



**Mugambi & 8 others v District Land and Settlement Officer Ruiru Rwarera & 3 others; David Ndumba M’guabi (Interested Party) (Environment & Land Petition E006 of 2023) [2024] KEELC 4338 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4338 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ENVIRONMENT & LAND PETITION E006 OF 2023**

**CK NZILI, J**

**MAY 22, 2024**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 26A, 27, AND 28 OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 7 OF LAND ACT SECTION 6 OF 2012**

**AND**

**IN THE MATTER OF ENVIRONMENT AND LAND ACT 2012**

**BETWEEN**

**BENSON MUGAMBI ..... 1<sup>ST</sup> PETITIONER**  
**FLORENCE NAITORE ..... 2<sup>ND</sup> PETITIONER**  
**GRACE KUURI ..... 3<sup>RD</sup> PETITIONER**  
**JOSEPH MWITI NKANATA ..... 4<sup>TH</sup> PETITIONER**  
**ALICE MWIRIGI ..... 5<sup>TH</sup> PETITIONER**  
**JAMES KINGORA MBOROKI ..... 6<sup>TH</sup> PETITIONER**  
**NAFTALY MBAABU M’MUGWIKI ..... 7<sup>TH</sup> PETITIONER**  
**JAMES MURITHI RWIGI ..... 8<sup>TH</sup> PETITIONER**



**DR. NAATHAN MWONGERA ..... 9<sup>TH</sup> PETITIONER**

**AND**

**DISTRICT LAND AND SETTLEMENT OFFICER RUIRI**

**RWARERA ..... 1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF LANDS PHYSICAL PLANNING AND DEPARTMENT OF  
LAND ADJUDICATION AND SETTLEMENT ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**DAVID NDUMBA M'GUABI ..... INTERESTED PARTY**

### **JUDGMENT**

1. The petitioners took out a petition dated 9.5.2023, claiming that the 1<sup>st</sup> petitioner was the recorded owner of Ruiiri/Rwarera parcel No. 712 since 1968, measuring approximately 15 acres, which is still under her occupation to date. It was averred that in 2018, the 1<sup>st</sup> interested party filed Objection No. 3479, which was heard and determined by the 1<sup>st</sup> respondent, whose effect was that each of the 1<sup>st</sup> interested parties acquires 7 ½ acres while the 1<sup>st</sup> petitioner retained the balance.
2. The 1<sup>st</sup> petitioner averred that she filed Ministers Appeal No. 161 of 2018 against the decision to share her property with the 1<sup>st</sup> interested party, and since there was no adverse caution or restriction over the land, she dealt with the land as it pleased her by selling part of it to the 2<sup>nd</sup> -9<sup>th</sup> petitioners.
3. The 1<sup>st</sup> petitioner averred that during the committee case and in the appeal, the 1<sup>st</sup> interested party never produced any documents showing that he and his mother were ever the recorded owners of the land. That notwithstanding, it was averred that the (IP) unjustly influenced the committee to rule that he was entitled to a share thereof.
4. As a consequence, the 1<sup>st</sup> petitioner averred that the committee wrongly and illegally awarded part of her land to the 1<sup>st</sup> interested party, yet there was no sufficient reason or justification. It was averred that the 1<sup>st</sup> respondent visited the scene and found that the 2<sup>nd</sup> – 9<sup>th</sup> petitioners had settled therein and had undertaken extensive developments, yet he refused to consider their interests and hence condemned them unheard.
5. The petitioners averred that the corrupt scheme and collusion of the 1<sup>st</sup> interested party and the 1<sup>st</sup> respondent, unfairly made them lose their land or interest in it by inserting the name of the 1<sup>st</sup> interested party in the register for parcel No. 712 yet the land and its registration in favor of the 1<sup>st</sup> petitioner has existed since 1968.
6. The petitioners averred that the Minister did not hear the appeal as per law. The Deputy County Commissioner, did not know land matters but instead handled it, hence dismissing the 1<sup>st</sup> petitioners' appeal. It was averred that the 1<sup>st</sup> petitioner had initially successfully sued the mother of the 1<sup>st</sup> interested party in Isiolo DMCC No. 9 of 1989 for trespass, and eviction and the lawful evictions were carried out, which decree was never appealed against.



