



REPUBLIC OF KENYA



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Konza Ranching & Farming Cooperative Society v Inter County Joint Physical and Land Use Planning Committee (Makueni, Machakos & Kajiado Counties) & 8 others (Environment & Land Petition E007 of 2023) [2024] KEELC 5559 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5559 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION E007 OF 2023

CA OCHIENG, J

JULY 29, 2024

IN THE MATTER OF ARTICLES 2, 10, 19, 20, 9(1 -4), 21 (1), 22(1)
& (2B & C), 23 (1 & 3), 27, 35(1), 40 (1,2 & 3), 48, 64, 66, 73, 75,
159, 162 (2,A), 165 (3,B), 232, 258 (1 & 2B & C) & 259(1) OF THE
CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING
ACT, 2019

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE
PETITIONER’S FUNDAMENTAL RIGHTS AND FREEDOMS
PROTECTED BY ARTICLES 27, 35, 40 & 47 OF THE
CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF NATIONAL
VALUES AND PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10
AND THE VALUES AND PRINCIPLES OF LAND POLICY UNDER
ARTICLE 60 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 2, 4, 10, 11, 13 AND 14 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE



RULES, 2013
BETWEEN
KONZA RANCHING & FARMING

BETWEEN
KONZA RANCHING & FARMING COOPERATIVE SOCIETY PETITIONER
AND

**INTER COUNTY JOINT PHYSICAL AND LAND USE
PLANNING COMMITTEE (MAKUENI, MACHAKOS & KAJIADO
COUNTIES) 1ST RESPONDENT**
**NATIONAL PHYSICAL AND LAND USE PLANNING LIAISON
COMMITTEE 2ND RESPONDENT**
LAND USE PLANNING 3RD RESPONDENT
MINISTRY OF LAND & PHYSICAL PLANNING 4TH RESPONDENT
COUNTY GOVERNMENT OF MAKUENI 5TH RESPONDENT
COUNTY GOVERNMENT OF MACHAKOS 6TH RESPONDENT
COUNTY GOVERNMENT OF KAJIADO 7TH RESPONDENT
KONZA TECHNOPOLIS DEVELOPMENT AUTHORITY 8TH RESPONDENT
THE ATTORNEY GENERAL 9TH RESPONDENT

JUDGMENT

1. By a Petition dated the 21st June, 2023, the Petitioner prays for Judgment against the Respondents for:-
 - i. A Declaration that the Konza Technopolis Buffer Zone Inter – County Physical and Land Use Development Plan (2023 – 2033) is null and void ab initio for having violated the Petitioners’ Constitutional rights under Articles 35, 40 and 64 of *the Constitution* of Kenya and the decision and action thereto are invalid, null and void ab initio.
 - ii. A Declaration be and is hereby issued that subjecting the Petitioners’ private land to development planning and subsequent approvals without their consent and comments is unlawful, unprocedural and equates to deprivation of interests and rights over their property.
 - iii. A Declaration be made that the failure by the 1st Respondent and to coopt any stakeholders to the Inter-County Joint Physical and Land Use Planning Committee under Section 29 (4) of the *Physical and Land Use Planning Act, 2019* renders the Committee unconstitutional, and its activities are therefore rendered null and void.



