



**Baitalakua v Deputy County Commissioner Igembe Central Sub
County & another; Kabilia (Interested Party) (Petition E003 of 2023)
[2024] KEELC 1778 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E003 OF 2023
CK NZILI, J
MARCH 20, 2024**

BETWEEN

BENSON MUTUMA BAITALAKUA APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER IGEMBE CENTRAL SUB
COUNTY 1ST RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

VINIAS KABERIA KABILIA INTERESTED PARTY

JUDGMENT

1. The petition before the court is dated 23.7.2023. The petitioner avers that he is the rightful and actual owner of Land Parcel No. 7294 Athiru Ruujine Adjudication Section measuring 4 acres, bought from one Henry Miriti M'Arucha. He avers he has been in occupation of and developed the suit land until 2009 when the interested party filed a committee case, which he won and was subsequently dismissed also at objection proceedings, leading to an appeal at the minister's level by the interested party.
2. The petitioner avers the 1st respondent as a delegatee of the minister, heard the appeal, and directed that the decision would be delivered on notice, only for the interested party on May 2023 to enter and start grazing on the land forcefully, claiming it was his.
3. The petitioner avers that he visited the offices of the Director of Adjudication in Nairobi for inquiry, only to be told that the minister's decision was delivered a year ago without his knowledge or notification by the 1st respondent. He termed the delay and the decision wrong, unconstitutional,



fraudulent, a conspiracy to assist the interested party, unlawful, and amounting to a deprivation of his right to property under Article 40 of *the Constitution*.

4. The petitioner averred that since he had exhausted the internal dispute mechanisms under statutory law, the court should declare the decision unconstitutional, issue certiorari orders to quash it, declare the land as his, and grant general damages. In support of the petition, the petitioner relied on an affidavit sworn by Benson Mutuma on 24.8.2023, where he attached the sale agreement dated 18.4.2007, transfer dated 4.4.2007, 18.4.2007 and adjudications record as annexure BMB "1" – "5" respectively. Further, the petitioner avers that in 2008, the 1st interested party had filed a committee and objection cases, all of which were unsuccessful, and later filed a minister's appeal. He attached copies of proceedings and decision BMB 6, 7 & 8.
5. The petitioner avers that despite visiting the 1st respondent's office severally to enquire about the decision, he was denied a copy, for he was told it was yet to be delivered to that office, making him to visit the office of the Director of Land Adjudication in Nairobi.
6. The petitioner avers that the decision does not contain the proceedings, departs from previous issues, history and evidence as captured in the previous proceedings and was tailor-made to secure a win for the interested party. Additionally, he says it was made without notice; it does not analyze or refer to any adduced evidence; it did not include the vendor who sold him the land, yet he was a party before the appeal; it denied him a right to a fair hearing and lastly, it did not apply the law.
7. Moreover, the petitioner avers the 1st respondent failed to supply him with the verdict in good time and, therefore took away his right to contest the decision; it was discriminatory and took away his only family land.
8. The respondents opposed the petition through a replying affidavit of Hassan Ali Bule, the 1st respondent, sworn on 20.11.2023. The respondents aver the petition does not meet the constitutional threshold, for lack of particulars on how the petitioner's rights were infringed and lacks evidence of ownership and occupation of the suit land.
9. The 1st respondent averred that the minister's appeal was heard under delegated authority, each of the parties was accorded a fair hearing or an opportunity to present their case, there was no bias or collusion as alleged, parties were aware of the scheduled hearing, and a ruling date; the decision was rendered verbally, following due process based on the facts, issues, evidence, presented and was governed by justice and the applicable law.
10. The respondents aver there is no evidence presented that the decision is unconstitutional, fraudulent, arbitrary or wrongful. Additionally, the respondents aver the petition was brought after an inordinate delay, which was not substantiated owing to the fact that the decision was delivered verbatim, with the responsibility resting on the petitioner to request a copy of the decision thereof. Yet, no copies of letters have been attached to show that the petitioner followed up for a copy. The respondents aver the decision was final by dint of Section 29 of (Cap 284) of the *Land Adjudication Act*; hence the court has no jurisdiction, more so when certiorari is being sought outside the six months for a decision made on 7.2.2022.
11. The interested party opposed the petition through a replying affidavit by Vinius Kaberia Kabilia sworn on 8.11.2023, terming it as an afterthought, a fishing expedition, res-judicata, suffering from laches, brought in bad faith, misleading with no evidence of follow-ups, lacking substantiation.
12. The interested party avers the petitioner chose not to oppose the minister's appeal and should not be allowed to do so through this petition. It was averred that the petition falls short of meeting the requirements of a constitutional petition and is otherwise an appeal against the decision, which renders



