Musya & 3 others v Muviku & 4 others (Environment & Land Petition E003 of 2022) [2023] KEELC 16087 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16087 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT & LAND PETITION E003 OF 2022

LG KIMANI, J

FEBRUARY 28, 2023

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24, 25, 27, 40, 47, 48, 50, 159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 10,19,20,21,22,23, 24, 25, 27,40,47, 48, 50(1) AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 29(1)(B) OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF SECTION 4 & 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF THE DOCTRINE OF REASONABLENESS

BETWEEN

ROBERT MUTIE MUSYA ..... 1ST PETITIONER

MUTINDA MUVIKU ..... 2ND PETITIONER

MUTISYA MATI ..... 3RD PETITIONER

HARRISSON MWENGA MUSYOKA ..... 4TH PETITIONER

AND

DANIEL MUSYOKA MUVIKU ..... 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER, KYUSO ..... 2ND RESPONDENT

LAND ADJUDICATION OFFICER, KYUSO ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

1. Before the court is a request by the Petitioners for empanelment of a bench of an uneven number of judges dated 1st November 2022 seeking the following orders:

    a. This Honourable Court be pleased to certify that the Petition herein raises substantial questions of law and forthwith refer the case to his Lordship/Ladyship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three(3) pursuant to Article 165(4) of the *Constitution*.

    b. That the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.

    c. Any other order and/or modification of prayers which this Honourable Court may deem fit regarding empanelment.

    d. That the costs of the application be in the cause.

Application For Empannellment

2. The grounds relied on in support of the petition are that the 2nd Respondent is a Government official who exercises delegated authority by the Cabinet Secretary for lands under Section 29 (4) of the *Land Adjudication Act* and is tasked with hearing of appeals to the Minister as contemplated under Section 29 (1). The Petitioners claim that the hallmark of this Petition is the actions and discretion of the 2nd Respondent herein, the Deputy County Commissioner Kyuso County whose decision is stated to be final and cannot be challenged in a court of law.

3. The Petitioners set out the dispute resolution process under the *Land Adjudication Act* commencing with section 20 and 21 which provide for the Land Adjudication Committee and the Arbitration Board respectively. The next state is the objection to the Land Adjudication Officer under section 26 of the *Act*. A party dissatisfied by the decision of the Land Adjudication Officer appeals to the Minister under Section 29.

4. The Petitioners claim that a party dissatisfied by the decision of the Ministers delegate can only move the court for declaratory orders and judicial review. According to the Petitioners, judicial review is ill-equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof.

5. That the provision of Section 29(1) (b) ousts the jurisdiction of the court to examine the merit of the decision of the Minister yet the court has supervisory jurisdiction over judicial and quasi-judicial authorities and tribunals and power to call or recall the impugned decision and satisfy itself whether the decision is founded on sound reasoning and examine about its legality, correctness, propriety and soundness.

6. It is the Petitioners' submission that the protection of their fundamental human rights and the right to initiate judicial proceedings for enforcement of the right to property is an important entitlement of the Petitioners and it should not be clawed back even for the sake of achieving finality in dispute settlements.

7. The Petitioners submit that there has been a strict approach in the interpretation of the finality and ouster clause in Section 29(1) (b). They give examples of the cases of *Timotheo Makenge v Manunga Ngochi* (1979) eKLR where the court held that while the Minister's decision might have been a harsh one or a wrong one, but the court found that no want or excess of jurisdiction had been established. He also cited this courts holding in the case of *Robert Kulinga Nyamu v Musembi Mutunga & another* (2022) eKLR where the holding was that the provision of Section 29 of the *Land Adjudication Act* is couched in mandatory terms and parties cannot re-litigate the dispute. The cases of *Lepore ole Maito v Letwat Kortom & 2 others* (2016) eKLR and *Republic v Attorney General ex parte Dominic Muthi; Juliuss Wambua Kanyenze (Interested Party)* (2022) eKLR.

