



**Kaploni v Cabinet Secretary Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works & 3 others (Environment & Land Petition 20 of 2022) [2023] KEELC 21006 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 20 OF 2022  
NA MATHEKA, J  
OCTOBER 26, 2023**

**BETWEEN**

**JACKTONE MANG'ENI KAPOLONI ..... PETITIONER**

**AND**

**THE CABINET SECRETARY MINISTRY OF TRANSPORT,  
INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT & PUBLIC  
WORKS ..... 1<sup>ST</sup> RESPONDENT**  
**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**  
**THE KENYA PORTS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**  
**HONORABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner avers that in purported discharge of its functions and powers under Section 72 of the *Kenya Ports Authority Act*, the 3<sup>rd</sup> Respondent, acting through its Board of Directors has continued to sell, lease and dispose of public land held by it in an opaque and haphazard manner devoid of transparency and accountability. That such disposal and leasing of public land held by the 3<sup>rd</sup> Respondent has been done without a robust policy, legal and institutional framework, leading to massive losses and plunder of public resources, to the detriment of the citizenry. The illegal and fraudulent exercise of the 3<sup>rd</sup> Respondent's powers under the Act has also exposed the 3<sup>rd</sup> Respondent to various legal and financial risks, exhibited by various Court cases facing the 3<sup>rd</sup> Respondent. The Petitioner is aware that the 3<sup>rd</sup> Respondent continues to effect the illegal sales, transfers, leases and disposals of public land held by it.
2. The Petitioner prays for;



1. That a declaration be and is hereby issued that all Leases and disposals of public land effected by the 3<sup>rd</sup> Respondent in contravention of the provisions of Articles 70 and 60 of [the constitution](#) and in the absence of a robust policy, legal and institutional framework are null and void.
  2. That an Order of injunction do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein from Leasing, letting or disposing of any public land held by the 3<sup>rd</sup> Respondent in the absence of a comprehensive policy, legal and institutional framework governing the leasing and disposal of public land.
  3. That an Order do issue directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to take immediate steps to put in place a comprehensive policy, legal and institutional framework for dealing with Leases and disposals of land held by the 3<sup>rd</sup> Respondent.
  4. That an Order do issue directing the 3<sup>rd</sup> Respondent to conduct an Audit and furnish the Report to the Court and the Petitioner covering;
    - a. All land held by the 3<sup>rd</sup> Respondent.
    - b. Details of land disposed of or leased out by the 3<sup>rd</sup> Respondent.
    - c. Particulars of all purchasers and Lessees of all land owned by the 3<sup>rd</sup> Respondent.
    - d. Particulars of the Sale and Lease Agreements of all affected land.
    - e. The consideration paid in exchange for the said leases/purchases.
  5. That there be an order as to costs.
3. The 3<sup>rd</sup> Respondent stated that the Petition does not disclose a cause of action against the 3<sup>rd</sup> Respondent. That neither the Petition nor the Notice of Motion with which it was filed sets out, with reasonable precision or at all, the Constitutional rights which are alleged to have been violated, or are threatened with violation. The Honourable Court lacks jurisdiction to review cases over which other Courts of competent jurisdiction are properly seized. In so far as the Petition seeks to create conditions for the 3<sup>rd</sup> Respondents use of land, other than those conditions provided for in law, it is an invitation for the Court to exercise a legislative function of which the Court lacks both the power and jurisdiction. In so far as the Petition seeks to examine the robustness of the policy, legal and institutional framework in relation to the 3<sup>rd</sup> Respondent's use of land, it seeks to examine a policy issue over which the Court has no jurisdiction. In so far as the Petition seeks orders directing that a comprehensive policy, legal and institutional framework for dealing with leases be put in place, the Petition seeks to invite the Court to usurp executive functions, and is therefore an abuse of its process. In so far as the Petition seeks to invite the Court to audit all its land related documents, the Petition is an invitation for the Court to perform executive functions.
4. The Petition is premised on Article 22 of [the Constitution](#) which grant every person the right to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or threatened. The issue at hand has some essence of public interest, which was defined by the Supreme Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR as,
- “Public Interest Litigation plays a transformational role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was [the Constitution](#)'s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of



constitutional interpretation and application, the court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. The discretion is drawn from the command of article 259(1) to interpret *the Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”

