



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC JUDICIAL REVIEW APPLICATION CASE NO. 02 OF 2018

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY OF LANDS, HOUSING, PHYSICAL PLANNING &

SETTLEMENT.....1ST RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER MERU SOUTH/

MAARA SUB COUNTY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

WILFRED KITHINJI MAGAMBO (SUBSTITUTED FOR MUTUA MUGAMBI

AREWA.....1ST INTERESTED PARTY

WERU TEA FACTORY COMPANY LIMITED.....2ND INTERESTED PARTY

GILBERT MUCHIRI NGAINE.....EX-PARTE APPLICANT

JUDGMENT

1. This matter was first brought to court through Chamber Summons on **22nd February, 2018**. The applicant was allowed to apply for an order of certiorari. The applicant did not move the court to grant him an order of stay of the impugned judgment.

2. The substantive suit was brought to court by way of a Notice of Motion application dated 19th March, 2018. It has the following format:

TAKE NOTICE THAT the honorable court shall be moved on the 21st day of March, 2018 at 9:00 o'clock in the forenoon or so soon thereafter for hearing counsel for the ex-parte applicant for orders that;

1. That the findings, ruling and judgment of ABRAHAM KEMBOI the deputy county commissioner Maara Sub County delivered on 16th November 2017 for and on behalf of the minister of lands, housing, physical planning and settlement in appeal no 451/2017 preferred from objection no 1529 and 1530 in respect of land parcels 2266 Lower East Magutuni Adjudication section and 1864 Lower East Magutuni Adjudication section respectively be quashed by way of an order of certiorari.

2. That the respondents and the interested parties be prohibited from executing or implementing the findings, ruling and judgment of ABRAHAM KEMBOI the deputy county commissioner Maara Sub County delivered on 16th November 2017 for and on behalf of the minister of lands, housing, physical planning and settlement in appeal no 451/2017 preferred from objection no 1529 and 1530 in respect of land parcels 2266 Lower East Magutuni Adjudication section and 1864 Lower East Magutuni Adjudication section pending the hearing and determination of this judicial review.

3. Cost of this judicial review be provided for.

3. This application is supported by the annexed affidavit of GILBERT MUCHIRI NGAINE, the statutory statement of facts of the ex-parte applicant and the annexures thereto sworn and dated **20th February 2018** and the verifying affidavit of GILBERT MUCHIRI NGAINE sworn and dated 20th February 2018 fortified by the following principal grounds;

(a) That the appeal to the minister as presented was out of time granted that the appeal ought to have been preferred within 60 days of the determination by the district land adjudication and settlement officer (A.R proceedings date-30th August 2016, appeal to the minister on 30th May 2017).

(b) That the deputy county commissioner for and on behalf of the minister did not give the litigants a fair hearing which was an affront to the principles of natural justice which demand that a person should not be condemned unheard.

(c) That the deputy county commissioner did not hear submissions from the ex-parte applicant and the 1st interested party but rather proceeded to pronounce the findings, ruling and judgment without any proceedings upon which he could base his findings, ruling and/or judgment.

(d) That the minister through the deputy county commissioner had no basis of his findings, ruling and judgment given that none of the litigants adduced evidence in support or against the findings, determination and/or award of the 2nd respondent.

(e) That the minister's findings through the deputy county commissioner were openly biased against the ex-parte applicant and in particular when the deputy county commissioner made the following findings;

(i) That 1864 Lower East Magutuni Adjudication Section was owned jointly between the ex-parte applicant and the 1st interested party when the correct position was that the ex-parte applicant was the sole owner of 1864 Lower East Magutuni Adjudication Section and the 1st interested party was the owner of 2354 Lower East Magutuni Adjudication Section and the two parcels of land measured 70 acres and not 35 acres.

(ii) That the 1st interested party and the ex-parte applicant in 2015 **agreed** to sell 1864 Lower East Magutuni Adjudication Section to the 2nd interested party when the correct position is that the 1st interested party on his own secretly, fraudulently and dishonestly sold the ex-parte applicant's land parcel 1864 Lower East Magutuni Adjudication Section and his own land 2354 Lower East Magutuni Adjudication Section to the 2nd interested party.

(iii) That the ex-parte applicant and the 1st interested party disagreed on how to share the proceeds from the 2nd interested party when the correct position is that the ex-parte applicant has never been privy to any agreement with the 2nd interested party and the ex-parte applicant has never agreed on how to share money paid by the 2nd interested party.

(iv) That the proceeds were to be shared equally initially but after the sale they disagreed on how to share the proceeds and in particular when the deputy county commissioner does not explain where the proceeds went after the disagreements.

(v) That GILBERT MUCHIRI NGAINE demanded that the sale be reversed without any explanation as to what happened if GILBERT MUCHIRI NGAINE the ex-parte applicant was dissatisfied with the sale although the correct position is that the ex-parte applicant did not participate or engage himself with the 2nd interested party in a sale of land agreement.

(vi) That without giving reasons the deputy county commissioner on behalf of the minister pronounced himself that "from the foregoing I do not find any reason why GILBERT MUCHIRI NGAINE should be awarded 40 acres of land while the size of the land which they jointly owned with MUTUA AREWA was 35 acres which land was to be shared equally between the two disputing parties thus 17 ½ acres each".

(vii) That each party was to get an equal share out of the 35 acres when the true position was that the 2nd interested party bought 70 acres comprising the ex-parte applicant 1864 Lower East Magutuni Adjudication Section and 2354 Lower East Magutuni Adjudication Section belonging to the 1st interested party hence the ex-parte applicant was entitled to 35 acres plus 5 acres compensation to be excised from the 1st interested party's land parcel 2266 Lower East Magutuni Adjudication Section.

(f) That the minister through the deputy county commissioner did not give any reasons for his findings, ruling and judgment and seemingly they were based on the deputy county commissioner's own thinking and wishes.

(g) The procedure followed by which the deputy county commissioner arrived at his findings, ruling and judgment were unprocedural.

(h) That the findings, ruling and judgment of the minister through the deputy county commissioner lack any legal basis and in particular noting that the deputy county commissioner entertained an appeal based on issues of facts instead of issues of law this being a second appeal.

DATED AT CHUKA THIS 19TH DAY OF MARCH, 2018

4. It is opined that the grounds on the face of the application are a conspectus of the Statutory Statement of Facts filed at the ex-parte stage which is in the following format:

STATUTORY STATEMENT OF FACTS

UNDER ORDER 53 RULE 4 (1) OF THE CIVIL PROCEDURE RULES

I GILBERT MUCHIRI NGAINE OF P.O BOX 82 Magutuni in the republic of Kenya make oath and state as follows;

