoing, I am unable to discern any scintilla of evidence to demonstrate breach/ violation of the petitioners' / constitutional rights. Suffice it to posit that it is one thing to allege and another to prove. Moreover, it was incumbent upon the petitioners to place before the court plausible; cogent and compelling evidence demonstrating the infringements complained of [see Dr. Samson Gwer & 5Others versus KEMRI [2020] eKLR-paragraphs 49, 50; and 51 thereof].
63. Next is the issue of bias, namely; whether the 2<sup>nd</sup> respondent was biased as against the petitioners. In this regard, it is imperative to recall that the petitioners have contended that the 2<sup>nd</sup> respondent demonstrated bias as against same and that the bias has colored the decision that was reached and or arrived at. Furthermore, it has been posited that the bias has rendered the decision beforehand illegal and illegitimate.
64. I beg to state that it was incumbent upon the petitioners to plead and particularize bias as a basis for impugning the decision of the 2<sup>nd</sup> respondent. However, it is evident that the question of bias has merely been brought forth by the submissions of the petitioners. For good measure, it is common ground that submissions cannot take the place of pleadings and evidence. In addition, courts of law



are enjoined to determine disputes on the basis of pleadings and evidence. [ See the decision in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Mureithi 2014 eKLR].

65. Finally, and before making a decision as pertains to bias; it is important to take into account the complaints that were impleaded by the petitioners. To this end, it is imperative to highlight that the petitioners herein supplied the particulars, namely; the manner in which their rights are said to have been violated/ infringed.
66. For ease of reference, it suffices it to reproduce the particulars at the foot of paragraph 38 of the petition.
67. The particulars are as hereunder:-
  - i. Failing to re-hear the matter as directed by the Hon. Court by failing to take fresh evidence as the only reason he was rehearing the appeal is because the Deputy County Commissioner Igembe North sub-county who had earlier heard the appeal, lacked jurisdiction.
  - ii. That the 2<sup>nd</sup> respondent proceeded to replicate the decision of the 1<sup>st</sup> respondent as evident in the face of the appeal proceedings at the heading “Appeal to the minister land case No. 276/23 No. 8226” which parcel was created by the decision of the 1<sup>st</sup> respondent despite the appeal having been in respect to parcel number 2196 Naathu B Adjudication section and status quo orders having been issued by the 1<sup>st</sup> respondent pending the hearing and determination of the appeal as such the decision was marred by illegality, bias and procedural impropriety.
  - iii. The 2<sup>nd</sup> respondent, together with the petitioners and the 5<sup>th</sup> respondents, visited the site on the 28<sup>th</sup> February 2025; however, the decision of the 2<sup>nd</sup> respondent is indicated as having been delivered on the same date, a clear indication that the 2<sup>nd</sup> respondent had a pre-determined opinion of the outcome of the dispute and outright bias.
  - iv. That the 2<sup>nd</sup> respondent failed to take into account how the said parcel number 226 came about the same having been subject of the objection proceedings before the 1<sup>st</sup> respondent where the objector was not claiming the entire parcel number 2196 but did not state the acreage or the size of land he was awarding to the objector noting that in his decision, he was relying on the evidence of the beacons shown to him by the 5<sup>th</sup> respondent as such the decision unfair and was not based upon logical proof or evidence material and was ambiguous and unreasonable which caused the petitioner to lodge an appeal to the minister and file a judicial review case.
  - v. That in his findings, the 2<sup>nd</sup> respondent indicates that there are clear, undisputed boundaries and beacons on the ground which is false and illogical as the petitioners and the 5<sup>th</sup> respondent could not have the dispute at hand had the boundaries and beacons to their respective properties had been undisputed.
  - vi. That the 2<sup>nd</sup> respondent did not take into account the petitioners’ evidence that they have been cultivating the land since 1996 and have even raised several complaints and had several demand letters done to pastoralists who have been trespassing on their land parcel number 2196, now known as 8226 Naathu B adjudication section and destroying the crops.
  - vii. That the 2<sup>nd</sup> respondent did not take into account that the then district land adjudication officer vide a letter dated 12<sup>th</sup> May 2005 and the demarcation officer vide a letter dated 17<sup>th</sup> December 2019 confirmed that parcel number 2196, now known as 8226 Naathu B adjudication Section belonged to the petitioners.
  - viii. That the 2<sup>nd</sup> respondent failed to acknowledge that the 5<sup>th</sup> respondent did not have parcel number 2196 now known as 8226 Naathu B Adjudication Section, demarcated to him, neither



did he raise any dispute and/or objection on the ownership of the aforesaid parcel of land at the committee stage and arbitration stage.

