



**Kimechwa v County Land Adjudication & Settlement Officer, Trans Nzoia
& 3 others; Simeon (Interested Party) (Environment & Land Petition
E002 of 2023) [2025] KEELC 1042 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND PETITION E002 OF 2023
CK NZILI, J
MARCH 5, 2025**

BETWEEN

JOSEPH KIMECHWA PETITIONER

AND

**COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER, TRANS
NZOIA 1ST RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT 2ND
RESPONDENT**

THE LAND REGISTRAR TRANS NZOIA COUNTY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

ALICE MOKEIRA SIMEON INTERESTED PARTY

JUDGMENT

1. The petitioner came to this court through a petition dated 20/12/2023. He sought:
 - (a) Declaration that the re-allocation of Plot No. 365 Zea ADC Settlement Scheme measuring approximately 5 acres by the 1st and 2nd respondents, the subsequent registration and issuance of title deed for LR No. Trans Nzoia/Zea/292 by the 3rd respondent to the interested party contravened *the Constitution* and is therefore null and void.
 - (b) An order of mandamus compelling the 3rd respondent to revoke the registration of the interested party as the proprietor of parcel number Trans Nzoia/Zea/292.



- (c) An order of mandamus directing the 1st and 2nd respondents to re-allocate plot number 365, now 292 Zea ADC Settlement Scheme, giving preference to the petitioner as the person in actual occupation of the said parcel of land.
2. The petition was supported by a verifying and supporting affidavits sworn by Joseph Kimwechwa on 20/12/2023 and 10/2/2024. The facts, as pleaded by the petitioner, are that he was allocated Plot No. 365 Zea ADC Settlement Scheme, now LR No. Trans Nzoia/Zea/292 on 3/4/1997, entered and occupied the same and has remained therein, openly, quietly, uninterruptedly, peacefully, and in continuity, cultivating maize crops over the years until late 2023.
 3. The petitioner averred that around December 2023, he learned that the land had secretly been re-allocated and a title deed issued to the interested party after strange persons invaded the land and begun fencing it, prompting him to obtain a certificate of official search, which revealed that a title deed had actually been issued to the interested party. The petitioner avers that his allocation of the land has never been revoked, and even if it had, his actual possession of the land entitled him to take preference in any re-allocation of the said land and that the 1st and 2nd respondents ought to have publicized the availability of the said land for re-allocation, and invited him to participate in the process.
 4. According to the petitioner, the re-allocation of the suit land was unjustified, unlawful, unfair, and offends the principles of good governance and land policies; hence was and is unconstitutional. Further, the petitioner avers that the re-allocation of the land, which was under his actual occupation, violated his right to access the land, fair administrative actions, equality before the law and the right from discrimination, the rule of law, democracy, human rights and reeks of corrupt practices on the part of the 1st, 2nd and 3rd respondents.
 5. The petitioner averred that the 1st and 2nd respondents' actions of re-allocation of the land were secretive, unilateral and biased. Additionally, the petitioner avers that the interested party should have undertaken due diligence as to the validity and efficacy of the process of re-allocation before accepting the land as required under Article 3(1) of *the Constitution* of Kenya.
 6. In support of the petition, the petitioner relied on a letter of allocation dated 3/4/1997, photographs showing the ground status, an official search certificate dated 19/12/2023, a demand letter by his advocates to the 1st respondent dated 24/1/2024 and a letter in response by the 1st respondent dated 29/1/2024 as annexures marked JK '1', '2 a - d' and '3', respectively.
 7. The 1st – 4th respondents opposed the petition through a replying affidavit sworn by Nyanga C.A., the County Land Adjudication & Settlement Officer, Trans Nzoia, on 8/7/2024. It is deposed that the petitioner was indeed allocated land by the Agricultural Development Corporation (A.D.C), which unfortunately was unlawful since the ADC had no legal mandate to do so as such exercise must be done through the Ministry of Lands.
 8. The respondents averred that the Settlement Fund Trustees (S.F.T) acquired the Zea Settlement Scheme in 1996/1997 and discovered that the ADC had allocated part of the land to various people, yet the land had not been surveyed and demarcated. The respondents averred that in order to regularize the allocation that ADC had done, the Ministry planned, surveyed, and issued letters of offer to the petitioner dated 2/12/2002, whose terms were that the petitioner was to pay the full purchase price in three installments within 12 months, in default the offer would be canceled without further reference as per annexure marked NCA-1.
 9. The respondents averred that since there was no acceptance of the offer for purchase of the suit land by the petitioner, he could not be issued with a notice to remedy breach of the conditions. The