1. That the name and address of the applicant is as follows

GILBERT MUCHIRI NGAINE

P.O BOX 82

MAGUTUNI

2. That the name and address of the 1st respondent is as follows

MINISTER OF LANDS, HOUSING

PHYSICAL PLANNING AND SETTLEMENT

P.O BOX

NAIROBI

3. That the name and address of the 2nd respondent is as follows

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

MERU SOUTH/MAARA SUB COUNTIES

P.O BOX 80

CHUKA

4. That the name and address of the 3rd respondent is as follows;

THE HONORABLE ATTORNEY GENERAL

P.O BOX

40112-00100

NAIROBI

5. That the name and address of the 1st interested party is as follows

MUTUA MUGAMBI AREWA

P.O BOX 82

MAGUTUNI

6. That the name and address of the 2nd Interested party is as follows

WERU TEA FACTORY COMPANY LIMITED

P.O BOX

CHOGORIA

7. That the facts of this judicial review are as follows;

- (i) That the applicant and the 1st interested party are cousins.
- (ii) That during the adjudication process of Lower East Magutuni Adjudication Section the applicant walked the boundaries of 1864 Lower East Magutuni Adjudication Section which was measuring 35 acres.
- (iii) That during the adjudication process of Lower East Magutuni Adjudication Section the 1st interested party walked the boundaries of 2354 Lower East Magutuni Adjudication Section which was measuring 35 acres.
- (iv) That upon the applicant and the 1st interested party walking the boundaries of their respective land parcels 1864 and 2354 Lower East Magutuni Adjudication Sections respectively no person lodged a dispute against their being recorded with their respective parcels of land either at the land committee level or arbitration board level.
- (v) That there being no disputes the applicant held his horses to await the issuance of title deeds and in particular the title deed to land parcel 1864 Lower East Magutuni Adjudication Section.
- (vi) That as the applicant was awaiting the issuance of the title deed he rented portions of his land 1864 Lower East Magutuni Adjudication Section to persons who wanted to practice peasant farming.
- (vii) That on or around 2011 the applicant found out that the 2nd interested party was doing aforestation on his land parcel 1864 Lower East Magutuni Adjudication Section when the applicant found persons not known to him planting trees on his land aforesaid and without prior consent or knowledge of the applicant and on inquiry he found out that those who were planting trees were agents of the 2nd interested party.
- (viii) That upon demanding to know from the agents of the 2nd interested party who were working on the applicant's land the agents informed the applicant that the 2nd interested party had bought land from the 1st interested party.
- (ix) That upon inquiring from the 1st interested party who had allowed the 2nd interested party to plant trees on the applicant's parcel of land and the 1st interested party's land parcel 2354 Lower East Magutuni Adjudication Section the 1st interested party through his son one WILFRED KITHINJI told the applicant that they had only rented the portions of land to the 2nd interested party.
- (x) That upon inquiring as to the payments or proceeds paid by the 2nd interested party the 1st interested party told the applicant that the 2nd interested party would take time to pay the renting of the two parcels of land consequently the applicant had to wait for a longer period before he could get part of the proceeds paid by the 2nd interested party.
- (xi) That the applicant became suspicious of the information given by the 1st interested party and the applicant decided to make an inquiry at the district land adjudication and settlement office at Chuka where the applicant found out that his land 1864 Lower East Magutuni Adjudication Section and the 1st interested party's land parcel had been transferred to the 2nd interested party.
- (xii) That there is no time that the applicant has ever received any consideration or any payment of any kind from the 2nd interested party with a view to transferring his land 1864 Lower East Magutuni Adjudication Section.
- (xiii) That upon discovering that that the 1st interested party had fraudulently and dishonestly transferred the applicant's land parcel 1864 Lower East Magutuni Adjudication Section to the 2nd interested party interested party (sic) the applicant lodged objection no 1529 and 1530 against land parcels 1864 Lower East Magutuni Adjudication Section belonging to the applicant which was sold by the 1st interested party to the 2nd interested party and 2266 Lower East Magutuni Adjudication Section belonging to the 1st interested party **(annexed and marked G.M.N.1 are the proceedings, findings and award in objection no 1529 and 1530)**
- (xiv) That after full hearing of objection no 1529 and 1530 in respect of land parcels 1864 Lower East Magutuni Adjudication Section and 2266 Lower East Magutuni Adjudication Section the district land adjudication and settlement officer one MR CHARLES KITHINJI decided inter alia
 - (a) Objection no 1530 filed by GILBERT MUCHIRI NGAINE against parcel no 1864 of Weru Tea factory is hereby dismissed and the disputed land to remain as recorded in the adjudication register,
 - (b) Objection no 1529 filed by GILBERT MUCHIRI NGAINE against parcel no 2266 of MUTUA MUGAMBI AREWA is partly allowed.
 - (c) The objector GILBERT MUCHIRI NGAINE is awarded 40 acres being compensation for his land which was

sold by MUTUA MUGAMBI AREWA's son KITHINJI MAGAMBO to Weru Tea Factory (this is enough compensation bearing in mind that parcel 1864 is more valuable than 2266 due to its terrain and developments and proximity to main road to Kaare).

(d) GILBERT MUCHIRI NGAINE will be at liberty to share the awarded land to his children as per his wishes new no 3961 issued. The rest of the land to remain in the name of MUTUA MUGAMBI AREWA.

(e) Right of appeal to cabinet secretary for lands and physical planning granted and explained to the parties within 60 days with effect from the date of this decision.

(xv) That the award of the 2nd respondent in objection no 1529 and 1530 in respect of land parcels 1864 Lower East Magutuni Adjudication Section and 2266 Lower East Magutuni Adjudication Section has been implemented on the map but on the ground the same has not been implemented because the 1st interested party has always ignored calls by the demarcation officer to have the said award implemented on the ground.

(xvi) That the 1st interested party was aggrieved by the decision of the 2nd respondent and appealed to the 1st respondent vide appeal no 451 of 2017 and which appeals are ordinarily heard and determined by the deputy county commissioner **(annexed and marked G.M.N.2 is the appeal findings, ruling and judgment in appeal no 451/2017)**

(xvii) That to the best of the applicant's knowledge and information when the appeal to the minister by the 1st interested party came before the deputy county commissioner for hearing, the deputy county commissioner only talked to the parties present and then proceeded to advise the parties that he would write a judgment and take it to the director of adjudication where the applicant could buy them.

(xviii) That on 8th January 2017 the applicant visited the offices of the director of adjudication in Nairobi and the applicant was issued with findings, ruling and judgment written and signed by ABRAHAM KEMBOI the deputy county commissioner Maara Sub County who heard and determined appeal no 451/2017.

(xix) That the "findings, ruling and judgment" inter alia determined appeal no 451/2017 as follows;

(a) FINDINGS

(i) The land dispute started from parcel no 1864 Lower East Magutuni Adjudication Section which was jointly owned and was to be shared equally thus registered under the appellant and the respondent in this case.

(ii) Sometimes in 2015 according to the evidence adduced they jointly agreed to sell the land so that they could get money for their needs.

(iii) The land was then sold to Weru tea factory but they disagreed on how to share the money realized from the sale of the land to Weru Tea Factory.

(iv) One of the parties namely GILBERT MUCHIRI NGAINE then demanded that the sale of the land to Weru Tea Factory be reversed to its initial status.

(v) Objection no 1530 against parcel no 1864 was dismissed while objection no 1529 against parcel no 2266 was partially allowed and GILBERT MUCHIRI NGAINE was granted 40 acres as compensation for his portion of his land in objection no 1529.

(vi) From the foregoing I do not find any reason why GILBERT MUCHIRI NGAINE should be awarded 40 acres of land while the size of the land which they jointly owned with MUTUA AREWA was 35 acres which land was to be shared equally between the two disputing parties thus 17 ½ acres each.

(vii) Thus each party was to get an equal share out of the 35 acres.

(b) RULING

(i) Appeal case no 451/2017 Lower East Magutuni Parcel no 3961 partially allowed.

(c) JUDGMENT

(i) The appellant Mr. MUTUA MUGAMBI AREWA to be allocated 21 acres out of plot no 3961 while the respondent GILBERT MUCHIRI NGAINE to remain with 19 acres (17 ½ + 1 ½ acres compensation).

8. That the grounds upon which the relief is sought are as follows;

(i) That the appeal to the minister as presented was out of time granted that the appeal ought to have been preferred within 60 days of the determination by the district land adjudication and settlement officer (A.R proceedings date-30th

August 2016, appeal to the minister on.....) **(annexed and marked G.M.N.3 is the receipt for filing the appeal to the minister)**

(ii) That the deputy county commissioner for and on behalf of the minister did not give the litigants a fair hearing which was an affront to the principles of natural justice which demand that a person should not be condemned unheard.

(iii) That the deputy county commissioner did not hear submissions from the applicant and the 1st interested party but rather proceeded to pronounce the findings, ruling and judgment without any proceedings upon which he could base his findings, ruling and/or judgment.

(iv) That the minister through the deputy county commissioner had no basis of his findings, ruling and judgment given that none of the litigants adduced evidence in support or against the findings, determination and/or award of the 2nd respondent.

(v) That the minister's findings through the deputy county commissioner were openly biased against the applicant and in particular when the deputy county commissioner made the following findings;

(a) That 1864 Lower East Magutuni Adjudication Section was owned jointly between the applicant and the 1st interested party when the correct position was that the applicant was the sole owner of 1864 Lower East Magutuni Adjudication Section and the 1st interested party was the owner of 2354 Lower East Magutuni Adjudication Section and the two parcels of land measured 70 acres and not 35 acres.

