



REPUBLIC OF KENYA



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**M'Ikingo'la & 4 others v M'Chokera & 2 others (Environment & Land Petition
E001 of 2024) [2024] KEELC 7442 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7442 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E001 OF 2024
CK NZILI, J
NOVEMBER 6, 2024
IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS ARTICLES 27 (1) AND (2), 35, 40, 47,
48 AND 50 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLES 22, 23, AND 162 (2) (B) OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF SECTIONS 4, 5 (2) (B) & (C) OF THE FAIR
ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015
IN THE MATTER OF SECTION 29 OF THE LAND ADJUDICATION
ACT CAP 284

BETWEEN

SAMUEL NDUMBA M'IKINGO'LA 1ST PETITIONER
GEORGE NG'OLUA CHOKERA 2ND PETITIONER
ISAIAH MURUNGI M'MUNORU 3RD PETITIONER
GEORGE MUTABARI 4TH PETITIONER
MUMANO M'ING'OLA 5TH PETITIONER

AND

CIOBAIBAYA M'CHOKERA 1ST RESPONDENT



**DEPUTY COUNTY COMMISSIONER (DCC) TIGNAIA EAST SUBCOUNTY
(ON BEHALF OF THE MINISTER FOR LANDS) 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

JUDGMENT

1. The petitioners who are residents of the Muthara area of Meru County, save for the 5th petitioner, are registered owners of L.R No's. Buuri/Buuri A/922, 923, 925, 939 and 940; are in possession as gatherers of the suit parcels of land since 1973, where they have been growing subsistence food crops and grazing their livestock.
2. The petitioners averred that during the adjudication stage, the 1st respondent had sued the 1st – 4th petitioners vide A/R Objection No's 85, 86, 88, 89, and 90, claiming land parcels No's. 922, 923, 925, 939, and 940, whose verdict was delivered on 21.5.2007, dismissing the A/R objections, which thereby remained the properties of the 1st – 4th petitioners.
3. The petitioners averred that the aggrieved party was given sixty days to appeal, which the 1st respondent did not file and serve within stipulated timelines, leading to the issuance of a title deed dated 30.10.2013 for the respective parcels of land, which the deed has never been challenged.
4. On or about 27.11.2020, the petitioners averred that the 2nd respondent summoned them to appear at his Muriri office on 30.11.2020, and on arrival, the 2nd respondent invoking his powers as the representative of the minister, ambushed and compelled the relatives of the 1st, 3rd and 4th respondents together with the 2nd and 5th petitioners to participate in a purported ministers appeal allegedly filed against them by the 1st respondent.
5. The petitioners averred that the 5th respondent was not a party to the appeal as his parcel no. Further, it was averred that the A/R Objection case did not cover Parcel No 924, yet his land parcel was included in the purported appeal to the minister.
6. Again, the petitioners averred that at the hearing of the purported appeal, the 2nd respondent failed to inform the parties of the date of delivery of his decision, and this led to the petitioners proceeding severally to the office of the 2nd respondent, to know the outcome procure the attendant proceeding and the decision in vain. Further, the petitioners aver that they wrote to the 2nd respondent asking for written reasons why they could not be supplied with the decision as mentioned earlier and the proceedings in vain.
7. Moreso, the petitioners averred that on 29.1.2024, the 1st respondent, his children and agents confronted them on the subject parcels of land, threatened to forcefully evict them therefrom, bragging that the 1st respondent defeated them in the said appeal; whose decision was in the process of being implemented so that the said parcels of land could be registered in her name, only for them to rush to the 2nd respondent's office on 30.1.2024, where they obtained a copy of the proceedings and the verdict.
8. The petitioners averred that they were surprised to find the decision titled Appeal Case No. 63 of 2008, which had not been filed or served upon them within 60 days from 21.5.2007.
9. The petitioners averred that as a result of collusion by the 1st respondent with the 2nd respondents to conduct or fabricate a non-existent appeal, the said proceedings or the decisions were not dated; it included the A/R Objection; the appeal had not been served upon them before the hearing; it was