- respondents averred that there was a site visit on 15/11/2021, to establish the whereabouts of the petitioner and prepare a ground report, which indicated that there was no structure nor had the land been fenced, apart from a maize plantation by someone who was not on the land at the time of the visit, as per a report dated 3/6/2022 marked NCA-2.
10. The 1st respondent deposed that since the petitioner was not in occupation of the land and had not honored the offer letter, a new letter of offer was prepared in favor of the interested party dated 2/6/2022, attached as annexure NCA-3. It was deposed that the interested party made full payment of the purchase price, and the land was discharged on 6/10/2023 as per the attached copies of the payment receipt, transfer, and discharge of charge marked NCA - 4, 5, and 6. The respondents aver that the re-allocation of the suit land was conducted as per the laid down procedures after efforts to trace the petitioner bore no fruits, the petitioner slept on his rights, inadvertently delayed, or refused to comply with the conditions of the offer letter for the land. The respondents, therefore, termed the petition as drafted without precision and devoid of any merits.
 11. The petition was opposed by the interested party through an affidavit sworn on 17/1/2024 by Alice Mokeira Simeon for lack of merits, bad in law, and establishing no breach of the petitioner's constitutional rights as envisaged in *the Constitution*.
 12. The interested party averred that she was the one in possession and occupation of Plot No. Trans Nzoia/Zea/292 after it was allocated to her and started ploughing it as per photos marked AMS'1'. The interested party averred that the ADC could not allocate or alienate any proprietary interest in land as alleged by the petitioner, who in any event has failed to demonstrate how Plot No. 365 transformed into Plot No. 295, which are two distinct parcels of land.
 13. The interested party averred that she was offered Plot No. 292 at Zea Settlement Scheme measuring 2.4 Ha as per a letter dated 2/6/2022, which she accepted and made payments to discharge it as per copies of the offer letter, payment receipt, and discharge of charge marked ALS 4(a), (b) and (c). The interested party averred that a transfer document was prepared in her favor, having fulfilled all the required conditions, and was eventually issued with a title deed produced as annexure AMS3(a) and (b). The interested party averred that annexure JK'1' under paragraph 2(a) clearly shows that the petitioner was informed of the price per acre of land and told "THEY SHALL REVERT TO HIM SOON TO INFORM HIM OF HIS PLOT NUMBER" and has not annexed any evidence as to whether the ADC ever reverted to inform him his plot number, or whether he ever made any payments towards discharging the said plot.
 14. The petition was canvassed by way of written submissions. The petitioner relied on written submissions dated 13/2/2025, isolating six issues for the court's determination. The petitioner submitted that the procedure for the allocation of land in a settlement scheme is governed by Sections 4, 12, 134, and 135 of the *Land Act*, which provides that the identification of the beneficiaries shall be carried out and verified by a subcounty selection committee appointed by the Cabinet Secretary upon nomination by the area member of the National Assembly.
 15. The petitioner submitted that the allocating authority under Sections 4, 12, and 134 (6) of the *Land Act* has to observe the national values and principles enshrined under Articles 10 and 60 (1) of *the Constitution*. In this instance, the petitioner submitted that there was no indication of the method and the law that was used to allocate the land to the interested party; otherwise, the whole arrangement was purely a private treaty between the respondents and the interested party. The petitioner submitted that the respondents were mandated to appts the constitutional principles set out under Articles 2(1) and (2), 3, 10, and 60 (1) of *the Constitution* as read together with Sections 4 and 12(1) of the *Land Act*, which unfortunately were not observed in the re-allocation of the land to the interested party.



