



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo v County Government of Kisumu & 4 others (Environment & Land
Petition E006 of 2022) [2023] KEELC 17419 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17419 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND PETITION E006 OF 2022

E ASATI, J

MAY 18, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010,

ARTICLES 2, 19, 20, 21, 22, 23, 27, 31, 40, 43, 47, 50, 64,

157 AND 248

AND

IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND

FREEDOMS CONTRARY TO ARTICLE 40, CHAPTER 4 OF THE

CONSTITUTION OF KENYA AND IN THE MATTER OF

CONTRAVENTION OF RIGHT TO OWN PROPERTY CONTRARY TO

ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LOCAL GOVERNMENTS ACT

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT CHAPTER

280, LAWS OF KENYA

AND

IN THE MATTER OF REGISTERED LAND ACT, CHAPTER 300,

LAWS OF KENYAN OF THE REPUBLIC OF KENYA 2010

BETWEEN

BETWEEN

TOBAIS ODHIAMBO PETITIONER

AND



COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF LANDS, HOUSING & PHYSICAL
PLANNING URBAN DEVELOPMENT 2ND RESPONDENT
KENYA INFORMAL SETTLEMENT IMPROVEMENT PROJECT
(KISIP) 3RD RESPONDENT
LAND REGISTRAR, NYANDO/NYAKACH/MUHORONI .. 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The Petitioner herein, Tobias Odhiambo, vide the Petition dated 14th November, 2022 and filed in court on 17th November, 2022 sought the following relief against the Respondents;
 - a. A declaration that the proprietary interest in Shauri Yako Plot No.529 otherwise currently known as Kisumu/Muhoroni Township/294, 295, 296, 301, 302 & 304 vests in the Petitioner absolutely.
 - b. A declaration that the subdivision of Shauri Yako Plot No.539 and registration as land as parcel number Kisumu/Nuhoroni Township/294, 295, 296, 301, 302, 304 and titles issued in the names of some unknown individual was null and void for all intents and purposes.
 - c. An order of permanent injunction against and restraining the Respondent or any interested party from trespassing on to or evicting the petitioner from Shauri Yako Plot No.529 otherwise known as Kisumu/Muhoroni Township/294, 295, 296, 301, 302, & 304.
 - d. An order of mandamus compelling the 4th Respondent to cancel registration of any 3rd party in respect of Kisumu/Muhoroni Township/294, 295, 296, 301, 302 & 304 and register the petitioner as the proprietor of Kisumu/Muhoroni Township/294, 295, 296, 301, 302 & 304.
 - e. An order of mandamus compelling the 1st, 2nd and 3rd Respondents to jointly and/or severally pay the petitioner general damages for infringement of fundamental rights.
 - f. In the alternative, an Order of mandamus compelling the 1st, 2nd and 3rd Respondents to jointly and severally;
 - i. Pay Kshs.7,000,000 (Seven million) being fair compensation for true market value of the suit land herein.
 - ii. Refund of all the land rates paid towards the suit property with interest.
 - g. Costs of the suit.
 - h. Any other consequential relief and orders that this Honourable deems just and expedient to grant.
2. The legal foundation of the Petition was stated to be the provisions of articles 2(1), 3(1), 10, 19, 20, 22, 23, 27, 28, 40(3)(b)(i), 47, 48, 67(2)(e) and 258 of the Constitution of Kenya 2010 and Section 111(1) and (2) of the Land Act No.6 of 2012.



