



Kamau & 71 others v Chief Land Registrar & 5 others (Petition E038 of 2021) [2023] KEELC 17027 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17027 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

PETITION E038 OF 2021

EK WABWOTO, J

APRIL 13, 2023

BETWEEN

JOSEPH KIMANI KAMAU & 71 OTHERS PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI 4TH RESPONDENT

VIRGINIA KAGIO MIANO 5TH RESPONDENT

**THE DEPUTY COUNTY COMMISSIONER, MAKADARA,
NAIROBI 6TH RESPONDENT**

JUDGMENT

1. The Petitioner in the Petition dated 12th October 2021 seeks the following reliefs: -
 - i. A declaration that the land reserved as an open public space at LR No 209/4401/R commonly referred to as Megaki Garage along Hamza Road, in Hamza, Makadara, Nairobi is public land and that it can only be utilized as a public amenity.
 - ii. An order be issued cancelling the title numbers LR No 209/4401/834, LR No 209/4401/835 and LR No 209/4401/836 and revoking the registration of the 5th and 6th Respondents and/or any other private persons as the owners of LR No 209/4401/R commonly referred to as Megaki Garage along Hamza, Makadara, Nairobi.
 - iii. An order be directed to the Chief Land Registrar to restore LR No 209/4401/R commonly referred to as Megaki Garage along Hamza, Makadara Nairobi to its original state as public



land and issue a Title to the Nairobi City County to hold the same in trust as land reserved as an open public space.

- iv. A permanent injunction be issued prohibiting the Respondents, their servants, agents, employees, relatives or anyone acting on their behalf from evicting the Petitioners, alienating, trespassing, constructing, encroaching, changing the land tenure or in any manner dealing or interfering with the land LR No 209/4401/R commonly referred to as Megaki Garage along Hamza Road, in Hamza, Makadara, Nairobi.
 - v. Costs of the Petition be granted to the Petitioners.
2. The Petition was supported by an affidavit sworn on 12th October 2021 by Joseph Kimani Kamau, Stanley Irungu Mwangi and Peter Njuguna Wangoto.
 3. The Respondents opposed the Petition. The 3rd Respondent filed grounds of opposition dated 31st May 2022, the 4th Respondent filed a Replying Affidavit sworn by Abwao Eric Odhiambo sworn on 21st July 2022 while the 5th and 6th Respondents filed a Replying Affidavit sworn by Virginia Kagio Miano sworn on 22nd July 2022.

The Petitioners case

4. The case of the Petitioners is that they have been operating from a public space along Hamza Road, Makadara, Nairobi which space was reserved as a public open space since time immemorial and that the 4th Respondent has always issued them with licenses to run an open garage known as Megaki Garage on LR No 209/4401/R.
5. It was averred that in September 2021, the 5th and 6th Respondents and some other unidentified persons caused the summoning of the Petitioners' representatives to the office of the Deputy County Commissioner at Makadara wherein the Deputy County Commissioner told the 1st, 2nd and 3rd Petitioners that the public open space now belonged to the 5th and 6th Respondents and other "private developers". That subsequent to the said notification, they were required to vacate the premises or else they would be evicted.

The Petitioners contended that the suit property LR No 209/4401/R is a public amenity reserved for public space.

6. It was also contended that no public participation over any proposals to convert the suit property to anything else other than its current status of a public amenity/ public land.
7. In support of their Petition, the Petition filed written submissions dated 28th January 2022 through Njoroge Nganga Advocates. Counsel cited the case of *Omar R. Yakub & another v Attorney General* [2021] eKLR, and submitted that the open space known as Megaki Garage is public land reserved as an open space and hence should be protected from falling into the hands of "influential private persons".
8. The Petitioners urged the Court to grant them the prayers sought in the Petition together with costs.

The case for the 1st, 2nd and 7th Respondents

9. The 1st, 2nd and 7th Respondents despite being served never filed any pleadings neither did they participate in the proceedings herein.