- iv. A Declaration be and is hereby issued that the Konza Technopolis Buffer Zone Inter-County Physical and Land Use Development Plan (2023-2033) having been planned and prepared without the involvement of key stakeholders, is inconsistent with the principles of democracy, participation of the people, inclusiveness, good governance, transparency and rule of law and, therefore, null and void, and of no consequence in law, to the extent of the inconsistency.
 - v. A Declaration that the Petitioners' rights as stated in paragraphs 58 – 66 of the Petition were violated.
 - vi. An Order of Certiorari be and is hereby issued removing into this court and quashing the decision of the National Director of Physical Planning contained in the Gazette Notice No. 12740 of 2012 purporting to declare the Petitioners' property as a special planning area without following the due procedure.
 - vii. An order of certiorari be and is hereby issued removing into this court and quashing the decision of the National Director of Physical Planning contained in the Kenya Gazette No. 3465 a notice of intention to plan Konza Technocity and buffer zone as special planning area.
 - viii. An Order do issue compelling the Respondents to involve the Petitioners and other key stakeholders in any decisions or plans regarding their private land, and supply the Petitioners with documents and/or information pertaining to the Development Plan.
 - ix. An Order do issue compelling the Respondents to indicate the mode of acquisition intended for the property subject to the development plan.
 - x. An Order do issue that in the event the private land earmarked for public utilities and environmental conservation is to be acquired by way of Compulsory Acquisition, prompt payment be made in full, of just compensation to the Petitioners and any other registered owner of the property.
 - xi. A Permanent Order of Injunction be and is hereby issued restraining the Respondents by themselves or through their agents or representatives from continuing with the Inter County Physical and Land Use Planning process for the Konza Technopolis Buffer Zone Inter County Physical and Land Use Development Plan (2023-2033)' without first legally acquiring the property.
 - xii. An Order of compensation and general damages does issue pursuant to Article 23 of *the Constitution* directing Respondents to jointly and severally pay damages.
 - xiii. Any other relief and/or orders the Honourable Court deems appropriate just, and/or fit to grant.
 - xiv. The cost of the Petition be provided for.
2. The Petition was supported by the Affidavit of DAVID M. KATU YAITHYA. The 4th to 9th Respondents opposed the instant Petition by filing their respective Replying Affidavits.
 3. The 4th Respondent filed a Replying Affidavit sworn by TIMOTHY W. MWANGI, its Deputy Director of Physical Planning in the Ministry of Lands, Public Housing and Urban Development,



where he confirms that the genesis of planning for the Konza Buffer Zone begun in 2013 and this culminated in the Plan No. 3 of 2013, that was for a period of ten years (2013 - 2023). He contends that the draft Plan took into account the environmental, social, economic changes that occurred overtime between Konza Technopolis and its immediate environs. He explains that the Notice of Intention to Plan to review the Konza Techno-City Local Physical Development Plan (10 KM) approved plan No. 03 of 2013 was published in the local dailies on 15th September, 2021. He insists that there was proper public participation in the review process as there was meaningful stakeholder engagements. He highlights the people/stakeholders who participated in the various forums. He argues that the Letter dated 14th May, 2021 by the Petitioner was not an appeal within the Notice No. 142/1998 on the Physical Planning (Appeals to the Physical Planning Liaison Committee) Regulations. Further, the Petition did not attach a duly completed Form PPA 9 as evidence of filing an appeal as required by Legal Notice No. 142 of 1998. He confirms there was a 90-day moratorium, which did not invoke or extinguish development permission granted. Further, that the Planning process did not interfere with the property rights of the Petitioner as the draft plan is not for purposes of alienating land. He avers that there is no evidence that the Respondents ignored the Petitioner's views and process. He reiterates that this being a matter arising from physical and land planning, such matters should be heard by the National Physical and Land Use Planning Liaison Committee under Section 75 of *Physical and Land Use Planning Act* hereinafter referred to as (PLUPA). He reaffirms that on 31st July, 2018, ELC Makueni delivered a Ruling in Judicial Review No. 5 of 2017 that the court had no jurisdiction to hear the Petition because Konza Ranching Cooperative Ltd had not exhausted the dispute resolution mechanism provided for, in the repealed Physical Planning Act Cap. 286.

