



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**  
**CHUKA JUDICIAL REVIEW CASE NO 18 OF 2017**  
**FORMERLY MERU JUDICIAL REVIEW NO. 15 OF 2014**

**VERONICA CIAMBURA MUTEGI.....EX-PARTE  
APPLICANT**

**VERSUS**

**THE DISTRICT LAND ADJUDICATION AND**

**SETTLEMENT OFFICER MERU SOUTH DISTRICT.....1<sup>ST</sup>  
RESPONDENT**

**PHILLISCILA KAGENI RUGENDO.....1<sup>ST</sup> INTERESTED  
PARTY**

**AUSILIA CIANDEKE MUTEGI.....2<sup>ND</sup> INTERESTED  
PARTY**

**PRISCILLA MURUGI NJOGU.....3<sup>RD</sup> INTERESTED  
PARTY**

**JANE ITARA MUSYOKA.....4<sup>TH</sup> INTERESTED  
PARTY**

**JUDGMENT**

1. This application is dated **30<sup>th</sup> May, 2014** and seeks the following orders:

**1.That** an order of certiorari to remove into the high court for the purpose of quashing the decisions of the District Land Adjudication and Settlement Office Chuka contained in the Decision/Award in Case Numbers **605, 600, 611, 618 all of 2013** delivered on **23<sup>rd</sup> January, 2014** in respect of family Land parcel land parcel No. **269/Kamwimbi/Adjudication Section** where the 1<sup>st</sup> respondent purported to determine the issue of ownership of the above Land and further making decision of sub-division and distribution of the same to the interested party without following due process of law.

**2.That** the costs of this application be provided for and/or be in the cause.

2. The ex-parte applicant's statement of facts reads as follows:

## **STATEMENT OF FACTS**

**(Filed pursuant to Order 53 Rule 1(2) of the Civil Procedure Rules, chapter 21 of the laws of Kenya).**

### **NAME AND DESCRIPTION OF THE APPLICANT**

1. The names of the applicant are **VELONICA CIAMBUBA MUTEGI** here address for service shall be care of **P. O. BOX 56, CHUKA**.
2. That the ex-parte applicant is the legal wife of the deceased disputed land (sic) hence one of the beneficiary.
3. That the respondent is a the District Land Adjudication and Settlement Officer Meru South District, Chuka Act (sic) and having jurisdiction to determine the all cases of Civil nature involving disputes as to;
  - a) The division of and determination of boundaries to land
  - b) Claims in respect to occupation of land
  - c) Trespass to land within Chuka area of Meru South District Meru County.

### **THE FACTS RELIED UPON**

4. The respondent purported to frame the issues for determination being ownership and sub-division of land No. 269/Kamwimbi/Adj. Section, without following due process of law and fairly hearing all the parties concerned.
5. That applicant contends that the issues of ownership and sub-division of the aforesaid land was not within the mandate of the respondent.
6. Further to the above the applicant asserts that the determination ownership and sub-division in respect to land parcel No. 269/Kamwimbi/Adj. Section is not within the jurisdiction of the said the District Land Adjudication.
7. That the respondents reached a decision based on wrong principles and therefore wrong foundation on both facts and law.
8. That applicant further states as a procedural lapse the process of and culminating to the findings of the District Land Adjudication was flawed in the sense that the applicant was not allowed to participate and respond to the issues before the District Land Adjudication.
9. The applicant in the light of the above states that the said finding and / or decision is erroneous and failed to take into account the expected and legitimate objections as to the lack of jurisdiction, the orders passed were harsh, oppressive and uncalled for taking all circumstances of this matter into account.
10. That further to the above the respondent proceeded to allocate and distribute the property belonging to the deceased applicant without her consent, approval and oblivious of their (sic) inherent proprietary interest in the said land.
11. That the applicant has been adversely affected by the District Land Adjudication award/decision. (Annexed and marked VCM – 1 is a copy of the said proceedings.)

### **REASONS WHY THE APPLICANT SEEKS THE FOLLOWING RELIEFS**

- a) By way of a certiorari to remove into court and quash all the decisions of the respondent in the

decision/award delivered on 23<sup>rd</sup> January, 2014 and not to be domesticated as an order of honourable court or making findings and/or entering judgment in respect to ownership of land parcel No. 269/Kamwimbi/Adj. Section against the applicant's legitimate expectation and ordering the sub-division of land unfairly.

b) The honourable court be pleased to grant any other and/or further relief on terms that it may find fair and just in the circumstances.

c) The costs and interest thereon of these proceedings be granted to the applicant

**THE GROUNDS ON WHICH THE SAID RELIEF IS SOUGHT**

**Ultra vires the Powers of Tribunal**

i) The District Land Adjudication and Settlement Officer Meru South District, Chuka acted contrary to the guiding provisions under the Land Dispute Tribunal Act No. 18 of 1990:

**IRREGULARITY**

ii) The District Land Adjudication and Settlement Officer Meru South District, Chuka sought to sub-divide and allocate Applicant's husbands property whereas it has no jurisdiction under the Land Disputes Act No. 18 of 1990 over such matters.

iii) The District Land Adjudication and Settlement Officer Meru South District, Chuka acted irregularly since it had no jurisdiction to entertain matter pertaining to sub-divide or ownership to land.

