



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA JUDICIAL REVIEW CASE NO. 20 OF 2017

FORMERLY MERU JUDICIAL REVIEW 38 OF 2013

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW OF REFORM ACT

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER,

MERU SOUTH DISTRICT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

KIENGE KARUGUMA.....1ST INTERESTED PARTY

PATRICK IRERI MWANIKI.....2ND INTERESTED PARTY

ALEXANDER NJERU.....3RD INTERESTED PARTY

EDWARD GITONGA.....4TH INTERESTED PARTY

JEMIMA MBURA NYAGA.....5TH INTERESTED PARTY

AND

NJERU NTHARANO.....EXPARTE APPLICANT

JUDGMENT

A. This application states that it is brought to court under Order 53 Rule 3 of the Civil Procedure Rules. It seeks the following orders:

1. That an order of certiorari do issue for purposes of quashing the proceedings and decision of the 1st respondent dated 19.9.2013 in objection Nos.363, 103, 66, 640, 64, 641, 68, 874, 65, 642, 875, 67, 367, 84, 392, 975, 876 and 366 between the exparte applicant and the interested parties, over parcels of land Nos. 50, 54, 55, 56, 57, 58, 59, 60, 881 and 357 KAMWIBI ADJUDICATION SECTION within Meru South District.

2. That costs of this application be borne by the respondent and the interested parties.

B. The application is supported by the applicant's affidavit verifying the facts and the statutory statement of facts filed at the leave stage.

C. The application has been canvassed by way of written submissions.

D. The exparte applicant's submissions (in the words of his advocate) are reproduced herebelow:

EX-PARTE APPLICANT'S SUBMISSIONS

Your Lordship,

May it please the court we are on record for the ex-parte applicant herein and now wish to tender herewith or (sic) written submissions as we proceed to do heretoeafter.

1. BRIEF BACKGROUND

Your Lordship, these are Judicial Review proceedings arising out of a decision of the 1st Respondent herein made on 19.9.2013 in objection case Nos. 363, 103, 66, 640, 64, 641, 68, 874, 65, 642, 875, 67, 367, 84, 392, 975, 876 and 366 and which relate to land parcel Nos. 50, 54, 55, 56, 57, 58, 59, 60, 881 and 357 KAMWIMBI ADJUDICATION SECTION in Meru South District. The said objection proceedings involved the ex-parte applicant herein, who is the owner of the above listed land parcels, and the interested parties herein who had lodged objections with the land adjudication officer, over the said land parcels. It is the decision of the said land adjudication officer, from the said objection cases that has resulted into these proceedings.

2. THE PLEADINGS

Your Lordship, the main motion herein is dated 16.12.2013 and in it, the ex-parte applicant seeks for the following prayers.

i) That an order of certiorari do issue for purposes of quashing the proceedings and decision of the 1st respondent dated 19.9.2013 in objection Nos. 363, 103, 66, 640, 64, 641, 68, 874, 65, 642, 875, 67, 367, 84, 392, 975, 876 and 366 between the ex-parte applicant and the interested parties over parcels of land Nos. 50, 54, 55, 56, 57, 58, 59, 60, 881 and 357 KAMWIMBI ADJUDICATION SECTION within Meru South District.

ii) That costs of this application be borne by the respondent and the interested parties.

This motion your Lordship is the subject of our submissions herein and we shall herebelow proceed to briefly give a short summary of the facts as laid before court by the parties and as part of our submissions.

a) THE EX-PARTE APPLICANT'S CASE

Your Lordship, the main motion herein has been based on the grounds appearing in the body of the statutory statement of facts filed therewith as well as an affidavit in verification of the facts, sworn by the ex-parte applicant and in which, among others, the ex-parte applicant has stated that he is the owner of the land parcels aforesaid and for which objections were raised by the interested parties herein.

The ex-parte applicant has stated that the said objections were initially earmarked for hearing before a Mr. MUCHIRI, who was then serving as an adjudication officer for Kamwimbi Adjudication Section. On the date of the hearing however, the ex-parte applicant states that the said objections were heard by a different land adjudication officer named SARAH and who proceeded with the said hearing in the absence of the ex-parte applicant herein which is against the rules of natural justice. The ex-parte applicant has further stated that the said land adjudication officer proceeded with the said hearing without the aid of a committee as required by the law thus she acted ultra vires by usurping the powers which she did not have under the law.

