

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELCLPET NO. E020 OF 2024**

**KITSAO KADENGE MWAGAHA**  
**PETITIONER**

.....

**VERSUS**

**CABINET SECRETARY OF LANDS AND SETTLEMENT & 3 ORS ...**  
**RESPONDENT**

**JUDGMENT**

1. **Kitsau Kadenge Mwagaha** filed this petition on 17<sup>th</sup> December 2024 seeking the following orders:

- a. Declaration that the petitioner is entitled to be registered as the legitimate and beneficial owner of the suit property herein as was original demarcated to him at the time of demarcation;
- b. A permanent injunction be issued restraining the first, second, third, and the interested party by themselves, agents, servants, employees or otherwise howsoever from effecting registration and or issuing title deed in respect of the land herein and or any other person other than the petition (sic);
- c. A declaration that the issuance of a title deed to the interested party for the parcel of land pursuant to decision that was a flowered decision will further violate the petitioner's right to fair hearing and fair administrative action as well as to the petitioner's right to property as enshrined in articles 40 47 and 50 of the Constitution of Kenya;
- d. An order of *certiorari* quashing the decision of the Appeal No 290 of 2023 and also quashing the order that **Plot Number 350 Mwanda**

- Mbalamweni** or portions of the same be registered in the names of the interested party;
- e. Cost of this petition;
  - f. Any ability that this court made him fit to grant so as to meet the end (sic) of justice and the protection of the petitioner's Constitutional rights.
2. The facts relied on for the petition are as follows: at all material times the petitioner was the beneficial owner entitled to possession of the suit property which he acquired by way of purchase. When the area where the suit property is situated became declared an adjudication section, the petitioner was documented as the owner of the suit property. During demarcation they said land was allocated to the petitioner and the interested party never objected at third stage yet he was present. The interested party later raised an objection to the demarcation after **3** years and preferred an objection being Objection Number 234. On 8<sup>th</sup> March 2020 the objection was heard and the suit property was recorded in the name of the interested party. The petitioner being a grieved by the outcome of the objection, preferred an appeal pursuant to the provisions of Section 29 of the Land Adjudication Act Cap 284 of the Laws of Kenya.
3. The decision on the appeal recognized that the appellant's brother refuted the appellant claims and indicated that he and his brother have their own land parcels registered in their own names elsewhere. The decision also noted that the appellant seemed to contradict himself in his grounds of appeal where he claimed there was a graveyard with 11 bodies of his family members buried whereas in his statement before the Appeals

panel he said they are none. The appellant's purported witness stated that he had come to listen to the dispute and he was surprised to have been chosen to stand as a witness and he indicated he had nothing to tell the panel. Finally, the respondents claim was that the disputed parcel was initially **9** acres and that after selling **4** thus he remained with **5** acres. It is asserted that the reasons given by the committee on appeal are not sufficient enough to enable the committee make a decision in favor of the interested party.

4. The appeal was heard on 14<sup>th</sup> February 2024 and the decision was delivered. That the panel did not determine the appeal placed before it on the merits but only on a technicality which was not presented before the committee. The petitioner is apprehensive that the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents may place their award before the 3<sup>rd</sup> respondent for the purpose of issuance of title deed to the interested party pursuant to the appeal decision which is flawed; that any action on the appeal will perpetuate an illegality.
5. The petition is supported by the affidavit of the petitioner sworn on 17<sup>th</sup> December 2024.

### **The Respondent's Grounds of Opposition**

6. The respondents filed grounds of opposition dated 17<sup>th</sup> April 2025 as follows:
  - a. The petition has not established and or demonstrated any cause of action against the respondents;
  - b. The petition is unsubstantiated and without proper basis as the petition has not demonstrated with precision how his fundamental

- right and freedoms have been violated or infringed contrary to the principles espoused in the *locus classicus* case of Mumo Matemu Versus Trusted Society of Human Rights Alliance 2013 eKLR and Anarita Karimi Njeru 1979 KLR 154;
- c. The petitioner in the same vein has gone against the doctrine of Constitutional avoidance as there are other ways of resolving this dispute outside the Constitutional petition. We (sic) put reliance on the Supreme Court decision in Communication Commission of Kenya and 5 others versus Royal Media Services Limited & 5 Others 2014 eKLR at paragraph 256;
  - d. This court does not have jurisdiction to entertain the petition since the petitioner has failed to exhaust the available remedies before filing the petition.
  - e. The work of allocation of land is a preserve of the executive hence the petitioner cannot be allocated land by this court as where there exists competing interest in land courts have been advised to abstain from allocating land and let the executive office in charge to do its work.
  - f. This petition lacks merit, is made out of bad taste (sic) is malicious vacations and gross abuse of court process and therefore deemed as persuading this court or attempting to waste the court's time and therefore must be dismissed with costs.
7. The petition was tried by way of written submissions and the petitioner filed his submissions on 29<sup>th</sup> September 2025. The respondent filed their written submissions dated 1<sup>st</sup> October 2025.