**PROCEDURALLY IMPROPRIETY/NULL AND VOID**

iv) The District Land Adjudication and Settlement Officer Meru South District, Chuka failed to adhere to the provisions of section 3 of the Land Disputes Tribunal Act and therefore took a position which was a nullity in law.

v) The District Land Adjudication and Settlement Officer Meru South District, Chuka award was done and concluded without following the procedure provided for under the provisions of the land disputes Tribunal Act.

vi) That in the District Land Adjudication and Settlement Officer Meru South District, Chuka proceedings they have named the said Charles Mutegi Musyoka. (Deceased) as the defendant which is a nullity and the said decision by the Land Adjudication ought to be dismissed.

**BIASNESS & UNFAIRNESS CONTRARY TO THE RULES OF NATURAL JUSTICE**

vii) The said District Land Adjudication acted against the Rules of fairness by refusing to accord the applicant an opportunity to file a defence at its sitting and thereby condemning the applicant unheard.

viii) THAT the District Land Adjudication and Settlement Officer Meru South District, Chuka dealt and determined issues that were not presented before it including determining allocation of land, allocating specific acreage to the applicant whereas those issues had not been framed.

**DATED at Embu this 12<sup>th</sup> day of May, 2014**

.....

**VELONICA CIAMBUBA MUTEGI**

**THE APPLICANT**

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties, in opposition to the application, adopted the averments contained in the Replying Affidavit of the 4<sup>th</sup> Interested party sworn on **25<sup>th</sup> July, 2014** which states as follows:

**I, JANE ITARA MUSYOKA** of P. O. Box 56 **MAGUMONI** in the Republic of Kenya do make oath and states as follows (in its wordings):

1. That I am the 4<sup>th</sup> interested party well versed with the particulars of this case and hence competent to make this oath.
2. That the exparte applicant in this judicial review case is wife to my son one the late **CHARLES MUTEGI MUSYOKA**.
3. That the late **CHARLES MUTEGI MUSYOKA** had two wives namely **AUSIIA CIANDEKE MUTEGI** the 2<sup>nd</sup> interested party and **VERONICA CIAMBUBA MUTEGI** the applicant in this case.
4. That my late husband was **MUSYOKA M'GARU** who died before the adjudication process in **KAMWIMBI "A" ADJUDICATION SECTION** had commenced.
5. That upon **KAMWIMBI "A"** adjudication section number 269 being declared an adjudication section I and the late **MUTEGI MUSYOKA** (my only son) agreed that the said **MUTEGI MUSYOKA** to walk the boundaries of the ancestral land.
6. That the late **MUTEGI MUSYOKA** being my only son and his father my husband was deceased customarily was the head of the family and he had no otherwise rather than to take responsibility of the ancestral land.
7. That when the adjudication record commenced the late **MUTEGI MUSYOKA** walked the boundaries of the ancestral land and the same was allocated and designated as **KAMWIMBI "A"** adjudication section number **269**.
8. That I and the late **MUTEGI MUSYOKA** agreed that the late **MUTEGI MUSYOKA** do dispose 2 acres out of the ancestral land aforedeponed to raise money to enable him pay for witnesses and attendance in objections that were raised by various people when the said **MUTEI MUSYOKA** walked the boundaries of **KAMWIMBI A ADJUDICATION SECTION** number **269**.
9. That the late **MUTEGI MUSYOKA** and I opted to and we actually sold the two acres to the 3<sup>rd</sup> interested party namely: **PRISCILLA MURUGI NJOGU**.
10. That it is within my knowledge and information that by the time the late **MUTEGI MUSYOKA** died **PHILISILLA MURUGI NJOGU** had been shown a piece of and the applicant and other interested parties were aware of the late **MUTEGI MUSYOKA'S** sentiments that the said **PHILLISILA MURUGI NJOGU** should occupy and make use of a portion and indeed the late **MUTEGI MUSYOKA** had received payments for the portion sold and no one was to evict her.
11. In fact I can vouch for the fact that by the time the late **MUTEGIMUSYOKA** died he had informally subdivided the ancestral land **KAMWIMBI "A"** adjudication section 269 into two portions where upon one portion was given to **AUSILLIA CIANDEKE MUTEGI** the 1<sup>st</sup> wife and the 2<sup>nd</sup> interested party and the other portion was given to **VERONICA CIAMBUBA MUEGI** the applicant and the 2<sup>nd</sup> wife.
12. That the portion that was given to the first wife and the 2<sup>nd</sup> interested party one **AUSILLIA**

**CIANDEKE MUTEGI** was the portion that **PHILLISILA KAGENI** 1<sup>st</sup> interested party, **PRISCILLA MURUGI NJOGU** 3<sup>rd</sup> interested party and I had the right to occupy and use and the same situation remains to date.

