



**Republic v Attorney General & 2 others; Mulavu (Exparte Applicant); Ngoloi (Interested Party) (Environment and Land Case Judicial Review Application E010 of 2022) [2024] KEELC 241 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 241 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITUI**  
**ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E010 OF 2022**  
**LG KIMANI, J**  
**JANUARY 23, 2024**

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION BY Nditu Kalisau on Appeal to the Minister Case No.351 of 2001 before Mr. Jama M. H Hirsi the Deputy County Commissioner Mwingi West (Migwani) Sub-County**

**AND**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

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

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 LAWS OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, MWINGI WEST (MIGWANI) SUB-COUNTY ..... 2<sup>ND</sup> RESPONDENT**



**MINISTRY OF LANDS & PHYSICAL PLANNING ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**NDITU KALISAU MULAVU ..... EXPARTE APPLICANT**

**AND**

**CHRISTOPHER NDITU NGOLOI ..... INTERESTED PARTY**

### **JUDGMENT**

1. The Ex parte Applicant filed the Notice of Motion dated 16<sup>th</sup> August 2022 seeking the following orders:
  - a. An order of Certiorari to bring to this court and quash the proceedings of the 2<sup>nd</sup> Respondent's decisions or (findings) of appeal to the Minister no. 351/2001 delivered on the 1<sup>st</sup> day of March 2022 and issued/supplied on 25.7.2022 in its entirety.
  - b. An order of prohibition restraining the Respondents, the Interested parties and their subordinates or agents from implementing any decision of the 2<sup>nd</sup> Respondent in the appeal to the minister no. 351/2001 delivered on the 1<sup>st</sup> day of March 2022 and issued/supplied on 25.7.2022.
  - c. An order of Mandamus compelling the respondents to register the Land Parcel No. 499 Kyusani adjudication section to the ex-parte applicant.
  - d. Leave granted do operate as a stay restraining the respondents from implementing or executing the decision by the 2<sup>nd</sup> Respondent made and delivered on 1.3.2022 and issued/supplied on 25.7.2022.
  - e. That the costs of this application be awarded to the applicant.
2. The application is supported by the grounds in the statement of facts, verifying and the supplementary affidavits sworn by the ex-parte applicant.
3. The land subject matter of litigation herein is parcel No. 499 Kyusyani Adjudication Section within Mwingi West (Migwani) Sub-County of Kitui County. The land is said to have been litigated upon at the Committee, arbitration, objection and appeal to the minister.
4. The adjudication process commenced in the Kyusyani Adjudication Section in the year 1990.
5. Mulavu Nditu Mung'ela lodged a complaint in respect of Land Parcel 499 to the Arbitration Board and as a result of the Arbitration Board hearing, he was awarded the said land. Aggrieved by the decision of the Arbitration Board, Ngoloi Mulei lodged an objection in respect of the said land and as a result of the hearing of the objection the land was given to him.
6. Appeal to the Minister No. 351/2001 was lodged by Mulavu Nditu Mung'ela against the decision of the Land Adjudication & Settlement Officer in the objection and upon hearing this appeal, the 2<sup>nd</sup> Respondent awarded the suit land to Ngoloi Mulei.
7. The exparte applicant explained the adjudication process concerning the original land in dispute stating that land parcel No. 212 Kyusyani Adjudication Section was adjudicated in his father's name, the late Mulavu Nditu Mung'ela. Being dissatisfied with this decision, one Ngoloi Mulei lodged a claim



at the adjudication committee stage in 1993. The committee decided to subdivide the land to create Land Parcels No. 212 and 499 with Mulavu Nditu being awarded parcel 212 and Ngoloi Mulei parcel 499.