The said land adjudication officer, the 1st respondent herein, acted without jurisdiction as the powers she purported to exercise are by law, only vested in a committee, and the 1st respondent had no power or authority or jurisdiction to purport to act as she did or to hear the said objections.

In addition to the above your Lordship, the ex-parte applicant has stated that the 1st respondent denied him an opportunity to cross-examine the interested parties and their alleged witnesses and further that the 1st respondent exhibited open bias against the ex-parte applicant by refusing to accept any evidence that was against the interested parties claims and that, in particular she objected to and refused to take as evidence, a letter dated 25.11.1903 in which the 4th interested party herein had confirmed that he was a mere licensee on the ex-parte applicant's land. The 1st respondent also refused to take the testimony and evidence of one MUGO NJERU, who was to testify in the ex-parte applicant's favour. This action by the 1st respondent was premised on the perceived fears that if crucial evidence was tendered in the ex-parte applicant's favour, she the (1st respondent) may not arrive at her already predetermined decision.

The ex-parte applicant further states that the 1st respondent also refused to take or accept in evidence several letters and communication from the Land Adjudication Officer, which had been written by her predecessors asking the interested parties to stop interfering with the ex-parte applicant's land.

Your Lordship, it is on the basis of the said reasons and / or grounds that the ex-parte applicant seeks for the Judicial Review Orders in terms of the prayers on the main motion herein.

b) THE INTERESTED PARTIES' CASE

Your Lordship, the interested parties filed a replying affidavit herein on 8.7.2014 sworn a day earlier by the 3rd interested party and in which the interested parties avoided addressing the issues raised by the ex-parte applicant in his pleadings.

Your Lordship, the interested parties have dwelt on allegations of ownership and alleged that the disputed land parcels are part of their alleged ancestral land which they allege, has partly been occupied by the ex-parte applicant.

We submit your Lordship, that such line of argument is not what is required in an application for Judicial Review and as such we urge this honourable court to ignore any such arguments and proceed to determine the motion herein as per the provisions of the law in determination of Judicial Review proceedings. Interestingly your Lordship, the interested parties have in paragraph 17 of their Replying affidavit confirmed that the proceedings before the 1st respondent herein were conducted in the absence of the ex-parte applicant. The contents of paragraphs 19 and 20 of the

interested parties' replying affidavit have been rebutted by the ex-parte applicant, in a further affidavit sworn on 28.10.2015 and filed herein on the same day and date.

c) THE RESPONDENT'S CASE

Your Lordship, as at the time of filing our submission herein, we have had no opportunity of knowing whether the respondent has any opposition to the main motion herein, we have not seen any replying affidavit from the respondents and we submit that if there is any replying affidavit filed on the court file by the respondent, then the same has never been served upon ourselves as required by the law and the same should therefore be struck out.

1. FACTS, THE LAW AND ISSUES FOR DETERMINATION

Your Lordship, it is not in dispute that the interested parties herein filed objections against the ex-parte applicant over the land parcels identified as No. 50, 54, 55, 56, 57, 58, 59, 60, 881 and 357 and which objections were registered as objection Nos. 363, 103, 66, 640, 64, 641, 68, 874, 65, 642, 875, 67, 367, 84, 392, 975, 876 and 366. It is also not in dispute your Lordship, that the said objections were heard by the 1st respondent herein and whose decision was made on 19.9.2013.

It is that decision your lordship which has provoked the ex-parte applicant into filing these proceedings and he seeks for the Judicial Review Order of certiorari to remove into this Honourable court, for purposes of being quashed, the said proceedings and decision by the 1st respondent herein.