13. That the portion that was given to **VERONICA CIAMBURA** the applicant in this case was to be exclusively to be used by the applicant and her children and situation remains the same to date.

14. That in response to paragraph 1 and 2 of the applicants supporting affidavit I wish to aver that the same raises no canvassed issues between me and the applicants save to qualify that had the court been up raised (sic) with the complete and true facts of this case probably it would have refused to grant leave to apply for the orders of certiorari mandamus and prohibition otherwise the suit is an abuse of the court process.

15. In response to paragraph 3 of the supporting affidavit I wish to aver that objections number **600, 605, 611, 618 all of 2013** were objections not meant for determination of ownership but that of subdividing of the ancestral land to the beneficiaries and the applicant participated fully and 1<sup>st</sup> respondent did his best guided by the principals (sic) of natural justice to share the ancestral land to those who were beneficiaries and the 1<sup>st</sup> respondent (sic) decision went along way to quell the fighting between the applicant (sic) family and the interested parties.

16. That in further response to paragraph 3 of the supporting affidavit I wish to aver that **Kamwimbi "A"** adjudication section number **269** was shared by **CHARLES MUTEGI MUSYOKA** before his demise and all what the 1<sup>st</sup> respondent did was to implement the decision of the registered owner the late **CHARLES MUTEGI MUSYOKA**.

17. That issue of ownership of **KAMWIMBI "A"** adjudication section number **269** was determined at the committee level and the 1<sup>st</sup> respondent did not engage himself with ownership but distribution of land parcel number **269 KAMWIMBI "A"** adjudication section.

18. In right of my averment herein above the contents of paragraph 4 of the supporting affidavit are misplaced and lack merits.

19. In response to paragraph 5 of the supporting affidavit I wish to say that the 1<sup>st</sup> respondent was right and within his legal mandate to subdivide and distribute to the beneficiaries (including the applicant herself) parcel **KAMWIMBI "A"** adjudication section **269** as opposed to the averments of the applicants of the said paragraph.

20. The contents of paragraph 6 of the supporting affidavit is (sic) totally misleading and I wish to say that no beneficiaries of the late **CHARLES MUTEGI MUSYOKA** was left out in the ruling and distribution of **KAMWIMBI "A"** adjudication section **269** and it is the key to note that **CHARLES MUTEGI MUSYOKA** had two legal wives the applicant and the 2<sup>nd</sup> interested party and the applicant is not honest by failing to tell the court that she was given half of the ancestral land while the other half went to the 1<sup>st</sup> wife, 2<sup>nd</sup> interested party who had to share the same with the 1<sup>st</sup> interested party and 3<sup>rd</sup> interested party.

21. The contents of paragraph 7 of the supporting affidavit is correct save to qualify that the applicant was not the only wife of **CHARLES MUTEGI MUSYOKA** that the third interested party had bought 2 acres from the late **CHARLES MUTEGI MUSYOKA** that the 1<sup>st</sup> interested party has the right to occupy and use the ancestral land that the 2<sup>nd</sup> wife also has right to occupy and use the ancestral land without forgetting me as the mother of the late **CHARELS MUTEGI MUSYOKA** actually given half of **KAMWIMBI "A"** adjudication section number **269** as it was then hence taking a lion share of the ancestral land.

22. While I agree that land parcel **KAMWIMBI "A" 269** adjudication section is ancestral land as

deponed in paragraph 7 of the supporting affidavit it is true to note that the applicant is not the only wife of the late **CHARLES MUTEGI MUSYOKA** and there are other beneficiaries of the ancestral land under reference who includes (sic) me as the mother third interested party as a purchaser 2<sup>nd</sup> interested party as the 1<sup>st</sup> legal wife of **CHARLES MUTEGI MUSYOKA** without forgetting the 1<sup>st</sup> interested party who is a sister to the late **CHARELS MUTEGI MUAYOKA** the applicant is selfish (sic).

23. That I agree that the applicant is a beneficiary of the land in reference as posted in paragraph 8 of the supporting affidavit but her beneficial interest does not extinguish the interest of other beneficiaries as deponed in paragraph 8.

24. That in response to paragraph 9 of the supporting affidavit I wish to say that in adjudication process the adjudication officer has been empowered by **Cap 284** to apply custom and culture when adjudicating disputes hence there was no need of filing succession cause after law (sic) the land in issue is not registered under act number **3 of 2012** of the **Land Registration Act**.

25. The contents raised on **paragraph 10** of the supporting affidavit is neither here nor there granted that the area is under adjudication and as pointed out the adjudication officer had wide discretion under **cap 284** to adjudicate in an adjudication section.

26. In response to paragraph 11 of the supporting affidavit I say that the adjudication officer acted prudently, honestly, fairly and within his mandate more so because he was dealing with land in an adjudication section.

27. That nothing is far from the truth than the applicant's averments as posted in paragraph 12 of the supporting affidavit that she was not heard when the applicant fully attended and participated in objections numbers **600, 605, 611 and 618 all of 2013** and indeed the applicant finger printed the proceedings.