5. The Petitioner is questioning the legality of alienation of public land held by the Kenya Ports Authority (3<sup>rd</sup> Respondent), he averred that the 3<sup>rd</sup> Respondent has been disposing of public land vested in it in a way that violates Article 60 of *the Constitution*, which states the principles of land policy, that land shall be held, used and managed in a manner that is equitable, efficient, productive, in accordance with the principle of sustainable and cost-effective administration of land. The Petitioner further maintained that the processes under which the 3<sup>rd</sup> Respondent leased and disposed of public land were manned with illegality and lacked transparency. The actions of the 3<sup>rd</sup> Respondent was said to be in contravention of Article 73 of *the Constitution* on the principles of leadership and integrity including objectivity and impartiality in decision-making and accountability to the public and Article 232 on the values and principles of public service including effective, efficient and economic use of resources.
6. In particular the Petitioner referred to the Memphis Limited case, where he argued that the acts illegal disposal of public land by the 3<sup>rd</sup> Respondent to Memphis Limited would cost the public over Kshs 700 million. These cases are summarised as follows;
  - a. Mombasa HCCC No. 163 of 2018 Arbitration between Memphis Limited v KPA- an- arbitral award Memphis Limited was awarded inter alia Kshs 715,000,000/= as compensation for loss of its leasehold interest in the lease agreement dated 17<sup>th</sup> April 2009 with KPA over Mombasa MN/VI/4770 for a term of 33years.
  - b. Mombasa ELC Civil Appeal No. 23 of 2020 KPA v Memphis Limited- where KPA has filed an appeal against the arbitral award issued to Memphis Limited.
  - c. Mombasa ELC Petition E009 of 2021 Caleb Ngwena and Milicent Adhiambo v KPA and Memphis Limited- where the Petitioners sought inter alia court to compel KPA to lodge an appeal against the Arbitral award to Memphis Limited.
7. The 3<sup>rd</sup> Respondent is a body corporate with the power to acquire, own and dispose of property in its own name, the statutory provisions that guide its acquisition and disposal of its immovable is provided for under the parent Act. Section 12 (2)(k) of the *Kenya Ports Authority Act* provides that;

“Subject to this Act, the powers conferred by subsection (1) shall include all such powers as are necessary or advantageous and proper for the purposes of the Authority and in particular, without prejudice to the generality of the foregoing, shall include power:

to sell, let or otherwise dispose of any property, movable or immovable, which in the opinion of the Board is not necessary for the purposes of the Authority:

Provided that the Authority shall not so sell, let or otherwise dispose of any building or land placed at its disposal by the Government otherwise than with the consent of, and under conditions agreed by, the Government;



8. Further, Section 13 (4) of the KPA Act provides that;

“The Authority may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for, or without, consideration:

Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.”

9. In reference to Plot No. MN/I/4770, which is the subject in the above-named suits, KPA is the registered lessee pursuant to a grant from the government for 99 years from 1<sup>st</sup> October 2008. As such it had proprietary rights protected by Article 40 of *the constitution* and Sections 12 (2)(k) and 13(4) of the KPA Act as mentioned above to hold and dispose of immovable property within the duration of the lease. The suit property, Plot No. MN/I/4770, just like any other land held by KPA is public land within the meaning of Article 62 (2) (a)(b) of *the Constitution* which provides that public land is land held, used or occupied by a national State organ, of which KPA is a state organ. This public land, held, used or occupied by a state organ as the 3<sup>rd</sup> Respondent is to be exclusively managed, allocated or alienated by its internal management as opposed to being managed by the National Land Commission. Article 62(2)(b) expressly prohibits the National Land Commission from dealing with the land that is held, and occupied by a national state organ. Since the land is neither vested in the national government nor the county government, and the National Land Commission has no role in its management, which would include allocation or alienation of such land on behalf of the national and/or county government, as the case may be.

10. The Petitioner has argued that all dealings involving public land held by the 3<sup>rd</sup> Respondent ought to be halted by the court pending the institutionalization of a policy, legal and institutional framework that will guide the 3<sup>rd</sup> Respondent in leasing and disposing off public land. The Court in *Law Society of Kenya v Kinyua, Head of Public Service & 5 others; Migot-Adholla & another (Interested Party) (Environment & Land Petition E029 of 2022) [2022] KEELC 3962 (KLR) (12 August 2022) (Ruling)* was faced with a similar dilemma where the issue was the legitimacy of the decision of the Council of Kenyatta University, a state organ to alienate a portion of its land. The court held that;

“Article 62(4) of *the Constitution* provides that public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. In the circumstances of this case, the law governing the disposal and use of the suit property is the *Universities Act*, 2012 and the Charter for Kenyatta University which was gazetted as Legal Notice No 231 on December 30, 2013.

...From the above provision, it is clear that the manner in which a public university deals with its land is determined by the University itself, subject to any endowment, bequest or donation. Section 60 of the *Universities Act* provides for the functions of the University Council to include managing, supervising and administering the assets of the university in such a manner as best promotes the purpose for which the university is established.