7. The 1<sup>st</sup> petitioner averred that due to such a lawful decree of the court, the committee case or appeal ought not to have been instituted. Due to the preceding, the petitioners averred that their constitutional right to a fair hearing was abused since the 1<sup>st</sup> interested party never owned any land, filed the committee case long after the death of his mother, facts of the judgment in Isiolo case and its execution were not disclosed and the committee case was res-judicata. The petitioners termed the process initiated by the 2<sup>nd</sup> respondent as flawed and that it should never have reached the Minister.
8. Additionally, the 3<sup>rd</sup> to 9<sup>th</sup> petitioners averred that they were never heard despite the Deputy County Commissioner visiting the ground and finding them in occupation with extensive developments thereon.
9. As a result, the petitioners urged the court to declare Objection No. 3479, Appeal No. 161 of 2018 and the resultant decisions, unconstitutional and to order the 1<sup>st</sup> respondent to return to the 1<sup>st</sup> petitioner her land measuring 7 ½ acres to the register, in place of the 1<sup>st</sup> interested party or any other person from the register.
10. In support of the petition, even though the 2<sup>nd</sup> petitioner was granted the authority to plead, swear, and sign affidavits by the 1<sup>st</sup> and 3<sup>rd</sup> – 9<sup>th</sup> petitioners, strangely, the affidavit before the court supporting both the notice of motion and the petition was sworn by Grace Kuuri, the 3<sup>rd</sup> petitioner.
11. It is averred that the late Jackson Angaine allocated the 1<sup>st</sup> petitioner the suit land in 1968, who recorded his relatives among them the 1<sup>st</sup> petitioner, as owners by virtue of being Mau Mau veterans. She annexed a copy of the confirmation letter marked F.N. "1". It was averred that from 1968, the 1<sup>st</sup> petitioner settled, fenced and developed her land measuring about 20 acres, but at the adjudication stage, it was reduced to 15 acres.
12. The 1<sup>st</sup> petitioner averred that after she was transferred to Kitui Hospital from Isiolo, she learned of encroachment of her land by one Julia Gatiria, the mother to the 1<sup>st</sup> interested party and filed Isiolo DMCC No. 9 of 1989 for trespass and eviction orders were duly issued. She attached the court documents as F.N. "2," leading to a forceful eviction from the land, and after that, neither the judgment debtor nor her relatives or family members stepped back to the land.
13. It was averred that the adjudication record was never changed until the 1<sup>st</sup> interested party, a son of the deceased Julia Gatiria, filed Objection No. 3479, attached as F.N. "3," which was not fairly heard, there was nepotism and corruption contrary to the Constitution.
14. The 1<sup>st</sup> petitioner averred that both at the committee and before the appeal, she notified the member of the previous decree, but they did not give her time to produce the entire record or follow up to find out the court documents, which, had it perused the record from the court, it would not have entertained the committee case or the appeal.
15. The 1<sup>st</sup> petitioner averred that at the scene visit, the 3<sup>rd</sup> – 9<sup>th</sup> petitioners were found on the land, yet they were condemned unheard and that after the lawful eviction and in the absence of any impediments to the title, the 1<sup>st</sup> petitioner was in order to deal with her land and sell it to them.
16. Additionally, it was averred by the 3<sup>rd</sup> petitioner that there was no evidence submitted by the 1<sup>st</sup> interested party on the occupation of the 7 ½ acres. He was given more, yet lawful eviction had been carried out against his late mother. The petitioners termed the 1<sup>st</sup> interested party's objection irregular and unprocedural.
17. The respondents oppose the application through a replying affidavit by Joseph N Kithinji, a Land Adjudication and Settlement Officer Ruiru/Rwarera Adjudication area sworn on 21.9.2023. It is



