



Wekesa & 2 others v County Government of Trans Nzoia & 5 others (Environment and Land Constitutional Petition E005 of 2024) [2025] KEELC 185 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEELC 185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E005 OF 2024
CK NZILI, J
JANUARY 29, 2025**

BETWEEN

**NOAH MAHALANG'ANG'A WEKESA 1ST PETITIONER
EDWARD MATISI KAKOI 2ND PETITIONER
CHRISTINE MULONGO WEKESA 3RD PETITIONER**

AND

**THE COUNTY GOVERNMENT OF TRANS NZOIA 1ST RESPONDENT
THE COUNTY SECRETARY, TRANS NZOIA COUNTY 2ND RESPONDENT
TRUPHOSA AMERE 3RD RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER OF LAND, HOUSING AND
URBAN DEVELOPMENT, TRANS-NZOIA 4TH RESPONDENT
JANEROSE NASIMIYU MUTAMA 5TH RESPONDENT
COUNTY DIRECTOR, PHYSICAL AND LAND USE PLANNING TRANS-
NZOIA COUNTY 6TH RESPONDENT**

JUDGMENT

1. What is before the court is an amended petition dated 17/10/2024 in which the 1st petitioner a citizen, resident, and registered owner of LR No. Kitale Municipality Block 7/163, measuring approximately 3.6 Ha, sold ½ an acre of the land to 2nd and 3rd petitioners by completion document dated 6/1/2021, who took possession thereof and prepared a residential development plan ready to develop.
2. The 2nd and 3rd petitioners aver that the relevant officers of the 1st respondent approved the plans, subject to which, on 8/8/2023, the office of the County Director of Planning visited the site and invoiced the 2nd petitioner for payment of the approved plan's fees, which was effected on 9/8/2023.



- Despite the payment of requisite fees, the 2nd and 3rd petitioners aver that the plans have neither been approved nor reasons given why the same has not been made.
3. The 2nd petitioner avers that he has visited the respondents' offices many times seeking the approved plans or the reasons for not approving, all in vain. The 2nd and 3rd petitioners aver that despite demand notices made by their advocates on record, for an explanation as to why the residential development plans have not been approved, the respondents have refused to respond. The petitioners aver that the 6th respondent in matters of physical planning and land use, with the 1st respondent falling under the 4th and 5th respondents, whose chair of the planning committee is the 5th respondent, yet the 4th and 5th respondents have deliberately ignored to act on the application.
 4. The petitioners pray for:
 - (a) Declaration that the respondents have violated the petitioners' right to fair administrative action.
 - (b) Mandamus compelling the respondents to decide whether to approve or refuse to approve the residential development plans submitted for development on Kitale Municipality/7/163 within 14 days of the judgment and reasons for not approving and evidence thereof.
 - (c) Declaration that the 3rd and 5th respondents are unfit to hold public office for violating the Constitution and the law.
 - (d) General damages.
 - (e) Costs.
 5. In support of the petitioners, Edward Matisi Kakoi, the 2nd petitioner, has sworn affidavits dated 17/10/2024 and 8/11/2024 on behalf of the 1st petitioner. He has attached a copy of a Lease Certificate and an official search showing the 1st petitioner as the registered owner of the suit land marked EMK 1(a) and (b). Further, the petitioners rely on a sale agreement dated 16/6/2018, acknowledged receipts for payment, building plans approval forms, checklist and plans, invoice, payment receipts, clearance certificate and payment receipts, demand notice, and an affidavit of service of demand notice as annexures marked CMK 2, 3, 4(a), (b) and (c), 5, 6, 7(a) and (b), 8(a) and (b), 9 and 10 respectively.
 6. The petitioners aver that the 3rd respondent, as the County Secretary and coordinator of the government activities, has failed to cause the 5th respondent to perform her duties. Further, the petitioners aver that the refusal by the 5th respondent to reply to the demand notice issued to her denies them their rights and brings disrespect to the office that she holds, more so when she is the chair of the planning committee.
 7. The petition was served upon the respondents. Though they attended court through their lawyers on 6/11/2024 and 16/12/2024, they failed to file any response or attend court on the hearing date of 21/1/2025. The petition was canvassed by way of written submissions.
 8. The petitioners relied on written submissions dated 17/10/2024. Reliance was placed on Republic - vs.- Principal Secretary, Ministry of Internal Security & Another Exparte Schon Noorani & Another [2018] eKLR. The petitioners urged the court to find that the respondents have failed to perform their statutory obligations set out in Section 20(j), 57(1), and 61(2) of the Physical and Land Use Planning Act, which acts of omission violates Articles 10(2), 40, 47 and 73 of the Constitution.
 9. The issues calling for my determination are:
 - (1) If the petition raises a constitutional question.



