



**Malua v Yatta & 2 others (Environment and Land Constitutional Petition  
1 of 2021) [2022] KEELC 15261 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15261 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 1 OF 2021**

**LG KIMANI, J**

**DECEMBER 8, 2022**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLE 21 (1) ,25 (C) , 27 (1) AND 47 (1) AND (2), 50 (1)  
AND S.77(1) AND 77(A) OF THE REPEALED CONSTITUTION AS READ WITH S.6  
AND 7 OF THE SIXTH SCHEDULE TO THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF THE PREAMBLE TO AND ARTICLES 1, 2, 3. 4. 10,  
19, 20, 23, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLE 8 AND 10 OF THE UNITED  
NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**AND**

**IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284, AND  
IN THE MATTER OF THE SPECIAL MINISTER FOR LANDS AND  
PHYSICAL PLANNING APPOINTED FOR PURPOSES OF APPEALS  
UNDER SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284**

**AND**

**IN THE MATTER OF THE DECISION /RULING IN APPEALS NO. 245 OF  
1988 RELATING TO PARCEL NO.188 NZALAE LAND ADJUDICATION  
SECTION AND APPEAL NO.241 OF 1988 FOR LAND PARCEL NO.186  
NZALAE LAND ADJUDICATION SECTION DATED 30.4.2019 RESPECTIVELY.**

**BETWEEN**

**MUTINDA MUSILA MALUA ..... PETITIONER**

**AND**

**NGUNGA YATTA ..... 1<sup>ST</sup> RESPONDENT**



**DEPUTY COUNTY COMMISSIONER, KITUI WEST SUB-COUNTY ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

## JUDGMENT

1. Before the court is a Petition dated June 14, 2019 brought under the provisions of the Constitution of Kenya 2010 cited above; The Petitioner claims to be a resident of Kitui West Sub-County, Kitui County and has enforceable rights under the Constitution of Kenya 2010. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are sued in their capacity as office holders and institution respectively conferred under the Land Adjudication Act, Cap 284 Laws of Kenya while the 4<sup>th</sup> Respondent is the chief legal advisor of Government of Kenya.
2. The Petitioner avers that the initial dispute was between his father, one Musila Ngua (deceased) who was sued by the 1<sup>st</sup> Respondents father Ngunga Yatta (deceased) in Ministers Appeal No 241 of 1988 in relation to Parcel No 186 and Appeal No 245 of 1988 in relation to parcel no 188 Nzalae Land Adjudication Section lodged on December 22, 1986. The said appeals were never heard until April 30, 2019 having delayed for a period of 33 years which delay the petitioner contends was in violation of the Constitution. The Petitioner claims that after hearing the appeals the 2<sup>nd</sup> Respondent awarded the two parcels of land to the 1<sup>st</sup> Respondent.
3. The Petitioner states that he had legitimate expectation that the 3<sup>rd</sup> Respondent, after receiving the appeals and in exercise of the administrative powers conferred upon him would expeditiously, efficiently, without delay and within a reasonable time prepare the appeals for hearing by the 2<sup>nd</sup> Respondent in accordance with Section 29 (1) and (2) of the Land Adjudication Act and Article 25 (c), 47 and 50 (1) of the Constitution of Kenya 2010.
4. The Petitioner claims that delay of 33 years was unfair and in breach of Sections 77(1) and 77(9) of the Repealed Constitution of Kenya and Articles 2(4), 25(c), 50(1) and Article 47 of the Constitution of Kenya. The Petitioner's father passed away before hearing of the appeals.
5. The Petitioner claims breach of fair administrative action and violation of his right to a fair hearing in the substance and the procedure adopted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
6. The Petitioner further contended that his right to an independent and impartial trial under Articles 25(c) and Article 50(1) of the Constitution were violated for the reason that the 2<sup>nd</sup> Respondent demanded payments from the Petitioner coined as costs, expenses, charges for conducting hearings, sitting allowances and for visiting or viewing the disputed parcels of land. He pointed out that the Petitioner paid a total of over Kshs 150, 000/= while the 1<sup>st</sup> Respondent paid over Kshs 300,000/= hence he is under the impression that whoever paid the most allowances had the power to influence the independence and impartiality of the 2<sup>nd</sup> Respondent.
7. The Petitioner further claims that the acts of the 2<sup>nd</sup> Respondent were in violation of Article 10 of the United Nations Declaration of Human Rights guarantees to a fair hearing by an independent and impartial tribunal in the determination of rights.
8. The Petitioner has also raised issue with Section 29 of the Land Adjudication Act CAP 284 stating that it does not make in built provision to ensure that Land Adjudication officers after receiving appeals will ensure hearing by the Minister within a reasonable time nor does it set out procedures to guarantee



fair administrative action, nor to ensure the integrity, independence, impartiality and fairness of the process in accordance with the constitution and other statute.

9. It is his contention that Section 29 of the Land Adjudication Act, having not been amended, revised and/or repealed after the promulgation of the Constitution of Kenya 2010 is in conflict with its tenets, values and principles of governance under Articles 10 (a) 19, 20, 21, 22, 25, 47 (1) and 50 (1) and Sections 77 (1) and 77 (9) of the repealed constitution.
10. Further, the Petitioner claims that Section 29 of the Land Adjudication Act confers quasi-judicial functions to the 2<sup>nd</sup> Respondent but does not make any proper provisions to ensure integrity, independence, impartiality and fairness and to that extent it is flawed and exposed to corruption and likely to abuse, manipulation and exploitation for selfish gain.
11. In view of the above, the Petitioner has averred that the verdicts reached by the 3<sup>rd</sup> Respondent on April 30, 2019 lack legality and/or validity as it is a constitutional principle of just and fair determination of judicial and quasi-judicial disputes and that the Petitioner has the right to defend the constitution under Article 3 as well as that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had a duty as administrative/adjudicative bodies to observe, protect and promote the petitioners fundamental rights. The Petitioner therefore prays for the following orders:
  - a) A declaration that the process of administrative action and the proceedings of the adjudication adopted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were and/or was inconsistent with and in contravention of section 77(1) and 77(9) of the repealed Constitution and in violation of Article 25(c), 47(1) and 50(1) of the Constitution of Kenya,2010, hence invalid, null and void.
  - b) A declaration that the proceedings and the verdict of the 2<sup>nd</sup> Respondent were in violation of fundamental rights enshrined in Article 25(c), 47(1) and 50(1) of The Constitution of Kenya and Article 10 of the United Nations Universal Declaration of Human Rights and hencefore null and void.
  - c) A declaration that in so much as S.29 of The Land Adjudication Act does not provide a clear legal or institutional and financial policy framework to support the adjudicative functions of the Deputy Commissioners or the District Commissioners as they were then, so as to ensure independence, impartiality and the integrity and leadership of the adjudication, then, it was in conflict with aspiration of s.77(1) and 77(9) of the repealed Constitution and as per articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) of the Constitution of Kenya.
  - d) A declaration that in so much as S.29 of the Land Adjudication Act does not provide for or is silent on the aspirations and the expectations of the Kenyan citizens of a hearing of their disputes within a reasonable time as was assured or enshrined in S.77 and 77(1) and 77(9) of the repealed Constitution, and as guaranteed in Article 50(1) of the Constitution of Kenya(2010), then to that extent, it was in conflict with S.77(9) of the repealed Constitution and Article 50(1) of the Constitution of Kenya 2010.
  - e) A declaration that in so much as S.29 of the Land Adjudication Act has not been revised, amended, repealed and/or reformed or any legal framework thereto promulgated to accord or reflect the aspirations of or expectation of or demands of the citizens of a fair trial and hearing within a reasonable time and/or fair administrative actions and the values , principles and objectives of good governance as expected of all adjudicative functions then and to that extend, it is in conflict with Article 10(1) and (2),19,20,21,22,25(c),47(1) and 50(1) pf the Constitution of Kenya 2010 and S.77(1) and 77(9) of the repealed Constitution.



