

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC JR NO. 4 OF 2023
IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 OF THE
LAWS OF KENYA

-AND-

IN THE MATTER OF THE LAW REFORM ACT CAP 26 THE LAWS OF
KENYA

-AND-

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

-AND-

IN THE MATTER OF ARTICLES 40, 47, 48, 50 AND 159 OF THE
CONSTITUTION OF KENYA 2010

-AND-

IN THE MATTER OF THE DECISION OF THE DEPUTY COUNTY
COMMISSIONER, KILUNGU SUB-COUNTY AS A DELEGATE OF THE
CABINET SECRETARY, LANDS AND PHYSICAL PLANNING

-AND-

IN THE MATTER OF AN APPEAL NUMBER 244/2017 IN RESPECT OF
LAND PARCELS NUMBERS 15, 21, 23 AND 24 KISEKINI ADJUDICATION
SECTION

-BETWEEN-

CYPRIAN MWINZI KIVIVYA (Suing as the legal Representative of the
estate of CYRIL KIMEU MWEVYA (DECEASED).....EX-PARTE
APPLICANT

-VERSUS-

DEPUTY COUNTY COMMISSIONER, KILUNGU SUB-COUNTY (As a
delegate of the Cabinet Secretary for Lands and Physical
Planning)1ST

RESPONDENT

THE DIRECTOR LAND ADJUDICATION &
SETTLEMENT2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

-AND-

JOHN MUNUVE KITUMA1ST INTERESTED
PARTY

SIMON NZEKELE MAKOVO2ND INTERESTED PARTY

JUDGMENT

1. The Ex-parte Applicant filed the Notice of Motion dated 27th February, 2024 under the provisions of Sections 8 and 9 of the Law Reform Act and Order 53 Rules 1 and 2 of the Civil Procedure Rules, 2010. The Ex-parte Applicant seeks issuance of the following orders against the Respondents: -

- 1) **THAT an Order of Certiorari do issue to remove into this Honourable Court and quash the decision of the Deputy County Commissioner – Kilungu Sub-County, the 1st Respondent herein sitting as the Delegate of the Cabinet Secretary, Lands and Physical Planning which decision was made on 13th June, 2023 disallowing the applicant’s appeal No. 244 of 2017 in respect of land parcels numbers 15, 21, 23 and 24 Kisekini Adjudication Section, Kilungu Sub-County, Makueni.**
- 2) **THAT an Order of Prohibition do issue directed to the 2nd Respondent from effecting and/or implementing the decision of the 1st Respondent in the appeal to the Minister case number 244 of 2017 delivered on the 13th June, 2023 over land parcels numbers 15, 21, 23 and 24 Kisekini Adjudication Section, Kilungu Sub-County, Makueni by ensuring that the Director of Land Adjudication and Settlement does not submit the decision to the Land Registrar, Makueni County.**
- 3) **THAT costs of this suit and incidentals to the application be provided.**
- 4) **Such further and or other reliefs that this Honourable Court may deem just and expedient to grant.**

2. The application is supported by the statutory statement and verifying affidavit of Cyprian Mwinzi Kavivya sworn on 27th February, 2024. The deponent averred that the 1st Respondent did not make an independent decision over the disputed parcels of land and thus arrived at the wrong conclusion. He contended that while making the decision, the 1st Respondent ignored the evidence of the Ex-parte Applicant concerning his ownership of the land which led to an unreasonable finding that he had not proved his appeal.
3. The Ex-parte Applicant insisted that by failing to visit the land, the 1st Respondent made a premature decision which failed to take account of the necessary evidence. He further contended that his constitutional right to a fair hearing had been violated and the 1st Respondent's decision was ultra vires the provisions of Sections 4 and 7 of the Fair Administrative Action Act. In two supplementary affidavits sworn by the Ex-parte Applicant on 9th September, 2024 and 16th May, 2025, reference was made to various proceedings and decisions which were annexed as Exhibits CMK1, CMK2, CMK3, CMK4 and CMK5 respectively. It was alleged that the 1st Respondent failed to consider the said evidence.
4. Opposing the application, the Respondents filed grounds of opposition dated 27th November, 2024 in which it was contended as follows: -
 - i. **That the Notice of Motion is misconceived, bad in law and fatally defective.**
 - ii. **That the application does not meet the threshold for granting of the orders sought.**
 - iii. **The application is brought in bad faith and a waste of the court's judicious time.**
 - iv. **The orders sought are untenable and therefore incapable of being granted by this honourable court.**

v. The application lacks merit and ought to be dismissed with costs.

