



REPUBLIC OF KENYA



**KENYA LAW**  
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**Leiyagu v National Land Commission & 3 others (Environment & Land  
Petition 4 of 2023) [2023] KEELC 21216 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21216 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT OL KALOU  
ENVIRONMENT & LAND PETITION 4 OF 2023**

**YM ANGIMA, J  
OCTOBER 26, 2023**

**BETWEEN**

**RICHARD NCHAPI LEIYAGU ..... PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR NYANDARUA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**MARY WACERA NGUGI ..... 3<sup>RD</sup> RESPONDENT**

**PETER KAMAU MUTUGI ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**A. Petitioner's Case**

1. By a petition dated 08.11.2020 based upon Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 35, 40, 47, 48 and 50 of *the Constitution* of Kenya, 2010, the *Fair Administrative Action Act*, 2015, the *Land Registration Act*, 2012 and the *National Land Commission Act*, 2012 the Petitioner sought the following reliefs:
  - a. A declaration that LR No Nyahururu Municipality Block 8/702 belongs to the Petitioner.
  - b. A declaration that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to nullify, cancel, expunge and deregister the Petitioner's names from the entries held at the District Land Registry in Nyahururu is invalid, null and void.
  - c. An order directed at the 2<sup>nd</sup> Respondent to restore and reinstate the Petitioner's names to the register at Nyahururu and a further order that the Lease and Certificate of Lease issued on 17<sup>th</sup> June, 2016 and 22<sup>nd</sup> December, 2017 respectively, are valid, genuine and indefeasible for all intents and purposes.



- d. An order declaring that Nyahururu Land Case No. 59 of 2020 between the 3<sup>rd</sup> Respondent and the Petitioner is non-starter, incompetent and an abuse of the court process.
  - e. A permanent injunction do issue against the 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent by themselves or any other person claiming any right under them or servants, agents, family members and or proxies from interfering, trespassing and or encroaching on the Petitioner's property herein and peaceful enjoyment of the same.
  - f. Costs of the suit.
2. The petition was supported by an affidavit sworn by the Petitioner on 08.11.2020 and six (6) exhibits thereto. The Petitioner contended that he was the registered proprietor of the suit property and that the 1<sup>st</sup> Respondent (NLC) had unlawfully and in violation of *the Constitution* of Kenya and in particular Articles 47, 48 and 50 thereof made a determination purporting to deprive him of the suit property without according him a hearing in violation of the rules of natural justice. It was further contended that the said determination was made on 09.01.2019 by the NLC without any jurisdiction to do so. The said determination was made upon a complaint from the 4<sup>th</sup> Respondent who claimed to have been the original allottee of the suit property.
  3. The Petitioner further pleaded that in reliance upon the said determination the 3<sup>rd</sup> Respondent had filed a suit against him for recovery of the said property being Nyahururu CM ELC No. 59 of 2020 – Mary Wacera Ngugi v Richard Nchapi Leiyagu. The Petitioner consequently wanted the 3<sup>rd</sup> Respondent's suit declared incompetent and an abuse of the court process and his ownership of the suit property to be reinstated and protected.

## **B. Responses by Respondents**

### **a. 1<sup>st</sup> Respondent**

4. The 1<sup>st</sup> Respondent did not enter an appearance in the proceedings and neither did it file any answer to the petition.

### **b. 2<sup>nd</sup> Respondent**

5. The Hon. Attorney General entered appearance for the 2<sup>nd</sup> Respondent but he did not file any answer or response to the petition.

### **c. 3<sup>rd</sup> Respondent**

6. The 3<sup>rd</sup> Respondent filed a response dated 06.10.2022 to the petition which was amended on 04.05.2023. She stated that she purchased the suit property for valuable consideration from the 4<sup>th</sup> Respondent who was the original allottee thereof. She pleaded that whilst pursuing processing of the lease she discovered that the Petitioner had fraudulently caused the suit property to be registered in his name. It was her case that she communicated the issue to the 4<sup>th</sup> Respondent who lodged a complaint with the NLC for resolution.
7. It was further pleaded that upon investigation of the complaint it was found by NLC that the 4<sup>th</sup> Respondent was the legitimate allottee of the suit property and that the Petitioner had caused the same to be fraudulently registered in his name. It was pleaded that although NLC made a recommendation for the Chief Land Registrar to cancel the Petitioner's title the recommendation was never, in fact, acted upon by reason whereof she filed CMCC No. 59 of 2020 for, inter alia, nullification of the Petitioner's title and for recovery of the suit property.



