



**Brunnel v Attorney General (Constitutional Petition E052 of 2024)
[2025] KEHC 2612 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E052 OF 2024**

J NGAAH, J

MARCH 14, 2025

BETWEEN

KAREL BRUNNEL PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. Before court is a petition dated 4 September 2024. The petitioner is a citizen of Belgium and in the affidavit in support of the petition, he has sworn that he is based at Groenhove 13, 9800 Woutergem (Deinze).
2. According to the petitioner's pleadings and the affidavit sworn in support of the petition, in the year 2018, the petitioner filed a case against one Joan Muthoni Nduta in the Environment and Land Court in Mombasa and which was registered in that court as ELC NO. 160 of 2018. After the establishment of the Environment and Land Court at Kwale, the case was transferred to Kwale in the year 2021 and registered as ELC No. 76 of 2021. The land in dispute is said to be known as Kwale/Diani Complex/695.
3. At some point in the year 2019, further progress of the case was stayed by the court in which it was instituted when the court was informed that the title of the subject property was one of the titles that were annulled in Mombasa High Court Petition No. 21 of 2010 in a judgement that was rendered on the 23 May, 2019. The Court was also informed that an appeal or appeals had been filed in the Court of Appeal at Mombasa against the judgement in Mombasa High Court Petition no. 21 of 2010. The proceedings in the Environment and Land Court were thus stayed pending the determination of the appeals in the Court of Appeal, registered as nos. 4 of 2020 and 8 of 2020.
4. The petitioner is aggrieved that despite the appeal having been filed in the year 2020 it still pending for determination, almost five years down the line and, since the progress of his case in the Environment



and Land Court was pegged on the outcome of the Court of Appeal decision on the pending appeals, his case has also stalled.

5. Meanwhile, besides the petitioner's witness in the land court case being elderly and saddled with what the petitioner has described as "health complications", the defendant is alleged to have taken advantage of the delay in the determination of the petitioner's case to intimidate and harass the petitioner's witnesses.
6. As a matter of fact, the defendant was charged alongside two other accomplices for intimidating the petitioner's witness and impersonating police officers in Kwale criminal case number 1048 of 2018 Republic v Amos Wabomba Nalianya, Walter Viketi Shem and Joan Muthoni Nduta. Judgment in the criminal case was delivered on the 17 February, 2022 and, according to the judgment, the defendant and her accomplices were found guilty of the charges and convicted accordingly.
7. Against this background, the petitioner pleads that:

"18. To the extent that the extent that the Court of Appeal in Mombasa having conduct of COACA No. 4 of 2020 and COACA No.8 of 2020 has failed to determine the case for more than 5 years and thus leaving the Petitioner's land case in Kwale ELC No. 76 of 2021 undetermined for years, the Petitioner's rights to have his case begin and conclude without unreasonable delay as guaranteed under article 50(2)(e) was violated.

19. To the extent that the extent that the Court of Appeal in Mombasa having conduct of COACA No. 4 of 2020 and COACA NO. 8 of 2020 has failed to determine the case for more than 5 years and thus leaving the Petitioner's land case in Kwale ELC No. 76 of 2021 undetermined for years, the court of Appeal is in violation of article 159 (2)(b) of *the Constitution* which provides that Justice shall not be delayed."

8. The petitioner also prays for "a declaration that resonating the intention of Articles 5 (2)(e) with 159 (2) (b) of *the Constitution*, the court of Appeal's delay in determining COACA No. 4 of 2020 and COACA No. 8 of 2020 violated the petitioner's rights to fair hearing." He also seeks damages for what he claims to a violation of his constitutional rights.
9. The respondent opposed the petition and a replying affidavit to this end was sworn by Honourable Emily Mwamuye, the deputy registrar, Court of Appeal at Mombasa. According to Honourable Mwamuye, Civil Appeals Nos. 4 and 8 of 2020, were placed before the Honourable Court of Appeal bench on the 21 February 2023 for hearing of an application for review. The application was dated the 21 November 2022.
10. The application was for review of orders issued on the 21 October 2022 by the Honourable Court in application 4 of 2020; Leisure Lodges Limited versus Nasorro Abdhalla Mwachibulo & 165 others. As is evident from in the certificate of urgency, affidavit in support of urgency accompanying the application and in the application itself, the application questioned, among other things, the impartiality of the Honourable Judges.
11. In particular, it has been sworn:

"7. That in Paragraph (i) of the certificate of urgency the applicants laid down grounds, of note is sub-paragraph xii:



‘15. That, in the circumstances, there has been judicial discrimination against the applicant as to equal protection of the law and equality before the court’.

