



**Bwonde (Suing as the administrator of the Estate of Peter Remington Bwonde) v County Land Adjudication & Settlement Office, Trans-Nzoia & 3 others; Okero & another (Interested Parties) (Environment & Land Petition E001 of 2023) [2025] KEELC 3043 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3043 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND PETITION E001 OF 2023**

**CK NZILI, J**

**APRIL 2, 2025**

**IN THE MATTER OF ARTICLES 10(1) (B) (C), 10(2)(A) (B) (C), 27(1) (2), 35(1), 35(3), 47(1), 47(2), 60(1)(A)(D), 73(1)(A), (2)(B) AND 232(1) (A), (B), (C),(D), (E) AND (F) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**EDNA AYUMA BWONDE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF PETER REMINGTON BWONDE) ..... PETITIONER**

**AND**

**COUNTY LAND ADJUDICATION & SETTLEMENT OFFICE, TRANS-NZOIA ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, TRANS-NZOIA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

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

**AND**

**HENRY IGONYI OKERO ..... INTERESTED PARTY**

**DANIEL MOGOI ONCHIEKU ..... INTERESTED PARTY**

**JUDGMENT**

1. The amended petition dated 1/12/2023 seeks:



- (a) Declaration that the re-allocation of Plot No. 225 Kapkoi Settlement Scheme measuring approximately 5 acres by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents to the interested parties contravened *the Constitution* and is therefore null and void.
  - (b) Mandamus compelling the 3<sup>rd</sup> respondent to revoke the registration of the 2<sup>nd</sup> interested party as the proprietor of parcel No. Trans Nzoia/Kapkoi/225.
  - (c) Mandamus directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to reallocate Plot No. 225 Kapkoi Settlement Scheme, giving preference to the petitioner as a person in actual occupation of the said land.
2. The facts are set out in the amended petition and verified by an affidavit sworn by Edna Ayuma Bwonde on 1/12/2023. The petitioner deposed that she brings the petition as the widow and administrator of the estate of Peter Remington Bwonde, pursuant to a grant of letters of administration issued on 8/12/2017 annexed as EAB 1A and 1B.
  3. The petitioner deposed that parcel No. Trans Nzoia/Kapkoi/225, that was previously known as Plot No. 225 Kapkoi Settlement Scheme measuring 5 acres or thereabout, was allocated to Tirop A. Saina on 1/12/1987 (hereinafter the initial allottee), who sold it to her late husband, Peter Remington Bwonde (the deceased), in 2007 as per the sale agreement and acknowledgment notes annexed as EAB 2A, 2B and 2C.
  4. The petitioner deposed that her late husband took possession of the land and was growing maize on the land, year in and year out, until he passed on, on 5/9/2011. She said that she continued utilizing the land continuously, openly, exclusively and with the knowledge of the 1<sup>st</sup> respondent going by the ground report dated 11/8/2019, which was furnished to the 2<sup>nd</sup> respondent confirming the land was under maize cultivation attached as EAB-3.
  5. More so, the petitioner deposed that it appears that on 19/8/2019, the plot was, without her knowledge or notice, reallocated to the 1<sup>st</sup> interested party, who was later issued with a title deed on 4/12/2022, as per annexure EAB-4. The petitioner deposed that the 1<sup>st</sup> interested party appears to have obtained the land for speculative purposes, contrary to the public land policy, for barely a year later, he transferred the same to the 2<sup>nd</sup> interested party on 27/5/2023, as per the annexed title deed and certificate of an official search marked EAB 5A and 5B. The petitioner deposed that the 2<sup>nd</sup> interested party remains incognito and has never come out to identify himself with the land in question.
  6. Again, the petitioner deposed that due to her possession of the land, she was entitled to preference in its reallocation; the respondents ought to have publicized the availability of the land for reallocation, and invited the public in general and in particular herself, to show cause why the land could not be reallocated to 1<sup>st</sup> interested party.
  7. Further, the petitioner deposed that the reallocation of the suit land by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was unjustified, unlawful, unfair and unconstitutional; hence, unless the reliefs sought were granted, she stands to suffer irreparable loss for the 2<sup>nd</sup> interested party is likely to move in, and forcefully occupy the land. The petitioner deposed that the reallocation of the land, while still under her possession, was contrary to the dictates of a free and democratic society and had violated her rights to access to land, fair administrative action, equality before the law and the right against discrimination.
  8. Similarly, the petitioner deposed that the respondents' actions and practices reek of corruption and are in total disregard for the rule of law, democracy and human rights. The petitioner also deposed that she became aware of the secret reallocation of the land to the 1<sup>st</sup> interested party in October 2023 and also the transfer of the land to the 2<sup>nd</sup> interested party, which had allegedly happened on 27/5/2021.



