



**Tune v Madungi & 3 others (Environment & Land Case  
56 of 2021) [2024] KEELC 4702 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4702 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 56 OF 2021**

**EK MAKORI, J  
JUNE 12, 2024**

**BETWEEN**

**JAMES KIRINGI TUNE ..... PLAINTIFF**

**AND**

**BONFACE K. MADUNGI ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR-KILIFI ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER-  
KILIFI ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, by a plaint dated 4<sup>th</sup> June 2021, seeks the following reliefs from this Court, which are the specific outcomes they are requesting from the court:
  - a. A permanent injunction restraining the Defendants by themselves, their servants, agents, employees, or whoever acting through them to desist from selling, subdividing, or in any other way from interfering with the use of enjoyment, possession, and ownership of the suit property.
  - b. A declaration that the decision of the Land Dispute Tribunal and the Appeal to the Minister involving land parcel No.Chonyi/Bedzombo/Kitsoeni/321 is null and void.
  - c. An order be issued against the 1<sup>st</sup> Defendant directing him to remove any illegal structures, such as unauthorized buildings, posts, and or barbed wires, erected on the suit property within 60 days from the date of the judgment herein.



- d. An order be issued directing the 3<sup>rd</sup> Defendant to remove the Caution placed by the 1<sup>st</sup> Defendant on land parcel No.Chonyi/Bedzombo/Kistoeni/321.
  - e. An order directed to the OCS Kilifi and Kijipwa Police Station, the local law enforcement authorities, to ensure compliance with orders 1 and 3 above and provide any necessary security required to enforce compliance with those orders.
  - f. Costs of the suit, including legal fees and other expenses incurred during the legal process, interest at court rates, and the standard interest rate applied by the court.
  - g. Any other relief this Court may deem to grant, which refers to any additional outcomes or decisions that the Court may consider in light of the arguments and evidence presented by the Plaintiff and the 1<sup>st</sup> Defendant.
2. The 1<sup>st</sup> Defendant filed a statement of defence and counterclaim dated 18<sup>th</sup> August 2021 in which he seeks recovery of the following reliefs:
    - a. An order to the District Land Surveyor-Kilifi to implement the decision made in Appeal Case No.195 of 2005-Boniface K. Madungi v Baya Mwanje & others by surveying and subdividing land Title No.Chonyi/Bedzombo/Kitsoeni/321 into two parcels and allocate the Plaintiff and his relatives the parcel of land on which their homestead is situated and on which they undertook cultivation and also allocate to the Defendant the rest of the parcel of land on which his family used to cultivate in conformity with the decision.
    - b. An order to the District Land Registrar - Kilifi to rectify the Register relating to land Title No.Chonyi/Bedzombo/Kitsoeni/321 by cancelling the registration made on the Register of the said Title and, in its place, implement the decision made in Appeal Case No.195 of 2005 - Boniface K. Madungi v Baya Mwanje & others by registering one of the parcels of land subdivided from land Title No. Chonyi/Bedzombo/Kitsoeni/321 in favour of the 1<sup>st</sup> Defendant by counterclaim and his relatives and the other parcel of land in the name of the Plaintiffs by counterclaim in conformity with the decision made in the said Appeal.
    - c. Costs of the suit and interest thereon at Court rates.
    - d. Any other relief that this Court shall deem just to grant.
  3. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their Memorandum of Appearance dated 10<sup>th</sup> September 2023 but did not adduce any evidence.
  4. The subject of this suit is a land parcel - Chonyi / Bedombo Kitsoeni /321, measuring approximately 7.79 Hectares. According to a copy of the title deed produced as evidence in Court, the registered owners include Baya Mwanje Baya, Ngumbao Mwanje Baya, and Ngeda Mwanje Baya, who are all deceased, and James Kiringi Tune, also known as Kiringi Tune Mwanje, who is the only surviving registered owner of the suit property and the Plaintiff herein.
  5. The case at hand is not a simple matter of land ownership. It involves a land parcel - Chonyi/ Bedombo Kitsoeni/321, measuring approximately 7.79 Hectares. Before the title deed for the said land was issued, a series of events unfolded, adding complexity to the case. The 1<sup>st</sup> Defendant's relative, Gideon Mrima, attempted to stop the registration of the suit land. He filed several cases at the Land Adjudication Tribunal, all decided in favour of the Plaintiff and the other registered owners. These cases allegedly concluded in 1992 when the Plaintiff and his relatives were declared the owners of the suit land and proceeded to acquire the title deed in 2007.