### **Petitioner's Submissions**

8. The petitioner restated the kind of orders the court can award under Article 23(3) of the Constitution, the threshold required for a Constitutional petition as held in Anarita Karimi Njeru Versus the Attorney General (No 1) 1979 KLR 154; Stanley Njindo Matiba versus the Attorney General Misc Appl. No 666 of 1990, and Meme versus Republic and another [2004] 1 KLR 637. It was submitted that the petitioner has fully

complied with the required threshold of a Constitutional petition as set out in the above cases.

9. Regarding the doctrine of exhaustion, it was urged that it is meant to prevent premature litigation and allow administrative bodies to address issues first. In the present case it was urged that the petitioner who is aggrieved made an appeal having exhausted all remedies available and the only option available after the appeal to the Minister is to seek redress in this petition before this court and therefore the petition is properly before court.
10. Regarding the doctrine of avoidance, it was submitted that the doctrine applies only where it is manifestly clear that parties have not adequately exhausted the locally available remedy before seeking judicial intervention; that in this particular case there's no other remedy available for the purpose of dealing with the situation before Court as all requirements provided for under the Land Adjudication Act have been met. The petitioner urged that the petition be allowed.

### **Respondents' Submissions**

11. The respondents urged at the petition has not demonstrated how the decision by the 1<sup>st</sup> respondent perpetuated an illegality or violation of his rights, that the petitioner gave contradictory grounds of appeal, that the panel claimed that the appellant seemed to contradict himself in his grounds of appeal where he claimed there was a graveyard with 11 bodies of his family members buried whereas in a statement he had said

they are none; that there was no evidence that the disputed land is family land and this was confirmed by the petitioner's brothers who refuted the claims and said they had their own parcels registered in their names and there was no proof that the disputed parcel belongs to the petitioner as he was residing in another portion, and even the witnesses he called stated that they had nothing to tell the panel. On the basis of the above the respondent submitted that the petition does not raise any Constitutional issues.

12. Citing *Mungai Versus the Attorney General* 2025 K E H C 8544 KLR, it was urged that the Land Adjudication Officer possesses powers to determine dispute arising during adjudication under Section 26 of Cap 284; that Section 29 provides that a decision on an appeal to the Minister is final; that the matters were canvassed in the proceedings in the appeal to the Minister case number 290 of 2023. The respondent relied on *Ngari Kiranga Versus Jerusha Mucogo Kiura & 2 Others* 2020 KEELC 2001 KLR to state that the Minister's decision is only subject to judicial review proceedings challenging the decision-making process; that however the present petition is nothing but a disguised appeal against the decision of the Minister which should be rejected.

13. The respondents cited *Anarita Karimi Njeru Versus the Republic* [1976] 2 [1980] KLR 1272 to submit that the petitioner has not demonstrated infringement of his rights by the respondents as he has not

presented evidence or factual basis by which the court can determine whether there has been a violation.

14. Citing Kenyan National Examinations Council, *Ex Parte* Geoffrey Gathenji Njoroge and 9 Others 1997 eKLR, it was urged that *certiorari* will only issue if there was no jurisdiction or where the decision-making body exceeded its jurisdiction, or where the rules of natural justice were not complied with which is not the case in this petition with regard to the decision of the Minister.

#### **ANALYSIS AND DETERMINATION.**

15. This court has considered the petition, the response and the submissions the parties filed. The issue arising for determination is whether the prayers in the petition are merited.
16. The real gist of the petitioner's complaint regarding the appeal to the Minister is decipherable from paragraphs **23, 24** and **25** of the petition. The petitioner's case is that his **Appeal Number 290 Of 2023** before the Minister was not heard on the merits but was dismissed on mere technicalities which had not been presented before the committee.
17. He seeks orders that the respondents be enjoined from effecting registration and issuing the title deed over the suit land to the interested party. He also seeks a declaration that the issuance of the title deed will further violate his rights to fair hearing and fair administrative action as

well as his right to property under articles **40, 47** and **50** of the Constitution. An order of *certiorari* is also sought.