(b) That the 1st interested party and the applicant in 2015 **agreed** to sell 1864 Lower East Magutuni Adjudication Section to the 2nd interested party when the correct position is that the 1st interested party on his own secretly, fraudulently and dishonestly sold the applicant's land parcel 1864 Lower East Magutuni Adjudication Section and his own land 2354 Lower East Magutuni Adjudication Section to the 2nd interested party.

(c) That the applicant and the 1st interested party disagreed on how to share the proceeds from the 2nd interested party when the correct position is that the applicant has never been privy to any agreement with the 2nd interested party and the applicant has never agreed on how to share money paid by the 2nd interested party.

(d) That the proceeds were to be shared equally initially but after the sale they disagreed on how to share the proceeds and in particular when the deputy county commissioner does not explain where the proceeds went after the disagreements.

(e) That GILBET MUCHIRI demanded that the sale be reversed without any explanation as to what happened if GILBERT MUCHIRI the applicant was dissatisfied with the sale although the correct position is that the applicant did not participate or engage himself with the 2nd interested party in a sale of land agreement.

(f) That without giving reasons the deputy county commissioner on behalf of the minister pronounced himself that "from the foregoing I do not find any reason why GILBERT MUCHIRI should be awarded 40 acres of land while the size of the land which they jointly owned with MUTUA AREWA was 35 acres which land was to be shared equally between the two disputing parties thus 17 ½ acres each".

(g) That each party was to get an equal share out of the 35 acres when the true position was that the 2nd interested party bought 70 acres comprising the applicant's 1864 Lower East Magutuni Adjudication Section and 2354 Lower East Magutuni Adjudication Section belonging to the 1st interested party hence the applicant was entitled to 35 acres plus 5 acres compensation to be excised from the 1st interested party's land parcel 2266 Lower East Magutuni Adjudication Section.

(vi) That the minister through the deputy county commissioner did not give any reasons for his findings, ruling and judgment and seemingly they were based on the deputy county commissioner's own thinking and wishes.

(vii) The procedure followed by which the deputy county commissioner arrived at his findings, ruling and judgment were unprocedural.

(viii) That the findings, ruling and judgment of the minister through the deputy county commissioner lack any legal basis and in particular noting that the deputy county commissioner entertained an appeal based on issues facts instead of issues of law this being a second appeal.

9. That the relief sought is as follows;

(a) That the findings, ruling and judgment of the minister through the deputy county commissioner in appeal no 451/2017 be quashed and set aside through an order of certiorari.

(b) That the minister's determination be substituted with an order that the applicant is entitled to 40 acres out of the 1st

interested party's land parcel 2266 Lower East Magutuni Adjudication Section which upon the award of the 2nd respondent was given new number to wit 3961 Lower East Magutuni Adjudication Section.

(c) That the 2nd respondent be ordered by way of an order of mandamus to implement its award in objection no 1529 and 1530 by recording the applicant as the owner of 3961 Lower East Magutuni Adjudication Section.

(d) That the 1st, 2nd and 3rd respondents and the 1st and 2nd interested parties jointly and severally be condemned to pay the cost of this suit.

SWORN AT CHUKA BY THE SAID GILBERT MUCHIRI NGAINE THIS 20TH DAY OF FEBRUARY, 2018

The suit was canvassed by way of written submissions.

6. The ex-parte applicant's submissions state as follows:

EX-PARTE APPLICANT'S FINAL SUBMISSIONS

1. (I) Your lordship the brief facts giving rise to this judicial review are as follows and which are contained at paragraph 7 (i) to (xix) of the statutory statements of facts and they are as follows;

(i) That the ex-parte applicant and the 1st interested party are cousins.

(ii) That during the adjudication process of Lower East Magutuni Adjudication Section the ex-parte applicant walked the boundaries of 1864 Lower East Magutuni Adjudication Section which was measuring 35 acres.

(iii) That during the adjudication process of Lower East Magutuni Adjudication Section the 1st interested party walked the boundaries of 2354 Lower East Magutuni Adjudication Section which was measuring 35 acres.

(iv) That upon the ex-parte applicant and the 1st interested party walking the boundaries of their respective land parcels 1864 and 2354 Lower East Magutuni Adjudication Sections respectively no person lodged a dispute against their being recorded with their respective parcels of land either at the land committee level or arbitration board level.

(v) That there being no disputes the ex-parte applicant held his horses to await the issuance of title deeds and in particular the title deed to land parcel 1864 Lower East Magutuni Adjudication Section.

(vi) That as the ex-parte applicant was awaiting the issuance of the title deed he rented portions of his land 1864 Lower East Magutuni Adjudication Section to persons who wanted to practice peasant farming.

(vii) That on or around 2011 the ex-parte applicant found out that the 2nd interested party was doing afforestation on his land parcel 1864 Lower East Magutuni Adjudication Section when the ex-parte applicant found persons not known to him planting trees on his land aforesaid and without prior consent or knowledge of the ex-parte applicant and on inquiry he found out that those who were planting trees were agents of the 2nd interested party.

(viii) That upon demanding to know from the agents of the 2nd interested party who were working on the ex-parte applicant's land the agents informed the ex-parte applicant that the 2nd interested party had bought land from the 1st interested party.

(ix) That upon inquiring from the 1st interested party who had allowed the 2nd interested party to plant trees on the ex-parte applicant's parcel of land and the 1st interested party's land parcel 2354 Lower East Magutuni Adjudication Section the 1st interested party through his son one WILFRED KITHINJI told the ex-parte applicant that they had only rented the portions of land to the 2nd interested party.

(x) That upon inquiring as to the payments or proceeds paid by the 2nd interested party the 1st interested party told the ex-parte applicant that the 2nd interested party would take time to pay the renting of the two parcels of land consequently the ex-parte applicant had to wait for a longer period before he could get part of the proceeds paid by the 2nd interested party.

(xi) That the ex-parte applicant became suspicious of the information given by the 1st interested party and the ex-parte applicant decided to make an inquiry at the district land adjudication and settlement office at Chuka where the ex-parte applicant found out that his land 1864 Lower East Magutuni Adjudication Section and the 1st interested party's land parcel had been transferred to the 2nd interested party.

(xii) That there is no time that the ex-parte applicant has ever received any consideration or any payment of any kind from the 2nd interested party with a view to transferring his land 1864 Lower East Magutuni Adjudication Section.

(xiii) That upon discovering that the 1st interested party had fraudulently and dishonestly transferred the ex-parte applicant's land parcel 1864 Lower East Magutuni Adjudication Section to the 2nd interested party the ex-parte applicant lodged objection no 1529 and 1530 against land parcels 1864 Lower East Magutuni Adjudication Section belonging to the ex-parte applicant which was sold by the 1st interested party to the 2nd interested party and 2266 Lower East Magutuni Adjudication Section belonging to the 1st interested party

(xiv) That after full hearing of objection no 1529 and 1530 in respect of land parcels 1864 Lower East Magutuni Adjudication Section and 2266 Lower East Magutuni Adjudication Section the district land adjudication and settlement officer one MR CHARLES KITHINJI decided inter alia

(a) Objection no 1530 filed by GILBERT MUCHIRI NGAINE against parcel no 1864 of Weru Tea factory is hereby dismissed and the disputed land to remain as recorded in the adjudication register,

(b) Objection no 1529 filed by GILBERT MUCHIRI NGAINE against parcel no 2266 of MUTUA MUGAMBI AREWA is partly allowed.

(c) The objector GILBERT MUCHIRI NGAINE is awarded 40 acres being compensation for his land which was sold by MUTUA MUGAMBI AREWA's son KITHINJI MAGAMBO to Weru Tea Factory (this is enough compensation bearing in mind that parcel 1864 is more valuable than 2266 due to its terrain and developments and proximity to main road to Kaare).

(d) GILBERT MUCHIRI NGAINE will be at liberty to share the awarded land to his children as per his wishes new no 3961 issued. The rest of the land to remain in the name of MUTUA MUGAMBI AREWA.