8. It was the 3<sup>rd</sup> Respondent's case that the instant petition was merely intended to scuttle the hearing of the pending civil suit in which the issue of the legality of the Petitioner's acquisition of the suit property is to be determined. It was contended that the Petitioner was trying to employ the petition to legitimize his fraudulently acquired title hence the petition was misconceived and bad in law. It was her case that since the Petitioner's title was never cancelled, then its validity can only be properly determined in the pending civil suit and that any prior investigations, findings, or determination by the NLC can only be used as evidence therein. The 3<sup>rd</sup> petition also contended that the instant petition was sub judice on account of the pendency of the said civil proceedings.

#### **d. 4<sup>th</sup> Respondent**

9. The 4<sup>th</sup> Respondent did not enter appearance to the petition. The court was informed by the 3<sup>rd</sup> Respondent's counsel that he died on 28.05.2021 before the filing of the instant petition. It is thus not clear why the Petitioner decided to sue a deceased person instead of his estate. When the petition was listed for directions, the Petitioner elected to abandon his claim against the 4<sup>th</sup> Respondent.

#### **C. Petitioner's Response to 3<sup>rd</sup> Respondent's Answer**

10. The Petitioner filed a 'response' dated 02.06.2023 to the 3<sup>rd</sup> Respondent's amended response. The Petitioner denied any fraud in his acquisition of title to the suit property. He asserted that he was lawfully and procedurally allocated the suit property and that he lawfully obtained a certificate of title from the Land Registrar – Laikipia.
11. He denied that the petition was sub judice on account of the pendency of the civil suit before the Chief Magistrate's court which was filed earlier. He contended that the doctrine of sub judice does not apply because the court had issued a conservatory order staying that suit pending the hearing and determination of the petition.

#### **D. Directions on Submissions**

12. When the petition was listed for directions it was directed that the petition shall be canvassed on the basis of the pleadings, affidavits and documents on record. The parties were also granted timelines within which to file and exchange their respective submissions. The record shows that the Petitioner's submissions were filed on 26.09.2023 whereas the 3<sup>rd</sup> Respondent's submissions were filed on 18.07.2023. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file any submissions in the matter.

#### **E. Issues for Determination**

13. The court has perused the petition, the 3<sup>rd</sup> Respondent's answer to the petition as well as the Petitioner's response to the latter. The court has perused the Petitioner's further affidavit annexing a copy of a letter of allotment. The court is of the opinion that the following are the key issues which arise for determination herein:
- a. Whether the instant petition is sub judice.
  - b. Whether the Petitioner has made out a case for the grant of the reliefs sought in the petition.
  - c. Who shall bear costs of the petition.



## F. Analysis and Determination

### a. Whether the instant petition is sub judice

14. The court has considered the material and submissions on record on this issue. The 3<sup>rd</sup> Respondent submitted that the instant petition was sub judice because the issues raised herein were also directly in issue between the same parties in CMCC No. 59/2021. It was contended that the parties were essentially the same and the subject matter was the same. The 3<sup>rd</sup> Respondent cited some authorities in support of that submission.
15. The Petitioner, on the other hand, submitted that the petition was not sub judice because the civil suit had been stayed through a conservatory order and that this court had supervisory jurisdiction over the magistrate's court. It was further submitted that upon hearing the petition it could issue appropriate directions on how the civil suit should be handled.
16. The court has considered the nature of the civil suit by the 3<sup>rd</sup> Respondent against the Petitioner and the remedies sought therein. The 3<sup>rd</sup> Respondent is essentially seeking nullification of the Petitioner's certificate of lease on the ground it was obtained fraudulently. That is a matter perfectly within the magistrate's court to deal with. The court has also considered the nature of the petition and the remedies sought by the Petitioner. It is essentially challenging the constitutionality and legality of the determination of the NLC in so far as it recommended cancellation of his lease and title over the suit property without following due process and without any jurisdiction. The court is not satisfied that the subordinate court can properly entertain the issues raised in the petition and grant the reliefs sought. Moreover, the court is of the opinion that the Petitioner's cause of action in the petition is totally different from the 3<sup>rd</sup> Respondent's cause of action in the civil suit. The mere fact that the subject matter is the same and that there is a commonality of some parties is not sufficient to trigger the application of the doctrine of res sub-judice. The substantive issues in the latter suit must be the same or substantially the same as the issues raised in the earlier suit. In the premises, the court finds that the instant petition is not sub judice.