8. That the Applicant's counsel in the affidavit in support of the urgency of the application for review states in the conclusion of the affidavit as follows:

‘15. That, in the circumstances, it is discernible that there was an appearance of bias in the ruling by this Honourable Court in civil Appeal (application) no. 4 of 2020 Leisure Lodges Limited v Nasoro Abdhalla Mwachibulo and 165 others which must be resolved by this Honourable court so as to restore the public confidence in the fairness and impartiality of the Judicial system.’

17. That the impression created to the ordinary bystander is that the Honourable Court is bending over backwards, ignoring the law and abusing the judicial discretion to sustain a breach of the rules of the court through unexplained rulings and gratuitous orders...”

12. With these accusations, the court comprising the Honourable Justices Gatembu, Nyamweya and Lesiit recused itself from the case on 21 February 2023. Due to shortage of judges in the Court of Appeal and, owing to the fact that the few who are available have been deployed to different parts of the country, the delay in reconstituting afresh bench was inevitable.
13. Coupled with this fact, the petitioner has not disclosed that even before its recusal, the court had deliberated upon and delivered several rulings in the matter before it. To be precise, on the 14 November 2019, the court delivered a ruling on an application for stay of execution and on 6 November 2020, the court delivered a ruling in an application for amendment of the Memorandum of Appeal. There were also applications for substituted service and for leave for other parties to join the appeals. The petitioner is said to have suppressed this vital information to create the wrong impression that the Court of Appeal has delayed the determination of appeal or appeals before them.
14. Honourable Mwamuye has sworn further that the litigants in the appeal or appeals in question had been heard by the Court of Appeal on several occasions prior to the bench's recusal. Thus, the delay in the determination of the appeals is neither intentional nor deliberate. In any event, there are other cases which the same court has been called upon to determine.
15. This honourable court has been asked to take judicial notice that of the fact judges of the Court of Appeal are few in number and that there has been considerable backlog of cases in the Court due to the shortage of judges specifically noting that some appointments of judges were delayed causing further delay in the administration of justice that affected the entire country. Reconstituting an entire bench of three judges to hear and determine the appellants' applications was due to the constraints faced by the Court of Appeal in the deployment of an entirely different bench of judges to Mombasa, to replace the bench that recused itself following the applicants' application. Nonetheless, the President of the Court of Appeal has now reconstituted a new bench which, at the time Honourable Mwamuye swore her affidavit, was set to hear the pending applications on 12 November 2024.
16. In his submissions, the petitioner has urged that his rights to a fair hearing under articles 50(2) and 159(2)(b) of *the Constitution* have been violated. He has also urged that the delay in the determination of the appeals has violated article 159(2) (e) of *the Constitution* which enjoins the courts and the tribunals to uphold the principle that justice shall not be delayed when exercising their judicial authority. It has also been urged that the right to fair trial includes the right to have trial to begin and conclude without unreasonable delay and, according to article 25(c) of *the Constitution*, this right is not subject to any limitation.