- not filed and served within 60 days from 21.5.2007, it should have borne a number of 2007 and not 63/2008 and that it took long to be heard.
10. The petitioners aver that the conduct of the 1st and 2nd respondents violated their constitutional right to equality before the law, acquiring and owning the subject parcels of land, fair administrative action and access to information contrary to Articles 27 (1) & (2), 35, 40, 47, 48 and 50 of the Constitution of Kenya.
 11. Further, the petitioners aver that the 1st & 2nd respondents breached the aforesaid constitutional rights and freedoms by:
 - i. Concocting, fabricating and hearing a non-existent or statutory time-barred appeal contrary to Section 29 of the Land Adjudication Act leading to a decision that deprived them their right to ownership of property.
 - ii. Conducting and hearing the appeal long after the title deed had been issued.
 - iii. Denying them an opportunity to be heard and tender evidence contrary to Articles 27 (1) & (2) and (5),
 - iv. Failing to supply the petitioners with the appeal to prepare for the hearing adequately.
 - v. Ambushing and compelling the relatives of the 1st, 3rd & 4th petitioners to participate in the hearing and conduct of the appeal, yet they had no instructions to do so.
 - vi. Denying the petitioners a chance to prepare for the hearing and call or avail witnesses adequately.
 - vii. Refusing to supply them with the proceedings and judgment on time or at all, hence violating their rights or access to justice and information.
 - viii. Refusing to furnish the petitioners with reasons in writing, for not supplying the requested documents.
 12. The petitioners averred that the action, inaction, infraction, and conduct of the 1st & 2nd respondents were unlawful and unconstitutional and called for remedies action by this court.
 13. The petitioners prayed for:
 - a. A declaration that the proceedings for judgment in Appeal Case No. 63 of 2008 over Parcel No. Buuri/Buuri/A 922, 923, 924, 925, 939, and 940 did not amount to an appeal to the minister as envisaged in Section 29 of Cap 284, for it was statutorily time-barred.
 - b. Declaration that the inclusion of Parcel No. 921 was unlawful and unconstitutional, hence rendering the entire proceedings and judgment null and void.
 - c. Orders of judicial review by way of certiorari to call into this court and quash the proceedings and judgment in appeal Case No. 63 of 2008.
 - d. Permanent injunction.
 14. The petition was supported by an affidavit of Samuel Ndumba M'Ikingola dated 21.2.2024, attaching an authority to plead, copies of the proceedings and decision, title deeds, the appeal demand letters, title deed for Parcel No. 924 as annexures marked S.N.M. "1" - "8", respectively.
 15. The 1st respondent opposed the petition through a replying affidavit sworn on 27.3.2024 by Ciobaibaya M'Chokera.



16. The 1st respondent confirmed that the petitioners were initially the registered owners of the suit parcels of land but denied that the 2nd and 5th petitions are not in possession of or gatherers of the parcels of land since 1973; otherwise, all the parcels originated from Parcel No. 338.
17. With regard to the 3rd and 4th petitioners, it was averred that they were born after 1973, while the 2nd and 5th petitioners were very young school-going children barely 10 years old at the time when gatherings were happening and hence played no role in gathering the parcels whatsoever.
18. The 1st respondent averred that the 1st petitioner and her husband belonged to the same family of Iyari, who had two wives. The mother of the 1st petitioner remained in Laciathuriu, while the 2nd mother of her husband moved to Lii. The 1st respondent averred that when the 1st petitioner began gathering the land, the Akiaga clan members invaded them. Therefore, he requested help from the 1st respondent's husband to fence the land, including plowing 9 acres of the disputed land to deter the Akiaga clan members as per an extract of that clan case minutes on Lii settlement dated 11.6.2005 attached as annexure CM "2".
19. The 1st defendant averred that the land returned to the family, with the more significant share going to the 1st petitioner for his role in acquiring the land. It was averred that a dispute, however, arose between the two persons, and a mediator was appointed who settled the two in Laciathuriu and Lii respectively. Unfortunately, the 1st respondent averred that during the demarcation process, the 1st petitioner demarcated all parts of the land and included himself in Parcel No. 338 and others; he only partly distributed to the rightful individuals and included himself in Lii side as per annexure CM "3" (a) & (b) (c) & (d), being minutes of clan meeting held on 19.12.2004, 6.1.2005, minutes of the clan members dated 11.6.2005 and a letter dated 9.5.2006 from the District Land Adjudication & Settlement Officer Meru North District, showing allocation of the parcels.
20. The 1st respondent averred that she immediately lodged an objection with the DLASO against the six suit parcels of land as per annexure marked CM 4 (a) & (b), the objection and a receipt of payment.
21. Additionally, the 1st respondent averred that subsequent summons for hearing was issued as Objection No's 85 – 90, including Parcel No. 924 as per summons dated 4.5.2007, following which the objections were dismissed on 21.5.2007. The 1st respondent averred that he promptly appealed on 21.6.2007, within the statutorily allowed 60 days for lodging appeals under Section 29 of the *Land Adjudication Act* as per the annexed form of appeal, together with grounds of appeal and official receipts of payment of appeals fees dated 22.6.2007 and annexed as CM 6 (a), (b) & (c).
22. The 1st respondent averred that as soon as title deeds were issued to the petitioners, he informed the chief land registrar that there was a pending appeal to the minister and a restriction was registered against all the titles; hence, it was not true that the titles were not challenged.
23. Again, the 1st respondent averred that on 5.11.20202, he received a summons from the 2nd respondent for hearing of the appeal through the Chief Buuri Location as per annexure marked CM "7"; otherwise, if the summons were not disclosed to the petitioners or the notice was short, the petitioners ought to have taken up the matter with the 2nd respondent, at the appropriate juncture.
24. In addition, the 1st respondent averred that notwithstanding the alleged inadequate notice, the 1st, 3rd, and 4th respondents sent representatives to the hearing who participated in the hearing by cross-examining her witness and giving their statements in accordance with the *Land Adjudication Act* as per adjudication appeals proceedings, duly stamped as true copies of the original by the Director of Land Adjudication Nairobi as annexure CM "8".



