



**Ongera v County Executive Committee Member, Lands, Housing, Physical Planning And Urban Development & 5 others (Constitutional Petition E002 of 2022) [2023] KEELC 17187 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17187 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
CONSTITUTIONAL PETITION E002 OF 2022**

**M SILA, J**

**MAY 4, 2023**

**BETWEEN**

**JOYCE ONGERA ..... PETITIONER**

**AND**

**COUNTY EXECUTIVE COMMITTEE MEMBER, LANDS, HOUSING,  
PHYSICAL PLANNING AND URBAN DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT  
THE COUNTY DIRECTOR OF PHYSICAL AND LAND PLANNING KISII  
COUNTY ..... 2<sup>ND</sup> RESPONDENT  
THE GOVERNOR, KISII COUNTY ..... 3<sup>RD</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF KISII ..... 4<sup>TH</sup> RESPONDENT  
THE LAND REGISTRAR, KISII COUNTY ..... 5<sup>TH</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

(Petitioner holding title to the suit property and wishing to develop it; petitioner lodging an application for development permission to the County Government of Kisii; no response received to the application; subsequent letters seeking to know the position of the application going unanswered; petitioner proceeding to check on her title and finding out that a restriction has been placed pursuant to a certain letter; petitioner’s request to be furnished with the said letter not eliciting a response; petitioner now filing suit asserting inter alia that her constitutional right to property and to fair administrative action have been violated and seeking orders that her application be deemed as allowed following the provisions of the *Physical and Land Use Planning Act*; response of the County Government being that the petitioner’s title was under investigation by EACC and development permission could not therefore be granted; court holding that the County



Government was enjoined by law to respond to the application and if it was of opinion that permission ought not to be granted, proceed to disallow the application and inform the petitioner of the reasons; law not contemplating a situation of silence; silence and refusal to respond to queries declared an unfair administrative action; letter that led to the restriction not presented to court thus no demonstration of any justification for the restriction; refusal to grant the petitioner a copy of the letter being a violation of the constitutional right to information; presence of the restriction being a curtailment of the constitutional right to property; petitioner's application deemed approved in accordance with Section 58 (6) of the [Physical and Land Use Planning Act](#); petitioner also awarded exemplary damages in the sum of Kshs.500,000/= and costs)

1. This suit was commenced through a constitutional petition filed on 21 June 2022. The 1<sup>st</sup> respondent is the County Executive Committee Member for Land, Housing, Physical Planning and Urban Development of the County Government of Kisii and the 2<sup>nd</sup> respondent is its Director of Physical and Land Use Planning. The 3<sup>rd</sup> respondent is the Governor of the County Government of Kisii. The 4<sup>th</sup> respondent is the County Government of Kisii. The 5<sup>th</sup> respondent is the Land Registrar, Kisii County and the 6<sup>th</sup> respondent is the Honourable Attorney General. The petitioner avers to be the registered proprietor of the leasehold title in the land parcel Kisii Municipality/Block II/256 located in Mashauri area, along the Kisii- Kilgoris Road, in Kisii Town, which she asserts to be private land under Article 64 of the [Constitution](#) and entitled to protection under Article 40 of the [Constitution](#). She acknowledges that pursuant to Article 68 of the [Constitution](#) as read with Sections 55 to 68 of the [Physical and Land Use Planning Act](#), (Act No. 3 of 2019) the state may regulate the manner of use of the land but she avers that she has a constitutional right to fair treatment under Articles 27, 35, 40, 48, and 50 of the [Constitution](#).
2. She has pleaded that she wished to commence development of the suit property, and that on 26 July 2019, she lodged her application for development approval with the office of the 1<sup>st</sup> and 2<sup>nd</sup> respondent and paid the prescribed fee in accordance with the provisions of Sections 57, 58, 60 and 61 of the [Physical and Land Use Planning Act](#). She avers that pursuant to Section 58 (6) of the said Act, the application was to be considered and approved or disapproved within 60 days, failure to which the permission would be deemed to have been automatically granted. She contends that notwithstanding the foregoing, the respondents have refused and ignored to act on her application for development permission and she is unable to commence development as the respondents have kept the suit land under the watch of the county enforcement askaris. She avers that she has made numerous visits to the offices of the respondents to follow up on her application but no action has been taken and no reason given to her. She states that she wrote a letter to that effect dated 9 December 2019 but it elicited no response. She claims that she was informed by support staff of the County that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have a personal interest in the land and that there were issued strict instructions that no one should act on her application. The petitioner contends that the inaction of the respondents contravenes the mandatory provisions of Section 61 (2) of the [Physical and Land Use Planning Act](#) and violates her right to appeal to the County Physical and Land Use Liaison Committee, and the Court, under Section 61 (2) and (3) of the [Act](#).
3. She avers that out of personal instinct and suspicion that there was mischief afoot, she visited the Kisii Land Registry on 3 March 2020, and she was informed that the respondents have registered a restriction/caveat allegedly on issues contained in a letter dated 9 January 2020 which the Land Registrar refused to avail to the petitioner. The restriction was registered on the same day of the date of the letter. She avers that she applied to be furnished with a copy of the letter dated 9 January 2020 and made the requisite payment but the 5<sup>th</sup> respondent (Land Registrar, Kisii) flatly refused to supply to her the letter and indicated that he was under strict instructions not to furnish the said document to her.