17. The petitioner has relied on *Chege Kuria Mwere & 6 Others versus Attorney General (2017) eKLR* where it has held that fundamental rights are owed to persons as a matter of human dignity and that fundamental rights and freedoms of the individual are inherent and are not granted by the state.
18. On whether the petitioner is entitled to compensation, the petitioner has cited *Florence Wamukanda & Another versus Attorney General & 2 Others (2016) eKLR* where the court held that it is an established principle that violations of fundamental rights must be remedied. In that case, the court cited with the approval the decision in the South African case *Ntanda Zeli Fose versus The Minister for Safety and Security* (full citation has not given) where Kriegler is said to have held that the object of the court in remedying constitutional violations is, at the very least, to vindicate *the constitution* and to deter its further infringement.
19. In his submissions, the Attorney General has countered that the petitioner has failed to discharge the evidential burden that his property is, in any way affected by the order of stay the proceedings in the Environment and Land Court. It has also been urged that the Court of Appeal had no notice that the appeals before it have any impact on the case in the Environment and Land Court.
20. The respondent has also urged that the suit is bad for misjoinder in the sense that although the petitioner seeks compensation against the Attorney General, the impugned conduct is attributed the Court of Appeal. According to the Attorney General, the Court of Appeal ought to have been sued in its own name. The Attorney General has submitted that although the Court of Appeal, like all other government entities, are legally represented by the Attorney General, they must be sued in their name so as to assert the constitutional independence of the judiciary in accordance with article 160 of *the Constitution*. Due to this independence, the court cannot make any inference to the effect that Attorney General is sued on behalf of the Court of Appeal.
21. Having considered the petition and the response thereto together with submissions in support of and against the petition, I find that the petition is lacking in its material respects; in particular, its factual basis. In the affidavit in support of the petition, the petitioner has sworn as follows:
 - “ 1. That I am the Petitioner herein and holder of Belgium Passport No. 397995, hence competent to make and swear this Affidavit.
 2. That I have read and had explained to me by my Advocates on record, the meaning and intent of the contents of the Respondent's replying affidavit dated 4th November, 2024 to which I wish to respond as follows;
 3. That the Respondent blames the parties to the Appeals for the delay in their determination. However, according to the documents filed by the Respondents, the last application in the appeals is dated 21st November, 2022.
 4. That there is no explanation for the delay as from the said date.
 5. That the delay in determining the appeals has delayed the hearing of my case in Kwale ELC NO. 76 OF 2021 (formerly Mombasa ELC No. 160 of 2018) from the year 2019. (annexed and marked KB-1 is a copy of the order dated 12th June, 2019)
 6. That the Respondent's excuse that there are numerous applications and appeals pending before the court of appeal where parties are as anxious to have their applications and appeals disposed of expeditiously and without delay



does not invalidate my individual claim for violation of my rights under the constitution.

7. That what is deponed herein is true to the best of my knowledge.”
22. To begin with, it is not clear from these depositions how the petitioner’s case ELC no. 76 of 2022 is related to the appeals in the Court of Appeal which, as far as I can gather from the material placed before me, were filed against the judgment of a three-judge bench of this Honourable Court. (Hon Justice EK Ogola, Lady Justice D. Chepkwony and Hon Lady Justice Thande) in Constitutional Petition No. 21 of 2010 (Mombasa). The judgment was delivered on 23 May 2019. The petition was between Nassoro Abdalla Mwachibulo & 165 Others on the one hand and Leisure Lodges Limited, on the other hand. The latter appears to have been the petitioner in the petition.
23. It has not been suggested that the petitioner in this petition was one of the 166 respondents or a party, in any capacity, to the suit in the Environment and Land Court, and, therefore, if he was not, how he became involved or was affected by an appeal arising from a suit to which he was not party.
24. More importantly, the order purporting to have delayed the petitioner’s case does not state unambiguously that the petitioner’s suit no. 76 of 2022 is stayed pending the determination of the appeals filed against the decision of this Honourable Court in petition no. 21 of 2010. In its material respects, the order reads as follows:
- “Order
- This matter coming up for hearing on 12.6. 2019 in the presence of Ms. Adoli counsel for the plaintiff and Mr. Omolo counsel for the defendant
- And upon hearing
- It is ordered:
1. That the case is stood over generally.
 2. That parties to comply pending the outcome of the appeal from the high court decision (Pet. No. 23 of 2010).”
25. Even if it was to be assumed that the order stayed the proceedings in case no. 76 of 2022, it is not clear from the order who, between the parties before court, moved the court for this order. Assuming it was not the petitioner in the instant petition, this Honourable Court would have been interested to know whether the petitioner raised any objection to stay of the proceedings, if not for any other reason, for the reason that he was not party to the proceedings out of which the judgment appealed against arose.
26. Equally important, it is obvious that this order did not emanate from the Court Appeal. Even if I was to proceed on the assumption that the order effectively stayed the proceedings in the Environment and Land Court, it is clear that the order emanated from that court and not from the Court of Appeal. The point is, the Court of Appeal cannot be faulted for the alleged delay in the hearing and determination of ELC no. 76 of 2022, when the order for stay of the proceedings emanated from the court in which that case was instituted.
27. The second reason why I opine that the factual basis of the petitioner’s petition is faulty is that the petitioner suppressed facts material to his petition and which facts only came to light in the replying affidavit of the respondent. I say so because looking at the petitioner’s pleadings and the affidavit filed in support of the petition, without any reference to the respondent’s response, one would be forgiven



for reaching the conclusion that ever since the appeals were filed in 2019 or 2020, they have been lying in the registry without any action.