16. In contrast, it was submitted that it is not disputed that the petitioner was issued with a letter of allocation dated 3/4/1997, entered and took possession of the plot, and remained there up to 2023; the same was secretly re-allocated to, registered, and a title deed issued to the interested party on 3/11/2023, without his knowledge or that of the public, only to learn of it after the invasion of the land and after conducting an official search at the land's office. The petitioner submitted that his letter of allocation was not revoked; there was no publication of the intention to re-allocate or on the availability of the land for re-allocation, followed by an invitation to him and other persons to participate in the re-allocation exercise.
17. As a consequence, the petitioner submitted that the 1st, 2nd and 3rd respondents contravened Article 47 of *the Constitution* of Kenya as read together with Sections 4 and 5 of the *Fair Administrative Action Act*, Article 10(2)(a) of *the Constitution*, Section 134(4) of the *Land Act* for the land was taken before he was given an opportunity to be heard and with no written reasons for the decision, and lastly on the principle of public participation, which abhors conducting of proceedings in a secretive or opaque manner.
18. Further, the petitioner submitted that the respondents violated his right to equality and freedom from discrimination, right to ownership of property, consistency with the purposes and objects of *the Constitution*, public confidence, respect for the people, promotion of public confidence, and integrity of public officers, transparency and accountability under Articles 27, 40, 40(1) and (3), 60(1)(a), 73 and 232 of *the Constitution*.
19. As to the fate of a decision made in violation of *the Constitution* and the law, the petitioner submitted that any act or omission in contravention of *the Constitution* is invalid by dint of Article 3(4) of *the Constitution*. The petitioner submitted that the 1st and 2nd respondents' secretive, unilateral, and biased re-allocation of Plot No. 365 Zea ADC Settlement Scheme and the subsequent issuance of a title deed to the interested party was null and void. Further, the petitioner submitted that the land in issue, having been a settlement scheme, required the interested party to undertake due diligence as to the validity and efficacy of the process of reallocation before accepting the land as required under Article 3(1) of *the Constitution* of Kenya.
20. The petitioner submitted that the land in question was one of the controversial questions in the constitutional-making process in Kenya before 2010 and that the respondents are still wallowing in the miasma of the pre-2010 constitutional era when public land was a tool for speculation and arbitrary allocations. The petitioner submitted that the petition raises extremely weighty issues and the court should take judicial notice of similar pending petitions in which the respondents have managed and administered settlement scheme's land in the County of Trans Nzoia, which are matters of public interest and concern, hence are not ordinary land disputes.
21. The petitioner submitted that he has elaborately and sufficiently demonstrated how the respondents have acted not only in violation of the *Land Act* but blatantly violated various provisions of *the Constitution* on Land Management and Administration. The petitioner urged the court to adopt the approach in *Katiba Institute & Others -vs- Director of Public Prosecutions & Others: Ayika (Interested Party) Petition EO16 of 2023 [2024] KEHC 2890 [KLR]* to construe *the Constitution* holistically, liberally, purposively, broadly, contextually and take into account non-legal phenomena by reflecting on the history of the text and apportioning the fullest possible constitutional guarantees.
22. The petitioner submitted that the petition provides a momentous opportunity for this court to pronounce itself on the matters presented before it, given the glaring lapses and serious omissions in the manner in which the 1st and 2nd respondents re-allocated the land in question, which glaring



mischief, this court is obligated for remedy so that public servants are guided accordingly on matters land management and administration.

23. The respondents rely on written submissions dated 14/2/2025, isolating two issues for the court's determination. As to whether the re-allocation of the plot violated the petitioner's rights, the respondents submitted that the burden of proof under Section 107 of the Evidence Act is on the petitioner to discharge, which it has failed to do as per Anarita Karimi Njeru -vs- Republic [1979] KLR, as read together with Section 13 of the Land Adjudication Act, for the petitioner right to access to information was adhered to, with the issuance of a letter of offer, notifying him of the terms and conditions.
24. Again, the respondents submitted that the petitioner not only failed to report to the Sub-County Land Adjudication & Settlement Officer to be shown the plot and boundaries and be issued with a confirmation letter as per Section 13(2) of the Land Adjudication Act, but also failed to accept the offer and the respondents proceeded in his absence. Therefore, it was submitted that the petitioner could not be issued with a notice to remedy the breach guided by Section 13(4) of the Land Adjudication Act.
25. The respondents submitted that the petitioner was accorded fair administrative action under Article 47 of the Constitution and Sections 9 and 13 of the Land Adjudication Act. Given the ground report, the respondents submitted that the allocation was validly canceled on top of the petitioner's failure to accept/respond to the letter of offer, thus extinguishing his proprietary rights. The respondents submitted that they acted with fairness and the process was not marred with any procedural irrationality, impropriety, and unreasonableness as the said respondents remained faithful to the guiding principles in Sections 9 and 13 of Cap 284, more so when the petitioner has failed to point out with reasonable exactitude the rights and fundamental freedoms violated backed with supportive evidence of the allegations.
26. As to whether an order of mandamus can be issued, the respondents submitted that the petition offends the doctrine of exhaustion as there are elaborate procedures under Sections 21 and 22 of the Land Adjudication Act regarding the Arbitration Committee and the Board, who could have handled the dispute. Reliance was placed on Anthony Miano & Others -vs- Attorney General & Others [2021] eKLR and Republic -vs- Jomo Kenyatta University of Agriculture & Technology Exparte; Elijah Kamau Mwangi [2021] eKLR.
27. Similarly, the respondents submitted that equity aids the vigilant and the petitioner cannot seek remedies before this court when he slept on his rights and failed to exhaust the alternative available remedies before moving to court. Reliance was placed on William Odhiambo Ramogi & Others -vs- Attorney General & Others (MUHURI) (IP) [2020] eKLR.
28. The interested party belatedly filed and relied on written submissions dated 28/2/2025. Reliance was placed on Sections 107(1), 109 and 112 of the Evidence Act and Isaac Adhiambo Okayo -vs- Kenya Women Finance Trust [2016] eKLR on the burden of proof which is upon the petitioner to discharge and prove the facts he wishes the court to believe in its existence. Further, the interested party relied on Torino Enterprises Ltd -vs- Attorney General (Petition 5 (E006) of 2022 [2023] KESC 79 [KLR]) that a letter of allotment does confer ownership or transferable interest in land, unless it is perfected by fulfilling the specific conditions, which in this case, the petitioner failed to fulfil to be entitled to issuance of a title deed unlike the interested party.
29. The issues calling for my determination are:
 - (1) If the petition meets the constitutional test.
 - (2) If the petition raises constitutional issues or questions.