She states that she instructed her advocates to seek reasons for the inaction of the respondents and her advocates wrote a letter dated 10 July 2021 which has however not elicited any response. She contends that the acts of the respondents are unreasonable, irrational, oppressive, unconstitutional, capricious, whimsical, and illegal, and constitutes gross acts of impunity which calls for the court's intervention. She asserts violation of various of her constitutional rights being the rights under Article 40 (right to property), Article 27, 47, 50, 35, 48, and also violation of the provisions of the *Fair Administrative Action Act* (Act No. 4 of 2015) and the *Physical and Land Use Planning Act* (Act No. 3 of 2019). She states that she has been exposed to extreme hardship and loss at the behest of the respondents who have exhibited gross impunity and lawlessness. She states that she has received reliable information that the 4<sup>th</sup> respondent intends to deregister her lease to the suit property and that the respondents also intend to forcefully acquire her property.

4. The petitioner seeks the following orders (slightly paraphrased for brevity) :
  1. The petitioner be declared the rightful owner of the land parcel Kisii Municipality/Block II/256 and is entitled to exclusive use and to develop it according to her wishes in accordance with the law.
  2. A declaration that the 1<sup>st</sup> to 6<sup>th</sup> respondents have violated the petitioner's constitutional right to property by unlawfully restricting the suit property and refusing to act on her development application.
  3. A declaration that the respondents' actions have violated the petitioner's constitutional rights particularly, Articles 27, 40, 47, 48 and 50 and the provisions of the *Fair Administrative Action Act*, Act No. 4 of 2015, and the *Physical and Land Use Planning Act*, Act No. 3 of 2019.
  4. An order declaring that the petitioner's application stood granted and/or is deemed granted by operation of law as per Section 58 (6) of the *Physical and Land Use Planning Act*, the 60 day grace period having lapsed.
  5. An order directing the 5<sup>th</sup> respondent to remove the restriction registered on 9 January 2020 against the title of the land parcel Kisii Municipality/Block II/256.
  6. An order granting permission to the petitioner to commence and continue developing her property in accordance with the proposed plans lodged with the 1<sup>st</sup> – 4<sup>th</sup> respondents and the respondents be restrained from interfering with the petitioner while undertaking the development.
  7. An order prohibiting the respondents from harassing, forcefully taking over, encroaching, or converting the petitioner's rights of ownership over the land parcel Kisii Municipality/Block II/256.
  8. An order of exemplary and/or punitive damages against the respondents for the violations and acts of impunity perpetrated by them.
  9. Interest on (8) above.
  10. Costs of this suit.
  11. Any further or such orders that the Court may deem fit and just to grant.