## The Petitioners Case

12. The court directed that the Petition proceed by way of viva voce evidence. The Petitioner testified and adopted his supporting affidavit as evidence in chief. He also adopted and produced as exhibits the documents attached to the supporting affidavit and on the list of documents dated April 27, 2022. The Petitioner stated that the area where the suit parcels of land are situated was declared an adjudication section on October 22, 1976. That at the time the Petitioners father was alive and the land parcel No 188 was demarcated and adjudicated in his name. That the 1<sup>st</sup> Respondent lodged a claim to the land in committee case no 154 of 1977. That the case was heard and determined and the claim was dismissed. The 1<sup>st</sup> Respondent then filed a case before the Arbitration Board in case NO AB 18 of 1977. The case was heard and it was decided that Land Parcel 188 be subdivided into two and the 1<sup>st</sup> Respondent was given a portion of it being parcel No 186 while the Petitioners father retained parcel No 188 and that remained the position until the hearing before the Minister.
13. Thereafter the Petitioners father and the 1<sup>st</sup> Respondent lodged objections vide objection No 114 of 1984 against parcel 186 by the Petitioners father and Objection 238 of 1984 against parcel No 188 by the 1<sup>st</sup> Respondent. That the objections were heard and the two were dismissed with both parties being left with the same land parcels No 188 for the Petitioners father and 186 for the 1<sup>st</sup> Respondents father.
14. However, the 1<sup>st</sup> Respondents father lodged the two appeals to the Minister referred to previously and the 2<sup>nd</sup> Respondent in his judgment awarded the 1<sup>st</sup> Respondent a portion of parcel No.188 and awarded parcel no.186 to the 1<sup>st</sup> Respondent and further directed that the two parcels be rejoined as one land. Further it was directed that the boundaries be fixed.
15. The 3<sup>rd</sup> Respondent is joined in this suit as having the administrative duty to follow up on the files with appeals and take them to the 2<sup>nd</sup> Respondent for hearing. His father unfortunately passed away on October 14, 1982, before the appeals were determined and in the course of time, they had done developments on Land Parcel No 188, hence it was absurd to award an extra portion of land to the 1<sup>st</sup> Respondent.
16. The Petitioner reiterated the contents of the Petition highlighting that they were made to incur expenses in the hearing process of the appeals as the 2<sup>nd</sup> Respondent demanded payments from the Petitioner coined as costs, expenses, charges for conducting hearings, sitting allowances and for visiting or viewing the disputed parcels of land. They were made to understand that this was a requirement from all litigants. He pointed out that the Petitioner paid a total of over Kshs 150, 000/= while the 1<sup>st</sup> Respondent paid over Kshs 300,000/= and he attached M-Pesa statements evidencing this but later learnt that they had incurred less costs than the Petitioner.
17. On the issue of delay in hearing the appeals, the Petitioner testified that he used to check with the office of the Minister to confirm the hearing of the appeals but was always told to wait. He later on found out the appeals had been transferred to the Assistant County Commissioner's office at Kabati. They were then summoned for hearing but were told that for the elders to visit the land he had to give them money for fuel and further that all other people involved in the appeal were giving the money for the same purpose. The Petitioner complained that when the 2<sup>nd</sup> Respondent went to view the land there was an unknown person who was identifying the land. He further stated that the allegations that the 1<sup>st</sup> Respondent gave money to the 2<sup>nd</sup> Respondent were true.
18. Upon cross-examination, the Petitioner denied stating that the 2<sup>nd</sup> Respondent was bribed; but stated that his evidence was that he was asked money for fuel and allowances. He also clarified that he did not see the 1<sup>st</sup> Respondent give any money to the 2<sup>nd</sup> Respondent but that it was given by someone else.



19. The Petitioner confirmed that the 2<sup>nd</sup> Respondent visited the suit land and found that there was a home built on the land by a son of the 1<sup>st</sup> Respondent.
20. PW 2 James Malua Musila is the Petitioner's brother and he confirmed that the money that he paid to the 2<sup>nd</sup> Respondent was sitting allowances, transport and viewing fee and that he sent money about five times. He further stated that during the viewing of the land, there was a stranger who was leading in showing of the land and that he has never seen him again. He further stated that he learnt that the 1<sup>st</sup> Respondent paid Kshs 300, 000 to the 2<sup>nd</sup> Respondent but did not actually see him giving the money and did not have evidence showing the same.

### **1<sup>st</sup> Respondent's Case**

21. The 1<sup>st</sup> Respondent herein testified that he hails from Nzalae in Kitui West and that his father Ngunga Yatta (deceased) was the one who dealt with this dispute until the time of his death and that he took over as administrator of his estate. The deceased had filed a reply to the petition stating that he participated in all the Adjudication processes in relation to Parcel Number 186 and 188-Nzalae Mutonguni Adjudication Section and avers that all the processes and decisions with regard to the land were conducted in accordance with the relevant law. He stated that the Petitioner's rights were not violated as alleged or at all and that the Petitioner has not placed any credible, cogent and concrete material before the Court to prove the alleged violation of fundamental rights and freedoms.
22. With regard to the Petitioner's claim that the 1<sup>st</sup> Respondent gave out Kshs 300, 000 to influence the outcome of the Appeals, the 1<sup>st</sup> Respondent denied this or any other form of inducement as alleged. He stated that the claims are meant to scandalize, annoy, vex and stain his character and that of the 2<sup>nd</sup> Respondent. That if the Petitioner is aggrieved by the delay in hearing the appeal the said delay if any cannot be the basis for invalidating an otherwise lawful decision.
23. The 1<sup>st</sup> Respondent denied influencing the outcome of appeals 241 /88 and 145/88 as he had no control over the handling of the Appeals. He pointed out that the Minister has no time lines within which to conclude appeals and as such he is not to blame for the perceived delay in the delivery of the decisions. He further stated that that during the hearing, of appeals to the there were members from the Petitioner's family, from his family and from the office of the 2<sup>nd</sup> Respondent present.
24. The 1<sup>st</sup> Respondent stated that he was satisfied with the 2<sup>nd</sup> Respondent's judgment and did not notice anything wrong with the way the appeal was conducted. The 1<sup>st</sup> Respondent confirmed that his father was the one who prosecuted the two appeals before the 2<sup>nd</sup> Respondent. Regarding the delay, he stated that it was the responsibility of the government to have the case heard. He completely denied ever sending any money during the hearing of the case.