- averred that the hearing and determination of the objection was conducted in accordance with [Land Adjudication Act](#) (Cap 284) Laws of Kenya as well as the appeal to the minister in the presence of the parties who were accorded an opportunity to file and present their respective cases and documents.
18. The respondents averred that the land adjudication process was followed, and parties were accorded an opportunity to apply for any redress under Sections 21 to 29 of [Cap 284](#) internal dispute mechanism.
  19. The respondents averred that no evidence has been tendered to show that the petitioners were denied audience under the law, and that the 1<sup>st</sup> respondent acted within its scope and mandate as provided by the law. Therefore, the respondents averred that the petitioners have failed to satisfy the conditions laid down by the law to deserve the reliefs sought.
  20. From the court record the 1<sup>st</sup> interested party entered appearance through the firm of Mutunga Mwesigwa LLB Advocates on 30.5.2023. The court issued directions by an order dated 17.7.2023 for the responses to be filed within 30 days from 30.5.2023.
  21. After the ruling was delivered on 15.11.2023, parties again were directed to exchange responses and written submissions before 15.12.2023. Come 18.12.2023, there was no response from the 1<sup>st</sup> interested party. Parties were nevertheless given a last chance to comply. On 20.2.2024, the court gave a judgment date of 22.5.2024.
  22. By an application dated 24.2.2024, the 1<sup>st</sup> interested party sought to arrest or postpone and or enlarge time to respond to the petition. The reason given was that the interested party had passed on. Thurania Mwenda Mutunga Advocate swore the supporting affidavit on 29.2.2024. No supporting documents by way of death certificates or an application for letters of administration were attached to verify the alleged death. The application referred to both the 1<sup>st</sup> petitioner and the 1<sup>st</sup> interested party as the one who had passed on yet the said law firm only represented the interested party.
  23. Due to the glaring inconsistencies and non-compliance with Order 24 of the [Civil Procedure Rules](#) and the [Law of Succession Act](#), the court, by an order dated 4.3.2024, found the application incompetent and lacking merits.
  24. The petitioners relied on written submissions dated 16.2.2024 and isolated four issues for determination by the court. On the jurisdiction of this court, it was submitted that under Articles 22(1), 23 of the [Constitution](#), the petitioners have a right to approach the court for redress of the denial of their rights or property and a fair hearing, regarding the exercise of quasi-judicial powers by the respondents, who failed to adhere to the rules of natural justice in hearing and determination of both the objection and the Minister's appeal.
  25. In particular, the 2<sup>nd</sup> – 9<sup>th</sup> petitioners submitted that even though they were listed as parties to the appeal and marked as present during its hearing, they were never called to tender any evidence, hence causing their rights to be infringed. Reliance was placed on [Andrew Cheruiyot & another vs Medical Practitioners & Dentist Board](#) (2014) eKLR.
  26. The petitioners submitted that the 1<sup>st</sup> interested party also failed to explain the prolonged delay in filing the objection and waiting for his mother to pass on to take action. The petitioners termed the delay of 40 years as unreasonable and prejudicial to their witnesses and possible defense. Reliance was placed on *Re-Mlambo* (1993) 2 L.R.C. 28.
  27. The petitioners submitted that the petition had met the constitutional threshold on four critical issues regarding the delay, the sham proceedings, bias, and the failure to uphold the law. Relying on [Tobias Ochola & others vs Cyprianus Otieno Ogolla & others](#) (2013) eKLR, the petitioners submitted that the court's role in supervising the adjudication process was critical to ensure that there were no