8. The decision is challenged on the grounds that it is not dated was arrived at unfairly and was not delivered procedurally but was supplied to the parties upon request from the lands office on 25<sup>th</sup> July 2022 when the same had been forwarded to the Director of Land Adjudication.
9. The 2<sup>nd</sup> Respondent is accused of abuse of power for personal interests, and failure to observe rules of natural justice and impartiality. He was accused of failure to grant the applicant a fair hearing, to inform parties to avail witnesses, failure to issue hearing notices and failure to visit the suit land.
10. The ex-parte applicant states that the decision of the 2<sup>nd</sup> Respondent is tainted by illegality and irrationality and hence is null and void. He accuses the 2<sup>nd</sup> Respondent of declining his request to visit the locus and establishing the correct status of the suit land.
11. Further, he states that the failure by the 2<sup>nd</sup> Respondent at the hearing date, to record all evidence and failure to notify the ex-parte applicant's witness supply the ruling was a demonstration of open bias and an infringement of Constitutional rights.
12. The ex-parte applicant states that the Respondents controverted the applicant's legitimate expectation that he would be accorded a fair hearing and was subjected to an unfair decision which was arrived at without adherence to the due process of the law.
13. The ex-parte applicant states that he has obtained letters of administration over the estate of his father, Mulavu Nditu Mung'ela (Deceased). He claims his family have been living on the suit property for more than 50 years and his father was not related to the Interested Party.

#### **The Respondents' Grounds of Opposition**

14. The Respondents filed Grounds of Opposition dated 12<sup>th</sup> October September 2022 stating that the application is unmerited, misconceived, vexatious, bad in law and therefore an abuse of the processes of the court. It was stated that the 3<sup>rd</sup> Respondent is mandated under the law to hear such appeals and can delegate such powers/mandate to the 2<sup>nd</sup> Respondent herein. It was further stated that both parties were heard and a determination made and it was upon the Applicant to follow up and obtain a copy of the decision. The Respondents further objected on the ground that the Applicant has not demonstrated sufficient cause for grounds upon which the Court can grant the orders sought and that the Applicant is challenging the merits and not the process and therefore, if he is aggrieved he should file an appeal and not judicial review.

#### **The Interested Party's Replying Affidavit**

15. The interested party filed a replying affidavit sworn on 1<sup>st</sup> November 2022 deposing that the disputed Land Parcel Thaana Nzau/Kyusyani/499 belongs to his late father Ngoloi Mulewa who died in 2016 and that no letters of administration to his estate have been taken.
16. He deposes that his late father acquired the suit land in the year 1960 and they all fenced the land and started using it collectively with his uncle Ngoloi Mung'ela, Mulavu Nditu, the ex-parte applicant's father, Kea Nditu and his son one Mutoni Ngoloi by grazing, cutting firewood and beekeeping.
17. His uncle, Ngoloi Mung'ela passed away before sub-dividing the said parcel of land, but they continued using the land without problems until 1969 and 1970 when one Lea Nditu and Motoni Ngoloni began having issues. A clan committee meeting subdivided the land into four equal parts and each of them.



Each person fenced off the land and the interested party's family used their land for grazing, cutting firewood and beekeeping.

18. In the year 1985, the Interested Party stated that the ex-parte applicant and his brother, Mulewa Mulavu trespassed into their portion and began constructing houses armed with pangas, axes, bows and arrows. The clan members were summoned, and they met and ordered the ex-parte applicant and his brother to vacate the land, which they refused to do.
19. When the area became an adjudication section in 1990, he deposed that the ex-parte applicant's father illegally surveyed the whole parcel of land that they had sub-divided as Parcel No. 212, leading to the subsequent challenge by the Interested party's father at the committee stage and all other subsequent challenges up to the appeal to the minister.
20. The interested party avers that the allegations made by the ex-parte applicant are without evidence and go to the core of the decision to allocate the suit property to his father and he therefore states that the application has no merit, is bad in law and urged the court to dismiss the same with costs.