25. Consequently, the 1st respondent averred that if at all the 1st, 3rd and 4th respondents gave different instructions to their representatives and their representatives acted on their motion, they should take up that issue with them as no other party was privy to those instructions.
26. Nonetheless, the 1st respondent denied that the petitions were ambushed by the 2nd respondent as the summons for hearing of the appeal was duly served upon all parties on 5.11.2020, and they never alleged that there was an ambush, including the 1st petitioner as per copy of summons attached as CM 9 (a) & (b).
27. The 1st respondent averred that the 5th petitioner and Parcel No. 924 have always been part of the A/R cases indicating the objection and the subsequent appeal as per the objection letter and receipt marked as CM 4 (a) & (b), 6 (a) – (c) and CM "7" and as per S.N.M. "2", in the petitioner pleadings.
28. Further, the 1st respondent averred that she was not in any way involved in recording the proceedings of the A/R case, and if at all any omission was made she believes it was inadvertent and not attributed to her. The 1st respondent termed letters marked S.N.M. "5" & "6" a slacking any mark or evidence that they were manufactured belatedly to pre-empt the suit.
29. The 1st respondent averred that when the county surveyor began the process of implementing the minister's decision with a site visit scheduled for 1.2.2024, the petitioners rushed to the other 2nd respondent's office and obtained the proceedings and the verdict of 30.1.2024 as per annexure marked CM "10", a letter by the county surveyor requesting for security for the exercised thereby, a day after alleged threats on 29.1.2024.
30. The 1st respondent averred that she had no control over how the minister assigns case numbers with regard to appeals, and her only duty was to appeal within the statutory time allowed, which she did with no collusion with the 2nd respondent to fabricate a non-existent appeal yet annexures CM "6" (a) – (c) CM "8" CM 4 (a) & (b) and CM (a) – (f) indicate otherwise. The 1st respondent averred that she conducted herself legally, judiciously, constantly, and with respect to the rule of law of the violations of the petitioners, rights are false, baseless, total fabrication, and misrepresentation of facts.
31. The 2nd & 3rd respondents opposed the petition through a replying affidavit of Kelvin Kimulu sworn on 29.8.2024. As a Deputy County Commissioner of Tigania East Sub-County, he averred that the 1st respondent filed an appeal to the minister receipt number 6389258 dated 22.6.2007 which he attached as an annexure marked K.K. "1". The 2nd respondent averred that a restriction was placed on the title register on 1.11.2013 Parcel No. Buuri (Buuri) "A" 922, 923, 924, 925, 939 and 940, while awaiting the hearing and determination of the appeal case, as per the official search certificate marked K.K. "2", hence the title deed was null and void for being issued during the pendency of the appeal cases.
32. The 2nd respondent averred that all parties were served with summons issued through the area chief, Buuri location, indicating the appeal case, parcel numbers, names of the parties, the case purpose of the summons, venue and the date of the case hearing as per the attached copy marked K.K. "3".
33. Accordingly, the 2nd respondent averred that the claims that the 1st, 3rd and 4th petitioners did not authorize their son, wife, and mother, respectively, to represent them in these appeals hearings were fallacious, misleading and unfounded since all parties appended their signature/thumbprint freely without any coercion or intimidation.
34. The 2nd respondent averred that the petitions never protested or recorded a statement in any police station to protest forces signing or appending of thumbprints or writing to the minister indicating their reservation and seeking intervention.