28. The contents of paragraph 13. And 14 of the supporting affidavit is not meritorious and it is not supported by any facts or law hence the same should be dismissed with the contents (sic) it deserves.

29. That in right of my averments in paragraph 27 above the contents of paragraph 15 of the supporting affidavit cannot hold and the same should be ignored as having no consequences.

30. In response to paragraph 16 and 17 of the supporting affidavit I aver that the contents therein are not supported by law or hardy facts.

31. That there was no stranger or strangers introduced by the respondent into the decision under judicial review and if anything I aver that those who have been given land as per the decision of the respondent are legitimate beneficiaries who were known by the late **CHARLES MUTEGI MUSYOKA** before he died.

32. That I am advised by my counsel on record which advice I verily believe to be true that the application is improperly instituted hence incompetent and an abuse of the court process and the same should be struck off and or dismissed with costs to the interested parties.

33. That all which is deponed herein is true to the best of my knowledge, belief and information.

4. Directions were given by this court that this Judicial Review application be canvassed by way of written submissions. The exparte applicant and the respondent were accorded several chances to file and exchange their written submissions. On 8<sup>th</sup> November, 2017, Mr. I. C. Mugo, the advocate representing the Interested parties moved the court to fix a date for delivery of judgment. I do note that the exparte applicant failed and or refused to file and exchange submissions.

5. I reproduce herebelow the joint submissions dated **24<sup>th</sup> July, 2017** proffered by the 4<sup>th</sup> Interested parties. They say:

**JOINT INTERESTED PARTIES' FINAL SUBMISSIONS (in their wordings.)**

1. Your lordship this is a judicial review case. At the preliminary stages the ex-parte applicant by ex-parte chamber summons dated 12<sup>th</sup> May, 2014 sought for the following orders;

a) That this application be certified urgent and heard on an ex-parte basis, and as propitious as possible for the reasons of urgency stated in the certificate herein.

b) That the applicant, **VERONICA CIAMBURA MUTEGI** be granted leave to apply for an order of certiorari to call for and quash the decision of the district land adjudication and settlement officer Meru South contained in the decision award in objection numbers 600, 605, 611 and 618 al of 2013 made on 23<sup>rd</sup> January, 2014 in respect of family land parcel NO. 269 Kamwimbi A adjudication section where the respondent purported to determine the issue of ownership of the above and further making the decision of subdivision and distribution of the same without following due process of the law.

c) That the leave granted do operate as a stay of the implementation of the decision/award contained in objection no. **600, 605, 611 and 618 all of 2013 made on 23<sup>rd</sup> January, 2014** and further stay of the proceedings in principal magistrate's court at Chuka or any other court pertaining family land parcel No. **269 Kamwimbi "A" Adjudication section.**

2. The ex-parte chamber summons were supported by a statutory statement of facts and a verifying affidavit. When the ex-parte application came up for hearing leave was granted to the ex-parte applicant to call into court the decision of land adjudication officer dated **23<sup>rd</sup> January, 2014** for purposes of being quashed by way of an order of certiorari. The ex-parte applicant was given 21 days from **13<sup>th</sup> May 2014** within which to file a substantive notice of motion. The ex-parte applicant filed her notice of motion on **4<sup>th</sup> June, 2014.**

3. The notice of motion dated 30<sup>th</sup> may, 2014 and received in court on 4<sup>th</sup> June, 2014 sought for the following orders;

a) That an order of certiorari to remove into the high court for the purpose of quashing the decision of the district land adjudication and settlement officer Chuka contained in the decision/award in case No. 600, 605, 611 and 618 all of 2013 made on 23<sup>rd</sup> January, 2014 in respect of family land parcel No. 269 Kamwimbi A adjudication section where the respondent purported to determine the issue of ownership of the above land and further making the decision of subdivision and distribution of the same to the interested parties without following due process of law.

b) That cost of this application be provide for and/or be in the cause.

4.

i) The substantive notice of motion dated 30<sup>th</sup> May, 2017 by the ex-parte applicant was supported by a supporting affidavit sworn and dated 30<sup>th</sup> May, 2014. At paragraph 3 of the supporting affidavit the ex-parte applicant deposed as follows, "that I was the defendant in the district land adjudication and settlement officer Meru South Case No. 600, 605, 611 and 618 all of 2013 where the said disputed land parcel 269 Kamwimbi A adjudication section the 1<sup>st</sup> respondent purported to determine the issue of ownership and further making the decision of subdivision and distribution of the same to the interested parties without due process of law". The ex-parte applicant deposed that the respondent did not follow the due process of the law when subdividing and distributing land parcel 269 Kamwimbi A adjudication section. Using the award dated 23<sup>rd</sup> January, 2014 land

parcel 269 Kamwimbi A adjudication section and gave it over to the interested parties.