3. The petition was supported by the facts and grounds contained in the Petition and the averment in Affidavit in Support sworn by the Petitioner on 14th November, 2022 and the annexure thereto.
4. The 1st Respondent filed no reply to the Petition. Affidavit of Service sworn by one Boniface Owuoche on 23rd November, 2022 indicates that the 1st Respondent was served with the Petition together with other documents on 23rd November, 2022. A copy of the application indicated to have been served together with the petition annexed to the Affidavit of Service bears the receiving stamp of the 1st Respondent showing that it was received by the 1st Respondent on 23rd November, 2022. Further, Affidavit of Service sworn by the same process server on 2nd December, 2022 indicates that the 1st Respondent was served with a court order on 2nd December, 2022. A copy of the court order attached to the Affidavit shows that the order was received at the 1st Respondents' offices on 2nd December, 2022. The court is satisfied that the 1st Respondent was properly and sufficiently served with the petition but failed to respond.
5. The 2nd, 3rd, 4th and 5th Respondents responded to the petition vide the Replying Affidavit sworn by Charles M. Hinga, CBS, the Principal Secretary for the State Department of Housing and Urban Development. He stated that the suit property known as Shauri Yako Plot No.529 formed part of public land and due process was followed in sub-dividing and allocating the same.
6. By consent of the parties (the Petitioner and the 2nd, 3rd, 4th and 5th Respondents) the petition was canvassed by way of written submissions. Written submissions dated 3rd March, 2023 were filed by Grace Essendi Senior Litigation Counsel for the Attorney General on behalf of the 2nd, 3rd, 4th and 5th Respondents. Written submissions dated 21st March 2023 were filed on behalf of the Petitioner by the firm of Tawo & Co Advocates.
7. The issues raised by the parties in their submissions as the issues for determination herein are;
 - a. Whether the jurisdiction of the court has been properly invoked and whether the Petitioner meets the threshold of constitutional petition.
 - b. Whether the Respondent violated the Petitioner's right to acquire and own property and as envisaged in article 40 of the *Constitution*, right to legitimate expectation, right to life, human dignity, economic and social dignity and the right to fair administrative action.
 - c. Whether the Petitioner is entitled to general damages for violation and infringement of fundamental rights.
 - d. Whether the Petitioner is entitled to prompt and just compensation for his land as an alternative prayer.
 - e. Who pays the cost of the petition.
8. On whether the jurisdiction of this court has been properly invoked and whether the petition meets the threshold of constitutional petitions, the Petitioner submitted that the petition is grounded on the provisions of articles 2, 19, 20, 21, 22, 23, 27, 21, 40, 43, 47, 50, 64, 157 and 258 of the *Constitution* of Kenya 2010. That the suit property belonged to the County Government and was legally allotted to him but later given to 3rd parties. That the petition has set out the Petitioner's complaint, the provisions of the *Constitution* infringed and the manner of infringement of his rights. That the prayers sought by the Petitioner are not available in an ordinary suit as they are a preserve of the Constitutional Court. Counsel relied on the case of *Gray Jepkemoi Kiplagat – Vs- Chekongga Cheruiyot* [2021] eKLR to support this submission.



9. The 2nd, 3rd, 4th and 5th Respondents relied on the same authority of Gray Jepkemoi Kiplagat to submit that the Petitioner has failed to establish how his fundamental rights as envisaged under the Constitution of Kenya 2010 were violated. That a party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom.
10. I have considered the entire petition and the submissions. I find that the Petitioner in addition to citing the provisions of the Constitution he claims to have been violated, has also pleaded as to what according to him, are the actions and omissions of the Respondents in violation of his rights. I find that the test of specificity in Anarita Karimi case has been satisfied and that the jurisdiction of this court has been properly invoked.
11. The second issue for determination is whether or not the Respondent violated the Petitioner's right to acquire and own property as envisaged in article 40 of 2010 Constitution of Kenya 2010 and the right to legitimate expectation, right to life, human dignity, economic and social dignity and the right to fair administrative action. The Petitioner's case is that he is the beneficial owner of Shauri Yako Plot No.529 situated in Muhoroni town measuring 271 ft by 134 ft by 222 ft by 184 ft which he bought from one Barack Okeno Osare on 16th July, 1992 at Kshs.80,000/=.
- That the suit property was sub-divided without notice to him and reduced to smaller plots which were arbitrarily transferred to some other individuals without compensating him. That he was only left with a smaller portion thereof assigned plot No.529A measuring 50 ft by 30ft for which he was given a letter of allocation dated 19th September, 2008 and allotment letter dated 9th February 2009 upon payment of demarcation (survey fees) of Kshs.7000/- and annual ground rent for the years 1998 – 2008 of Kshs.5,000/- vide minute MTC/5/2006.
- That the action of sub-dividing Shauri Yako Plot No.529 without notice to him and registering it as parcel numbers Kisumu/Muhoroni Township/294, 295, 296, 301, 302 & 304 issuing titles in the names of some unknown individuals is a violation of his right to own and acquire property.
12. That the same act of the Respondents amounted to illegal cancellation of the said allotment letter hereby infringing on the right to fair administrative action under article 47 of the Constitution as the Petitioner was given no notice of the cancellation or any hearing before the said action was taken.
13. That having been given an allotment letter and paid the requisite fees and rates, the Petitioner legitimately expected to be issued with a certificate of lease to the suit land. That the 3rd Respondent's cancellation of previously issued allotment letter and issuing fresh allotment letters within Shauri Yako area denied the Petitioner the right to legitimate expectation.
14. That the Petitioner having taken possession and heavily developed the land with temporary structures – five (5) rows of houses comprising of 40 rooms (8 rooms per row) and had rent paying tenants in occupation his livelihood depended on the same. That the act of the Respondent of sub-dividing the suit property without notice or compensation to the Petitioner is a violation of the Petitioner's right to life, human dignity and economic and social dignity.
15. It was submitted on behalf of the Petitioner that the allotment letter dated 9th February, 2009 in favour of the Petitioner was valid and conferred not just a beneficial interest but proprietary rights which the Respondent infringed. Counsel for the Petitioner relied on the case of Eunice Cynthia Njeri –vs- Andrew T. Kiptanui & Another [2018] eKLR where the court held that once a letter of allotment has been issued and the allottee meets the conditions therein, the land the subject of the letter is no longer available for allotment to any other person unless the allotment has been cancelled or revoked by the allotting authority.