8. Counsel for the Petitioners therefore submits that it is apparent that the courts will not interfere with the decision of the Minister even when it is apparent that the Minister made a wrong decision. The Petitioners state that this Petition raises substantial and novel questions of law to warrant the empanelment of a bench of an uneven number of judges being not less than three under Article 165(4) of the *Constitution* and that it is desirable that the file be referred to the Honourable Chief Justice for the constitution of such a bench for the following reasons:

    a. The Petition raises weighty and complex questions of law concerning the interpretation and application of the provisions of Section 29(1) (b) of the *Land Adjudication Act*, particularly the Minister being the final arbiter.

    b. The Petition raises questions as to the Constitutionality of Section 29(1) (b) of the *Land Adjudication Act*.

    c. The Petition argues that any legislation which intends to limit a right ought to reasonable and justifiable in an open democratic society.

    d. In a provision ousting the jurisdiction of the court, the courts should lean towards the interpretation that preserves the ordinary jurisdiction of the court.

    e. The right of the Petitioner to move a court of law is preserved in the *Constitution*.

    f. Without access to courts, there can be no rule of law and therefore no democracy and anyone seeking a remedy should be able to knock on the doors of justice and be heard.

    g. Any exception to judicial inquiry should apply only to acts or deeds that are in accordance with the *Constitution* or relevant laws and any act or deed contrary to the *Constitution* or relevant law is subject to review or inquiry by the appropriate court of law.

    h. The issues raised in the Petition are novel and have not been decided upon before a court of law.

9. Counsel for the Petitioners relied on the case of *Peter Nganga Muiruri v Credit Bank Limited & another* Civil Appeal No. 203 of 2006 where the court held that the decision of whether to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. Counsel further relied on the case of *Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another* (2016) eKLR which addressed the meaning of substantial question of law.

10. According to the Petitioners, this matter has disclosed that there is a substantial question of law and that a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened and the issue of interpretation of the Constitution.

11. The Petitioners therefore pray that the request for empanelment of a bench of uneven numbers be allowed for the sake of justice.

Background Facts

12. The background to the Petition is that the Petitioners had cases arising out of the adjudication process over Land Parcel Nos.2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145, 2146, and 2404 within Kimangao Adjudication Section and Mivukoni Adjudication Section, Kyuso sub-county. The dispute went through all the stages of the adjudication process, beginning with a clan elders determination, decision by the Committee, Arbitration Board Objection proceedings and Minister's Appeal No.28 of 2020 and Appeal 270 of 2020.

13. The Petitioners' contention is that the decision of the 2nd Respondent is largely dependent on hearsay evidence and that it is a miscarriage of justice and prejudicial to the Petitioners' rights over the subject property who have been the owners of the suit properties and in occupation of even before the demarcation commenced. They also contend that the 2nd Respondent did not evaluate the responses and grounds of appeal and did not give reasons why he either agreed or disagreed with the Land Adjudication Officer's decision.

14. The Petitioners have sought for the following reliefs in the Petition:

    a. An order of certiorari do issue to remove and quash the decision made by the Deputy County Commissioner, Kyuso Sub-County, Kitui County in Minister's Appeal Case Nos. 27, 28 and 270 of 2020 in regard to Land Parcels 2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145, 2146, and 2404 within Kimangao Adjudication Section and Mivukoni Adjudication Section, Kyuso sub-county.

    b. A declaration that the Petitioners are entitled to be registered as the legitimate and beneficial owners of their ancestral land herein as originally demarcated to them as Land Parcels 2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145, 2146, and 2404 respectively.

    c. A permanent injunction be issued restraining the 4th Respondent by themselves, agents, servants, employees or otherwise howsoever from effecting registration and/or issuing Title Deeds in respect to the Parcels of Lands herein to the 1st Respondent and/or any other person other than the petitioners.

    d. An order of injunction be issued compelling the 4th Respondent to register the Petitioners as the beneficial and legitimate owners of the subject ancestral land originally demarcated to them as Land Reference No. 2152, 2148, 2149, 2150, 2151, 2142, 2143, 2144, 2145, 2146, and 2404 respectively.

    e. A declaration that Section 29(1)(b) of the *Land Adjudication Act* is inconsistent with Articles 10(2), 19, 20, 21, 22, 23, 24, 25, 27, 28, 40, 47, 48, 50, 159, 162, and 162 and 165(6) of the *Constitution* thus unconstitutional, null and void to the extent of the inconsistency.