4. The 5th Respondent opposed the instant Petition by filing a Replying Affidavit sworn by DR. SONIA NZILANI MUSYOKA, its County Executive Committee member (CECM) Lands, Urban Planning & Development, Environment & Climate Change where she deposes that the process of review of the Konza Technopolis Physical and Land Use (Buffer Zone) Plan has been ongoing even before the pioneer county administrations were established after the 2013 general elections. Further, that the process has been in the public domain since 2012 and has been carried out in a transparent, participatory and professional manner in accordance with the provisions of the law. She admits that the Notice of Intention to Plan Konza Technocity and Buffer Zone as special planning area was issued by the Director of Physical Planning on 2nd June, 2012 under the now repealed Physical Planning Act, 1996. She confirms that the planning process was undertaken and on 28th February, 2013, the Director of Physical Planning issued notice of successful completion of the approved plan for the area being approved Plan No. 3 of 2013, with the said Plan having been approved on 9th December, 2012. She contends that on 4th February, 2013, the County Council of Olkejuado, Municipal Council of Machakos, County Council of Makueni and County Council of Masaku (the predecessors of the present counties) issued notice to the public reminding them of ongoing planning process and warning against putting up, of structures on the affected area. Further, on 13th April, 2021, the CECMs responsible for Physical and Land Use Planning matters for Machakos, Kajiado and Makueni Counties, issued a public notice on the formation of the Inter County Joint Physical and Land Use Planning Committee whose objective was to review and update the existing Plan.
5. She avers that on 11th May, 2021, the said CECM's published in Daily Newspapers of National Circulation, notice of formation of the Inter County Physical and Land Use Committee's intention to review the Konza Buffer Zone Plan, Approved Plan No. 3 of 2013 in accordance with Section 31(1) of PLUPA. Further, that the 5th Respondent also published a notice in his website. She explains that, by the notice issuance, development for the affected area was temporarily suspended to aid the planning process and the processing of development approvals resumed after the moratorium lapsed. She further confirms that on 3rd May, 2021, the joint committee commenced inaugural meetings to draw the road



map for the review process under coordination of the Director General Planning. Further, the objective of the joint committee was to update the existing 2013 Plan and align the same with the provisions of PLUPA. She contends that on 1st October, 2021, the National Director of Physical Planning published Kenya Gazette Notice 10419 dated 15th September, 2021 in the context of the aforementioned notices by the three CECMs. Further, that the terms of the administrations in the three (3) counties forming the said joint committee lapsed after the August 2022 general elections before completion of the review process, which was taken up and continued by the new County Administration. She states that on 27th February, 2023, the joint committee held a high-level stakeholder engagement meeting on the revision of the Konza Buffer Zone Plan and on 7th March, 2023, as chairperson of the joint committee, advertised in the national dailies Notice of Intention to review plan. Further, on 13th April, 2023 as part of the stakeholder engagement process, they held a meeting for residents, political leaders including members of the County Assemblies as well as County and Sub County Commissioners. She reiterates that on 21st April, 2023, she advertised Notice of Completion of Inter County Physical and Land Use Development Plan in the Daily Nation Newspapers and in the County Website of the 5th Respondent. Further, the said Notice called on any person who had any representation or objection to plan to present the same within fourteen (14) days. She reaffirms that between 19th to 23rd May, 2023, the joint committee held a validation workshop incorporating stakeholders in the review process and the said stakeholders present included the Chairman of the Petitioner, residents of the area, as well as business community among others.