6. The 1<sup>st</sup> Defendant's relative, Gideon Mrima, satisfied with the Tribunal decisions, lived peacefully away from the suit land until over twelve (12) years later, specifically in 2005. At this point, the 1<sup>st</sup> Defendant, strangely and by ignoring the long time since judgment involving the suit land had been delivered and further by ignoring the existence of the previous litigant Gideon Mrima, who had represented the 1<sup>st</sup> Defendant at the Tribunal and who was still very much alive and satisfied with the awards, appealed the said decision issued in 1992.
7. The 1<sup>st</sup> Defendant did not inform Plaintiff and the other registered owners of the appeal, which was filed allegedly twelve years late. Still, the Plaintiff learnt of the same twenty-nine years later, specifically in April 2021, when the 2<sup>nd</sup> Defendant sent a letter to the Plaintiff threatening to subdivide the suit land, and the Plaintiff proceeded to file this suit.
8. The Plaintiff now contends that the said appeal to the Minister is strange. It did not involve any of the registered owners of the suit land. It was also filed over twelve (12) years late, which was way out of the required time, and the same should, therefore, be declared null and void
9. The 1<sup>st</sup> Defendant also placed a caution, indicating a legal notice of a claim or interest in the suit land, on the suit land in 2018, specifically on 23<sup>rd</sup> November 2018, and the Plaintiff prays for it to be lifted.
10. The 1<sup>st</sup> Defendant claims the suit land and seeks the implementation of the Minister's findings in Appeal Case No. 195 of 2005, Boniface K. Madungi v Baya Mwanje, and others.
11. The 1<sup>st</sup> Defendant claims that the Minister in the said appeal case granted him a portion of the suit land on 19<sup>th</sup> September 2007. The Minister allegedly gave the 1<sup>st</sup> defendant a portion of land where his homestead was and where he reportedly cultivated. There is no indication of how big the said portion is. The 1<sup>st</sup> defendant, therefore, prays for the implementation of the said decision.
12. This Court directed the parties to file written submissions on the issues arising from the pleadings and the evidence adduced at the hearing. The Plaintiff and the 1<sup>st</sup> Defendant did comply, but the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants did not tender evidence in this case nor file submissions.
13. I frame the issues for the determination of this Court as follows - whether the Minister's decision in Appeal Case No. 195 of 2005, Boniface K. Madungi v Baya Mwanje and others, should be declared null and void (as per the plaint, or implemented (as per the counterclaim. Whether Title Deed Chonyi / Bedombo Kitsoeni /321, measuring approximately 7.79 Hectares, was acquired fraudulently or by way of misrepresentation given the decision by the Minister or the pendency of the adjudication process. Should the caution standing on that title be removed? Whether the orders sought in the plaint and the counterclaim can be decreed by this Court and who should bear the costs of the plaint and the counterclaim.
14. The Plaintiff testified as PW1 and produced exhibits 1 to 8 attached to his list of documents filed on 4<sup>th</sup> June 2021 and exhibits 9 to 11 attached to his further list of documents dated 2<sup>nd</sup> April 2023. He called four witnesses, PW2 –Daniel Hezron Kiringi. PW3-Renson Chai Naunga and, PW4 Frankline Chai Baya.
15. The Plaintiff's case, as pleaded in the Plaint, is that the 1<sup>st</sup> Defendant unlawfully and without colour of rights invaded and trespassed into the suit property and continues to frustrate and infringe on the Plaintiff's rights on the suit land. The Plaintiff further testified that the 1<sup>st</sup> Defendant registered a Caution against the suit land, preventing the Plaintiff from dealing with the suit land and that the 1<sup>st</sup> Defendant has approached the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to assist him with the subdivision and possible transfer of the suit land to himself and other strangers.



16. The Plaintiff testified that he is a registered landowner of Title No.Chonyi/ Bedzombo/Kitsoeni/321, the suit property herein. The other registered owners are Baya Mwanje Baya, Ngumbao Mwanje Baya, and Ngeda Mwanje Baya. He produced a copy of the title deed and certificate of official search as exhibits No.1 and 2.
17. PW1 testified that the other registered owners have since passed away. He produced copies of their death certificates as exhibits 3, 4, and 5. PW1 testified that he did not participate in the Appeal to the Minister and that he only came to know of the decision that was made in the Appeal when the District Surveyor issued to him and his family a letter dated 6<sup>th</sup> April 2021 informing him of the Appeal and of his intention of visiting the suit land to undertake a subdivision in implementation of the orders issued in the appeal. He produced a copy of the decision made in the Appeal as exhibit No.8 and a copy of the letter by the Surveyor as exhibit No.11.
18. The 1<sup>st</sup> Defendant testified as DW1. He produced exhibits No.1 to 9, attached to his list of documents dated 15<sup>th</sup> February 2023. He testified that Plaintiff and his relatives were not lawfully registered as owners of the suit property and that their registration was obtained using fraud, misrepresentation, mistake, and unprocedurally. He produced a copy of the Title Deed as exhibit No.1.
19. DW1 testified that he lodged Appeal Case No.195 of 2005 to the Minister after the dismissal of his Objection Case No.143. He produced a copy of the proceedings and decision made in the Objection case and a copy of the proceedings and decision made in the Appeal as exhibit No.3 and 4.DW1 testified that before these proceedings, the dispute had been heard before the Arbitration Board, and a decision made in favor of the Plaintiff. He produced a copy of the proceedings and decision of the Arbitration Board as 1<sup>st</sup> Defendant exhibit No.2.In the decision in Appeal made on 19<sup>th</sup> September 2007, the Plaintiff and his relatives were to get only the parcel of land where their homestead was situated and on which they undertook cultivation while the 1<sup>st</sup> Defendant was to get the rest of the parcel of land his family used to cultivate. However, the Title Deed produced as exhibit No.1 shows that the Plaintiff and his relatives were registered as the absolute owners of the suit property contrary to the decision made in Appeal Case No.195 of 2005 and without considering the interests of the 1<sup>st</sup> Defendant as ordered in the said decision.
20. Plaintiff submits that the Appeal to the Minister in Appeal Case No. 195 of 2005 Boniface K. Madungi v Baya Mwanje and others should not be implemented but declared null and void. That the said appeal to the Minister is not only strange to the plaintiff but that the same is bad in law; it was time-barred and an afterthought. The Court is urged to look at the previous proceedings involving the suit land, which has been under adjudication since the 1980s and registered in the names of the Plaintiff and the other owners, who are now deceased. After the registration, the 1<sup>st</sup> Defendant's relative, Gideon Mrima, was unsatisfied, so he filed a Land Committee Case No.15/89-90, which he lost to the current registered owners. The said Gideon Mrima proceeded to procedurally file an objection being Objection Case No.55/89-90, and once again, he lost, and a judgment was delivered on 12<sup>th</sup> February 1992 in favor of the current registered land owners.
21. The Plaintiff averred Court that just before the Defendants testified in the objection, as mentioned earlier, the Tribunal recorded that the registered owners were all present and had authorized one of them, Ngeda Mwanje Baya, to represent them in the case.
22. After the Judgment on 12<sup>th</sup> February 1992, the said Gideon Mrima was satisfied and did not file an appeal within the required time. The Register was, therefore, closed. Subsequently, the parties lived peacefully, and the Plaintiff collected the title deed in 2007, which was free from any encumbrances.