(e) Right of appeal to cabinet secretary for lands and physical planning granted and explained to the parties within 60 days with effect from the date of this decision.

(xv) That the award of the 2nd respondent in objection no 1529 and 1530 in respect of land parcels 1864 Lower East Magutuni Adjudication Section and 2266 Lower East Magutuni Adjudication Section has been implemented on the map but on the ground the same has not been implemented because the 1st interested party has always ignored calls by the demarcation officer to have the said award implemented on the ground.

(xvi) That the 1st interested party was aggrieved by the decision of the 2nd respondent and appealed to the 1st respondent vide appeal no 451 of 2017 and which appeals are ordinarily heard and determined by the deputy county commissioner

(xvii) That to the best of the ex-parte applicant's knowledge and information when the appeal to the minister by the 1st interested party came before the deputy county commissioner for hearing the deputy county commissioner only talked to the parties present and then proceeded to advise the parties that he would write a judgment and take it to the director of adjudication where the ex-parte applicant could buy them.

(xviii) That on 8th January 2017 the ex-parte applicant visited the offices of the director of adjudication in Nairobi and the ex-parte applicant was issued with findings, ruling and judgment written and signed by ABRAHAM KEMBOI the deputy county commissioner Maara Sub County who determined appeal no 451/2017.

(xix) That the "findings, ruling and judgment" inter alia determined appeal no 451/2017 as follows;

(a) FINDINGS

(i) The land dispute started from parcel no 1864 Lower East Magutuni Adjudication Section which was jointly owned and was to be shared equally thus registered under the appellant and the respondent in this case.

(ii) Sometimes in 2015 according to the evidence adduced they jointly agreed to sell the land so that they could get money for their needs.

(iii) The land was then sold to Weru tea factory but they disagreed on how to share the money realized from the sale of the land to Weru Tea Factory.

(iv) One of the parties namely GILBERT MUCHIRI NGAINE then demanded that the sale of the land to Weru Tea Factory be reversed to its initial status.

(v) Objection no 1530 against parcel no 1864 was dismissed while objection no 1529 against parcel no 2266 was partially allowed and GILBERT MUCHIRI NGAINE was granted 40 acres as compensation for his portion of his land in objection no 1529.

(vi) From the foregoing I do not find any reason why GILBERT MUCHIRI NGAINE should be awarded 40 acres of land while the size of the land which they jointly owned with MUTUA AREWA was 35 acres which land was to be shared equally between the two disputing parties thus 17 ½ acres each.

(vii) Thus each party was to get an equal share out of the 35 acres.

(b) RULING

(i) Appeal case no 451/2017 Lower East Magutuni Parcel no 3961 partially allowed.

(c) JUDGMENT

(i) The appellant Mr. MUTUA MUGAMBI AREWA to be allocated 21 acres out of plot no 3961 while the respondent GILBERT MUCHIRI NGAINI to remain with 19 acres (17 ½ + 1 ½ acres compensation).

(II) The 1st interested party being dissatisfied by the findings of DLASO of 7th June 2016 appealed to the minister. This was appeal number 451 of 2017. The said appeal was lodged outside the 60 days prescribed by section 29 of Cap 284. The decision by DLASO was delivered on 7th June 2016 and the appeal was lodged on 30th May 2017. The DCC on behalf of the minister delivered his findings, ruling and judgment on the appeal and the ex-parte applicant was not satisfied and he lodged this judicial review.

2. At the preliminary stages the ex-parte applicant by ex-parte chamber summons dated 20th February 2018 sought for the following orders;

(a) That this application be certified as urgent and the same be heard and determined ex-parte in the first instance and prayer 2 be granted on ex-parte basis.

(b) That the applicant be granted leave to apply for an order of **certiorari** to call to this court and quash the findings, ruling and judgment of ABRAHAM KEMBOI the deputy county commissioner Maara Sub County delivered on 16th November 2017 for and on behalf of the minister of lands, housing, physical planning and settlement in appeal no 451/2017 preferred from objection no 1529 and 1530 in respect of land parcels 2266 Lower East Magutuni Adjudication sections and 1864 Lower East Magutuni Adjudication section.

(c) That the leave if granted do operate as a stay of implementation or execution of the findings, ruling and judgment of ABRAHAM KEMBOI the deputy county commissioner Maara Sub County delivered on 16th November 2017 for and on behalf of the minister of lands, housing, physical planning and settlement in appeal no 451/2017 preferred from objection no 1529 and 1530 in respect of land parcels 2266 Lower East Magutuni Adjudication sections and 1864 Lower East Magutuni Adjudication section pending the hearing and determination of this judicial review.

(d) That the court be pleased to issue an order of mandamus directing the 2nd respondent to implement the finding and determination of the 2nd respondent in objection no 1529 and 1530 in respect of land parcels 2266 Lower East Magutuni Adjudication section and 1864 Lower East Magutuni Adjudication section.

(e) That the cost of this application be provided for.

3. The ex-parte chamber summons were supported by a statutory statements 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 for purposes of being quashed by way of an order of certiorari. The ex-parte applicant was granted leave to file a substantive notice of motion. The ex-parte applicant filed his notice of motion on 19th March 2018.

4. The notice of motion dated 19th March 2018 and received in court on 19th March 2018 sought for the following orders;

(i) That the findings, ruling and judgment of ABRAHAM KEMBOI the deputy county commissioner Maara Sub County delivered on 16th November 2017 for and on behalf of the cabinet secretary of lands, housing, physical planning and settlement in appeal no 451/2017 preferred from objection no 1529 and 1530 in respect of land parcels 2266 Lower East Magutuni Adjudication sections and 1864 Lower East Magutuni Adjudication section respectively be quashed by way of an order of certiorari.

(ii) That the respondents and the interested parties be prohibited from executing or implementing the findings, ruling and judgment of ABRAHAM KEMBOI the deputy county commissioner Maara Sub County delivered on 16th November 2017 for and on behalf of the minister of lands, housing, physical planning and settlement in appeal no 451/2017 preferred from objection no 1529 and 1530 in respect of land parcels 2266 Lower East Magutuni Adjudication section and 1864 Lower East Magutuni Adjudication section pending the hearing and determination of this judicial review.

(iii) Cost of this judicial review be provided for.

5. (i) That the ex-parte applicant deposes that upon discovering that the 1st interested party had fraudulently and dishonestly transferred the ex-parte applicant's land parcel 1864 Lower East Magutuni Adjudication Section to the 2nd interested party interested party ex-parte applicant lodged objection no 1529 and 1530 against land parcels 1864 Lower East Magutuni Adjudication Section belonging to the ex-parte applicant which was sold by the 1st interested party to the 2nd interested party and 2266 Lower East Magutuni Adjudication Section belonging to the 1st interested party. That the 1st interested party was aggrieved by the decision of

the 2nd respondent and appealed to the 1st respondent vide appeal no 451 of 2017 and which appeals are ordinarily heard and determined by the deputy county commissioner. That the appeal was filed out of time. That the Deputy County Commissioner did not give the litigants a hearing which was an affront to the principles of natural justice.

(ii) That the deputy county commissioner delivered judgment and/or ruling without hearing presentations from the litigants therefore the ruling had no basis and/or foundation. That the deputy county commissioner was biased against the ex-parte applicant. That the deputy county commissioner did not give any reasons for his ruling and/or judgment and therefore the ruling and/or judgment of the deputy county commissioner were of his own thinking.

(iii) The procedure followed by the deputy county commissioner was irregular and therefore findings, ruling and/or judgment of the deputy county commissioner lack any legal basis.

6. 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 of facts only vide Order 53 rule 4 (1) civil procedure rules. The ex-parte applicant cannot add even one other ground other than those stated in the statutory statement in support of his application for leave to call for the 1st 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 in principle should be treated as the issues for determination in this judicial review;

(i) That the appeal to the minister as presented was out of time granted that the appeal ought to have been preferred within 60 days of the determination by the district land adjudication and settlement officer.

(ii) That the deputy county commissioner for and on behalf of the minister did not give the litigants a fair hearing which was an affront to the principles of natural justice which demand that a person should not be condemned unheard.