9. The petition is anchored on violation of Articles 10(2)(a), (b)(c), 27, 40, 47, 60(1)(a), 73 and 232 of *the Constitution*. Further, the petition is based on Articles 1(2), 10(1), 2(a),(b) and (e), 27, 35, 60(1)(a), 61, 73(1)(a) & 2(b) and 232 of *the Constitution*.
10. Subsequently, the petitioner reiterated that since the land fell under a Settlement Scheme, the 2<sup>nd</sup> interested party should have undertaken due diligence in the process of reallocation and issuance of title before having it transferred to him.
11. The petition was opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents through a replying affidavit sworn on 7/3/2024 by Nyanga Crecencia for incompetence; defectiveness; frivolous, scandalous; devoid of substance in law; as full of falsehoods and misrepresentation to win the court's sympathy. The respondents averred that the land in question was allocated to one Tirop A. Saina, who executed a legal document on 1/12/1987 as per a charge marked NC-1, which required him to pay for the land within 28 years while settling and making use of it and without any transfer, lease or otherwise parting with the possession of the land, without prior consent of the trustees.
12. The respondents averred that the initial allottee defaulted in making any payments and breached the conditions of the allocation, to which several demand notices were issued to remedy the breach in vain, as per annexures NC-2(a) - 2(i). As a consequence, the respondents aver that the 2<sup>nd</sup> respondent directed that the land parcel to be visited and establish the whereabouts of the initial allottee, upon which, through a ground visit on 25/10/2018, it was found that the land had no structures, was not fenced, it was all arable, had indigenous trees. In contrast, the rest of the land had maize plantations. Further, the respondents deposed that it was also established that the land had also been sold to one Peter Bwonde as per the ground report annexed as NC-3.
13. Furthermore, the respondents deposed that a notice to remedy the breach of conditions was issued on 7/11/2018, but the initial allottee did not remedy the breach, resulting in the cancellation of the offer on 14/8/2019, as per annexures NC-4(a) and (b). The respondents deposed that a new letter of offer was prepared in favor of the 1<sup>st</sup> interested party, who promptly paid for it through outright purchase as per a copy of the offer letter and a receipt payment marked NC-5 and 6.
14. According to the respondents, the 1<sup>st</sup> interested party executed the discharge of charge on 10/3/2020, and the parcel was transferred to him on 10/3/2020, as per the annexed discharge of charge and transfer marked NC 7(a) and (b). The respondents termed the petitioner as a stranger whose late husband and the initial allottee failed to report such a transaction or make a formal request so as to be guided on what to do, to have the land registered to the buyer by the Settlement Fund Trustee(SFT).
15. The respondents further deposed that despite the fact that SFT officials visited the plot severally, neither the initial allottee nor the person who had registered the caution, nor the supposed buyer was found in occupation. The respondents deposed that the responsibility lay squarely on the alleged buyer of the suit property to confirm the ownership of the plot before committing his resources. In this case, the respondents averred that the initial allottee had breached all conditions, yet the petitioner is claiming contravention by them of *the Constitution*, yet all the necessary procedures were followed; otherwise, the petition raises no valid constitutional grounds, prayers, or issues to warrant intervention. The respondents deposed that the balance of convenience, public interest, and the scales of justice militate and tilt against granting the orders sought.
16. The 1<sup>st</sup> interested party opposed the petition by a replying affidavit of Henry Igonyi Okero sworn on 30/11/2023. He deposed that the suit property was allocated to him upon an application to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and upon making the requisite payment, he was issued with a title deed attached as HIO-1. The 1<sup>st</sup> interested party deposed that thereafter, he sold the parcel to the 2<sup>nd</sup> interested party,



- who was issued with a title deed on 9/2/2016, and then took up both ownership and possession of the land.
17. Again, the 1<sup>st</sup> interested party averred that unknown to him, when some two persons invaded the land, the 2<sup>nd</sup> interested party filed Kitale Chief Magistrates ELC Case No. 12 of 2022, which was compromised as per order annexed as HO-2. The 1<sup>st</sup> interested party averred that neither the petitioner nor the initial allottee have been in possession or occupation of the suit property, let alone making any payments to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, which is confirmed by the letter dated 11/10/2019, and the cancellation notice dated 14/8/2019, annexed as HIO-3, which is self-explanatory.
  18. The 1<sup>st</sup> interested party denied the alleged purchase of the land from the initial allottee, whom, in the first instance, had never acquired ownership from the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 1<sup>st</sup> interested party averred that he acquired good title over the suit property, which he lawfully transferred to the 2<sup>nd</sup> interested party, leaving him with no interest in the land.
  19. Consequently, the 1<sup>st</sup> interested party deposed that he reliably established that one Daniel Mogoi had entered into an agreement dated 28/3/2022, with people who were in possession then, who have vacated the land and that the 2<sup>nd</sup> interested party resolved the attempted re-entry to the land by the petitioner as per the chief's letter dated 27/10/2023, confirming the current status of the suit property.
  20. He annexed the letter dated 27/10/2023, the agreement dated 28/3/2022, the official search certificate, and a copy of the title as HIO 1-4.
  21. The petition was canvassed by way of written submissions. The petitioner relied on written submissions dated 18/2/2025, isolating 6 issues for the court's determination. On the procedure of allocation and reallocation of land in a settlement scheme, the petitioner submitted that Sections 4, 12(1), 134, and 135 of the *Land Act* 2012 is the operative law, which also requires compliance with Articles 10 and 60 (1) of *the Constitution*. In this petition, it is submitted that the 2<sup>nd</sup> - 4<sup>th</sup> respondents have not indicated what method was used to allocate the land to the 1<sup>st</sup> interested party, and equally, there is no evidence that the 2<sup>nd</sup> - 4<sup>th</sup> respondents applied any law or principles in allocating the land to the 1<sup>st</sup> interested party; otherwise, the whole arrangement was a purely private treaty between the respondents and the 1<sup>st</sup> interested party.
  22. On whether constitutional principles were applied in allocating land in a settlement scheme, the petitioner submitted that Article 2(1)(3) of *the Constitution*, as read together with Sections 4, 12, and 134(6) of the *Land Act* obligate every person or organ exercising state authority to do so in accordance to *the Constitution* in general and in particular, guided by the national values and principles of governance under Article 10 and the principles of natural land policy under Article 60(1) of *the Constitution*. In this instance, the petitioner submitted that in contrast, it is not disputed that the late Tirop A. Saina was allocated Plot No. 225 Kapkoi Settlement Scheme on 1/12/1987 which he sold to the petitioner's late husband in 2007, who took possession in 2008 after completing the payment and has been on the land until he passed on in 2011, leaving behind the petitioner cultivating maize therein, with the knowledge of the 1<sup>st</sup> respondent as per the ground report dated 11/8/2019.
  23. The petitioner submitted that the replying affidavit by the 2<sup>nd</sup> - 4<sup>th</sup> respondents is silent on particulars of the powers adopted to reallocate the land to the 1<sup>st</sup> interested party and whether the same conformed with the above-cited statutory and constitutional requirements. The petitioner submits that in view of the uncontroverted facts, her constitutional rights under Article 47(1)(2) of *the Constitution*, as read together with Sections 4 and 5 of the *Fair Administrative Action Act*, were violated. The petitioner further submitted that the reallocation did not observe the constitutional values and principles of governance as well as the principles of the national land policy, for she was not given an opportunity