ii. The ex-parte (sic) deposed that she is the legal wife of the deceased (sic). The ex-parte applicant averred that the disputed land belongs to her late husband one **CHARLES MUTEGI MUSYOKA**. The ex-parte applicant contended that some of the beneficiaries are not entitled to benefit from land parcel 269 Kamwimbi A adjudication section. The ex-parte applicant questioned the naming of her husband as a defendant in the district land adjudication and settlement proceedings and deposed that the proceedings by the respondent were a nullity. That the ex-parte applicant contended that the respondent acted in excess of its powers (ultra vires) and she questioned whether or not the respondent had powers to determine ownership of the land in question. The ex-parte applicant contended that she was not afforded a hearing before she was condemned. That the decision of the respondent is made outside the law and therefore a nullity ab initio.

iii. That the ex-parte applicant deposed that “the applicant is aggrieved for having not been given any notice or any reasons and/or any hearing by the respondents on or before the proceedings and decision(s) consequently, neither under the act nor any other law does the respondent have any jurisdiction to make any of the decisions that it purported to make and therefore ultra vires”. The ex-parte applicant contends that the decision by the respondent is therefore a nullity and void for all intents and purposes. The ex-parte applicant avers in her supporting affidavit that the decision is unconstitutional and against public policy. That the ex-applicant further avers that there are strangers who have benefited from the decision of the respondent when in fact they ought not benefit.

5.

i) Your lordship we will pause here and submit that the suit being a judicial review the ex-parte applicant is bound to rely on the grounds set out in the statutory statements only. The ex-parte applicant cannot add even one other ground to those she stated in her statutory statement in support of her application for leave to call for the respondent’s decision to the high court for purposes of being quashed by way of certiorari. We will reproduce the said grounds as set out by the ex-parte applicant in the statutory statement and which were as follows:

- a) Ultra vires the powers of the tribunal
- b) Irregularity
- c) Procedurally impropriety/null and void
- d) Biasness and unfairness contrary to the rules of natural justice

ii. We shall be visiting these grounds later in these submissions. By so doing we shall be out to show the court that the respondent acted in good faith, legally, lawfully and fairly. The respondent’s action in his decision of 23<sup>rd</sup> May, 2014 was justifiable, legal and lawful.

6.

i) Your lordship the interested parties opposed and remain opposed to the substantive notice of motion dated 30<sup>th</sup> May, 2014. In so doing each interested party filed and served a replying affidavit. Each interested party filed and served a replying affidavit. Each interested party deposed the reasons for opposing the ex-parte applicant’s notice of motion.

ii) That on the part of the 4<sup>th</sup> interested party she was clear who she was vis a vis the ex-parte applicant and CHARLES MUTEGI MUSYOKA. Her replying affidavit is sworn and dated 25<sup>th</sup> July, 2014. She started by stating that the ex-parte applicant is the wife to the 4<sup>th</sup> interested party’s son one CHARLES MUTEGI MUSYOKA. That the said CHARLES MUTEGI MUSYOKA had

two wives namely the ex-parte applicant and the 2<sup>nd</sup> interested party one AUSIIA CIANDEKE MUTEGI. She stated in her affidavit that her husband the late MUSYOKA M'GARU died before the adjudication process commenced in Kamwimbi A adjudication section. That upon Kamwimbi A Adjudication section No. 269 being declared an adjudication section the 4<sup>th</sup> interested party and the her only son MUTEGI MUSYOKA agreed that the said MUTEGI MUSYOKA walk the boundaries of the ancestral land.

iii) The 4<sup>th</sup> interested party deposed in her replying affidavit that CHARLES MUTEGI MUSYOKA her only son had the responsibility to act as the father of the home. When the late CHARLES MUTEGI MUSYOKA walked the boundaries of 269 Kamwimbi A adjudication section he was doing it on behalf of the whole family and the land was not his. That when the adjudication record commenced the late CHARLES MUTEGI MUSYOKA walked the boundaries of the ancestral land and the same was allocated and designated as Kamwimbi Adjudication Section No. 269. In deed (sic) the 4<sup>th</sup> interested party and her son agreed to sell 2 acres out of the ancestral land to raise funds to meet transport and subsistence for witnesses during the adjudication process. The 4<sup>th</sup> interested party stated in her replying affidavit that she and the late CHARLES MUTEGI MUSYOKA sold the 2 acres to the 3<sup>rd</sup> interested party one PRISCILA MURUGI NJOGU. That by the time CHARLES MUTEGI MUSYOKA the 3<sup>rd</sup> interested party had occupied the two acres sold to her. CHARLES MUTEGI MUSYOKA had already received the full price and the ex-parte applicant and all the interested parties were aware that the 3<sup>rd</sup> interested party had 2 acres out of 269 Kamwimbi A Adjudication section.

iv) The 4<sup>th</sup> interested party the mother in law of the applicant was in her replying affidavit clear that by the time CHARLES MUTEGI MUSYOKA died he had divided the suit land into two portions whereupon the 1<sup>st</sup> portion was given to the ex-parte and the other portion given to AUSCILLIA CIANDEKE. These were the two wives of the late CHARLES MUTEGI MUSYOKA. The 3<sup>rd</sup> interested party had her own portion distinct to the two portions excised and given to the late CHARLES MUTEGI MUSYOKA'S wives out of the portion given to the 2<sup>nd</sup> interested party. She deposed that she was supposed to live, occupy and make use of the portion given to the 1<sup>st</sup> wife (2<sup>nd</sup> interested party AUSCILIA CIANDEKE) and so was the 1<sup>st</sup> interested party and 3<sup>rd</sup> interested party. The status quo remains to date. The ex-parte applicant make (sic) use of her portion as shown by CHARLES MUTEGI MUSYOKA.