Counsel also relied on the case of *Communication Commissions of Kenya & 5 others -vs- Royal Media Services & 5 others*, where the Supreme Court held that legitimate expectation would arise when a body, by representation or by past practice aroused an expectation that is within its power to fulfill.

16. The 2nd, 3rd, 4th and 5th Respondents' response to this was contained in the Replying Affidavit. They contended that Shauri Yako Plot No.529 formed part of public land belonging to the County Government of Kisumu. That the 3rd Respondent is a project under State Department aimed at improving the living conditions of Kenyan citizens in selected informal settlements across various counties in Kenya. That the 3rd Respondent has a clear process and criteria for undertaking interventions in informal settlements which are guided by the subject County Government and all other relevant participatory stage handlers and takes into account that the settlement area is on public land, the tenure regularization process in the settlement has not been carried out or completed. That there is no court case or any other legal encumbrance on part of or all of the land on which the settlement sits and the community readiness for the project.

That the process involves stakeholder identification and engagement, preparation of Local Physical Development plans for the respective informal settlement, survey of plots and preparation of survey plans and preparation and implementation of the Resettlement Action Plans.

17. That the Respondents conducted an all participatory process of all relevant stakeholders including community members. That in compliance with the requirement of the Physical Land and Use Planning Act 2019, the 2nd Respondent published a notice of completion plan dated 22nd March 2018 for Kisumu NRB/9/2018/01 – proposed Shauri Yako Settlement Scheme calling for persons to make any representation or objections to the development plans. That no such representation or objection was made by the Petitioner.
18. That the property was legally and procedurally sub-divided and allocated. That the petitioner has not produced any evidence of ownership. That when the Petitioner wrote to the 3rd Respondent, the title deeds belonging to the Muhoroni beneficiaries of the 3rd Respondent's project had already been issued sometime in 2021. That the 3rd Respondent could be acting ultra vires if it changed the list of beneficiaries as verified by the community, adopted by the county government and approved by the Director, Physical Planning. That the Petitioner's right to property under Article 40 of the *Constitution* have not been violated.
19. On behalf of the 2nd, 3rd, 4th, and 5th Respondents it was submitted that the Petitioner having not produced any certificate of lease or any documents of registration, has not proved ownership of the suit land. That the suit land formed part of public land belonging to the Kisumu County Government. Counsel relied on the case of *Ali Wanje Ziro vs Abdulbasit Abeid Said & Another* [2022] eKLR and Section 26 of the *Registration Act* for this submission. That the Petitioner is also a beneficiary to the resettlement projects by the 3rd Respondent. That there is no cause of action demonstrated by the Petitioner.
20. I have considered the pleadings in the petition and the evidence in the Affidavit in Support of the petition and the Replying Affidavit. I do not find evidence that the Petitioner has ever owned Shauri Yako Plot No.529.



