



**Mutuku v Deputy County Commissioner Kilungu & 2 others; Mutuku
(Interested Party) (Environment and Land Judicial Review Case
E020 of 2022) [2025] KEELC 5277 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E020 OF 2022**

EO OBAGA, J

JULY 15, 2025

BETWEEN

MUSYOKI MUTUKU APPLICANT

AND

DEPUTY COUNTY COMMISSIONER KILUNGU 1ST RESPONDENT

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT (MAKUENI
COUNTY) 2ND RESPONDENT**

THE HON ATTORNEY GENERAL 3RD RESPONDENT

AND

ONESMUS MUTUA MUTUKU INTERESTED PARTY

JUDGMENT

Introduction

1. By a Notice of Motion dated 19th December, 2022, the Exparte Applicant (Applicant) sought the following orders:
 - a. That the court do grant the Exparte Applicant a judicial review order of certiorari to bring into the Environment and Land Court and quash the decision of the Deputy County Commissioner-Kilungu Subcounty sitting as the delegate of Cabinet Secretary, Lands and Physical Planning and Urban Development which the decision was made on the 20th September, 2022, allowing the Interested Party's Appeal No. 356 of 2012 in respect of land parcels No. 1208 and 4595, Kalongo Land Adjudication Section Kilungu Subcounty, Makueni County.



- b. That the court do grant the Exparte Applicant a judicial review order of prohibition the implementation of the decision of the Deputy County Commissioner as a Delegate for the Cabinet Secretary Lands and Physical Planning and Urban Development, Kilungu Subcounty Makueni in Minister's Appeal No. 356 of 2012 in respect of parcels of land No. 1208 and 4595 Kalongo Land Adjudication Section Makueni by ensuring that the Director of Lands Adjudication and Settlement does not submit the decision to the Land Registrar Makueni County for implementation.
- c. That the costs of this application be granted to the Exparte Applicant.

Background

2. The dispute which resulted in these judicial review proceedings can be traced to the period before 2005 when Mutuku Kyui had been recorded in the adjudication register as owner of 13 parcels. Mutuku Kyui passed away in 2005. He had two wives. The first wife was Mbose Mutuku. The second wife was Mulekye Mutuku.
3. As the process of adjudication was yet to be completed, Mulekye Mutuku filed a complaint before the Adjudication Committee. The Adjudication Committee deliberated on the dispute and reached a verdict that the disputed plots were to be recorded in the name of Mulekye Mutuku.
4. Dissatisfied with the decision of the Adjudication Committee, the Applicant appealed to the Land Adjudication Officer. The Land Adjudication Officer restored the disputed plots which had been given to Mulekye Mutuku back to the Applicant.
5. The grandson of Mulekye Mutuku one Onesmus Mutua Mutuku filed an appeal to the Minister as Mulekye Mutuku had passed away. The appeal to the Minister was heard and the Land Adjudication Officer's decision was set aside and the disputed plots were restored back to Mulekye Mutuku.

Applicant's Case

6. The Applicant's Notice of Motion was supported by a verifying affidavit of the Applicant sworn on 5th December, 2022. The Deponent stated that the parcels in issue are parcel 1208 and 4595. Parcel 4595 was hived from parcel 1366 which are within Kalongo Land Adjudication Section. He stated that he had lived all his life on parcel 1366.
7. The Applicant contends that the Atangwa clan interfered with the suit properties which had already been distributed by his late father Mutuku Kyui through a written will. The Applicant contends that the Atangwa clan had no mandate to deal with the properties of his deceased father Mutuku Kyui as they had no letters of administration and consequently, their decision and all other decisions including the Minister's decision are null and void.
8. The Applicant contends that the Atangwa clan was only out to ensure equality of distribution of plots without considering the sizes of the plots and that the Minister's decision merely adopted the clan's decision which was contrary to the mandate of the Minister. The Applicant contends that the interested Party ended having more land than what the Applicant was given an action which was unfair.
9. The Applicant further contends that the Atangwa clan usurped the powers of a succession court by distributing land which had already been demarcated and never took into account the fact that the Interested Party was not a dependant of the late Mutuku Kyui. The Applicant went on to state that the Atangwa clan failed to consider the fact that the Interested Party had sold a portion of parcel 1208 and that what remained belonged to his family. He therefore stated that it was unfair for the Minister



to give parcel 1208 to the Interested Party when his own evidence was that the family of the Applicant had a share of the same.