- the petition unlawful, irregular and an attempt to reopen the case before the minister. The interested party avers the issue of ownership of the suit land having been fully settled by the minister cannot be revisited through a constitutional petition which is hopelessly flawed in law, dead on arrival, fatally defective and an abuse of the court process.
13. In a further affidavit sworn on 29.11.2023, the petitioner avers BMB "5" & "6" was enough evidence of ownership rights to the suit land, and it was curious how the interested party acquired the verdict, yet none was supplied to him for over a year after its delivery.
 14. The petitioner aver his constitutional rights were infringed since he was not given a copy of the verdict to challenge it; his evidence and that of his witnesses were not examined or considered before the verdict was delivered; he was condemned without calling or involving the vendor who sold the land to him yet he was a party in the earlier objection proceedings and that the 1st respondent made or cooked his evidence which the parties did not present.
 15. The petitioner avers he appeared during the minister's appeal with the legitimate expectation that his evidence and that of his witnesses would be taken down and given due consideration. However, unfortunately, no proceedings were taken, only for the 1st respondent to casually create his findings not originating from the parties's evidence hence occasioning a substantial prejudice by carelessly taking away his right to ownership of the suit property.
 16. With leave of court, parties were directed to canvass the petition by way of written submissions. The petitioner submitted that he had a legitimate expectation that the 1st respondent would hear and determine the petition based on Articles (1), (2), 10, 21, 22, 23, 27, 40, 50(1) of *the Constitution* as read together with Section 29 Cap 284 in a fair, independent, unbiased manner, without influence, with equality and not with a predetermined mind.
 17. The petitioner submitted that it was the duty of the 1st respondent to notify and summon parties for the hearing or mention of their appeals, but contrary to what is expected, there was no notification to him of the date of the ruling, only to learn of its delivery, a year later, hence denying him the right to challenge it on time or at all.
 18. The petitioner submitted, unlike other proceedings and decisions, the instant one lacks information on what transpired, its findings, its rationale and its basis. Further, that the verdict lacks legitimacy or legality, and it appears it was carried out with the aim of awarding the land in dispute to the interested party.
 19. The petitioner submitted that the 1st respondent's decision is amenable to the supervisory jurisdiction of this court under Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice And Procedure Rules (2013) (Mutunga Rules). Reliance was placed on Halsbury Laws of England 5th Edition 2010 Vol 61 paragraph 639.
 20. The petitioner submitted that although the 1st respondent is obligated under Article 35 (1) of *the Constitution* to provide the information or verdict of its determination immediately after the outcome, he only came to know it about a year later, hence violating Article 47 (9) (L) of *the Constitution*. In this instance, the petitioner submitted that the 1st respondent had not denied his allegations that the proceedings were never supplied in good time, contrary to *the Constitution*, yet he had the right to obtain them in order to appeal in good time, so he was denied a right to information as guaranteed under Article 48 of *the Constitution*. Reliance was placed on Van Huyssten vs Minister of Environmental Affairs and Tourism (1995) 4 LRC and Section 6 (2) of the *Fair Administrative Action Act*.