v) The 4<sup>th</sup> interested party averred that objections No.600, 605, 611 and 618 all of 2013 were objections not meant for determination of ownership but that of subdividing of the ancestral land to the beneficiaries and the applicant participated fully and the respondent did his best guided by the principles of natural justice to share the ancestral land to those who were beneficiaries and the respondent decision went along way to quell the fighting between the applicant's family and the interested parties. That the late CHARLES MUTEGI MUSYOKA had distributed 269 Kamwimbi A Adjudication section before he died and all that the respondent did was to put into effect the desires of the late CHARLES MUTEGI MUSYOKA vis a vis parcel No. 269 Kamwimbi A adjudication section. That the issue of ownership of land parcel No. 269 Kamwimbi A Adjudication section was determined at the committee level and the respondent did not engage himself with the ownership but distribution of and parcel No. 269 Kamwimbi A Adjudication section. That the respondent was right and within his legal mandate to subdivide and distribute to the beneficiaries ( including the applicant herself) land parcel No. 269 Kamwimbi A Adjudication section. No beneficiary of the late CHARLES MUTEGI MUSYOKA was left out in the ruling and distribution of 269 Kamwimbi A adjudication section.

vi) Land parcel 269 Kamwimbi A adjudication section is ancestral land. The ex-parte applicant is one of the beneficiaries of the said ancestral land. The land belongs to the family and the 3<sup>rd</sup> interested party who purchased 2 acres from the late CHARLES MUTEGI MUSYOKA the husband of the ex-parte applicant. The ex-parte applicant's interest cannot be enjoined at the expense of other beneficiaries who include all the interested parties herein.

vii) The 4<sup>th</sup> interested party deposed in her replying affidavit that in an adjudication section DLASO is empowered to apply custom and culture when adjudicating disputes hence there was no need of filing a succession cause for the land is yet to be registered under the land registration Act No. 3 of 2012. That under cap 284 the DLASO has wide discretion to adjudicate over disputes in an adjudication section. He therefore acted within his mandate. The adjudication officer acted prudently, honestly, fairly and within his mandate more so because he was dealing with land in an adjudication section. The ex-parte applicant attended and participated in objection No. 600, 605, 611 and 618 all of 2013. She cannot therefore say that she was condemned unheard against the principles of natural justice. The respondent acted within the law and his findings were legal and lawful let alone being fair and just. There is nothing unconstitutional in what the respondent did in implementing what the late CHARLES MUTEKI MUSYOKA had done on the ground. There is nothing in it to suggest that what the DLASO did was against public policy. The DLASO was out to try and cool the squabbles and tempers fomented by a son of the ex-parte applicant who not only burnt the 4<sup>th</sup> interested party's house but chased away all the other interested parties from the suit land. The ex-parte applicant was helpless and could do nothing to her rogue son. Eventually the rogue son was subjected to mob justice and lynched.

viii) That there was no stranger or strangers introduced by the respondent into the decision under judicial review and if anything the 4<sup>th</sup> I.P avers that those who have been given land as per the decision of the respondent are legitimate beneficiaries who were well known by the late CHARLES MUTEKI MUSYOKA before he died. That it is not escape (sic) to the sight of the court that the respondent did not make any determination of ownership of 269 Kamwimbi A adjudication section. The respondent only implemented what CHARLES MUTEKI MUSYOKA had done informally. DLASO came in after being requested by the administration to assist the family settle down.

ix) The application is improperly constituted. In the notice of motion the applicant should be the republic and not the ex-parte applicant. Certiorari, mandamus and prohibition are prerogative orders. The republic should be the right applicant.

7.

i) The 1<sup>st</sup> interested party's replying affidavit is sworn and dated 25<sup>th</sup> July, 2014. She is in full support of the 4<sup>th</sup> interested party's averments in her replying affidavit.

ii) Among others she deposes that the ex-parte applicant is her sister in law in that she is a sister to CHARLES MUTEKI MUSYOKA and a daughter to the 4<sup>th</sup> interested party. That the 2<sup>nd</sup> interested party is also a sister in law to the 1<sup>st</sup> interested party. That the 2<sup>nd</sup> interested is also a sister in law to the 1<sup>st</sup> interested party that is the wife to CHARLES MUTEKI MUSYOKA. She wholly adopts the averments of the 4<sup>th</sup> interested party.

8.

i) The 2<sup>nd</sup> interested party is AUSILIA CIANDEKE MUTEKI. Her replying affidavit is sworn and dated 25<sup>th</sup> July, 2014. She in turn also adopts the affidavit of the 4<sup>th</sup> interested party.

ii) In her replying affidavit she deposes that the ex-parte applicant is her co-wife and she was married earlier than the ex-parte applicant. She deposes that the 1<sup>st</sup> interested party is her sister in law while the 4<sup>th</sup> interested party is her mother in law. She wholly associates herself with the sentiments contained in the replying affidavit of the 4<sup>th</sup> interested party.