The case for the 3rd Respondent

10. The 3rd Respondent filed grounds of opposition dated 31st May 2022 in opposing the Petition. It was contended that the Petitioners have not demonstrated in any manner whatsoever how the 1st, 3rd and 7th Respondents have violated their constitutional rights under the Constitution, it was also contended that the Petitioners have not cited any provisions of the Constitution that have been violated by the 1st, 3rd and 7th Respondents and further that the Petitioners have failed to produce any ownership documents before the Honourable Court in respect to the suit land. The 3rd Respondent also added that the Petition is an abuse of the Court process.
11. The 3rd Respondent filed written submissions dated 16th June 2022 through Elizabeth Mwalizi, Senior State Counsel. Counsel outlined three issues for defemination by the Court;
 - i. Whether the Petition meets the legal threshold of a Constitutional Petition.
 - ii. Whether the Petitioners have shown any wrongdoing on the part of the 1st, 3rd and 7th Respondents.
 - iii. Whether the Petitioner is entitled to any reliefs.
12. It was submitted that pursuant to the case of Anarita Karimi Njeru v R [1976-1980] KLR 1272 which was also affirmed in Mumo Matemu v Trusted Society of Human Rights Alliance & others [2013] eKLR averred that after making the said payments, the Petitioners have failed to set out the Constitutional provisions which have been violated and the manner in which the 1st, 3rd and 7th Respondents have violated those provisions. The Petitioners have not demonstrated how their rights have been violated.
13. It was also argued that the Petitioners are not claiming any ownership to the suit land rather they are claiming to have been operating from their open space along Hamza Road and were issued with licences to operate garages by the 4th Respondent. It was further argued that from the documents presented in court, the land belonged to the County Government of Nairobi and it is not clear why the Chief Land Registrar had been sued.
14. It was also submitted that the Petitioner were not entitled to any of the reliefs sought having failed to meet the threshold required for a Constitutional Petition. The Court was requested to dismiss the Petition with costs.

The case of the 4th Respondent

15. The 4th Respondent opposed the Petition vide a Replying Affidavit sworn by Abwao Eric Odhiambo, the Ag. County Solicitor on 21st July 2022. It was deposed that the LR No 209/4401 was allocated to the National Government for developments of institutional, commercial and residential developments. LR No 209/4401/R is such a huge portion of land measuring approximately hundred of acres and comprises thousand of plots it cannot be claimed by a small number of people or said to be an open space or public utility.

It was also averred that as a result of lack of finances to develop the land and owing to the high demand for houses in Nairobi, in 1993, the defunct Nairobi City County prepared a part development plan for residential plots and allocated to different beneficiaries among them being the 5th and the 6th Respondents and that contrary to the Petitioners allegations, the land in question was not marked as a public utility and the concept of open space is not known to the 4th Respondent but a creation of the Petitioners.



16. It was also deposed that the annexures filed by the Petitioners were forgeries which did not emanate from the 4th Respondent for the reasons that; the handwriting on the receipts is similar to the one on the attached to the application, the purported licence application do not disclose which property has been issued, the purported license were meant to expire on 12th December 1997 and no further application or renewal was shown.
17. It was contended by the 4th Respondent that even if the licenses were issued by the 4th Respondent, the same does not bestow ownership rights to the Petitioners.
18. The 4th Respondent also argued that the Petitioners have not demonstrated how the allocation of the suit property has negatively affected or infringed on their constitutional rights and neither have they challenged the process the 4th Respondent used to allocate the 2 properties to the 4th and 6th Respondent.
19. It was also argued that the Petition violates the doctrine of avoidance and amounts to an abuse of the court process.
20. The 4th Respondent also filed written submissions dated 24th July 2022 through Chesikaw & Kiprop Advocates. The 4th Respondent outlined the following issues for determination by the Court;
 - i. Whether this Court has jurisdiction to hear and determine the Petition?
 - ii. Whether the Petition satisfies the threshold of a Constitutional Petition?
 - iii. Whether the Petitioners are entitled to the orders sought?
 - iv. Who should bear the costs of the suit?
21. It was submitted that this court does not have jurisdiction to hear and determine the Petition since the Petition does not disclose any action against the 4th Respondent, the ownership of the suit land is not in issue and the same is owned by the 4th Respondent and further the Petitioners do not claim ownership rights over the suit property. It was also submitted that the suit has been filed without locus and the impugned suit property is nonexistent.
22. The 4th Respondent also submitted that the Petitioners have not demonstrated how the Respondents violated their constitutional rights and therefore the Petition does not meet the threshold of a Constitutional Petition.
23. It was also argued that the orders sought cannot be granted in view of the foregoing and hence the Petition as filed ought to be dismissed with costs.