(iii) That the deputy county commissioner did not hear submissions and/or presentations from the ex-parte applicant and the 1st interested party but rather proceeded to pronounce the findings, ruling and judgment without any proceedings upon which he could base his findings, ruling and/or judgment.

(iv) That the minister through the deputy county commissioner had no basis of his findings, ruling and judgment given that none of the litigants adduced evidence in support or against the findings, determination and/or award of the 2nd respondent.

(v) That the minister's findings through the deputy county commissioner were openly biased against the ex-parte applicant and in particular when the deputy county commissioner made the following findings;

(a) That 1864 Lower East Magutuni Adjudication Section was owned jointly between the applicant and the 1st interested party when the correct position was that the applicant was the sole owner of 1864 Lower East Magutuni Adjudication Section and the 1st interested party was the owner of 2354 Lower East Magutuni Adjudication Section and the two parcels of land measured 70 acres and not 35 acres.

(b) That the 1st interested party and the applicant in 2015 **agreed** to sell 1864 Lower East Magutuni Adjudication Section to the 2nd interested party when the correct position is that the 1st interested party on his own secretly, fraudulently and dishonestly sold the applicant's land parcel 1864 Lower East Magutuni Adjudication Section and his own land 2354 Lower East Magutuni Adjudication Section to the 2nd interested party.

(c) That the applicant and the 1st interested party disagreed on how to share the proceeds from the 2nd interested party when the correct position is that the applicant has never been privy to any agreement with the 2nd interested party and the applicant has never agreed on how to share money paid by the 2nd interested party.

(d) That the proceeds were to be shared equally initially but after the sale they disagreed on how to share the proceeds and in particular when the deputy county commissioner does not explain where the proceeds went after the disagreements.

(e) That GILBET MUCHIRI demanded that the sale be reversed without any explanation as to what happened if GILBERT MUCHIRI the applicant was dissatisfied with the sale although the correct position is that the applicant did not participate or engage himself with the 2nd interested party in a sale of land agreement.

(f) That without giving reasons the deputy county commissioner on behalf of the minister pronounced himself that "from the foregoing I do not find any reason why GILBERT MUCHIRI should be awarded 40 acres of land while the size of the land which they jointly owned with MUTUA AREWA was 35 acres which land was to be shared equally between the two disputing parties thus 17 ½ acres each".

(g) That each party was to get an equal share out of the 35 acres when the true position was that the 2nd interested party bought 70 acres comprising the applicant's 1864 Lower East Magutuni Adjudication

Section and 2354 Lower East Magutuni Adjudication Section belonging to the 1st interested party hence the applicant was entitled to 35 acres plus 5 acres compensation to be excised from the 1st interested party's land parcel 2266 Lower East Magutuni Adjudication Section.

(vi) That the minister through the deputy county commissioner did not give any reasons for his findings, ruling and judgment and seemingly they were based on the deputy county commissioner's own thinking and wishes.

(vii) The procedures followed by which the deputy county commissioner arrived at his findings, ruling and judgment were unprocedural.

(viii) That the findings, ruling and judgment of the minister through the deputy county commissioner lack any legal basis and in particular noting that the deputy county commissioner entertained an appeal based on issues of facts instead of issues of law this being a second appeal.

7. (I) Your lordship the minister (through the deputy county commissioner) is supposed to receive and entertain an appeal from the land adjudication and settlement officer within 60 days from the date of the decision of DLASO. This is according to section 29 of Cap 284 which provides, "29 (1) any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the minister and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final". The minister's decision is final but not for the purposes of a judicial review against the said order. The high court will always supervise such decisions of quasi judicial officers proceedings. The quasi judicial officers must operate within the law.

(II) Objections number 1529 and 1530 were heard and determined by DLASO on 7th June 2016. (See exhibit number 1 attached to the statutory statements of facts). That sixty days upon which an appeal to the minister was supposed to have been preferred were expiring on or around 7th August 2016. A receipt by one MUTUA MUGAMBI AREWA (substituted 1st interested party) dated 30th May 2017 clearly shows that the 1st interested party lodged the appeal to the minister on 30th May 2017. (see exhibit number 3 attached to the statutory statements of facts) There is no way the 1st interested party could have filed the appeal and pay for the same later. In fact the delay in filing the appeal was inordinate. This was almost a year from the time DLASO made a decision in respect of objections number 1529 and 1530. The appeal to the minister therefore was incompetent, bad in law and non starter ab initio. It is for this reason we are urging the court to quash by an order of certiorari the decision, ruling and judgment by the deputy county commissioner on behalf of the minister and which decision was delivered on 16th November 2017. (see exhibit number 2 attached to the statutory statements of facts).

(III) One of the cardinal principles of natural justice is that a litigant has an inherent right to be heard. Failure to afford a litigant a hearing in any side of the divide is in breach of the principles of natural justice. Natural justice simply means the principles that are not written but flow naturally. That the deputy county commissioner for and on behalf of the minister did not give the litigants a fair hearing which was an affront to the principles of natural justice which demand that a person should not be condemned unheard.

We invite your lordship to what the deputy county commissioner refers to as findings, ruling and judgment. Despite requesting for any proceedings that gave rise to the deputy county commissioner's finding, ruling and judgment now sought to be quashed the same were not available. One can safely conclude that the finding, ruling and judgment of the deputy county commissioner was unilateral. The deputy county commissioner only delivered his finding, ruling and judgment which was founded on no basis. The decision therefore lack merit and the base upon which the finding and judgment stands. Nothing is on record and in particular the proceedings to show that parties participated in the hearing whereupon the deputy county commissioner on behalf of the minister to reach at his finding, ruling and judgment in respect of the objections by the ex-parte applicant. Nothing would therefore stop this court to presume that there were no proceedings upon which the deputy county commissioner based his findings, ruling and judgment. The appeal therefore was not suited for it was unilateral. There is nothing on record to suggest that the appellant prosecuted the appeal and the respondent responded to the appeal. The undertaking by the deputy county commissioner on behalf of the minister was bad and incompetent ab initio. The decision should be quashed by way of certiorari for going against the requirements of the civil procedure rules as to how a party should be heard and more importantly against the principles of natural justice that demand that a person should not be condemned unheard.

(IV) That the deputy county commissioner did not hear submissions or presentations from the ex-parte applicant and the 1st interested party but rather proceeded to pronounce the findings, ruling and judgment without any proceedings upon which he could base his findings, ruling and/or judgment. There are no proceedings that preceded the deputy county commissioner's finding, ruling and judgment. There should have been proceedings whereby the appellant and the respondent would have presented themselves before the deputy county commissioner and make their cases. The appellant and the respondent having not prosecuted the appeal and responded to the same the trial was a mistrial. It seems that the finding, ruling and the judgment of the deputy county commissioner for and on behalf of the minister was one-sided. The deputy county commissioner having no basis upon which he could rely on when delivering the finding, ruling and judgment the same can only be declared as being irregular and unprocedural. The same cannot be a binding finding, ruling and judgment. The litigants had an inherent right to prosecute and respond to the appeal to the minister as the case may be. The finding, ruling and judgment of the deputy county commissioner on behalf of the minister having been described as incompetent and a non starter for failing to give the appellant and the respondent time to prosecute and respond to the appeal the same ought to be quashed by way of an order of certiorari.