10. The Applicant contended that the clan members failed to take into account the fact that he had been on parcel 1366 for over 20 years and had developed it. The Applicant stated that the complaint by the Interested Party was not made in good faith the same having been raised after the death of his father.
11. The Applicant went on to state that the Minister should not have rendered his decision as there was no appeal to him under Section 26 of the Land Adjudication and that the dismissal of his appeal on the ground that his appeal to the Land Adjudication Officer was an afterthought was unfair.

Respondent's Case

12. The Respondents opposed the Applicant's application based on grounds of opposition dated 11th January, 2023. The Respondents contend that the Applicant's application is incompetent and incurably defective; that the application is brought in bad faith; is misconceived and is only meant to mislead the court and further that it has been overtaken by events.

Interested Party's Case

13. The Interested Party contends that the parcels in issue lie within Kalongo Adjudication Section and that the Land Adjudication Officer had powers to ascertain interest and rights of parties within the Kalongo Adjudication Section. The parcels in issue had been recorded for his late grandfather Mutuku Kyui and that the Adjudication record had not become final. Following the demise of his grandfather, a dispute arose in the family over the ascertainment and registration of interests in various portions which he owned upon his death and which were still pending adjudication process.
14. The Land Adjudication and Settlement Officer was approached and pursuant to his mandate under Section 6 of the [Land Adjudication Act](#), he appointed members of the area comprising members of Atangwa clan who arbitrated and made a determination as a committee vide determination made on 7th May, 2008 which granted him parcel 1208 and 4595.
15. The Interested Party contends that despite the Applicant having 14 days to complain to the Executive Officer of the committee, he did not do so as provided under Section 21 of the [Land Adjudication Act](#). The Committee's decision was recorded in the register in the name of his grandmother Mulekye Mutuku. His grandmother thereafter gifted him parcel 1208 a portion of which he sold to Makau Muliko.
16. Over two years later in 2010, the Applicant objected to the register and after hearing, the Land Adjudication Officer took away parcel 1208 and 4595 from his grandmother and gave it to the Applicant. The Interested Party's grandmother appealed to the Minister and her appeal was allowed and the two parcels were restored back to her. The Applicant contends that the proper procedure was followed and that the Applicant is trying to mislead the court that what happened was interference with the Estate of Mutuku Kyui which should have been a succession matter. The Interested Party further states that the Applicant is litigating before Kilungu Magistrate's Court in PMCC No. 19 of 2011 and Machakos CMCC No. 528 of 2023 which is contrary to the law.

Submissions of the Parties

17. The parties were directed to file written submissions. The Applicant filed his submissions dated 9th October, 2024. The Respondent filed their submissions dated 24th March, 2023. The Interested Party filed his submissions dated 4th April, 2023.



Applicant's Submissions

18. The Applicant submitted that the Minister's decision was influenced by an error of law. He submitted that the Minister relied on the decision of an entity unknown in law that is the Atangwa clan. He submitted that the process of demarcation had already been completed and plot numbers allocated to the owners. It was his submissions that adjudication committee is appointed before the adjudication process commences. The Applicant also submitted that the officer who was present during the committee proceedings never participated and that she was not the proper officer and if she was the proper officer, she abdicated her duties as she never took part in the proceedings.
19. The Applicant further submitted that the Atangwa clan had no jurisdiction to entertain matters which should have been dealt in a succession court. It was further submitted that the Adjudication Officer should not have appointed another committee and that she should have referred the matter to the initial committee or resolve the matter by herself.
20. The Applicant further submitted that the Minister failed to take into account the size of the plots in issue and the will of the deceased. Further that the Minister failed to make a determination by herself but relied on the decision of Atangwa clan which was an illegal entity unknown in law.