6. Further, upon receipt of comments from the stakeholders by the joint committee, they again issued a notice to the public on the decisions of the joint committee on the said comments in accordance with the requirements of the Act. She further reiterates that as a planning function, it was necessary to update existing land use development plans. Further, in this case there was already in existence Konza Technocity local physical development plan (Buffer Zone) 2013 – 2023 being approved plan No. 3 of 2012 which was being implemented and required revision and updating to align it with PLUPA as well as Article 66 of *the Constitution* hence the revision process and formulation of the 2023 - 2033 plan. She denies that the Respondents prepared and approved Konza Technopolis Buffer Zone, Inter County Physical and Land Use Development Plan 2023 – 2033 unprocedurally as claimed by the Petitioner.
7. The 7th Respondent opposed the instant Petition by filing a Replying Affidavit sworn by HAMILTON PARSENA, its County Executive Committee Member, Lands, Physical Planning and Urban Development, Housing and Municipalities where he deposes that the instant Petition lacks substance, is unnecessary, frivolous, vexatious and otherwise an abuse of the court process and ought to be dismissed with costs. He explains that pursuant to the provisions of Section 29 of the *Physical and Land Use Planning Act*, 2019, hereinafter referred to as “PLUPA”, the three counties of Machakos, Kajiado and Makueni in consultation with the National Government agreed to formulate an Inter County Physical and Land Use Development Plan covering the area falling within the ten-kilometer radius around the Konza Technopolis City.
8. He associates himself with paragraphs 12 – 25 of the 5th Respondent’s affidavit sworn by Dr. Nzilani Musyoka and states that the planning process was undertaken in an environment of intense public consultation and participation. Further, the planning process was guided by best practices in community engagement including dialogue and the Respondents intensely consulted with all stakeholders. He insists that the Public was invited to participate in the formulation process and that the Petitioner has not exhausted primary dispute adjudication mechanisms provided under PLUPA. Further, PLUPA divests the court of primary adjudicatory mandate and vests it, in the National Physical Planning Liaison Committee, reserving the court with an appellate jurisdiction in physical



and land use planning disputes and as such it would be premature for this Court to assume jurisdiction in the first instance.

9. The 8th Respondent opposed the instant Petition and filed a Replying Affidavit sworn by MERCYLEEN NDATHO, its Senior Urban Planner, where she contends that the deponent has not demonstrated he is a member of the Petitioner nor that the members he represents, belong to the Petitioner. She contends that the Petitioner nor its members have failed to demonstrate through documentary evidence that they are the registered owners of all those parcels of land known as LR Numbers 3879, 363, 5933, 1742, 7714 and 1731/1 and that the said parcels are within the ten (10) Kilometre Radius of the Konza Buffer Zone. She describes the Buffer Zone and avers that the Inter County Joint Physical and Land Use Planning Committee is a statutory body that was created by two or more counties by mutual agreement under Section 29(1) of PLUPA to formulate an Inter County Physical and Land Use Development Plan as per an advertisement in the newspaper of 4th February, 2013.
10. She explains that under the repealed Physical Planning Act (1996), the National Physical Planning Liaison Committee gave guidance and recommendations on physical planning of Konza Technopolis which transcended three (3) counties for purposes of co-ordination and integration of physical development and the Minister of Lands & Physical Planning approved the 10-year Development Plan of the Technopolis on 9th December, 2013. Further, during the subsistence of the 2013 Approved Development Plan No. 3 of 2013, the Physical Planning Act, 1996 was repealed and replaced by PLUPA and there was therefore a need to provide a framework to guide the development within the 10 KM buffer zone around Konza Techno City and to align the Plan with the provisions of Section 19 of PLUPA. She states that, with the 10-year Konza Technopolis Development Plan nearing its expiry, an Inter County Joint Physical and Land Use Planning Committee was constituted to review the existing 2013 plan. Further, the Committee published a notice on 11th May, 2021 in which the CEC members of the three Counties jointly issued a moratorium suspending for a period of 90 days, the processing of development permission applications in the planning area, which Notice also provided that pursuant to Section 29 of PLUPA, the three county Governments had agreed to formulate a joint inter county physical and land use plan covering the area falling within the buffer zone.
11. She avers that, despite the fact that the Inter County Physical and Land Use Planning Process provided for, under Section 31 of PLUPA was yet to commence, the Petitioner instantly lodged what they described to be an Appeal against the 90 days suspension period, which was not provided by law. She reaffirms that, after the expiry of the 90 days moratorium, proposals for subdivision or amalgamation of land including extension of user, approval of building plans resumed as normal and this is illustrated in the title for Atanas Mweu Nzioka for LR No. Konza South/Konza South Block 5 (Konza)/2178 dated the 2nd August, 2022, which arose from a subdivision of land belonging to the Petitioner. She denies that there is any compulsory acquisition or annexation of the Petitioner's land as claimed.
12. She reaffirms that the publication by the Inter County Joint Physical and Land Use Planning Committee of a Notice in the Daily Nation Newspaper on 28th September, 2021 and in the Gazette Notice on 1st October, 2021 titled 'Notice of Intention to Plan' signaled the commencement of the Inter County Physical and Land Use Planning process as provided under Section 31(1) of PLUPA. She avers that a Notice of Intention to Review Plan was published in the 7th March, 2023 issue of My Gov. Further, that in line with Section 31(1) of PLUPA, the joint committee was required to prepare and complete the Inter – County Physical and Land Use Development Plan within two (2) years from the time the notice of intention to prepare the plan is published.



