



**Kathure & another v Land Registrar, Meru County & another (Constitutional  
Petition E023 of 2021) [2023] KEELC 17670 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17670 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
CONSTITUTIONAL PETITION E023 OF 2021**

**CK NZILI, J**

**MAY 24, 2023**

**BETWEEN**

**FAITH KATHURE ..... 1<sup>ST</sup> PETITIONER**

**FAITH KAGWIRIA MUNYUA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**LAND REGISTRAR, MERU COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through a petition dated August 26, 2021, the petitioners are described as the registered owners of Plot No Meru Municipality Block 1/265 since July 25, 2002, which they bought from Japhet M'Mugambi (K) Ltd, previously owned by Hellen Mwiraria, the original allottee have sued the 1<sup>st</sup> & 2<sup>nd</sup> respondents for purportedly revoking their certificate of lease by a Gazette Notice No 2653 of 2010 without any fair hearing and in breach of the right to own land.
2. The petitioners averred that the respondent's acts were illegal, arbitrary, contrary to rules of natural justice, *ultra vires*, irresponsible, and violated their constitutional rights as to equality before the law, land ownership, and fair administrative action.
3. The petitioner prayed for:
  - i. A declaration that the decisions and actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to purportedly revoke and or cancel their Plot No Meru Municipality Block 1/265 vide Gazette Notice No 2653 of 2010 were illegal inconsistent, null, void, and amounted to a violation of their rights to property.
  - ii. An order directing the 1<sup>st</sup> respondent to rectify and reinstate the petitioners' names as absolute proprietors of Plot No Meru Municipality Block 1/265.





- was sure she paid for stamp duty, and her husband appeared before the Land Control Board, where he obtained Land Control Board consent. She could neither remember the meeting date, nor produce the said consent, the lease, an application for Land Control Board consent, and the receipts of payments.
12. PW 1 clarified that she learned about the revocation in 2010 when she wanted to develop the property and conducted an official search. She said that she never acted for close to 11 years according to her land reverted to the government for a public purpose, which was the basis upon which revocation occurred.
  13. Further, PW 1 said that she was unaware of the Ndungu Report or any other inquiry on the illegal allocation of government land. Regarding the terms and conditions in the certificate of lease, PW 1 told the court that she was supposed to pay annual rates and rent, which she had been undertaking, although she had no receipts of payments before the court.
  14. In re-examination, PW 1 told the court that she was never summoned before any tribunal or quasi-judicial body to answer any questions before her certificate of title was revoked. She denied any fraudulent or illegal scheme in acquiring the property. PW 1 clarified that she was not requested to surrender her lease certificate for the cancellation.
  15. Faith Kagwiria, the 2<sup>nd</sup> petitioner, testified as PW 2. She adopted her witness statement dated August 26, 2021 as her evidence in chief. Her evidence was that PW 1 and herself acquired the suit land in 2002 for an amount she could not recall. According to her, the land was gifted to them by the company, among whose directors was her husband. PW 2 said they did not acquire vacant possession though someone they did not know was occupying the suit land.
  16. PW 2 confirmed that they had not received any rent from the said tenant though she was sure someone was in occupation when they bought the land. She confirmed that when they purchased the land, it was an already-developed plot with a house and two compartments.
  17. PW 2 told the court that the lease certificate was brought to them, but she could not remember attending any land control board meeting for consent to transfer the land to them. Equally, PW 2 clarified that it was PW 1 who was paying the annual rates and rent. She said that the entry on revocation came to her by surprise in 2020 through PW 1. She testified that the land acquisitions were legal, regular, and procedural and that since it was a gift, she took it the way it was and that there was nothing unusual about the land.
  18. In re-examination, PW 2 confirmed that no one summoned her to any office to explain the circumstances under which she had acquired the land before the revocation was done. Similarly, PW 2 said that they had not been given any sufficient reason why the certificate of the lease was cancelled, even though the revocation affected other landowners in the vicinity. Additionally, PW 2 told the court that she was still holding the original lease certificate since no one summoned her to surrender it for cancellation.
  19. Following the closure of the petitioner's case, a defense hearing was by consent fixed for February 23, 2023. Unfortunately, the respondents did not appear that day, and the defense case was ordered closed, paving the way for the filing of written submissions dated March 23, 2022 and May 9, 2023, respectively.
  20. The petitioners submitted that the purported revocation of the lease certificate was done without notice or communication contrary to the *Constitution*, yet it had not been unlawfully acquired. The petitioners submitted that when they acquired the Plot, they had no knowledge and were not privy to any fraud, illegality, irregularity, or acquisition through any corrupt scheme which, if any were in existence, the respondents have not proved to the required standard. Reliance was placed on *Denis Noel Mukhulo Ochwada and another v Elizabeth Murungari Njoroge & another* (2018) eKLR *Evans Otieno*