21. Additionally, the petitioner submitted there was gross unreasonableness in the decision taken or act done by the 1st respondent that no reasonable authority addressing itself to the facts and law before it would have made such a decision which defies logic and the acceptable moral standard.
22. The respondents relied on written submissions dated 15.1.2024 and isolated two issues for determination. The respondents submitted the petition does not meet the constitutional threshold for it was not pleaded with precision on the correct nature of the injuries and manner of infringement and raises no constitutional issues as set in the Mutunga Rules, Mumo Matemu vs Trusted Society of Human Rights Alliance & others (2013) eKLR, Robert Kulinga Nyamu vs Musembi Mutunga & another (2022) eKLR, Tobias Achola Osidi & others vs Cyprianus Otieno Ogalo & 6 others (2013) eKLR.
23. The respondents submitted that the role of the court during land adjudication process is limited to supervision of the process. However, in this petition, the substratum is in challenging and or appealing the decisions of the minister instead of the decision-making process. Further, it was submitted that the petitioner had not exhausted the available dispute mechanism prescribed by the law, and the petition is, therefore, statute-barred and an afterthought.
24. The respondents submitted that the appeal decision was rendered in the presence of the petitioner; he did not tender enough evidence during his hearing and or demonstrate any efforts that he made after, to pursue the decision at the 1st respondent's office. The respondents submitted that the petitioner should not be allowed to circumvent the law under the pretext of a constitutional petition when he was indolent in prosecuting his claim.
25. The respondents submitted that the petitioner has failed to substantiate irregularity, fraud, unconstitutionality, bias, or collusion alleged in the petition. Reliance was placed on Kuria Kiarie & others vs Sammy Magera (2018) eKLR.
26. The respondents submitted that from annexure marked UKK "1," there was evidence of a fair hearing to all the parties and that the petitioner was unable to prove his case, unlike the interested party before the minister, and so is the case in this petition which has not been proved to the required standard.
27. The interested party relied on written submissions dated 12.1.2024. The interested party submitted the petition is res-judicata the minister's final decision in Appeal No. 1 of 2012 is final under Section 6 of the Civil Procedure Act in the absence of a challenge through judicial review.
28. The interested party submitted that the petition was contradictory, an afterthought, self-defeating, and full of falsehood. Whereas the minister's decision should have been challenged by way of judicial review within six months, it is submitted that the petitioner cannot seek certiorari orders in this petition belatedly; otherwise, he was on a fishing expedition on the last kicks of a dying horse in an attempt to cover up for an unexplained failure to challenge the decision on time.
29. The interested party submitted that filing the petition some nineteen months after the delivery of that decision shows the petitioner was indolent and disinterested in agitating for his claim, more so when no evidence has been tendered by way of follow-up letters. On compromise and fraud, the interested party submitted no evidence to substantiate the allegations by way of reports made to the Ethics and Anti-corruption Commission, the police, or the 1st respondent's employer. Therefore. the interested party submitted that the petition fails to meet the constitutional threshold. Reliance was placed on Edarus Salim Hussein & others vs Shariffs Binti Salim & others (2022) eKLR, Grays Jepkemoi Kiplagat vs Zakayo Chepkonga Cheruiyot (2021) eKLR, Uhuru Muigai Kenyatta vs Nairobi Star Publication Ltd (2013) eKLR and Rapinder Kaur Atwal vs Manjit Singh (2014) eKLR.