- unreasonable, decisions devoid of reasons or made in the total disregard of the constitutional rights and freedoms of the parties.
28. Therefore, the petitioners submitted that to ensure there was constitutionality of the entire adjudication process, judicial intervention cannot be excluded. The petitioners submitted that they seek refuge in the constitutional court for the petition raises constitutional questions whose remedy depends on the Constitution, for the petition represents a peculiar situation where a public body acted arbitrarily without following the laid down mechanism in an improper and unprocedural manner, that limited the petitioner's rights to fair hearing and ownership of property contrary to Articles 50 and 159 (2) (a) and (c) of the Constitution.
  29. The petitioners submitted that the adjudication officer and the minister failed to accord them rules of natural justice under Articles 25 & 50 (1) of the Constitution, more so the 3<sup>rd</sup> – 9<sup>th</sup> petitioners who were bona fide purchasers of the suit land as demonstrated in the attached sale agreements. Reliance was placed on *Rep vs National Police Service exparte Daniel Chacha and Msugha Chief Justice and seven others* (2006) 1 KLR 663 and *Pinnacle Projects Ltd vs PCEA Ngong Parish and another* (2018) eKLR.
  30. Regarding the interested party, the petitioners submitted that under Section 26 of Cap 284, any person affected by an adjudication register has 60 days upon the publication the notice of completion of the register to object in writing on why he thinks the adjudication register is incorrect or incomplete. To this end, the petitioners submitted that the only person(s) who can bring up an objection is either the person named in the register or one who can illustrate to the adjudication officer as affected by it.
  31. The petitioners submitted that whereas under Section 82 of the Law of Succession Act (Cap 160), a personal representative can come in where a cause of action survives the deceased, the 1<sup>st</sup> interested party was not directly affected by the ownership of the 1<sup>st</sup> petitioner's land since his interest or title emanates from his mother. In contrast, he produced no evidence of the allocation of the land by the Minister for Lands. Therefore, his name or that of his mother featured nowhere in the adjudication register.
  32. The petitioners submitted that the rationale behind res-judicata, as stated in *William Koross vs Hezekiah Kiptoo Komen and others* (2015) eKLR, is to put a rest to litigation and to stop the re-opening of concluded matters, so that a successful party can reap the benefits of his successful litigation. Given the previous decree over the dispute, the petitioners submitted that the adjudication officer and the minister had no jurisdiction to rehear a matter already concluded between the same parties over the same issues and title to land.
  33. The petitioners submitted that under section 30 (4) of cap 284, court orders were enforceable through the adjudication procedure, and the committee ought to have taken notice of the existence of the judgment and to ensure that its exercise of their mandate did not conflict with the courts. The petitioners urged the court to find there was procedural irregularity bias, illegality, and unconstitutionality in the manner that the respondents heard and determined the objection, the appeal and subsequently recorded the interested party as the owner of a half share of the 1<sup>st</sup> petitioner's land.
  34. The respondents relied on written submissions dated 18.12.2023 and isolated three issues for the court's determination. The respondents submitted that jurisdiction was everything, and without it, a court must down its tools as held in the *Owners of Motor Vessel Lillian "S" vs Caltex Oil (K) Ltd* (1989) K.L.R. 1.
  35. The respondents submitted that under Cap 284, elaborate mechanisms for solving disputes during the adjudication process have been laid out, and the Minister's decision was final. Reliance was placed on *Robert Kulinga Nyamu vs Musembi Mutunga and another* (20220 eKLR and *Tobias Achola Osidi*



