



Mohamed v County Government of Kilifi & 2 others (Constitutional Petition E011 of 2024) [2025] KEELC 3090 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELC 3090 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION E011 OF 2024

EK MAKORI, J

MARCH 27, 2025

IN THE MATTER OF: ARTICLES 22 (1)(2) AND (3), 23 AND 165 OF THE CONSTITUTION OF KENYA AND CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM PRACTICE AND PROCEDURE RULES 2013)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA AND AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW BY WAY OF MANDAMUS

BETWEEN

KASSIM ABDALLA MOHAMED PETITIONER

AND

COUNTY GOVERNMENT OF KILIFI 1ST RESPONDENT

JANE KAMTO, THE KILIFI COUNTY EXECUTIVE MEMBER

LANDS 2ND RESPONDENT

KOMBE NZAI, THE COUNTY PHYSICAL PLANNER

KILIFI 3RD RESPONDENT

JUDGMENT

1. the Petition herein dated 16th July 2024 is premised on the provisions of Articles 22 (1)(2) and (3) 23, 40 and 47, and 165 of *the Constitution* of Kenya and Constitution of Kenya (Protection of Rights and Fundamental Freedom Practice and Procedure Rules 2013), Petitioner is seeking the following orders:
 - a. A declaration that the Petitioner is entitled to Administrative Actions that are expeditious, efficient, lawful, reasonable, and procedurally fair.



- b. A declaration that the Petitioner is entitled to be issued with a Letter of Approval unconditionally.
 - c. An order for Judicial Review by way of mandamus directing the 1st, 2nd, and 3rd Respondents to issue the Petitioner with an Approval Letter within a specific period.
 - d. A declaration that should a County Law grant the 2nd and 3rd Respondents discretion to refuse approval to the Petitioner, the Law be declared null and void.
 - e. Should the 2nd and 3rd Respondents decline to issue the Approval, the Petitioner shall be allowed to continue with construction, provided that payment for the Approval has been made.
 - f. Exemplary damages to be issued and assessed, and paid personally by the 2nd and 3rd Respondents.
 - g. Costs and Interest of this Petition to be provided for.
2. The Petition is supported by the Supporting Affidavit of Kassim Abdalla Mohamed, sworn on the 16th of July, 2024. He deposed that he is the registered owner of Plot Numbers 2310/IV/MN, 2311/IV/MN, and 2312/IV/MN situated in Mtwapa within Kilifi County. Furthermore, he stated that he applied for Building Approval to construct a perimeter wall. Upon visiting the Respondent, he was directed to file a Building Plan and pay the requisite fee for approval of the Development Plan, which he duly complied with. That, upon complying with all the relevant processes, the Respondents have yet to furnish him with the Approval necessitating his seeking the court's intervention. He deposed that the 2nd and 3rd Respondents have exhibited a personal vendetta against him, thereby constituting malicious abuse of administrative powers.
 3. The Respondents herein oppose the Petition, and to that end, they have filed a Replying Affidavit duly sworn by Raymond Nzai, County Assistant Director in the Department of Physical Planning and Urban Development, on November 6, 2024. The County Assistant Director in the Department of Physical Planning and Urban Development confirms the following:
 - a. *The Constitution* of Kenya mandates the County Government, as outlined in the County Government *Act No. 17 of 2012* and the Physical Planning and Land Use *Act No. 13 of 2019*, to oversee issues relating to planning and development within the County.
 - b. That before persons begin to develop a parcel of land, they have to obtain approval from the 2nd and 3rd Respondents.
 - c. That the 2nd and 3rd Respondents only consider formal applications for permission for any construction and always communicate their decision by way of a formal document confirming whether the application has been approved or rejected.
 - d. That the Petitioner has not exhibited any application for Approval of Development or Building Plans for a perimeter wall having been made to the 1st Respondent Department of Physical Planning and Urban Development, and in any case, the Petitioner produced no evidence to indicate that he applied for Approval of Development Plans under the Department of Physical Planning and Urban Development as it were.
 - e. There is no evidence on record that the 2nd and 3rd Respondents under the Department of Physical Planning and Urban Development were called upon to consider such an Application for approval of development plans, and the Director failed or refused to act on it.