30. The issues calling for my determination are:
- i. If the petition meets the constitutional threshold.
 - ii. If the petitioner should have exhausted the internal dispute mechanism under Cap 284.
 - iii. If the failure to file a judicial review within six months bars the petitioner from approaching this court by way of a constitutional petition.
 - iv. If the petitioner has pleaded and proved, the complaints in the petition to be entitled to the reliefs sought.
 - v. What is the order as to costs?
31. A party seeking constitutional reliefs based on an alleged infringement of constitutional rights and freedoms must meet the procedural and substantive law captured in Articles 21, 22, 23, 165, 258, and 260 of *the Constitution* as read together with the Mutunga Rules, the *Environment and Land Court Act* and the *Fair Administrative Action Act*. In particular, the petition and the answers to it must comply with the format in Rules 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 20, 21 and 22 thereof. Rule 10 provides that a petition must disclose the particulars of the petitioner, acts relied upon, constitutional provisions violated, nature of injury caused or likely to be caused, details regarding previous proceedings, signature and the reliefs sought. Documents and affidavits may support a constitutional petition.
32. In *CCK & others vs Royal Media Services Ltd & others* (2014) eKLR, the court observed that even though Article 22 (1) of *the Constitution* gives every person the right to initiate proceedings, claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking the Article has to show the rights said to be infringed as well as the basis of his grievance and manifest its contravention or infringement. The court said the principle plays a positive role as a foundation of conviction and good faith in engaging the constitutional process of dispute settlement.
33. In the petition before the court, it substantially complies with Rule 10 above. Details have been pleaded and substantiated by way of affidavits accompanied by annexures marked BMB 1-8. None of the respondents and the interested party sought better particulars. On the contrary, the respondents and the interested party filed comprehensive replying affidavits to the petition.
34. The purpose of precision in pleadings for a constitutional petition is to enable parties to define succinctly the issues so as to guide the testimony required on either side with a view to expediting the litigation through the diminution of delay and expense. The court is itself bound by the pleadings of the parties and must adjudicate upon specific matters in dispute as raised in the pleadings, as held in *David Sironga Ole Tunkai vs Francis Arrap Muge & 2 others* (2014) eKLR.
35. In *Mumo Matemu vs Trusted Society of Human Rights Alliance* (supra), the court cited *Thorp vs Hold Worth* (1876) 3 CHD 637 at 639 that the whole object of pleadings is to bring the parties to an issue and the meaning of the rules was to prevent the issue being enlarged, which could prevent either party from knowing when the case came for trial what the real point to be discussed and decided was.
36. The next issue raised by the respondents and the interested party is whether the petitioner should have exhausted the internal dispute mechanics under Cap 284 order 53 and Sections 8 & 9 of the *Law Reform Act*. Put another way is whether the delay in challenging the minister's appeal within six months of its delivery bars the petitioner from circumventing the law by filing a constitutional petition as a cover-up for indolence, inordinate delay, and whether it amounts to an abuse of the court process.



37. The petitioner alleges that whereas the appeal was heard and parties were told the decision would be rendered on notice, there was inordinate delay in delivering it; he was not notified of the date of the delivery, or soon after notified of its outcome and lastly, that there was collusion and inordinate delay to notify him and or avail him copies so as to exercise his right of challenging the decision. He avers that the acts of the respondents were and amounted to a denial of his constitutional right to a fair hearing, notification of the date of the decision and the right to challenge the decision.
38. In answer to the petition, Hassan Ali Bule, for the 1st respondent, in paragraph 9 of his affidavit, averred that the parties were aware of the ruling date, and the decision was rendered verbally on 7.7.2022.
39. The interested party, on the other hand, in his replying affidavit, does not state whether he attended the delivery and how he became aware of the date of the delivery of the decision. The minister's appeal was heard and the decision was made by M.K Kioni and not Hassah Ali Bule, the deponent herein. The deponent does not state if he had the authority to swear the affidavit on behalf of the decision maker. He did not state the source of the facts and information he was swearing on. The deponent does not state whether he was privy to the subject or issue. The date of the proceedings and scene visit notes are missing. Parties who testified are not indicated. The manner in which the appeal was heard, including what the grounds of the appeal were and the specific evidence the parties relied upon, was not indicated. Whether the parties were present at the delivery of the ruling on 7.7.2022 was not indicated.
40. The respondents are silent on the failure to notify, communicate or avail copies of the decision to the petitioner on time or at all. All these are issues that the respondents should have clarified and specifically responded to. Attendance during, notification of, and access to copies of the decision on time touch on observance of rules of natural justice and the right of appeal. In *Njonjo Mue & another vs Chairperson of IEBC & others* KESC 45 (KLR) 11th December (2017) (Ruling), the court addressed itself on Article 35 of *the Constitution* and the effect of the *Access to Information Act* 2016. The court cited *R.O Timothy Njoya & another vs A.G. & another* (2014) eKLR, that the state must not only proactively publish information in the public interest but also provide open access to such specific information as people may require from the state. The court said that Section 8 of the *Access to Information Act* provides that one may apply for a decision orally or in writing and that the information must be processed or availed to him within 21 days.
41. In *Gladys Boss Shollei vs JSC KESC* 5 (KLR) 17th February 2022 (Judgment), the court said that the right of fair administrative action under Article 47 of *the Constitution* guarantees every person the right to a fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. In *Mohamed Fugicha & another vs Methodist Church (K) & 3 others* (2016) eKLR, the court said that any reasons for a limitation of a constitutional right must be disclosed.
42. In this petition, the petitioner has averred that he was not aware of the decision and its date of delivery, was not given a copy, and could not, therefore, file a judicial review on time since he became aware of the decision in May 2023, when the interested party threatened to enter his land forcefully. He also takes exception to the contents of the decision as not meeting his reasonable, legitimate expectation of the law and the Constitutional threshold.
43. In *Suchan Investment Ltd vs Ministry of National Heritage & Culture & others* (2016) eKLR, the court observed that the provisions of the Fair Administrative Action & Act were retroactive in nature and could apply to all the proceedings pending in court. The court said that Section 12 thereof provides that the Act was in addition to and not in derogation from the principles of common law and the rules of natural justice. The court further said that under Article 47 of *the Constitution*, as read together with Section 4 (3) (b) of the Fair Administrative Action & Act, where an administrative action was likely to affect the right or fundamental rights of any person adversely, the administrator must give



