



**Nguutu v Cabinet Secretary Lands & Housing and Urban Development & 2 others
(Constitutional Petition 6 of 2021) [2023] KEELC 173 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
CONSTITUTIONAL PETITION 6 OF 2021**

LG KIMANI, J

JANUARY 24, 2023

**IN THE MATTER OF ARTICLES 2, 10, 20, 21, 22, 23, 28, 40, 47, 48, 50 AND
259 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF
THE ENVIRONMENT AND LAND COURT ACT AND IN THE MATTER
OF LAND ADJUDICATION ACT CAP 284 AND IN THE MATTER OF
FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 BETWEEN**

BETWEEN

TILI NGUUTU PETITIONER

AND

**CABINET SECRETARY LANDS & HOUSING AND URBAN
DEVELOPMENT 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

PATRICK KAVIU KITHUSI 3RD RESPONDENT

JUDGMENT

1. The Petitioner filed the petition dated 14th October 2019 under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and all enabling provisions of the law seeking the following orders;
 - a. A declaration that the Petitioner is the rightful owner of the land known as Mutonguni/Kakeani/2160.
 - b. A judicial review order of Certiorari to quash the decision and/or judgment of the Cabinet Secretary of Lands and Housing.
 - c. An order of Permanent Injunction restraining the 3rd Respondent from interfering, trespassing either through himself and/or his agents with the portion occupied by the Petitioner.



2. The grounds relied on in support of the Petition are contained in the Petition itself and the supporting affidavit of the Petitioner sworn on 16th October 2019. The petitioner claims under Article 22 (1) of *the Constitution* 2010 that his rights or fundamental freedoms in the Bill of Rights have been denied, violated and/or infringed. He further claims that the 3rd Respondent has trespassed and/or directly violated his right to use and/or enjoy quiet possession of a portion of land known as Mutonguni/Kakeani/2160.
3. The Petitioner states that he is a small-scale farmer residing in Kitui County within the Republic of Kenya and that he inherited the suit land known as Mutonguni/Kakeani/2160 from his father one Nguutu Nzonga and has resided on the land since birth and that he enjoyed quiet possession until the 3rd Respondent's father made a baseless claim over it. The 3rd Respondent herein is the son of one Kaviu Kathusi who is deceased.
4. The Petitioner claims that being dissatisfied with the decision of the Land Adjudication processes, he lodged an appeal No. 111 of 1988 with the Ministry of Lands and Housing but before the matter proceeded for hearing before the 1st Respondent, the 3rd Respondent's father passed on. The Petitioner complains that the 1st Respondent continued with the said proceedings despite failure by the 3rd Respondent to legally substitute his deceased father by applying for the relevant grant of representation to enable him continue with the case before the 1st Respondent. The Petitioner claims that allowing the 3rd Respondent to continue with the case was unlawful and procedurally unfair.
5. Further, the Petitioner states that the 1st Respondent awarded the land in question to the deceased Kaviu Kithusi based on grounds enumerated in the Petition and which the Petitioner believes were not valid grounds.
6. The Petitioner claims that the constitutional provisions violated by the respondents are Articles 10(1) and (2), 21, 40 (1) and 47 (1) of *the Constitution* of Kenya 2010. On Article 10 he claims that the 1st Respondent failed to apply his mind to the rule of law and good governance in making the determination thereby granting the land to the 3rd Respondent. Further, that he failed to appreciate that the Petitioner was the rightful owner of the suit land based on inheritance and possession.
7. On Article 21 he claims the 1st Respondent failed to observe, respect, protect and promote the Petitioner's right to property when he failed to take into consideration his lawful interest in the land based on inheritance.
8. On breach of Article 40(1) the Petitioner claims that the 3rd Respondent unlawfully entered into the Petitioner's portion of land without any justification whatsoever.
9. The Petitioner also alleged breach of Article 47(1) of *the Constitution* and Section 4 (1) of the Fair Administrative Actions Act that the decision rendered by the 1st Respondent was unlawful and procedurally unfair since he allowed the 3rd Respondent to substitute his deceased father without being appointed legal representative.
10. The Petitioner further stated that the 1st Respondent's decision was not reasonable and was tainted with bias for disregarding the evidence by the Petitioner's witness, making a baseless accusation of coaching and faulting the Petitioner for not calling his brother as a witness. The totality of the above stated facts show according to the petitioner that the 1st Respondent's decision was unfair and in abuse of discretion and power.



