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ENVIRONMENT & LAND COURT (ELC) REINFORCES PLANNING CERTAINTY:

County Governments cannot indefinitely delay development approvals or frustrate property rights through administrative inaction

INTRODUCTION

There's a particular kind of dread familiar to anyone who has tried to build something in Kenya. One submits an application to the relevant county physical, land use and planning office (s) for development permissions. You pay the requisite fees, attach every document the county could possibly ask for and then nothing happens. No approval. No rejection. No letter explaining why. Just silence, sometimes for months, sometimes for years, while your capital sits idle and your financing costs climb.

A decision from the Environment and Land Court has told county governments, in fairly blunt terms, that this silence is not an option they get to choose.

THE CASE

In ***Ongera v County Executive Committee Member, Lands, Housing, Physical Planning and Urban Development & 5 Others [2023] KEELC***, a registered proprietor had applied for development permission and then watched the statutory clock run out with no decision in sight.

The Petitioner in this case went to court asking for three things: a declaration that the delay was unlawful, recognition that approval had already been deemed granted under the Physical and Land Use Planning Act, and removal of the restriction choking the title. The Court gave all three and further awarded exemplary damages against the county.

What makes this Judgment worth paying attention to is not just the outcome for one developer in one county. It is a reminder that statutory timelines are not aspirational targets. They are legal obligations. When Parliament imposes a time limit on a public authority, that authority cannot simply ignore an application until the applicant gives up or is forced into endless follow-up visits.

The Court reaffirmed that under the Physical and Land Use Planning Act, county governments are required to determine an application for development permission within the prescribed statutory period. If they fail to do so without communicating a lawful decision, the law itself steps in. Approval is deemed to have been granted. In other words, silence has legal consequences.

This is an important shift in the balance of power between developers and planning authorities. For years, many applicants have assumed that construction cannot begin until a county physically stamps the plans or issues a formal approval letter. The Judgment makes it clear that a county's inaction cannot indefinitely suspend a landowner's rights where the law provides otherwise.

SILENCE IS NOT A DECISION

Section 61(2) of the Act provides as follows:

61. Decision making and communication

(2) With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may—

(a) grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission; or

(b) refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing.

Section 61(2) leaves very little room for ambiguity. Once a compliant application has been received, the county has only two lawful options. It may approve the application, with or without conditions, or it may refuse it, provided it gives written reasons for doing so. What the provision does not contemplate is a third option of simply doing nothing.

Administrative silence is not recognized as a lawful response under the Act. A county cannot avoid making a decision by allowing an application to gather dust on a desk or by keeping an applicant in an endless cycle of follow-up visits. The Act deliberately framed the provision in mandatory terms to ensure that development applications are dealt with expeditiously. It is instructive to note that parliament did not stop at requiring county governments to make a decision. It also addressed the inevitable question: what happens if they simply fail to do so?

The answer lies in Section 58(6) of the Physical and Land Use Planning Act, 2019 which provides;

58. Application for development permission

- (1)**
- (2)**
- (3)**
- (4)**
- (5)**
- (6) Where an applicant does not receive written response for development permission within sixty days, such permission shall be assumed to have been given in terms of this Act.**

The provision places a statutory clock on planning applications and the consequence of inaction. Where a county authority fails to determine an application within the prescribed period, the law deems development permission to have

been granted. Parliament recognized that administrative delay can be just as damaging as an outright refusal and therefore ensured that a planning authority could not frustrate development simply by remaining silent. The “**deemed approval**” mechanism is intended to promote certainty by attaching real legal consequences to administrative inaction.

In *Ongera (supra)* the Court took Section 58(6) of the Physical and Land Use Planning Act, 2019 seriously. That the Act gives a planning authority exactly three (3) options: approve it, approve it with conditions, or reject it with reasons. Sitting on the file indefinitely is not a fourth option.

Perhaps the sharpest part of the Judgment deals with the county's defence that ongoing investigations justified withholding approval indefinitely. The Court was not having it! County officials sometimes reach for “there's an investigation” as a reason to avoid making a decision. The Court in *Ongera (supra)* rejected that position, observing that investigations do not constitute a legal determination that a registered title is invalid or that development rights should automatically be suspended. In reaffirming the protection afforded to registered proprietors under Section 26 of the Land Registration Act, the Court emphasized that allegations or investigations cannot replace due legal process.