- to be heard before the plot was taken away, no written reasons were served upon her, yet the action about to and which was taken had far-reaching consequences and was a matter of public interest, which obligated the 2<sup>nd</sup> - 4<sup>th</sup> respondents to involve public participation, especially the neighbors to tell the actual status of the suit property before reallocating it.
24. Again, the petitioner submitted that in order to enhance good governance, transparency, accountability, fairness, equity, the rule of law, involvement of the people, and social justice, all available plots within the scheme as of 2018 ought to have been publicized and qualified persons invited to apply for allocation. The petitioner submitted that after the 2010 Constitution, public land could not be administered by the respondents so secretly behind the curtain in the boardroom without observance of the constitutional making values and principles alluded to herein above.
  25. The petitioner also submitted that the above acts of commission and omission by the respondents further reveal glaring violations of not only her right to equality and freedom from discrimination under Article 27 of *the Constitution* but also that of other deserving public and citizenry. The petitioner submits that the respondents have not demonstrated that this was the only plot where there was a default in payment, why the reallocation took too long and was also selective, contrary to Article 40 of *the Constitution*. The petitioner submitted that the 2<sup>nd</sup> - 4<sup>th</sup> respondents have not tendered evidence if the default notices were ever served upon the initial allottee. The petitioner submitted that the annexure DMO-1 shows the letter was only sent to the 1<sup>st</sup> respondent and not the late Tirop A. Saina.
  26. The petitioner submitted that the conduct of the respondents was in contravention of Articles 60(1) (a), 13, and 232 of *the Constitution* on the promotion of equitable access to land, respect for and the involvement of people while acting transparently and in providing information to the public. The petitioner submitted that any act or omission in contravention of *the Constitution* is invalid by dint of Article 3(4) of *the Constitution*. In this case, the acts of the respondents fail the constitutional test and hence are null and void.
  27. The petitioner submitted that the interested parties failed to undertake due diligence as to the validity and efficacy of the process of the allocation as required under Article 3(1) of *the Constitution*, which obligates them to respect, uphold and defend *the Constitution*.
  28. On whether the petition passes the constitutional test, the petitioner submitted that the land question was central to the constitutional making process in the late 1990s; hence, the manner of dealing with settlement schemes is a matter of great public interest and concern to the residents of Trans-Nzoia County, going by numerous pending cases over the processes.
  29. The petitioner submitted that the said disputes are not ordinary cases but weighty in nature. In this instance, it was submitted that the petitioner has sufficiently and elaborately demonstrated how the respondents had violated both statute law and *the Constitution*, its values and principles on governance, particularly those on land management and administration. Reliance was placed on *Katiba Institute & Others -vs- DPP & Others; Ayika (IP) (Petition E016 of 2023 [2021] KEHC KLR*, on the need for a holistic, liberal, broad and purposive interpretation of *the Constitution*.
  30. The petitioner submitted that she had met the test in *Anarita Karimi Njeru -vs- Attorney General [1979] eKLR*, hence deserves the reliefs sought due to the glaring lapses and serious omissions in the manner the respondents handled the reallocation issue, calling for remedies so that public servants adhere to constitutional requirements on land management and administration, failure of which they shall attract an order of mandamus.
  31. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents relied on a written submission dated 27/2/2025, isolating 4 issues for the court's determination.