11. The Petitioner claims that he has suffered injury in terms of violation of his right to land, to human dignity, social justice and respect for him as a human, loss of livelihood and that his families are at real risk of being rendered destitute and vagrant, unless this Honourable Court intervenes.

The 1st and 2nd Respondents Case

12. The 1st And 2nd Respondents filed Grounds of Opposition stating that;
 1. The petition does not meet the test and threshold of a Constitutional Petition as laid down in the case of Anarita Karimi Njeru v Republic [1979] eKLR and further buttressed in the case of Mumo Matemu vs Trusted Society of Human Rights alliance [2014] eKLR.

The petition offends the principle of constitutional avoidance and that there exist alternative remedies through statutory law that the petitioner first ought to pursue. Further it claimed that the petitioner does not raise any constitutional issues to be determined by this Honourable Court as held by Angote, J. in his Ruling issued in this matter on 29th January, 2021.
 2. The petitioner actively participated in the Respondent's proceedings and was granted a fair chance of presenting his case, he even called witnesses as demonstrated and as such the allegations that Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act were violated are not only farfetched but also an afterthought.

Further that this petition does not meet the threshold for granting judicial review orders of Certiorari sought by the petitioner as set out in Section 7 (2) of the Fair Administrative Action Act.
 3. That the petitioner seeks to appeal against the finding of the Deputy County Commissioner which decision is final and not subject to appeal as provided under Section 29 of the Land Adjudication Act. That in challenging the decision of the Minister, the only avenue available for the petitioner was to file a Judicial Review Application pursuant to the provisions part VI of the Law Reform Act and Order 53 of the Civil Procedure Rules, 2010 as held by Angote, J in his Ruling issued in this matter on 29th January, 2021.
 4. The 1st and 2nd Respondents further stated that all the issues raised in this petition have already been determined by Angote, J. in his Ruling issued in this matter on 29th January, 2021 when the court further found that the petitioner has not raised any constitutional issues in the petition herein and that the issue of whether the 1st Respondent's decision was fair and reasonable can never amount to a constitutional issue considering that the 1st Respondent was exercising a mandate donated to him by the law.

The 3rd Respondents Case

13. The 3rd respondent filed a replying affidavit sworn on 15th November 2021 stating that the petition herein is couched as a right to inherit the Petitioner's late father's property; which issue should be a subject of a succession cause and not the subject of the proceedings herein. That the nature of the petition amounts to an appeal clothed as a constitutional petition. Further that a tribunal or public body cannot be held to have acted unconstitutionally when it executes its mandate in tandem with statutory provisions and following the laid down procedures. He confirmed that the necessary steps were followed when coming up with the 1st Respondent's decision.



14. He stated that the decision in Ministers appeal No 111 of 1988 cannot be challenged by way of a constitutional petition as there were no constitutional issues involved in the dispute before the 1st respondent.
15. The 3rd Respondent stated that the petitioner did not object to his participation before the 1st respondent and the issue is being brought up in these proceedings for the first time and he is estopped from doing so.
16. The 1st respondent denied the Petitioners claim that he has been living on the suit land since birth yet the truth is that the land has been in use of the family of the 3rd respondent even before adjudication process began. He faulted the Petitioner for failure to exhibit the proceedings before the other tribunals that heard the dispute where decisions were made not favoring him.
17. The 3rd Respondent further claimed that interfering with the decisions or orders made by the 1st respondent would amount to unnecessarily usurping the powers and mandate of other independent and lawfully constituted bodies or institutions.