- and others vs. Cyprianus Otieno Ogalo* (*supra*) that the court cannot usurp the functions and powers of the bodies set out under Cap 284 in the ascertainment of rights and interest in land save for supervisory roles.
36. The respondents submitted that the substratum of the petitioners' case was challenging and appealing against the minister's decision and not the decision-making process. Relying on *John Masiantet Saeni vs Daniel Aramat Lolungiro & others* (2017) eKLR, the respondents submitted that the petition was a back-door appeal of the minister's decision to reverse that was legally and validly done under Cap 284 and was, therefore, an abuse of the court process aimed at resurrecting already determined matters.
  37. The respondents submitted that the petitioners had failed to tender evidence that the decision-making process was marred with irregularities for the court to intervene and, more so, prove any alleged fraud or collusion between the interested party and them, significantly where the Act empowers the Minister to delegate his powers to the D.C.C.
  38. The respondents submitted the petition fell short of the threshold set in *Mumo Matemo vs Trusted Society of Human Rights Alliance & others* (2015) eKLR for it was not pleaded with precision and particularly as to how the alleged rights accrued, the constitutional provisions infringed and the manner in which the respondent infringed the rights.
  39. The respondents, relying on *Tobias Achola Osidi vs Cyprianus Otieno Ogola* (*supra*), submitted that the process of ascertainment of rights under Cap 284 concluded with the finalization of the adjudication register and its hand over by the director of the land adjudication to the chief land registrar for registration and tilling under Sections 24 & 25 of the Land Registration Act.
  40. In this petition, the respondents submitted that the petitioners failed to avail documents to show who that they were the legal owners of the suit land or had any proprietary right or interests over it; otherwise, the right to property with respect to the land had not crystallized for one to say the right had been infringed.
  41. The respondents submitted that under Section 12 of Cap 284, an adjudication officer is allowed to follow the procedure of hearing civil suits, and res judicata was one of the principles observed in civil proceedings and that Section 30 (4) of (Cap 284) provides that matters already concluded and final judgment entered before the land in question was declared an adjudication area to be enforced in the adjudication process.
  42. Relying on *Timotheo Makenge vs Manunga Ngochi* (1979) eKLR, the respondents submitted that interest in law within an adjudication area previously recognized by courts was not binding in land adjudication proceedings and was only relevant as a factor to be taken into account. Therefore, the respondents submitted that the decision in Isiolo DMCC No. 9 of 1989 was not binding, but the respondents took into consideration the judgment. Reliance was placed in *Daniel Musili Nyeki & others vs. Cabinet Secretary of Lands & Settlement and another; Benard Malonza Musya and others (I.P.)* (2021) eKLR.
  43. The respondents urged the court to find that the petitioners were not entitled to the reliefs sought, for they had failed to demonstrate how the impugned objection and appeal were unconstitutional or how they were entitled to the whole 15 acres of land.
  44. The issues calling for my determination are:
    - i. If the petitioners exhausted the internal dispute mechanism under the statute before invoking the jurisdiction of this court.