5. The petition is supported by the affidavit of the petitioner who has more or less reiterated the contents of the petition. She has deposed that she purchased the suit property from one Tom Nyangau Nyachio Mongare, through a sale agreement dated 8 November 2018. She has annexed the sale agreement, the transfer and Certificate of Lease which shows that she got registered as proprietor on 10 January 2019. She avers that prior to the transfer, all rates were paid and a copy of rates clearance certificate was obtained. She states that the respondents confirmed having no claim over the land and issued the consent to transfer. She has averred that she examined the trail of documents of the original owner and she was satisfied that the property was lawfully and procedurally allotted under the mother title Kisii Municipality/Block II/185. She has annexed a set of documents indicating the acquisition of title. She deposes that she is aware that part of the original title was compulsorily acquired for construction of the Kisii-Kilgoris road after a vetting process including the respondents, and it was confirmed that the title was clean and the original owner compensated for the portion taken away. She has attached various documents to demonstrate the compulsory acquisition. She states that the mother title, Kisii Municipality/Block II/185 was subdivided into three parcels, being Kisii Municipality/Block II/255, 256 and 257, after due process was followed. She has annexed copies of letters granting permission for subdivision. She states that the area index map was amended to incorporate the subdivisions and creation of the suit property. She avers that over the years, the respondents have from time to time reviewed titles and leases within their area of jurisdiction, i.e Kisii County, to ascertain the authenticity of the acquisition process, and she submitted her documents and no irregularity or defect has ever been raised over the years. She has annexed notices calling for submission of title and notices of revocation of various other titles. She deposes that she submitted her application for development approval on 26 July 2019 and has annexed her said application. She states that notwithstanding her application, the respondents have not responded to the same and have kept her property under the watch of County askaris such that she is unable to develop her property. She has also annexed a copy of the register to show the restriction entered on 9 January 2020. She has annexed various letters that she and her counsel wrote regarding the issues raised and requesting for reasons which letters went unanswered. She asserts that she is entitled to seek redress pursuant to Article 23 of the *Constitution*.
6. The 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents are represented by the County Attorney of the County Government of Kisii. They responded to the petition through a replying affidavit sworn by Haron Nyamache, the Director, Land Administration, of the County Government of Kisii. He deposed that the petitioner's ownership of the suit property is under scrutiny and investigation by the Ethics and Anti-Corruption Commission (EACC) for illegal allocation. He deposes that the petitioner is the third lessee but the title of the first lessee, one John Silas Nyamwange Omboto, is under question. He avers that once an application for development permission is lodged, the 2<sup>nd</sup> respondent is required to establish the true ownership of the property. He states that the 2<sup>nd</sup> respondent did so by comparing records from the County registry and the national registry and it was established that the property together with other parcels were not allocated on the basis of any part development plan prepared and approved by the Ministry of Lands and Physical Planning. He avers that unfortunately, the 2<sup>nd</sup> respondent was unable to establish records from the defunct Municipal Council as the said records were destroyed in a fire. The 2<sup>nd</sup> respondent therefore sought information from the national registry and was unable to establish true ownership of the suit property which was initially known as Block II/85. He states that there is an endemic issue of illegal land allocation in Kisii County and the County Government has embarked on investigating the allocation of properties under Block II, Kisii Municipality.
7. He adds that the EACC was requested to assist in the process of investigation of various plots under Block II; that while investigations were undergoing, the 4<sup>th</sup> respondent, through the Director of Land