13. She explains that as a result of the publication, the Petitioner wrote a letter dated the 12th October, 2021 raising concerns about the Notice of Intention to Prepare a Plan which was responded to, on 15th November, 2021. She insists that public participation was undertaken where different stakeholders were engaged. Further, that reconnaissance visits were undertaken, members sensitized through the radio and copies of the Development Plan deposited at the Malili, Maanzoni, Kalanzoni and Kilima Wards, where the parcels of land claimed by the Petitioner falls. She highlighted the various stakeholder engagement meetings, which were held on 20th February, 2023, 27th February, 2023, 13th March, 2023 and 14th April, 2023. Further, that the Joint Planning Committee considered the concerns including comments raised by the stakeholders and incorporated the same in the Development Plan.
14. She reiterates that there was a Joint Committee meeting held on 19th to 23rd May, 2023 aimed at incorporating comments received from the Validation Exercise and another high-level stakeholder meeting held on 5th June, 2023. Further, pursuant to Section 32(3) of PLUPA, the Inter County Physical and Land Use Planning Joint Committee proceeded to publish a Notice of Incorporation of Comments in the Kenya Gazette and the Daily Newspapers on 9th June, 2023. She reaffirms that the Notice of Incorporation of comments published by the Committee also expressly indicated that anyone dissatisfied with the decision of the Committee ought to file an appeal at the Liaison Committee. Further, that the Petitioner being dissatisfied with the decision of the Inter-County Physical and Land Use Planning Joint Committee ought to have first lodged an Appeal at the National Physical and Land Use Planning Liaison Committee within fourteen (14) days from 9th June, 2023 as provided under Section 32(4) of PLUPA.
15. She reaffirms that the letter dated 14th May, 2021 referenced Appeal against the Intended Review of the Approved Development Plan of 2013 was not an Appeal even though it was said to have been brought under Section 32(4) of PLUPA. She further insists that, at the time the Petitioner lodged their so called 'Appeal' on 14th May, 2021, the Inter County Physical and Land Use Planning Joint Committee was yet to publish and Gazette a Notice of Intention to prepare an Inter County Physical and Land Use Development Plan, rendering the same premature and incompetent. She explains that the Athi Kapiti Wildlife Dispersal area traverses over LR Nos. 9917, 9918/4 and 7374 but does not cover any of the Petitioner's land parcels.
16. The Petition was canvassed by way of written submissions which were highlighted by respective Counsels.

Analysis and Determination

17. Upon consideration of the Petition, the Notice of Preliminary Objection, the respective affidavits, annexures and rivalling submissions, the following are the issues for determination:-
 - a. Whether the Respondents' undertook public participation in respect to the process of review of the Konza Technopolis Buffer Zone Inter-County Physical and Land Use Development Plan (2023-2033).
 - b. Whether the Respondents have violated the Petitioner's rights to Articles 27, 35, 40 and 47 of *the Constitution*.
 - c. Whether the Petition is merited.

As to whether the Respondents undertook public participation in respect to the process of review of the Konza Technopolis Buffer Zone Inter-County Physical and Land Use Development Plan (2023-2033).