- (3) If the petitioner exhausted any available alternative dispute resolution.
 - (4) If the process and the outcome of the cancellation of the letter of allocation, re-allocation, and issuance of a title deed to the interested party breached Article 10 of *the Constitution* of Kenya, the petitioner's right to equality and freedom from deprivation of property, *fair administrative action act*, the principles of leadership in public service.
 - (5) If the petitioner is entitled to the reliefs sought.
 - (6) What is the order as to costs?
30. A party seeking relief for an alleged breach of constitutional rights and freedoms has to meet both the procedural and substantive law set out under Articles 22, 23, 258, and 260 of *the Constitution* and *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules) 2013, (Mutunga Rules).
 31. While addressing the above legal framework, the court in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & Others* [2013] KECA 445 [KLR] emphasized the principle in *Anarita Karimi Njeru -vs- Republic* [1976-80] KLR, 1272, that a petitioner must specifically plead and particularize the nature, manner, and details of the alleged infringements so as to meet the threshold. In *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another* [2014] KECA 642[KLR], the court emphasized that a petition must be supported by evidence to sustain the allegations of the infringement of constitutional rights and freedoms. In *Sand & Others -vs- Taboo Flowers Co-operative Society & Others* ELC Petition No. 1 of 2020 [2025] KEELC 503 [KLR] (11TH February, 2025) (Judgment), the court observed that a constitutional petition must be pleaded with precision and clarity in order to define the dispute to be determined by the court and for the opposite party to know what it is being blamed for.
 32. Rules 4 and 10 of the Mutunga Rules require that the petition discloses or describes the nature of the acts and omission of the alleged complaints on violation, threats, or infringements of the specified constitutional rights and freedoms, loss or damage, caused, past and present cases involving the same dispute, reliefs sought and the accompanying documents to sustain the allegations.
 33. In *Wekesa & Others -vs- County Government of Trans Nzoia & Others*, E&L Constitutional Petition No. E005 of 2024 [2025] KEELC 185 [KLR] (20th January, 2025) (Judgment), the court observed that a constitutional petition must be pleaded with specificity and clarity, based on facts, contain a live dispute and must not be based on speculations or suppositions as held in *CCK -vs- Royal Media Services & Another* [2014] eKLR and in *Kenya Medical Practitioners & Dentists Union -vs- University of Nairobi & Another* (2021) eKLR.
 34. The petition dated 20/12/2023 has substantially been pleaded with precision, clarity, and specificity. The respondents were able to respond to it and draw out the issues for determination without seeking better particulars from the petitioner. The whole meaning of pleadings is to bring the parties to the dispute in contention, to define the issues, and thereby diminish expense and delay, as held in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance* (Supra) citing with approval the words of *Jessel M.R.* in *Thorpe -vs- Holdsworth* [1876] Ch.D. 639 as held in *Dr. Timothy Njoya & Another -vs- The Hon. A.G. KRA* HC Petition No. 479 of 2013, that a petitioner cannot come to court to seek facts and information that he intends to use to prove the very case he is arguing before the court. The petition herein is supported by documents attached to both in the verifying and supplementary affidavits. Both the respondents and the interested party have also responded to the petition.