- Administration, Kisii County, wrote to the 5<sup>th</sup> respondent a letter (dated 8 April 2020) asking the Land Registrar to register a caveat on various properties (including the suit land).
8. He contends that the area Kisii Municipality Block II was zoned and designated for Government Housing based on the Plan No. 5 (Development Plan Ref. No. 37/71/1) approved in the year 1974. He states that there is no change of the approved plan of 1974 to provide for private residential housing and the plan has not been amended to provide for development of a private residence on the suit property. He avers that there are government buildings in the area where the suit land is located. He states that initially, there were 16 parcels of land identified from the office of the Principal Secretary, Ministry of Lands and Physical Planning, through a letter by the EACC dated 18 February 2020; that in addition to the 16 plots mentioned in the said letter, it was established that there were other properties that did not have proper records; that all these properties are under investigation by EACC and a full report is awaited; that due to the nature and level of documentation, the investigations are bound to take time to be completed.
  9. He states that the 1<sup>st</sup> – 4<sup>th</sup> respondents have no interest in declining development approval without justification; that the reason for the delay in granting approval is based on the issue of ownership which the 4<sup>th</sup> respondent, as lessor, has an interest; that the 4<sup>th</sup> respondent is mandated to protect County land from illegal transactions and allocations; that the caveat registered is intended to protect county land and the public in general. He points out that the petitioner has admitted that the 4<sup>th</sup> respondent has been carrying out review of titles under its jurisdiction and the petitioner cannot therefore have issue if the 4<sup>th</sup> respondent has requested for assistance from the EACC to help with investigations into the validity of her title. He denies that the petitioner has been treated unfairly; denies that she has been targeted; and states the caveat has been registered against 44 other properties. He avers that caveats have been registered under properties that emanated from Block II/185, specifically the Plots No. 255, 256 and 257. He states that the 2<sup>nd</sup> respondent cannot lift the caveat before investigations into the ownership of the property is established; that once EACC complete investigations into the ownership of the property and all documents are found to be in order, there will be no issue proceeding with the process of development approval; that approval cannot be done while investigations by an independent body are ongoing; that the 2<sup>nd</sup> respondent cannot approve the development without an investigation report from EACC.
  10. On the allegations of the petitioner that she was informed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have an interest in the property, he has pointed out that the petitioner has not given the details of who spoke to her and contends that the petitioner is being sensational. He denies that the respondents have caused harm or hardship to the petitioner.
  11. The petitioner filed a supplementary affidavit in response to the replying affidavit. She states that if her title was under scrutiny by EACC the 1<sup>st</sup> – 4<sup>th</sup> respondents could have communicated to her such position and decline her application so that she can proceed to exercise her right of appeal. She points out that she requested for reasons but none were given to her. She avers that it is the first time she has heard that there is investigation by the EACC and she believes that this is an afterthought. She states that if that was the case, EACC should have escalated the issue to her to adduce an explanation. She adds that the 1<sup>st</sup> – 4<sup>th</sup> respondent could not by fiat form an opinion that the titles in the letter dated 8 April 2020 are illegally acquired and decline to give her an opportunity of being heard and present her case on legitimacy of her title. She avers that it cannot be justified that she was denied a copy of the letter that placed a caveat on her title. She asserts that the documents she has displayed reveal that her acquisition of the land was lawful and supported by documents, some of which emanate from the 1<sup>st</sup> – 4<sup>th</sup> respondent, including the rates clearance certificate. She states that at no stage has she been asked to prove ownership of her title and there has never been any issue regarding the legality



of her title. She avers that if the respondents had any claim over her land nothing barred them from approaching the court but they cannot unilaterally decide that her title is illegal without affording her a hearing and without any evidence. She proceeds to state that the purported zoning of her land as Government Housing Development vide the alleged Plan Ref No. 37/71/1 is a myth as no such plan has been presented to court and there is no proof that the suit land was hitherto owned by the Government or zoned as such.