4. Based on the materials and submissions, I frame the following issues for the court's determination: Whether the Respondent made a decision that is capable of being reviewed by the court. Whether this court is properly seized of the complaint by the Petitioner that the Respondents have unreasonably withheld approval for the development or building plan. Whether the orders sought are available to the Petitioner in the circumstances. And who is to bear the costs of the petition?
5. The Petitioner submits – and correctly so - that Article 47 of *the Constitution* requires that any Administrative Action must be lawful, reasonable, and procedurally fair. The refusal to grant approval without due care and caution and the casual instruction to Appeal is in itself unlawful, unreasonable, and procedurally unfair. The referred *Physical and Land Use Planning Act* No. 13 of 2019 does not cancel and erase the fundamental principles of fair Administrative Action as provided for under Article 47 of our Constitution. Article 47 introduces the concept of natural justice into our Constitution, making the issuance of a written notice mandatory. The Petitioner places reliance on the decisions in *Wuantai Ole Saire & another v Cabinet Secretary for Lands and Planning & another (Petition 68 of 2022)* (2024)KEELRC 894 (KLR) (18 April 2024) (Judgement) , *Judicial Service Commission v Mbalu Mutava & another* (2014) eKLR, *Republic v Vive Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwachui and another* (2008) eKLR, *Muigana & 16 others v County Government of Nyandarua (Petition E007 of 2023)* (2024) KEHC 960 (KLR) (8 February 2024) (Judgement) and *James Willy Kingori v Chairman Extra Ordinary Meeting of Michimikuru Factory Ltd & 2 others; Maurice Kobia Dickson (Interested Party)*, - the cited judicial precedents emphasizes that pursuant to Article 47 of *the Constitution*, an administrative action is to be expeditious, fair, lawful and reasonable and that where such an action adversely affects a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action.
6. On the other hand, the 2nd Respondent contends that the mandate of approving building and development plans lies squarely with the Department of Physical Planning and Urban Development, pursuant to Section 58 of the Physical Planning and Land Use *Act No. 13 of 2019*. The mandate is executed in consultation with the Department of Physical Planning and Survey Department. Thus, any person requiring development or building plan approval shall apply for Approval of Development Plans to the 2nd Respondent in the Department of Physical Planning and Urban Development, accompanied by a duly filled and completed PPA 1 Form as prescribed in the Third Schedule of the Physical Planning and Land Use *Act No. 13 of 2019*. This application for Approval of Development or Building Plans must be accompanied by the Applicant's set of drawings or plans, as well as ownership documents, necessary to indicate the purpose of the development as provided for under Section 58 of the Physical Planning and Land Use *Act No. 13 of 2019*. Section 58 of the Physical Planning and Land Use *Act No. 13 of 2019* provides:

“ 58. Application for Development Permission

- (1) A person shall obtain development permission from the respective County Executive Committee Member by applying for development permission from the County Executive Committee Member in the prescribed form and after paying the prescribed fees.
- (2) An applicant for development permission shall provide documents, plans and particulars as may be required by the respective County Executive Member to indicate the purpose of the proposed development.”



7. The 2nd Respondent asserts that once such an Application for Approval of Development or Building Plans is received, an initial assessment has been done; the Applicant is invited to pay the prescribed fee, which varies depending on the type of development and the specific zone in which the property is located and the size of the property in question. Section 58 of the Physical Planning and Land Use [*Act No. 13 of 2019*](#) empowers the 2nd Respondent to approve development or building plans upon receipt of an application in the requisite PPA 1 Form. Subsequently, the 2nd Respondent is mandated to notify the Applicant of its decision in writing within sixty days of the decision being made and shall therein specify the conditions, if any, attached to the application for development or building plans as being approved, approved with conditions or in the case for refusal to approve, the grounds necessitating refusal.
8. The 2nd Respondent believes that the Petitioner has not demonstrated that a decision made by the 2nd and 3rd Respondents is tainted with illegality, irrationality, or procedural impropriety, warranting a grant of Judicial Review Orders. I agree with the 2nd Respondent on this point because no such application for approval, as required by law, was attached to the Petitioner's claim, indicating that the 2nd and 3rd Respondents unreasonably withheld their consideration.
9. According to the 2nd Respondent, with which I also agree, the Petitioner has not demonstrated that he applied for Approval of Development Plans for the Perimeter Wall as required under Section 58 of the Physical Planning and Land Use [*Act No. 13 of 2019*](#). Furthermore, even if an Application for Approval for Development or Building Plans had been submitted, there is no evidence that the Petitioner requested it to be considered, and the 2nd Respondent either failed to or refused to act on the same.
10. The Petitioner has annexed to his Petition a Building Plan and a Cash Deposit Receipt of Kshs. 43,000.00 marked as "K-3" purporting to be an Application for Approval for Development or Building Plans. The 2nd Respondent asserts, rightly so in my view, that the annexures mentioned above do not, in any way, amount to an Application for approval of development or Building Plans as envisaged by Section 58 of the Physical Planning and Land Use [*Act No. 13 of 2019*](#)—the cash deposit receipt for Kshs. 43,000.00 does not indicate the purpose of the payment, and the relevant Department of Physical Planning and Urban Development received it. Thus, the 2nd Respondent, under the Department of Physical Planning and Urban Development, was never called to consider any Application for Development or Building Approval; hence, Judicial Review Orders cannot be issued.
11. In this regard, I am persuaded by the decisions as quoted by the 2nd Respondent - in JR Case No. 151 of 2012 Republic v City Council of Nairobi & anor. Ex Parte Shital Bhandari [2015] eKLR Korir J. recited the case of Republic v Kenya Forest Service Ex Parte Joseph Kakore Ole Mpoe & 5 others [2010] eKLR where Maraga J. (as he then was) stated that:

“ 45. I concur with Lenaola J's view in *Wamwere vs Attorney General* (2004)1KLR 166 that a Public Officer cannot: -

...be compelled to do something when there was no evidence of refusal or at the very least apparent refusal on the part of the Public Officer to do the thing. Even if such refusal has been shown it must also be shown to be unlawful.