The basis of the Petitioner's claim is that he bought the land from one Barack Okeno Osare. A document attached to the petition and marked TO1 was adduced by the Petitioner as the land sale agreement. It read;

“I have transferred the left portion area measuring 184.5 ft by 222 ft by 134ft by 271ft at Ombogo Estate opposite Sang'aro store to Mr. Tobias Odhiambo I/d No.8144070 (signature) for further development with effect from 19/7/1992 at the cost of Kshs.80,000/ =”.

Firstly, it is important to note that the parcel number is handwritten and inserted on the document while the rest of the document is typed. There is no evidence as to why and whether the insertion was done later or on the same date of the document. However, that notwithstanding, it is not clear from the document what the size of the entire of plot No.529 Shauri Yako was. It appears it was only a portion of the plot with the specified measurements that was the subject of the document. It is also not clear what rights the transferor held over the property which he could then pass to the Petitioner through the document. There is no evidence that any process took place after the said documents so as to formally transfer Plot 529 Shauri Yako to the Petitioner.

21. I have perused the allotment letter dated 9th February, 2009 and addressed to the Plaintiff by Town Council of Muhoroni. It clearly shows that the Petitioner was allotted Plot No.529A Shauri Yako and not 529. The certificate of payment of rates and other charges annexed to the petition is in respect of plot No.529A Shauri Yako. Similarly, the receipts marked To 5(b) is in respect of Plot 529A Shauri Yako. I have not seen any allotment letter for Plot No.529 Shauri Yako in favour of the Petitioner. And if the Petitioner only bought the portion shown in the document annexed to the petition as land sale agreement, he has no basis to claim the entire of the plot No.529 Shauri Yako.
22. The Petitioner's claim is anchored on the allotment letter. There is no complainant in the petition that Plot No.529A has been interfered with. The 2nd, 3rd, 4th and 5th Respondents swore and submitted that the Petitioner is one of the beneficiaries of the settlement scheme project by the 3rd Respondent. The Petitioner did not deny this.
23. I find that the Petitioner has failed to prove any rights over plot No.529 Shauri Yako and infringement or violation of any or all of the rights enumerated in the petition. I find no basis to make a declaration that the proprietary interest in Shauri Yako Plot No.529 otherwise currently known as Kisumu/ Muhoroni Township/294, 295, 296, 301, 302 & 304 vests in the Petitioner absolutely or that the subdivision of Shauri Yako Plot No.539 and registration as land as parcel number Kisumu/Nuhoroni Township/294, 295, 296, 301, 302, 304 was null and void as prayed in the Petition. Similarly, I find that a case has not been made out for issuance of an order of permanent injunction against the Respondents restraining them from trespassing onto or evicting the petitioner from Shauri Yako Plot No.529 otherwise known as Kisumu/Muhoroni Township/294, 295, 296, 301, 302, & 304 or an order of mandamus compelling the 4th Respondent to cancel registration of any 3rd party in respect of Kisumu/ Muhoroni Township/294, 295, 296, 301, 302 & 304 and register the petitioner as the proprietor of Kisumu/Muhoroni Township/294, 295, 296, 301, 302 & 304.
24. As regards the claims for compensation and for general damages, having found that ownership rights of Plot No.529 Shauri Yako and infringement of the petitioner's rights have not been proved, the claim for compensation and general damages must fail. There is no evidence that the petitioner procured the requisite approvals for development of plot 529 Shauri Yako. There is no evidence as to how the amount of Kshs.7,000,000 (Seven million) claimed in the petition was arrived at. No evidence was tendered that plot No 529 A Shauri Yako for which an allotment letter and evidence of payment of



rates and other charges was exhibited herein has been taken away from the petitioner and allotted to someone else. There will therefore be no basis for making an order for refund of land rates paid towards the suit property with interest as claimed in the petition.

25. On costs of the petition, the law is that costs follow the event.
26. In conclusion, I find that the claim in the petition has not been proved. The petition is dismissed in its entirety. Costs to the 2nd, 3rd, 4th and 5th Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 18TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Tawo Advocate for the Petitioner.

No appearance for the 1st Respondent

No appearance for the 2nd, 3rd, 4th and 5th Respondents.