- (2) If the petitioners exhausted the internal mechanism under the statute.
 - (3) If the petitioners have proved a breach of the right to Fair Administrative Action.
 - (4) If the petitioners are entitled to the reliefs sought.
10. A party seeking constitutional reliefs for breach of constitutional rights and freedom must comply with Articles 19-23, 258, and 260 of *the Constitution* and *the Constitution* of Kenya Fundamental Rights and Procedure Practice and Procedure Rules 2013 by defining the capacity, particulars of the breach, manner, nature of violation, loss, or damage, pending or concluded proceedings, on the matter, reliefs sought and the signature. See Annarita Karimi Njeru -vs- Attorney General [1979] eKLR, and Mumo Matemu vs- Trustees Society of Human Rights Alliance [2013] eKLR.
 11. A constitutional petition must be supported by evidence. It has to be pleaded with specificity and clarity. It must have a factual basis. It must be on a live dispute and not based on speculations or suppositions. See Communication Commission of Kenya -vs.- Royal Media Services & Another [2014] eKLR. In Hakiziman Abdul Abdulkarim -vs.- Arrow Motors E.A. Ltd and Another [2017] eKLR, the court observed that a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. Claims of statutory violation ideally cannot give rise to a constitutional violation as held in Turkana County Government & Others -vs- A.G. & Other [2016] eKLR.
 12. The petition must be pleaded with clarity and specificity so that the opposite party may know what questions or issues to answer. See Kenya Medical Practitioners and Dentists Union -vs- University of Nairobi and Another [2021] eKLR.
 13. The party must demonstrate what constitutional rights have been infringed, threatened, and or violated and lay a basis for the grievances and must link the claim with the articles of *the Constitution* contravened, including manifestation for the infringement, violation, and/or breach. See CCK and Others -vs.- Royal Media Services Ltd (Supra). In Nasra Ibrahim Ibren -vs.- IEBC & Others [2018] eKLR, the court said that a party is under a constitutional forensic duty to set out the particulars of the constitutional transgressions in a precise manner. In Trans Nzoia Chingano Grain Farmers Co-operative Society -vs.- Hon. Attorney General & Others [2013] eKLR, the court was of the view that a party could not bring a claim for adverse possession as a constitutional petition since the *Civil Procedure Act* provides for the manner in which such a claim can be brought. See also Parkire Stephen Munkasio & Others -vs.- Kedong Ranch Ltd & Others [2015] eKLR.
 14. Further, in John Harum Mwau -vs.- Peter Gastrow & Others [2014] eKLR, the court was of the view that ordinarily, it would not consider a constitutional question unless the evidence of the remedy depends on it, and if a matter could be resolved without recourse to *the Constitution*, *the Constitution* should not be involved at all. Lastly, in Uhuru Muigai Kenyatta -vs.- Nairobi Star Publication Ltd [2013] eKLR, the court observed that where there is a remedy in civil law, a party should pursue that remedy, for not every ill in the society should attract a constitutional sanction. Moreover, the court in Rapinder Kaur Atwal -vs.- Manjit Singh Amrit Petition No. 236 of 2011, the court held that *the Constitution* was a solemn document that should not be a substitute for remedying emotional personal questions or merely controlling excesses within administrative processes.
 15. As to the exhaustion of other available alternative dispute mechanisms, a party is supposed to move to a constitutional court as a last resort unless the other available forums are also inadequate, inefficacious, insufficient, or infunctional or where there are exceptional circumstances as per Section 9 of the Fair Administrative Actions Act. See William Odhiambo Ramogi & Others -vs.- A.G. & Others [2020] eKLR.