23. The 1<sup>st</sup> Defendant, in filing the Appeal to the Minister, ought to have followed the laid down procedures and mechanisms in dispute resolutions following the [Land Adjudication Act](#), particularly Section 29, which provides:

“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 by: -

- a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and
- b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the orders shall be final.”

24. According to the Plaintiff, a clear timeline of events in the land dispute can be garnered from the proceedings in the various stages of adjudication. The objection involving the suit land was determined on 12<sup>th</sup> February 1992, and when the time for the appeal lapsed, the register was closed. However, the 1<sup>st</sup> Defendant, seemingly out of the blue and disregarding the lapse of time and the principle that litigation should have an end, filed a second objection case against the decision issued on 12<sup>th</sup> February 1992. This objection was filed explicitly in 2004, about twelve (12) years late, and was dismissed for being res judicata. The Court is urged to reckon that at the time the objection was filed by the 1<sup>st</sup> Defendant in 2004, the initial litigant, Gideon Mrima, was still alive, and no reason was given as to why the 1<sup>st</sup> Defendant had ignored Mrima and his decision to accept the Court’s judgment. The 1<sup>st</sup> Defendant also did not seek an extension before starting litigation twelve years later. All in all, the 1<sup>st</sup> Defendant’s objection was declared res judicata and was dismissed.

25. The Plaintiff’s primary request is for the Court to declare the appeal, which was filed after the second objection was declared res judicata, null and void. The appeal, known as Appeal Case No. 195 of 2005, Boniface K. Madungi v Baya Mwanje and others, was allegedly obtained illegally in the 1<sup>st</sup> Defendant’s favor. The Plaintiff seeks to have the Court declare this appeal null and void.

26. The Plaintiff submits that the said appeal was a means to defeat justice and the well-laid-down legal procedures; the Plaintiff did not receive any notice of the said appeal. No Memorandum of Appeal was issued to the Plaintiff or his relatives; the Court will note that the registered owners were always ready to defend themselves on issues involving the suit land in previous suits, but the appeal to the Minister was and is still very strange. In the said appeal to the Minister, Anthony Chai is said to have participated on behalf of the Plaintiffs, who - not one of the registered landowners- indicated they were not involved.

27. In all the previous cases, the Plaintiff and his relatives appeared or consented to be represented, but it is reiterated that the appeal to the Minister is strange. In the previous cases, the Court is asked to find that the Tribunal Board visited the suit land on several occasions, confirming that, indeed, it was the Plaintiff and his family members who occupied the suit land while the Minister in the appeal case awarded to the 1<sup>st</sup> Defendant the portion of land he allegedly occupied and cultivated. The Minister completely ignored the previous cases and the land visits and, by his imagination, assumed that the 1<sup>st</sup> Defendant occupied and cultivated a portion of the suit land. Further, in the said appeal to the Minister, there was no mention of the issue of res-judicata, which was being appealed against. It is surprising how the Minister accepted to hear an appeal filed twelve (12) years late with no explanation and in complete disregard of the well-established legal parameters.



28. Plaintiff avers that It is pretty unfair that, unknown to the registered land owners, the Minister proceeded to grant an unspecified size of the suit land to the 1<sup>st</sup> defendant. The 1<sup>st</sup> Defendant then proceeded to take advantage of the said decision and, in 2021, through means of violence as was testified by PW3, stopped the Plaintiff and all other beneficiaries of the registered owners from cultivating the suit land; the 1<sup>st</sup> Defendant also started putting up structures on the said land and brought a surveyor in 2021 to subdivide the suit land and give himself a massive portion of the same to the detriment and loss of the actual owners.
29. The Court is argued to find that before the appeal to the Minister, the previous Tribunal Officers had visited the suit land and had determined that it was the Plaintiff and the families of the other registered owners who were in occupation of the suit land but since the appeal to the Minister, the Plaintiff, and his family are being illegally and unlawfully displaced from the suit land
30. The Court is called upon to find that the decision arrived at by the Minister is null and void for all the above reasons and also for failing to appreciate that many individuals will be seriously affected if the said decision is implemented and who were not accorded an opportunity to be heard. The appeal ought to have been lawful, procedurally fair, and within the legal parameters, which is the opposite of the Minister's actions in the appeal. It is, therefore, the plaintiff's submission that the Minister did not follow the appropriate procedures, steps, and requirements, and as a result, the outcome of the appeal was not justified. It should, therefore, be deemed null and void. In violating the doctrine of fair hearing, the decision has undermined the essence of justice, as enshrined in *the Constitution* of Kenya 2010, the *Land Adjudication Act*, and the Rules of Natural Justice. Therefore, the same to be declared null and void.
31. The Plaintiff cites the decision in ELC Petition No. 7 of 2017 Kimeu Musyoka v District Commissioner Kathiani District & 10 others [2019] eKLR in which the judge declared a Minister's decision null and void because the appeal to the Minister was heard in the absence of parties thus contravening Article 50(1) of *the Constitution* on a fair and public hearing. Before an Independent and Impartial Tribunal. The Plaintiff further relies on a passage by Lord Denning MR in *Macfoy v United Africa Co. Ltd* [1961] 3 ALLER, 1169, where Lord Denning MR stated:

“If an act is void, then it is in Law a nullity. It is not only bad but incurably bad. There is no need for an Order of the Court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse.”
32. This being a dispute emanating from an adjudication process, Plaintiff submits the process following the procedures and mechanisms in dispute resolutions by the *Land Adjudication Act*, particularly sections 26, 26A, 27, and 29. Plaintiff contends that when the time for objection under Section 26(1) has expired, the Adjudication Officer shall prepare an Objection Register for any land not subject to an objection and deliver the same to the Director of Land Adjudication. The Plaintiff submits that the Plaintiff followed the elaborate process in the Act and that the process of acquiring the title deed was proper. From the evidence produced in Court, the objection was determined on 12<sup>th</sup> February 1992, and when the time for the appeal lapsed, the register was closed. When Plaintiff acquired the title deed for the suit land, no known cases were pending in any Court of Law, and neither were there any encumbrances stopping Plaintiff from acquiring the title deed.
33. The Plaintiff states that the Court will find from the certificate of official search, which was produced in Court, that the two encumbrances currently placed on the suit land were placed in 2018, twenty-



- six (26) years since the register was closed. There is a caution registered on 23<sup>rd</sup> November 2018 and a restriction registered on the same day stating “no dealing until the appeal to the Minister is finalized.” The preceding shows that when the Plaintiff and his relatives acquired the title deed for the suit land in 2007, there were no encumbrances. The allegation in the counterclaim that Plaintiff acquired the title deed fraudulently is false and unfounded. Plaintiff avers it is indeed surprising that the 1<sup>st</sup> Defendant’s appeal was allegedly determined in 2007. Yet, in 2018, the Land Registrar restricted any dealings until the appeal to the Minister was determined. The Plaintiff believes the process surrounding the said appeal and the restrictions placed on the suit land are questionable.
34. Given the prior submissions, the Plaintiff submits and prays for the encumbrances placed on the suit property evidenced by the land search produced in evidence to be lifted as there is no valid basis for continuing to have the caution and restriction thereon. The Court is urged to order the 2<sup>nd</sup> Defendant to remove the caution and restriction placed on the suit property under Section 73 of the [Land Registration Act](#), 2012.
35. Plaintiff proceeds to state that, as evidenced by the title deed produced in Court, he is the surviving registered owner of the suit property. This fact, supported by Section 24 of the [Land Registration Act](#) No 3 of 2012, which states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land, should invoke a sense of justice. The Plaintiff’s rights, as per Section 25 of the Act, should not be liable to be defeated except as provided in the Act and shall be held by the proprietor, together with all privileges and appurtenances belonging to it, free from all other interests and claims whatsoever. Therefore, the Plaintiff’s ownership should be respected, and quiet possession, ownership, and enjoyment of the suit property should be allowed free from encumbrances.
36. The Plaintiff asserts that the 1<sup>st</sup> Defendant, through the use of force, intimidation, and coercion, has managed to disrupt the Plaintiff’s peaceful occupation and enjoyment of the property, thus infringing on Plaintiff’s right to the property despite the matter dealt with severally and a finding/ conclusion reached in favour of the Plaintiff and his family members. The Plaintiff and other beneficial owners of the suit property continue to suffer prejudice as they are prevented from dealing and enjoying the property as rightful owners despite numerous favourable rulings. Litigation should end, and where one suffers defeat, one should concede and abide by the law. The 1<sup>st</sup> Defendant’s refusal to comply with the law has caused the Plaintiff to move to this Court, seeking a permanent injunction against the Defendants and their agents, employees, servants, or whoever acting under their instructions from interfering with the suit property. The Plaintiff has cited the case of Danson Kamau Samuel [Mburu v Kibara & 2 others \(Environment & Land Case 237 of 2021\)](#) [2022] KEELC 3226 (KLR) (28 July 2022) (Ruling), as being relevant and of persuasive nature to guide this Court to arrive at a finding that will fully and finally determine the rights of the parties in this case who have been litigating for a long time.
37. The 1<sup>st</sup> Defendant’s case is that the Plaintiff has willfully refused and or obstructed the implementation of the decision in the Appeal to the Minister. This is supported by the production of copies of the implementation letters and a copy of the Plaintiff’s Advocate’s letter protesting the implementation of the decision made in the appeal. The 1<sup>st</sup> Defendant’s case is that the decision of the Minister in the Appeal is final and has not been set aside by any competent authority and that pursuant to the said decision, the suit property should be surveyed and subdivided, and the resultant subdivided parcels of land registered in favour of the respective parties in compliance with the said decision, should be taken seriously.
38. According to the 1<sup>st</sup> Defendant, from the evidence adduced, it is apparent that the registration of the suit property was under an adjudication process governed by the provisions of the [Land Adjudication](#)



Act Chapter 284 of the Laws of Kenya. Under the Act, all claims and interests in the land are to be ascertained in the manner provided.