### **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent's Case**

25. The 2<sup>nd</sup> to 4<sup>th</sup> Respondent's filed Grounds of Opposition dated September 30, 2019 on the following grounds:
  1. That the Land Adjudication Act does not impose a time limit within which Appeals for the Minister should be heard.
  2. That the Petitioner's fully participated in the Minister's Appeal hence cannot claim that he was accorded fair hearing.
  3. That the allegations of corruption against the 2<sup>nd</sup> Respondent are best raised and determined in a criminal court.



4. That the Petition as drawn and taken out is bad in law, incompetent and otherwise an abuse of the process of this Honourable Court and prayed that the Petition be dismissed with costs.

### **The Petitioner's submissions**

26. The Petitioner submitted on the government and its official's duty to uphold the rule of law. He emphasized that there was an unexplained prolonged delay from lodging of the appeals to the time the appeal was determined stretching over a period of 33 years which offended his fundamental freedoms and rights guaranteed under the Bill of Rights and particularly S.77 (a) of the repealed constitution to have a fair hearing within a reasonable time as well as Article 50(1) of the Constitution of Kenya on fair trial and Article 47(1) on the right to fair administrative action. The Petitioner added that if for some reason the two appeals could not be determined within a reasonable time or without unreasonable delay, then the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is obliged to give reasons. According to the Petitioner, the 1<sup>st</sup> Respondent's Claim that the Land Adjudication Act CAP 284 does not give a Minister any time limit cannot justify the delay.
27. The Petitioner relied on the Zimbabwean case of *Re Mlambo (1993) 2 LRC and Shameem v State (2007) FJCA* on the concept of reasonableness where the Court states that 'The concept of reasonableness is one which defies definition' It went on to state that 'whether a period of delay complained of was unreasonable or not was a question of degree: that it might have been the practice in the past to tolerate such delays did not protect them from scrutiny under section 18 (2) of the constitution. The onus was on the accused to show that the delay complained of was prima facie unreasonable or presumptively prejudicial.' *Shameem v State [2007] FJCA* the court made the following findings: -
28. With regard to Section 29 of the and Adjudication Act, the Petitioner submitted that even though it does not provide for time limit within which to act, the section is not a stand-alone law but must be read alongside the Constitution, Section 7(2) of the Fair Administrative Action Act and well-known principles of common law and doctrines of equity, the rule of law and the due process and tenets of fairness and justice. According to the Petitioner, the uncertainty and delay prevented them from taking actions on the land as they were uncertain of their legal rights. The law did not empower the Minister to delay the dispute for over thirty-three years, therefore he submits that the decision was made ultra vires while relying on the holding in the case of *Craig v South Australia [1995]184 CLR 163*.
29. Counsel relied on several authorities in the matter including the Australian case of *MZAPC v Minister For Immigration and Border Protection[2021] HCA 17* and *Stead V State Government Insurance Commission [1986] 161 CLR* and *WZAPH (2015 256 CLR 326*.
30. Further, regarding conflict with the Constitution, the Petitioner submitted that as per Articles 25(c) of the Constitution, Article 50(1)(e) and Articles 47(1) and (2) the delay of the trial for over 33 years was not a trial that was expeditious, efficient, lawful, reasonable and procedurally fair as per the law. The Petitioner highlighted sub-article 2 of Article 47 and put a duty on the administrator to give reasons for any eventuality that is likely to adversely affect the person entitled to the administrative action in question.
31. The Petitioner avers that he exercised his rights under Section 29 of the Land Adjudication Act by lodging an appeal No 175 of 1978 but he claims his Constitutional right to fair trial under Article 25 (c) and 47 (1) of the Constitution was violated since the 2<sup>nd</sup> Respondent failed to take any proceedings or accord the Petitioner's witnesses the opportunity to testify. He averred that he had a legitimate expectation that the appeal would be heard and determined within a reasonable period of time but



was delivered after a period of about thirty nine (33) years, that the 2<sup>nd</sup> Respondent would be fair, just and neutral to all parties.

32. the Petitioner submitted on the conduct of the 2<sup>nd</sup> Respondent in soliciting for money from the Petitioner and receiving money from the 1<sup>st</sup> Respondent in order to give a favourable decision amounted to a violation of the constitution since he was a public officer. He relied on Article 10 (2) of the Constitution on the national values and principles of governance and Chapter six of the Constitution as well as the [Public Officer Ethics Act](#) No 4 of 2003 and The [Leadership and Integrity Act](#) No 19 of 2012. Counsel further cited several authorities in support of his submissions.

### **The 1<sup>st</sup> Respondent's submissions**

33. The 1<sup>st</sup> Respondent submitted that this Petition falls short of the legal threshold required of Petitions of this nature and that it is misconceived, grossly incompetent, misleading, an afterthought, speculative and an abuse of the process of the court. The 1<sup>st</sup> Respondent pointed out that in the hearing, upon being cross-examined on the allegations of bribery, the Petitioner categorically denied ever raising those allegations in his Petition and could not sustain the allegation.
34. Submitting that it is trite in law that he who alleges must prove, and the fact that a Respondent who does not adduce evidence in rebuttal thereof is not any better the 1<sup>st</sup> Respondent submitted that the allegations were rebutted by the 1<sup>st</sup> Respondent who testified that the 2<sup>nd</sup> Respondent's conduct was irreproachable. The 2<sup>nd</sup> Respondent had the requisite jurisdiction to hear and determine appeals, and none of the parties were denied a chance to present their respective cases according to the 1<sup>st</sup> Respondent.
35. The 1<sup>st</sup> Respondent quoted Section 29(1) of the Land Adjudication Act and stated that there is nothing in the said section to suggest that the 2<sup>nd</sup> Respondent had statutory timelines within which to determine the subject appeals. He added that he cannot be faulted for this legislative deficiency.
36. Submitting that the Petitioner failed to discharge his burden of proof, the 1<sup>st</sup> Respondent submitted that the Petition is devoid of merit and ought to be dismissed with costs.