16. In *Nicholus -vs.- A.G. & 14 Others: National Environmental Complaints Committee (NECC) & Others (Interested Parties) Petition No. E007 of 2023 [2023] KESC 113 [KLR] (28th December 2023)* (Judgment), the apex court held that though, under Section 9(2) of the *Fair Administrative Action Act*, a court may not review the administrative action until exhaustion of internal dispute mechanism, however, the court held that courts should adopt a nuanced approach to safeguard a party's right to access justice, while also recognizing the purpose, efficiency, specificity, adequacy, and efficacy of the alternative dispute mechanism, more so where the issue at hand involves the enforcement of fundamental rights and freedoms, otherwise its availability was not a bar to an individual seeking constitutional reliefs.
17. Applying the foregoing principles to the instant petition, have the petitioners surmounted the parameters set? The complaints by the petitioners are that the failure to act on the lodged residential development plans, one way or the other, on time or at all, and for not giving reasons why there is inaction or refusal to act, has infringed on the rights to fair administrative action as enshrined in Article 47 of *the Constitution*, that is expeditious, efficient, lawful, reasonable, and procedurally fair? The petitioners have pleaded that under Section 7 of the *Fair Administrative Action Act*, any person aggrieved by an administrative action or decision may apply for its review where there is an abuse of discretion, unreasonable delay, or failure to act in the discharge of a duty imposed under any written law. The petitioners term the inaction of the respondents as contrary to Articles 47 and 259 of *the Constitution*. Looking at the petition, my finding is that the petition is pleaded with clarity and specificity. It raises constitutional questions or issues.
18. The answers to the issues or questions raised arise from *the Constitution* and not a statute. Further, the court finds that there is no other alternative available internal dispute mechanism in place with the capacity to provide any constitutional relief to the petitioners' issues. The above answer issues No. (1) and (2).
19. The next issue is if the petitioners have proved a breach of the right to fair administrative action by the respondents. It is trite law that he who alleges must prove, under Sections 107 and 112 of the *Evidence Act*. See *Eycad Properties Ltd & Another -vs.- Attorney General & Others* [2013] eKLR. There is no dispute that the petitioners have a constitutional right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Section 4(3) of the *Fair Administrative Action Act* requires that a person against whom an administrative action has been taken be given an opportunity to be heard and to make representation. He is also entitled to reason where an administrative action is likely to affect his fundamental rights and freedom. See *Oindi Zaippeline & Others -vs.- Karatina University and Moi University Nyeri Civil Appeal No. 52 of 2014*.
20. The petitioners have produced evidence that they own the subject land on which they wish to undertake developments. The respondents have not impeached the title documents as provided under Sections 24, 25, 26, and 28 of the *Land Registration Act*. A certificate of title is to be taken by the court as prima facie evidence of ownership in the absence of evidence of its acquisition through corrupt means, illegality, and irregularity. See *Dr. Arap Ngok -vs- Ole Keiwua & Others and Base Titanic Ltd -vs.- County Government of Mombasa & Another* [2018] eKLR.
21. The petitioners have produced documents to show that they lawfully lodged development plans with the respondents and paid the requisite fees. The petitioners have waited for the approval of the development plans one way or the other for almost a year without any response or action on the part of the respondents. Section 2 of the *Fair Administrative of Actions Act* defines an administrative action as the powers, functions, and duties exercised by authorities, or quasi-judicial tribunals, or any act,



omission, or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates.