- ii. If the petition raises any constitutional questions or issues.
  - iii. If the petitioners have pleaded and proved, a breach of any constitutional rights and freedoms to be entitled to the reliefs sought.
  - iv. What is the order as to costs?
45. The petition before this court relates to the alleged unconstitutional manner in which the respondents admitted, heard, determined, and implemented the 1<sup>st</sup> interested party's Objection No. 3424, and the Minister Appeal No. 161 of 2018 in total disregard to the petitioner's rights to fair hearing and the right to property.
  46. The impugned objection and the appeal, the proceedings, and the decisions, therefore, sought to be challenged or affirmed have not been attached to either the supporting affidavit to the petition or the replying affidavit by the respondents sworn on 9.5.2023 and 21.9.2023.
  47. The respondents have attacked the petition as seeking to re-open the adjudication process, which was heard, determined, and concluded under the land adjudication process and which, if allowed, would undermine or be tantamount to negating the role, essence and calling the court to assume a jurisdiction it does not possess under the *Land Adjudication Act*. Reliance was placed on *Tobias Achola Osidi & others vs Cyprianus Otieno Ogalo and others* (*supra*), *John Masiantet Saeni vs Daniel Aramat Lolungiro & others* (*supra*) *Owners of Motor Vessel Lillian "s" vs Caltex Oil (K) Ltd* (*supra*) and *Robert Kulinga Nyamu vs Musembi Mutunga* .
  48. As indicated above, none of the parties have pleaded the particulars of the date of filing, hearing and determination of both the objection and the Minister's Appeal. The petitioners, in their written submissions dated 16.2.2024 on pages 2-3 refer to pages 33, 34, 36, 37 & 39 in the objection, which document was not attached to the petition as an annexure.
  49. Courts have times without number said written submissions cannot replace pleadings or amount to evidence. Page 3 of the written submissions, from paragraphs 13 – 17 they relate to the Minister's appeal, yet the said facts were not pleaded in the body of the petition, albeit in a cursory manner in paragraphs 15-2021 of the petition.
  50. There was no single affidavit by the 2<sup>nd</sup> – 9<sup>th</sup> petitioners to verify the manner of purchase, entry into, consideration paid, development made, and the manner of infringement of their constitutional rights as to fair hearing and land ownership. For instance, the date of the hearing of both the objection and the appeal were not pleaded. As to whether the 3<sup>rd</sup> to 9<sup>th</sup> petitioners were parties to the minister's appeal that is a fact that this court could only be ascertain from the proceedings and the decision then itself. More importantly and critically, for purposes of this issue, is when the minister's appeal was lodged, heard and determined and if there was a right of appeal given to the petitioners.
  51. It is trite law that under the *Land Adjudication Act*, objections to the register have to be lodged within 60 days after the publication of the adjudication register. Further, it is trite law that any party aggrieved by a minister's appeal decision has six months to apply for orders of certiorari prohibition and mandamus at the High Court.
  52. Following the elevation of judicial review as a constitutional right after 2010, a party has a choice and can move the court through a constitutional petition. The respondents have pleaded that the petition before the court is a back door means for the petitioners to appeal, which the law does not allow for such a decision is final. The respondents have submitted that under Section 29 of Cap 284, the minister's decision became final. As held in *Robert Kulinga Nyamu vs Musembi Mulinga & another* (*supra*), it



was submitted that this court should not allow the petitioners to relitigate a dispute that was fairly reasonably, lawfully, and procedurally handled under the internal dispute mechanism set under the Act. The respondents further urged the court that its role, guided by *Tobias Achola Osidi & others vs Cyprianus Otieno Ogalo & others (supra)*, was supervisory, and any issue on adjudication should have been through the Act and not a constitutional petition.

53. Joseph N. Kithinji, a Land Adjudication and Settlement Officer, swore the replying affidavit to the petition instead of the minister. In paragraph 11 thereof, he failed to mention when the minister's appeal was heard and determined and indicate if, apart from the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> – 9<sup>th</sup> petitioners were parties to the minister's appeal or whether they were heard and their rights as to fair hearing and property, observed.
54. On that score alone and in the absence of timelines in which the 1<sup>st</sup> petitioner was to challenge the minister's decision and failed to do so, I find that the issues raised by the 1<sup>st</sup> petitioner individually and those of the 3<sup>rd</sup> – 9<sup>th</sup> petitioners separately, entitle them to move to this court for a determination of the alleged breach of their constitutional rights.
55. Further, my finding is that it was the respondents who would have benefited if they had proved that the timelines set under the law were not adhered to by the petitioners to challenge the minister's decision. The burden of proof was on the respondents to plead and prove that the minister's decision was supplied to the petitioners on time as per Article 47 of the *Constitution* and Order 53 of the *Civil Procedure Rules*, Sections 8 and 9 of the *Law Reform Act* and failed to challenge it within six months.
56. Exhaustion of internal dispute mechanism, as held in *Speaker of National Assembly vs Karume* (1997) KLR 425, should not be raised to act as an impediment to accessing justice. A party raising it must lay the material as to why the court should decline jurisdiction. See *Geoffrey Mutbinja Kabiru & others vs Samuel Munga Henry & others* (2015) eKLR.
57. The next issue is whether the petition has met the threshold of a constitutional petition. A party seeking constitutional reliefs based on infringement of constitutional rights and freedoms has to disclose the specific rights or freedoms infringed, the manner, nature, and particulars of the infringement, by whom the infringement occurred, pending or previous disputes touching on the issue, and the loss or damage caused to him, in line with the *Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice & Procedure Rules 2013*, otherwise known as the Mutunga Rules. In *Mumo Matemba vs Trusted Society of Human Rights Alliance* (supra), the court cited with approval *Anarita Karimi Njeru vs Republic* (1997) KLR case that in the petition and the supporting affidavit the particulars of the claim relating to the alleged violations of constitutional rights and freedoms must be pleaded.
58. In *C.C.K. vs. Royal Media Services Ltd* (2014) eKLR, the court observed that pleadings and framing of issues in a constitutional petition must be specific and particular so that the opposite parties know what they are facing and respond appropriately. Pleadings also serve to enable the court to establish the issues at stake and to give the appropriate directions.
59. In this petition, the petitioners invoked Article 10 of the *Constitution* as the basis of the petition. Paragraphs 1-6 thereof described the parties. From paragraphs 7 – 21, the facts, details, circumstances, and basis of seeking for the court to find and hold the right to the property having been infringed by the respondents, in the manner the objection and the Minister's appeal were entertained, heard, and determined were laid out.