9.

i) The 3<sup>rd</sup> interested party is one PRISCILLA MURUGI. Her replying affidavit is sworn and dated

25<sup>th</sup> July, 2014. She also associates herself with the averments of the 4<sup>th</sup> interested party contained in her replying affidavit sworn and dated 25<sup>th</sup> July, 2014.

ii) She inter alia deposes that the late CHARLES MUTEGI MUSYOKA brother to the 1<sup>st</sup> interested party and husband to the ex-parte applicant and the 2<sup>nd</sup> interested party and the son of the 4<sup>th</sup> interested party during his life time sold to her 2 acres out of land parcel NO. 269 Kamwimbi A adjudication section. She then proceeded to adopt the averments contained in the replying affidavit of the 4<sup>th</sup> interested party.

10. Your lordship from the foregoing it can clearly be discerned that this is a family dispute. The ex-parte applicant pitted against her sister in law the 1<sup>st</sup> I.P. a co-wife 2<sup>nd</sup> I.P. her mother in law 4<sup>th</sup> I.P. and a purchaser for value the 3<sup>rd</sup> I.P. The purchaser had bought the land from the ex-parte applicant's child one CHARLES MUTEGI MUSYOKA. The ex-parte applicant has her own portion out of 269 Kamwimbi A adjudication section. That CHARLES MUTEGI MUSYOKA left all the I.Ps on their respective portion having informally shared 269 Kamwimbi A adjudication section to the ex-parte applicant one portion and the remaining portion to be shared by all the I.Ps.

11. Seemingly the ex-parte applicant after the death of her husband wanted to take the whole land to the exclusion of the interested parties despite that the land is family and ancestral on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> I.Ps. The 3<sup>rd</sup> I.P. has a purchaser's interest. This led to the squabbles and fighting with many cases being conducted before the administration. One of such disputes was heard by the district commissioner who directed the respondent to demarcate 269 Kamwimbi A adjudication section to the rightful owners going by the intentions and wishes of CHARLES MUTEGI MUSYOKA who walked the boundaries of the land under reference and shared it to the ex-parte applicant and all the IPs. The fighting was such that the 4<sup>th</sup> I.P was chased from the land by the applicant's son.

12. What is it that the respondent did that was wrong that compelled the applicant to file this J.R? Our answer to this question is that indeed nothing was wrong. The applicant was only disgruntled. She wants to own everything that is family and ancestral land at the expense of the I.Ps. She also wants to deny that her husband sold 2 acres to the 3<sup>rd</sup> interested party. The applicant and CHARLES MUTEGI MUSYOKA received the purchase price and converted it into their use when her husband was alive. She should not be allowed to enrich herself unfairly. She cannot have her cake and eat it.

13. Your lordship we will now interrogate the grounds which the ex-parte applicant relies on in support of her judicial review. As pointed out she can only rely on her grounds in support in her statutory statement of fact.

i) The first claim by the applicant against the respondent's decision under judicial review is that the respondent acted ultra vires his legal mandate under CAP 284. This is not possibly true. The respondent has wide powers and duties under CAP 284. The respondent's powers are donated by section 9(2) and section 10 of CAP 284. The respondent is given the power and authority to hear all objections brought under section 26 of CAP 284. Before him were objections No. 600, 605, 611 and 618 all of 2013 for determination. The objections were in relation to the sub division, occupation and use of ancestral land.

ii) Section 10 in particular gives very wide powers to the adjudication officer. The adjudication officer therefore acted within his mandate by hearing and determining the interests of the interested parties in regard to their interests over 269 Kamwimbi A adjudication section.

iii) The second complaint against the respondent's decision of 23<sup>rd</sup> January, 2014 was that there were irregularities in the manner in which the respondent conducted himself in hearing and determining objection Nos. 600, 605, 61 and 618 al of 2013. The ex-parte applicant in the first

instance is wrong by suggesting that the respondent was being guided by the provisions of repealed land dispute tribunal act No. 18 of 1990. The respondent was acting under the provisions of CAP 284. The land in question 269 Kamwimbi A adjudication section was not the property of CHARLES MUTEGI MUSYOKA. CHARLES MUTEGI MUSYOKA was only a trustee. The land was family land and/or ancestral land. The late CHARLES MUTEGI MUSYOKA had shared out 269 Kamwimbi A adjudication section before his death where he divided the land into two equal portions. One half for the applicant and the second half for the four interested parties. CHARLES MUTEGI MUSYOKA had also divided the second half into four portions meant for each of the four interested parties. The respondent only picked up the boundaries and gave the portions registration numbers.

iv) The applicant is wrong to suggest that the respondent had no jurisdiction to entertain the objections. We repeat that the objections by the I.Ps were within the mandate and power donated by section 9 (2) and section 10 of CAP 284. The respondent was only determining or picking the boundaries that CHARLES MUTEGI MUSYOKA had left having beckoned (sic).