### b. Whether the Petitioner has made out case for the grant of the reliefs sought

17. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the Petitioner was aggrieved by the purported cancellation of his registration as proprietor of the suit property as a result of the determination dated 09.01.2019. It was submitted that the NLC had purported to investigate a complaint by the 4<sup>th</sup> Respondent over the suit property and made a determination without reference to the Petitioner in violation of, inter alia, Articles 47, 48 and 50 of *the Constitution* of Kenya. It was further submitted that by the time the NLC purported to entertain the complaint its 5 year mandate to do so under Section 14(1) of the National *Land Control Act*, 2012 had expired. It was submitted that the 5 year period expired in 2016, that is, 5 years from the date of promulgation of *the Constitution* of Kenya, 2010.
18. The 3<sup>rd</sup> Respondent submitted that whatever NLC may have done upon receipt of the complaint was really of no consequence because its determination and recommendation were never acted upon by the Land Registrar who was supposed to cancel the Petitioner's registration as proprietor of the suit property. She submitted that it was as a result of the Land Registrar's failure to cancel the Petitioner's registration that she decided to file the civil suit seeking, *inter alia*, cancellation of the Petitioner's registration on account of fraud and recovery of the suit property.



19. It was the 3<sup>rd</sup> Respondent's submission that there was, in fact, no evidence on record of cancellation of the Petitioner's registration and that even the copy of the certificate of search dated 30.01.2020 exhibited by Petitioner when he filed the petition on 08.11.2021 showed that he was still the registered proprietor. It was thus contended that there was absolutely no reason to grant the prayers sought since the Petitioner had not suffered any prejudice or loss and as a result of NLC's determination of 09.01.2019 because it was never acted upon.
20. The 3<sup>rd</sup> Respondent further submitted that the proper forum for determining the dispute on land ownership and the validity of the Petitioner's title was the civil suit which is pending before the Chief Magistrate's court and not the constitutional petition. It was contended that there were no constitutional issues in the resolution of the question of whether or not the Petitioner obtained registration of the suit property through fraudulent means or whether or not his title and registration should be cancelled.
21. The court has noted that despite correspondence amongst the NLC, the Chief Land Registrar and the County Land Registrar – Nyandarua County in 2019 on the determination of the NLC, there is absolutely no evidence of implementation of the decision. There is no evidence that the County Land Registrar ever cancelled the Petitioner's registration as proprietor of the suit property in the land register. There is no letter to the Petitioner calling upon him to surrender his certificate of lease for cancellation. There is even no gazette notice informing the general public that the Petitioner's registration as proprietor of the suit property had been cancelled. The copy of the certificate of official search dated 30.01.2020 exhibited by the Petitioner still showed the Petitioner as the registered proprietor of the suit property.
22. The court is persuaded by the 3<sup>rd</sup> Respondent's contention that there is no evidence of cancellation of the Petitioner's registration in the land register. The court is persuaded that that is the case because if it were otherwise, the Petitioner would certainly have exhibited evidence of cancellation since he filed his petition on 08.11.2022. That also explains why the 3<sup>rd</sup> Respondent filed the civil suit in 2020 before the Chief Magistrate's court seeking not only recovery of the suit property but also cancellation of the Petitioner's registration in the land register. Being of that persuasion, the court finds absolutely no need to grant the reliefs sought which are essentially premised on the assumption that there was cancellation of the Petitioner's registration. A court of law ought not to grant orders in vain especially when there is no live grievance in existence.
23. The court also takes the view that the pending civil suit filed by the 3<sup>rd</sup> Respondent is neither misconceived nor an abuse of the court process. The court is of the opinion that the issue of the contested ownership of the suit property ought to be ventilated in a civil suit commended by plaint where evidence would be tendered and tested through cross-examination. In the premises, the concerned parties should canvass the validity of the Petitioner's title to the suit property including the alleged fraud in its acquisition before the Chief Magistrate's Court. The court is thus not satisfied that the Petitioner has made out a case for the grant of the orders sought in the petition or any one of them.

### **c. Who shall bear cost of the petition**

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs



of the action. Accordingly, the 3<sup>rd</sup> Respondent shall be awarded costs of the petition. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall not be awarded any costs since they did not participate in the proceedings.

#### **G. Conclusion and Disposal Orders**

25. The upshot of the foregoing is that the court finds no merit in the petition. Consequently, the court makes the following disposal orders:
- a. The petition dated 08.11.2022 is hereby dismissed in its entirety with costs to the 3<sup>rd</sup> Respondent only.
  - b. For the avoidance of doubt, the conservatory orders granted on 21.07.2022 are hereby discharged forthwith.
  - c. Since the suit property is located in Laikipia County the file is hereby transferred to the ELC at Nyahururu for custody.

**JUDGMENT DATED AND SIGNED AT OL KALOU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Mr. Okemwa holding brief for Mr. Abuor for the Petitioner

N/A for the 1<sup>st</sup> Respondent

N/A for the Attorney General for the 2<sup>nd</sup> Respondent

Mr. Ratemo for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents

N/A for the 4<sup>th</sup> Respondent