- Nyakwana v Cleophas Bwana Ongaro* as cited with approval in *Central Bank of Kenya v Trust Bank Ltd and others*, *Vijay Morjaria vs Nansingh Madbusingh Darbar & another* (2000) eKLR, *KPLC Pamela Awino Ogunyo* (2015) eKLR, *Moses Parantai & another v Stephen Njoroge Macharia* (2020) eKLR.
21. As to whether the 1<sup>st</sup> respondent has powers to revoke and or cancel the certificate of the lease, the petitioners submitted that Article 40 of the *Constitution* protected their title and that the 1<sup>st</sup> respondent did not specify under what Section of the *Land Registration Act* and the *Land Adjudication Act* his decision was based on, given the law did not empower the 1<sup>st</sup> respondent to arbitrarily revoke a valid land title.
  22. The petitioners submitted that the 1<sup>st</sup> respondent acted *ultra vires* and unlawfully. Reliance was placed on *Republic v Kisumu District Land Officer and another* (2010) eKLR *Samuel Murimi Karanja & 3 others vs Republic* HCCC Criminal Application No 412 of 2003 cited in *Joseph Arap Ngok v Justice Moijo Ole Keiwua*, *Republic v Devon Count Council exparte Boker* (1995) 1 ALL ER, *Council of Civil Service vs Minister for Civil Service* (11984) 3 ALL ER 935.
  23. On whether their rights were violated, petitioners submitted that the revocation of the titles was oppressive and discriminative and violated Article 40 of the *Constitution* and hence was entitled to general damages. Reliance was placed in *Park Towers Ltd vs John Mithamo Njuki & 7 others* (2014) eKLR *Gitobu Imanyara & 2 others vs AG* (2016) eKLR and *Peter Ndegwa Kiai t/a Pema Wines & Spirit vs AG* (2021) KECA 328 (KLR) 17<sup>th</sup> December (2021) (Judgment).
  24. The respondents submitted that Article 40 (6) of the *Constitution* limits the scope of the right to property where the property is found to have been acquired illegally. In this case, the petitioners' title was illegally acquired as the suit property was reserved for public purposes and unavailable for allocation, as evidenced in the gazette notice.
  25. The respondents relied on *Dina Management Ltd vs County Government of Mombasa & 5 others* Petition No (E010) of 2021, where the court addressed itself on the right to property unlawfully allocated out of public land and cited with approval *Munyu Maina vs Hiram Gathiha Macha* Civil Appeal No 239 of 2009, and submitted that since the petitioners' title was under challenge, they were under an obligation to prove as to how they legally acquired the title.
  26. Further, the respondents submitted that the petitioners failed to tender evidence that they were bonafide purchasers for value who had also carried out due diligence. Reliance was placed on *Sukbdev Singh Laly vs Philip Ojwang Kamau & others* (2018) eKLR cited with approval in *Samuel Kawere vs land Registrar* Kajiado Nairobi Civil Appeal No 28 of 2005 on the proposition that when a title deed is under challenge, a title holder must prove that he had acquired a valid and legal title and secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title and thirdly that he paid valuable consideration for the suit property.
  27. The respondents submitted that the petitioners failed to tender evidence on the acquisition, the payment of valuable consideration, due diligence carried out, any amount of stamp duty or land rents cleared, land control board consent obtained, consent procured from the allocating authority, production of the sale agreements and transfer forms. Relying on *Dina Management* (*supra*), the respondents emphasized that whether or not one was a bona fide purchaser for value, the court must go to the root of the title from the first allotment. Reliance was also placed on *Funzi Development Ltd and others vs County Council of Kwale* (2014) eKLR, on the proposition that indefeasibility or absolute title exists if and only if the allocation was legal, proper, and regular since a court of law cannot sanction illegality or give a seal of approval to an illegal or irregularly obtained title, and that a title or lease was