12. The State Law Office, on behalf of the 5<sup>th</sup> and 6<sup>th</sup> respondents, filed no response to the petition and Mr. Ndiritu, learned State Counsel, stated from the bar that he will associate himself with the position of the 1<sup>st</sup> – 4<sup>th</sup> respondents.
13. I invited counsel to file submissions to the petition and I have seen the submissions of Mr. O.M Otieno, learned counsel for the petitioner, and Mr. Manyange, learned counsel for the 1<sup>st</sup> – 4<sup>th</sup> respondents. I am of the following view.
14. The petitioner holds a leasehold title to the land parcel Kisii Municipality/Block II/256. From the evidence, presented, this title emanated from a subdivision of the land parcel Kisii Municipality/Block II/85. The 1<sup>st</sup> – 4<sup>th</sup> respondents doubt the legality of this title and contend that the petitioner's title is under investigation by the EACC. In fact, in his submissions, Mr. Manyange did submit that because of this, the petitioner does not deserve the protection of Article 40 of the *Constitution*, which protects the right to property, owing to the provisions of Article 40 (6) which provides as follows :

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

15. First, I do not have any cross-petition or any suit before me that wishes to declare the petitioner's title to be a bad title. The 1<sup>st</sup> – 4<sup>th</sup> respondents only aver that the title of the petitioner is under investigation. Nowhere has there been any holding that the petitioner's title is unlawfully acquired. An investigation is nothing more than an inquiry; it is not a finding. So far, nothing has been presented before me that conclusively asserts that the title of the petitioner is not a good title. I would not wish to be embroiled into an investigation of whether or not the petitioner's title is a good or bad title within the precincts of the pleadings in this suit. Indeed, the legality or otherwise of the petitioner's title is not a matter that can be conclusively determined within the pleadings herein for I am not dealing with a suit where there is a prayer seeking cancellation of the title of the petitioner. If the 1<sup>st</sup> – 4<sup>th</sup> respondents feel that the title of the petitioner is blemished, there is nothing stopping them from filing suit to have the said title declared unlawful. At the moment, given that the petitioner has title, this court is enjoined to consider that, prima facie, the said title is a good title pursuant to the provisions of Section 26 of the *Land Registration Act*, which provides as follows :-

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

16. As I have mentioned, I do not have a case before me challenging the title of the petitioner. Thus, this court will proceed with the determination of this petition on the basis that prima facie, the petitioner has good title to the suit property. It is not thus necessary for this court, within the purview of this petition, to even go to the genesis of the said title. I am prepared to hold that for the purposes of determining the issues presented in this petition, the petitioner is entitled to protection of her proprietary rights under Article 40 of the *Constitution*.

17. Having title, the petitioner wished to develop her land and she lodged an application for development permission on 26 July 2019. She did require development permission before she could embark on any development on the suit land pursuant to the provisions of Section 57 (1) of the *Physical and Land Use Planning Act*, which provides as follows:

57.

- (1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.

18. What should follow once an application is lodged is contained in Section 60 of the Act, which provides as follows:-

60.

- (1) Within seven days of receiving an application for development permission, the county executive committee member shall give a copy of the application to the relevant authorities or agencies to review and comment and the relevant authorities or agencies shall comment on all relevant matters including—
  - (a) land survey;
  - (b) roads and transport;
  - (c) agriculture and livestock;
  - (d) health;
  - (e) public works and utilities;
  - (f) environment and natural resources;
  - (g) urban development;



- (h) national security in respect of land adjoining or within reasonable vicinity of safeguarding areas; and
  - (i) any other relevant authority.
- (2) Within fourteen days of receiving the copy of the development permission from a county executive committee member, the relevant authorities or agencies shall submit their comments to the respective county executive committee member.
61. Decision making and communication
- (1) When considering an application for development permission, a county executive committee member—
    - (a) shall be bound by the relevant approved national, county, local, city, urban, town and special areas plans;
    - (b) shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought;
    - (c) shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought;
    - (d) shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and
    - (e) in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease.
  - (2) With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may—
    - (a) grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission; or
    - (b) refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing.



- (3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.
  - (4) An applicant or an interested party who files an appeal under subsection (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.
19. Section 58 (6) of the Act, provides for what should happen where no response to the application is received. It states that:

58.