39. The evidence shows that the Arbitration Board first heard the dispute in February 1992. The decision of the Arbitration Board was in favour of the Plaintiff and his relatives as evidenced by the proceedings and decision of the Board produced as the 1<sup>st</sup> Defendant exhibit No.2.
40. The evidence also shows that after the Arbitration Board's decision, the 1<sup>st</sup> Defendant filed an Objection case whose decision also favoured the Plaintiff. The decision was made on 12<sup>th</sup> April 2005, as shown in the 1<sup>st</sup> Defendant's exhibit No.3.
41. The 1<sup>st</sup> Defendant then appealed to the Minister, whose decision was rendered on 19<sup>th</sup> September 2007, as shown in the 1<sup>st</sup> Defendant's exhibit No.4.
42. The 1<sup>st</sup> Defendant avers that the Plaintiff's allegation that they did not participate in the proceedings is false. He admitted under cross-examination that they participated in the Arbitration Board case in their capacity but that during the Objection Case, they were represented by one Antony Chai Baya, their witness during the Arbitration Board case, as shown in the proceedings.
43. The evidence shows that during the appeal to the Minister, they were represented by the same Antony Chai Baya. Although they had no issues with his representation in the Objection Case, the Plaintiff now objects to his representation of them in the appeal. The 1<sup>st</sup> Defendant contends that this can only be because the decision rendered in the Appeal was not in his favour.
44. 1<sup>st</sup> Defendant asserts that it cannot, therefore, be true that the Plaintiff was unaware of the Appeal to the Minister until the time he was served with the Surveyor's letter dated 6<sup>th</sup> April 2021 giving notice of his intention of visiting the suit land to undertake a subdivision in implementation of the orders issued in the Appeal.
45. According to the 1<sup>st</sup> Defendant, The Plaintiff's evidence and that of his witnesses appear to challenge the merits of the decision made in the Appeal. The 1<sup>st</sup> Defendant submits that this suit is not the proper forum to challenge the decision.
46. Given that under Section 29 of the Act, the decision of the Minister is final, meaning it cannot be further appealed or challenged. The Plaintiff cannot re-open the appeal and urge this Court to usurp the mandate of the Minister under the Act and arrive at a different decision. The Plaintiff can only challenge the decision through judicial review proceedings, which are separate legal processes. For this proposition of the law, the 1<sup>st</sup> Defendant relies on the decision in the case of Gorave Amaruathi v Patricia Kazungu & 2 others, Civil Appeal No. E033 of 2021.
47. About the registration of the suit property, the 1<sup>st</sup> Defendant contends that the Title Deed produced as Plaintiff exhibit No.1 shows that the impugned registration was made on 30<sup>th</sup> October 2007. However, the official search certificate produced as Plaintiff's Exhibit No.2 shows that the registration was effected on 27<sup>th</sup> July 2007, and the title deed was issued on the same date. The Plaintiff did not explain the conflicting dates in the registration. The 1<sup>st</sup> Defendant avers that exhibit No.3 shows that the decision in the Objection case was made on 12<sup>th</sup> April 2005, while the 1<sup>st</sup> Defendant's exhibit No.4 shows that the Appeal to the Minister was lodged in 2005. It was Appeal Case No.195 of 2005. The appeal was heard and determined on 19<sup>th</sup> September 2007.
48. The 1<sup>st</sup> Defendant submits that if one were to take the 30<sup>th</sup> day of October 2007 as the correct date of registration as indicated in the Title Deed, then the registration did not accord with the decision in the Appeal because the decision had been delivered by then. It had been ordered that the Plaintiff and



his relatives were to get only the parcel of land where their homestead was situated and on which they undertook cultivation while the 1<sup>st</sup> Defendant was to get the rest of the parcel of land his family used to cultivate. However, the Title Deed shows that the Plaintiff and his relatives were registered as the absolute owners of the suit property contrary to the decision made in Appeal Case No.195 of 2005 and without considering the interests of the 1<sup>st</sup> Defendant as ordered in the said decision.

49. 1<sup>st</sup> Defendant states, on the other hand, if one were to take the 27<sup>th</sup> day of July 2007 as the correct date of registration as indicated in the certificate of official search, then the registration was made during the pendency of the Appeal contrary to the provisions of Section 29(3) of the [Land Adjudication Act](#) Chapter 284 of the Laws of Kenya as read with the provision to Section 28 of the Act.
50. The effect of Section 29 (3) and Section 28 of the Act is that no registration should be made for land affected by an Appeal to the Minister until the Appeal has been determined. The Director of Land Adjudication has certified that the Adjudication Registrar relating to the land has become final in all respects.
51. The 1<sup>st</sup> Defendant contends that the evidence he adduced demonstrated that the title registered on 27<sup>th</sup> July 2007 was issued during the pendency of the appeal to the Minister. The appeal was filed in 2005 and determined on 19<sup>th</sup> September 2007.
52. The Plaintiff was aware of the pendency of the appeal, having been represented throughout the Objection case and at the Appeal by one Antony Chai Baya. He should not be allowed to feign ignorance merely because the decision was not in his favour.
53. The 1<sup>st</sup> Defendant underscores the argument that the evidence has demonstrated the irregular and illegal issuance of the title to the Plaintiff. Without following the due process provided in the Act, this issuance is a direct violation of the law. The Act explicitly states that an appeal before the Minister must be determined before a title could be issued regarding land affected by an appeal.
54. Further to the preceding, the Land Registrar is mandated under Section 28 of the Act to register a restriction against the land affected by an Appeal. The restriction endures until the appeal is determined. According to the 1<sup>st</sup> Defendant, this was the same position in the case of Kipkobel Arap Misoi v Proscila Chepkorir, Land Case No.43 of 2005 [2016] eKLR.
55. The 1<sup>st</sup> Defendant, therefore, submits that the registration, whether made on 30<sup>th</sup> October 2007 or 27<sup>th</sup> July 2007, was made illegally and unprocedurally. Thus, the registration is invalid and should be cancelled, giving way for the decision made in the Appeal to the Minister to be implemented fully.
56. For these reasons, the 1<sup>st</sup> Defendant submits that Plaintiff has failed to prove his case on the required standards, that the 1<sup>st</sup> Defendant has proved his case in the counterclaim, and prays for judgment as such
57. This is yet another matter before the ELC emanating from the rigorous Adjudication process. It's noteworthy that the parties have been in Court since 1944 when they first appeared before the Kaloleni African Court. This also underscores the protracted nature of land dispute resolution and adjudicative mechanisms as laid out under the [Land Adjudication Act](#) and the manner of invoking the jurisdiction of this Court when one is dissatisfied with the various tiers of decisions made by the quasi-judicial bodies established under the Act.
58. It should be reckoned from the proceedings and evidence placed before me, that there is no dispute that the issues raised in this suit have a bearing on the Adjudication process under the [Land Adjudication Act](#). Both the Plaintiff and the 1<sup>st</sup> Defendant admit to that fact. Before I resolve the issues where the parties differ, let me re-state the path one undertakes in the adjudication process under the



*Land Adjudication Act* before one is issued with a title. It was summarized by Dr. Iur Nyagaka J. in *Kanyarkwat Group Ranch & 4 others v Meringiro Lokadir Joseph & 3 others* [2021] eKLR as follows:

“Under the *Land Adjudication Act*, the process of ascertainment and recording of rights and interests in Trust Land follows a few simple steps. I summarize them here below.