the person affected by the decision an opportunity to be heard and be given information, materials, and evidence relied upon in making the decision or in the taking the administrative action. The court said Article 47 (2) of *the Constitution*, as read together with Sections 4 (3) (d) 55 (2), 6 (2) (a) & (4) of the Fair Administrative Action & Act, the reasons for the administrative decision must be given as a matter of right where a right under the bill of rights has been or is likely to be adversely affected by the administrative action and that the right to be given reasons for the decision can be limited by law for reasonable and suitable cause.

44. The court said the holding that constitutional issues cannot be raised in a judicial review case was the law prior to 2010, which has now changed under Articles 22 (3) and 22 (4) of *the Constitution* as read together with Article 47 of *the Constitution* and sections 5 (2) (b) (c) and 7 (1) (a) & (b) of the *Fair Administrative Action Act*, suggesting a violation of constitutional rights and freedoms can be entertained by way of a constitutional petition under Mutunga Rules. The court said Article 47 and Section 5 (2) of the Fair Administrative Action & Act permit the bifurcation or a split approach to remedies, either through a judicial review or constitutional petition, which are not mutually exclusive.
45. On whether the court can determine the merits of a decision as opposed to the decision-making process, the court observed Section 7(2)(1) of the Fair Administrative Action & Act and Article 24(1)(b) of *the Constitution*, proportionality was a ground for judicial review, which in essence includes an evaluation of the merits of the decision. The court said that even if the merits of the decision are undertaken in Section 11 of the *Fair Administrative Action Act*, it forbids the court from substituting the decision with its decision to only but to remit the matter for re-hearing.
46. Guided by the preceding case law, I find the petition is properly before the court since it seeks the court to look at the constitutionality of the decision, among other things, allegedly undertaken without giving the petitioner notice of the decision and or supplying him with the same on time, for purposes of challenging it before the six-month rule. See *Dande & others vs Inspector General of Police Service & another* (2023) KESC (Judgment).
47. The next issue is whether the petition discloses constitutional issues. A constitutional issue or question is one whose resolution requires the interpretation of *the constitution* rather than that of a statute. See *Hakizimana Abduol Abdulkarim vs. Arrow Motors E.A Ltd & another* (2017) eKLR. In *Turkana County Government & others vs Attorney General & others* (2016) eKLR, the court said claims of statutory violation could not give rise to a constitutional violation. See *Gatirau Peter Munya vs Dickson Mwenda Kithinji & others* (2014) eKLR.
48. The issues raised in the petition are whether, in hearing and determining the minister's appeal, the 1st respondent infringed on or violated the petitioner's rights to fair hearing or administrative action, appeal, and ownership of property. To my mind, the three questions derive their answers from *the Constitution* and not from the statutes. The respondents in paragraphs 6, 7, 8, 9, 10, 11, 12, 14, 15, and 17 of the replying affidavit, as read together with paragraphs 3, 4, 5, 6, 7, 8, 9, 10-19 of the interested party's affidavits have denied that the alleged rights were violated, infringed or threatened. Additionally, in the further affidavit dated 29.11.2023, the petitioner invoked Section 7 of the *Fair Administrative Action Act* to, among other things, legitimate expectation of fair hearing and access to justice at the hands of the 1st respondent.
49. The respondents and the interested party urge the court to find a delay of 19 months inordinate to move the court. In *Edward Akongo Oyugi & 2 others vs AG* (2009) eKLR, the court said laches refer to a lack of diligence and inactivity in making a legal claim or moving forward with legal enforcement of a right. The court said that to invoke laches, the delay must be unreasonable and prejudicial to the opposite party. None of the respondents or the interested party have pleaded how the inordinate delay