32. The 1<sup>st</sup> - 4<sup>th</sup> respondents submitted that the petition offends the doctrine of constitutional avoidance since the single issue raised revolves around the legality of the title held by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. It is submitted that the title deed is alleged to have been issued by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without her knowledge or that of the public, hence is unjustified, unlawful, unfair, and unconstitutional, requiring cancellation on account of fraud, and for violating her rights to access land, for administrative action, equity before the law and against discrimination.
33. The respondents submitted that it is the initial owner who breached the letter of offer, and despite notices to remedy the same, he neglected, leading to the cancellation of the offer and reallocation of the same to the 1<sup>st</sup> interested party. The respondents submitted that the factual basis of the petition requires the court to check the regularity and the legality of the title held by the interested parties vis-à-vis the petitioner's claim on ownership. Further, the respondents submitted that the constitutional court is not the proper forum to determine contested ownership disputes of the properties such as the instant one, its rationale being that in a constitutional petition, the court does not hear and interrogate the evidence of the parties' claims of ownership.
34. Reliance was placed on *Yaa -vs- District Land Registrar Kilifi* [2023] KEELC 21694 [KLR], *Joseph Musilali Mutemi -vs- National Land Commission & Others* [2021] KEELC 1469 [KLR], *Valentine Odhiambo & Others -vs- H.F. Development & Investment Ltd and Another* [2021] KEELC 392[KLR] and *KKB -vs- SCM & 5 Others* [2022] KEHC 289[KLR].
35. The respondents, therefore, urge the court, guided by the cited case law, to hold and find that the issues raised by the petitioner are better suited to be effectively addressed in a typical civil suit and as not ripe for determination under the constitutional court as the only course that can give the reliefs sought. The respondents submitted that the petition raises no constitutional question, for the issue solely revolves around ownership and validity of the title held by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, which are matters that may be resolved without invoking *the Constitution*. Reliance was placed on *KKB -vs- SCM & Others* (Supra).
36. Equally, the respondents submitted that the petition as presented is not pleaded with clarity, specificity, precision and supported by evidence. Reliance is placed on *Anarita Karimi Njeru* (supra), *Mumo Mutemu -vs- Trusted Society of Human Rights Alliance & Others* [2013] KECA 445 [KLR] and *Kamau -vs- Karanja & Another* [2024] KESC 64 [KLR]. Guided by the cited case law, the respondents submitted the petition merely cites the constitutional provisions without showing the nexus of how they were violated and or the facts giving rise to the violation; otherwise, a mere citation cannot clothe the same as a constitutional petition.
37. The respondents submitted that since the petitioner has failed to prove her case to the required standards, that the allocation, survey, and registration of Plot No. 225 Kapkoi Settlement Scheme did not comply with statutory and procedural requirements and that there was a breach of her constitutional rights, the reliefs sought are unwarranted.
38. The issues calling for my determination are:
  - (1) If the petition meets the constitutional test.
  - (2) If the petitioner has pleaded and proved a breach of her constitutional rights by the respondents.
  - (3) Whether the petition has merits.
  - (4) If the doctrine of avoidance is applicable.



- (5) What is the order as to costs?
39. A party seeking constitutional reliefs on account of breach of constitutional rights and freedoms is required to comply with both procedural, statutory and constitutional requirements, which are governed by Articles 19, 20, 22, 23, 24, 25, 26, 162, 258 and 260 of *the Constitution, the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms), Practice and Procedure Rules, (Mutunga Rules) and Section 13 of the *Environment and Land Court Act*.
40. Rule 10 of the Rules requires that the petition disclose the petitioner's name and address, facts relied upon, constitutional provisions violated, nature of injury caused, capacity, date of registration, any civil or criminal case over the matter in issue pending or otherwise, reliefs sought and the signature. Rule 11 requires that the petition may be supported by an affidavit and attachments of any document that is to be relied upon. Rule 15 requires that if there are any documents attached to the petition, a respondent to file a replying affidavit or provide other written documents as a response to the petition within 14 days. A respondent may also file a cross-petition. Rule 20 allows the hearing of the petition by way of affidavits, written submissions, or oral evidence. The court is also at liberty to examine any witness or call and examine or recall any witness who may assist it in arriving at a decision.
41. The purpose of pleadings in litigation is to clarify to the opposite party and the court what is it is at issue. In a constitutional petition, an applicant must state how, when, where, nature, and the manner in which his constitutional rights and freedoms have been violated, infringed, and or threatened. See *Mumo Matemu* (supra).
42. There must be a genuine infringement, breach, denial of right or freedom, or threat to violation that calls for interpretation of *the Constitution*, -vis-à-vis the violation alleged. It is not every infringement or breach of statutory rights that must find its way into a constitutional court. Statutory rights are not constitutional rights and freedoms. See *Japheth Oloda Origa -vs- Vice Chancellor University of Nairobi & Others* [2018] eKLR and *Turkana County Government & Others -vs- Attorney General & Others* [2016] eKLR.
43. In *Anarita Karimi Njeru* (supra), the court observed that issues in a constitutional petition are required to be pleaded with clarity and in a concise manner, so as to enable the respondents and the court to appreciate the complaints laid before it. In *Mumo Matemu* (supra), the court emphasized that due process, substantive justice and exercise of jurisdiction are a function of precise legal and factual claims that define issues in litigation and administration.
44. As to what should be ventilated as a constitutional petition does not include matters relating to private disputes, such as trespass breach of contract, such a claimant ought to approach the court through other avenues for redress.
45. For instance, in *Kennedy Odoyo Okello -vs- District Land Registrar Migori & Others* [2015] eKLR, the court held that where a property is charged to a financial institution to secure repayment of a loan, and upon default, a chargee exercises the statutory power of sale, it amounted to crying wolf for the appellant to allege that his constitutional right to property and those of his family members had been breached.
46. A constitutional petition must, therefore, raise constitutional questions or issues. Similarly, a claimant must have exhausted other available alternative dispute forums to deal with the dispute before resorting to a constitutional court. Courts must also exercise restraint by giving deference to such other alternative dispute forums. See *Albert Chaurembo Mumba & 7 Others -vs- Maurice M. Munyao & 148 Others* [2016] eKLR. In *Speaker of National Assembly -vs- Njenga Karume & Others* [1992] KECA 42 (KLR), the court held that where there is a straightforward procedure for redress of any