60. The complaints by the petitioners were clearly set out, such that the respondents and the interested party were able to understand and respond to the petition without seeking better particulars. My finding is that the petition meets the test of particularity in pleadings.
61. On whether the petition raises a constitutional issue, in *C.N.M. vs W.M.G.* (2018) eKLR, the court observed that in determining whether an argument raises a constitutional issue, the court is not stealthily concerned with whether the argument will be successful, but if it forces the court to consider constitutional rights and freedoms.
62. The petitioners raised allegations of breach of Article 40 of the *Constitution*, which states that one's property shall not be arbitrarily taken without the basis of any of the grounds set or contemplated in Article 27 (4) thereof. The petitioners have pleaded the nature of the complaint and the nature of the infringement with specificity on the events relating to the hearing and the disposal of the objection and the minister's appeal by the respondents. The answers as to whether the conduct of the respondents in hearing and determining the objection and the minister's appeal has to meet the constitutional test of equality before the law and the right to equal protection and equal benefit of the law as set out in the *Constitution*.
63. The respondents in hearing the objection and minister's appeal have to abide by the constitutional edifice set under Article 47 of the *Constitution* as to expeditious, efficiency, lawfulness, reasonableness, and procedural fairness. The answers to the constitutional issues posed in this petition by the petitioners find their answers not on a statute, but on the *Constitution* itself. I find the petition has met the constitutional threshold, meriting determination by this court.
64. The next issue is whether the petitioners have proved a breach of the right to property and equal protection and benefit of the law during the hearing and determination of both the objection and the minister's appeal. The law governing the hearing and determination of the minister's appeal is, inter alia Article 47 of the *Constitution*, the *Fair Administrative Action Acts* and the *Land Adjudication Act*.
65. Article 47 of the *Constitution* is aimed at promoting efficient administration. It binds all state organs and non-state organs, bodies, and entities as they exercise administrative action as the power, function and or duties whose exercise affects the rights or interest of a party. Article 47 (1) provides that every person has the right to an administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Further, Article 47 (2) provides that if a constitutional right or fundamental freedom of a person is likely to be adversely affected by the administrative action, the person has a right to be given written reasons for the action.
66. Article 50 (1) provides that every person has a right to have a dispute resolved by the application of law in a fair manner. In *Republic vs Firearms Licensing Board and another exparte Boniface Mwaura* (2019) eKLR, the court observed that Article 47 codifies every person's right to fair administrative action and an administrator has a duty imposed to accord a person procedural fairness or natural justice when a decision is made that affects a person's right, interest or legislative expectations. Under Section 7 of the *Fair Administration Action Act*, any person affected by an administrative action or decision can apply for a review of the decision or action in accordance with Section 8 thereof, on whether or not he has annexed the decision.
67. The petitioners alleged that there was procedural impropriety for the rules of natural justice were not observed, especially relating to the 3<sup>rd</sup>-9<sup>th</sup> petitioners who had genuine interest or rights to the land by virtue of sale agreements attached hereto and occupation rights witnessed during the scene visit by the 3<sup>rd</sup> respondent.