35. The 2nd respondent averred that an objection was filed against Parcel No. 924 and an appeal to the minister equally filed as indicated in the receipts memorandum of appeal, appeal case proceedings and restrictions placed on the parcels affected by appeal to the minister cases and certificate of search as per the attached Parcel No. 924 copies marked K.K. "4", "5" and "6", respectively.
36. The 2nd respondent averred that parties in these appeals were requested to attend the reading of the case determination, which was read to them, signed and dated 22.4.2021, as is the practice with all such case hearings.
37. Subsequently, the 2nd respondent averred that after hearing and determination of the above appeals, the files were forwarded to the minister for Lands Public Works, Housing, and Urban Development, Nairobi, for further action, and the parties were so advised when the decision was read to them.
38. The 2nd respondent averred that all purchases and genuine appeals to the minister case proceedings should bear an official stamp from the Director of Land Adjudication and Settlement Nairobi, certifying them to be true copies of the original, unlike the ones attached in the petition, which bear in such features are not certified and no receipt for the said purchase of proceedings is attached unless the petitions obtained government document without following due process and thus denied government revenue.
39. The 2nd respondent averred that his evidence is enough that the petitioners conducted this narrative and gathered uncertified documents to antagonize the adjudication process, delay the implementation of the appeal cases and waste the court's time.
40. Again, the 2nd respondent averred that the admission in paragraph 18 of the petition that they used an unprocedural method to obtain the appeal to the minister case proceedings, is a confirmation that they are out to use unconventional methods at all costs.
41. The 2nd respondent averred that the petitioners should disclose the specific person who supplied them with these unsigned uncertified proceedings and the official receipt issued to them for the purchase of the same for authentication and clarification of the claim.
42. The 2nd respondent averred that the ministry or state department does not collect any revenue or appropriation in aid for the purchase of documents or proceedings on behalf of the Ministry of Lands Public Works, Housing, and Urban Developments and therefore; the proceedings presented by the petitioners are inadmissible and do not meet the required procedure of obtaining government documents and should therefore be expunged as evidence in this petition.
43. The 2nd respondent averred that appeal to the minister case numbers are issued in Nairobi by the Ministry of Lands, once case files are forwarded by the sub-county land adjudication and settlement department, filing and preparation of appeal to the minister cases and files, issuance of official receipt for purchase of procedures and the issuance of appeal case numbers among other procedures are done by the said Ministry. Therefore, the parcel numbers indicated on the official receipts certified appeal case provide and copy of the implementation of the appeal case letter all capture P/No's 922, 923, 924, 925, 939, and 940.
44. The 2nd respondent averred that the parcels objected against after the adjudication registers for Buuri "A" adjudication Section was published complete were Parcel No's. 922, 923, 924, 925, 939, and 940, as per the attached official receipts marked K.K. "7". The 2nd respondent averred that the verdict in the appeal cases directed the six parcels be collapsed and merged with Parcel No. 942 as per annexure made K.K. "8" and the implementation order dated 18.8.2023.