18. The Petitioner claims the Respondents violated their rights to Articles 27, 35, 40 and 47 of *the Constitution* as they failed to involve them in the review of the Konza Technopolis Buffer Zone Inter-County Physical and Land Use Development Plan (2023-2033). It contended that it appealed vide Appeal dated the 14th May, 2021, where they sought for the review of the Plan to be suspended but its Appeal has never been heard. It claimed that several of its members owned property within the 10 Kilometer radius buffer zone. It contended that they had been locked out of the decision-making process, as there was no public participation during the revision of the Plan (Konza Technopolis Buffer Zone Inter-County Physical and Land Use Development Plan (2023-2033)), no gazette notice issued and the land for development had never been compulsorily acquired. It further raised the issue that there is a wildlife migration corridor. It explained that on 15th November, 2021, the National Director of Physical Planning wrote to them and promised to revert on the concerns they had raised but he failed to do so.
19. The Respondents vehemently opposed the Petition and argued that the Petitioner had not adhered to the doctrine of exhaustion by referring the dispute to the National Physical Planning Liaison Committee. The 8th Respondent had also raised a Notice of Preliminary Objection on jurisdiction of the court to handle this matter. They contended that the Petitioner should have lodged an Appeal to the National Liaison Committee first, in accordance with the provisions of PLUPA.
20. They insisted that the revision of the Konza Plan 2012-2023 had nothing to do with compulsory acquisition as it was done in accordance with the provisions of PLUPA. Further, that area under planning in the three counties as well as designation of various uses does not amount to compulsory acquisition. They argued that the Petitioner did not prefer an Appeal within the required period and referred to Form 'PP A9' in PLUPA. They insisted that the Petitioner should have lodged an Appeal to ELC and not file a Petition. They insisted that there was public participation during the review of the Plan. They claimed the Petitioner had not exhibited proof of ownership of land by its members, within the buffer zone. They further highlighted the various forums on public participation that were conducted and insisted that the process undertaken adhered to the provisions of PLUPA.
21. The Petitioner has claimed that failure by the 1st Respondent to coopt any stakeholders to the Inter-County Joint Physical and Land Use Planning Committee under Section 29(4) of PLUPA rendered the Committee unconstitutional, and its activities are therefore rendered null and void. I note Section 29 (1) to (4) of PLUPA, stipulates that:-
 - “(1) Two or more Counties may, by mutual agreement or out of compelling necessity, formulate an inter-county physical and land use development plan.
 - (2) In the preparation of the Inter-County physical and land use development plan, the counties shall form an Inter- County Joint Physical and Land Use Planning Committee.
 - (3) The Inter-County Joint Physical and Land Use Planning Committee shall consist of— (a) the county executive committee member of the respective counties; (b) two other relevant county executive committee members from the respective counties nominated by the relevant county governor; (c) the Director-General of Physical and Land Use Planning who shall be an ex-officio member of the Committee.
 - (4) The inter-county joint physical and Land Use planning committee may co-opt such other person as may be necessary to assist it in performance of it's duties.”
22. From a reading of the aforementioned legal provisions, I find that there is no mandatory provision in which the 1st Respondent was compelled to coopt the Petitioner in the Inter-county joint physical



and Land Use planning committee. I opine that the 1st Respondent was only supposed to coopt any person to assist where necessary and failure to do so, does not render the committee unconstitutional as claimed by the Petitioner. In the circumstances, I find this claim frivolous.

23. On the Petitioner's claim that the Konza Technopolis Buffer Zone Inter-County Physical and Land Use Development Plan (2023 – 2033) was planned and prepared without the involvement of key stakeholders, first I wish to point out that there was no new Plan being prepared but a review of the 10-year Konza Technopolis Development Plan which was nearing its expiry. Further, this culminated in the formation of an Inter County Joint Physical and Land Use Planning Committee in accordance with Section 29 of PLUPA, to review the said existing 2013 plan, to align it to the provisions of PLUPA, since the previous Physical and Land Use Act had been repealed during pendency of the said Plan.