### **The ex-parte applicant's supplementary affidavit**

21. The ex-parte applicant responded that both he and the interested party were allowed to participate in the adjudication proceedings without taking out letters of administration. He stated that the 2<sup>nd</sup> Respondent relied on inconsistent, misleading evidence. He denied being aware of the case No. RMCC 45 of 1994.
22. He challenged the decision of the land adjudication officer and the sub-county commissioner, the 2<sup>nd</sup> Respondent as illegal since the same was rendered when the title deed to the suit property had already been issued to Ngoloi Mulewa on 30<sup>th</sup> October 2013.
23. He also stated that the objection board was dealing with a boundary dispute but instead, it decided on the ownership of land parcel No.499 Kyusyani Adjudication Section.
24. Commenting on time frames, he stated that the appeal was slated for hearing on 25<sup>th</sup> March 2021 but he was summoned over the phone by the chief on 22<sup>nd</sup> March 2021 which was unreasonable and that the 2<sup>nd</sup> Respondent took a whole year to write the judgment, which raises questions on the integrity of the conduct.

### **The Ex-parte Applicant's submissions**

25. Counsel for the ex-parte applicant submitted that the issuance of the title deed to the suit land after the decision in the Objection stage, while an appeal to the minister was pending meant that the title deed was irregular, unreasonable and an abuse of the discretion which meant that the appeal was already pre-determined. It was further submitted that issuance of the title deed before hearing the appeal rendered the decision of the minister null and void.
26. It was submitted that the 2<sup>nd</sup> Respondent did not afford the ex-parte applicant a fair hearing contending that only the grounds of appeal were read and he was not given an opportunity to narrate his story and table evidence while the interested party was given time to give his evidence. This is said to have been unfair, biased and partial in violation of Article 50 of *the Constitution*. He complained that no summons was issued to him as he was only called over the phone.
27. The ex-parte applicant stated that the 2<sup>nd</sup> Respondent relied on irrelevant matters and concentrated on land parcel No. 212 which was not subject to adjudication. The applicant further stated that the 2<sup>nd</sup>



Respondent acted ultra vires because he spoke about the violation of the status quo as ordered by the court and told the ex-parte applicant to move his works and his agents to land parcel 212.

28. The applicant submitted that the impugned decision was unreasonable for not considering that the ex-parte applicant and his family live on the suit property. Further decision was flawed, tainted by illegality, partiality, and bias and was ultra vires and relied on the authority in the case of Republic v Nairobi City County ex-parte Gurchan sign Sihora & 4 others (2014) eKLR and other cited authorities submitting that the 2<sup>nd</sup> Respondent acted unprocedurally in conducting the proceedings.

### **Interested Party's submissions**

29. Counsel for the interested party reiterated the contents of the replying affidavit stating that the property was one large parcel of land shared among the party fathers and two other individuals but was sub-divided during a clan meeting and later on, the ex-parte applicant and his brother trespassed onto the land that was given to Ngoloi Mulewa, the Interested Party's father.
30. Counsel submitted that the suit property is registered in the name of the deceased Ngoloi Mulewa, and no one has taken out letters of administration to his estate, therefore the interested party cannot be sued since he is not a personal representative of his father's estate. He relies on the definition of a legal representative in Section 2 of the [Civil Procedure Act](#) and the case of Melickzedek Shem Kamau v. Beatrice Waithera Maina & 2 others (2020) eKLR.
31. Counsel further challenged the suit on the ground that the ex parte applicant has not met the threshold for the grant of judicial review orders in that he has not proved that the decision-making process was procedurally unfair and unreasonable and that the decision was illegal. He relied on the holding in the case of Republic v Kenya National Examination Council ex parte Gathenji and 9 others (1997) eKLR.
32. It was submitted that the applicant was accorded a fair hearing, in that he participated in the hearing, was granted an opportunity to address the 2<sup>nd</sup> Respondent and presented his evidence as seen in the proceedings. In addition, it was submitted that there was nothing to show that the ex parte applicant requested to bring witnesses and such a request was denied.
33. The interested party submits that there is no evidence to substantiate the allegation of bias. As to the failure to be supplied with a copy of the ruling, it was submitted that as a party to the proceedings, he could have sought a copy himself.
34. On whether the ex-parte applicant ought to be granted orders compelling the Respondents to register the suit land in his name, the ex-parte applicant quoted Section 26 of the [Land Registration Act](#) 2012 on the indefeasibility of title unless on the grounds of fraud, misrepresentation or title has been acquired illegally, unprocedurally or through a corrupt scheme. It is submitted that the ex-parte applicant has failed to prove any of these and thus title ought to remain in the deceased person's name until a grant is taken over his estate.