5. The 2nd Interested Party swore a replying affidavit in opposition to the application on 27th June, 2024. He averred that the Ex-parte Applicant was accorded his right to be heard. It was contended that the Ex-parte Applicant gave evidence, called witnesses and cross-examined the respondents in a fair and public hearing at the appeal before the minister. The deponent further contended that the decision of the 1st Respondent was fair and reflective of the evidence on the record. He asserted that there is no procedural requirement that the 1st Respondent had to visit the land. He urged the court to dismiss the application with costs.
6. The 1st Respondent swore a replying affidavit on 27th June, 2024. He fully adopted the averments made by the 2nd Respondent in his replying affidavit.
7. The application was disposed of by way of written submissions.
8. In the Ex-parte Applicant's submissions dated 18th May, 2025, Counsel contended that there was nothing in the 1st Respondent's decision showing that any of the documents produced by the Ex-parte Applicant were considered. Counsel opined that the foregoing failure to consider documents confirms that the 1st Respondent ignored relevant evidence.
9. Counsel went on to submit that by failing to visit the suit properties, the 1st Respondent made a determination without full and accurate information on the occupancy and use of the disputed parcels which occasioned an injustice against the Ex-parte Applicant. It was added that the lack of a site visit fell short of the requirements of a fair and just administrative process. Counsel urged the court to allow the application as sought.
10. In the Respondents' submissions dated 20th June, 2025, learned State Counsel submitted that the Ex-parte Applicant had failed to demonstrate illegality, irrationality and procedural impropriety on the part of the 1st Respondent as was

expressed in the case of **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300.**

11. It was further submitted that the parties were given an opportunity to present their respective cases, call witnesses and cross-examine them before the decision was made. State Counsel argued that the 1st Respondent is not required by law to visit the site and hence the Ex-parte Applicant's allegations that the proceedings were not fair are baseless. They urged the court to dismiss the application with costs.
12. The Interested Parties filed their submissions dated 11th August, 2025. On their behalf, Counsel argued that the 1st Respondent properly exercised its jurisdiction without any legal or procedural impropriety. It was contended that the Ex-parte Applicant did not make any application for a site visit by the 1st Respondent nor was there any written protest to such a request being disallowed. In the circumstances, Counsel asked the court to dismiss the application with costs.
13. The sole issue for determination is whether the Ex-parte Applicant has sufficiently demonstrated that judicial review orders of certiorari and prohibition ought to issue against the Respondents.
14. Being a quasi-judicial tribunal, the Minister's Appeal No. 244 of 2017 Kisekini Adjudication Section was conditioned upon the requirements of Section 4 of the Fair Administrative Action Act, 2015 which provides in part as follows: -
 - 1) **Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
 - 2) **Every person has the right to be given written reasons for any administrative action that is taken against him.**

- 3) **Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–**
 - a. **Prior and adequate notice of the nature and reasons for the proposed administrative action;**
 - b. **An opportunity to be heard and to make representations in that regard;**
 - c. **Notice of a right to a review or internal appeal against an administrative decision, where applicable;**
 - d. **A statement of reasons pursuant to section 6;**
 - e. **Notice of the right to legal representation, where applicable;**
 - f. **Notice of the right to cross-examine or where applicable; or**
 - g. **Information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
- 4) **The administrator shall accord the person against whom administrative action is taken an opportunity to–**
 - a. **Attend proceedings, in person or in the company of an expert of his choice;**
 - b. **Be heard;**
 - c. **Cross-examine persons who give adverse evidence against him; and**
 - d. **Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

15. The main contention by the Ex-parte Applicant is he was not granted a fair hearing and that the 1st Respondent ignored relevant evidence in support of the Ex-parte Applicant's case. It was further contended that in making her decision,

the 1st Respondent did not visit the subject parcels of land which led to a premature decision.

16. The question that comes to mind is what entails a fair hearing. **Black's Law Dictionary 9th Edition page 789** defines a fair hearing as follows: -

“A judicial or administrative hearing conducted in accordance with due process.”