Your Lordship, we submit that the ex-parte applicant has raised a suitable case for the granting of the orders being sought for and we herebelow highlight just some of the issues this honourable court ought to consider and address in arriving at its decision or determination of the matter.

i) THE RESPONDENT'S JURISDICTION

Your Lordship, it is on record herein, and it is well exhibited from the handwritten proceedings before the respondent, that the respondent proceeded to hear and decide on the said objections alone and without the aid of a committee as required by law. In so doing your Lordship, the respondent usurped the powers of the committee and therefore acted against the law. The law provides my Lord, “ **that the land adjudication officer shall hear objections with the aid of a committee.**” This position has been restated by the court on several occasions and courts have in no uncertain terms pronounced that “ **the land adjudication officer has to subject himself/herself to this requirements of the law and that any proceedings conducted by the land adjudication officer without a committee are not only done without jurisdiction but that they are also illegal ab initio. See the Court of Appeal decision in Peter Kimandiu vs. land adjudication officer, Tigania West District & 4 others 2106 eKLR** wherein the court WAKI, NAMBUYE & KIAGE, JJA) expounded on the subject extensively and under scored the crucial importance of the committee in the hearing of objection cases. The court was categorical that **the land adjudication officer cannot sit or hear an objection at any level or stage without the involvement or and of the committee.**

This position is also underscored by the court in the decision of Republic VS. District Land Adjudication & Settlement Officer, Imenti South District, Ex-parte Murianki Ncurai & 9 others (2016) eKLR and in which the court again emphasized the importance of the committee and the need for the Land Adjudication Officer to comply with the requirement.

We submit your Lordship, that the 1st respondent herein having proceeded with the said objections without the aid of a committee as required by the law, renders the whole process illegal, and on this ground alone, the honourable Court is by law empowered to quash the said proceedings and decision by the 1st respondent.

ii) RULES OF NATURAL JUSTICE

Your lordship, the ex-parte applicant has stated that the proceedings before the 1st respondent herein were conducted in his absentia. This position has also been confirmed by the interested parties in their Replying Affidavit herein.

We submit your Lordship that the respondent violated the law and breached the cardinal principle of the rules of natural justice by electing to proceed with the hearing and determination of the said objections in the absence of the ex-parte applicant. This Lordship, was not only in violation of the rules of Natural Justice but also a violation of Article 50 (1) of the Constitution of Kenya 2010. **A similar scenario your Lordship, was addressed by the court in Republic VS. District Land Adjudication Settlement Officer, Imenti South District ex-parte Murianki Ncurui & 9 Others (2016) eKLR – supra.**

We therefore urge this honourable court to find that the respondent breached the rules of natural justice in the conducting of the said proceedings and in arriving at the impugned decision. With the said finding my lord, we urge this honourable court to allow the ex-parte applicant’s application and grant the Judicial Review Order of Certiorari;

iii) ILLEGALITIES, IRRATIONALITY, BIAS AND UNREASONABLENESS

Your Lordship, the ex-parte applicant has stated that by proceeding with the said objections in his absentia, the respondent did not just breach the rules of natural justice but also denied the ex-parte applicant the right of participation in the said proceedings and also the right to cross-examine the interested parties and their alleged witness.

This Your Lordship, we submit, was illegal and unreasonable.

It has further been stated by the ex-parte applicant that the respondent refused to hear or take evidence from persons whom she perceived would give evidence in favour of the ex-parte applicant. The respondent, without any reasonable grounds refused to take or hear the testimony of some of the persons who wanted to give evidence in favour of the ex-parte applicant. The respondent further refused to take or accept in evidence any documents tendered in favour of the ex-parte applicant and she further exhibited open bias against the ex-parte applicant herein.

Your Lordship, the actions of the 1st respondent as aforementioned were illegal, irrational, unreasonable and bereft of procedural integrity and the proceedings and decision thereof ought to be quashed. There can never, my Lord, be any fairness where, for example, statutory provisions are ignored or where, life in our instant case, (sic) a person is denied his right of participation in proceedings.

For the reasons, above stated Your Lordship, we submit that the ex-parte applicant’s motion herein ought to be allowed and the prayers being sought for granted.

4. SUMMARY AND CONCLUSION

In conclusion my Lord, we submit that this is a proper case where the court ought to restate the law and proceed to allow the ex-parte applicant’s application dated 16.12.2013 and to grant the Judicial Review orders of Certiorari as being sought for by the ex-parte applicant.

We so submit and rest the case for the ex-parte applicant.

DATED AT MERU THIS 28TH DAY OF MARCH 2017

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FOR. MITHEGA & KARIUKI

ADVOCATES FOR THE EX-PARTE APPLICANT.