v) Section 3 of the land dispute tribunal act No. 18 of 1990 was not applicable to the I.P's objections. Strictly the respondent was guided by CAP 284 and in particular sections 9 and 10 of CAP 284. By this time the land dispute tribunal act No. 18 of 1990 had been already repealed. How the applicant brings in the land dispute tribunal in a matter of adjudication one cannot explain. There is no time the respondent was guided by the land dispute tribunal act No. 18 of 1990 and in any case section 3 of the land dispute tribunal gave the powers to the land dispute tribunal to determine boundaries but by so saying we are not suggesting that the respondent was obligated to follow that particular section. The respondent's decision is therefore based on a concrete foundation of the law (CAP 282). The objections were in relation to the occupation and use of 269 Kamwimbi A adjudication section and in any case the land dispute tribunal act No. 18 of 1990 had already been repealed. The same was repealed in August 2010. It had no place in the decision. The land dispute tribunal act did not oust the powers of the respondent in adjudicating land under Cap 284.

vi) The other complaint against the decision of the respondent was that CHARLES MUTEGI MUSYOKA was named as a respondent in objection No. 600, 605, 611 and 618 al of 2013 when he was already dead. This assertion was not correct. Section 13 (5) OF cap 284 states as follows, "where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or her attendance shall be taken to be the attendance of all successors unless the adjudication officer otherwise directs". From the foregoing section one can discern that a deceased person can be represented in adjudication proceedings. In the respondent's decision of 23<sup>rd</sup> January, 2014 CHARLES MUTEGI MUSYOKA was represented by the applicant. The proceedings therefore were lawful.

vii) The applicant accuses the adjudication officer (respondent) of bias and unfairness. She also accuses the respondent of being in breach of the principles of natural justice. This allegation is far from the truth. The respondent gave the applicant half of the suit land just the way CHARLES MUTEGI MUSYOKA had divided it. CHARLES MUTEGI MUSYOKA had two wives. The land was shared into two halves. The respondent was not biased and he acted diligently. The four interested parties shared half of the whole land while the applicant went with the other half. The land being family and ancestral land the respondent can only be said to have been biased against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> interested parties. As regards the 3<sup>rd</sup> interested party she had bought 2 acres from CHARLES MUTEGI MUSYOKA and the respondent did not give her more than that. The 2<sup>nd</sup> interested party a co-wife of the applicant is entitled to claim an equal share as that of the applicant and the applicant doesn't see this. The 2<sup>nd</sup> interested party is contented.

viii) Did the respondent affront principles of natural justice? Not a single moment. The applicant attended and participated in the proceedings of 23<sup>rd</sup> January, 2014. She presented her case, argued it and cross examined the opposing side. She was heard and she was not condemned unheard.

14. In light of the foregoing your lordship we urge the court to make a finding and hold that the J.R. lacks merit. The same should be disallowed with costs to the interested parties. The respondent's decision of 23<sup>rd</sup> January, 2014 should not be disturbed. The decision has gone an extra mile to settle the scuoboes (sic) and fighting between the applicant and the interested parties a situation that is unfortunate granted that they are close relatives who are fighting over family and/or ancestral land.

15. We rest our submissions and pray.

6. I frame the main issue to be determined as if or if not the exparte applicant has demonstrated that the prayers sought in this application are merited. If the court finds that the prayers are merited, it will allow the application. If it finds that the prayers are not merited, it will dismiss the application.

7. It is an established tenet of judicial practice, whose origin can be traced to antiquity that in civil proceedings, the claimant must prove what he claims on a balance of probabilities. Sections 107 and 108 of the Evidence Act place responsibility of proving an alleged fact upon the person who so alleges. It is also an established judicial precept that what is not controverted by a party is deemed to be determined in favour of the party whose assertions are not controverted by the opposite party.

8. The exparte applicant and the respondents have not controverted, in any way, the assertions contained in the sworn affidavits filed by the interested parties. The court, therefore, deems them as proof that their assertions have integrity. I also find that the ex-parte applicant actively participated in the proceedings which spawned this application. Indeed, I find that the 1<sup>st</sup> respondent properly acted within his powers and jurisdiction when he made the decision being impugned by the ex-parte applicant. The exparte applicant is wrong in averring in her statement of facts that the respondent had no jurisdiction to determine ownership under the Land Disputes Tribunals Act. The impugned decision was made in accordance with the Land Adjudication Act. The exparte applicant has veritably conflated the applicable laws.

9. In the circumstances, the exparte applicant has not demonstrated that the prayers sought in this application are merited.

10. In the circumstances, this application is dismissed.

11. Costs are awarded to the interested parties and are to be paid by the exparte applicant.

12. It is so ordered.

Delivered in open court at Chuka this **13<sup>th</sup> day of February, 2018** in the presence of:

CA: Ndegwa

I.C. Mugo for the Interested parties

Ex-parte applicant and his advocate absent

Attorney General's representatives absent

**P. M. NJOROGE**

**JUDGE**