17. The court in the case of **Richard Bwogo Birir v Narok County Government & 2 others [2014] eKLR**, adopted the following interpretation for what entails due process: -

“Due process of law or simply, “due process” entails according the concerned person proceedings in which rules and principles for the protection and enforcement of private rights are upheld by the decision maker or relevant authority. At the core of due process is according the concerned person a reasonable notice with sufficient particulars to prepare for a fair hearing, the second crucial element of due process (see definition and explanation in Black's Law Dictionary, 9th Edition). Thus the court holds that due process will not be said to exist in absence of a reasonable notice with sufficient particulars to prepare for a fair hearing.”

18. In the decision of the 1st Respondent dated 13th June, 2023, it is evident that the Ex-parte Applicant was present for the hearing of his Appeal Case No. 244 of 2017. It is also evident that the Ex-parte Applicant called one witness in support of his case. The proceedings also show that the both parties were equally granted the opportunity to cross-examine their respective witnesses.

19. Contrary to the Ex-parte Applicant's allegations, it is plainly clear that the 1st Respondent took into account relevant court proceedings delivered earlier before. In her findings, the 1st Respondent cited the Civil Case No. L 113 of 1979 which was relevant in the fair determination of the appeal. The said

evidence was introduced to the proceedings by the Ex-parte Applicant and hence the aspect of his case that his evidence was not duly considered by the 1st Respondent is spurious.

20. Noting the foregoing, it is clear that due process was accorded to the Ex-parte Applicant and the Interested Parties in the proceedings before the 1st Respondent and hence a fair hearing was achieved.

21. Another aspect of the Ex-parte Applicant's attack against the 1st Respondent's decision is that she did not visit the subject land (locus in quo) prior to making her decision. No authority was presented in support of the contention that the Minister must conduct a site visit. There is also no legal requirement in the Land Adjudication Act that compels the 1st Respondent to conduct a site visit. In the case of **LOCAL GOVERNMENT BOARD vs ARLIDGE [1915] A.C. 120, 132-133, SELVARAJAN vs RACE RELATIONS BOARD [1975] I WLR 1686, 1694**, and in **R vs IMMIGRATION APPEAL TRIBUNAL ex-parte JONES [1988] I WLR 477, 481** it was aptly held as follows:-

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.”

22. Again, in the case of **SIMON GAKUO -VS- KENYATTA UNIVERSITY AND 2 OTHERS MISC. CIVIL APPLICATION NO. 34 OF 2009 (UR)**, the court said:-

“The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per Section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a

serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc.” (See also Odunga J. in PERIS WAMBOGO NYAGA V. KENYATTA UNIVERSITY [2014] eKLR)”

23. On whether the 1st Respondent acted ultra vires, the Court in Okoti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others [2021] KEELRC 2306 (KLR) had the occasion to express itself on what amounts to an ultra vires act. The three-judge bench stated as follows: -

“An act is ultra vires when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles renders the decision made laced with illegality. See Republic v Secretary of the Firearms Licensing Board & 2 others ex-parte: Senator Johnson Muthama [2018] eKLR. In the case of Pastoli v Kabale District Local Government Council & others, (2008) 2 EA 300 the court held that;

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.”

24. It is not in doubt that the 1st Respondent had the jurisdiction to hear and determine the Appeal Case No. 244 of 2017 in accordance with Section 29 of the Land Adjudication Act. That being said, it is observable from a perusal of the impugned decision dated 13th May, 2023 and the proceedings therein that

the Ex-parte Applicant was duly accorded the opportunity to prove his case with support from witnesses and relevant documentary evidence. The Respondents therefore acted within the confines of the law by following due process.

25. In Municipal Council of Mombasa v Republic & another [2002] eKLR, the Court held as follows: -

“Judicial review is concerned with the decision-making process, not with merits of the decision itself... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

26. After a scrutiny of the 1st Respondent’s decision, there is no proof of procedural impropriety in the proceedings or that the 1st Respondent ignored relevant considerations material to a fair determination. The instant application constitutes an appeal on the merits of the 1st Respondent’s decision and these are not the proper proceedings for such a challenge.

27. In the end, the application is devoid of merit. It is dismissed with costs.

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HON. E. O. OBAGA

JUDGE

**RULING/JUDGMENT DATED, SIGNED AND DELIVERED VIA
MICROSOFT TEAMS THIS 9TH DAY OF FEBRUARY, 2026.**

IN THE PRESENCE OF:

Mr. Kalinga for Exparte Applicant.

Mr. Mbithi for Interested parties.

Court assistant – Steve Musyoki

ORIGINAL