Petitioner's Submissions

18. The Petitioner submitted on violation of Article 47 of *the Constitution* and he relied on the case of Kenya Human Rights Commission & Another vs Non-Governmental Organization Co-ordination board and another (2018) eKLR which quoted with approval the decision in the case of Dry Associates Ltd vs Capital Markets Authority and Another (2012) eKLR where the court held that Article 47 is intended to subject administrative processes to constitutional discipline.
19. It is the Petitioner's submission that the 1st Respondent made an error in the decision in Appeal No.111 of 1988 by giving the suit land to a stranger who was not a party to the proceedings. According to the Petitioner, Section 12(1) of the *Land Adjudication Act*, the adjudication officer must follow the procedure to be observed in the hearing of civil suits and that an administrative action that flows from statute must meet the constitutional test of legality, reasonableness and procedural fairness failure to which it renders their actions unconstitutional null and void.
20. The Petitioner submitted that it was apparent that the Deputy County Commissioner disregarded the evidence given by the Petitioner's witness and without giving reasons, and on the basis that the witness had been coached. The Petitioner contended that the decision by the Deputy County Commissioner was contrary to the evidence adduced and was based on other considerations and was biased, breaching the rules of natural justice as they cited the case of Justice Amrapael Mboghohi Msagha v Chief Justice of the Republic of Kenya & 7 others (2006) eKLR that the tenets of natural justice are adequate notice, fair hearing and no bias. The Petitioner contended that the finding that the Petitioner's witness 'was only saying what he was told to come and say' was not based on any logical proof of material evidence consequently leading to a biased decision. The Petitioner submitted that the the decision of the 1st Respondent does not meet the test of Fair Administrative Action under Article 47 of *the Constitution* and the orders in Petition d ated 14th October 2020 should be granted.

1st and 2nd Respondent's submissions

21. The 1st and 2nd Respondent submitted that the Petitioner cannot appeal against the decision of the 1st Respondent, since Section 29 of the Land Adjudication provides that the decision in the Minister's Appeal is final. They submitted that the ruling of this court issued on 29th January 2021 where the court already decided that the Petition is essentially an appeal against the decision of the 1st Respondent and that parties were granted a fair hearing. Hon Anjoje J's ruling also found that the Petitioner has not



raised any constitutional issues because whether the 1st Respondent's decision was fair and reasonable was not a constitutional issue.

22. It was the 1st and 2nd Respondent's submission that the this court cannot sit on appeal in this matter but can only exercise supervisory jurisdiction through a judicial review process relying on the case Corave Amrnath(Suit on behalf of the late Amrnath Gupta) v Patricia Kazungu & 2 others(2021)eKLR and the case of John Masiantet Saeni v Daniel Armat Lolungiro and 3 others eKLR where the court held that the decision in the Minister's appeal is final and not subject to any appeal.
23. The 1st and 2nd Respondents contend that the *Land Adjudication Act* has set up an elaborate procedure in which the rights and interests of all persons are established and once completed, the determination by the Minister is final and not subject to appeal. The suit offends the mandatory provisions of Section 29 if the *Land Adjudication Act* and the Petitioner ought to have commenced judicial review proceedings in accordance with Order 53 if the Civil Procedure Rules 2010 and prayed that the suit be dismissed with costs to the 1st and 2nd Respondents.

3rd Respondent's submissions

24. The 3rd Respondent submitted that no breach of constitutional right has been established because the Petitioner has not specified the specific violations in *the Constitution* nor as he shown how they were breached by the decision made by the 1st Respondent.
25. He also submitted that the constitutional petition hereunder is not the right legal avenue to challenge the decision of the 1st Respondent as the Petitioner has not produced any evidence to show that the 1st Respondents actions were unconstitutional and should have filed an appeal instead and relied on the decision in Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority & Another (2016) eKLR.
26. The 3rd Respondent submitted that the Petitioner is not entitled to stay orders? and that no proof of ownership has been established by the Petitioner or any documents. The 3rd Respondent concluded that the Petitioner has failed to establish sufficient grounds to allow grant of the prayers and failed to establish how his constitutional rights have been violated and submitted that the Petition should be dismissed with costs.