- ix. That all attempts by the petitioner to access justice through the provided statutory mechanism have proven futile as the 5<sup>th</sup> respondent, being a member of the land control board has always influenced the decisions of the 3<sup>rd</sup> respondent's delegates who by virtue of their position chair the board in which he is a member hence the outright bias by the two different respondents delegates.
68. It is the petitioners who highlighted the particulars in terms of the preceding paragraphs. Having highlighted same, it was incumbent upon the petitioners to place before the court evidence to prove same. Moreover, the petitioners were bound by the case as pleaded. In this regard, the petitioners cannot seek to expand the scope of their case vide the written submissions [ See the decision in IEBC versus Stephen Mutinda Muli 2014 eKLR].
69. Before concluding on the issue of biasness it is important to posit that a charge of bias must not only be particularized but same must also be proven on the basis of clear, cogent, compelling and credible evidence. It is not enough for a claimant [in this case the petitioner] to throw omnibus allegations on account of biasness and thereafter imagine that such omnibus/generalized allegations would suffice.
70. In the case of Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR (2016) eKLR the Court of Appeal stated as hereunder:-

[60] What then amounts to bias?

The Oxford English Dictionary defines bias as an inclination or prejudice for or against one thing or person,” while Black’s Law Dictionary defines the word bias as follows:

“Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. The condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in a particular case. As used in law regarding disqualification of judge, refers to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.”

- (61) From the above definition, it is clear that the issue of bias negates the twin virtues of impartiality and independence of the Court of the Judge hearing and determining a matter. These two principles are the hallmark of a fair trial as espoused in section 77 of the retired Constitution of Kenya and Article 50 of the current Constitution.
- (62) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR), among other International conventions, which this country has ratified. Article 25(c) of *the Constitution* 2010 elevates it to an inderrogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one’s case heard by an independent, impartial and unbiased arbiter or judge. The facet of fair trial we are dealing with here is that of bias or perceived bias on the part of the judge or the court.



- (63) Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of Lord Goff in the case of *R vs Gough*, [1993] 2 All CR 724:
- “Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking 'the judge was biased'. (Emphasis ours)
- (64) In *Metropolitan Properties Co., Ltd v Lannon* (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694 it was observed that:-
- “Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias”. (Emphasis ours)
- (65) In the Australian case of *Webb v The Queen* (1994) 181 C L R 41 Mason CJ and McHigh J held:
- “In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done.
- (66) The rule against bias is an important element of the right to a fair trial. This rule is to be very strictly applied, so that even the appearance of bias is done away with. This is because it aids in public confidence in the fairness and impartiality of the judicial system. In view of the jurisprudential importance and uniqueness of this application, we find it necessary to say slightly more on perception or appearance of bias. As the court stated in the English case of *R v Sussex Justices ExP. McCarthy* [1924] 1 KB 256:
- “Justice should not only be done but should manifestly and undoubtedly be seen to be done.”
- (67) The import of the rule against bias, as well as its strict application, is that there need not be actual bias on the part of the judge for apprehended bias to be found. It is enough that the adjudicator might not appear to be impartial. In determining whether or not there has been bias, the test to be applied is whether a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias.
- (68) In *Kimani v Kimani* (1995-1998) 1 EA 134 LKHA JA, who coincidentally was part of the bench that rendered the impugned decision herein, in the majority judgment stated as follows on the test of likelihood of bias:
- “The correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias.”
- (69) In his dissent, Gicheru JA (as he was then) stated in the same case that:
- “.....the court hearing the matter is not, indeed, it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would, that the judge is biased or is likely to be biased”
- [70] This test was endorsed by the East African Court of Justice in *Attorney General of the Republic of Kenya v Prof Anyang' Nyong'o and Others* (5/2007) [2007] EACJ 1 (6 February 2007) where the Court stated that:



“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks the disqualification of a judge comes to court because of his own perception that there is an appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case.”

- (71) We also cite with approval the proposition of the English Court in *FLS Aerospace Ltd [1999] EWHC B3 (Comm) (20 April 1999) Ltd* wherein it is stated that:

“First, actual bias will of course always disqualify a person from sitting in judgment. Even in the absence of actual bias, however, the importance of public confidence in the administration of justice is such that even the appearance of bias will disqualify.” (Emphasis supplied).