- of 19 months has prejudiced them, status of the suit land, its occupation, and developments thereon. The petitioner has explained the cause of the delay. He squarely lays it on the 1st respondent.
50. As indicated above, the deponent to the respondents replying affidavit is not the Deputy County Commissioner who handled the minister's appeal. He has not shown anything that he was delegated by the minister to step in for the maker of the decision. No notices to attend the delivery of the ruling have been attached to show that the parties and in particular the petitioner, were notified of or duly aware of the date of delivery of the decision. The respondents have not confirmed when the hearing was undertaken which means the parties were notified of the ruling date on the impending decision and its outcome. The petitioner has pleaded that he made numerous visits to the 1st respondent's office to seek the decision. The respondents have not confirmed when, how and where the copy of the decision was availed to the petitioner, and especially if it was made available before the expiry of the six months.
51. In *Gilbert Guantai Mukindia vs Attorney General & another* (2019) eKLR, the court said the statute of limitation does not saddle constitutional petitions, and where there was a delay, a reasonable explanation must be availed in court. See *Rtd Col. Peter Ngare Kagume & others vs AG* (2016) eKLR.
52. The legal proof lies with the petitioner to prove a breach of his constitutional rights and freedoms. See *Harun Thungu Wakaba vs AG* (2010) eKLR, *David Gitau Njau & others vs. AG* (2013) eKLR, *Peter Mathuki Kaijenja & others vs Chief of Defence Forces and another* (2019) eKLR, *Peter Tonny Wambua & 17 others vs AG* (2017) eKLR. Communication of a decision is part of a decision-making process. The failure to notify parties of the decision is critical in administrative action.
53. Regarding the manner in which the appeal process was undertaken, In *Republic vs D.C Kitui & others Machakos H.C Civil Misc Appeal No. 126 of 204* cited *Makenge vs Ngochi C. A 25/126 of 1978*, that there was no duty under the law for the minister to follow the procedure laid down for hearing of civil suits. See also *Republic vs Special District Commissioner & another* (2006) eKLR. In *Maingi vs Kyumbwa & others Constitutional Petition 11 of 2021* (2022) KEELC 3225 (KLR) 27th July 2022) Judgment, the court said a minister's appeal was like any other, where the court or a quasi-tribunal authority considers the previous records before arriving at their own decision, and that the minister has to consider the grounds of appeal, the previous evidence tendered and make his determination which under Section 29 of the Cap 284 must be just and fair. The court cited with approval *Matwaga Kilonzo vs D.C Kitui & another* (2021) eKLR that the minister has to give reasons as to why he agrees or disagrees with the decisions of the Land Adjudication Officer. On the issue of bias, the court cited in *Kalpana Rawal & others vs JSC & others* (2016) eKLR that apprehension of bias must be reasonable, the test being what an informed person viewing the matter realistically and practically and having thought of the matter would include. The court said a real likelihood of bias must be demonstrated since mere suspicion is not enough.
54. In this petition, the contention by the petitioner is that the 1st respondent did not observe the rules of natural justice in hearing and determining the appeal and subsequently in delivering the decision. The interested party, on the other hand, says the petition is res judicata and improperly before the court as an appeal. In the case of *Amarth* (suing on behalf of the estate of the late *Amarth Gumpta Kazungu & others* (Civil Appeal E033 of 2021 (2023) KECA 1280 (KLR) 27th October 2023 (Judgment), the court said that the minister's decision cannot be appealed against, whether under Cap 284 or in court and the only option is a judicial review under Article 47 of *the Constitution* and the *Fair Administrative Action Act*. The court said a party could not reopen the case and challenge it except through judicial review. The court cited *Julia Kaburia vs Kaberia & others* (2007) eKLR, that consent under Section 30 of the Land Adjudication Act is to persons wishing to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication but not to a person seeking to challenge the land adjudication decision on its merits. The court reaffirmed *Tobias Achola Osidi & others vs*