### **Analysis and Determination**

37. I have considered the petition herein, supporting affidavits and attached documents and the documents filed in opposition to the petition. I have also considered the evidence adduced at the hearing and the submissions by Counsel for the parties and the many authorities cited. I am of the view that the following issues arise for determination;
- 1) Was there a breach of the Petitioner's right to fair hearing within a reasonable time and the right to fair administrative action?
  - 2) Was there a violation or breach of independence and impartiality on the part of the 2<sup>nd</sup> Respondent?
  - 3) Is there a conflict of Section 29 of the Land Adjudication Act with the Constitution?

#### **1. Was there a breach of the Petitioner's right to fair hearing within a reasonable time and right to fair administrative action?**

38. The Petitioner pleaded violation of his right to a fair hearing under Articles 77(1) and 77(9) of the repealed Constitution and Article 2(4), 25(c) and 50(1) of the [Constitution of Kenya 2010](#) and his right to fair administrative action under Article 47 due to the prolonged delay of the hearing of the appeals



from the time they were filed, amounting to a total of about 33 years. Section 77(9) of the Repealed Constitution of which provided that;

' A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.'

39. The fundamental right to fair trial breach of which the Petitioner claims is guaranteed by Article 25(c) and Article 50 (1) and (2) (e) of the [Constitution of Kenya 2010](#) which provides that: -

' Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(e) To have the trial begin and conclude without unreasonable delay;'

Article 47 of the Constitution of Kenya provides that:

'Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.'

40. It is an admitted fact that the period between the filing of the appeal and the time when judgment was rendered was 33 years and the Petitioner claims the period was an unreasonable delay that amounts to a violation of the his constitutional rights. The court agrees that a period of 33 years from the time of filing the appeals to the time of hearing and determination was a prolonged length of time and delay. Unfortunately and as complained by the Petitioner, the 2<sup>nd</sup> Respondent did not deem it fit to offer any explanation for the said prolonged delay. Further, the Petitioner claims that he was entitled to reasons for the prolonged delay under Article 47 (2) which provides for the right to be given written reasons for a decision that is likely to adversely affect him and no reasons were given as required by law. On the failure to give reasons the court agrees that there is failure to give reason for the prolonged period. However, it is noted that there is no request prior to filing this suit for said reasons.

41. The issue that arises for determination is whether the Delay was so Inordinate as to Result in violation of the Petitioners' right to fair trial within a reasonable time contrary to Article 50(2)(e) and Section 77 of the [repealed Constitution](#). According to Black's Law Dictionary the term unreasonable is defined as 'Not guided by reason, irrational or capricious' while reasonable is defined as 'Fair, proper or moderate under the circumstances, sensible.'

42. In considering whether the delay was unreasonable it is important to look at the circumstances surrounding the delay. The appeal to the Minister was filed by the 1<sup>st</sup> Respondents father. In my view he had the responsibility of following up on the said appeal to ensure that the same was heard expeditiously and without undue delay. The 1<sup>st</sup> Respondent did not show to the court what efforts the deceased made to have the appeal heard. However, the evidence of the Petitioner shows that he used to go to the offices of the 2<sup>nd</sup> Respondent to follow up on the appeal but he was asked to wait. It appears from the conduct of the parties that the 2<sup>nd</sup> Respondent being the officer in charge with the mandate of hearing and determining appeals had control of the time and place when the appeal would be heard. Indeed it was confirmed that it is that office which summoned the parties for hearing of the appeal.



43. Section 29 of the [Land Adjudication Act](#) does not provide for the process of fixing of hearing dates for appeals filed. It appears that the hearing of the appeals is at the discretion of the Minister and it behooves that office to set the appeals down for hearing and hear them in accordance with relevant provisions of the law relating to hearing cases expeditiously and without unreasonable delay.
44. The Petitioner claims that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents bore the burden of explaining the reasons for the delay and in this case they failed to do so. Counsel for the Petitioner submitted that even though the burden of proof will normally be on the applicant (Petitioner in this case) courts generally expect public authority defendants to explain themselves. On this Counsel for the Petitioner relies on the Australian case of *MZAPC v Minister For Immigration And Border Protection* (2021) HCA 17. The Petitioner further submits that all he had to show was that the denial of natural justice deprived him of the possibility of a successful outcome and it was for the Respondents to demonstrate that a properly conducted trial could not possibly have produced a different result. On this Counsel relied on the Australian cases of *Stead v State Government Insurance Commission* [1986] 161 CLR and *WZAPH* (2015) 256 CLR 326. Generally the Petitioner's submission is that once there is an error, irregularity or delay or a wrong in a decision or process leading to a miscarriage of justice the burden automatically shifts to the state to satisfy the court that there has been no substantial miscarriage of justice.
45. Kenyan courts have had occasion to analyze and consider commonwealth and international jurisprudence and domestic case law on provisions of law similar to the Kenyan provisions on fair hearing within a reasonable time. This was in the case of [Julius Kamau Mbugua v Republic \[2010\] eKLR](#) where the court of Appeal made the following summary of the legal position;

' The following broad principles emerge from the consideration of the Commonwealth and international jurisprudence on the right to a trial within a reasonable time which we will endeavour to restate, thus:

- i. The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.
- (ii) The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.
- (iii) The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.
- (iv) There is no international norm of 'reasonableness'. The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.
- (v) Although an applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden may shift depending on the circumstances of the case. However, the court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.



- (vi) The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.
- (vii) Although the procedure for raising a violation of the right varies from one jurisdiction to the other, the violation of the right should be raised at the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.
- (viii) The purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.
- (ix) The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.
- (x) (a) The remedy for the violation of the right varies from jurisdiction to jurisdiction. In some jurisdictions such as Canada and New Zealand it seems that permanent stay of proceedings is the normal remedy for violation of the right.
- (b) Under the Common Law and under the jurisprudence of European Court of Human Rights, a permanent stay of proceedings is considered a draconian remedy only granted where it is demonstrated that the breach is so severe that a fair trial cannot be held.
- (c) In most of the Commonwealth countries with Bill of Rights and a Constitution based on Westminster model, and, in South Africa the remedies are flexible – courts can grant any relief it considers appropriate in the circumstances of the case.
- (d) In some jurisdictions, where the applicant is already convicted the quashing of a conviction is not considered a normal remedy and the court could take into account the fact that the applicant has been proved guilty of a crime, the seriousness and prevalence of the crime and design an appropriate remedy without unleashing a dangerous criminal to the society.'

46. Arising from the foregoing summary it emerges that as the court considers the consequences of the determination that there was a delay in hearing and determination of the appeals to the 2<sup>nd</sup> respondent, the court has to consider that the right is not an absolute right and the Petitioners rights must be balanced with equally fundamental societal interests. In my view the broader societal interests at play in this case arise from the fundamental rights under Article 27 of the Constitution which provides that 'Every person is equal before the law and has the right to equal protection and equal benefit of the law' The Petitioner and the 1<sup>st</sup> Respondent have been subjected to the delay in hearing and determination of their appeal. Nullification of the proceedings before the 2<sup>nd</sup> Respondent herein will affect both parties more than it does affect the 2<sup>nd</sup> Respondent. In my view it is in the best interests of justice that the matter be determined on merit notwithstanding the prolonged delay.