The case of the 5th and 6th Respondents

24. The Petition was equally opposed by the 5th and 6th Respondents. The 5th and 6th Respondents filed a replying affidavit date 22nd July 2022 sworn by Virginia Kagio Miano. She deposed that the court lacked jurisdiction to hear the Petition as the pleadings do not disclose how the Petition qualifies to be a Constitutional Petition.
25. She also averred that the parcel of land referenced by the Petitioners may not be the same as the one alleged to be public space for the following reasons; that the plot allocated to her and the 6th Respondent was LR Nos 209/44701/835 and 209/4401/836, the Land Reference number allocated to her and the 6th Respondent are indicated to be IR Nos. 197692 and 197695 respectively, that it does not make



- sense that the 2 portions of land and the one allocated to her could have been occupied by more than 73 Petitioner and that the Plot allocated to her and the 6th Respondent were allocated in vacant possession.
26. It was also averred that the 6th Respondent applied for and was allocated her plots after following the due process and was subsequently issued with a title while the Petitioners have no documents to support their Petition.
27. In their submissions dated 22nd July 2022 and filed by Mwangi & Ngatia Advocates, Counsel outlined three issues for consideration by this Court;
- i. Whether the Petition raises any Constitutional issues.
 - ii. Whether the Petitioner are entitled to the orders sought.
 - iii. Who should bear the costs of the Petition.
28. The 5th and 6th Respondents reiterated the contents of their affidavit and It submitted that the Petition does not demonstrate any violations and hence therefore the reliefs sought cannot be granted. Citing the case of *Anarita Karimi Njeru v Republic* (No 1) (1979) 1 KLR 154, it was submitted that none of the Petitioners' rights had not been violated by the Respondents.
29. It was also added that the 5th and 6th Respondents had clearly demonstrated how they acquired their property and the same was not public open space as alleged by the Petitioners. It was also submitted that the allotment letter and eventual lease by the Nairobi City County was conclusive evidence of their ownership.
30. It was also submitted that the 5th and 6th Respondents have been paying land rates over their property and the process of the allocation of the said properties has never been challenged.
31. The 5th and 6th Respondents also argued that, the Petitioners had adduced a doctored map which is a forgery and should not be relied upon by this court.
32. The Court was urged to dismiss the Petition with costs to the 5th and 6th Respondents since the 5th and 6th Respondents had demonstrated how they had lawfully and legally acquired their properties.

Analysis and Determination

33. I have considered the Petition together with all the responses to the Petition. I have similarly considered the parties' submissions, together with the cited law and authorities. Having considered the parties' pleadings, evidence and submissions, the following are, in the court's view, the three key issues falling for determination in this petition;
- i. Whether the court has jurisdiction to hear and determine the Petition.
 - ii. Whether the Petitioners have established violations of his rights by any of the Respondents.
 - iii. Whether the Petitioners are entitled to any of the reliefs set out in the petition against any of the Respondents.
34. The first issue for determination is whether this Court has jurisdiction to hear this Petition. The *Constitution* itself confers on the ELC the jurisdiction to determine disputes relating to the environment and the use and occupation of, and title to land. This position was affirmed by the Court



of Appeal in *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others*, [2016] eKLR which observed as follows;

“The *Constitution* has therefore created a specific court, with equal status to the High Court and conferred on it the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and “any other dispute relating to land.”