- Cyprianus Otieno Ogola (*supra*) that an ELC has no jurisdiction to usurp the functions and powers of adjudicatory bodies under Cap 284 except to ensure the process used accorded with the law, interpret and determine any point or issue of law arising out of the adjudication process.
55. In this petition, I do find the petitioner is attempting to challenge both the process and merits of the decision made by the 1st respondent. He has raised the legitimate expectation and proportionality test. The petitioner has also averred that he expected that the 1st respondent would notify him of the date of the decision-making and provide him with the proceedings and the decision on time so that he could challenge the outcome before the expiry of the six months set under the Act. The petitioner blames the 1st respondent for denying him the right to be present at the delivery of the decision and for failing to supply him with the proceedings and the decisions on time. The petition reads malice, collusion, and bias against him by the 1st respondent in favor of the interested party, with a view of denying him the right to protection of property. Fraud and collusion must be pleaded with particulars and proved to the required standard.
56. Similarly, there must be a basis for the actual likelihood of bias. The petitioner did not particularize the alleged fraud, collusion and basis of bias. My finding is that fraud and collusion were not proven to the required standards.
57. Regarding how the proceedings were undertaken and evidence taken, other than VKK "1", which page 12 is missing, attached to the interested party's replying affidavit, the respondents did not attach copies of the grounds of appeal, the proceedings leading to the decision, and the materials the 1st respondent considered in arriving at the decision. The respondents were aware that the petitioner was questioning both the process and the merits of the decision. Further, the interested party averred and submitted, guided by *Rapinder Kaur Atwal vs Manjit Sigal* (*supra*), that the petition seeks to revisit, quash, and or question the merits of the minister's decision, which this court should not entertain through a constitutional petition.
58. In other words, the respondents and the interested parties take the view that this court cannot look at the merits of the decisions since it is only restricted to a decision-making process. That view, unfortunately, is no longer tenable. In *Dande & 3 others vs. I.G National Police Service & others* (Petition 6 (E007) 4 (E005) & 8(E010 of 2022) consolidated (2023) KESC (Judgment), the question was whether under judicial review a court ought to carry out a merit review of a case when a party approaches it under the provisions of *the Constitution*. The court said the judicial review had been entrenched and elevated to a substantive and justiciable right under *the Constitution*, providing that every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
59. As to whether the court can consider the merits of the decision as opposed to the process, the court said it all depends on how a party approaches the court. Therefore, the court said if a party invokes the jurisdiction of the court under *the Constitution*, then the court ought to carry out a merit review of the case as set under Section 7 of the *Fair Administrative Action Act*.
60. The court cited *CCK and others vs Royal Media Services Ltd & others* (2014) eKLR, that judicial review after 2010 transcends the technicalities of common law. Additionally, the court cited *Praxidis Saisi & others vs DPP & others* (2023) KESC 6 (KLR) (Civ) 27th February 2023 (Judgment), that judicial review under *the Constitution* was a constitutional imperative not just for state bodies but for any person, body or authority.