(V) That the minister's findings through the deputy county commissioner were openly biased against the ex-parte applicant and in particular when the deputy county commissioner made the following findings;

- (a) That 1864 Lower East Magutuni Adjudication Section was owned jointly between the ex-parte applicant and the 1st interested party when the correct position was that the ex-parte applicant was the sole owner of 1864 Lower East Magutuni Adjudication Section and the 1st interested party was the owner of 2354 Lower East Magutuni Adjudication Section and the two parcels of land measured 70 acres and not 35 acres in total.
- (b) That the 1st interested party and the ex-parte applicant in 2015 **agreed** to sell 1864 Lower East Magutuni Adjudication Section to the 2nd interested party when the correct position is that the 1st interested party on his own secretly, fraudulently and dishonestly sold the ex-parte applicant's land parcel 1864 Lower East Magutuni Adjudication Section and his own land 2354 Lower East Magutuni Adjudication Section to the 2nd interested party.
- (c) That the ex-parte applicant and the 1st interested party disagreed on how to share the proceeds from the 2nd interested party when the correct position is that the ex-parte applicant has never been privy to any agreement with the 2nd interested party and the ex-parte applicant has never agreed on how to share money paid by the 2nd interested party.
- (d) That the proceeds were to be shared equally initially but after the sale they disagreed on how to share the proceeds and in particular when the deputy county commissioner does not explain where the proceeds went after the disagreements.
- (e) That GILBET MUCHIRI demanded that the sale be reversed without any explanation as to what happened if GILBERT MUCHIRI the ex-parte applicant was dissatisfied with the sale although the correct position is that the ex-parte applicant did not participate or engage himself with the 2nd interested party in a sale of land agreement.
- (f) That without giving reasons the deputy county commissioner on behalf of the minister pronounced himself that, "from the foregoing I do not find any reason why GILBERT MUCHIRI should be awarded 40 acres of land while the size of the land which they jointly owned with MUTUA AREWA was 35 acres which land was to be shared equally between the two disputing parties thus 17 ½ acres each".
- (g) That each party was to get an equal share out of the 35 acres when the true position was that the 2nd interested party bought 70 acres comprising the ex-parte applicant's 1864 Lower East Magutuni Adjudication Section and 2354 Lower East Magutuni Adjudication Section belonging to the 1st interested party hence the ex-parte applicant was entitled to 35 acres plus 5 acres compensation to be excised from the 1st interested party's land parcel 2266 Lower East Magutuni Adjudication Section.

We invite the court to interrogate the award of the DLASO dated 30th August 2016.

(VI) That the minister through the deputy county commissioner did not give any reasons for his findings, ruling and judgment and seemingly they were based on the deputy county commissioner's own thinking and wishes. There is nothing the findings, ruling and judgment of the deputy county commissioner on behalf of the minister to support the reasoning behind his findings, ruling and judgment. We dare say that the findings, ruling and judgment of the deputy county commissioner on behalf of the minister is the thinking of the deputy county commissioner. The deputy county commissioner on behalf of the minister ought to have explained and given reasons as to why he arrived on his findings, ruling and judgment. The findings, ruling and judgment of the deputy county commissioner on behalf of the minister is not supported by any reason. There is no explanation as to why he sided with one side against the other. He did not explain why he was against one side. He did not explain why he took the stand he took against the ex-parte applicant. The deputy county commissioner ought to have come out with reasoned findings, ruling and judgment. No other document accompanied the deputy county commissioner's findings, ruling and judgment. For this reason we will urge the court to quash by way of certiorari the findings, ruling and judgment of the deputy county commissioner delivered on 16th November 2017 for and on behalf of the minister the 1st respondent herein.

(VII) That the minister through the deputy county commissioner erred in law and fact by failing to interrogate the proceedings of DLASO. A good example is that in the proceedings before DLASO the 1st interested party's land was 35 acres while the ex-parte applicant's land was 35 acres. A total of 70 acres was therefore sold to the 2nd interested party. In the findings of the minister the minister made his own finding that the total acreage of the land owned by the 1st interested party and the exparte applicant that was sold to the 2nd interested party was 35 acres. It is this 35 acres that the minister shared to the 1st interested party and the exparte applicant whereby the 1st interested party was given 21 acres while the exparte applicant was given 19 acres. This was open bias and an equitable distribution. The minister did not explain where 35 acres went to and he had no reasons to give the exparte applicant 19 acres while giving the 1st interested party 21 acres. Even one wonders where he got 40 acres while in his findings the land was 35 acres.

(VIII) The minister was equally wrong to hold that Lower East Magutuni 1864 was owned jointly between the 1st interested party and the exparte applicant. This land was owned by the exparte applicant alone. Moreover the minister was also equally wrong by making a finding that the 1st interested party and the exparte applicant had agreed to sell the land but the two differed on how to share the proceeds. However the minister says that the exparte applicant refused to take the money that was being shared to him. The minister does not say where the money went to after the exparte applicant refused to take it.

(IX) That the minister could not change the facts of the decision of DLASO in any case he was not the one who heard the objections at DLASO level. The minister could only question the illegalities if any of the decision of DLASO. Towards this feat the minister failed consequently the minister's findings, ruling and judgment should be quashed.

8. Your lordship for reasons stated herein above in these submissions we urge the court to grant the prayers sought by the ex-parte applicant in the notice of motion dated 19th March 2018. In particular your lordship we pray that the findings, ruling and judgment of the deputy county commissioner for and on behalf of the minister delivered on 16th November 2017 be quashed by way of an order of certiorari. The court should order and direct that the decision of DLASO of 7th June 2016 is valid, legal and lawful. The ex-parte applicant should retain 3961 Lower East Magutuni Adjudication Section. The 2nd interested party is in this case in that he fraudulently and dishonestly bought 1864 Lower East Magutuni Adjudication Section the property of the ex-parte applicant from the 1st interested party. The ex-parte applicant did not receive any consideration when his land was alienated by the 1st interested party to the 2nd interested party.

9. The relief sought in this judicial review is set out at paragraph 9 of the statutory statements of facts sworn and dated 20th February 2018. We replicate the said prayers herewith;

(a) That the findings, ruling and judgment of the minister through the deputy county commissioner in appeal no 451/2017 be quashed and set aside through an order of certiorari.

(b) That the minister's determination be substituted with an order that the applicant is entitled to 40 acres out of the 1st interested party's land parcel 2266 Lower East Magutuni Adjudication Section which upon the award of the 2nd respondent was given new number to wit 3961 Lower East Magutuni Adjudication Section.

(c) That the 2nd respondent be ordered by way of an order of mandamus to implement its award in objection no 1529 and 1530 by recording the applicant as the owner of 3961 Lower East Magutuni Adjudication Section.

(d) That the 1st, 2nd and 3rd respondents and the 1st and 2nd interested parties jointly and severally be condemned to pay the cost of this suit.

10. Your lordship in light of the foregoing submissions we urge the court to allow with costs the ex-parte applicant's notice of motion dated 19th March 2018 as **presented. We rest our submissions and pray.**

DATED AT CHUKA THIS...28TH DAY OF JUNE, 2018

7. The 1st Interested Party's written submissions state as follows:

1ST INTERESTED PARTY'S SUBMISSIONS

My Lord,

I submit that the Judicial Review application dated 19/3/2018 is vehemently opposed as ill- advised and it is respectfully submitted it is an abuse of the court process.

I had the benefit of reading through the exparte applicant's submissions for which I will raise a few comments and then proceed to substantively state what I see as the major flaws in this Judicial Review application which makes it untenable in law.

On the submissions, I respectfully felt that they are to a large extent a reproduction of the statement of facts almost verbatim making them being too repetitive of the statement of facts already on record crowding as it were, the intended message.

These lengthy submissions tend to support my submission that the exparte applicant is seeking a determination on the facts as to whether the Minister's decision is either right or wrong which I submit respectfully should not be point at this point in time. The exparte Applicant has spent time to establish the rightness of his crusade while he should have shown what are the procedural flaws that gave rise to the Minister's decision dated 30/5/2017.

For the exparte applicant to submit that the proceedings before the Minister were not available, then it means the Judicial Review application was the wrong choice for the exparte applicant.

How is the alleged bias going to be assessed without the proceedings?

To say that the proceedings were not available does not mean that they are not there in fact. Evidence should have been called to show they were not recorded. Even if it were to be accepted then they were not recorded (which is denied) Judicial Review would not be able to address such an alleged anomaly. An appropriate suit would be called for which could interrogate the facts on then own merit.

I submit that in the absence of the proceedings this application must respectfully fail for lack of particulars for the court to determine the legality of the process as opposed to the merits of the decision.