...The totality of the above provisions of the law is that the Council of Kenyatta University is supposed to administer the assets of the University, including disposing its land, in the interest of the University and the public at large, and in accordance with the procedures laid down by the government. Does the alleged subdivision and alienation of the suit property, prima facie, meet the above criteria?”



11. In the instant case, the manner in which the 3<sup>rd</sup> Respondent deals with its land is determined by the Authority itself subject to Sections 12 and 13 of the KPA Act. The Petitioner has not submitted any evidence to support the allegations that the Authority has been dealing or disposing of public land held by it, in violation of the already laid down procedure in the statute. The onus is always on the Petitioner to establish a violation of the principles of land policy (Article 60), the specific acts committed by the 3<sup>rd</sup> Respondent while disposing of the suit land, that were in violation of (Article 62 (4)) and the violations of the values and principles of public service by the 3<sup>rd</sup> Respondent in disposing of their suit land, a sublease or any other dealings of conveyance. In particular, this court has not been shown any evidence by the Petitioner that the lease agreement entered between the 3<sup>rd</sup> Respondent and Memphis Limited was illegal. The court has not been presented with any evidence to show that any subsisting land dealings that the 3<sup>rd</sup> Respondent has entered into with any third party are illegal or inconsistent with the procedure laid down in its statute.
12. The court will now consider the prayer by the Petitioner, brought under Article 35 of the Constitution on the right of access to information held by the 3<sup>rd</sup> Respondent as a state organ. The Petitioner prays for the 3<sup>rd</sup> Respondent to conduct an audit and furnish to the court and the Petitioner, details of all land held by the 3<sup>rd</sup> Respondent and particulars of all leases and agreements of sale of land held by the 3<sup>rd</sup> Respondent. The rationale of the right of access to information held by the state was emphasised in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR, where the court held that;

“The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen’s ability to access information held by public authorities. Where they don’t know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country’s governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.”
13. The right of access to information held by a state organ, as a constitutional right has been actualised by the Access to Information Act No. 31 of 2016 by providing the procedure to access information. Section 8 of the Act, prescribes the procedure to be used by a citizen who wants to access information from a state organ, the same should be done in writing with sufficient details and particulars to enable the public officer to understand the information requested. Section 9 provides that a response should be given to the request to access information and communicated within 21 days including whether the office has the information requested and if the same will be accessed.
14. In the present petition, the Petitioner has referred to a demand letter dated 29<sup>th</sup> April 2022 written by one Peter Mabuka of Aguko Osman & Company advocates to the Chairman, Board of Directors of Kenya Ports Authority demanding inter alia an audit of all land held by the 3<sup>rd</sup> Respondent and leased out to third parties. The letter produced does not amount to a proper request for information under Section 8 (1) of the Access to Information Act, and as such Petitioner failed to exercise his constitutional right of access to information. On this ground, the court cannot grant the prayers sought in the petition of compelling the 3<sup>rd</sup> Respondent to avail information about land it holds as a state organ, since the Petitioner has failed to prove that he requested for the information and despite that request, the 3<sup>rd</sup>



Respondent failed, refused or declined to supply it. Even where it may have been proved that the 3<sup>rd</sup> Respondent did not respond to the said letter and declined to give the Petitioner the information requested, the Petitioner still had to exhaust all the avenues of dispute resolution mechanism under the [Access to Information Act](#) before approaching this Court by way of a Constitutional Petition. Section 14 of the Act provides the remedy in terms of review of the decision of the entity or person that has refused to provide access to the information that is requested. In Commission for Human Rights & Justice (CHRJ) & another vs Chief Officer, Medical Services County Government of Mombasa & 3 others (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR) (21 September 2022) (Judgment) it was held that;

“When a statute expressly states that the exhaustion of internal remedies is an indispensable condition precedent before launching an application to a court then that condition must first be fulfilled....The Petitioners ought to have exhausted the mechanism provided under the [Access to Information Act](#) before approaching this court. This petition offends the doctrine of exhaustion of remedies. On this ground alone, the Petitioners’ petition fails.”

15. Further, the 3<sup>rd</sup> Respondent has challenged the arbitral award issued to Memphis Limited in Mombasa ELC Civil Appeal No. 23 of 2020 KPA vs Memphis Limited. The Appeal is still a live matter before court, therefore the court cannot go into its merits and demerits herein. In conclusion, I find that the petition dated 10<sup>th</sup> May 2022 is unmerited and I hereby dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF OCTOBER 2023.**

**N.A. MATHEKA**

**JUDGE**