an end product of a process such that if a process did not comply with the law, then such a title cannot be indefeasible, even if it was a first allocation.

28. The respondents submitted that since the suit property was unavailable for allocation due to its reservation for public use, no good title was passed to the petitioner as their title was acquired after an unlawful allocation of public land. It was submitted that the previous allocation and title were empty, defective, invalid, and incapable of conveying any rights to a third party, including the petitioners as held in *Sukbdev (supra)*, *Macfoy vs United Africa Co. Ltd* (1961) 3 ALL ER 1169.
29. As to whether the 1<sup>st</sup> respondent had powers to cancel or invalidate a title, the respondents submitted that such powers are governed by Section 79 of the *Land Registration Act* as held in *Peter Mwai Marui vs Lawrence Mabiga Murithi & 2 others* (2020) eKLR.
30. Concerning the reliefs sought, the respondents submitted that none of the petitioners' rights were violated since such ownership rights did not extend to property illegally acquired. Therefore, the court was urged to find that no general damages should be granted or reversal of cancellation to the title; otherwise, the court would be perpetuating illegality.
31. The court has carefully reviewed the pleadings, evidence tendered, and written submissions. The issues calling for determination are:
  - i. If the petition meets the constitutional threshold.
  - ii. If the petitioners should have exhausted the internal mechanisms under the law.
  - iii. If the petition is guilty of laches.
  - iv. If the petitioners have proved any breach of their rights by the respondents, to be entitled to damages for violation of the rights and liberties.
  - v. If the respondents were justified in canceling the certificates of the lease.
  - vi. What is the order as to costs?
32. A party filing a petition based on an alleged breach, threat, or infringement of a constitutional right or freedom must disclose a constitutional question or controversy whose solution or answers is to be solely found within the *Constitution* itself and not in a statute.
33. In *National Government and Coordination Board v E.G & 4 others (Katiba Institute) (Amicus Curiae)* Petition 16 of 2019 (2023) KESC 17 (KLR) Constitutional & HR (February 24, 2023) Judgment the court observed that since there was no precise mechanism of appeal or remedy with the *NGO Coordination Act* concerning the reservation of a name or names of the proposed NGO and secondly since the case raised an issue on constitutional interpretation and its application thereof and given the administrative forum did not have the jurisdiction to hear the parties, the case presented a constitutional question. Therefore, the court said that the High Court could not have shut its doors to the appellant for non-failure to exhaust an internal remedy that did not apply to their circumstances.
34. In this petition, the petitioners allege that the revocation of their certificate of title was done without the right to fair administrative action and against the right to own the property, yet they are innocent purchasers for value without notice. In my view, the issues before the court are constitutional questions that require the interpretation of the *Constitution* vis a vis the *Land Registration Act* on whether the petitioners should have been notified, given an audience, and reasons communicated to them before and after the certificate of the lease could be cancelled or revoked.