Analysis and Determination

27. I have considered the petition herein, the supporting affidavit, the replying affidavit; grounds of opposition, written submissions and the authorities cited. Counsel for the parties did not agree on the issues for determination but each counsel has drawn what they consider them to be. I have considered all of them and my view is that the issues for determination are as follows;
 - A. Whether a constitutional petition is the correct avenue to challenge the decision of the 1st Respondent.
 - B. Whether there was breach of the Petitioners constitutional rights during the proceedings and decision of the 1st Respondent in the Ministers Appeal No. 111 of 1988.
 - C. Whether the issues raised in the petition were determined by this court in the ruling delivered on 29th January 2021.
 - D. What orders should the court make?



A. Whether a constitutional petition is the correct avenue to challenge the decision of the 1st Respondent.

28. The first issue for consideration was the claim by the Petitioner that the 1st Respondent unlawfully substituted Kaviu Kathusi (deceased) the Respondent in the appeal to the Minister who died when the appeal was pending with the 3rd Respondent herein without having obtained a grant of letters of administration to the said Respondents estate. It is to be noted that the 3rd Respondent was the son of the deceased Kaviu Kathusi.
29. On this issue I have considered the provisions of Section 13(5) of the [Land Adjudication Act](#) CAP 284 which provides that:

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

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

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

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

31. Following the above provisions of the law and the guidance from the court of appeal I do find that the 3rd Respondent was a proper representative of the estate of the Respondent, his father Kaviu Kathusi (Deceased) in his capacity as his son for the purpose of the Minister’s Appeal. There was therefore no procedural impropriety in the 1st Respondent allowing the 3rd Respondent to represent his deceased father even though he had no letters of Administration.
32. Constitutional Petitions are premised on Article 22, 23 and 165 of [the Constitution](#) of Kenya. Article 22(1) provides as follows:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”



33. Article 23 which provides for jurisdiction of the court as follows:

“The High court has jurisdiction in accordance with Article 165 to hear and determine Applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.

Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine Applications for redress of a denial, violation or infringements of or threat to a right or fundamental freedom in the Bill of Rights.

In any proceedings brought under Article 22, a Court may grant appropriate relief including -

- (a) A declaration of rights
- (b) An injunction
- (c) A conservatory order
- (d) A declaration of an invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill or Rights and is not justified under Article 24.
- (e) An order for compensation
- (f) An order of Judicial Review.

34. The Environment and Land Court is a court with equal status to the High Court having jurisdiction to the use and occupation of and title to land. Section 13 of the [Environment and Land Court Act](#) elaborates the jurisdiction of the Court. This jurisdiction allows the High Court and Courts of equal status to hear and determine matters that relate to the denial, violation or infringements of or threat to a right or fundamental freedom in the Bill of Rights The Court in the case of OMAR TAHIR SAID v REGISTRAR OF TITLES & another [2013] eKLR held that:

“The E and L Court has juridical likeness or similarity with the High Court. In this juridical likeness, the E and L Court would have authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. It is in acknowledgement of this, I suggest, that the Legislature, by Section 13(3) of the E and L Court Act, expressly recognized the authority of the Court to enforce the fundaments rights under Articles 42, 69 and 70 of [the Constitution](#).”

35. By a preliminary objection dated 10th December 2021, the 1st and 2nd Respondents challenged the jurisdiction of this court to hear and determine this constitutional petition based on the provisions of Section 29 of the [Land Adjudication Act](#). This court found that it has jurisdiction over quasi-judicial bodies acting by virtue of the [Land Adjudication Act](#). In the said ruling the Court stated as follows;

“It is the Courts view that this court has supervisory jurisdiction over the adjudication process under the [Land Adjudication Act](#) and as such any person can bring a Constitutional Petition if the person claims that their constitutional rights have been violated under the adjudication process. The Court in exercising its mandate to hear Constitutional petitions does so pursuant to Articles 22, 23 and 165 of [the Constitution](#) and Section 13 of the Environment and [Land Act](#).



36. Further the court cited with approval the case of:

John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR

“The Court in hearing a constitutional petition may very well arrive at the same conclusion as the Court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the Court will be playing fairly different roles.”

B. Whether there was breach of the Petitioners constitutional rights during the proceedings and decision of the 1st Respondent in the Ministers Appeal No. 111 of 1988.