45. Further, the 2nd respondent averred that appeal case numbers are issued when the file is forwarded to the Ministry of Lands headquarters and may take a long to complete; hence, the appeal case numbers were issued in 2008. Further, the 2nd respondent averred that the hearing and determination of appeal to the minister cases is dependent on the schedule of the D.C.C's available resources and other factors and this explains why such cases may take longer to be determined from the time of filing.
46. The 2nd respondent averred that the appeal case numbers would not have been issued if the matter did not meet the required threshold of date, for filing required documents to prepare files and an implementation order dated 18.8.2023, issued at the end, contrary to claims by the petitioners in paragraph 20 (b) of the petition.
47. The 2nd respondent averred that the appeal case number 63 of 2008 was filed within a stipulated 60 days, as illustrated in the official receipts attached, and the options should not be allowed to use a flawed process of obtaining official documents to sue the same uncertified documents to file a petition deny government revenue by not paying for official proceedings concert stories and falsehood to delay implementation of a decision legally and procedurally arrived at and abuse the court process.
48. Adding on to, the 2nd respondent averred that no rights of the petitioners were violated, and the process of filing hearing and determination of the appeal cases was conducted fairly and in accordance with the Constitution and other legislative laws, following a duly filed minister's appeal within the stipulated period.
49. The 2nd respondent averred that the title deed issued to the petitioner in 2013 had already been restricted due to the pending appeal cases and, therefore, challenged.
50. The 2nd respondent averred that parties were advised on where to purchase the proceedings when the decision was read out, and therefore, the petitioners should not use ignorance as a defence, since they hold proceedings that bear no official stamp or purchase receipt.
51. Moreso, the 2nd respondent averred that the prayers sought by the petitions were invalid, an abuse of the court process intended to derail the implementation of the adjudication process and deny the 1st respondent an opportunity to win the land awarded to her through the appeal, whose determination following the provisions of Section 29 of the Land Adjudication Act hence the request for judicial review by the petitioner's lack merits.
52. Again, the 2nd respondent averred that the petition was filed in bad faith, intended to undermine administrative justice rendered through the process of adjudication, it lacked factual evidence, was an abuse of the court process, the assertion was inaccurate, and no constitutional issues were discernible to warrant its admission and adjudication before this court.
53. The petition was canvassed through written submissions. The petitioners relied on written submissions dated 18.10.2024. It was submitted that since no appeals were filed within sixty days after 21.5.2007, title deeds were issued to them as absolute owners of the subject parcels of land, only for them to be summoned to appear before the 2nd respondent on 30.11.2020, in the absence of the 1st, 3rd & 4th petitioners and for their representatives who had no authority or instructions to be ordered to proceed with the appeal.
54. The petitioners submitted that after the hearing of the appeals, they were not informed of the date the decision was made, until the threatened eviction on 29.1.2024 by the 1st respondent. The court was urged to find the appeals a nullity and a violation of their rights as per paragraphs 2 (a-g) and 20 of the supporting affidavit.



55. The 2nd respondent relied on written submissions dated 24.10.2024, in which submissions set out what were said to be brief facts of the 1st respondent's.
56. The 1st respondent submitted that the *Land Adjudication Act* provides that parties may attend in person or by a representative, and in this case, summons for a hearing were duly issued on the same day to all the parties, following which a hearing took place on 20.11.2020 and 30.11.2020, with the participation of all the parties and their witnesses.
57. The 1st respondent submitted that the petitioners were accorded procedural fairness and the right to be heard under Article 50 of the *Constitution*. Reliance was placed on *Sceneries Ltd vs National Land Commission* and another (2017) eKLR, on the proposition that a fair hearing is achieved when parties have an opportunity to present their case, even if they choose to do so through representatives.
58. Relying on *Mutanga Tea & Coffee Co. Ltd vs Shikara Ltd & another* (2015) eKLR, that due process in property disputes requires notifying and involving all affected parties in the instant case, each petitioner received a summons and participating without disputing inclusion that time; hence the due process was followed as per Section 29 of the *land adjudication act*. Reliance was also placed on *Cyrus Maina vs Kenya Ports Authority* (2019) eKLR.
59. The 1st respondent submitted that the chief land registrar placed restrictions on the parcels in dispute, due to the ongoing appeal which is a lawful administration action to prevent unauthorized dealings. Reliance was placed on *Kenya National Highways Authority vs Sheila Masood Mughal & others* (2017) eKLR, on the proposition that restrictions placed to preserve land status during pending disputes are legitimate if they align with administrative processes.
60. Further, the 1st respondent relied on *Muchanga Investment Ltd vs Safaris Unlimited Africa Ltd & others* (2009) eKLR on the proposition that using the court process to deal with or pre-empt actual proceedings was an abuse of process. It was submitted that the petitions acquired appeal documents only one day before a scheduled survey, suggesting a strategy to delay enforcement, hence undermining the integrity of the court process.
61. The 1st respondent submitted that since the portions did not object to Parcel No. 924 during the hearings, it implies acceptance of its inclusion; hence, retroactive claims of its inclusion are unconvincing; otherwise, the objection should have been raised during the initial proceedings. Reliance was placed on *E.A Railways Corporation vs Anthony Sefu* 1973 E.A 237, on the proposition that parties must raise objections promptly if they believe that specific properties are erroneously included in disputes.
62. The 1st respondents submitted that the petitioner's case is weakened by their active participation in earlier hearings, timely appeals by her lawful restrictions, and an apparent delaying tactic, all of which say that they were accorded procedural fairness and hence lack substantive grounds for overturning prior decisions.
63. The court has carefully gone through the pleadings and written submissions by the parties.
64. The issues calling for my determination are:
- i. Whether the petition raises a constitutional question.
 - ii. Whether the petitioners' rights to the *Fair Administrative Action Act*, access to justice, fair hearing, equality before the law, and to acquire and own property, were violated by the 2nd respondent in hearing and determining the minister's appeal.