22. In *Judicial Service Commission -vs.- Mbalu Mutava & Another* [2015] eKLR, the court observed that Article 47(1) of *the Constitution* makes a transformative development of administrative justice for it lays a constitutional foundation for not only control of the protection of state organs and other administrative bodies, but also articulates the rights to fair administrative action, as a reflection of Article 10 of principles and values on inter alia good governance, transparency, and rule of law accordingly. The court said that administrative action of public officers, state organs, and other administrative bodies are subject to Article 47.
23. In *Dry Associates Ltd -vs.- Capital Markets Authority & Another Petition No. 328 of 2011*, the court observed that Article 47 is intended to subject administrative process to constitutional discipline; hence, the relief of administrative grievances was no longer left to the realm of common law, but was now measured against the standards established by *the Constitution*.
24. The constitutional standards or tests set under Article 47 include expeditious, efficient, lawful, reasonable, and procedural fairness. Reasons for acting or not acting have to be given in writing under Article 47(2). Section 13(2) of the ELC Act grants this court powers to deal with environmental planning disputes. Section 72(3) of the Physical Land Use Planning Act establishes a county physical and land use planning liaison committee, hereinafter the (CPLUPLC). Its roles are set out in Section 78 to hear and determine claims made with respect to applications submitted to the planning authority in the County, to hear appeals against decisions by the planning authority with respect to physical and land use development plans, advise the County executive member on broad physical and land use planning policies, strategies and standards and to hear appeals with respect to enforcement notices.
25. What the petitioners have brought before this court is inaction by the respondents to act on their application for approval of development plans within a reasonable, efficient, fair, expeditious, and lawful manner. They seek an order of mandamus to compel the respondents to immediately and unconditionally act on the development plans to enable them to develop their property. The petitioners term the delay to act inordinate, unreasonable, and bordering on abuse of discretion.
26. The scope of mandamus is to direct any person, corporation, or inferior tribunal, requiring him or them to do something pertaining to his or their office, which is in the nature of a public duty. In *KNEC -vs.- Republic Exparte Geoffrey Gathenji Njoroge & Others* [1997] eKLR, the court said that the purpose of mandamus is to remedy the defects of justice and ensure that the acts of justice are met, in cases where there is a specific legal right or no specific legal remedy for enforcing that right. The court said that the order may be issued where there is an alternative legal remedy, yet that mode of service is less convenient, beneficial, and effectual.
27. The court said that the order of mandamus commands a party against which it is issued, who has a general duty imposed on him or them by statute to undertake the duty, which he or them has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. Furthermore, the court said that an order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same.
28. In *Republic -vs.- County Government of Machakos & Another Exparte Elijah Waweru Mathere & Another* [2015] eKLR, Odunga J (as he then was) held that the decision whether or not to issue a development plan was an exercise of discretion on the part of the 1st respondent, and a court will only interfere with the discretion if:
 - (1) There is an abuse of discretion



- (2) The discretion is exercised for an improper purpose.
 - (3) If the decision maker breaches the duty to act.
 - (4) If the decision maker has failed to exercise statutory discretion reasonably.
 - (5) The decision maker acts in a manner to frustrate the purpose of the Act donating the power.
 - (6) The decision maker fetters the discretion given.
 - (7) The decision maker fails to exercise discretion.
 - (8) When the decision maker is irrational and unreasonable.
29. In *Pastoli -vs- Kabale District Local Government Council & Others* [2008] 2EA 300, the court observed that to succeed in an application for judicial review, an applicant has to show that the Act complained about is illegal, irrational, and full of procedural impropriety. Procedural impropriety was defined as where there is a failure to observe rules of natural justice or to observe procedural rules. In *Republic -vs.- County Director Physical Planning Department - Kiambu County & Others Exparte Shainaz Shamshudin & Jamal & Another* [2016] eKLR, the court held that mandamus cannot be sought to compel the exercise of discretion in a particular manner.
30. In this petition, the respondents have refused to approve the petitioners' development plans or give reasons for not approving. It is a statutory duty of the respondents to act one way or the other over the submitted plans. The acts of the respondents to act in one way or another would be looked into under the provisions of Article 47 of *the Constitution* as read together with Section 4 of the *Fair Administrative Action Act*. There is no doubt that the respondents have discretion as to mode of performing their statutory duties. The court, however, through an order of mandamus, may not direct the performance of those duties by the respondents in a specific way.
31. The respondents must consider the development plans in light of the Physical Land Use Planning Act and any other zoning regulations. The statutory obligations must not be delayed. The respondents cannot choose not to act at all. The respondents must and should have acted within a reasonable time. A year or so without acting cannot be reasonable. The failure to act either way or to furnish the petitioners with reasons for non-action for over one year, in my considered view, is unreasonable, unprocedural, and unfair. My finding is that the acts of neglect, refusal, and failure to provide reasons fall short of the requirements of Article 47 of *the Constitution*.
32. The upshot is that I grant the petitioners prayer No. (a) and (c) of the Amended Petition dated 8/11/2023. Prayers No. (d) and (e) are declined. Costs to the petitioners.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 29TH DAY OF JANUARY, 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Chebon for the Respondents

Mr. Nyamu for the petitioners

AMENDED AT KITALE ON THIS 6TH DAY OF FEBRUARY, 2025.

HON. C.K. NZILI



JUDGE, ELC KITALE.

In the presence of:

Mr. Nyamu for the petitioners

Chebon for Otieno for the Respondents