12. First, the Government, through the relevant Ministry by a County Council to or itself identifies an area of Trust Land whose ownership rights should be ascertained and recorded and makes an order to that effect. That is done pursuant to the provisions of Section 3 of the Act. Second, the Ministry declares that areas as an Adjudication Area. Third, the Ministry appoints by Gazette Notice an Officer to be in charge of the adjudication area. Fourth, the Adjudication Officer appoints survey, demarcation and recording officers to be in charge of the adjudication area but under him.
13. Fifth, Adjudication Officer establishes adjudication sections within the area or proceeds with the process as one block of adjudication. In case the officer proceeds with the former, a separate notice must be issued for each adjudication section. Sixth, there is establishment of Adjudication Committees and Provincial Arbitration Boards which shall record and make decisions about the ascertainment of the interests, and arbitrate on matters arising from the Committees respectively. Seventh, anyone claiming interest in the land shall make such claims to the Recording Officer in accordance with Section 19 as read with Section 5(2) of the Act. Eighth, objections to claims are made, recorded, handled as in civil proceedings except where the decisions made thereon but if the Recording Officer is unable to determine them, he shall refer them to the Committee which if unable to resolve shall refer them to the Board.
14. Ninth, once decisions are made in accordance with Sections 20, 21 and 22 of the Act, an Adjudication Register will be made in accordance with Section 23. Tenth, upon completion of the Register, it is published in terms of Section 25 and any objections made. Eleventh, if none is made or if made and resolved the Register is finalized under Section 27 only subject to appeals to the Minister as provided under Section 29. Twelfth, upon determination of the Appeals in accordance with the law, the Minister shall send the same to the Director of Land Adjudication and the Chief Land Registrar. Thirteenth, the Director of Adjudication alters the Register in line with the determinations of the appeals and certify on the duplicate that is final.
15. Fourteenth, he will send it to the Chief Land Registrar who makes final alterations. Fifteenth, titles are issued thereafter. At this point the land ceases to be under the *Land Adjudication Act*. Once that happens, the Land Adjudication Officer ceases to have anything to do with the land. He cannot therefore be required to give authority to institute suit. No other person is required to do so, except if the land was owned by a registered company, in which case then a Resolution of the shareholders giving such permission would be required either before or after instituting suit but before the hearing.”



59. The divergent view taken by the Plaintiff and the 1<sup>st</sup> Defendant is that the former says that the Adjudication process had been completed in the year 1992, and the title was issued in 2007 in their favour, when the window to appeal to the Minister had closed. Pursuant to Section 26(1) of the Act, the Adjudication Officer complied with the provisions of that Section, which resulted in the issuance of the title. Conversely, the latter says that the impugned title was either issued fraudulently, by misrepresentation or by mistake, oblivious of the pendency of the Appeal to the Minister. Objections had not closed by 2005. After the last Objection proceedings were closed, an immediate appeal to the Minister was preferred leading to Appeal Case No.195 of 2005, under focus.
60. Even if the Plaintiff terms the Appeal ‘strange’ and surreptitiously obtained, it cannot be ignored by this Court because it is a provided mechanism under the Act. It is acknowledged by the Plaintiff that it is what sparked this suit because the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had put mechanisms in motion to implement the Minister's decision. The Plaintiff extensively submitted that this Court should declare the Appeal to the Minister null and void for negating the doctrines of res judicata, lack of a fair hearing, and not in accord with the Rules of Natural Justice in the trial (audi alteram partem - without “listening to the other side”, or “letting the other side be heard as well”.), lack of representation of the Plaintiff in the appeal, and the covert manner in which it was handled et al. But then again, was the plaint the mode of initiating the plaintiff's grievances under the *Land Adjudication Act* regime? I do not think so; it is through a judicial review application as provided under Article 47 of *the Constitution*, and the *Fair Administrative Action Act*, 2015, or a constitutional petition for the declaration of invalidity of the Minister's decision and issuance of judicial review orders under Article 22 as read with Article 23 of *the Constitution*. There are ample authorities from this Court and the Superior Courts on this dispute. Mr Shujaa, for the 1<sup>st</sup> Defendant, cited the Court of Appeal decision in Amarnath (Suing on *Behalf of the Estate of the Late Amarnath Gupta*) v *Kazungu & 2 others (Civil Appeal E033 of 2021)* [2023] KECA 1280 (KLR) (27 October 2023) (Judgment):

“The Act is clear that any person aggrieved by a decision made under the Section 26 of the Act must follow the process under Section 29 and appeal to the Minister. Once the Minister, or the panel delegated to make a determination, his order is final. That means the Minister's decision cannot be appealed, whether under the Act or in Court. The option the Appellant had was to pursue Judicial Review process provided under Article 47 of *the Constitution*, and the *Fair Administrative Action Act*, 2015 a statute enacted pursuant to the Article 47 of *the Constitution*. He could not re-open the case and challenge it except through Judicial Review. The Appellant was attempting to undo the process he participated in using a process that is not provided for and that is not allowed.