68. Decision-makers are constitutionally required to look into matters of both procedure and substance. A person who is adversely likely to be affected by an administrative action must be accorded an opportunity to be heard with prior and adequate notice of the nature and reasons for the proposed administrative action.
69. Section 4 of the *Fair Administrative Action Act* obliges the administrator to accord affected persons an opportunity to attend the hearing in person, a chance to be heard, an opportunity to cross-examine persons who give adverse evidence against them, and a request for an adjournment for purposes of fair hearing.
70. Non-compliance with these constitutional edicts enables the court under Article 47 and the Fair Administrative Actions Act to strike out the decision for failing to muster the constitutional test. Section 7 (2) (1) of the *Fair Administrative Action Act*, provides that a court can review an administrative action, if it is not rationally connected to the purpose for which it was taken or the empowering provision of the information before the administrator and the reasons given for it and where the conduct of the administrator is contrary to logic. See *Pastoli vs Kabale District Local Government council & others* (2008) 2 E.A 300.
71. In this petition, the respondents, and especially the minister, did not explicitly refute paragraphs 11, 12, 13, 14, 15, 18, 19, 20 & 21 of the petition on the right to be heard, which is a constitutional right belonging to the purchasers to the land, from the 1<sup>st</sup> petitioner as enshrined under the *Constitution*. The 3<sup>rd</sup> – 9<sup>th</sup> petitioners produced annexures marked F.N. 4 (a), the sale agreements between them and the 1<sup>st</sup> petitioner.
72. Condemning the petitioners unheard and failing to give them reasons why they were not heard before this court flies against Article 47 (3) of the *Constitution* and Section 4 (2) of the *Fair Administrative Action Act*. See *JSC vs Hon. Justice Mutava Mbalu* C.A No. 52 of 2014. In *John Wachuri t/a Gitbakwa Graceland & Wandumbi Bar & 50 others vs the County Government of Nyeri and another* (2016) eKLR, the court listed three public law wrongs, namely, illegality, fairness, irrationality, and proportionality, which, if not adhered to by a court can strike down a decision.
73. In exparte *Bernard Mwaura* (*supra*), the court said that under Article 73 of the *Constitution*, a public or state officer must be objective and impartial in decision-making. See also *Republic vs National Police Service exparte Daniel Chacha* (*supra*).
74. In this petition, the 1<sup>st</sup> respondent filed a response on oath to matters falling under the office of the District Land Adjudication and Settlement Officer in hearing and determining the objection. The Minister's mandate under Section 29 of *Cap 284* falls beyond his jurisdiction. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents failed to answer the complaints by the petitioners as regards the right to fair administrative action, fair hearing, right to equal protection of law and equality before the law, in depriving them accrued rights or interests to the subject land by virtue of both possessory and occupation rights. See *Pinnacle Projects Ltd vs PCEA* (*supra*).
75. It is the 3<sup>rd</sup> and 4<sup>th</sup> respondents who admittedly heard and determined the Minister's appeal. In the absence of an explanation or reasons for condemning the petitioners unheard, there is a presumption under Section 9 of the *Fair Administrative Actions Act* that the respondents had no good reasons.
76. The upshot is that I find the Minister's decision unconstitutional. The appeal is remitted for rehearing with the involvement of all the petitioners and the affected parties within six months from the date hereof. There will be no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU



**ON THIS 22<sup>ND</sup> DAY OF MAY, 2024**

**In presence of**

C.A Kananu

Mrs. Kume for the Petitioners

Miss Mbaikyatta for the respondent

Thuranira for interested parties

**HON. C K NZILI**

**JUDGE**

ELC PET E006 OF 2023 - JUDGMENT	0
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