- iii. If the petitioners are entitled to the reliefs sought.
- iv. What is the order as to costs?
65. The procedural and substantial parameters governing the filing contents, hearing and determination of the constitutional petitions are Articles 20, 21, 22, 23, 165(2), (b), 258, 259 and 260 of the Constitution as read together with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules). Rules 10, 11, 15 and 20 of the Mutunga Rules relate to the form, affidavits, documents, replies, and the mode of hearing of a constitutional petition.
66. In the petition before the court, the petitioners have indicated their names and set out the facts, given the constitutional provisions alleged to have been infringed, included details regarding the history of the litigation under the Land Adjudication Act Cap 284, including the reliefs sought, and that the documents to be relied upon have been attached. Lastly, the respondents have been able to reply to the same extensively. My finding is that the petition complies with *Anarita Karimi Njeru vs Attorney General and others (1979) eKLR*.
67. The next issue is whether the petition raises a constitutional question. In *Nicholas Kiptoo Arap Korir Salat vs IEBC (2014) eKLR* the court observed that a constitutional question includes issues of constitutional interpretation or its application breach of constitutional rights. Likewise in *Nicholas vs Attorney General and others National Environmental Compliant Committee and others (I.P.) (Petition E007 of 2023) (2023) KESC 113 (K.L.R.) (28th December 2023) (Judgment)*, the court cited *John Florence Maritime Service Ltd & another vs Cabinet Secretary for Transport and Infrastructure & others (2019) eKLR* that in a matter involving interpretation and application of the Constitution, the conventional approach is that a particular provision of the Constitution must have been an issue for interpretation and or and that a court should not have a narrow mind when evaluating whether a matter raises a constitutional issue and that the search for constitutional issues should extend beyond specific constitutional provisions, by taking a holistic inquiry of all the various facets of the law pleaded by the parties to establish whether they do indeed raise a constitutional question.
68. The court in *Nicholas Kiptoo (supra)* observed that the Environment and Land Court under Articles 22, 23 & 162 2 (b) of the Constitution has the mandate to determine an alleged violation of the Constitution as read together with section 4 of the Environment and Land Act. The court observed that the right to access the court for redress of alleged constitutional violations should not be impeded or shifted in a manner that frustrates the enforcement of fundamental rights and freedoms. The court cited with approval *William Odhiambo Ramogi and others vs A.G. & others (2020) eKLR*, where a suit primarily seeks to enforce fundamental rights and freedoms, and it is demonstrated that the claimed constitutional violations are not mere bootstrap or merely framed in the bill of rights languages, as a pretext to gain entry to the court the doctrine of exhaustion does not bar it.
69. In *C.N.M. vs W.M.G. (2018) eKLR*, the court cited *Fredrick and others vs M.E.C. for Education and Training Eastern Cape & others (2002) 23 I.L.J. 81 (CC)* that a constitutional matter includes a dispute as to whether any law or conduct is inconsistent with the Constitution as well as issues concerning the status powers and functions of an organ of the state and interpretation of any legislation.
70. Looking at the pleadings by the parties herein, there is no dispute that what the petitioners are disputing is the manner in which the 1st respondent filed the minister appeal was not brought to their attention; the 2nd respondent summoned them for a hearing date, how the hearing was conducted, the failure to give them a fair hearing at the hearing of the appeals, the manner in which they were not notified of the date of delivering the verdict the failure to be supplied with the outcome and reason for



the decision infringing on the right to a fair hearing, access to justice, Fair Administrative Actions Act and the right to ownership and protection of property.