1st Respondent's submissions

15. The 1st Respondent submitted that the Petition is not ripe for presentation to the Chief Justice for reference purposes because the matter herein is a simple one examining whether the Minister's decision

was in contravention of the provisions of the *Constitution*. He the contends that the subject matter herein was the subject of litigation in Civil Case 28 of 2014 Kyuso Law courts and High Court at Kitui Miscellaneous 29 of 2015 which was not challenged in the court of appeal and thus the issues were fully addressed and determined by the court and by the appeal to the Minister.

16. According to the 1st respondent, the Petitioners are seeking to cause delay in delivery of justice. He also states that the 2nd Petitioner has not disclosed to the courts that the 1st Respondent is his brother and that they were to share the suit property but he instead caused the same to be demarcated to him.

17. The 1st respondent urged the court to find that the issues relating the suit parcels of land are simple and no complicated issues. He stated that the suit properties were one parcel of land and that the demarcation process was requested by the petitioners to sub-divide the property.

18. The 1st respondent concluded by submitting that the Petitioners have not proved any complication in the matter and have not proved that there are substantial issues to be determined by more than one judge to warrant the matter referred to the chief justice as they relied on the case of *Mbuvi Gideon Mike Sonko v Director of Public Prosecution & 4 others* [2021] eKLR as they urged the court to dismiss the applicant' request and set the matter down for hearing and determination.

The 2nd -5th Respondents' Submissions

19. State counsel for the 2nd -5th Respondents submitted that even though Article 165(4) does not define what 'substantial question of law' but it was held in the case *Community Advocacy Awareness Trust & others v the Attorney General and others* High Court Petition No. 243 of 2011 where the court held that the question has been left to each judge's interpretation. They also relied on the principles applicable set out in the case of *Martin Nyaga and others v Speaker County Assembly of Embu and 4 others and Amicus* (2014) eKLR.

20. According to state counsel the main issue in the Petition is the quashing of the decision made by the Deputy County Commissioner which is not a complex or a weighty issue. The second issue is the constitutionality of Section 29 (1) (b) if the *Constitution*, which they also submit is not a complex issue that warrants certification under 165(4) of the *Constitution* and relied on the case of *Harrison Kinyanjui v Hon Attorney General* in Nairobi Petition Number 74 of 2011 where the court held that the decision of a three judge bench is of equal force to that of a single judge exercising the same jurisdiction.

21. It is also their submission that the court must adopt a holistic approach to the matter at hand as was held in the case of *Chepkorir Rehema (suing through father and next friend) & 130 others v Kenya National Examinations Council* (2017) eKLR. They submit that suits arising from the decisions of the Minister have been challenged before single judges on numerous occasions and that the constitutionality of sections is not novel and has been on many occasions been dealt with by a single judge and relied on the holding in the case of *Council of County Governors v Lake Basin Development Authority & 6 others* (2019) eKLR where the court found that the issues on the impugned acts are no novel and the holding in *Peter Nganga Muiruri v Credit Bank Limited & Another* Civil Appeal No.203 of 2006 where the court held that a single judge of the High Court can handle a constitutional question such as the one raised in the petition. State counsel for the 2nd -5th Respondents therefore prayed that the application be dismissed with costs to the Respondents.

Analysis and Determination

22. I have considered the application herein where the Petitioners pray for certification that the Petition raises substantial questions of law and forthwith refer the case to the Chief Justice for appointment

of a bench of an uneven number of judges being not less than three (3) pursuant to Article 165(4) of the *Constitution*.