24. Section 31 of PLUPA provides the procedure in which a joint intercounty physical planning and land use Committee should adhere to, in development of a Plan and stipulates inter alia:-

“(1) The Inter-County Physical and Land Use Planning Joint Committee preparing an Inter-County Physical and Land Use Development Plan shall publish a notice of intention to prepare a plan in the Gazette, in at least two newspapers with a national circulation and through electronic media. (2) The notice published under sub-section (1) shall state *the constitution* of the Inter-County Physical and Land Use Planning Joint Committee, the broad reasons for *the constitution* of the joint committee and the joint committee's address where comments on the plan may be submitted. (3) The joint committee shall prepare and complete the Inter-County Physical and Land Use Development Plan within two years from the time notice of intention to prepare the plan is published. (4) The joint committee shall consult, publish, consider national security and hold stakeholders' meetings during the preparation of the Inter-County Physical and Land Use Development Plan.”

25. Looking at the documents presented, it is evident that vide Legal Notice No. 23 of 5th April, 2012, the 8th Respondent was created. The Petitioner has sought for an order of certiorari to quash the decision of the National Director of Physical Planning contained in the Gazette Notice No. 12740 of 2012 as well as the decision of the National Director of Physical Planning contained in the Kenya Gazette No. 3465, a notice of intention to plan Konza Technocity and buffer zone as special planning area. It is trite that for an order of Certiorari to issue, the Applicant should apply for it, within six months from the date of the decision sought to be quashed, in accordance with Order 53 of the Civil Procedure Rules. Even though the Petitioner has sought for the Order of Certiorari within the Petition, it has not explained the reason for the delay in applying for the said order. It is my considered view that there has been unreasonable delay in seeking the order of Certiorari as the Gazette Notice sought to be quashed was issued more than twelve years ago. Further, the Development Plan which was approved by the Minister established the Konza Techno City in 2012 and the only issue in dispute is the Plan being reviewed. To my mind, the Orders sought to be quashed have been overtaken by events and cannot issue.

26. The Petitioner has alleged that they were never involved in the review of the Plan and neither was there public participation which fact is disputed by the Respondents, that proceeded to highlight the various public participation fora, conducted to engage with disparate stakeholders on the review of the Plan.



27. The Supreme Court in *British American Tobacco Kenya Ltd Vs. Cabinet Secretary Ministry of Health & Others Supreme Court Petition No. 5 of 2017* provided the parameters on public participation and stated that:-

“The jurisprudence (on public participation) also reveals that allegations of lack of public participation must be considered in the peculiar circumstances of each case. The mode, degree, scope and extend of public participation is to be determined on a case by case basis.....What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic timeframe for public participation should be given...”

28. I note the Joint Committee published a notice on 11th May, 2021 in which the CEC members of the three Counties jointly issued a moratorium suspending for a period of 90 days, the processing of development permission applications in the planning area. I also note that the Petitioner thereafter lodged an Appeal against the 90-day moratorium yet the inter county Physical and Land Use Planning Process provided for under Section 31 of PLUPA was yet to commence. Further, the 8th Respondent has even confirmed that after the 90-day moratorium, there were proposals for subdivision or amalgamation of land including extension of user, approval of building plans which resumed as normal and it made reference to the title of Atanas Mweu Nzioka for LR No. Konza South/Konza South Block 5 (Konza)/2178 dated the 2nd August, 2022, which arose from a subdivision of land, belonging to the Petitioner. This evidence has not been controverted by the Petitioner and I opine that, there is no way the title could have been issued for a resultant subdivision of the Petitioner’s land, if there was indeed a moratorium in place.
29. From the annexures in the respective Replying Affidavits, I note there was a publication by the Inter County Joint Physical and Land Use Planning Committee of a Notice in the Daily Nation Newspaper on 28th September, 2021 and in the Gazette Notice on 1st October, 2021 titled ‘Notice of Intention to Plan’. Further, I note a Notice of Intention to Review Plan was published in the 7th March, 2023 issue of My Gov. The Respondents contend that in line with Section 31(1) of PLUPA, the joint committee was required to prepare and complete the Inter -County Physical and Land Use Development Plan within two (2) years from the time the notice of intention to prepare the plan is published.
30. It has emerged that as a result of the publication, the Petitioner wrote a letter dated the 12th October, 2021 raising concerns about Notice of Intention to Prepare a Plan which was responded to, on 15th November, 2021. From the documents presented by the various Respondents, on how public participation was carried out, I note there were minutes of various stakeholder meetings held including identities of people who participated that even included the Petitioner’s Chairman. The Petitioner has not denied that various visits were undertaken, members sensitized through the radio and copies of the Development Plan deposited at the Malili, Maanzoni, Kalanzoni and Kilima Wards. From the evidence presented, it is clear that indeed stakeholder engagements were undertaken on 20th February, 2023, 27th February, 2023, 13th March, 2023 and 14th April, 2023 respectively. Further, that the Respondents confirm that, after the aforementioned sessions, the Inter-County Joint Planning Committee considered the concerns including comments raised by the stakeholders and incorporated the same in the Development Plan being reviewed. On record, there is even information on meetings held on 19th to 23rd May, 2023 and 5th June, 2023 to discuss them. Further, I note there was publication of a Notice of Incorporation of Comments in the Kenya Gazette and the Daily Newspapers on 9th June, 2023. There is no indication on whether the Petitioner being aggrieved with the said decision, proceeded to lodge an Appeal at the National Physical and Land Use Planning Liaison Committee within fourteen (14) days from 9th June, 2023 as provided under Section 32(4) of PLUPA.