Let me now turn to what I consider to be the greatest flaws in this Judicial Review application, but before I do so, let me state that the exparte applicant has gotten it all wrong as to the purpose and scope of a Judicial Review application of the exparte Applicant appreciated the scope of the Judicial Review jurisdiction then the exparte Applicant would not be praying that the Minister's decision to be substituted as indicated in paragraph 9(b) of the exparte applicant's submissions that this court orders that the exparte Applicant is entitled to 40 acres as this is not

the jurisdiction of this court as currently constituted.

This then brings me to the core of the Respondent's submissions in respect of the Judicial Review application dated **16/11/2017**. I do rely on the 1st interested party's Replying affidavit dated **24/5/2018** and the annexure thereof.

In addition a Judicial Review motion by its very nature ought to be limited to the manner or the way the Appeal to the Minister was handled before the Tribunal but not the opposition to the decision.

In the instant application there is no secret that the ex parte applicant does not like or agree with the decision of the Minister made on **16/11/2017**. If that be the case, the ex parte applicant would have been well advised to file a substantive suit against whoever he desired to complain about. A suit would have provided the basis of the factual complaints made by the ex parte applicant in this Notice of Motion. A suit would have provided the forum to complain about the finding of the Minister as it appears to be the case in this Notice of motion. In the Notice of Motion the ex parte applicant is complaining about findings of the Minister which he condemns as being erroneous. These imaginary errors needed to be confronted through a comprehensive manner which is not permissible in proceedings of a Judicial Review.

In other words, I am submitting that to the extent that this notice of Motion seeks the overturning of the Minister's decision on its merits, then the application is incompetent and I invite the court to reject the Notice of Motion and dismiss the same. What was expected of the ex parte applicant was to lay the entire proceedings of the minister before this Honourable Court for this court to scrutinise the same for procedural fairness and other procedural complaints that this ex parte applicant has been complaining about.

To the extent that the proceedings are not before this court, I submit the Notice of Motion is fatally defective and it is only good for dismissal as the defect of leaving out the proceedings before the Minister is not curable. I submit that providing the Judgement

Without the entire proceedings is putting the cart before the horse, and therefore this application is a non- starter, and I call for its dismissal. It is not enough to say the Minister did not give a fair hearing without showing the proceeding to the court to make its own judgement. To the Extent that there are no proceedings before this court, I submit this court will never know what transpired at the Tribunal before the Minister and therefore this Court Cannot help.

It is submitted that Judicial Review strictly so-called is not concerned with the Private rights or merits of the decision being challenged, but with the decision making process. It's purpose is to ensure that the individual is accorded fair treatment by the authority for which he has been subject to, in the instant suit that cannot be established without the proceedings.

On whether certiorari can issue or not, it is submitted that certiorari being an equitable relief it can not issue to a person who comes to court with dirty hands. There is evidence from the 1st interested party's affidavit that the ex parte Applicant together with Land Adjudication Officer acted in conspiracy to block the Adjudication Record judgement being denied to the 1st interested party causing grave injustice to the 1st interested party to get the Adjudication Record judgement on 26/5/2017 but filing the appeal on **30/5/2017**.

To the extent that the ex parte applicant was complicit in this cover up to "buy" time. The ex parte Applicant cannot benefit from a court of equity. To get equity one has got to do equity.

Secondly, certiorari is concerned with the decision making process not the merits.

In the absence of the entire proceedings before the Minister certiorari can't issue.

This brings me to the issue of time alluded to by these ex parte Applicant as one of the reasons for brining up this Judicial Review Application. That time for the appeal had run out when the Minister took up the appeal. That 60 days had elapsed, it was stated. The 1st interested party has adduced sufficient evidence that the Adjudication Records were hidden deliberately by the Land Adjudication Officer, in collusion with the Ex parte Applicant (see "**W K M 1, and W K M2**") The Adjudication Record was released to the 1st interested Party on 26/5/2017 and the Cabinet Secretary issued a Certificate on the date of the release as **26/5/2017**, and the appeal was filed on **30/5/2017**, only for 4 days after the release.

I invite Your Lordship to find time in law could only begin to run from **26/5/2017** the date of the release of the record. It is submitted therefore the appeal to the Minister was perfectly within the four corners of the law for the reasons of collusion of the ex parte Applicant and Land Adjudication Officer to hide the records.

In addition, I invite the court to construe time in the circumstances of this case within the context of Article **159(2)** of the Constitution of Kenya, in order to do justice in this case, so much so that section 29 of the Land Adjudication Act cap 84 laws of Kenya is subordinate to Article **159(2)** of the Constitution Of Kenya, that calls this court to do substantial justice to prevent the 1st interested party from losing his Land to the unscrupulous applicant who hides the adjudication records then pops up again to claim expiry of time hence benefiting from his own acts of illegality and impunity.

The complaints by the ex parte applicant is all about the finding of facts by the Minister. (see paragraphs 22, and 24 of the Replying affidavit of the 1st interested party dated **24/5/2018**)

CONCLUSION.

At common law judicial review is concerned with the legality of the process not the merits of the decision whereas an appeal would be

concerned with the merits of the decision. To the extent that the Judicial Review application complains about Minister's decision on its own merits, then this motion ought to fail. To the extent that the proceedings before the Minister have not been laid before the court to see for itself how the matter proceeded before the Minister. The application is incompetent.

It is submitted without the proceedings this court as currently moved by the ex parte applicant, lacks the powers to question the Minister's decision.

In conclusion, I invite the court to dismiss the entire Motion as the same is not properly before the court. It lacks merits and it is also brought in bad faith.

I pray for the costs of the suit.

DATED AT CHIKA THIS 29TH DAY OF JUNE, 2018

8. The 2nd Interested Party's written submissions state as follows:

SUBMISSIONS FOR THE 2ND INTERESTED PARTY

Your Lordship the following comprises the submissions for the 2nd Interested party.

Introduction

Your Lordship with the leave of this Honourable court, the ex parte applicant lodged the notice of motion application dated 19/03/2018 principally seeking orders of certiorari and prohibition against the Respondents and the Interested-parties. The ex parte applicant thereafter amended the motion with the leave of court.

On the part of the 2nd Interested party, a replying affidavit and Grounds of Opposition were lodged opposing the ex parte applicant's claim. The same did not elicit any rejoinder from the ex parte applicant.

The parties were then directed to canvas their various positions by way of written submissions.

Factual analysis

Your Lordship, the ex parte applicant's position is that the Minister through the Deputy County Commissioner fell into error when handling the appeal lodged by the 1st Interested party thereby arriving at an erroneous decision.

The 2nd Interested party contested the issues raised by the ex parte applicant, particularly that it was not a party to the proceedings before the Minister and that its parcel of land registration number 1864 Lower East Magutuni Adjudication Section was not the subject in those proceedings.

The legal analysis

Your Lordship it has been held that '**judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made but the decision making process itself**'. This is the defining principle that must guide a court that is faced with an application instituted as a judicial review. We seek to rely on the citation made in **REPUBLIC Vs CABINET SECRETARY, MINISTRY OF LANDS & HOUSING & 3 OTHERS ex-parte MAVUTI MUANGE NTHEI {2015} eKLR**. (copy attached).

In the present instance the ex parte applicant has deceptively couched his complaint as one challenging the procedure followed but he is actually aggrieved by the merits of the decision.

Further, in the earlier cited case of **MAVUTI MUANGE NTHEI {2015} eKLR** the court observed that "**it follows that this court cannot revisit the findings of the Cabinet Secretary with a view to making a finding of fact**"

Your Lordship, the numerous issues relating to this dispute addressed by the Minister's representative particularly relating to the ownership of parcels numbers 1864 and 2354 Lower East Magutuni-Adjudication-Section are purely factual in nature for which the discretion of this court cannot be legally called upon to interrogate.

Your Lordship, the claim that the appeal was lodged out of time is also one of fact and the court in the said **MAVUTI MUANGE NTHEI** case stated that "**..... there is conflicting material as to when the appeal was lodged. That finding is necessarily a finding of fact and where there is conflicting evidence and the Tribunal-chooses one set of facts as opposed to another set, the court in a judicial review cannot enter into are-view of such findings unless there is no material to support the same**". In any case, while it is possible to deduce from the bundle of documents filed by the ex-parte applicant, the date when the decision of the Adjudication Officer was made, it is not clear when the appeal was lodged or whether the issue was raised at the hearing.