47. Further, I have also considered that the rights arising under Section 29 of the Land Adjudication Act provide for the final stage in hearing and determination of disputes arising out of the adjudication



process. The said section provides that the Minister determines the appeal and the orders he makes are final. As a final right of appeal in the adjudication process, the proceedings before the 2<sup>nd</sup> Respondent have serious implications and impacts on proprietary rights of not just the 1<sup>st</sup> Respondent but other persons that may claim under him. It is to be understood that the Land Adjudication process is meant to provide for the ascertainment and recording of rights and interests in community land and the rights are determined in accordance with customary rights.

48. The Court of Appeal in the case of *Julius Kamau Mbugua v Republic* (supra) further held as follows;

' Had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached and the right can no longer be enjoyed, secured or enforced, as is invariably the case'.

46. The case of *Julius Kamau Mbugua v Republic* (supra) was followed by the High Court in the case of *Andrew Kibet Cheruiyot & another v Medical Practitioners & Dentists Board & 2 others [2014] eKLR* where it was held as follows concerning whether the delay was so inordinate as to result in violation of the Petitioners' right to trial within a reasonable time contrary to Article 50(2)(e).

' Notwithstanding the delay in the matter, to invalidate the proceedings before the 1<sup>st</sup> respondent would be injurious to the public interest and should not be contemplated except in very exceptional circumstances, where serious prejudice has been shown as likely to occur to the defendant, which has not been shown to be the case here. As the Court observed in the Zanner Case (Supra):

'Although the time period was central to the enquiry of whether it was unreasonable, the fact of a long delay cannot of itself be regarded as an infringement of the right to a fair trial but must be considered in the circumstances of each case. The accused must show definite and not speculative prejudice'.

47. Following the above *Andrew Kibet Cheruiyot* (supra) case I am of the view that the Petitioner has not shown, that serious prejudice is likely to occur or has occurred since the trial has already taken place in order to qualify as the exceptional circumstances contemplated in the said case and as stated the prejudice shown must be definite and not speculative

48. From a look at the proceedings before the 2<sup>nd</sup> Respondent, it is my conclusion that the delay did not affect the fairness of the trial through for example unavailability of witnesses or the dimming of memories of witnesses. The proceedings show that the trial went on without a hitch and indeed both parties were heard and they called witnesses. Further the 2<sup>nd</sup> Respondent visited the suit land. It is further observed that this was an appeal and indeed courts have held that adducing fresh evidence



in appeals under section 29 of the Land Adjudication Act is not always necessary. This was held in *Matwanga Kilonzo v District Commissioner, Kitui & another [2021] eKLR* where it was stated that:

' The manner in which proceedings should be conducted by the Minister was captured in the case of *Republic v Special District Commissioner & another [2006] eKLR* as follows:

'It is expected therefore that the District Commissioner receives the lower tribunal records which will include the written grounds of appeal of the aggrieved party, and these are the documents which form the lower court record that will assist him to, 'determine the appeal and make such order thereon as he thinks just.'

49. In the case of *Martin vs Tauranga* it was held that

' Where the delay has not affected the fairness of any ensuing trial through; for example unavailability of witnesses or the dimming of memories of witnesses so as to attract consideration under Section 25 (a), it is arguable that the vindication of the appellant's rights does not require the abandonment of trial process; that the trial should be expedited rather than aborted and the breach of Section 25 (b) should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders'.

50. In the present case the court is not dealing with an issue of abandonment of the trial due to delay since the appeals have already been heard but an application for an order to nullify the proceedings and judgment of the 2<sup>nd</sup> Respondent on account of delay in the hearing of the appeal. This is all the more that such an order cannot be made when the interests of all the parties involved is balanced.

51. Further as was found in the *Julius Kamau Mbugua v Republic case* (Supra) that the fact of the violation ought to have been raised at the earliest opportunity. The court stated;

' For over two years, the defence counsel has been representing the accused and he never saw the need to raise the issue of violation of constitutional rights – till PW9 was presented to the court. As a general principle, the defence counsel had the duty, and obligation to raise the issue at the earliest opportunity to enable the prosecution have a chance to call evidence in rebuttal'.

The court continued:

' Unfortunately in this case, the application was made as an afterthought and as an additional defence to counter the evidence on record. Obviously the application was brought too late and did not afford the prosecution adequate time to avail evidence to rebut the same. Given the evidence on record the court is of considered opinion that fairness and justice dictate that this case should be decided purely on merit. Due to above, I hereby dismiss the application. The accused is at liberty to file a suit for compensation relating to any violation of his constitutional rights'.

52. In the present case the Petitioner waited until the appeals were heard and a decision rendered and it was only because the determination in the appeals did not favour him that he brought this petition. The Petitioner participated in the appeals and called witnesses and further cross-examined the 1<sup>st</sup> Respondent and went on site visit. I therefore find as was found in the *Julius Kamau case* that claim by the Petitioner was an afterthought only brought because the Petitioner lost in the appeals. The court



finds that the purpose of the rights claimed by the Petitioner is to expedite trials and minimize prejudice and not to avoid trials on the merits.

**2. Was there a violation or breach of impartiality on the part of the 2nd Respondent?**

53. Serious claims have been made against the 2<sup>nd</sup> Respondent that he solicited money from the parties to the appeals which money was coined as costs, expenses, charges for conducting hearings, sitting allowances and for visiting or viewing the disputed parcels of land. The Petitioner claimed that he paid a total of over Kshs 150, 000/= while the 1<sup>st</sup> Respondent paid over Kshs 300,000/= thus leading to his belief that whoever paid the most allowances had the power to influence the independence and impartiality of the 2<sup>nd</sup> Respondent and thus to influence the outcome of the Appeals. The Petitioner provided m-pesa statements from his own telephone number showing that indeed on various dates he sent various amounts of money to one the 2<sup>nd</sup> Respondent herein.