- (72) This is the standard we must apply in this case in determining whether the Court, as constituted, was biased, or could have been perceived to have been biased when handling the impugned proceedings, which are the subject of this application.

- (73) Before we discuss the issue of fair trial in the context of the current Constitution, it is important to look at the relevant provision of the retired Constitution, which was in operation when the impugned proceedings were conducted. Section 77 (9) of the retired constitution provided as follows:

“A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time”.

- (74) The same provision was imported into the current Constitution 2010 vide Article 50(1) of *the Constitution* which provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.

- (75) As observed earlier, unlike in the old constitutional dispensation, the right to fair trial is now among four other rights that enjoy an eminent special place in the current Constitution as an inderogable right. This is the more reason why the Court must ensure that the said right is jealously guarded.

- (76) Article 50 (1) of *the Constitution* imposes a twofold obligation in the dispute resolution process. These are independence and impartiality on the part of the adjudicator, and fairness in the resolution procedures. Thus, allegations of bias on the part of a judge presiding over a matter is a serious allegation which if proved amounts to breach of a constitutional right that vitiates the dispute resolution process.

71. Furthermore, the Court of Appeal revisited the manner of pleading; the test and the standard of proving a charge of biasness in the case of *Gachagua & 5 others v Maingi & 80 others (Civil Appeal*



The test has been considered by various courts before. In *R. vs Gough* (1993) AC 646, the House of Lords adopted the 'real danger' test, which focused on whether there was a real risk that a fair trial would be compromised. However, this test did not gain acceptance across the Commonwealth. In *Magill vs Porter* (2002) 2 AC 357, the House of Lords refined the test, introducing the standard of whether a fair-minded and informed observer, considering all the facts, would conclude that there was a real possibility of bias. The House of Lords held thus: "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

177. In *Committee for Justice and Liberty et al. vs National Energy Board et al* [1978] 1 SCR 369, 1976 Can L 112 (SCC), the Supreme Court of Canada (per Laskin C.J. and Ritchie, Spence, Pigeon and Dickson, JJ) considered an objection to Mr. Crowe's involvement in the National Energy Board, which was reviewing applications under section 44 of the National Energy Board Act. The objection stemmed from Mr. Crowe's prior participation in a Study Group in a representative role. Given the quasi-judicial nature of the Board and its duty to uphold the principles of natural justice, the Court ruled as follows: "...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude."

178. In another decision by the Supreme Court of Canada to wit, *Ontario Labour Relations Board, (International Brotherhood of Electrical Workers, Local 894 vs Ellis – don Limited* [1990] 1 SCR 282), the Court held thus: "In the case of bias, the state of mind of the decision- maker, evidence of bias is often difficult to apprehend directly. Therefore, the test adopted had to be usually limited to the demonstration of a reasonable apprehension that the mind of the adjudicator might be biased. If a requirement to establish actual bias had been adopted as a general principle, judicial review for bias would be a rare event indeed."

179. Closer home, the Constitutional Court of South Africa in *The President of the Republic & 2 Others vs South African Rugby Football Union & 3 Others*, (Case CCT 16/98) held, inter alia, that: "The test of bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades, that approach is the one contained in the dissenting judgment by de Grandpre, J. in *Committee for Justice and Liberty et al v National Energy Board*: "...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is 'what would an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude.'" ...the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be



reasonable in the circumstances of the case...An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application.” [Emphasis added].

72. In a nutshell, I come to the conclusion that the petitioners herein have neither proven nor substantiated the charge of biasness as against the 2<sup>nd</sup> respondent. For clarity, the charge of biasness cannot be established on the basis of generalized allegations and innuendos.

**Final Disposition .**

73. For the reasons which have been adverted to in the body of the judgment, it must have become crystal clear that the petitioners have failed to prove the allegations of breach/ infringements complained of. To this end, I find and hold that the petition is bereft of merits.

74. In the upshot, the final orders that commend themselves to the court are as hereunder:

- i. The Petition be and is hereby dismissed.
- ii. Costs of the Petition be and are hereby awarded to the respondents.
- iii. The cost in terms of clause [ii] above shall be agreed upon; and in default same to be taxed in the conventional manner.

75. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU, 3<sup>RD</sup> DAY OF OCTOBER 2025**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].**

**JUDGE**

In the presence of:

Hussein -Court Assistance

Ms. Maina for the Petitioners

Ms Miranda-[ senior Litigation counsel] for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> respondents

Mr. Mureithi for 5<sup>th</sup> respondent.