- (6) Where an applicant does not receive written response for development permission within sixty days, such permission shall be assumed to have been given in terms of this Act.
20. In our case, the development permission was lodged on 26 July 2019 after payment for it was made on 12 July 2019 (Kshs. 13,000) and 26 July 2019 (Kshs. 19,600/=). No response was received despite this application. It will be recalled that pursuant to Section 60 (1) of the *Physical and Land Use Planning Act*, the 1<sup>st</sup> respondent was required to circulate the said proposed plans to the relevant authorities and agencies for their comments. I have seen nowhere in the replying affidavit affirming that this was done. In fact, the response of the 1<sup>st</sup> – 4<sup>th</sup> respondents is that they did not act on the petitioner's application because the title of the petitioner was subject to an investigation. If the 1<sup>st</sup> respondent was of opinion that development permission ought not to be granted, for reason that the petitioner's title was under investigation, then he/she ought to have acted pursuant to Section 61 (2) (b) of the Act, i.e refuse to grant the development permission and give reasons for the refusal in writing. This would have paved way for the petitioner, if aggrieved, to lodge an appeal to the County Physical Planning Liaison Committee for determination. The avenue of keeping silent and sitting on the application is not there in the law.
21. This inaction by the 1<sup>st</sup> respondent contravened not only the *Physical and Land Use Planning Act*, but also Article 47 of the *Constitution* which gives one a right to fair administrative action and the enabling provisions contained in the *Fair Administrative Action Act*, Act No. 4 of 2015. Article 47 (1) and (2) of the *Constitution* provide as follows :

47. Fair administrative action

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



22. It is unreasonable, unfair, and unconstitutional, for a person exercising administrative authority to decline to act on an application when the law requires him/her to so act. If an administrator is of the view that there is a process which he/she is required by law to undertake but is unable to so act for one reason or another, then such administrator must provide such explanation to the applicant and give his reasons for not being able to act. It is an act of impunity and an unfair administrative practice for an administrator to stonewall an applicant. In very simple terminology, it is bad manners and an action (or is it inaction) that ought to be condemned in the strongest words possible. Failing to act is akin to one refusing to do one's job and you wonder why an administrator should be in office if he is refusing to do what the law requires him/her to do. An administrator is bound by the law and must act within the confines of the law and in accordance with it. If the law provides that the 1<sup>st</sup> respondent needs to act on an application for development approval, within a specified duration of time, then the 1<sup>st</sup> respondent needs to act as demanded by the law, not proceed on the basis of his moods, whims or personal opinion. It is against social justice, good governance, and integrity, for an administrator to chart a path of his own and decline to follow the law. It is in fact contrary to Article 10 of the *Constitution*, which outlines the national values and principles of governance. These principles, which apply to all State organs, State officers and public officers include:-
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
  - (c) good governance, integrity, transparency and accountability; and
  - (d) sustainable development.
23. Where, pray, is good governance, integrity, transparency and accountability when an administrator, instead of responding to an application for development permission as is required by law, simply keeps silent and does not provide any answer to the said application? The 1<sup>st</sup> respondent did not budge or act despite the petitioner writing on 9 December 2019 seeking to be informed of the fate of her application. He/she still continued to stonewall the petitioner.
24. Within their response to this petition, the 1<sup>st</sup> – 4<sup>th</sup> respondents contend that they could not give development approval because the title of the petitioner was under investigation. Why didn't they simply write to the petitioner to tell her that her title is under investigation and they cannot therefore deal with her application, or even ask for time for investigations to be completed? Whatever reasons the 1<sup>st</sup> – 4<sup>th</sup> respondent had, they needed to communicate to the petitioner. The 1<sup>st</sup> respondent, as demanded by the law, needed to respond to the petitioner's application and if he/she felt that there was good reason to deny her development permission, inform her of his/her reasons. I am persuaded that the petitioner has demonstrated that her right to Fair Administrative Action as required by Article 47 of the *Constitution* was violated by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent is an officer of the 4<sup>th</sup> respondent and the 4<sup>th</sup> respondent is thus vicariously liable for his/her omissions and commissions.
25. The other issue that the petitioner has raised is on the restriction placed against her title. She wants this lifted. She contends that this restriction violates her right to property. I have seen that the restriction was placed pursuant to a letter written by the 4<sup>th</sup> respondent dated 9 January 2020. The petitioner has demonstrated that she wrote a letter dated 3 March 2020 to the Land Registrar, Kisii, seeking to have a copy of the said letter. Again she was met with a loud silence. I need not repeat myself on what I said earlier on administrators and public officers simply not responding to queries made by the public.