### **Analysis and Determination**

35. Having considered all the pleadings, documents and submissions on record, the court opines that the issues that arise for determination are as hereunder:
- A. Whether the Interested Party is a proper party to the suit herein?
- B. Whether the issuance of the title deed to the suit property Land Parcel 499 Kyusyani Adjudication Section before the appeal to the Minister was heard was irregular.



- C. Whether the proceedings and decision in the appeal before the 2<sup>nd</sup> Respondent was unprocedural, unfair, illegal and/or in contravention of the Fair Administrative Actions Act?

**A. Whether the Interested Party is a proper party to the suit herein**

36. The Interested Party objects to his joinder in the proceedings on the ground that he is not the personal representative of the estate of Ngoloi Mulewa (Deceased) in whose favour the decision of the Minister in Appeal Number 351/2001 was made and in whose name the suit land is registered. He stated that his father died in 2016 before the Appeal to the Minister was heard and determined in the year 2022.
37. The ex parte applicant however states that the interested party represented his father during the hearing of the appeal to the Minister and this is confirmed by the said proceedings. The proceedings in the appeal show that the Appellant Mulavu Nditu was represented by the ex parte Applicant herein while the Respondent Ngoloi Mulewa who was deceased by then was represented by the Interested Party herein.
38. Order 53 Rule 3 of the Civil Procedure Rules provides that an application for judicial review is to be served on all persons directly affected. Sub-rule 3 (2) states that;

“The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action concerning the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and all parties to the proceedings.”

39. The court’s interpretation of “persons directly affected” would mean a person or entity whose interests will be affected by the outcome of a lawsuit. In this case, the decision of the Appeal to the Minister is stated as follows in the relevant part;

“Appeal case No. 351/2001 is hereby dismissed. Parcel number 499 is to be retained by the Respondent Ngoloi Mulewa.”

40. In the present case, the person whose interests in the suit land would be directly affected is the deceased Ngoloi Mulewa. The law provides that suits by or against the estate of a deceased person are brought against the legal representative of his estate. Section 79 of the *Law of Succession Act* provides for the vesting of the property of the deceased in the personal representative of his/her estate and states that;

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

41. Section 2 of the *Civil Procedure Act* defines “legal representative” to mean “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;”



42. During land adjudication proceedings parties are usually allowed to represent deceased parties without the necessity of taking out a grant of letters of administration. This is per Section 13(5) of the [Land Adjudication Act](#) CAP 284 which provides that:

“Where several persons claim separately as successors of a deceased person, and one or more of those persons attend, his or their attendance shall be taken to be the attendance of all the successors unless the adjudication officer otherwise directs.”

43. The Court of Appeal in the case of *Dominic Musei Ikombo v Kyule Makau* [2019] eKLR had this to say on having legal representatives during the adjudication process.

“Our view is that proceedings conducted under the [Land Adjudication Act](#) are not strictly speaking akin to proceedings under the [Civil Procedure Act](#). The District commissioner acting on behalf of the Minister has wide latitude to conduct the proceedings in a manner that meets the substantive ends of justice. Section 13 of the [Land Adjudication Act](#) talks of “guardian” or “representative according to African Customary Law”. It does not refer to legal representatives. The strict rules of civil litigation as relates to the capacity to sue and be sued do not apply to proceedings before the committee or the minister. It is not therefore necessary for a person appearing on behalf of a family or clan where the head of the family or clan has died to possess letters of administration in respect of a deceased claimant. The parties therefore had locus standi to appear before the adjudication committee, lack of letters of administration notwithstanding.

Further, the Act allows every person who considers that he has an interest in the land in question to lodge a claim to the recording officer. In this case, the parties did not need to obtain letters of administration to protect their interest in the land in question. Furthermore, the two qualified as representatives of the deceased under customary law to represent their respective families in the adjudication proceedings.”