18. Upon consideration of the present petition this court is at once of the conclusion that the avoidance and exhaustion doctrines are not applicable here in for reasons. The doctrine of exhaustion is unavailable simply because the petitioner had exhausted that process under the Land Adjudication Act by appealing to the Minister which led to a final decision under Cap 284. On the other hand, the doctrine of avoidance is inapplicable because there is evidently no other manner prescribed by law of presenting his grievance, which he has failed to pursue and therefore the petitioner is properly before this court.
19. The next challenge that a petitioner must face is whether the petition has attained the threshold of a Constitutional petition.
20. It is the duty of a petitioner to prove his case by way of evidence without which no relief sought can be issued. It was upon the petitioner to establish that he was not heard at the appeal stage and that the appeal was determined on technicalities.
21. Quasi-judicial bodies are supposed to keep their records when they try matters before them. The record presented in the present case is brief. It does not seem to have captured word for word each and every step of the proceedings in the manner court proceedings usually do. However, it is this court's belief that the record of proceedings attached by the

petitioner is genuine and that it reflects what happened during the hearing of the appeal.

22. In the present case evidence should be by way of a record of proceedings before the appeals Panel. The record of proceedings before that appeals panel would most likely show the course that the proceedings took.

23. I have examined record of the appeal proceedings in **Appeal Case Number 290 Of 2023** before the Deputy County Commissioner Kaloleni Sub County. In the findings, the language employed by the Panel leaves no doubt that there was a hearing that was held by the Deputy County Commissioner. It is evident that the appellant's brothers were present at the hearing of the appeal and that they refuted the claims of the appellant; besides, they maintained that they have their own parcels registered in their names. Particularly, the language employed in **paragraph 2** of the findings also reveals that the while the appellant was before the panel on 14<sup>th</sup> February 2024, he made statements which statements contradicted his grounds of appeal. In the conclusion of the panel, it was noted that other testimonials were presented before the panel.

24. In Republic v District Commissioner (Acting as a delegate of the Minister Under Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya); Okello (*Ex parte* Applicant); Oranya (Interested Party)

[2023] KEELC 20644 (KLR), it was stated as follows regarding a challenge to an arbitration board decision:

“I am not aware and none was pointed out by the Applicant of the existence of any rules or regulations under the Act for the hearing of the Appeals to the Minister. I am of the view that what was required of the Minister was to ensure that the parties were both given a fair hearing.”

25. In the present case, there are no rules that the Appeals Panel is alleged to have broken during the hearing of the appeal. The applicant cited none against the background of which the merits of his petition ought to be assessed.
26. It is not doubted that the Deputy County Commissioner had delegated powers from the Minister to hear the appeal. Inelegant as the record kept by the Deputy County Commissioner may seem to a reader, a cursory look at it shows that there was a hearing that took place before the appeals panel; that parties must have been aware of the hearing date; that parties made statements and produced documents before the panel. It is evident that the panel, especially with regard to the appellant's case, considered his statements against what was in the record of appeal. If the panel found that the appellant's statements made before them contradicted the grounds of appeal, then then that was a merit decision and this court cannot review the merits of a decision of the Minister in this petition as though it were an appeal as the decision of the Minister is final. Provisions of **Section 29 and 30** of Cap 284 state as much. However, this court agrees with the respondents that *certiorari* would issue if there

was no jurisdiction, or where the decision-making body exceeded its jurisdiction, or where the rules of natural justice were not complied with, which is not the case in this petition with regard to the decision of the Minister. Also, *certiorari* may issue where *Wednesbury* unreasonableness is detected.

27. It has not been contended at the Deputy County Commissioner had no jurisdiction or exceeded his jurisdiction. It has not been alleged that rules of natural justice were not complied with. Neither has the petitioner blamed the deciding panel on the basis of *Wednesbury* unreasonableness. His plea before this court is that he was not heard. Lack of a hearing can persuade the court to conclude that the rules of natural justice have not been observed, and may lead the court to intervene. Besides being allowed to testify and call witnesses, and to cross-examine the respondent's witnesses, there is not much else that the appellant should have expected from the proceedings on appeal, and this appears to have been done. The very fact that the elements of a hearing are detectable in the very record of proceedings he has presented negates the claim that he was not heard.

28. Without the evidence that he was not accorded a hearing the petitioner can not persuade this court to issue the declarations that he seeks in prayer nos **(a), (b), (c)** and **(d)**, because they are predicated on the finding of this court that the decision of the appeals Panel is not

valid. The court has not made such finding owing to lack of evidence to support the allegations in the petition.

29. The petitioner's claim that he was not heard lacks merit. There is no evidence of lack of a fair hearing. Also, the petitioner's claim has not attained the threshold of a Constitutional petition as prescribed in **Anarita** (supra).

30. For the foregoing reasons, the petition is dismissed with no orders as to costs.

**Dated, signed and delivered at Malindi on this 25<sup>th</sup> day of November, 2025.**

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE  
JUDGE, ELC, MALINDI.**