The petitioner held title to the subject land. She deserved to be informed that the 4<sup>th</sup> respondent has applied to restrict her title. She was not made aware and was not given a hearing before the restriction was placed. Even assuming that placing the restriction was urgent, and she could not be heard before it was placed, why was she being denied the letter that placed a restriction on her title? As the title holder, she had every right to be given a copy of this letter. The Land Registrar did not even bother to respond to her request of 3 March 2020. He/She simply refused to give the petitioner the letter of 9 January 2020. This, in my opinion, violated the petitioner's right, not only to Fair Administrative Action under Article 47, but also the right to information under Article 35 of the Constitution which provides as follows :-

35. Access to information

- (1) Every citizen has the right of access to—
  - (a) information held by the State; and
  - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicise any important information affecting the nation.

26. It is my view that by proceeding to register a restriction and refusing to inform the petitioner about such restriction, and also refusing to provide a copy of the letter which led to the registration of the restriction, despite demand for it, the 4<sup>th</sup> and 5<sup>th</sup> respondents violated the petitioner's right to property under Article 40 of the Constitution.

27. Surprisingly, even within this petition, none of the respondents have tabled this letter dated 9 January 2020 which led to registration of the restriction. What was displayed was a letter dated 8 April 2020, from the County Government of Kisii, which again asks the Land Registrar, Kisii to register a caveat in the register of the suit property and other properties noted in the said letter. It cannot be that it is this letter which led to the registration of the restriction in the register of the title, for the restriction was registered on 9 January 2020 which comes before the letter of 8 April 2020. I wonder what the big secret is with the letter dated 9 January 2020. The petitioner, as I have demonstrated, was entitled to know the contents of it and up to date, and despite this suit, the 1<sup>st</sup> – 4<sup>th</sup> respondents have not come clean on the contents of the said letter. Without disclosing the contents of the letter, it cannot be said that the respondents have tabled any justification as to why the title of the petitioner should remain under a restriction. The restriction certainly curtails the full enjoyment by the petitioner of her property and in my opinion violates the petitioner's right to property as provided for under Article 40 of the Constitution.

28. To buttress her claim of violation of Article 40, the petitioner did state that county askaris are keeping watch over the property and preventing her from it. I have gone through the replying affidavit and nowhere is this denied. Preventing one from accessing his/her property is certainly a violation of one's right to property. I am persuaded that the petitioner has demonstrated that the respondents have violated her right to property as provided under Article 40 of the Constitution.