35. The next issue is whether the petition raises constitutional questions or issues. A constitutional question or issue is one whose remedy or answer depends on *the Constitution* and not a statute. In *Gabriel Mutava & Others -vs- M.D. Kenya Ports Authority* [2016] eKLR, the court observed that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. The court said that constitutional litigation was not a panacea for all manner of litigation and that the first port of call should always be the suitable statutory underpinned forums for the resolution of such disputes.
36. In *Godfrey Paul Okutoyi -vs- Habil Olaka & Another* (2018) eKLR, the court emphasized that a breach of statutory rights does not amount to a breach of fundamental rights and freedoms and should be redressed in the ordinary manner allowed by a particular statute. The court said that a party should only file a constitutional petition for redress of a breach of *the constitution*, denial, violation or infringement of or threat to a right or fundamental freedom. In *Bernard Murage -vs- Fine Serve African Ltd & Others* [2015] eKLR, the court held that every violation of the law should not be raised as a constitutional issue, and where there exists an alternative remedy, through statutory law, the statutory remedy should be pursued first.
37. The petitioner complains that the recall or cancellation of his letter of offer, while still in occupation of the land, and the subsequent re-allocation, registration, and issuance of the title deed for the land to the interested party amounted to a violation of his constitutional rights and freedoms as enshrined in Articles 3, 10, 27, 40, 47, 61, 73 and 258 of *the Constitution* for he was not given notice, and written reason for the same by the 1st - 3rd respondents. In *CNM -vs- WMG* [2018] eKLR, the court observed that when determining if an argument raises a constitutional issue, the court is not strictly concerned on whether the argument will be successful, but as to whether it forces the court to consider constitutional rights or values. The court cited *Fredrick and Others -vs- MEC for Education and Training & Others* {2002} 23 ILJ 81 (CC), that the constitutional question includes disputes as to whether any law or conduct is inconsistent with *the Constitution*, issues concerning the status, power, and functions of an organ of the state, the interpretation, application and upholding of *the Constitution*.
38. In my considered view, they are constitutional questions or issues raised that require the court to consider if the acts of omission and commission by the 1st - 3rd respondents in canceling and re-allocating the land met the constitutional threshold of fair administrative action and the right to prevention of deprivation of land otherwise than in accordance with the law under Articles 40(3) and 47 of *the Constitution*.
39. The next issue is whether the petitioner exhausted any available alternative dispute resolution before moving to court. The respondents have invoked the doctrines of constitutional avoidance and exhaustion. The doctrines were expounded in *CCK & Others -vs- Royal Media Services Ltd & Others* (supra). The court said that the principle of constitutional avoidance entails that a court will not determine a constitutional issue when a matter may correctly be decided on another basis.
40. In *Southlake Panorama Ltd -vs- Kentraco & Others* [2021] eKLR, the court said that the purpose of the doctrine is to avoid misuse of the constitutional court, where ordinary disputes are brought before it. In *K K B -vs- S C M & Others* Petition No. E014 of 2020 [2022] KEHC 289[KLR] (22nd April 2022) Mativo J, as he then was, held that there are exceptions to constitutional avoidance where the constitutional violation is clear and direct, relevance to the matter and where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute, and where the remedy would not be efficacious.



41. The respondents have invoked the provision of the *Land Adjudication Act*, which has an arbitration committee and Board whose statutory mandate was not exhausted by the petitioner. In *Nicholas -vs- AG & Others; National Environmental Complaints Committee & Others (IP) Petition E007 of 2023 [2023] KESC 113 [KLR] (28th December 2023) (Judgment)*, the court observed that redress for constitutional violation was not part of the mandate of the National Environmental Tribunal, the Energy Petroleum Tribunal, National Environment Management Authority and Energy and Petroleum Regulatory Authority. The court observed that notwithstanding Section 9(2) of the *Fair Administrative Action Act*, a nuanced approach should be adopted by the courts in order to safeguard a litigant's right to access justice, safeguard the bill of rights, national values and principles, the principles of land policy and the dictates of natural justice.
42. The respondents have not pleaded whether the said allocating authority was set up, undertook its mandate, and made a determination to recall, review, revoke, and re-allocate the land initially offered to the petitioner for non-compliance with the terms and conditions of the offer letter, and in doing so accorded the petitioner his constitutional rights through the issuance of a notice to remedy the breach in default of which the land will be repossessed and re-allocated to third parties. These are the condition precedents that the respondents must show before invoking the non-exhaustion doctrine and constitutional avoidance.
43. As rightly submitted by the petitioner, the land question was critical in Kenya's constitutional-making process. In *Chemey Investment Ltd -vs- Attorney General & Others [2018] eKLR*, the court had this to say: "There was a time in the history of this country, not too long ago, when public officers appeared to have been bitten by a bug that infested them with a malignant and shameless craving to acquire for themselves, their friends or relatives, public property in respect of which they were trustees or custodian."
44. The court is alive to the contextual framework of our land laws and the need to subject all land processes, especially the allocation of public land, to the constitutional edicts. In *Speaker of the National Assembly -vs- James Njenga Karume [1992] eKLR*, the court observed that where there is a clear procedure prescribed by *the Constitution* and an act of parliament, that procedure should strictly be followed. It is the respondents who are alleging the existence of an alternative remedy that the petitioner has failed to submit to. It is upon the respondents to confirm on oath without merely alleging when the alternative forum was constituted, different from what Sections 134 and 135 of the *Land Act* 2012, stipulate. Article 40 (6) of *the Constitution* provides that the protection does not extend to property which has been acquired unlawfully or unprocedurally.
45. The petitioner is alleging that his constitutional rights to fair administrative action, access to justice, fair hearing and protection from deprivation of property without the protection of the law were breached. The respondents, on the other hand, aver that the petitioner failed to adhere to the terms and conditions of the offer letter, which allowed for the cancellation of the same without any further reference to him.
46. The efficacy, capacity, legality, efficiency, reasonableness, and appropriateness of the alleged alternative dispute forum to handle the issues raised in this petition have not been pleaded by the respondents save to say that the petitioner was accorded an opportunity, which he failed to comply with by meeting the terms and conditions of the allotment letter on time or at all. In *Gershon Ndege Erima -vs- Trans Nzoia County Land Adjudication & Settlement Officer & Another, Maronda Nicholas Ongera (IP) [2020] eKLR*, the respondents and the interested party had failed to demonstrate to the court whether the petitioner's letter of allotment had been validly canceled or that the petitioner had ever been alerted of such cancellation or any intention to cancel it, yet he had been in occupation of the land



for long. The court found the interference with the allotment process as amounting to a violation of his right to own property and an arbitrary deprivation of his right under Article 40(1) and (3) of *the Constitution*. Applying the foregoing case law, I find the objection based on the non-exhaustion doctrine and constitutional avoidance lacking merits.