35. Further, I find the threshold as set in *Anarita Karimi Njeru vs Republic* (1979) eKLR as read together with *Mumo Matemu vs Trusted Societies of Human Rights Alliance & 5 others* (2013) eKLR, met since the petition substantially complies with Articles 22 & 23 of the *Constitution* as read together with Rules 4 & 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.
36. As to whether the petitioners should have exhausted any internal dispute mechanism under the statute, the decision to cancel the certificate was made on April 1, 2010. Entry No 7 in the white card, which was produced as P. Exh No(3). The operative law at the time was Sections 27 (a) and 28 of the *Registered Land Act*, now repealed. Section 143 (2) of the *Registered Land Act* provided that the register shall not be rectified unless such proprietor knew of the omission, fraud, or mistake in consequence of which the rectification was sought or caused such omission, fraud, or mistake or substantially contributed to it by his acts, neglect or default.
37. In *Azania Holdings Ltd vs the Land Registrar Mombasa Misc. Application No 130 of 2010*, at issue, was an attempt to cancel a title without following the rules of natural justice or any due process. The court held that the respondents had acted without jurisdiction; thus, their acts were *ultra vires*. This petition does not indicate that the petitioners were involved in the events leading to the cancellation. The only option left for the petitioners was to move to court and challenge the decision either by way of judicial review or through an ordinary suit. I find that the petition is properly before the court.
38. As to whether the petitioners are guilty of indolence, acquiescence, or abandonment of their rights since the decision or the intended action was not brought to their attention and they only came aware that the certificate of title had been revoked when they went to search at the lands registry, the petition was filed within a reasonable time. Further, the respondents did not give evidence of a prior communication of the decision in 2010; my finding is that the respondents are estopped in law from raising such defenses. In any event, the court in *Chief Land Registrar vs Tirop Koeb & 4 others* (2018) eKLR, held that there could not be a limitation of time in a claim or acquiescence on enforcement of rights and freedoms and that all that matters is whether the delay was inordinate or unreasonable with no explanation accompanying it. See also *Mwangi S. Kimenyi vs Attorney General & another* (2014) eKLR
39. As to whether the petitioners have pleaded and proved a breach of their constitutional rights to fair administrative action and right to property, the petitioners had contended that they were not notified of the impending action and allowed to make presentations before the decision was made, involved in the decision making, informed of the decision and officially summoned to surrender the certificate of the lease for the cancellation. In support of their claims, the petitioners produced their exhibits No P. Exh No (1), (2) and (3). On the other hand, the respondents have pleaded that the decision was lawfully and legally taken since the land was never available for allocation in the 1<sup>st</sup> instance, that there was no good title that could be passed to the petitioners for the initial allocation was illegal and that public interest militated against the private interest.
40. The respondents have submitted that the petitioners did not prove that they acquired the certificates of title regularly, procedurally for valuable consideration, paid for the requisite consideration, obtained the necessary approvals and consents, and cleared the statutory fees, rates, and rents. Further, the respondents submitted that the petitioners never took vacant possession and continued to pay annual rents and rents until they learned of the revocation; hence, they have not suffered or proved any loss or damage deserving any compensation. Unfortunately, in answer to the petition, the respondents did not plead on whether there was proper communication involvement and notification to the petition before, during, and after the decision to revoke the certificate of the lease was made. Other than



