



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**ENVIRONMENT AND LAND COURT PETITION NO. 30 OF 2014**

**IN THE MATTER OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.  
ARTICLE 262 (19) OF THE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS**

**AND**

**IN THE MATTER OF ARTICLES 10, 21 (1), 22(3) c, 23 (1&3), 24 (1) d, e, 25 (C),  
27 (1&2), 28, 29(a), 39, 40(2) a & b and 47 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JULIUS ISABOKE KEGORO.....PETITIONER**

**VERSUS**

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

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

**THE HONOURABLE THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner has since 1977 occupied **Plot Number 1436/VII/37 Kisii Town** (PDP No. Kisii/37/2004/5) which I will hereinafter in this judgment refer to as **“the subject property”** under a temporary occupation licence (TOL) from the Kisii County Council where at he has operated a motor garage. The petitioner states he has applied to be documented for ownership of the subject property and alleges that although recommendations have been given for him to be documented as owner the 1<sup>st</sup> and 2<sup>nd</sup> respondents have failed, refused and/or neglected to process title of the subject property in his favour. The petitioner states the subject property has been surveyed and the District Lands Officer, the Physical Planner and the Kisii Town Clerk had all given their approval and recommendation for the petitioner to be issued a lease by the 1<sup>st</sup> respondent but the 1<sup>st</sup> respondent has ignored and/or refused to do so for no apparent reason.
2. The petitioner asserts that his fundamental rights as enshrined in the Constitution to be treated equally,

fairly and with dignity and not to be discriminated against have been violated. The petitioner avers that the 1<sup>st</sup> respondent has not treated him fairly or with dignity and has discriminated against him and in that regard has violated and is in breach of what the constitution dictates. The petitioner seeks the following reliefs in the petition:-

**1. That the court be pleased to grant an order to the petitioner herein, declaring that the petitioner is entitled to the ownership of the subject property and a lease be issued to the effect in the name of Julius Isaboke Kegoro.**

**2. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein do hereby sign the necessary letter of allocation and leasehold, in the alternative the same be signed by the Deputy Registrar of this honourable court.**

**3. That costs be provided for in favour of the petitioner.**

3. The petition was supported by the supporting affidavit sworn by one Julius Isaboke Kegoro the petitioner herein and the annexures thereof. The petitioner deposes that he was granted a licence to carry on a motor garage business on the subject property on 26<sup>th</sup> February 1977. That he had been issued a license of occupation of the subject property by the Kisii Town Council on 5<sup>th</sup> February 1977 and that he had registered his business “**practical garage**” and was issued a certificate of registration on 12<sup>th</sup> June 1973. The copies of the trade licence, occupation licence and business registration certificate are collectively annexed and marked “**JIK1**”. The petitioner states that he has since 1977 carried on his business of a garage at the subject property and has annexed the latest business permit issued on 6<sup>th</sup> February 2014 with an expiry date of 31<sup>st</sup> December 2014 marked as “**JIK2**”. The petitioner avers that the Kisii District Lands Officer, the District Surveyor, Kisii, the District Land Administration Officer Kisii, Nyamira/ Homa Bay and Migori, the District Planning Officer and the Town Clerk Kisii have all at varying times made recommendations that the petitioner be formally allocated the subject property which measures 0.0917 or thereabouts for carrying the business of a garage but the 1<sup>st</sup> respondent is yet to act appropriately.

4. The petition was served on the respondents and even though the Attorney General filed a memorandum of appearance on 18<sup>th</sup> November 2015, he never filed any response or reply to the petition and the petition remains unopposed. There is no dispute that the petitioner has been in possession and occupation of the subject property since 1977 whereat he has been carrying out an open air garage under a temporary occupation licence (TOL) from the Kisii Municipal Council. The District Lands Officer, the District surveyor, the Physical Planner and the Town Clerk Kisii Municipality have all at various times sanctioned the processing of a lease in favour of the petitioner.

5. On 15<sup>th</sup> October 2012 the District Land Administration Officer, Kisii/ Nyamira/Homa-Bay/Migori wrote to the Commissioner of Lands respecting the subject property and stated thus:-

**“The plot is being used for a garage, it has a temporary structure on it. Please note that this is a trust land, and I have no objection to the documentation of the same.”**

The District Physical Planning Officer, Kisii/Gucha Districts on 11<sup>th</sup> October 2012 wrote to the Commissioner of Lands on the same Plot thus:-

**“After making a site visit to the above property the following were observed:-**

- **That the plot is developed with a garage shade.**
- **That following utilities 9water mains, power line, telephone cables – underground, sewer lines) are sited in the lower side of the Plot abutting the road (Nyanchwa-roads).**

**This plot was allocated to the claimant (Julius Isaboke) by Municipal Council of Kisii on a TOL basis way back in 1988 and since then he has been in occupation.”**

The Town Clerk, Kisii Municipal council on 6<sup>th</sup> February 2007 wrote to the District Physical Planning Officer, Kisii regarding the subject plot stating thus:-

**“The council had allocated the said plot on a TOL basis and the applicant has since developed it for garage/commercial business. Considering the status of the plot, the council has no objection if the applicant would be assisted to facilitate the acquisition of lease for the property.”**

6. I have made reference to the various correspondences from the various authorities to illustrate the fact that the petitioner has had occupation and possession of the subject property and has operated a garage thereon over a long period of time and that the various agencies whose input would be necessary if the property was to be allocated have unequivocally supported the allocation of the subject property to the petitioner. The petitioner has in my view acquired a right over the subject property which ought to be recognized under the law. It would be an affront to justice if the subject property was allocated to and documented to any other person. It would not be fair administrative action if the petitioner was to be bypassed and the property allocated to another person. That in my view would constitute discrimination on the part of the petitioner contrary to Article 27 of the Constitution. The petitioner has a legitimate expectation that having been recommended for allocation of the suit property that he will truly be documented as the owner of the property. I see no reason and/or basis that would bar him from being documented as owner of the property.

7. The petition was not opposed and I find the same well founded. I accordingly grant the petition in terms of prayer (1) of the petition and further direct that the 1<sup>st</sup> and 2<sup>nd</sup> respondents be compelled to execute all and any necessary and appropriate documents to vest ownership of the subject property in the petitioner. I make no order for the costs of the petition.

**Judgment dated, signed and delivered at Kisii this 29<sup>th</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the petitioner

..... for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents

**J. M. MUTUNGI**

**JUDGE**