THE BOTTLENECKS

Strip away the legal language and the practical bottlenecks in Kenyan construction and planning approvals tend to cluster around a few recurring problems among which:

1. **Fragmented and inconsistent planning frameworks.** Devolution handed physical planning functions to 47 county governments with very different levels of capacity, digitisation, and staffing. A developer working across two (2) counties can face two entirely different approval cultures for what is functionally the same process under PLUPA.

2. **No real consequence for missed deadlines, until now.** Statutory timelines have existed on paper for years. What's been missing is a reliable mechanism forcing accountability when they are ignored which is exactly the gap Section 58(6) of the Physical and Land Use Planning Act seeks to close.

3. **Overlapping approvals across agencies.** A single development might need physical planning approval from the county, an EIA licence from the National Environment Management Authority under the Environmental Management and Coordination Act, 1999, and sector-specific consents, NCA registration for contractors or water and sewerage approvals. It is not novel that sometimes these bodies do talk to each other.

WHAT SHOULD DEVELOPERS DO?

As lawyers, we view Judgments as a useful tool in changing behavior. Rather than accepting indefinite delays as an unavoidable part of the approvals process, developers should approach planning applications with a clear understanding of the statutory framework and the remedies available where a county fails to comply with it. Developers can take a few practical takeaways from this decision:

1. **Keep a paper trail from day one;** application receipts, plans and correspondence. If you ever need to invoke Section 58(6), you will need to prove exactly when the statutory clock started and that it ran out without a determination.
2. **When the timeline lapses, do not wait longer;** Get legal advice on whether “deemed approval” already applies and fastest route to unlocking the project.
3. **Challenge restrictions that lack a clear, current legal basis;** Remember “there's an investigation” is not, on its own, sufficient justification anymore. A county has to point to an actual legal process affecting the title or the project. While on it, insist on written reasons whenever an application is delayed, conditioned, or refused.

Issue	Recommended Action
Development Applications	Maintain complete records of applications, supporting documents, approvals, receipts, and statutory timelines.
Planning Decisions	Request written decisions and detailed reasons where approvals are delayed, refused, or made subject to conditions.
Administrative Delays	Monitor statutory timelines under the Physical and Land Use Planning Act and seek legal advice where delays become unreasonable.
Title Restrictions	Promptly establish the legal basis for any restriction or inhibition affecting property and challenge unlawful restrictions where appropriate.
Project Due Diligence	Confirm planning approvals, environmental licenses, land use compliance, and regulatory requirements before acquisition, financing, or development.
Environmental Compliance	Coordinate planning approvals with Environmental Impact Assessment (EIA) requirements and sector-specific regulatory approvals.
Project Financing	Ensure all planning, environmental, and regulatory approvals satisfy lender conditions precedent before financial close.
Constitutional Remedies	Consider judicial review or constitutional proceedings where administrative action is unlawful, unreasonable, procedurally unfair, or disproportionate.
Dispute Preparedness	Preserve documentary evidence of all regulatory engagements and obtain early legal advice before disputes affect project delivery.

The reality is that this Judgment will not fix planning administration on its own. No single Judgment can cure the culture of administrative delay. But *Ongera* (supra) sends a message that county governments cannot ignore. When the law requires a decision, silence is not an option. It is a legal failure with legal consequences.

HOW CM ADVOCATES LLP CAN HELP

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Our multidisciplinary teams advise developers, financial institutions, REITs, pension funds, multinational corporations, contractors, consultants, project sponsors, government agencies, development finance institutions, family offices, and private investors on complex development projects, regulatory approvals, and high-value disputes throughout the investment lifecycle.

Our services include:

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- Land acquisition, due diligence and investment structuring;
- Environment and Land Court litigation;
- Judicial review and constitutional petitions;
- Construction, engineering and infrastructure disputes;
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- Environmental, climate change and ESG advisory;
- Real estate finance and secured lending disputes;
- Compulsory acquisition and compensation claims;
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- Arbitration, mediation and other alternative dispute resolution mechanisms; and
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