47. The next issue is whether the petitioner has proved a breach of his constitutional rights and freedoms. In *Arthur Matere Otieno -vs- Dorina Matsanza* [2003] eKLR, the court held that the right to repossess or forfeit land was the preserve of the Control Land Board and therefore, without the minutes, the notices of repossession, the approval of the forfeiture and re-allocation by the Board was null and void.
48. In *M’Mugwika M’Rugongo -vs- Settlement Fund Trustee & Another* [2022] eKLR, this court held that in the absence of a repossession or cancellation notice, the date and the record of the decision to repossess the land from the Director of Land Adjudication and Settlement Officer, Minutes to that effect, cancellation and repossession notice duly served upon the appellant, approval of the re-allocation by the Minister and according the appellant a fair hearing, having the repossession and the re-allocation, the 1st respondent had acted unprocedurally and was unjustified in repossessing and re-allocating the land in favor of the 2nd respondent.
49. In *Bandi -vs- Nzomo & 76 Others* (Civil Appeal No. 16 of 2001 [2022] KECA 584 [KLR] (24th June 2022) (Judgment), the Court of Appeal was emphatic that the operative law for a settlement scheme are Sections 134 and 135 of the *Land Act* No. 6 of 2012, which set out how National Land Commission creates settlement schemes, how and who is entitled to the land in these schemes, manner of setting up the authority responsible for identifying the beneficiaries and manner of acquiring land for the establishment of settlement programs. The court observed that before the amendment of the *Land Act*, there was in existence the Agriculture Act (repealed) that had established the S.F.T.
50. The petitioner has been categorical that the cancellation of his letter of offer and the subsequent issuance of a title deed to the interested party was in breach of his constitutional rights. The respondents, while admitting that the petitioner had a letter of allocation, insist it expired after he failed to write an acceptance letter, comply with its terms and conditions, and also failed to visit the office of the Land Adjudication and Settlement Officer, or had slept on his rights, inadvertently delaying or refusing to comply with the conditions of the offer.
51. In this petition, the respondents, through written submissions, state that the petitioner should have subjected himself to Section 13 of the *Land Adjudication Act* by writing an acceptance letter, meeting the terms and conditions of the letter of allotment and visiting the office of the Land Adjudication and Settlement Offices to be shown the plot and be issued with a plot number.
52. Additionally, the respondents submitted that the petitioner was accorded a fair administrative action under Sections 9 and 13 of the *Land Adjudication Act* as read together with Article 47 of *the Constitution* of Kenya; hence, the cancellation following the ground report was fair and free of any procedural irrationality, impropriety, and unreasonableness, for the respondents were guided by the principles set in the *Land Adjudication Act* Cap 284.
53. Written submissions are not pleadings and cannot be a substitute for pleadings or evidence. Written submissions have no evidential value. See *Macharia Waiguru -vs- Attorney General & Others* [2016] eKLR, and *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another* (supra). The written submissions by the 1st - 4th respondents are at variance with the affidavit in reply sworn by Nyanga C.A. on 8/7/2024. There is nowhere in the said affidavit that the 1st respondent has said that the petitioner was accorded an opportunity to appear or appeal against the cancellation of his letter of allocation under Sections 9 and 13 of the *Land Adjudication Act*. It is a trite law that settlement schemes are



governed by Sections 134 and 135 of the Land Act. See Philemon L. Wambia -vs- Gaitano Lusista Mukofu & Others [2019] KECA 157 [KLR].