- the general gazettement and entry of the restrictions, the respondents did not attach any additional correspondence sent to the petitioners regarding the action taken on their parcel of land.
41. Therefore, the question to be answered is whether, by failing to engage, notify, involve, and communicate to the petitioners, the respondents breached the petitioners' right to natural justice and property rights. Further is whether the doctrine of public interest should have been used to infringe the two rights of the petitioners.
  42. In the case of *Peter Bogonko vs NEMA* (2006) eKLR, the court was reluctant to issue an order for certiorari after considering that the public interest outweighed the applicant's individual rights. See also *KNEC vs Republic exparte Kemunto Regina* NRB Civil Appeal No 127 of 2009. In *Azaria Holdings Ltd vs the Land Registrar* Mombasa Misc No 130 of 2010, the court held that respondents acted without jurisdiction and the decision was *ultra vires* since it purported to revoke the applicant's title without following the rules of natural justice or any due process. In *Onyango vs AG* Court of Appeal Nairobi Civil Appeal No 52 of 1986, the court observed that a person against whom a decision was to be taken ought to be allowed to be heard on what was alleged against him so that he can present his case. See also *Oloo vs Kenya Posts and Telecommunication Operations*, Civil Appeal No 56 of 1981.
  43. In *Republic vs Land, Registrar Mombasa and three others exparte Alladina Properties Ltd* (2018) eKLR, at issue was a decision sought to be quashed in which the respondents had gazette revocation of the applicant's title on allegations of illegality without following due process. The court held that the land registrar did not have the power to revoke a title to land under Sections 27, 28 & 143 of the *Registered Land Act* now repealed, on account of fraud or mistake without a court order on a matter touching on illegal allocation or fraud or nullity, except where there was an error or omission not materially affecting the interest of any proprietor to the land. The court said a title can only be declared null and void by a court of law after a determination. As to public interest and the role of the court not to aid illegality, the court, guided by *Emfil Ltd vs Registrar of Titles Mombasa & 2 others* (2014) eKLR, held that it was in the public interest that the rule of law prevailed.
  44. Further, in *Commissioner of Lands vs Kunste Hotel Ltd* (1997) eKLR, the court, while determining the interplay between private interest vis avis public interest, held that judicial review is concerned with the decisions making process to ensure that an individual was given fair treatment by the authority to which he has been subjected to. The court said that the procedure for rectification of title under Section 143 of the *Registered Land Act* was by order of the court and that the respondent should have brought a suit on that behalf. The court cited with approval the procedure in Sections 27 & 28 of the *Registered Land Act* as observed in *Republic vs Land Registrar Taita Taveta District & another* (2015) eKLR that the government should have brought proceedings to that effect.
  45. In this petition, the respondents have failed to demonstrate any effort made to notify and or inform the petitioners before the decision was made so that they could make a presentation on the allegations that the allocation was illegal. It is the 1<sup>st</sup> respondents who had issued the certificates of the lease. In particular, the 1<sup>st</sup> respondent is the custodian of public and private land documents. As much as the respondents blame the petitioners, the law does not provide for the denial of the rules of natural justice. It abhors condemnation of a party without notification, notice to show cause, or the right to be heard. Private interest can not be sacrificed at the altar of public interest without observing the rules of natural justice.
  46. In the case of *Igainya Ltd vs NLC & another* (2022) eKLR, survey plans, deed plans, and part development plans had been produced showing that the suit land was part of the land planned as a public road reserve and therefore had ceased to be available for any alienation, subdivision or adverse dealing.