54. Article 73 (1) (IV) of the *Constitution of Kenya 2010* provides that the authority assigned to a State officer is a public trust to be exercised in a manner that among other things promotes public confidence in the integrity of the office. Article 75 (1) provides that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(c) c) Demeaning the office the officer holds

The Public Officer Ethics Act No 4 of 2003 Section 9 on Professionalism states that a public officer shall—

(a)	Carry out his duties in a way that maintains public confidence in the integrity of his office;
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Section 11 No improper enrichment



(1)	A public officer shall not use his office to improperly enrich himself or others.						
(2)	<p>Without limiting the generality of subsection (1), A public officer shall not—</p> <table border="1" data-bbox="667 456 1386 1384"> <tr> <td data-bbox="667 456 1027 1196">(a)</td> <td data-bbox="1027 456 1386 1196"> <p>Except as allowed under subsection (3) or (4), accept or request gifts or favours from a person who—</p> <table border="1" data-bbox="1043 658 1370 1151"> <tr> <td data-bbox="1043 658 1203 1151">(i)</td> <td data-bbox="1203 658 1370 1151">Has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;</td> </tr> </table> </td> </tr> <tr> <td data-bbox="667 1196 1027 1384">(i)</td> <td data-bbox="1027 1196 1386 1384">Has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;</td> </tr> </table>	(a)	<p>Except as allowed under subsection (3) or (4), accept or request gifts or favours from a person who—</p> <table border="1" data-bbox="1043 658 1370 1151"> <tr> <td data-bbox="1043 658 1203 1151">(i)</td> <td data-bbox="1203 658 1370 1151">Has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;</td> </tr> </table>	(i)	Has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;	(i)	Has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;
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	officer's duties;
(i)	Has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;

55. There is enough evidence from the Petitioner that various amounts of money were sent from the petitioner's telephone number to telephone number xxxx registered in the name of Patrick Kimolo, who according to the proceedings and judgement in Ministers Appeal 241 of 1988 and 245 of 1988 was the Deputy County Commissioner, Kitui West Sub-county the 2<sup>nd</sup> Respondent herein. The appeal was heard on March 11, 2019 while judgment was rendered on April 30, 2019. The M-pesa statement exhibited by the Petitioner shows some payments made to the 2<sup>nd</sup> Respondent between January 14, 2019 and February 20, 2019 and that the total amount confirmed by the Petitioner sent to the 1<sup>st</sup> Respondent was Kshs 150,000.00
56. The above payments were made when the appeals were pending before the 2<sup>nd</sup> Respondent and are on the face of it irregular and in my view were made for an illegal and/or irregular purpose. The contention by the Petitioner that the payments were made for the purpose of costs, expenses, charges for conducting hearings, sitting allowances and for visiting or viewing the disputed parcels of land are not convincing to this court. It would have been expected that any payments made for the mentioned purposes would be made through the official channels and an official receipt issued. The Land Adjudication Regulations make provision for certain payments for services rendered during the adjudication process and a schedule of the payments is attached to the regulations. Rule 4(2) provides that:
- ' A fee shall be payable in respect of each appeal at the rate specified in the Second Schedule to these Regulations.'
- Further, a schedule of the payments is attached to the regulations.
57. The Petitioner testified that the 2<sup>nd</sup> Respondent was the one who asked for the money and he sent the money directly to him. In my view what comes out of the testimony of the Petitioner is that there was irregular interaction between himself and the 2<sup>nd</sup> Respondent during the pendency of the appeals before the 2<sup>nd</sup> Respondent and the same were aimed at influencing the 2<sup>nd</sup> Respondent in the decision that he made.
58. On the contrary the contention by the Petitioner that the 1<sup>st</sup> Respondent paid money to the 2<sup>nd</sup> Respondent was not proved since no evidence was adduced to show the arrangement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for payment of the money claimed and the actual payment made as alleged. Indeed the Petitioner and his witness confirmed that they did not see the said payment being made but were informed by 3<sup>rd</sup> parties who were not called to testify. The 1<sup>st</sup> Respondent denied being required by the 2<sup>nd</sup> Respondent to make the payments the Petitioner claimed was required of all litigants. He further denied making any of the payment he is claimed to have made. I find that there is no evidence placed on record to disprove the 1<sup>st</sup> Respondents contention.



59. This court has not quite understood the Petitioners argument that his own payment of Kshs 150,000/- to the 2<sup>nd</sup> Respondent ought to be condoned and taken to be for a purely legitimate and lawful purpose of costs, expenses, charges for conducting hearings, sitting allowances and for visiting or viewing the disputed parcels of land and that only the 2<sup>nd</sup> Respondent should be taken to task for the same. Further, according to the petitioner the alleged payment of Kshs 300,000/- by the 1<sup>st</sup> Respondent for a similar purpose ought to be castigated and lead to nullification of the proceedings before the 2<sup>nd</sup> Respondent. In my considered view the Petitioners position is a perfect example of application of double standards by alleging that the 1<sup>st</sup> Respondent paid to the 2<sup>nd</sup> Respondent a lot more money than he did and thus obtained a favourable decision. In my view had the decision rendered by the 2<sup>nd</sup> Respondent been in favour of the Petitioner, this court would never have known or found out that any payments had changed hands between the Petitioner and the 2<sup>nd</sup> Respondent. My view is not in any way condoning the 2<sup>nd</sup> Respondent's conduct as a public officer. Indeed, the said conduct should to say the least be a subject of criminal investigations. Indeed, I do note that when this matter first came before the court on 3<sup>rd</sup> July 2009 the court made an order directing that Machakos EACC to conduct investigations in respect of the various allegations of money received by the 2<sup>nd</sup> Respondent from the Petitioner. I would reiterate the same view that this is a matter ought to be investigated by the relevant body as ordered by this court for possible action to be taken.
60. This recommendation arises under Article 252 and Chapter Six of the Constitution, where the Ethics and Anti-Corruption Commission is empowered to;
- c) Receive complaints on the breach of the code of ethics by public officers;
  - d) Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;

Subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices;'

61. In the case of *Edderman Property Ltd & 2 others v Ethics and Anti-Corruption Commission & 3 others [2021] eKLR* the court noted that;

' In corruption cases, the 1st Respondent has the constitutional and statutory mandate to carry out investigations. Article 79 of the Constitution of Kenya 2010 established the EACC while directed parliament to enact legislation to establish an independent Ethics & Anti-Corruption Commission. Additionally, Article 252(1) provides the EACC with powers and statutes of independent commission established of the Constitution, granting it powers to conduct investigation on its own or on a complaint made by a member of the public. Section 13(2) (b) of Ethics & Anti-Corruption Commission Act, 2011 grants the 1st Respondent powers to undertake preventive measures against unethical and corrupt practices and (c) to conduct investigations on its own initiative or on complaint made by any person under Section 28 of the Act.'



62. The charge of bribery as alleged in this case is composed of certain elements as was broken down in the case of *Pamela Zipporah Moriasi v Republic* [2021] eKLR

' Section 6 of the [Bribery Act](#) under which the appellant was charged provides as follows: (1) A person commits the offence of receiving a bribe if —

- (a) The person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person;
- (b) The recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.
- (c) In anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence. In *Gideon Makori Abere v Republic* [2019] eKLR., the court considered the provisions of section 6 of the Bribery Act and set out the ingredients therein as follows: 'From the wording of the two provisions quoted, one can conveniently distil in summary the ingredients of the offence as firstly, one has to request, receive or agree to receive a financial or (other) advantage, there must be the mens rea that by so receiving some function or activity should be improperly performed by that person or by somebody else and lastly the function must be of a public nature or of such a nature carried out by a public officer.' I take the view that a reading of section 6 of the Bribery Act demonstrates that requesting for a bribe is an element of the offence of receiving a bribe. In this case, the appellant was charged with the offence of receiving a bribe, an element of which is requesting for a bribe.'