Your Lordship, the ex-parte applicant has not demonstrated that the Deputy County Commissioner did not give him a fair hearing or that he did not hear the parties at all as alleged. We seek to rely on the decision made in **REPUBLIC Vs MWINGI DISTRICT COMMISSIONER & 2 OTHERS EXPARTE MUTINDI MWANGANGI** (copy attached) where the court found that there were no hard

and fast rules established on how appeals should be heard provided that no impropriety is observed on the part of the Minister.

In conclusion Your Lordship, several pertinent issues raised in the 2nd Interested party's replying affidavit sworn on 30/04/2018 and grounds of opposition which have not been controverted need to be addressed briefly.

a. Objection 1530 by the ex-parte applicant against the 2nd Interested party and relating to parcel No. 1864 Lower East Magutuni Adjudication Section was dismissed and was hence determined in favour of the 2nd Interested party.

b. It follows therefore that it is only the ex-parte applicant who could lodge an appeal to the Minister, the decision of the Adjudication Officer having gone against him.

c. It is thus an absurdity for the ex-parte applicant to complain that the appeal, which only he had the incentive and capacity to file, was actually instituted out of time.

d. In any case, no evidence has been provided to demonstrate that there indeed existed an appeal against object 1530 relating to parcel no. 1864 Lower East Magutuni Adjudication Section.

e. The preceding paragraph explains why the 2nd Interested party maintains that it was not party to the appeal determined by the Minister and the subject of these proceedings.

f. Finally, a perusal of the introductory part of the decision of the Deputy County Commissioner will reveal that the subject matter of that appeal was parcel No. 3961 Lower East Magutuni Adjudication Section and hence any reference to parcel No. 1864 was purely for purposes of analysis of the historical aspects of the dispute. It can also be deduced that the Appellant was actually MUTUA MUGAMBI AREWA who had not raised an objection relating to parcel number 1864 Lower East Magutuni Adjudication Section and by extension against the 2nd Interested party before the Adjudication Officer.

In a nutshell Your Lordship we submit that the judicial review application is a convolution of diverse issues not suitable for adjudication by this court as the same were not adjudicated upon by the Minister's representative and are outside the purview of judicial review.

We hence urge Your Lordship to dismiss the entire application with costs.

DATED AT CHUKA THIS 25TH DAY OF JULY, 2018

9. The 1st, 2nd and 3rd respondents refused or failed to take an active part in this matter even though they were accorded ample opportunities to do so. This is not the first time they have taken a veritably lackadaisical attitude towards suits where they are involved. The Constitution of Kenya is categorically pellucid in Article 159 (2) (b) that: "Justice shall not be delayed." I opine that courts of law cannot be held to ransom by parties who refuse to be diligent in their participation of apposite suits.

10. The 1st, 2nd and 3rd defendants did not file their written submissions.

11. I have found it necessary to reproduce in full the submissions proffered by the parties in support of their diametrically incongruent assertions.

12. I have perused the one authority proffered by advocate P. M. Mutani who represents the 1st Interested Party. It is the case of Republic Versus Commissioner For Investigations and Enforcement Ex-parte Wananchi Group Kenya Limited [IEA]2014 and particular reference is made to page 405 thereof. It quotes the Court of Appeal in Municipal Council of Mombasa Versus Republic [2001] LLR 3742 as having opined as follows:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making this decision the decision maker took into account relevant matters r did take into account irrelevant matters. ... The court should not act as a Court of Appeal over the decider which 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. It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so whether the decision maker is not a limited liability company created for commercial purposes but it is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute."

13. The court also said:

"Similarly, in Republic versus Kenya Revenue Authority ex-parte Yaya Towers Limited [2008] KLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless the restriction on the part of the court is observed, the court will, under the guise of preventing abuse of power:, be itself, guilty of usurpation of power. See: Halsbury's Laws of

England (4 ed) Volume (1) (1) paragraph 60.

14. I unequivocally state that the above is a veritably apt exposition of the law.

15. The 2nd Respondent through his lawyers Basilio Gitonga and Muriithi Associates proffered two authorities in support of his assertions. The first one is Republic (Applicant) versus Cabinet Secretary, Ministry of Lands and Settlement & Another AND Joseph Mutundu Kioko & Another (Interested Parties) AND MAVUTI MUANGE NTHEI (Ex-parte applicant). The case of Republic (Applicant) Ex-parte Mavuti Muange Nthei (supra), is, inter alia, a good authority for the principle that where there is conflicting assertions as to when an appeal is filed, this is necessarily a question of fact, and if a tribunal has chosen one set of facts vis- a vis another set, a court in exercise of its judicial review function cannot enter into a review of such findings unless there is no material to support the same. Although the court did not explicitly say so, it seems to me that such issues should be ventilated either through a normal plaint or through a proper appeal but not through judicial review proceedings.

16. The 2nd case proffered by the 2nd Interested Party is the case of Republic (Applicant) versus Mwingi District Commissioner & Another (Respondent) AND Muingo Ikumba (Interested Party) AND Mutindi Mwangangi (Ex-parte Applicant). This case is a good authority that an allegation that a tribunal failed to consider applicable law or was unfair must be properly demonstrated.

17. I unequivocally state that the above cases constitute a veritably correct enunciation of correct principles regarding the apposite legal areas.

18. I find that , as in all judicial proceedings, the issue to be determined is if or if not upon consideration of all assertions proffered by the parties, the orders sought by the ex-parte applicant are tenable. If they are tenable, the application will be allowed. If not, the application will be dismissed.

19. From the outset, it is noted that the ex-parte applicant did not provide the court with the impugned proceedings in the appeal before the minister. This makes it difficult for this court to determine if the process that led to the impugned decision had integrity.

20. Some of the issues raised in what the exparte applicant calls “principal grounds” invite arguments and go into the merits of the decision rather than the decision making process. There was no proof of, say, bias, refusal to give the applicant a fair hearing, breach of statutory provisions etc.

21. Regarding the claim that the appeal to the minister was filed out of time, I do note that the 1st Interested Party has alleged that the District Lands Adjudication Officer (DLASO) and the ex-parte applicant had colluded to delay release of the apposite proceedings so that it would be made difficult for the Interested Parties to file their appeal. This allegation has not been substantiated. It also has not been controverted by the ex-parte applicant. Should this allegation be true, and I am not saying that it is true, it would raise the spectre of tribunals refusing to release proceedings until the time stipulated for appeals in law expire. If the courts did not deprecate such moves, it would create an avenue for tribunals and public officers to subvert justice.

22. It is not disputed that the Adjudication Records were released to the 1st Interested Party on 26th May, 2017 and the appeal was filed on 30th May, 2017, only 4 days after its release. Substantive justice requires the court to take judicial notice of this fact. Had the Record of Appeal been released on the day the apposite decision was made, then the period of 60 days within which an appeal was to be made would run from that day. But since it was delayed beyond the stipulated 60 days, the interest of justice and the doctrine of extreme necessity would demand that the 60 days period starts running from the date the Record was released by the DLASO. I, however, opine that this being a matter of fact, the county commissioner, to whom the apposite appeal had been delegated by the Minister, had made his finding. It is not the province of this court to substitute the decision of the minister with its own decision. By so doing, this court would be abusing its power under the guise of preventing abuse of power by public officers.

23. Having considered all the pleadings, submissions and authorities proffered by the parties, in support of their diametrically incongruent positions, I find that this suit lacks merit. By and large, I accept the submissions proffered by the 1st and 2nd Interested Parties.

24. In the circumstances, this suit is dismissed.

25. Costs will follow the event and are awarded to the 1st and 2nd Interested Parties.

26. It is so ordered.

Delivered in open court at Chuka this 14th day of November, 2018 in the presence of:

CA: Ndegwa

Murango Mwenda h/b Mugo for exparte applicant

Kiongo present for the Respondents

Mark Muriithi for the 2nd Interested Party

P.M. NJOROGI

JUDGE