23. In *Julia Kaburia vs. Kabeera & 5 Others* [2007] eKLR, this Court, commenting on Section 30 of the Act, held: “The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather, the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication. This protection was availed to the parties herein by the appellate process, which culminates with Section 29 of the Act;



- “(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 by-
- a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
  - b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

61. The ELC (Okongo J.) was of the same view in *Tobias Achola Osindi & 13 others v Cyprian Otieno Ogalo & 6 Others* [2013] eKLR :

“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land...”

62. The Plaintiff seeks that I declare the Minister's decision null and void because it is stale, time-barred, res judicata, and was covertly obtained according to him. This Court could have delved into those issues only via judicial review application or, perhaps, a constitutional petition under its supervisory jurisdiction. The Court cannot reopen the adjudication process, rehear the parties in the manner we did here, and substitute the decision of the Minister or that made by the quasi-judicial bodies under the Act with its own decision. That is precisely what the Plaintiff wants this Court to do in his averment in the Plaintiff and evidence adduced before this Court. Significantly, the Plaintiff cited a passage from the decision from this Court (Angote J.) in *ELC Petition No. 7 of 2017 Kimeu Musyoka v District Commissioner Kathiani District & 10 Others* [2019] eKLR:

“The 1<sup>st</sup> Respondent having not heard the Petitioner or any other living representative of the Respondents, and considering that the right to be heard is a valued right, I find that the Petition herein is meritorious. Indeed, it matters not that the Petitioner herein did not file an Appeal against the decision of the 1<sup>st</sup> Respondent within the requisite time or that he has not challenged the decision of the Minister by way of Judicial Review. Once the Petitioner



shows, which he has done, that the decision of the Minister is null and void, and that his right to a fair hearing has been violated, this court is under a constitutional obligation to declare the decision null and void.”

63. I agree with Angote J. The ELC in the cited case had been called upon under a constitutional petition to declare an Appeal to the Minister, which had been made out of time and without representation of parties who had long died null and void. That was correct. What we have here is neither a constitutional petition nor a judicial review application but a plaint that seeks to reopen the Adjudication process. How can this Court possibly declare the decision of the Minister null and void via a plaint? Even if I were to do so, on the case’s merits, it would appear in all the processes undertaken in the adjudication path that all the parties had been represented. Significant in the appeal to the Minister, as the proceedings will show, one Antony Chai Baya, the same party who represented the Plaintiffs during the Objection proceeding, participated in representing the family of the Plaintiff. Since the proceedings under the [Land Adjudication Act](#) are quasi-judicial, unlike the ordinary Court proceedings which adhere to the rigmaroles of the Civil Procedure Rules, a party is allowed to represent others like a family unity as Antony Chai Baya, did in this case see *Chembe Katana Changi v Cabinet Secretary (Minister for Lands and Settlement & 5 others [2015] eKLR*:

“The 3rd defendant’s answer is that proceedings under the [Land Adjudication Act](#) are quasi-judicial, and the usual rules and procedure of the court will necessarily apply with modification. Neither the [Land Adjudication Act](#) nor the rules made thereunder, the Land Adjudication Regulations define a party. Both Section 29 of the Act and Regulation 4(1) appear to allude to the possibility of a person not involved in previous proceedings bringing an appeal before the minister. Section 29(1) states that:

“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...”

What does section 26(1) states regarding an objector?

“any person named in or affected by the adjudication register who considers it to be incorrect.... or incomplete in any respect may, within sixty days...object to the adjudication officer...”

The rationale for this wide latitude may be the very nature of land itself; parcels belonging to persons not directly involved in an adjudication dispute may be affected by the determination of a dispute between different parties and any subsequent adjustment to the register. They must have an opportunity to object to the Adjudication officer and also appeal to the minister, as the case may be. In my considered view, any other reading of these provisions could defeat the very intent of the Act, which is stated in the preamble as follows:

“an act of parliament to provide for the ascertainment and recording of rights and interests in Trust land...”

Proceedings thereunder are therefore sui generis and cannot be forced into the straight jacket of a formal court proceeding or suit section and 12(1) of the Act leaves no doubt about this. It provides:

“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 records, and may call evidence of his own accord."

The Civil Procedure Rules cannot oust the clear provisions of the *Land Adjudication Act.*"

64. The interests of the Plaintiff and those claiming under him were well represented by the said Antony Chai Baya, and therefore, it cannot be said that their interest was never considered nor that they were unaware of the Appeal.
65. The chronology of the events as placed by Plaintiff in my view from what was placed before me on the timelines between when the Committees heard the parties and the appeal to the Minister does not add up. The plaintiff stated there was a closure of Objections in 1992, leading to the title he holds issued in 2007. The question that begs an answer is what made the certificate of title issued in 2007 and not earlier? This means there were pending issues at the Committee and Arbitration stages and possible appeals to the Minister.
66. From the materials placed before me, the sequence of events seems to flow as put by the 1<sup>st</sup> Defendant in the registration of the suit property; the 1<sup>st</sup> Defendant contends that the Title Deed produced was registered on 30<sup>th</sup> October 2007. The official search certificate produced shows that the registration was effected on 27<sup>th</sup> July 2007, and the title deed was issued on the same date. The Plaintiff did not explain the conflicting dates in the registration. The decision in the Objection case was made on 12<sup>th</sup> April 2005, and the Appeal to the Minister was lodged in 2005. It was Appeal Case No.195 of 2005. The appeal was heard and determined on 19<sup>th</sup> September 2007.
67. I agree with the 1<sup>st</sup> Defendant that if one were to take the 30<sup>th</sup> day of October 2007 as the correct date of registration as indicated in the Title Deed, then the registration did not accord with the decision in the Appeal because the decision had been delivered by then. It had been ordered that the Plaintiff and his relatives were to get only the parcel of land where their homestead was situated and on which they undertook cultivation while the 1<sup>st</sup> Defendant was to get the rest of the parcel of land his family used to cultivate. However, the Title Deed shows that the Plaintiff and his relatives were registered as the absolute owners of the suit property contrary to the decision made in Appeal Case No.195 of 2005 and without considering the interests of the 1<sup>st</sup> Defendant as ordered in the said decision.
68. If one were to take the 27<sup>th</sup> day of July 2007 as the correct date of registration as indicated in the certificate of official search, then the registration was made during the pendency of the Appeal contrary to the provisions of Section 29(3) of the *Land Adjudication Act* Chapter 284 of the Laws of Kenya as read with the provision to Section 28 of the Act.
69. The effect of Section 29 (3) and Section 28 of the Act is that no registration should be made for land affected by an Appeal to the Minister until the Appeal has been determined and the Director of Land Adjudication has certified that the Adjudication Registrar relating to the land has become final in all respects.
70. The title registered on 27<sup>th</sup> July 2007 was during the pendency of the appeal to the Minister. The appeal was filed in 2005 and determined on 19<sup>th</sup> September 2007. The Plaintiff was aware of the pendency of the appeal, having been represented throughout the Objection case and at the Appeal by one Antony Chai Baya. This underscores the belief that the evidence on record clearly demonstrates the irregular and illegal issuance of the title to the Plaintiff before the exhaustion of the appeal mechanisms under the Act, in this case, the Appeal to the Minister. Issuing the title without following the due process provided in the Act is a direct violation of the law. The Act explicitly states that an appeal before the Minister must be determined before a title regarding land affected by an appeal can be issued.