71. The respondents, on the other hand, have answered the constitutional questions raised by the petitioners by saying that the process of filing hearings and determination of the minister, appeal cases, were conducted fairly, lawfully, legally and in accordance with the Constitution and other legislative law, hence the petition was filed in bad faith, is intended to undermine administrative justice, rendered through a process of land adjudication, lacks factual evidence and raises no constitutional issues, there was procedural fairness and is an abuse of the court process aimed at stifling the implementation of the adjudication outcomes.
72. In my considered view, the petition has raised constitutional questions as to whether the 2nd respondent in hearing and determining the minister's appeal adhered to Articles 40 and 47 of the Constitution which grant to the petitioner's right to fair administrative action that is expeditious, efficient, lawful, reasonable, procedurally fair, to ensure that they are not arbitrarily deprived of their property rights and access to information, held by the state. All these questions require answers from the Constitutional interpretation and not from a statute.
73. The next issue is whether the petitioners pleaded and proved an infringement of their rights under Articles 27, 35, 47, 48 & 50 of the Constitution. Section 29 of the Land Adjudication Act, governs the filing, hearings and determination of ministers' appeals. The petitioners faulted both the decisions and the decision-making process. In *Pastoli vs Kabale District Local Government Council & others* (2008) 2 E. A 300, the court observed that an applicant for judicial review has to show that the decision or action complained of is tainted with illegality, irrationality, and procedural impropriety. The court defined illegality as when the decision-making authority commits an error of law in the process of taking or making the act without jurisdiction. Irrationality was defined as where there is such unreasonableness in the decision taken or done that no reasonable authority addressed itself to the fact and the law before the decision would have reached such a decision. Procedural impropriety was defined as where there is a failure to act reasonably on the part of the decision maker such as non-observance of the rules of natural justice and failure to adhere to procedural rules.
74. In *Mugambi & others vs DLASO & others, David Ndumba M'Guabi (I.P.) E.L.C. Petition E006 of 2023 (2024) KEELC 4348 (K.L.R.) (22nd May 2024) (Judgment)* the court observed that following elevation of judicial review as a constitutional right after 2010, a party has a choice and can move the court through a constitutional petition. The court cited *Robert Kulinga Nyamu vs Mwembi Mulinga and another* (2022) eKLR, that a minister's decision under Section 29 of Cap 284 was final and a court should not allow the petitioners to relitigate a dispute that was fairly, reasonably, lawfully, and procedurally handled under a mechanism set under the Land Adjudication Act. The court cited *Tobias Achola Osidi & others vs. Cyprian Otieno Ogalo and others* (2015) that its role is mainly supervisory to ensure the bodies under the Land Adjudication Act acted within the law and the Constitution.
75. The court observed that Article 47 of the Constitution is aimed at promoting efficient administration and is binding on all state organs, bodies, and entities as they exercise administrative action powers or function or duties, whose exercise affects the rights or interests of any party.
76. In *Republic vs Firearm Licensing Board and another exparte Boniface Mwaura* (2019) eKLR, the court observed that Article 47 of the Constitution, codifies every person's right to fair administrative action and that an administrator has a duty imposed on him to accord a person procedural fairness or right to natural justice and when a decision is made, to give reasons therefor and for the affected person by the decision to apply for a review of the decisions as provided for under Section 7 of the Fair Administrative Action Act.



77. From the preceding, it is clear that decision-makers are now constitutionally required to observe matters of both procedural and substantive justice in administrative action decisions by according the affected person, prior and adequate notice of the nature and reasons for the proposed administrative action.
78. Section 4 of the *Fair Administrative Action Act* provides that an administrator must accord an affected person an opportunity to attend the hearing, a chance to be heard, an opportunity to cross-examine witnesses who give adverse evidence against them, offer evidence in rebuttal, request for an adjournment for fair hearing and give them the decision and the reasons thereof.
79. Section 7 of the Fair Administrative Actions Act grants the court power to review an administrative action if it is not rationally connected to the purpose for which it was taken or where the conduct of the administrator was irrational or contrary to logic, unfair reasons were not given rules of natural justice were not adhered to and where there was no proportionality in the decision-making process.
80. A public or state officer must be objective and impartial in decision-making. See Republic vs N.P.C exparte Daniel Chacha (2016) eKLR. In Amarnath (Suing on behalf of the estate of the late *Amarnath Gupta*) vs *Kazungu & others Civil Appeal E033 of 2021* (2023) KECA (1280) (K.L.R.) (27th October 2023) (Judgment) the court warned against allowing a party to re-open an adjudication process by challenging the ministers to appeal otherwise than through the route of judicial review as provided under Article 47 of this Constitution and the *Fair Administrative Action Act*.
81. In this petition, the burden of proof was on the petitioners to demonstrate that the 2nd respondent failed the constitutional test of the *Fair Administrative Action Act*, access to justice, fair hearing, access to information held by the state, and the right to own property. The petitioners had the burden to demonstrate that the 2nd respondent failed to follow mandatory and material procedures, was unfair, erred in law, acted in bad faith, was irrational, abused discretion, was unreasonable or disproportionate, abused power and violated the legitimate expectations of the parties as provided under Section 7 (1) & (2) of *Fair Administrative Action Act*.
82. The minister has deponed on oath that the minister's appeals were filed, heard, and determined in compliance with Rule 4 of the *Land Adjudication Act*, Regulation 1970, and sections 29 (5) of Cap 284. The 2nd respondent has pleaded that there was a competent appeal before it as per Sections 26 (1) & (2) and 29 of the *Land Adjudication Act*. The form, grounds of appeal and receipts of the same have been displayed before this court. The 1st respondent has equally attached documents to show that the appeal was lodged on time and processed for hearing by the 2nd respondent. The 2nd respondent urged the court to find that it acted legally and procedurally in admitting the appeals for a hearing since they were filed within 60 days.
83. In Japsher Maluki Kitavi vs. Minister for Land And Settlement And Physical Planning and another (2017) eKLR, the court cited with approval *Judicial Service Commission vs Mbalu Mutava* and another (2015) eKLR that investigative bodies must act reasonably and accord the party's rights to natural justice.
84. In these proceedings, the petitioners have been unable to challenge or rebut the documents produced by the respondents that a valid appeal was duly filled and was in existence within 60 days as per the law. The petitioners have not substantiated the assertions that the appeals were non-existent by the 2nd respondent on how the appeal was allocated and a date Appeal No. of 2008 is also rational and consistent with the standard practice of processing a minister's appeal.