35. In the current suit, the Petitioner has filed a Constitutional Petition alleging violations of their constitutional rights and seeking for various reliefs therein. It is therefore the finding of this court that having considered the petition and the reliefs sought therein, it is evident that the Environment and Land Court has jurisdiction to hear and determine matters relating to redress of a denial, violation or infringement of, or threat to, rights to Constitutional rights relating to use, occupation and title to land.
36. On the second issue, on whether the Petitioners have established violations of his rights by any of the Respondents, it was the Petitioners case that they have been operating from a public space along Hamza Road, Makadara, Nairobi which space was reserved as a public open space since time immemorial and that the 4th Respondent has always issued them with licenses to run an open garage known as Megaki Garage on LR No 209/4401/R.
37. It was averred that in September 2021, the 5th and 6th Respondents and some other unidentified persons caused the summoning of the Petitioners’ representatives to the office of the Deputy County Commissioner at Makadara wherein the Deputy County Commissioner told the 1st, 2nd and 3rd Petitioners that the public open space now belonged to the 5th and 6th Respondents and other “private developers”. That subsequent to the said notification, they were required to vacate the premises or else they would be evicted.
38. The Petitioners contended that the suit property LR No 209/4401/R is a public amenity reserved for public space.
39. It was also contended that no public participation over any proposals to convert the suit property to anything else other than its current status of a public amenity/ public land.
40. The 3rd, 4th, 5th and 6th Respondents however maintained that the Petitioners have not demonstrated how the Respondents violated their constitutional rights and therefore the Petition does not meet the threshold of a Constitutional Petition.
41. I have considered the evidence that was placed before this Court, it is evident that the that LR No 209/4401 was allocated to the defunct Nairobi City County for developments of institutional, commercial and residential developments. LR No 209/4401/R is such a huge portion of land measuring approximately hundreds of acres and comprises thousands of plots which it cannot be claimed by a small number of people or said to be an open space or public utility.
42. It was also evident that LR. No 209/44701/1835 and 209/4401/836 was allocated to the 5th and the 6th Respondents and that contrary to the Petitioners allegations, no evidence was placed before this court to the effect that the land in question was marked as a public utility. The Petitioners were not able to controvert the said evidence as adduced by the Respondents. My finding on the second issue therefore is that the Petitioners have not established any violation of their rights by any of the Respondents.
43. The last issue is whether the petitioners are entitled to any of the relief set out in the petition against any of the respondents. As I have pronounced myself earlier, having found that the petitioners have not proved any violations of their Constitutional rights, it follows that they have failed to prove their



petition on a balance of probabilities. The net result is that they are not entitled to any of the reliefs sought in the petition.

44. In the end, it is my view that the Petitioners have not proven their case to sustain this petition and it is my holding that no fundamental rights and or other constitution rights of the petitioners have been violated and or infringed as alleged.
45. On the issue of costs, its trite law that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice. Having regard to all the relevant circumstances herein, it would be fair, if each of the parties herein bear own costs. That is my order on costs.
46. In the circumstances, the Petition dated 12th October 2021 is dismissed with an order that each party bears own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF APRIL 2023.

E.K. WABWOTO

JUDGE

In presence of:

Mr. Nganga for the Petitioners.

N/A for the 1st Respondent.

N/A for the 2nd Respondent.

N/A for the 3rd Respondent.

Mr. Ondieki for the 4th Respondent.

N/A for the 5th and 6th Respondents.

N/A for 7th Respondents.

N/A for the 7th Respondent.