54. It is trite law that the Settlement Fund Trustees under the repealed Agriculture Act was initially the body mandated to allocate land within a settlement scheme once the land was acquired for settlement purposes, now repealed. Under Sections 134 and 135 of the Land Act, the identification and verification of the beneficiaries is provided for under Section 134(4) of the Land Act. A Sub-County Selection Committee is what is envisaged by the law. The selection committee under Section 134(6) of the Land Act must adhere to the constitutional threshold on fair administrative action.
55. In Ravindranath Dahyabhai Bhagat -vs- Hamisi Harod & Others [2014] ENC 6273 [KLR], the court observed that although the process of demarcation, surveys, and identification of squatters for purposes of allocating land is the same as the process of ascertainment of rights over trust land, the Land Adjudication Act is not applicable when it comes to the ascertainment of the claims of the squatters on government land. The court said that a squatter occupying government land is not entitled as of right to the piece of land that he occupies, although he is supposed to be given priority during the demarcation and surveying process.
56. In the replying affidavit by the respondents as well as the interested party, it is not indicated why the petitioner was not served a notice to rectify the breach, what measures were issued to trace him, if he was notified of the site visit preceding the ground report; if he was given any sufficient notice that his allocation of the plot had been canceled and was available for re-allocation and given an opportunity to re-apply during the re-allocation. Similarly, the respondents and the interested party have not clarified if the interested party was equally subjected to the process of squatter identification and verification after she had applied for a plot to the allocating authority.
57. Article 40 of the Constitution provides the manner in which a party may be deprived of his property. Article 47 of the Constitution grants every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Article 47(2) provides that if a right or fundamental freedom of a person has or is likely to be adversely affected by an administrative action, the person has a right to be given written reasons for the action.
58. In Albert Chaurembo Mumbo & 7 Others -vs- Maurice Munyao & Others (2018) eKLR, the Supreme Court held that a decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision and if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at.
59. In Pastoli -vs- Kabale District Local Government Council & Others (2008) 2 EA 300 and in Re-application by Bukoba Gymkhana Club [1963] EA 478, procedural impropriety was defined as where there is failure to act reasonably on the part of the decision-making authority in the process of work the decision by non-observance of the rules of natural justice or to aid with procedural fairness towards one to be affected by the decision or failure to adhere to the procedural rules set out by statutes.
60. Natural justice requires that no man is to be a judge in his cause, a man should not be condemned unheard and that justice should not only be done but must be seen to have been done. Section 4(3) and 4 of the Fair Administrative Actions Act goes further to state that an affected person by an administrative action must be accorded prior and adequate notice of the nature and reasons for the proposed administrative action, an opportunity to be heard and to make representation in that regard; notice of the right to a review or internal appeal against an administrative decision where applicable; statement of reasons pursuant to Section 6; notice of the right to legal representation, and to cross-examine, information, material and evidence to be relied upon and an opportunity to attend the proceedings in person or through an expert, an opportunity to be heard.



61. The respondents have failed to demonstrate how they adhered to the requirements of Articles 40 and 47 of *the Constitution*, read together with Section 4 of the Fair Administrative Actions Act. The petitioner urges the court, therefore, to find that the acts of omission and commission by the respondents are contrary to Articles 40 and 47 of *the Constitution* and issue an order of mandamus.
62. In *KNEC -vs- Republic Exparte Geoffrey Gathenji C.A No. 266 of 1996*, the court said that an order of mandamus is issued to remedy the defects of justice, to compel the performance of a public duty imposed on a person or body by a statute, which it has failed or refused to perform it to the detriment of a party who has a legal right. Mandamus can only be issued where the public officer or organ has acted to the detriment of the affected party. The refusal to act must be shown to be unlawful. See *Wamwere -vs- Attorney General [2004] KLR 166*. The court cannot command the duty in question to be carried out in a specific manner. See *KNEC -vs- Republic Exparte Geoffrey Gathenji & 9 Others (Supra)* and *Republic -vs- Kenya Vision 2023 Delivery Board Ex-parte; Engineer Judah Abekah [2015] eKLR*.
63. In *Republic -vs- The Commissioner of Lands & Another Ex-parte; Kithinji Murugu M'agere NRB H.C. Misc. Appl. No. 395 of 2012*, the court said that for an applicant to succeed in mandamus must show that the public officer has failed to perform his duty, the order will not be granted if there is an alternative remedy available to the applicant; it may be refused if the enforcement of the order will present problems like lack of adequate supervision; and the applicant must show that he has a legal right or substantial interest.
64. Mandamus does not lie against a public officer as a matter of course. Courts must proceed with extreme caution if its issuance would result in interferences with the executive work of the government, unless the duty is clearly established and defined and the obligation to act is peremptory as held in *Mwau -vs- Principal Immigration Officer [1983] eKLR*.
65. In this petition, it is not enough for the petitioner to allege that the respondents failed to act. Evidence that the petitioner wrote a complaint letter to the 1st respondent after the official search dated 19/12/2023 is missing. Courts of law are not involved in governance issues. All that the law requires is need for good public administration. The petitioner must show that there was a failure to act after he complained or sought the reasons for the fair administrative action to cancel the letter of allocation and the re-allocation of the land. See *Republic -vs- Minister for Finance Exparte Nyongo & Others [2007] eKLR*.
66. The petitioner has not demonstrated that he sought copies of the proceedings and the decision revoking his letter of allocation and re-allocating the land to the interested party. In this petition, a prayer for certiorari has not been included to quash such proceedings and decisions. That notwithstanding the respondents have not denied the existence of the decision to revoke and re-allocate the land. The respondents have not demonstrated that in arriving at the said decision, there was total adherence with the constitutional requirements under Articles 40 and 47 of *the Constitution*, to insulate the decision and the proceedings from lack of procedural fairness, legality, expeditious, proprietary, and reasonableness. See *Republic -vs- Public Procurement Review Board & Others [2008] eKLR*. Judicial review writs look into the process.
67. In *Judicial Service Commission -vs- Mbalu Mutava & Another [2015] eKLR*, the court cited *Ridge -vs- Baldwin [1964] AC 40*, that rules of natural justice generally and in particular fair hearing apply to both judicial and quasi-judicial bodies, with powers to exercise administrative duties. The court said fair administrative action refers broadly to administrative justice in public administration and deals mainly with the control of the exercise of administrative powers by state organs, or statutory bodies, in the execution of constitutional and statutory duties. The court observed that fair hearing in Article 50(1) of *the Constitution* applied in any dispute which can be resolved by application of the law and