E. The respondents' submissions (in the words of J. M. Kiongo, Senior Litigation Counsel) state as follows:

RESPONDENTS SUBMISSIONS

May it please your Lordship, we submit on behalf of the respondents as herein under:

The exparte applicant filed the Notice of Motion dated 16th December, 2013 seeking Orders of Certiorari to quash the decision of the 1st respondent made on 19th September, 2013.

Your Lordship we submit that the respondents opposed the exparte applicant application vide the Replying Affidavit by the District Land Adjudication Officer, Meru South dated 30.10.2015 opposing the exparte applicants application.

Your Lordship, it is our submission that the exparte applicant's application lacks merit, the same is misconceived. Your Lordship we submit that the 1st respondent adhered to the Law under Cap 284 Laws of Kenya as required. The exparte applicant representatives were present as can be seen in the proceedings annexed by him and which he is challenging.

Your Lordship, Section 20(b) Cap 284 Laws of Kenya has clearly stated the function of the committee. It's to advice and not to hear. Section 10 and 11 thereof expressly shows the power of the adjudication officer. The officer followed the law contrary to the averments by the exparte applicant.

Your Lordship, it is our submission that Judicial Review orders are discretionary; they are not MANDATORY (emphasis ours); they can be denied. We further submit that Judicial Review is concerned with the integrity of the process and not the outcome of the process as has held in the case of **REPUBLIC –VS- MOUNT KENYA UNIVERSITY & ANOTHER [2017] eKLR** (Copy annexed). In this case the 1st respondent followed the due process of law hence this application should be dismissed with costs.

Your Lordship we submit that the application is unmerited and ought to be dismissed. The exparte applicants have (sic) not exhausted all the mechanisms under Cap 284. He ought to have filed an appeal as it was indicated by the 1st respondent decision within 60 days. The exparte applicant herein is forum shopping. He ought to have followed the procedure as per Cap 284 and not to file Judicial Review proceedings before exhausting al remedies available.

It is our submission that the exparte applicant cannot have his cake and eat it at the same time. He ought to follow the right procedure as stipulated by Cap 284 Laws of Kenya. He should have gone to the arbitration board, then to appeal against the minister and is not contented to finally file Judicial Review proceedings. He chose not to follow the law as it is. Your Lordship he who comes to equity must do equity and also should come with clean hands; the exparte applicant has not.

Your Lordship, we submit that the exparte applicant (sic) application is unmerited and should be dismissed with costs.

This is our humble submission and prayer. We so pray.

Dated at Meru this 28th day of September, 2017

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J. M. KIONGO,

SENIOR LITIGATION COUNSEL,

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE.

F. The 1st, 4th and 5th Interested Parties' submissions (in the words of their advocate) state as follows:

THE 1ST, 4TH & 5TH INTERESTED PARTIES SUBMISSIONS

My Lord,

The exparte applicant's application dated 16th December, 2013 and filed on even date ought to be dismissed on account of two reasons.

1. That it is clear from the proceedings before the DLASO attached to the exparte applicant's annexure "NN2" at page No. 1 that one **Njeru Ntharano; the exparte applicant herein had died even before the hearing proceeded before the DLASO.** Unless the deceased Njeru Ntharano came back to life subsequently, there is no way he would have filed this Judicial Review in his name. We are all aware that Jesus Christ was the last person to resurrect from death and not Njeru Ntharano.

In view of that point alone, the exparte applicant's application for Judicial Review ought to fail.

2. Secondly My Lord, the deceased exparte applicant came to court prematurely. One has to exhaust all the available legal avenues and mechanisms for filing a Judicial Review. If for whatever reason the deceased exparte applicant was dissatisfied with the decision of the DLASO, he ought to have filed an appeal to the minister. Coming to this Honourable Court prior to exhausting that amounted to putting the cart before the horse.

In view of the foregoing matters, we urge Your Lordship to proceed and dismiss this suit with costs to the 1st, 4th and 5th interested parties.

DATED AT MERU ON THIS 16TH DAY OF JUNE, 2017

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NDUBI ONDUBI & ASSOCIATES

ADVOCATES FOR THE 1ST, 4TH & 5TH INTERESTED PARTIES

G. The 2nd and 3rd Interested Parties submissions (in the words of their advocate) state as follows:

2ND AND 3RD INTERESTED PARTIES' SUBMISSIONS ON THE NOTICE OF MOTION DATED 16/12/2013

Your Honour, we are on record for the 2nd and 3rd interested parties and wish to submit as follows on the application dated 16.12.2013.