85. As to whether the petitioners have proved a breach of their rights to being given adequate notice to prepare, attend, present evidence and participate in the hearing, Section 7 of the *Fair Administrative Action Act* provides that there must be regard to proportionality and legitimate expectations tests in administrative actions. In *Dande & 3 others vs Inspector General of National Police Service and Others* (2023) KESC 40 (K.L.R.) (16th June 2023) (Judgment), the court held that judicial review was a constitutionally justified means of legal control on misuse of public law and power including statutory and common law prerogatives powers.
86. The court observed that after 2010, judicial review was a substantial and justiciable right. The court said that where a party approaches the court under the provisions of the *Constitution*, a court may carry out a merit review of the cause, unlike in the traditional judicial review process, where a court is limited to the process and the manner in which the decision complained of was reached or action taken.
87. In these proceedings, the 2nd respondent has demonstrated that all the procedural aspects were adhered to from the filing, processing, hearing and determination of the appeal. The petitioners failed to file a supplementary affidavit to demonstrate how the appeal process, the minister's appeal, hearing, and determination was not fair, just, reasonable, logical, efficient, procedurally fair, lawful, reasonable, expeditious, and disproportionate. See *Daniel Nyongesa & others vs Egerton University C.A No. 90 of 1986* and *Keroche Industries Ltd vs Kenya Revenue Authority* (2007) KLR.
88. There is no evidence tendered that the minister in the administration, hearing and determination of the appeal, did not act judicially, failed to adhere to the law, acted irrationally, and the decision was ultra vires and or illogical.
89. See *Republic vs Minister of Lands and others* (1988) eKLR, *Matwanga Kilonzo vs DCC Kitui and another* (2021) eKLR, *John Masiantent Saeni vs Daniel Aramat Lolungiro & others* (2017) eKLR and *Dume Deri and Mumbo & others C.S of Lands Housing and Urban Development & others* (2016) eKLR.
90. A minister has wide latitude on how he conducts the proceedings as long as they meet the substantive ends of justice, as held in *Dominic Musi Ikombo vs Kyule Makau* (2019) eKLR. In the proceedings, the minister accorded all the parties a fair hearing. The record shows that he considered relevant considerations, acted reasonably, decided on the nature and particulars of the grounds of appeal, analyzed the facts and gave reasons for his decision. In my considered view, pleadings and evidence tendered by the petitioners did not meet the threshold set out under Sections 4 & 7 of the Fair Administrative Actions Act for this court to fault the admission, hearing and determination of the minister's appeal.
91. The court finds no procedural impropriety as held in *Republic Vs. Public Procurement Administrative Review Board and others exparte Sanlam Services Ltd* (2013) eKLR, *Bukoba Gymkhana Club* (1963) E. A 478, *Penina Nadako Kisilwa vs IEBC & others* (2015) eKLR.
92. Equally applying the doctrine of proportionality, I find the 2nd respondent struck to the relative weight, accorded to its interest, and considered all the evidence tendered by both the petitioners and the 1st respondent. See *Suchan Investment Ltd vs. Ministry of National Heritage & Culture & 3 others* (2021) KECA 160 KLR, *Republic vs KRA Exparte Prof. Tom Ojienda* (2018) eKLR.
93. The upshot is that the petition fails. It is dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6TH NOVEMBER, 2024.

In presence of



C.A Kananu

1st Petitioner

Miss Kimotho for the 1st respondent

Juma for the 2nd and 3rd respondent

HON. C K NZILI

JUDGE