- particular grievance prescribed by law or *the Constitution*, such a procedure should be strictly followed. Constitutional courts ought, therefore, to be a forum of the last resort and not the first port of call once a storm brews; as was held in *Geoffrey Muthinja Kabiru & Others -vs- Samuel Munge Henry & Others*.
47. Sections 9, 11, and 14 of the *Fair Administrative Action Act* are also evident in the exhaustion doctrine. Constitutional issues or questions are those that require answers from *the Constitution* and not from a statute. Even where they are raised, the court may invoke the doctrine of avoidance if such an issue or question can be decided on another basis, as held in *Communication Commission of Kenya & Others -vs- Royal Media Services Ltd & Others* [2014] eKLR.
  48. In *KKB -vs- SCM* (supra) Mativo J, (as he then was), held that the doctrines of ripeness and Constitution avoidance shun dealing with a constitutional issue where there exists another legal recourse which can give the litigant the relief he seeks. In *Furaj & Others -vs- Police & Others* Constitutional Petition 165 of 2020 [2022] KEHC 287 [KLR] (27<sup>th</sup> April 2022 (Judgment), Mativo J (as he then was), said that although a court may take up a matter and hear it, it would still decline to do so if there was another mechanism through which the dispute could be resolved.
  49. The question of non-exhaustion doctrine, its availability, efficacy and appropriateness was discussed in *Nicholas -vs- Attorney General & Others* (National Environmental Compliant Committee & Others Interested Parties Petition E007 of 2023 (2023) KESC 113 (KLR) (28<sup>th</sup> December 2023) (Judgment). The court observed that the availability of an alternative remedy did not necessarily bar an individual from seeking constitutional reliefs, especially if the alternative remedy is deemed inadequate in addressing the issue at hand and that there is a need for the court to scrutinize the purpose for which the party was seeking the reliefs. The court said that a nuanced approach should be undertaken on the relationship between constitutional reliefs on violation of rights and on alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs.
  50. The court said that if the alternative mechanism is inadequate or ineffective, there is nothing precluding a nuanced approach, the result being to safeguard a litigant's right of access to justice while also recognizing the efficacy and specificity that the alternative dispute resolution mechanism could offer.
  51. Applying the foregoing case law, respondents have pleaded and submitted that the petition is not pleaded with precision; the issues raised about the regularity and legality of the allocation, reallocation and issuance of a title deed to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, does not amount to constitutional issue(s) or question(s), to find its way to this court.
  52. The court is therefore urged to find the petition inelegantly pleaded by merely citing constitutional provisions without a nexus on how there was a violation and also to refrain from handling it through the doctrine of constitutional avoidance guided by *Yaa* (supra), *Joseph Musikali Mutemi* (supra), *Valentine Odhiambo* (supra) and *KKB* (supra).
  53. As a starting point, I have looked at the petition as presented. It substantially complies with the substantive and procedural law cited in this judgment. The respondents were able to respond to it without calling for better particulars. The petition set out the factual basis, the specific constitutional rights alleged to have been infringed and the manner of the alleged infringement. The respondents have also distilled the issues for determination by the court. See *CCK -vs- Royal Media Services Ltd* [2014] eKLR. The supporting affidavit to the petition equally sets out the facts, details, circumstances and the basis for seeking the court to find the acts of omission or commission of the respondents, as not only falling short of the statutory and constitutional parameters on the allocation and reallocation of land in settlement schemes.