The Exparte applicant brought an application dated 16.12.2013 seeking Order of Certiorari to issue for the purposes of quashing the proceedings and decision of the 1st respondent dated 19.9.2013 over parcels of land Nos. 50, 54, 57, 58, 59, 60, 881 and 351 KAMWIMBI ADJUDICATION SECTION within Meru

South District. As well costs of the application.

ISSUES FOR DETERMINATION

The main issue for determination is whether the exparte applicant has met the threshold for grant of orders certiorari by the honourable court?

SUBMISSIONS

Your Honour, the exparte applicant faults the decision of the Adjudication Officer who sat in the Arbitration Board Committee by claiming that the objection therein was heard without the aid of a committee. Further, that the exparte applicant was not accorded a fair hearing by the said Arbitration Board.

It is our submission that the exparte applicant interfered with the boundaries which were marked by sisal between land parcel Nos. 881 and 357 Kamwimbi "A" adjudication section which parcels of land are ancestral family land of the 3rd and 2nd interested parties respectively. The 3rd interested party made several attempts including seeking help from the area chief in effort to stop the exparte applicant with no success. Finally, the 3rd interested party took the matter of the boundary issue before the Land Adjudication Committee of about 11 people clan members of Kamwimbi "A" Adjudication Section. After the just hearing and determination, the 3rd and 2nd interested parties were awarded their respective land parcels NO. 881 and 357. The proceedings of the committee members are evidenced by annexures marked "AN2" in the replying affidavit dated 7.7.2014 sworn by the 3rd interested party.

Dissatisfied with the decision, the exparte applicant took the matter before the Land Arbitration Board which proceedings were constituted of a committee as shown by the proceedings dated 8.8.2013.

The Arbitration Board was lawfully constituted and the committee members gave all parties to the objection brought by the exparte applicant fair and equal opportunities to be heard. However, the exparte applicant was not present but was ably represented by his sons ELEAZER NJUE THARANO and ALEXANDER NJIRU THARANO. The two sons acted on behalf of their father the exparte applicant and in fact called upon two witnesses namely MUGO NJERU and NTHIGA GACHINDANO whose testimonies are contained in the said proceedings marked as "AN3" in the said replying affidavit of the 3rd interested party dated 7.7.2014.

Your Honour, as far as the rules of a fair hearing are concerned, we submit that the exparte applicant is misleading the court in his allegations. The exparte applicant was accorded a fair hearing. Further claims are that, the Adjudication Officer who was in the Arbitration Board Committee one SARAH was not competent to hear the objection.

It is trite law that he who alleges bears the burden of proof. There were 3 Government Officers allocated to hear and determine land cases at KAMWIMBI "A" ADJUDICATION SECTION; MUCHIRI, SARAH and NJOROGE. These 3 Adjudication Officers are competent to hear and determine any objection in land matters brought under it. In this case SARAH, one of the said Adjudication Officers, sat among other committee members in the objection that resulted in the application herein. The Land Arbitration Board Committee awarded parcels of land Nos. 881 and 357 KAMWIMBI "A" ADJUDICATION SECTION to the 3rd and 2nd interested parties respectively.

We therefore, submit that the Land Arbitration Board Committee was lawfully constituted with competent officers and the proceedings were not crowned with any irregularities.

The principles of natural justice were well adhered to and the Land Arbitration Board Committee acted within its jurisdiction.

CONCLUSION

We submit that the application dated 16.12.2013 is bad in law and should be dismissed with costs as it has no merits.

We rely on the authority of:

KIMACHIA FARMERS CO-OP SOCIETY V. LAND ADJUDICATION OFFICER TIGANIA WEST & ANOTHER (2016) eKLR

DATED AT MERU THIS 30TH DAY OF OCTOBER, 2017

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FOR: KIOGORA ARIITHI & ASSOCIATES

ADVOCATES FOR THE 2ND & 3RD INTERESTED PARTIES

H. The ex parte applicant replied to the submissions filed by the respondents and the interested parties (in the words of their advocates) as follows;

EX-PARTE APPLICANT'S REPLY TO THE SUBMISSIONS

a) On the 1st, 4th & 5th interested parties submissions

Firstly, it has been submitted that the ex parte applicant died even before the commencement of these proceedings. Your Lordship, this submission is best answered by the averment of the 3rd interested party ALEXANDER NJERU in his replying affidavit filed on 8.7.2014. At paragraph 20, the 3rd interested party confirms that the ex parte applicant is not dead as alleged by the 1st, 4th and 5th interested parties.