61. In this petition, the petitioner has clothed his grievances as constitutional questions, believing that his fundamental rights to fair hearing, fair administrative action, and right to ownership of property were violated. My finding is that the court's jurisdiction, guided by the caselaw cited, is invoked.
62. The 1st respondent in hearing and determining the minister's appeal was subject to not only Section 29 of the *Land Adjudication Act*, but also the constitutional standards and statutory law governing the administrative bodies or quasi-judicial tribunals.
63. The principal complaint by the petitioner is the failure to be notified of the date of delivering the decision, and the 1st respondent also for not according him with the copies of proceedings and decision so as to exercise his right of review before the expiry of the statutory six months. The respondents and the interested party have attempted, through evidence, to demonstrate that the petitioner was aware of or present during the delivery of the decision on 7.2.2022. It is the 1st respondent who heard, determined, and delivered the outcome of the appeal. It is the 1st respondent who would know the date the appeal was heard and the date the decision was delivered. It is through the proceedings and the decision that this court would know the coram of those who attended the hearing and the delivery of the decision.
64. In *Kenya Revenue Authority vs Menginya Salim Murgani C.A No. 108 of 2009*, the Court of Appeal held that decision-making bodies other than courts are masters of their procedures provided that they achieve the degree of fairness appropriate to their task. In *Republic vs AgaKhan Education Services Exparte Ali Sele & others H.C Misc Application No. 12 of 2002*, the court said there were situations when the need for expedition in decision-making outweighed the need to hear the other side. In the instant petition, the 1st respondent had a constitutional and statutory duty to ensure that the petitioner was present or aware of the date to deliver his decision since he would be adversely affected by it.
65. Article 47 (2) of *the Constitution* provides that an adversely affected person by an administrative action has a right to be given a written reason for the action. The right belongs to the petitioner and the duty to comply with that right was on the 1st respondent. It was upon the 1st respondent to ensure the written reasons as contained in the proceedings and the decision were given to the petitioner. It is not for the petitioner to prove by way of letters that he sought and was denied the decision. The 1st respondent has averred on oath that the decision was verbally delivered in the presence of the petitioner. Unfortunately, VKK "1" does not contain the coram of who was present during the delivery of the decision. If the decision was verbally delivered, it was upon the 1st respondent to show that it availed a written copy to the petitioner before the six months were over to challenge the decision.
66. The 1st respondent, as the duty holder, has not addressed the constitutional question(s) posed by the right holder. The presumption under Section 9 of the Fair Administrative Action & Act comes into play that there were no good reasons not to comply with Article 47 (2) of *the Constitution*. At the very least, one would have expected the 1st respondent to disclose when the typed copy was available to the parties. The interested party seems to have obtained a copy but does not say when exactly he obtained it. If the parties were given a ruling date after the hearing of the appeal, the proceedings, if availed before this court, would have contained the details that the decision was deferred for a later date after the completion of the hearing in the presence of the parties.
67. Additionally, the proceedings would have contained particulars of who gave what evidence on the ground of appeal, who cross-examined on what piece of evidence or documentation for this court to gauge whether the rules of natural justice and fair hearing were observed. The court would also have been able to find a linkage between the grounds of appeal and the evidence tendered in support and opposition of the appeal, the findings, and the conclusion.



68. The petitioner also raised a fundamental issue that one of the parties who participated in the objection proceedings did not take part in the hearing of the appeal, yet he was a necessary party to the appeal, given he was the one who had sold the land to him. The respondents and the interested party did not address the issue by way of a denial or otherwise that the failure to call or accord the petitioner a chance to rely on that piece of evidence was prejudicial to his defense in the appeal. Rules of justice demand that a party is availed all the opportunity to advance his defense and avail all the necessary material to sustain his claim or defence.
69. The proceeding by the 1st respondent have not indicated when he visited the locus in quo and in whose presence. The reasons why he agreed and disagreed with the previous findings at the committee and objection stages were not indicated. The rationale for allowing the interested party's appeal was lacking. Facts and reasons must back the findings.
70. The decision lacks the elementary features of an appellate decision. The upshot is that I find it a nullity ab' initio. The same is hereby set aside. The appeal is remitted for reconsideration within three months from the date hereof with the involvement of the vendor to the suit property. Costs to the petitioner.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH DAY OF MARCH, 2024

In presence of

C.A Kananu

Parties

Asuma for Mutembei for petitioner

Onyango for Ndubi for Interested party

HON. C K NZILI

JUDGE