- applies over proceedings before an independent and impartial tribunal or body and that under Article 25 of *the Constitution*, that right cannot be limited by law or otherwise.
68. The court held that Article 47 of *the Constitution* marks an essential and transformative development of administrative justice, for it not only marks a constitutional foundation for the control of powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the bill of rights, which is a reflection of the national values in Article 10 of *the Constitution* such as the rule of law, human rights, social justice, and good governance, transparency, and accountability. The court said that the administrative action of public officers, state organs and other administrative bodies were subject to Article 47 of *the Constitution* rather than to the doctrine of ultra vires under the common law.
 69. Going by their cited caselaw, the respondents cannot blow hot and cold. It is either they adhered to *the Constitution* and statutory requirements under Sections 134 and 135 of the *Land Act*, Section 4 of the Fair Administrative of Actions Act, and Article 47 of *the Constitution* or not.
 70. An administrative action is defined in Section 2 of the Fair Administrative of Actions Act to include a decision, powers, functions, and duties exercised by authorities, acts or omission of the authority, that affect the legal rights or interest of any person to whom such action relates. An administrator means a person who takes administrative action or makes an administrative decision. The 1st, 2nd and 3rd respondents fall within that definition. Public officers must embrace the paradigm shift and engage the right gear in ensuring that the manner in which they make and exercise administrative decisions complies with Article 47 of *the Constitution* and the Fair Administrative of Actions Act as held in *Walunya -vs- Kenyatta University (Constitutional Petition No, E470 of 2021)* (2023) KEHC 22407[KLR] (21st September 2023) (Judgment).
 71. From the foregoing, my finding is that the petitioner has discharged the burden of proof as held in *Gitobu Imanyara & Others -vs- Attorney General* [2016] eKLR that the respondents violated their constitutional rights, by being condemned unheard.
 72. The next question is whether the petitioner is entitled to any constitutional reliefs under Articles 22 and 23 of *the Constitution*. In *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018)* [2021] KESC 34 (KLR) (11 January 2021) (Judgment), the court addressed itself on the principles of continuing mandamus under Article 23(3) of *the Constitution*, that permits the court to grant appropriate reliefs, even in interim nature in specific causes, so as to redress the violation of fundamental rights. The court held that structural interdicts, supervisory orders, and any other order must be specific, appropriate, clear, effective, and directed at the parties to the suit or any other state agency vested with control and statutory mandate to enforce the orders.
 73. In this petition, I am satisfied that the petitioner is entitled to a declaration that the revocation of his letter of allocation and the subsequent re-allocation process of the same and the issuance of a title deed to the interested party, otherwise than in accordance with the law and *the Constitution* was unconstitutional, null and void ab initio. The primary object of the constitutional relief is not compensatory but to vindicate the fundamental rights infringed and to deter their future infringement, as held in *Dandy -vs- University of Witwaterand Johannesburg & Others* [2006] ILRC 291.
 74. The title deed issued to the interested party was a child of a flawed process, proceedings and a decision by the 1st, 2nd and 3rd respondents which did not meet the constitutional test. This court cannot, therefore, after finding the process, proceedings, and decision of the 1st, 2nd and 3rd respondents



unconstitutional, at the same time direct the respondents to re-allocate the plot to the petitioner. The petitioner, as rightly pointed out by the respondents and the interested party, has not tendered evidence that he complied with the terms and conditions of the letter of allocation on time at all. The letter of offer did not specify any parcel number. It is, therefore, up to the petitioner to move to the appropriate allocating authority as per Sections 134 and 135 of the Land Act, to regularize and or otherwise have his occupation of the suit land determined under the appropriate law.

75. Costs to the petitioner at a lower scale to be paid by the 1st, 2nd, and 3rd defendants.

76. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT
AT KITALE ON THIS 5TH DAY OF MARCH 2025.**

In the presence of:

Court Assistant - Chemutai

Petitioner present

Lichuma for the Petitioner present

Cheruiyot for Respondents present

Nakitare for the Interested Party present

HON. C.K. NZILI

JUDGE, ELC KITALE