71. The Land Registrar is mandated under Section 28 of the Act to register a restriction against the land affected by an Appeal. The restriction endures until the appeal is determined. That was the same position in the case of *Kipkobel Arap Misoi v Proscila Chepkorir*, Land Case No.43 of 2005 [2016] eKLR, where Mutungi J. held as follows:

“It is apparent the Plaintiff was issued with a Title when the decision of the Minister on the appeal preferred by the Defendant was still pending. The law provided that any parcel affected by an objection or appeal could not be registered before the appeal process was completed. It was wrong for the land registrar to register the Plaintiff as owner of the suit land before the appeal by the Defendant was determined by the Minister and accordingly it is my holding and finding that the provisions of the *Land Adjudication Act* were not complied with in issuing title to the Plaintiff”.

72. This was also the findings in *Jambo Fondo Gona & another v Minister of Lands & Settlement & 6 others* [2021] eKLR, where Olola J. held thus:

“In the matter before me, the Applicants assert that while this matter was pending before the Kilifi Magistrates Court as aforesaid, the 5<sup>th</sup> and 6<sup>th</sup> Respondents herein colluded and started the Appeal before the Minister for Lands and Settlement (named herein as the 1<sup>st</sup> Respondent). It is further their case that on the date when the matter came up for hearing, they informed the 1<sup>st</sup> Respondent that the matter was pending in Court but the 1<sup>st</sup> Respondent proceeded to hear the matter and thereafter to make findings that the land in question be registered in the name of the 6<sup>th</sup> Respondent.

A perusal of the *Land Adjudication Act* reveals that the Act provides a self-evolving mechanism for land adjudication in all areas that are declared adjudication areas. That process begins with land demarcation and adjudication and terminates after a determination of the Appeals resulting from the objections filed and the Director of Lands Adjudication certifies the process as complete under Section 29(3) thereof.

In the matter before me, I am not persuaded that the 1<sup>st</sup> Ex-parte Applicant had been finally adjudicated as the proprietor of the land when he purported to dispose of the same in February 2011 to the 2<sup>nd</sup> Ex-parte Applicant. Neither am I persuaded on the material placed before me that the Ministerial Panel was improperly moved by the Respondents when the matter was pending in Court or that it conducted itself in a manner that was illegal, irrational, procedurally improper, or that impeded the Applicant's right to fair administrative justice.”

73. It is the findings of this Court based on the materials placed before me that the registration of the Plaintiff and those he represents, whether made on 30<sup>th</sup> October 2007 or 27<sup>th</sup> July 2007, was illegally and unprocedurally and contra the provision of Section 29 of the *Land Adjudication Act*.

74. In conclusion, therefore, the prayers sought by the Plaintiff as crafted cannot be sustained; not only was the jurisdiction of this Court invoked wrongfully, but the Plaintiff also contravened the provisions of the *Land Adjudication Act* in acquiring title before the exhaustion of the appeal mechanisms under the Act. The orders sought by the Plaintiff cannot be issued by this Court. Therefore, the Plaintiff's suit is hereby dismissed in its entirety. In order to place all the parties on equal footing and back to the tracks of the *Land Adjudication Act*, the 1<sup>st</sup> Defendant's counterclaim succeeds to the extent that:



- a. An order be and is hereby issued to the District Land Registrar - Kilifi to rectify the Register relating to land Title No.Chonyi/Bedzombo/Kitsoeni/321 by cancelling the registration made on the Register to give way for the implementation of the decision made by the Minister in Appeal Case No.195 of 2005 - Boniface K. Madungi v Baya Mwanje & others.
- b. The other orders in the Counterclaim will not be available since they will result from implementing the Minister's decision.
- c. Cost arising from the plaint and counterclaim is hereby awarded to the 1<sup>st</sup> Defendant.

**DATED, SIGNED, AND DELIVERED VIRTUALLY ON THIS 12<sup>TH</sup> DAY OF JUNE 2024.**

**E.K. MAKORI**

**JUDGE**

In the Presence of:

Ms. Buluma, for the Plaintiff

Mr. Shujaa, for the 1<sup>st</sup> Defendant

Happy: Court Assistant

In the absence of:

Mr. Ojwang, for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

MALINDI ELC CASE NO. 56 OF 2021 Page 7 of 7