44. In the context of the present case, the parties are litigating in court, where the rules of procedure apply. The Court of Appeal in the case of *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR held as follows:

“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the [Law of Succession Act](#). That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased.”

45. In the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR the Mbogholi Msagha J held as follows:

“The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal



application has to be filed to facilitate this. No grant of representation has been presented to the court.”

46. The Court in the case of *In re Estate of John Karani Keberenge (Deceased)* [2018] eKLR held as follows regarding an ex-parte applicant in judicial review proceedings who was not a legal representative to the estate of the deceased:

“The Applicant has not been able to demonstrate that he is either an executor or administrator of the deceased, Kariuki Ngari. The court consequently finds and holds that the Applicant has no legal capacity to commence or prosecute legal proceedings before this court. The instant application for judicial review is therefore incompetent.”

47. The court thus finds that the ex parte Applicant ought to have joined to this suit the personal representative of the estate of Ngoloi Mulewa as an interested party. Christopher Nditu Ngoloi, the person joined as an interested party in this suit is improperly joined as an Interested Party herein and his name ought to be struck out.

**B. Was the issuance of the title deed to the suit property Land Parcel 499 Kyusyani Adjudication Section before the appeal to the Minister was heard irregular?**

48. The ex parte applicant contended that the title deed to the suit property was issued to the Interested Party’s father, Ngoloi Mulewa (Deceased) on 30<sup>th</sup> October 2013 while the appeal to the Minister was heard on 1.3.2021. He opines that the issuance of this title deed was irregular and an indication that the decision was pre-determined in favour of the interested party.

49. From the documents provided by the parties, the decision in the Objection proceedings was made on 2<sup>nd</sup> April 2001. The *Land Adjudication Act* CAP 284 Laws of Kenya provides for the procedure after the said decision in objection is made. Section 27(3) provides that:

“When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall—

- (a) alter the duplicate adjudication register accordingly; and then
- (b) certify on the adjudication register and the duplicate adjudication register that it has become final subject to the outstanding appeals; and
- (c) forward the adjudication register to the Chief Land Registrar together with a list of the appeals.”

50. This means that after objections have been determined, the adjudication register becomes final subject to any outstanding appeal to the Minister. Section 28 provides that:

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register: Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination, the register shall if necessary be altered in accordance with the determination.”



51. It is thus the position of the law that issuance of the title deed to the deceased when the appeal to the Minister was pending was in contravention of the provisions of Section 28 of the [Land Adjudication Act](#) since the Chief Land Registrar was expected to cause registration to be effected in accordance with the adjudication register in favour of the deceased Ngoloi Mulewa but accompanied by a restriction. The said section envisages registration that is subject to alteration to reflect the decision of the appeal to the minister. The said section does not, in the court's view, envisage the issuance of a title deed where an appeal to the Minister is pending.
52. Having said that, the question is whether the issuance of a title deed, as was done in this case, vitiated the proceedings before the Minister. To begin with, the court notes that the question of the title deed having been issued to the father of the interested party was not raised as an issue in the Notice of Motion, the Statement of Facts relied on dated 16<sup>th</sup> August 2022 and the supporting affidavit. The said issue was raised by the ex parte applicant in the supplementary affidavit and submissions ostensibly in reply to the information contained in the replying affidavit.
53. The Court has considered the provisions of Sections 27, 28 and 29 of the [Land Adjudication Act](#) and is of the view that the issuance of the title deed before the hearing of the appeal to the minister does not prevent the said appeal from being heard and determined as provided under Section 29. It is noted that no provision of the law was quoted by the ex-parte applicant to support the contention that the said hearing ought to have been stopped. There is also no evidence to show that the issuance of the title deed was known to the 2<sup>nd</sup> Respondent or that it was brought to his attention before the hearing proceeded. There is also no evidence adduced to show that the issuance of the title deed was an indication that the decision of the 2<sup>nd</sup> Respondent was pre-determined.
54. This court dealt with the same issue in the case of Republic v Deputy County Commissioner, Kitui West Subcounty; Malonza (Exparte) (Miscellaneous Civil Application 10 of 2021) [2022] KEELC 2723 (KLR) (23 June 2022) (Judgment) where it was contended that the Deputy County Commissioner Kitui West Sub-County lacked jurisdiction to hear and determine the appeal before him when the title deed to the suit land had already been issued. The court found that the Deputy County Commissioner had jurisdiction.
55. This followed the Court of Appeal decision in Euton Njuki Makungo v Republic & 2 others [2014] eKLR which held as follows;