23. Article 165(4) of the *Constitution* provides that:

> " Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."

Clause 3 (b) and (d) referred to above states

> " Subject to clause (5), the High Court shall have—
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (d). jurisdiction to hear any question respecting the interpretationof this *Constitution* including the determination of—
>
> (i) the question whether any law is inconsistent with or in contravention of this *Constitution*;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this *Constitution*;
>
> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> (iv) a question relating to conflict of laws under Article 191; and."

24. The petitioners claim that the petition raises weighty, complex and substantial questions of law under the constitution based on the interpretation and application of the provisions of section 29(1) (b) of the *Land Adjudication Act*, particularly the Minister being the final arbiter.

25. Finality and ouster clauses as found under section 29 of the *Land Adjudication Act* have been dealt with by the Supreme Court in the case of *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* [2014] eKLR as follows;

> " In England, ouster clauses are also known as "finality clauses". The design of such clauses is that decisions of a particular tribunal cannot be challenged in any Court. However, numerous decisions of the English Courts are to the effect that the Courts do not consider such clauses as excluding judicial review, especially where errors have been made that go to jurisdiction. In *R. v. Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 QB 574, the issue involved the *National Insurance (Industrial Injuries) Act* 1946, under which Section 36 (3) provided that any decision of a claim or question "shall be final". On the basis on an error on the face of the record, the applicant sought the remedy of certiorari. Denning LJ allowed the remedy at the Court of Appeal. He held that though the words of the statute may have been strong enough to exclude an appeal, they did not prevent judicial review. He found it to be well settled that the remedy by certiorari is never to be taken away by statute except by the most clear and explicit words; he doubted that the phrase "shall be

final" was sufficient to achieve this objective. He observed that if tribunals were to exceed their jurisdiction without any checks by the Courts, it would be the end of the rule of law ... The ultimate power of interpretation of the *Constitution*, or the statutes, rests with the Court. The Courts, therefore, will always jealously guard their jurisdiction, and save it from being inappropriately curtailed. The preliminary question as to whether the High Court has jurisdiction, eminently falls in the first place to that Court. The High Court has the obligation to consider the question carefully, in the light of all relevant law, and on the basis of legal reasoning and of constructive precedent, thereafter determining whether or not it has jurisdiction in that particular instance. In a case such as the instant one, in which it was alleged that the Constitution's fundamental rights and freedoms had been violated, the High Court, on a prima facie basis, indeed had the jurisdiction to determine whether or not it had jurisdiction, in the light of the ouster clause."

The court went on to summarize the findings of courts on clauses in law ousting the jurisdiction of courts and stated;

" Our consideration of the judicial experience in other countries shows that the ouster clause in Constitutions and in statute law is by no means a novelty. It is apparent, in the case of all jurisdictions we have considered, that the Courts have perceived such clauses as no more than a professional juristic challenge, each to be resolved in the context of its special facts and circumstances. However, the Courts have in general been guided by certain inclinations, especially the following:

(i) the legislative bodies have a popular mandate to make law as they find appropriate, in the public interest;

(ii) but their law-making function falls within a constitutional order in which the Judiciary is the regular custodian of the rule of law, and of the rights and freedoms of the individual;

(iii) it is presumed by the Courts that the legislature perceives them as a critical player in the scheme of the process of justice, and so does not intend to deprive them of jurisdiction, in those cases in which special tribunals or agencies are established to perform particular tasks;

(iv) the Courts have a conventional inclination to interpret statutes in a manner that precludes a ceding of jurisdiction to other agencies;

(v) subject to these principles, the Courts have recognized that, indeed, there will be proper instances of jurisdiction being conferred upon other agencies by the legislature;

(vi) but when the legislature does so, it has an obligation to express itself in clear, firm and unequivocal language – otherwise judicial interpretation is apt to take the stand that jurisdiction lies with the Courts;

(vii) legislative provision for commensurate remedies at the hands of a non-judicial agency, is a relevant factor in determining whether or not the Court's jurisdiction has been ousted;

(viii) it is also a relevant factor whether the ouster clause is likely to be a conduit for excess of power, such as would distort the principle of separation of powers, and the principle of balanced exercise of public powers."