54. The constitutional questions or issues raised in the petition are whether the procedure and manner in which the suit parcel of land was repossessed from the initial allottee and the subsequent reallocation to the interested parties infringed on the right to fair administrative action, right of property, equality before the law and the right against discrimination.
55. In *C.N.M. -vs- W.M.G.* [2018] eKLR, the court observed that in determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful, but if the same forces the court to consider the constitutional rights and freedoms. In this petition, the repossession, reallocation, and issuance of the title deed to the interested parties is not contested. The question before the court is not the legality and registration of the title deed, which, in my view, is a secondary issue.
56. The critical question or issue is whether the constitutional tenets as to fair administrative actions, the right to protection of property, equality before the law, right against discrimination, the natural values and principles, land management and administration guiding state officers in the settlement scheme were met.
57. In addressing the issues, regard shall not be solely based on the statute law but on *the Constitution*. A constitutional matter is one to be gleaned from the reading of *the Constitution*. It involves disputes as to whether any law or conduct is inconsistent with *the Constitution*. In my considered view, the constitutional issues or questions as raised in the petition not idle. See *Mbaabu -vs- Kaunu & 2 others* [2024] KEELC 4342 (KLR)
58. The respondents, though alleging the questions or issues can be handled in an ordinary suit, have not said how appropriate, efficacious, and capable a suit in an ordinary claim would determine whether there was an infringement of constitutional rights and freedoms. See also *Nicholas vs Attorney General* (supra). In *Dande* (supra), the court observed that under Articles 23(3), 47 of *the Constitution* and Section 7 of Fair Administrative of Action Act, the right to fair administrative action was a constitutional imperative binding not only state bodies or authorities in making administrative decisions but also any other person or private bodies carrying out administrative duties, obligations and decisions.
59. The petitioner's grievance, in my view, is beyond the alleged fraud and issuance of the title deed. It is on whether, in undertaking their statutory duties or obligations, by the respondents, the process of recall, repossession, reallocation, and issuance of the title deed to the interested parties met the constitutional test on administrative justice. An administrative action under Section 2 of the Fair Administrative of Action Act includes the powers, functions, and duties exercised by authorities, acts or omissions, or decisions by the body that affect the legal rights or interests of any person to whom such action relates.
60. Article 47 of *the Constitution* provides that administrative action must be expeditious, efficient, lawful, reasonable, and procedurally fair. The purpose of administrative justice under Article 47(b) of *the Constitution* is to promote efficient administration. See *Kiluwa Ltd & Another -vs- Business Liaison Co. Ltd & Others*, Petition 14 of 2026 [2022] KESC 37 [KLR] (6<sup>TH</sup> August, 2021) (Judgment). In *James Willy Kingori -vs- Chairman, Extraordinary Meeting of Michimikuru Factory Ltd & Others* [2022] eKLR, the court cited *Dry Associates Ltd -vs- Capital Markets Authority & Another* [2002] eKLR, that Article 47 of *the Constitution* was intended to subject administrative processes to constitutional discipline.
61. In *Judicial Service Commission -vs- Mbalu Mutava & Another* [2015] eKLR, the court observed that Article 47 was a transformative development of administrative justice to control the powers of state organs and other parties as a reflection of national values such as the rule of law; good governance, social



justice, human rights, transparency and accountability and that the failure to observe the constitutional imperatives for all intents and purposes undermines the rule of law and the values of Article 19(1) of *the Constitution*, since the bill of rights is an integral part of Kenyans democracy and a framework for social, economic and cultural policies.

62. In Republic -vs- Firearms Licencing Board & Another Ex-parte Boniface Mwaura [2019] eKLR, the court observed that all laws must conform to *the Constitution*, all statutes must be interpreted through the prism of the Bill of rights, and that Article 47 of *the Constitution* guarantees every person the right to fair administrative action that includes procedural fairness or natural justice, that under Section 7(2) of the Fair Administrative and Action Act, there are grounds of applying for judicial review as a means of supervising public bodies regarding the legal validity of their decisions or acts.
63. The court in this petition is therefore called upon to assess whether or not the actions of the respondents in recalling, reallocating, and issuing the title deed to the interested parties oblivious of the rights or interests of the occupant of the land on the ground passes the constitutional test under Articles 10, 27, 40, 47, 60 and 73 of *the Constitution*, regarding fairness, reasonableness, rationality, transparency, intelligibility, justification, legality, fairness, rationality and proportionality.
64. A party seeking constitutional reliefs for breach of constitutional rights and freedoms must avail cogent and tangible evidence. In Christian Juma Wabwire -vs- Attorney General [2019] eKLR and *Peter Ngari Kagame & Others -vs- Attorney General, Constitutional Petition No. 128 of 2006*, the court observed that a petitioner has to avail tangible evidence of the violation of the rights and freedoms other than mere allegations since a court should not deal with speculations or imaginations. In Mumo Matemu (supra), the court observed that even where a party cites articles of *the Constitution*, alleging that they have been violated, they are duty bound to adduce convincing evidence to prove the alleged violations.
65. In DPP -vs- Tom Ojienda T/a Prof Tom Ojienda & Associates Advocates & Others [2015] eKLR, the court held that Prof. Ojienda had not demonstrated how he was deprived of his right to property under Article 40 of *the Constitution* since he still had control and ownership of the bank account during the investigations. As to whether the acts of the EACC were administrative or not, the court held if indeed the actions were not as per Section 2 of the *Fair Administrative Action Act* and under Section 28 of the ACECA as read together with Article 47 of *the Constitution*, and without the issuance of a notice in writing to the petitioner, his rights had been violated. The court observed that some investigations do affect the rights or interests of the person being investigated. The EACC actions were subject to Article 47 of *the Constitution*. The court observed that Article 2 of *the Constitution* is supreme and binding on all state organs, and therefore, the EACC could not pick and choose which of the actions are bound by *the Constitution*.
66. The petitioner avers that her late husband died on 5/9/2011. She avers that Plot No. 225 at Kapkoi Settlement Scheme belongs to the estate of the deceased by dint of a certificate of confirmation of grant issued on 25/5/2023. According to the petitioner, her late husband was a lawful purchaser of the land from the initial allottee, Tirop A. Saina, on 1/12/1987.
67. Other than the sale agreement and the receipts acknowledging payments, the petitioner has not attached any documents to show that the seller of the land was a valid owner of the plot before purporting to sell it to her late husband. A nullity is a nullity. A party with no good title cannot pass anything good to another. In paragraphs 4, 5, 6, 7, and 8 of the replying affidavit by the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents, it is averred that though the late Tirop A. Saina was the initial allottee of the plot, he failed to meet the terms and conditions of the charge that he executed on 1/12/1987 within 28 years, leading to notice to remedy the default, all attached as annexures NCI-1, 2(a), (b), 3, 4(a) and (b), resulting to the cancellation of his offer on 14/8/2019. The petitioner refutes knowledge or service of