37. However, whether or not the present constitutional petition meets the threshold for grant of the orders sought is a question that could only be determined at the current hearing of the petition itself. The Petitioner claims violation of Articles 10(1) and (2), 21, 40 (1) and 47 (1) of *the Constitution* of Kenya 2010 and gives what he considers to be details of the violations. On Article 10 he claims that the 1st Respondent failed to apply his mind to the rule of law, good governance in making the determination thereby granting the land to the 3rd Respondent. Further, that he failed to appreciate that the Petitioner was the rightful owner of the suit land based on inheritance and possession. On Article 21 he claims the 1st Respondent failed to observe, respect, protect and promote the Petitioner’s right to property when he failed to take into consideration his lawful interest in the land based on inheritance.

On breach of Article 40(1) the Petitioner claims that the 3rd Respondent unlawfully entered into the Petitioner’s portion of land without any justification whatsoever.

38. The Petitioner also alleges breach of Article 47(1) of *the Constitution* and Section 4 (1) of the *Fair Administrative Action Act* on the right to fair administrative action in that the decision rendered by the 1st Respondent was unlawful and procedurally unfair since he allowed the 3rd Respondent to substitute his deceased father without being appointed legal representative.

39. The Petitioner claims that the 1st Respondent’s decision was not reasonable and was tainted with bias for disregarding the evidence by the Petitioner’s witness, making a baseless accusation of coaching without evidence of such coaching and faulting the Petitioner for not calling his brother as a witness. The totality of the above stated facts show that the Respondent’s decision was unfair and in abuse of discretion and power and the 1st Respondent failed to consider the evidence that was tabled by the Petitioner in support of his case.

40. The Ministers Appeal No. 111 of 1998 was filed, heard and determined pursuant to Section 29 of the *Land Adjudication Act* which provides;

- (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.
- (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.”



41. It is noted that once an area has been declared an adjudication area under the *Land Adjudication Act*, the ascertainment and determination of rights and interest in land within the area is reserved by law for the officers and quasi-judicial bodies set up under the Act. Under Section 29 of the Act it is stated that the decision of the Minister is final. Various courts have determined that in land adjudication proceeding, this court's role is only supervisory and not appellate as was held in *Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others* (2013) eKLR Okong'o J held that:

“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. (Emphasize added). 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.”

42. Having considered the summarized rendition of what the Petitioner claims to be violation of his constitutional rights, I am of the view that what the Petitioner is seeking is the re-consideration and re-evaluation of the evidence adduced before the 1st Respondent and the decision made with a view of this court substituting the said decision with its own decision which the Petitioner hopes would be in his favour. This is a function that in my view is reserved for an appellate court and not a constitutional or judicial review court.

43. On this issue I would adopt the reasoning of the Court of Appeal in *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR Civil Appeal No. 28 of 2016:

“Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review.”



44. As the court held in *Justus Mugaa M’Impwi v District Land Adjudication & Settlement Officer, Tigania West/East District & another* [2018] eKLR that not all grievances should warrant the filing of a constitutional petition. The court stated as follows;

“.... the petitioner has disguised this as a breach of his fundamental freedoms and constitutional rights. The most obvious remedy available to the petitioner after the objection was allowed by the adjudication officer was to lodge an appeal to the minister pursuant to Section 29 of the *Land Adjudication Act* cap 284 laws of Kenya. Having failed to exercise his right of appeal within the stipulated period, the petitioner avoided Judicial Review process to escape the limitation imposed by the statute and is now seeking an escape route through *the constitution*. It is imperative to note that not all grievances should warrant the filing of a petition. Constitutional jurisdiction must not be trivialized as by so doing, the value of *the constitution* would be diminished if it is allowed to be used as a general substitute for the normal proceedings for invoking judicial and constitutional rights. It is my view that the subject of this petition being a parcel of land which was undergoing adjudication process, the petitioner’s rights and interest would not have crystalized into rights capable of being protected under article 40 of *the constitution* of Kenya 2010. The process of appeal had not been exhausted and those rights are registered under the *Land Registration Act* of 2011.”