28. Contrary to what, in my humble view, is the petitioner's misrepresentation, it is apparent that the hearing and determination of the appeals has been plagued by a combination of factors that may not necessarily be attributed to the Court of Appeal or to the judiciary, as an institution. In the first place, there is evidence that after the appeals were filed, a series of applications ensued. For instance, according to a ruling delivered on 14 November 2019, a copy of which has been exhibited to the respondent's affidavit, upon filing of the appeal, the Attorney General applied for stay of execution of the judgment of this Honourable Court under rule 5(2) (b) of the Court of Appeal Rules. There is also another application, dated 12 June 2020 also filed by the Attorney General, for amendment of the memorandum of appeal, which was heard and determined by the court.
29. In the application dated 21 November 2022, the applicant in the Court of Appeal (Civil Appeal No. 4 of 2020) applied to court for review of its order made on 21 October 2022 in yet an earlier application dated 18 February 2020. This application sought, among other orders, that the appeal be struck out. In the order made on 21 October 2022, the application was dismissed.
30. The court proceedings of 21 February 2023 show that, there was also an application for the bench that was poised to hear the appeals to recuse itself. Gatembu, JA, the then presiding judge, is recorded to have noted as follows:

“Alright. I will repeat what I was saying earlier. That there are claims of bias, claims that the bench is bending over backwards to assist one party, there are claims that the bench is ignoring the law and we are abusing the process. The court has taken the view that is to say myself Gatembu, JA, the Honourable Lady Justice Nyamweya and the Honourable Lady Justice Lesiit, that it is best that the matter and the related matters be heard by a bench that excludes the three of us... that is the order we make in this application and in the related civil application no. 8 and the substantive appeals no. 4 and 8.”
25. The court then made an order that the matter before court and all related matters be placed before the President of the Court of Appeal for the purpose of constituting a new bench to hear those matters. As recently as 12 November 2024, the cause list of the Court of Appeal for the material date shows that there were two other applications coming upon for hearing in appeal no. E004 of 2020 and E008 of 2020.
26. The petitioner may not have been aware of these latest developments but he must have known or he ought to have been aware of the applications that had been filed in the appeals and which, as due process would demand, were to be heard and determined accordingly, hence the delay in the hearing of the substantive appeals.
27. If, for instance, there was any delay in reconstituting a fresh bench after the recusal of the previous one designated to hear the appeals, it is for the obvious reason that the Court of Appeal does not have enough judges. It is in the public domain that efforts to recruit more judges have been frustrated by what has been described as “austerity measures”. As far as I am aware, the Court of Appeal does not have an ad hoc or a stand-by bench waiting to dispose of cases where benches assigned those cases recuse themselves, for one reason or another. I am also aware and, indeed it is in the public domain, that except for the Nairobi station which has more than one bench of judges, each of the rest of the Court of Appeal stations throughout the country has only one bench. In these circumstances, it is inevitable that reconstitution of a bench, in any one station, where an entire bench has recused itself, is bound to take a while considering that the rest of the judges are engaged in their respective benches and stations.



28. As an institution, the judiciary will always strive to deliver on its responsibilities and obligations under *the Constitution* and, more importantly, hear and determine disputes before courts without undue delay. However, if, for whatever reason, Parliament starves it of the necessary resources, the most important of which are funds to recruit sufficient manpower at all court levels, the principle that justice shall not be delayed will be rendered aspirational yet it is a constitutional imperative under article 159(2) (b) of *the Constitution*.
29. For the reasons I have given I am not satisfied that the petitioner has made out a case for grant of the prayers sought. The petition is hereby dismissed. I make no orders as to costs.

SIGNED, DATED AND DELIVERED ON 14 MARCH 2025

NGAAH JAIRUS

JUDGE