- the default notices. She unfortunately failed to call evidence from the initial allottee to deny service or non-compliance with the offer.
68. It is a cardinal principle of contract law that where the intention of the parties has been reduced to writing, extrinsic evidence, oral or otherwise, cannot be admitted to show that intention to contract, vary, or add to the terms of the documents. See *Twiga Chemicals Industries Ltd -vs- Allen Stephen Reynolds* (2015) eKLR. See also Sections 97 and 98 of the [Evidence Act](#).
  69. Section 11 of the Limitations of Actions Act provides that a right of action to recover land by virtue of forfeiture or breach of conditions accrues on the date on which the liability to forfeiture occurred or the condition broken. The charge was signed on 1/12/1987 by the late Tirop A. Saina. The notice to remedy the breach was issued on 7/11/2018. The cancellation occurred on 14/8/2018. The first installment by the initial allottee, as per the charge, was due on 30/6/1982. Clause 3 provided that the initial allottee could not part, lease, or transfer the land without the prior consent, in writing, by the Trustees. Clause 3(2) required payment of all premiums and other monies to the Trustees on their due dates. The charge was subject to the Agriculture Act (now repealed).
  70. The charge provided that the allottee shall, within 6 months, cultivate at least 1 acre, erect a dwelling house, and erect a fence in breach of which the land shall be liable to forfeiture to the Settlement Fund Trustees upon service of a notice specifying the breach and requiring the remedying of the same. From the charge, it is clear that the original allottee acknowledged receipt of the charge. The demand notices were all sent to the address that the initial allottee gave on 1/12/1987, namely P.O. Box 2112, Kitale.
  71. The ground report dated 30/10/2018 was clear that the initial allottee had made no payments, and the fence and the structures on the land were missing. Equally, the person found on the land was Peter Bwonde's son, who had placed a caution on the land claiming a purchaser's interest. All this information confirmed a breach of the charge by the initial allottee. Time in a cause of action in a contract begins to run when the breach occurs. See *Gregory Mburu -vs- Thika District Hospital* [2018] eKLR.
  72. The breach was first communicated to the original allottee on 2/8/1989, 12 years had expired in 2001. The initial allottee failed to enforce or remedy the charge or seek specific performance to get the land. The contract became invalid and unenforceable due to his default. The disposal of the land to the late petitioner's husband without prior consent in writing from the SFT, in my view, was a fundamental breach of the offer letter.
  73. The petitioner now seeks to derive benefits from a non-existent contract or from an illegal transaction that her late husband had with the initial allottee, who had defaulted. The initial allottee had no better title to pass downstream to the late Peter Bwonde in 2008. See *Arthi Highway Developers Ltd -vs- West End Butchery* (2015) eKLR. No good title had vested in Tirop Arap Saina.
  74. The moment his charge became invalid, and the plot was forfeited on account of default and the failure to remedy the breach, despite valid notices, the initial allottee had nothing vested in him that he could pass to the petitioner's late husband. See *Dina Management Ltd -vs- County Government of Mombasa & 5 Others*, Petition No. 8 (E010) of 2021 [2023] KESC 30 [KLR].
  75. In *France International Ltd -vs- Kenya Anti- Corruption Commission & Others* (Civil Appeal No. E038 of 2021 [2024] KECA 714 [KLR] (21<sup>st</sup> June 2024) (Judgment), the court observed that the transfer of an allotment letter does not transfer any registrable interest and as held in *Torino Enterprises Limited -vs- Attorney General* [2023] KESC 79 (KLR), an allotment letter is a mere offer awaiting fulfillment of the stipulated conditions. The court cited *Gladys Wanjiru Ngacha -vs- Teresa Chepsant & Others* [2008] eKLR, that a letter of allotment per se is nothing but an invitation to treat that does