45. The Petitioner further complains that his rights under Article 47 of *the constitution* on Fair administrative action were violated. The said Article provides that;

Article 47 Constitution

(1)	Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
(2)	If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



(3)	Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— <table border="1" data-bbox="576 421 823 1025"> <tr> <td data-bbox="576 421 638 837">(a)</td> <td data-bbox="638 421 823 837">provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and</td> </tr> <tr> <td data-bbox="576 837 699 1025">(</td> <td data-bbox="699 837 823 1025">b) promote efficient administration.</td> </tr> </table>	(a)	provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and	(b) promote efficient administration.
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46. From the proceedings of the Minister’s Appeal, it is evident that both parties were duly heard and allowed to present their cases. No party was denied the right to fair administrative action under Article 47 and the Deputy County Commissioner made his decision based on his findings of the previous adjudication record and findings at the hearing.
47. Further in support of this ground the Petitioner states that the procedure adopted was unlawful and procedurally unfair on the ground of the substitution of the 3rd Respondent in place of his deceased father. This issue has been dealt with earlier and the finding of this court is that there were no violation of the Petitioners’ rights by allowing the 3rd Respondent to represent his deceased father in the proceeding. The Petitioner further states the 1st Respondent’s decision was not reasonable and was tainted with bias for the reasons that the 1st Respondent disregarding the evidence given by the Petitioner’s witness and that he made baseless accusation that the Petitioner’s witness had been coached Further by stating that the Petitioner should have called his brother as a witness.
48. Black’s Law Dictionary 8th Edition defines bias as:-

“inclination, prejudice judicial bias. A judge’s bias towards one or more of the parties to a case over which the judge presides. judicial bias is usually insufficient to justify disqualifying



a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extra judicial reasons.”

49. In the case of Republic V Speaker Of The Senate & Another Ex Parte Afrison Export Import Ltd & Another [2018] eKLR the court had this to say on the question of bias:-

“70. The Rule Against Bias, (Nemo in propria causa judex, esse debet), i.e.; no one should be made a judge in his own cause, is the minimal requirement of the natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias. Bias means an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue. Dictionary meaning of the term “bias” suggests anything which tends a person to decide a case other than on the basis of evidences.”

50. In the present case and taking into account the facts presented as showing proof of bias, I am of the view and find that there is no evidence presented by the Petitioner to show that the 1st Respondent was biased.

51. On Violation of rights under Article 40 of *the constitution* it is noted that the suit land was undergoing the process of adjudication under the *Land Adjudication Act*. The Act is said to be “An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto”. In my view until the process is completed and the rights are conclusively ascertained and recorded, constitutional rights under Article 40 of *the constitution* do not crystallize and are not capable of protection under the said article. This position was taken in the case of Justus Mugaa M’Impwi v District Land Adjudication & Settlement Officer, Tigania West/East District & another (supra) where the court stated as follows;

“It is my view that the subject of this petition being a parcel of land which was undergoing adjudication process, the petitioner’s rights and interest would not have crystalized into rights capable of being protected under article 40 of *the constitution* of Kenya 2010.”

C. Whether the issues raised in the petition were determined by this court in the ruling delivered on 29th January 2021.

52. On this issue I do find that the ruling of Angote J. dated 29th January 2021 was with regard to the specific application for preservative orders. The findings in that ruling are not binding to this court since at that stage of the proceedings all the court was to do was find whether a prima facie case had been established. However, in the end I do agree with the Judges finding;

“...the Petitioner has not raised ant constitutional issues in the Petition that is before this court. Indeed, the issue of whether the Respondent’s decision was fair and reasonable can never amount to a constitutional issue considering that the 1st Respondent was exercising a mandate donated to him by the law”

53. For the foregoing reasons I do find that the Petitioner’s claim that his constitutional rights were violated has not been proved. The Petition dated 14th October 2019 is therefore dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 24TH DAY OF JANUARY 2023.

HON. L. G. KIMANI



ENVIRONMENT AND LAND COURT JUDGE

Judgment read in open court in the presence of-

C. Nzioka/Musyoki Court Assistant

No attendance for Petitioner

M. Musyoki Advocate for the 3rd Respondent

M/S Kerubo State Counsel for the 1st and 2nd Respondents