25. From the foregoing it is clear that the finality clause in Section 29 of the *Land Adjudication Act* does not oust the jurisdiction of the court since as stated above the ultimate power of interpretation of the Constitution, or statutes, rests with the Court and the Courts will always jealously guard their jurisdiction.

26. The petitioners raise the issue of whether or not section 29 of the *Land Adjudication Act* limits the rights of access to the courts and to judicial inquiry into the issues determined in their dispute. The said questions have been the subject of consideration and determination by various courts. Such determination has shown that a party whose dispute has been heard through the adjudication process has a right to seek the remedy of judicial review. The *Constitution of Kenya* 2010 and the *Fair Administrative Actions Act* No. 4 of 2015 have expanded the scope of judicial review to include a possible merit review of the impugned administrative decision. The Court of Appeal in the case of *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR.

> "An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the *Constitution* to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the *Constitution* as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of

merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

In *Mbogo & another v Shah* (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in *Mbogo v Shah* (supra) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the *Fair Administrative Action Act* permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

27. It was thus determined that consideration of an administrative decision on the grounds of proportionality, irrationality and unreasonableness invites the court to evaluate the merits of the decision as it may require the reviewing court to assess the balance which the decision maker has struck. The court further addressed the ground whether relevant considerations were taken into account in making the impugned administrative decision and stated that the said ground also invites aspects of merit review.

28. The court of appeal gave further guidance in case the court finds that there is violation of a right to fair administrative action and held that there is no power for the reviewing court to substitute the decision of the administrator with its own decision.

29. In my view, the cases cited by the Petitioners Counsel are decisions made subject to the particular circumstances of each case. In the case of *Robert Kulinga Nyamu v Musembi Mutunga & another* [2022] eKLR the appellant filed a suit by way of a plaint seeking to re-litigate the same issues that had been determined by the adjudication proceedings. In *Lepore Ole Maito v Letwat Kortom & 2 others* [2016] eKLR the Plaintiffs filed a claim for adverse possession in a claim that had been determined through the adjudication process. In the circumstances of the cases the court made findings that the parties were not entitled to file the cases filed.

30. Section 29 of the *Act* is part of the dispute resolution process provided under the *Land Adjudication Act* and is a form of alternative dispute resolution as provided under Article 159 (2) (c) of the *Constitution*. The court of appeal has dealt with cases where alternative dispute resolution processes have been made

available by the constitution or a statute and stated that aggrieved parties must resort to the available mechanism before coming to court. This position was taken in *Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another* [2015] eKLR, where the following remarks were made:

> "We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the constitution or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the *Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that the constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of the *Constitution* in a way that will accommodate the alternative dispute resolution mechanisms."

31. The Petitioners claim that the issues raised in the Petition are novel and have not been decided upon before a court of law. Majanja, J in the case of J. *Harrison Kinyanjui v Attorney General & Another* [2012] eKLR addressed the meaning of a 'substantial question of law' under Article 165(4) of the *Constitution* and analysed thus:

> "The Constitution does not define, "substantial question of law." It is left to each High Court judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter. In *Chunilal v Mehta v Century Spinning and Manufacturing Co.* AIR 1962 SC 1314, the Supreme Court of India, after considering a number of decisions on the point, laid down the following test for determining whether a question of law raised in the case is a substantial question of law or not. It stated, "the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is more question of applying these principles or the plea raised is palpably absurd, then the question would not be a substantial question of law" (See also the case of W*ilfred Karuga Koinange v Republic* Nairobi Misc. App. 1140 of 2007 (Unreported), *Community Advocacy and Awareness Trust and Others v Attorney General and Others* Nairobi Petition No. 243 of 2011, *Justice Chemuttut and Others v Attorney General and Others* Nairobi Petition No. 307 of 2012 (Unreported)).
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> If I were to accept the above dicta, then it would follow, that every question concerning our Constitution would be a substantial question of law. Each case that deals with the interpretation of the Constitution or our expanded bill of rights would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest court. This would

burden judicial resources to the extent that the value of obtaining justice without delay under Article 159(2)(b) would be imperiled.