31. The Petitioner has heavily relied on a letter dated the 14th May, 2021 referenced Appeal against the Intended Review of the Approved Development Plan of 2013 which has been disputed by the Respondents who insist that this cannot be deemed as an Appeal in accordance with Section 32(4) of PLUPA. It is my considered view that the Letter dated 14th May, 2021 by the Petitioner cannot be deemed as an Appeal within the Notice No. 142/1998 on the Physical Planning (Appeals to the Physical Planning Liaison Committee) Regulations, since by 14th May, 2021, the Inter-County Physical and Land Use Planning Joint Committee had not yet published and Gazetted a Notice of Intention to prepare an Inter-County Physical and Land Use Development Plan. Further, the Petitioner has not attached a duly completed Form PPA 9 from PLUPA as evidence of filing an Appeal.
32. On public participation the South African Constitutional Court in Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5 stated that:-

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy.”
33. Further, a three Judge Bench in Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR opined that:-

“... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.”
34. See also the cases of Nairobi Civil Appeal 200 of 2014 Kiambu County Government & 3 others -vs- Robert N. Gakuru & Others [2017] eKLR, Commission for the Implementation of *the Constitution* v Parliament of Kenya & Another (2013) eKLR.
35. Based on the facts as presented while associating myself with the decisions cited, I find that the Respondents indeed undertook adequate public participation in respect to the process of review of the Konza Technopolis Buffer Zone Inter-County Physical and Land Use Development Plan (2023-2033). To my mind, it seems the Petitioner seeks to have its members’ parcels of land, compulsorily acquired first, hence the reason they do not want the Plan reviewed. I opine that compulsory acquisition is a totally different process which is governed by various laws. If indeed their rights to compulsory acquisition were violated, then they have recourse to lodge a complaint at the Land Acquisition Tribunal. In my view, I find that the Petitioner failed to adhere to the doctrine of exhaustion by lodging a proper Appeal at the National Physical Planning Liaison Committee in accordance with the provisions of PLUPA. I hence find the Notice of Preliminary Objection merited. In the circumstances, I do not find that the Respondents violated the Petitioner’s rights to Articles 27, 35, 40 and 47 of *the Constitution* as claimed.
36. In the foregoing, I find that the Petition is not merited and will proceed to dismiss it with costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JULY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Wachira for 8th Respondent

Amuka for Manwa for Petitioner

Kemunto for 7th Respondent

Court Assistant – Simon/Ashley

MKS. ELC. PETITION NO. E007 OF 2023 – Judgment Page 8