- not constitute a contract between the offeror with the offeree, capable of conferring interest in land at all.
76. In this petition, the initial allottee had not perfected the charge by fulfilling the terms and conditions thereon before he sold the land or passed on. The standard payments had not been paid. Unless and until he had acquired title to the land through registration under the applicable law, the late Tirop A. Saina could not confer any registrable interests or rights on the land to the late Peter Bwonde.
  77. Equally, by the time the late Peter Bwonde passed on on 5/9/2011, the suit land could not be termed as free property to his estate under Section 3 of the *Law of Succession Act*, capable of devolving to the petitioner and the estate, than the sale agreement, the late Peter Bwonde had not been registered as owner of the land. His name was not on the area list for those who had perfected the charge with the SFT. His alleged sale agreement and occupation of the land, if any, had not been authorized or approved in writing by the SFT.
  78. In *Botwa Farm Company Ltd -vs- Settlement Funds Trustee & another* [2019] eKLR, the court cited *John Kamunya & Another -vs- John Nginya Muchiri & Others* [2015] eKLR, that a land transaction between a purchaser and a seller that took place before the seller had completed paying a mortgage with the SFT had no contractual import until the seller had discharge his indebtedness to the SFT and the title transferred into his name as the owner. The court said that upon the repossession and issuance of the title to new owners, the titles could not be canceled without joining the new owners as parties to the suit.
  79. In *James Kiprono Tinego -vs- Peter Khisa Musungu* [2012] eKLR, the court was of the view that the offeree could not transfer an offer that he had yet to accept. The court said that in the absence of evidence of a sale and transfer sanctioned by the Land Control Board, the alleged sale was illegal, null, and void and that no legal interest in the land had ever passed to the purchaser. The court held that the land was forfeited after the offeree failed to accept the offer, and the land was offered to someone else who accepted the offer, paid for the land, and followed the procedure to acquire title to the land.
  80. In *Raphael Kibunei Kilach v Kenneth Kiptoo Boit & 4 others* [2019] eKLR, the court observed that the plaintiff had no proprietary interest in the suit land on the alleged fraud compared to the defendant, who had tabled proof of legality of the transaction backed by documentary evidence.
  81. Applying the foregoing case law to the facts in this petition, the petitioner had no proprietary interests or rights protected by law on the land in the first instance. A court of law cannot sanction an illegality. The petitioner wants to benefit from an illegal transaction.
  82. Equally, she wants the court itself to be made an instrument of enforcing an obligation arising out of the contract or transaction, which is illegal, as held in *Five Forty Aviation Ltd vs Erwan Lanoe* [2019] eKLR.
  83. Contracts that are illegal or against public policy or morality are illegal. The Agriculture Act had mandated the Settlement Fund Trustee to forfeit land where the offeree had breached the terms of the offer and the charge. The petitioner had an obligation to conduct due diligence and establish if the initial owner had complied with the law and perfected the charge with the Settlement Fund Trustee so that he could pass a clean title to her. The initial owner possessed and utilized the land without paying for it. That amounts to unjust enrichment. Equally, the petitioner's late husband continued to perpetuate the illegality.
  84. The allocating authority had not sanctioned the sale agreement between the initial allottee and the late Peter Bwonde. The petitioner seeks to elevate an otherwise contractual land claim to a constitutional



issue, yet she has not demonstrated any interests or rights to the suit land worthy of protection in contract law.

85. In *Basil Criticos -vs- Attorney General & Others* [2013] eKLR, the court invoked the doctrine of constitutional avoidance regarding matters of Chapter 6 of *the Constitution*, for there are alternative mechanisms for inquiry into unethical conduct created by statute before approaching the court.
86. The court observed that the existence of SFT was not in conflict with *the Constitution* under Article 60 of *the Constitution* and its powers and functions were covered under Section 134 of the *Land Act*. The court termed the argument by the petitioner against the 4<sup>th</sup> respondent pedestrian.
87. In this petition, other than making cold and blanket allegations of constitutional breach of rights, the petitioner has not provided a scintilla of evidence with the legal, statutory, and constitutional obligation that the respondents owed her in the first instance, given that the initial allottee had no protectable land rights or interests that he could pass to her late husband. In *Gabriel Mutava & Others M.D. KPA & Another* [2016] eKLR, the court observed that a contractual right negotiated and agreed by the employer and employee under the provision of private law, even if it was a public body, should not have been elevated into a constitutional petition.
88. In *Mwangi & Others -vs- Attorney General & Others; Joseph Kuria Njuguna & Others (IP) E&L Petition 146 of 2018* [2022] KEELC 84 [KLR] (26<sup>th</sup> May 2023)(Judgment), the court cited *Godfrey Paul Okutoyi -vs- Habil Olaka* [2018] eKLR, that rights conferred by statute are not fundamental rights under the Bill of Rights and therefore, breach of such rights should be redressed by way of ordinary suits.
89. In my considered view, therefore, the petitioner has failed to substantiate her claim. She does not, therefore, deserve the reliefs sought. I proceed to dismiss the petition with no orders as to costs.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 2<sup>ND</sup> DAY OF APRIL 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:

Court Assistant -- Laban

Lichuma for the Petitioner present

Nyaberi for 2<sup>nd</sup> Interested Party present

Oonge for 1<sup>st</sup> Interested Party present

No appearance for the Respondents.