Secondly, it has been submitted that the ex parte applicant ought to have filed an appeal to the minister instead of Judicial Review proceedings. Your Lordship, the scope of an appeal to the minister and the scope of Judicial Review proceedings are different. While an appeal to the minister is concerned with the merits of the decision, judicial review is concerned with the process. The ex parte applicant is challenging the decision making process. This has elaborately been expounded in the ex parte applicant's submissions filed on 29.3.2017.

b) ON THE 2ND & 3RD INTERESTED PARTIES SUBMISSIONS

Firstly, the 2nd & 3rd interested parties admit that the ex parte applicant was not present when the impugned proceedings took place. This is a confirmation of the ex parte applicant's complaint that he was condemned unheard.

Secondly, the 2nd & 3rd interested parties admit that the impugned proceedings were heard by one SARAH as opposed to MR MUCHIRI who had been allocated to hear the same. The ex parte applicant has raised specific issues of bias against the said officer by the name SARAH. Surprisingly, the said officer did not swear any affidavit to controvert the allegations of bias. Once the ex parte applicant alleged that the said officer allocated to herself cases which were meant to be heard by another officer and that she exhibited open bias during the hearing, the burden shifted to her to rebut the allegations. In the absence of a replying affidavit by SARAH the 2nd and 3rd interested parties cannot competently rebut those allegations and simply attempting to defend the indefensible.

Thirdly, the 2nd & 3rd interested parties have submitted that the Land Adjudication Officer sat with the aid of committee members. Your Lordship, this submission is best answered by a cursory

perusal of the impugned proceedings. There are no names of the alleged committee members. There is nowhere in the proceedings where it shows or suggests that there were committee members present during the hearing.

C) On the Respondent's Submissions

Firstly, the respondent's have not denied that there were no committee members during the hearing of the impugned proceedings. The respondents in their submissions however confirm that the committee members have specific functions outlined at section 20(b) of Cap 284. Among the functions of the committee members is to advise the Land Adjudication Officer on issues of customary law. At paragraphs 9 and 10 of the affidavit verifying the facts in support of the Notice of Motion, the ex parte Applicant has clearly stated that some of the issues that were raised during the hearing touched on customary law issues. The presence of committee members was therefore critical during the hearing of the objection proceedings.

Secondly, the respondents have submitted that the ex parte applicant ought to have filed an appeal instead of Judicial Review proceedings. Your Lordship, we reiterate our earlier submissions that the scope of appeal and the scope of Judicial Review Proceedings are different. The ex parte applicant is properly before this court having raised specific issues concerning the process leading to the impugned decisions.

c) CONCLUSION

We urge your Lordship to find that from the totality of the pleadings and submission filed by the parties;

- i) It is true that the 1st respondent sat without the aid of committee members.
- ii) It is true that the ex parte applicant was not present during the hearing of the impugned proceedings.
- iii) The officer by the name SARAH did not rebut the allegations of bias raised against her.
- iv) The Judicial Review Proceedings are well grounded and the grounds cited have been ably demonstrated.

We pray that the notice of motion dated 16.12.2013 be allowed. We so humbly pray.

DATED AT MERU THIS 30TH DAY OF OCTOBER, 2017

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FOR: MITHEGA & KARIUKI

ADVOCATES FOR THE EX-PARTE APPLICANT

I. The 1st, 4th and 5th Interested Parties had filed grounds of opposition dated 16th June, 2017 and filed on 21st June, 2017, in the following terms:-

- 1. That the application is misplaced and bad in law.
- 2. That the ex parte applicant had died long before the filing of his Notice of Motion dated 16.12.2013 and indeed, therefore, had no capacity and or locus to sue in person.
- 3. That otherwise, the ex parte applicants' application and the entire suit herein are premature and

uncalled for at this stage.

J. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties in support of their assertions. Herebelow, I give a conspectus of the parties' submissions which will constitute a summary thereof.

K. The exparte applicant's main complaints are:-

- a) The 1st Respondent sat without the aid of a committee and, therefore, acted illegally in not observing the applicable law.
- b) The rules of natural justice were ignored in that the applicant was not heard.
- c) The 1st respondent evinced open bias against the exparte applicant.

L. The respondents say that the Adjudication officer applied the applicable law contrary to the claims made by the exparte applicant. They say that representatives of the exparte applicant actively took part in the proceedings on his behalf.

M. The respondents say that the exparte applicant had not exhausted all available remedies when he filed this Judicial Review application. They state that he should have filed an appeal, as indicated in the decision of the 1st respondent, within 60 days. They proffer that the exparte applicant is forum shopping by not following the procedures elucidated in Cap 284 and by instead filing Judicial Review Proceedings. They opine that he has not come to court with clean hands in that this application seeks to subvert existing statutory law. They say: "He who comes to equity must do equity and also should come with clean hands, the exparte applicant has not." They urge this court to dismiss the application with costs.

N. The 1st, 4th and 5th Interested parties say that the proceedings annexed to the exparte applicants annexure "NN2" at page 1 indicate that one Njeru Ntharano, the exparte applicant in this application had died even before the 1st respondent heard the matter which spawned this suit. They say that, on that ground alone, this suit ought to be dismissed as there was no way a dead person would have filed this application. They also say that the exparte applicant had not exhausted available statutory remedies. They urge the court to dismiss this application.

O. More or less the 2nd and 3rd Interested party's submissions echo the submissions proffered by the respondents and by the other Interested parties. They, however, stress that any of the 3 Adjudication and settlement officers were competent to hear and determine objections in land matters and that the officer called "Sarah" who heard the matter which spawned this application had competence to do so.

P. I frame the only issue to be determined in this suit as: Has the exparte applicant demonstrated that the orders sought in this application are merited. If the orders are merited, the application will be allowed. If the orders are not merited, the application will be dismissed.

Q. I note that in his response to the submissions filed by the parties, the exparte applicant submits that he was entitled to file a Judicial Review application, even though he had not exhausted the available statutory remedies. He states that while an appeal to the minister is concerned with the merits of the decision, Judicial Review is concerned with the process.

I do opine that a party who appeals to the minister is not prohibited from raising issues concerning the process. In matters of Land Adjudication and Consolidation due to their special character they should be better canvassed in a way that exhausts existing statutory remedies. For example, by instituting Judicial Review Proceedings, an applicant will have avoided the requirement to obtain the Consent of the Adjudication and Consolidation Officer before filing a suit in any court in Kenya. This requirement has solid reasoning in that suits have the effect of delaying adjudication and consolidation matters to the detriment of many citizens who have no pending suits. In this matter, I am inclined to agree with the

respondents that a veneer of forum shopping is evinced.

R. I do note that in her Replying affidavit sworn on 30th October, 2015 the respondent avers at paragraph 8 as follows; “THAT there are pending appeal cases – 18/2013, 17/2013, 20/2013, 21/2013, 22/2013, 23/2013, 24/2013, 25/2013.”

This assertion has not been controverted. It is not desirable that parallel Judicial or quasi-judicial processes are allowed to exist. This amounts to forum shopping.

S. The issue regarding if or if not the exparte applicant was alive when this application was filed has not come out clearly. Obviously, a dead person cannot file any judicial proceedings. There are enough remedies which allow a deceased person to be substituted by a representative.

T. I find that the officer who handled the impugned decision had the requisite authority, and, therefore jurisdiction. I also find that the proceedings were conducted in accordance with the applicable law. The exparte applicant has not demonstrated that the 1st Respondent evinced bias. The exparte applicant has not demonstrated that the orders sought in this matter are merited.

U. In the circumstances;

1. This application is dismissed
2. Costs are awarded to the 2 respondents and to the 5 interested parties.

Delivered in open court at Chuka this **15th day of February, 2018** in the presence of:

CA: Ndegwa

Ann Kithaka h/b Manasses Kariuki for exparte applicant

Ann Kithaka h/b Kiogora Arithi for 2nd and 3rd interested parties

Respondents not represented

P. M NJOROGE,

JUDGE.