Respondents' Submissions

21. The Respondents submitted that the Applicant has not shown how the Minister's decision was either tainted with illegality, irrationality and procedural impropriety and that decision maker had no jurisdiction to make the decision. The Respondents further submitted that the purview of judicial review is the decision making process and not the decision itself. They relied on the case of Mombasa Civil Appeal No. 185 of 2001 Municipal Council of Mombasa –vs- Republic & Another (2002) eKLR where it was stated as follows:

“Judicial review is concerned with the decision-making process, not with merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. 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, ie. 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 byway 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”.

22. The Respondents submitted that what the Applicant is complaining about is not on the process leading to the decision but the decision itself which is not the province of judicial review. The Respondent relied on the case of Seventh Day Adventist Church (East Africa) Limited –vs- Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another 2014 eKLR where Justice Odunga (as he then was) stated as follows:

“Where an application brings judicial review proceedings with a view to determining contested matters of fact with an intention of securing a determination on the merits of the



dispute, the court would not have jurisdiction in judicial review proceedings to determine such a dispute and would direct the parties to ventilate the merits of the dispute in the ordinary civil suits”.

Interested Party’s Submissions

23. In his submissions the Interested Party reiterated the background of these proceedings from the committee stage to the appeal to the Minister. He quoted appeal to the Minister. He quoted preamble to the Adjudication Act which states as follows:

“An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto”.

24. He further quoted Section 10 of the *Land Adjudication Act* which states as follows:

“1. The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connexion with such claims, and for that purpose he shall be legally competent to administer oaths and to issue summonses, notices or orders requiring the attendance of such persons or the production of such documents as he may consider necessary for the carrying out of the adjudication.

2. The adjudication officer may himself exercise all or any of the powers which are given by this Act to officers subordinate to him”.

25. He submitted that the provisions quoted above shows that the Adjudication Officer had jurisdiction to deal with issues raised by both the Applicant and Mulekye Mutuku.

26. The Interested Party relied on the case of Tobias Achola Asindi & 13 others –vs- Cyprianus Otieno Ogalo & 6 others HCCC No. 4 of 2021 (201) eKLR where it was held as follows:

“The whole process leading up to the registration of a person as a proprietor of land as a foresaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act. It is for this reason that, there is injunction under Section 30 of the Act to any civil suit being instituted over an interest in land in an adjudication area save with leave of the Land Adjudication Officer. The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication areas prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submissions by the advocates for the Defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law that may arise in the course of the adjudication process”. (Emphasis added)



27. The Interested Party also relied in *Reuben Mwangela M'itelekwa (Suing as the legal representative of the Estate of M'itelekwa Mmucheke Naituri alias M'itelekwa Mucheke –vs- Paul Kigea Nabeba & 2 Others (2019) eKLR* where it was held as follow:

“I do not agree that the provisions of the *Land Adjudication Act* that deal with the process and procedure of adjudication would constitute procedural technicalities. The Act sets out in considerable detail the process of adjudicating people’s interests and rights over land the subject of adjudication before such land is demarcated for issuance of individual titles on registration. The Act equally sets out a dispute resolution mechanism during the process of land adjudication. The Petitioner participated in the adjudication process and invoked the dispute resolution mechanism up to the end resulting in the decision of the Minister on the appeal where the petitioner’s appeal was rejected”.

Analysis and Determination

28. I have considered the Applicant’s application, the opposition to the same by the Respondents and Interested Party, the submissions of the parties as well as the authorities cited. The only issue for determination is whether the Applicant has met the threshold for grant of judicial review in the manner sought.