63. For the purposes of this petition it is my view that the Petitioner did not discharge his burden of proving that the 1<sup>st</sup> Respondent did give to the 2<sup>nd</sup> Respondent the sum of Kshs 300,000/- in order for him to render a decision favourable to him. Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides as follows:-

' Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'

64. Further I do find that the maxim *ex turpi causa no oritur actio* applies to the circumstances of this case. The Petitioner had the option not to engage the 2<sup>nd</sup> Respondent on his demand for money. He also had an option of reporting the impropriety to the relevant authorities. Instead, he participated in a process aimed at subverting justice.



I am guided by the court of Appeal in [Kenya Ports Authority v Fadhil Jama Kisuwa \[2017\] eKLR](#) where the court states;

' We can only emphasise that *ex turpi causa non oritur actio*, based on the doctrine that no legal remedy or benefit can flow from an illegal act, explained succinctly by Lord Mansfield CJ in *Holman v Johnson* [1775] 1 Cowp 341 as follows:

'The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio* ['no action arises from deceit']. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* ['from an immoral cause'], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both were equally in fault, *potior est conditio defendentis* 'stronger is the position of the defendant.'

### **C. Is there a conflict of Section 29 of the Land Adjudication Act with the Constitution?**

65. In prayer C, D and E of the Petition, the Petitioner complains about the constitutionality of S.29 of the Land Adjudication Act on various grounds. In his submissions the Petitioner did not quite address the issues raised in the said prayers but based the challenge on the constitutionality of section 29 of the Land Adjudication Act on failure to provide for the time frame for hearing of appeals in a timely manner as provided for in the constitution. However, considering that the prayers sought were not abandoned I will proceed to deal with them.
66. The challenge is that S.29 of The Land Adjudication Act does not provide a clear legal or institutional and financial policy framework to support the adjudicative functions of the Deputy Commissioners or the District Commissioners as they were then, so as to ensure independence, impartiality and the integrity and leadership of the adjudication, and as such is in conflict with aspiration of s.77(1) and 77(9) of the repealed Constitution and articles 10(1) and (2), 19,20,21,22,47(1) and 50(1) of the Constitution of Kenya.
67. Further the Petitioner claims that in so much as S.29 of the Land Adjudication Act does not provide for or is silent on the aspirations and the expectations of the Kenyan citizens of a hearing of their disputes within a reasonable time as was assured or enshrined in S.77 and 77(1) and 77(9) of the repealed Constitution, and as guaranteed in Article 50(1) of the Constitution of Kenya(2010), then to that extent, it was in conflict with S.77(9) of the repealed Constitution and Article 50(1) of the Constitution of Kenya 2010.
68. Further, the Petitioner seeks a declaration that in so much as S.29 of the Land Adjudication Act has not been revised, amended, repealed and/or reformed or any legal framework thereto promulgated to accord or reflect the aspirations of or expectation of or demands of the citizens of a fair trial and hearing within a reasonable time and/or fair administrative actions and the values , principles and objectives of good governance as expected of all adjudicative functions then and to that extend, it is in conflict



with Article 10(1) and(2),19,20,21,22,25(c),47(1) and 50(1) of the Constitution of Kenya 2010 and S.77(1) and 77(9) of the repealed Constitution.

69. This court had occasion to deal with the challenge to the constitutionality of section 29 of the Land Adjudication Act in Kitui Elc Petition No 8of2021 Kalundi Mutua V Simon Mutiuli Kang'e & Others(Unreported) where the orders sought were in the exact same words as those sought in this petition. My views on the issues, raised in this petition remain the same as they were in the said petition and the Petitioner in this case has not made presentations that would change my opinion and findings.
70. In my view the challenge raised to the constitutionality of section 29 of the Land Adjudication Act cannot be considered in isolation from the legal, policy and institutional framework for the Land Adjudication Act as a whole. The Land Adjudication Act was first enacted in 1968. The said Act is said to be 'An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto'. From the outset, the process of registration of titles to land through the Land Adjudication Act had constitutional underpinnings by virtue of Chapter IX of the Repealed Constitution of Kenya which dealt with trust land. In particular Section 116 provided for registration of individual titles to trust land. Ultimately it was intended that when the title to any parcel of land within trust land area is registered under the [Land Consolidation Act](#) and/or Land Adjudication Act otherwise than in the name of the county council it would cease to be trust land.
71. While in the process of determining rights and interests in trust land, the Land Adjudication Act provides an elaborate and detailed process of dispute resolution. Section 29 is at the apex of the said process and for clarity the section is set out 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.'
72. It is the Courts view that land adjudication is provided for under the existing land policy through Sessional Paper No 3 of 2009 on National Land Policy. The said policy confirms the need to ensure that adjudication and consolidation processes are speedy, transparent and accountable. Under the policy the Government undertook to enact a '[Land Registration Act](#)' to recognize and protect all legitimate rights and interests in land and to harmonize the statutes dealing with the registration of land rights. The Government further undertook to repeal the Land Adjudication Act and Land Consolidation Act and repeal the land registration provisions of the Registration of Titles Act (RTA) (Cap 281), the Land Titles Act (LTA) (Cap 282) and the Registered Land Act (RLA) (Cap 300).
73. On the question of trust land, the policy provided for the repeal of the Trust Land Act and proposed to have a clear framework for recognition, protection and registration of community land and land-based resources incorporating mechanism for a land management and dispute resolution and for reviewing and harmonizing the Land (Group Representative) Act.
74. Subsequent to the promulgation of the Constitution of Kenya 2010 and in harmonizing of existing laws with the constitution, the Land Registration Act No 3 of 2012 repealed the Indian Transfer of Property Act 1882, the Government Lands Act, (Cap 280), the Registration of Titles Act, (Cap 281), the Land Titles Act, (Chapter 282), The Registered Land Act, (Cap 300).
75. The [Community Land Act](#) No 27 of 2016 was also enacted as 'An Act of Parliament to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of



county governments in relation to unregistered community land and for connected purposes'. Under the Act, the Land (Group Representatives) Act Cap 287 and the Trust Lands Act Cap 288 were repealed.