29. Let me now turn to the specific prayers in this petition. Prayer (1) seeks an order for a declaration that the petitioner is the lawful owner of the suit property. I am unable to make that declaration within the parameters of this petition as I have already stated that the issue of the legality of title cannot be determined herein given the nature of the pleadings. All I will say, is that prima facie, unless and until the petitioner's title is found by law to be illegal, it must, following Section 26 of the [Land Registration Act](#), be deemed as a proper title and should be accorded the respect that any valid title deserves. On prayer (2), I will declare that the respondents have violated the petitioner's right to property under Article 40, for reasons that I have already explained above. On prayer (3) I am persuaded to declare that the respondents' actions have violated the petitioner's right to Fair Administrative Action as required by Article 47 of the [Constitution](#).
30. Prayer (4) seeks an order that the petitioner's application for development be deemed as granted pursuant to Section 58 (6) of the [Physical and Land Use Planning Act](#). I am not too sure about the rationale of Section 58 (6). I ask myself why a proposed development should be deemed as allowed if no response to an application for development is made. I would rather that we insist that the application be given due consideration as required by law and for the persons in administration to act as the law enjoins them to do. The risk with invoking Section 58 (6) is that there could be developments that really ought not to be allowed if they are properly addressed in accordance with the procedures laid down in the Act, yet, because of failure to address the application, then the application is deemed as allowed. Let us assume that a developer proposes to construct a factory that will emit effluent, is very noisy, and will belch noxious fumes that will certainly affect residents. Does it mean that if such developer lodges the application for development approval, and the authorities do nothing to that application, then such development should proceed? You can see the danger of Section 58 (6). That is why I would rather insist that the authorities deal with the application as the law requires of them. However, I am alive to the fact that the law as is currently drawn is that if there is no response to the development application, then the application should be deemed as approved after lapse of 60 days and I have seen nothing repulsive in what the petitioner seeks to develop. 60 days lapsed a while back and in the circumstances of this case, I will invoke that provision and issue a declaration that pursuant to Section 58 (6) of the Act, the subject development of the petitioner is deemed as allowed.
31. Prayer (5) seeks an order for removal of the restriction registered against the title of the suit property. I have discussed this at length and pointed out that the letter which caused the registration of the restriction was never presented and therefore there has been no justification as to why the restriction should continue being in place. In any event, the restriction has been in place for over three (3) years now. Does it mean that the petitioner is to suffer because the 4<sup>th</sup> respondent and/or EACC are taking forever to conclude their investigations? I am not persuaded that a restriction should be for an indefinite duration. I indeed pronounced myself as such in the case of [David Macharia Kinyuru vs District Land Registrar, Naivasha & Another](#) (2017) eKLR which case Mr. Otieno referred to me. Three years in my opinion is more than sufficient time to have concluded any investigations, forget for a moment that we do not actually know the contents of the letter in issue. There is no justifiable reason why the restriction should continue subsisting and curtailing the enjoyment of the petitioner of her right to property. I order the 5<sup>th</sup> respondent to forthwith remove the said restriction.
32. Prayer (6) an (7) seeks an order granting permission to the petitioner to commence development and for an order to stop the respondents from interfering with the suit land. Since I have allowed prayer (4), I have no reason not to allow this prayer. It is hereby granted. In addition, I issue a permanent injunction restraining the respondents from interfering with the petitioner's proposed development or in any other way interfering with the petitioner's quiet possession of the suit land or with her and/or her servants/workers and or agents while she is undertaking the said development.



33. Prayer (8) seeks the grant of exemplary and/or punitive damages. I did not see any address on this in the submissions of both Mr. Otieno and Mr. Manyange. I am however persuaded that the respondents acted unfairly to the petitioner. They failed, as I have discussed, to uphold the national values and principles of governance enshrined in Article 10 of the *Constitution*. I have demonstrated that administrators need to follow the law and treat all persons fairly, and that includes responding to applications and letters. Kenyans should not be forced to tolerate behavior where administrators act as they please. Refusing to respond to applications and queries is not good conduct on the part of administrators and those in authority. To pass the message that this conduct ought not to be tolerated, I will make an award of Kshs. 500,000.00 (Kenya Shillings Five Hundred Thousand) in favour of the petitioner, as exemplary damages. Out of this amount, the 1<sup>st</sup> – 4<sup>th</sup> respondents will be liable to the extent of Kshs. 400,000/= and the 5<sup>th</sup> respondent, will be liable to the extent of Kshs. 100,000/= . I have distributed the said sum in this fashion to demonstrate my assessment of the level of culpability of the parties. This award to attract interest at court rates from the date of this judgment until settlement in full as sought in prayer (9) of the petition.
34. Prayer (10) seeks costs, and I award costs of this petition to the petitioner. Costs will again be in the ratio of 4:1 as above.
35. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 4<sup>TH</sup> DAY OF MAY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