29. The grounds upon which judicial review orders can be granted were set out in the case of *Pastoli –vs- Kabale District Local Government Council and Others (2008) 2 EA 300* where it was held as follows:

“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 improprietyillegality is when the decision-making authority commits an error of law in the process of taking 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 are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of District interdicts a public servant on District Service Commission....irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of law and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”

30. The Applicant contends that the Atangwa clan which rendered its decision on 7th May, 2008 was unknown in law and that any subsequent decisions based on this decision were null and void. There is no contention that the process of adjudication was going on as at the time Mutuku Kyui passed away in 2005. It is also not in contention that a dispute arose as to what interest his two widows had in the properties which had been recorded in the register in his name. This dispute was brought to the attention of the Adjudication Officer who placed it before the Committee which was appointed pursuant to the provisions of Section 6 of the *Land Adjudication Act*.

31. The Committee rendered its decision on 7th May, 2008. In accordance with Section 21 of the *Land Adjudication Act*, the Applicant was supposed to complain to the Executive Officer of the Committee



within 14 days. If any complaint would have been received then the Executive Officer would have placed it before the Arbitration Board for determination. The Applicant did not complain as required under the Act.

32. The committee which made a decision on 7th May, 2008 is the committee contemplated under Section 6 of the *Land Adjudication Act* and it does not matter whether it was described as Atangwa clan or the Executive Committee of the Atangwa clan as per the proceedings. The register was thereafter prepared in accordance with the decision of the committee. The Applicant did not complain to the Adjudication Officer within the 60 days granted. He instead did so in 2010 a period of over two years. Despite not complying with the 60 days given, the Adjudication Officer exercised his powers and listened to the parties and rendered his decision which was the subject of appeal to the Minister.
33. As was held in the case of Municipal Council of Mombasa (Supra), judicial review is only concerned with the process leading to the decision and not the merits of the decision. In the instant case, the Applicant was okay with the decision of the committee until two years later when he invoked the jurisdiction of the Adjudication Officer who granted him parcel 1208 and 4595 which had been hived off parcel 1366.
34. Mulekye Mutuku preferred an appeal to the Minister whereby the decision of the Adjudication Officer was overturned and the parcels in issue reverted to Mulekye Mutuku. There was absolutely nothing wrong in the procedure followed. The Minister's remarks in the decision of 20th September, 2021 that the appeal was an afterthought goes to the merits of the decision which is outside the province of judicial review.
35. The Applicant's complaint that the Minister did not consider the sizes of the land in issue is a matter which touches on the merits of the decision. There was no illegality committed. There is no error of law which was committed in the whole process. The Adjudication Officer who rendered a decision on 17th November, 2010 had jurisdiction to do so. The Minister who rendered a decision on 20th September, 2022 had jurisdiction to do so. All the decisions made by the officers were in accordance with the law.
36. The Minister's decision was not irrational. The Minister took into account the facts surrounding the case. The case before her was that if the decision of the Adjudication Officer was left to stand, the first house of Mutuku Kyui would have had 9 parcels recorded in their favour leaving the second house of Mutuku Kyui with only 4 parcels. The Applicant was content with the decision of the committee for two years after which he moved to file an objection to the Adjudication Officer prompting the Minister to observe in her decision that the appeal to the Adjudication Officer was an afterthought.
37. There was no procedural impropriety as all the procedural laws were followed before the Minister's decision was rendered. The parties were given opportunity to present their respective cases, called their witnesses and there was cross examination of the parties and their witnesses.

Disposition

37. From the above analysis it is clear that the Exparte Applicant's Notice of Motion is without merit. For avoidance of doubt the motion under consideration is the one dated 19th December, 2022. There was an application to amend the motion but that application which was dated 23rd February, 2023 was never prosecuted. I therefore proceed to dismiss the Notice of Motion dated 19th December, 2022 with costs to the Respondents an Interested Party.

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HON. E. O. OBAGA



JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF JULY, 2025.

IN THE PRESENCE OF:

Mr. Mbutto for Exparte Applicant.

Mr. Kuria for Ms. Mumo for Respondent.

Ms. Theuri for Interested Party.

Court assistant – Steve Musyoki