47. The court held that the allottees had procured the land had been alienated without regard to the requirements of Sections 22, 27, and 42 of the *Physical Planning Act (1996)* (repealed). The court cited with approval *Munyu Maina vs Hiram Gathita Maina* (2013) eKLR, that a registered proprietor must go beyond the instructions and prove the legality of how he acquired the title and show that the acquisition was lawful, formal, and free from any encumbrance. Further, the court cited with approval *Chemney Investments Ltd vs AG & others* (2018) eKLR, that a court would decline to recognize and protect a title obtained illegally and fraudulently. Additionally, the court cited with approval *KeNHA vs Shalien Masood Mughal & others* (2017) eKLR on the proposition that the existence of a road reserve before the disputed plot came into being in 2002 meant that it was not open for any authority to alienate it further for any private development. As to revocation, the court said that even though the grant held by the plaintiff was illegal, the plaintiff was entitled to due process because of Article 47 of the *Constitution* and further that the 2<sup>nd</sup> defendant had failed to demonstrate any law at the time which gave the land registrar of titles, powers to revoke a title without following the due process.
48. Additionally, the court said that in the absence of evidence to demonstrate that the plaintiff was given any hearing before the issuance of the gazette notice revoking the title, the same was unprocedural. The court awarded nominal damages of Kshs.2 million but declined to reinstate the title or revoke the gazette notice.
49. In this petition, the petitioners, as indicated above, have failed to produce the paper trail showing that they were innocent buyers for value without notice who were not aware of the history of the land. There is no evidence of due diligence before the transfer and registration. The petitioners failed to join in the suit or call as witnesses whoever had been initially allocated the land and the person who transferred it to them. The petitioners made no attempts to contact any officer from the County Government of Meru to come and testify or establish if they were recorded owners of the plots or leases who were lawfully and regularly paying rates to them. Additionally, the petitioners could not remember the consideration they allegedly paid to acquire the land.
50. On the other hand, the respondents failed to table any evidence in their possession, which led them to find and determine that the land was preserved for public purposes and remains so to date. Therefore, the court has no basis and cannot make a finding that the suit land was always reserved for public purposes and was not available for any allocation.
51. The gazette notice attached to the petition is Vol. C X11 No 35 of 1.4.2010 and indicates that the Gazette Notice No 3450 was the one which revoked the title and was published by Harrison Musumiah District Land Registrar Meru Central. It suggests at the bottom that Gazette Notice No2653 of 2010 was cancelled.
52. On the other hand, the gazette notice attached to the 1<sup>st</sup> respondent's affidavit sworn on 27.10.2022 annexed a Gazette Notice published on 9.3.2020, which is Gazette Notice No2653 issued by Harrison Musumiah District Land Registrar Meru Central. It has omitted the aspect of revocation of the earlier gazette notice.
53. So, the question is which of the two gazette notices is genuine for this court to go by. None of the parties have addressed the court on this issue. More importantly and for purposes of this petition, the two gazette notices do not specify under what Sections of the law quoted that the 1<sup>st</sup> respondent was used to revoke the titles. The gazette notices do not mention the owners of the lands, the manner, nature, particulars, and the basis on which the decision(s) was arrived at. The public need or interests and the public use of the properties were not indicated.



54. Therefore, the respondents were obligated to justify why the revocation was done and why they did not see it necessary to notify and give the petitioners a fair hearing. In failing to do so, the respondents infringed on the petitioners' rights and condemned them unheard.
55. On whether the petitioners are entitled to the reliefs sought, as indicated above, they produced no paper trial for this court to make a finding that they were innocent purchases for value without notice. The burden of proof was on them to show that even if they had to be accorded an opportunity to be heard before the revocation, they would have demonstrated legality, regularity, procedural allocation, compliance with the law, and the due diligence that they had made before the transfer and after the registration.
56. The petitioners had the onus to prove that they had complied with every step, procedure, and law before acquiring the land and that the land did not fall under public land contrary to the assertions by the respondents, and if by any chance it was public land, still they would have demonstrated that private interest was necessary, reasonable and relevant hence the reasons that the allocating authority set it aside and regularly allocated it to them.
57. In this petition, evidence was not tendered before the court to show that the respondents in revoking the title were actuated by malice, ill will, contempt of law, and were out to abuse their statutory duties. I hold that the petitioners have failed to prove the 2<sup>nd</sup> limb that the property is not and was never public land. I find no basis to revoke the gazette notice and the title's cancellation on that account.
58. Having found above that the petitioners have established a breach of their constitutional rights, the law is that there can be no right without a remedy. Therefore, the petitioners are entitled to nominal damages of Kshs.1.5 million shillings guided by the caselaw of *Peter Ndegwa Kiai (supra)*, *Gitobu Imanyara (supra)*, and *David Gitau Thairu vs County Government of Machakos & others (2020) eKLR*.
59. Therefore, the court finds no basis to hold that the gazettement as well as the cancellation of the title unconstitutional for the land to revert to the petitioners.
60. Costs of the petition to the petitioners in any event.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 24<sup>TH</sup> DAY OF MAY 2023**

**In presence of**

C.A John Paul

Muthomi for petitioners

Miss Mbaikyatta for respondents

**HON. C.K. NZILI**

**ELC JUDGE**