Therefore, giving meaning to "substantial question" must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."

32. Similarly, the Court of Appeal in the case of *Peter Nganga Muiruri v Credit Bank Limited & 2 others* [2008] eKLR held that:

> "... under our *Constitution* as it presently stands, there is no separate court known as the Constitutional Court. Power has been vested in the High Court to interpret the constitution and any single Judge or a bench of three in certain designated situations as provided under section 67 of the *Constitution* has or have jurisdiction and power to deal with any constitutional issue."

33. In my opinion, issues of impugned decisions of the Minister's Appeal and the provisions of Section 29 of the *Land Adjudication Act* are not novel issues of law to warrant certification by the court as raising a substantial question of law requiring to be heard by an uneven number of judges, as assigned by the Chief Justice. These are issues that are dealt with by this and other courts on a regular basis. As I have demonstrated above the issues have been dealt with by the Supreme Court of Kenya, the Court of Appeal, and the Environment and Land Court.

34. In any event novelty alone does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. Both the Petitioner and the 2nd -5th Respondents herein have relied on the Justice GV Odunga's holding in the case of *Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another* [2016] eKLR where he was of the view that:

> "... the Court must adopt a holistic approach to the matter at hand. In other words, the mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article 165(4) of the *Constitution*. In this case, it is contended that at least one of the issues in this petition is novel in that it requires the determination as to whether the Senate can entertain proceedings which the County Assembly is seized of. Secondly is whether the Director of Public Prosecution can be directed to commence criminal proceedings against a person who has failed to honour summons to appear before the Senate. Novelty alone with due respect does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment. In my view the mere fact that a matter is novel or jurisprudentially challenging does not ipso facto elevate it to a substantial question of law for the purposes of Article 165(4) of the *Constitution.* With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes to another organ."

35. In the above case, novel or jurisprudentially challenging cases does not ipso facto elevate it to a substantial question of law for the purposes of Article 165(4) of the *Constitution*. The court stated that any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes to another organ. In the present case not only are the issues raised in this petition not novel or complex this court has at some point dealt with the said issues in the particular circumstances of the said cases.

36. Prayer no.(e) of the Petition seeks for a declaration that section 29(1) of the *Land Adjudication Act* is inconsistent with the *Constitution*, Section 29(1) of the *Land Adjudication Act* Cap 284 reads as follows:

> " 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."

37. According to the Petitioners the finality of the Minister's decision is unconstitutional as they view it as an impediment to accessing courts thus curtailing their rights. As has been stated earlier, the provision that the Minister's order is final does not oust the jurisdiction of the court.

This court has jurisdiction to determine the question of whether any law is inconsistent with or in contravention of the Constitution; any constitutional issues by virtue of Article 165(3) of the *Constitution* which provides that:

> " Subject to clause (5), the High Court shall have—
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
>
> (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) the question whether any law is inconsistent with or incontravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
>
> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the

constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

e) any other jurisdiction, original or appellate, conferred on it by legislation."

38. In my view the question of whether the said section is inconsistent with or in contravention of this *Constitution* is not a novel issue. The said section has been in operation since enactment of the *Land Adjudication Act* in 1968 and has been the subject of numerous constitutional and judicial review cases. This court sitting as a single judge court can competently deal with the issue and grant reliefs provided for under the *Constitution*.

39. The final order of the court is that in the circumstances of this case, I decline to certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the *Constitution*. The application dated 1st November, 2022 fails and is hereby dismissed. The costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF FEBRUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read in open court in the presence of : -

Musyoki Court Assistant

Mwalimu C. M. Advocate for the Petitioners/Applicants

M/s Ndundu State Counsel for the 2nd – 5th Respondents