“The appellant contends that because the Registrar of Lands had already issued a title deed in favour of Mwaniki Mwige; the 2nd respondent acted in excess of jurisdiction to cancel the title which had been issued as a first registration. The disputed parcel of land was within an adjudication area and at the time when the Registrar purportedly issued the title deed, an appeal to the Minister was pending. The evidence on record reveals that the appellant and the registered proprietor had knowledge that an appeal to the Minister was pending. A person who has knowledge of a pending appeal cannot come to court and submit that because there were no restrictions entered in the register, he could deal with the land as he pleases. He who comes to equity must come with clean hands. The appellant and the registered proprietor knew there was a pending appeal and the disputed parcel of land was still undergoing the adjudication process. We find that the 2nd respondent had jurisdiction to hear the appeal relating to the parcel of land. In the case of R – v- Lancashire County Council Ex p Gayer, (1980) 1 WLR 1024 it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in R –v- Lancashire County Council Ex p Gayer, (supra) and observe that it is not the



duty of the Registrar of Land to determine adjudication disputes; the evidence on record is clear that an appeal to the Minister was pending and the Registrar had no jurisdiction to issue the title deed in favour of Mwaniki Mwige while the appeal was pending. The disputed property was still subject to the adjudication process and the action by the Registrar was null and void. It is our view that the judicial remedy of certiorari was neither created nor established to settle ownership disputes, nor to create and confer title to land and the learned Judge did not err in declining to grant the order for certiorari."

56. The court finds that the decision of the 2<sup>nd</sup> Respondent is not vitiated by the issuance of the title deed to the suit land before hearing and determination of the appeal filed before him.

**C. Whether the proceedings and decision in the appeal before the 2<sup>nd</sup> Respondent unprocedural, unfair, illegal and/or in contravention of the Fair Administrative Actions Act?**

57. The impugned proceedings and determination of the 2<sup>nd</sup> Respondent show that the ex-parte applicant represented his father as the Appellant during the hearing because his father was sickly and advanced in age. During the hearing, he testified and confirmed that the grounds of appeal were true and that he had nothing else to add. He was then cross-examined by the Interested Party, who later gave his statement and the ex-parte applicant was given a chance to cross-examine him.
58. The 2<sup>nd</sup> Respondent noted that the land was visited on the 2<sup>nd</sup> of November 2021 and proceeded to make his findings on the appeal, noting that the interested party has not managed to utilize the land since the appellants' descendants built houses and aggressively stopped him from accessing the land.
59. It appears from the record that the Interested Party or his father had filed a suit known as RMC 45/94 where the court ordered the status quo to be maintained, and this order was violated and therefore concluded that the ex-parte applicant had encroached onto the Respondent's land.
60. From the record, the court is satisfied that both parties were given equal chances to ventilate their case and be heard before the 2<sup>nd</sup> Respondent. The record does not show that the Ex parte Applicant requested to call any witness and such a request was denied. The record does not also show that the ex parte Applicant requested time to prepare for the hearing of the appeal if that was what he required.
61. The court follows the view that the Minister's Appeal is an appeal like any other and the court or quasi-judicial authority is expected to consider the previous record before arriving at its own decision. The Minister or the Deputy County Commissioner in this case had the mandate to consider the grounds of appeal, previous evidence tendered, take fresh evidence and finally make his determination as he deems just and fair as provided under Section 29 of the Land Adjudication Act. The decision of the 2<sup>nd</sup> Respondent shows that this was the procedure taken.
62. It was held in *Matwanga Kilonzo v District Commissioner, Kitui & Another* [2021] eKLR that:

"The Minister's mandate under Section 29 of the Act is to consider the grounds of appeal raised by any person appealing against the decision of the Land Adjudication Officer, and upon considering the record of the Land Adjudication Officer, arrive at an independent decision. Indeed, just like what happens in an appellate court, the Minister need not take fresh evidence while dealing with the appeal, although he may do so to seek clarification on certain issues. However, he must consider the grounds of appeal and the evidence that was adduced before the Land Adjudication Officer before making his decision. The said decision must give reasons as to why he agrees or disagrees with the decision of the Land Adjudication Officer..... The 1st Respondent made the above finding after hearing the parties herein, and after considering the decision of the Land Adjudication Officer.



Considering that the 1st Respondent heard both parties and considered the proceedings of the Land Adjudication Officer, I am not convinced that the 1st Respondent was biased while arriving at his decision.”

63. The ex-parte applicant also complained that the 2<sup>nd</sup> Respondent took into account irrelevant matters such as the Court Case RMC No.45/94 and told him that he should move his works and agents to land parcel No. 212 which is rightfully theirs. The court notes that land parcel No. 212 Kyusyani Adjudication Section was previously awarded to Mulavu Nditu (Deceased), the father of the ex-parte applicant herein and was the subject of adjudication between the fathers of the parties herein who were the initial litigants. The initial land parcel No. 212 was divided into two giving rise to parcel Nos. 212 and 499. The court found that consideration of land parcel No. 212 was not an irrelevant matter.
64. The court has also looked at the proceedings preceding the appeal to the minister and noted that the case in the R. M court at Mwingi and the order of “status quo” were mentioned in the findings by the Land Adjudication and Settlement Officer during the Objection proceedings and exhibits had been produced in the said case. The court finds that in arriving at his decision, the 2<sup>nd</sup> Respondent had an obligation to consider the proceedings before all levels of the dispute resolution process and in the court’s view the 2<sup>nd</sup> Respondent’s decision reflects consideration of all the proceedings.
65. Regarding the previous court decision that was considered in the findings of the 2<sup>nd</sup> Respondent, Section 12(1) of the *Land Adjudication Act* CAP 284 provides the Procedure for the conduct of hearings before the adjudication officer is provided for and states that;
  - “(1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.”
66. Regarding the time frame in the summons for the hearing of the appeal, the Applicant complained that the time given was too short. He further complained that the time taken by the 2<sup>nd</sup> Respondent to make the final decision was too long.
67. The court notes that the ex parte applicant was made aware of and he confirmed knowledge of the date of the hearing of the appeal before the 2<sup>nd</sup> Respondent. He presented himself during the hearing and proceeded with the hearing and did not seek to have the hearing adjourned due to what he states was short notice. It is noted that there are no strict timelines in the *Land Adjudication Act* nor laid down procedures as to how long each stage of adjudication should last. The ex parte Applicant has also not shown that he suffered any prejudice as a result of the decision of the 2<sup>nd</sup> Respondent being made on the date that it was made.
68. In the Court’s view, the ex parte applicant had an obligation to make efforts to obtain from the 2<sup>nd</sup> Respondent a copy of the decision made at the earliest opportunity. It is noted from the proceedings that the ex parte Applicant is one of the persons occupying the suit land and it cannot thus be said that he has been kept away from the suit land due to any perceived delay.
69. It is the finding of this court that the ex parte applicant has not proved that the proceedings and decision in the appeal before the 2<sup>nd</sup> Respondent was unprocedural, unfair, biased, illegal and/or in contravention of the Fair Administrative Actions Act as to warrant granting the orders sought.



70. Arising from the findings stated above, the Court concludes that the suit herein lacks merit and the same is hereby dismissed with costs to the Respondents and the Interested Party.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 23<sup>RD</sup> DAY OF JANUARY, 2024.**

**HON. L. G. KIMANI**

**JUDGE ENVIRONMENT AND LAND COURT**

Judgement read in open court in the presence of-

J. Musyoki - Court Assistant

Mbaluka for the Ex parte Applicant

No attendance for the Respondents

Gathoni for the interested party