76. However, when it came to the issue of ascertainment and recording of rights and interests in community land or trust land, the Land Adjudication Act was left intact with only a few amendments made through statute law (Miscellaneous Amendments) Act No 7 of 2016 which amendments consisted of substituting expressions 'Trust Land' wherever the same appeared with the expression 'Community Land' and substitution of the term 'Minister' for Cabinet Secretary and 'County Council' with 'County Government'.
77. In my view the legislature amended, reviewed, revised, repealed and/or enacted new laws in order to make them conform with the Constitution of Kenya 2010. From a look at the few amendments made to the Land Adjudication Act, it is clear that the said act was reviewed and revised but only a few amendments were found to be necessary. In my view the Petitioner has not placed before the court evidence and/or arguments showing that Section 29 of Land Adjudication Act does not conform with the provisions of the constitution or alternatively that the issues complained of are as a result of any failure of the law to conform with the cited constitutional provisions.
78. From the foregoing, I find that at the time when the Land Adjudication Act was being considered for revision, amendment, and/or reform after the promulgation of the Constitution of Kenya 2010, Section 29 was considered and no substantial amendment was found to be necessary. It has not been shown to the court that the said section and the Act does not accord or reflect the aspirations of or expectations of or demands of the citizens of a fair trial and hearing within a reasonable time as claimed by the Petitioner. It has also not been shown that it does not conform with the requirement for fair administrative actions and the values, principles and objectives of good governance as expected of all adjudicative functions, and that in its present form it is in conflict with Article 10(1) and (2), 19, 20, 21, 22, 25(c), 47(1) and 50(1) of the Constitution of Kenya (2010).
79. In the Petitioner's submissions he claims that although Section 29 provides for the right of appeal it does not make rules and regulations to ensure that parties shall be entitled to a fair trial and hearing before the Minister. However, I do find that the said Section 29 provides for a procedure of filing of the appeal by delivering to the Minister an appeal in writing specifying the grounds of appeal and the Minister is mandated to determine the appeal and make such order thereon as he thinks just and the orders made shall be final. Further, that by virtue of Section 35 of the Land Adjudication Act, Land Adjudication Regulations 1970 were enacted and the same provide for the procedure of conducting trials. It is thus the Courts finding that the rules and regulations do exist for the conduct of proceedings under the Land Adjudication Act, they may not be as comprehensive and detailed as may cover every possible procedure but the lack of detail is not such as would render the section unconstitutional.
80. Further, courts have also given directions on the manner in which proceedings should be conducted by the Minister and in [\*Gathigia v Kenyatta University Nairobi HCMA No 1029 of 2007 \[2008\] KLR 587\*](#) the Court held:

' I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; 'if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; In such a case the tribunal, which should be properly



constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best.'

81. As the above cases held, all quasi-judicial bodies must follow laid down procedure and in the absence of procedure they must still exercise the principles of fair hearing.
82. It is further the courts finding that constitutional safeguards exist and are available for a party appearing in an appeal before the Minister under Section 29 in that the provisions of the Constitution of Kenya 2010 are binding to all persons. In particular Article 2 of the constitution decrees that the constitution is the supreme law and binds all persons, state organs and public officers. Article 3 of the constitution obligates every person to respect, uphold and defend the constitution. Every person here includes the National Assembly as a state organ, all state and public officers are bound by the constitution and the principles therein especially when making decisions of a judicial or quasi-judicial nature. It matters not that the Land Adjudication Act does not have these provisions specifically stated but the 2<sup>nd</sup> Respondent was still bound to them under Article 10 which expressly sets out the National Values and Principles of Good governance.
83. Article 47 of the Constitution provides that, 'Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair,' which provision is reiterated at Section 4(1) of the *Fair Administrative Action Act* No 4 of 2015. In my opinion, Section 29 of the Land Adjudication Act is not in conflict with the Constitution because it still requires the Minister and all officers, committees and boards within the Land Adjudication process to be bound by the Constitution while making the decision on appeal and to follow a laid down procedure.
84. Further, courts have held that administrative actions must now meet the constitutional test of legality, reasonableness and procedural fairness. This new standard was well articulated by the court in *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR:

' Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.'
85. It is further the courts view that protection of any person appearing before the Minister under Section 29 of the Land Adjudication Act is guaranteed by virtue of the provisions of the Fair Administrative Actions Act for the reason that any person can institute proceedings for review of proceedings if aggrieved. Under Section 7 (2) A court or tribunal under subsection (1) may review an administrative action or decision, if the person who made the decision inter alia –was not authorized to do so by the empowering provision, acted in excess of jurisdiction or power conferred under any written law; acted pursuant to delegated power in contravention of any law prohibiting such delegation and finally the court or tribunal may review an administrative action or decision if it was procedurally unfair.



86. On the question of whether or not the provisions of the Section 29 complained of are in conflict with the constitution the law is that there is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndynabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country. In that case the court presided over by the Hon Chief Justice Samatta Stated as follows:

' Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, legislation should receive such a construction as will make it operative and not inoperative.'

87. In trying to determine constitutional validity of a statute the law provides guiding principles and one of them is by examining the purpose or effect of the law under challenge. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the constitution. In *Olum and another v Attorney General* [2002] EA, it stated that;

' To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.'

88. In the *Queen v Big M Drug mart Ltd, 1986 LRC (Const) 332*, the Supreme Court of Canada stated that;

' Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.'

89. From the foregoing it is necessary to apply the purpose and effect test by looking at the impugned section 29 of the Land Adjudication Act as against the constitutional test of Articles 10 (1) and (2), 19,20,21,22,47(1) and 50(1) and 159(1) and (2) of the Constitution of Kenya 2010. In my view the purpose for the said section is apparent from a literal reading of the section. The section is part of a dispute resolution process in the ascertainment of rights and interests in community land formerly trust land and it stands at the apex of that process. It provides a person aggrieved by the determination of an objection by the Land Adjudication and Settlement Officer under Section 26 an opportunity to appeal to the Minister. The Minister receives the appeal, hears it and decides the dispute and makes such order as he thinks just and the order shall be final. In my view the Petitioner has not shown that the said purpose violates the national values and principles of governance under Article 10 of the Constitution. It has also not been shown to the satisfaction of the court that the purpose violates the



provisions of Article 19, 20, 21, 22 on Rights and fundamental freedoms, Application of Bill of Rights, Implementation of rights and fundamental freedom and Enforcement of Bill of Rights. Indeed, as discussed earlier the Bill of Rights applies to all law and binds all State organs and all persons including the Minister under Section 29 of the Land Adjudication Act and his delegates. It is the courts view that the said section provides an avenue for determination of disputes in the process of ascertainment of rights and interests in formerly trust land and now community land and the said process does not derogate rights to a fair trial under Article 25 (c), 50 and the right to fair administrative action under Article 47 of the Constitution of Kenya 2010.

### **Final Orders**

For the reasons given above the court finds that Petition herein dated June 14, 2019 lacks merit and the same is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**Delivered, dated and signed at Kitui this 8<sup>th</sup> day of December, 2022.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE KITUI**

**Judgement read in open and virtual court in the presence of-**

**M/s Maritim Advocate holding brief for Kilonzi for Petitioner**

**Ngolya for 1<sup>st</sup> Respondent**

**No attendance for the 2<sup>nd</sup> to 4<sup>th</sup> Respondents**