I have perused the annexures to the affidavit in support of this application but I have not been able to find the Applicant's application to the Respondent which it has refused to consider. In the circumstances, I agree with Counsel



for the Respondent that Mandamus cannot issue and I accordingly dismiss the prayer for that Order.”

12. The Petitioner was obligated to demonstrate that, despite submitting the necessary application for Approval of Development or Building Plans in accordance with Section 58 of the Physical Planning and Land Use [Act No. 13 of 2019](#), the 2nd and 3rd Respondents intentionally neglected to review the application. This neglect is essential for the Court to determine that the Petitioner is entitled to a writ of mandamus to enforce the performance of that specific statutory public duty.
13. In the absence of such evidence, the request for mandamus is not available to the Petitioner, as there is no indication that the 2nd and 3rd Respondents have unjustifiably delayed the approval of the building plan for the construction of a perimeter wall surrounding the Petitioner’s property. Consequently, this claim ought to be dismissed.
14. I concur that the Petitioner’s argument does not meet the standards set by the doctrine of exhaustion; the assertion that the 2nd and 3rd Respondents have unreasonably withheld Approval for the Development or Building Plan is not adequately presented before the Court. Section 76 of the Physical and Land Use [Act No. 13 of 2019](#) establishes the County Physical and Land Use Planning Liaison Committees. Furthermore, Section 78 of the Physical and Land Use [Act No. 13 of 2019](#) outlines the responsibilities of the County Physical and Land Use Liaison Committee as follows:

“The function of the County Physical and Land Use Planning Liaison Committee shall be to; -

- (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the County,
- (b) hear appeals against the decisions made by the planning authority with respect to physical and land use development plans in the County;
- (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards;
- “(d) hear Appeals with respect to Enforcement Notices.”

15. The Physical and Land Use [Act No. 13 of 2019](#) provides a forum for the ventilation of grievances in cases where there is a complaint regarding the refusal of Approval of Development or Building Plans. In this case, the Petitioner complains that the 2nd and 3rd Respondents have willfully failed to issue him with approval for the construction of a perimeter wall around his referenced properties. As such, the Physical and Land Use [Act No. 13 of 2019](#) provides for an internal appeal mechanism, and that venue is to appeal to the Liaison Committee in the manner contemplated in Section 80 of the Physical and Land Use [Act No. 13 of 2019](#), which stipulates:

- “(1) A person who appeals to the County Physical and Land Use Planning Liaison Committee shall do so in writing in the prescribed form.
- (2) A County Physical and Land Use Planning Liaison Committee shall hear and determine an Appeal within Thirty Days of the Appeal being filed and shall inform the Appellant of the decision within Fourteen Days of making the determination.
- (3) The Chairperson of a County Physical and Land Use Planning Liaison Committee shall cause the determination of the Committee to be filed in the



Environment and Land Court and the Court shall record the determination of the Committee as a Judgment of the Court.”

16. As submitted by the 2nd Respondent, this position was elaborated upon in *Republic v Nairobi City County Government Exparte Ndiara Enterprises Limited* [2017] KEHC 8731 (KLR), where Aburili J. held:

“62. In *Samson Chembe Vuko vs. Nelson Kilumo & 2 Others* [2016] eKLR the Court of Appeal, citing other decisions with approval, among them, *Speaker of the National Assembly vs. Karume* [2008]1 KLR 425 where the Court of Appeal held, inter alia; -

“...where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or the Act of Parliament, that procedure should be strictly followed.”

17. Section 9 (2) of the *Fair Administrative Action Act* No. 4 of 2015 stipulates:

“(1) The High Court or a Subordinate Court under Sub Section (1) is expressly prohibited from and “shall not” review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for Appeal or Review and all remedies available under any other Written Law are first exhausted.

(2) The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in Subsection (1) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under Subsection 1.”

18. The aforementioned provisions of the Law and relevant case law indicate that the *Fair Administrative Action Act* No. 4 of 2015, which the Petitioner alleges has been breached, requires an Applicant to demonstrate that they have fully utilized all alternative remedies available under any other applicable legislation or pathway before seeking judicial review in Court. It is the Petitioner's responsibility to prove to the Court that exceptional circumstances exist that justify their exemption from pursuing available remedies and to substantiate their request for such an exemption. The Petitioner had the opportunity to address their concerns, remarkably if the 2nd and 3rd Respondents declined to approve the Development or Building Plans.

19. Furthermore, the Physical and Land Use *Act No. 13 of 2019* outlines comprehensive procedures for resolving disputes concerning the approval of development plans; thus, no Party is allowed to circumvent these procedures and seek judicial review for discretionary orders.

20. In light of the above, it is evident that the orders requested in the petition cannot be granted; consequently, the petition is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 27TH DAY OF MARCH 2025.

E. K. MAKORI
JUDGE

In the Presence of:



Mr.Kithi, for the Respondents

Happy: Court Assistant

In the Absence of:

Mr. Odiagga, for the Petitioner

