



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC PETITION NO. 13 OF 2017**

**IN THE MATTER OF**

**ARTICLES 22(1), 23(1)(3), 40, 62, 64(b), 165(1)(a), (b), (d),**

**162 2(b), 159(d) OF**

**THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF**

**ENVIRONMENT AND LAND COURT ACT, 2011**

**(SECTIONS 3(1), 13(1) (2), (7) AND S19**

**AND**

**IN THE MATER OF**

**SECTION 6 OF THE COUNTY GOVERNMENT ACT, 2012**

**AND**

**IN THE MATTER OF**

**VIOLATION AND INFRINGEMENT OF FUNDAMENTAL RIGHT**

**TO OWN PROPERTY AND PROTECTION OF THE SAME BY**

**AN ORDER OF INJUNCTION AND CONSERVATORY ORDERS**

**BETWEEN**

**PRESBYTERIAN FOUNDATION (*Suing for and on behalf of***

**P.C.E.A. ST. CUTHBERT PARISH).....PETITIONER**

**-VERSUS-**

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

**COUNTY GOVERNMENT OF NYERI.....2<sup>ND</sup> RESPONDENT**

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

## JUDGMENT

### BACKGROUND

1. By their Petition dated 18<sup>th</sup> September, 2017 as filed herein on 26<sup>th</sup> September 2017, the Presbyterian Foundation, suing for and on behalf of P.C.E.A. St. Cuthbert Parish (*hereinafter the Petitioner*) prays for orders:

*(i) That a conservatory order should issue to preserve an unsurveyed Church Plot near Ruringu Stadium, Nyeri to remain the property of the Petitioner;*

*(ii) That the Assistant County Commissioner and the Administration Police Commander Nyeri County or any officer acting under them should be restrained from claiming interest, entering, developing, occupying or doing anything in the said Plot.*

*(iii) That the said officer (sic) be ordered to remove the fence and structure in the said Plot; and*

*(iv) That the Respondents do pay the costs of this Petition.*

2. Those prayers arise from the Petitioner's contention that the Commissioner of Lands did alienate part of public land and allocated the same to the P.C.E.A. St. Cuthbert Parish to construct a church house.

3. The Petitioners aver that the Parish accepted the offer by paying part of the legal fees as stipulated in the letter of offer. The church has since been looking for a donor to assist it financially to construct the Church house but on 18<sup>th</sup> August 2017, its officers found the Assistant County Commissioner, Nyeri Central and Senior Administration Police Officers supervising construction of a perimeter fence around the parcel of land.

4. The Petitioner asserts that the land having been alienated, planned for development, approved and allocated to the church was no longer available for development by any Government officers or any other person and hence this Petition.

5. The Petition is opposed. In a Replying Affidavit sworn by its Nyeri County Coordinator Saida Isak and filed on 14<sup>th</sup> March, 2018 the National Land Commission (*the 1<sup>st</sup> Respondent*) avers that there are no available records in existence for any allocation by the Commissioner of Lands to the Petitioner and that therefore their Letter of Allotment could not be verified.

6. The 1<sup>st</sup> Respondent further avers that it has no records for the Part Development Plan held by the Petitioner purportedly approved in 1998. On the contrary, the Petitioner only has records for the parcel of land in question which were approved in 1979. It is therefore the 1<sup>st</sup> Respondent's case that the Petitioner is not entitled to the orders sought as the Letter of Allotment in their possession was obtained under unclear circumstances.

7. The County Government of Nyeri (*the 2<sup>nd</sup> Respondent*) is equally opposed to the grant of the orders. In a Replying Affidavit sworn on its behalf by one Joseph Martin Ngondo Maina, a technician in its Department of Lands and filed herein on 5<sup>th</sup> June, 2018, the 2<sup>nd</sup> Respondent avers that the suit as filed against itself is frivolous, vexatious, bad in law, misleading and an abuse of the court process.

8. The 2<sup>nd</sup> Respondent avers that it has not trespassed on the Petitioner's parcel of land as alleged and asserts that like the 1<sup>st</sup> Respondent, it has no records whatsoever in relation to the Letter of Allotment held by the Petitioner.

9. The 2<sup>nd</sup> Respondent further asserts that the Petitioner's Letter of Allotment in issue cannot be verified and it has no records of any minutes allotting the land to the Petitioner as alleged. The 2<sup>nd</sup> Respondent further avers that there is no evidence whatsoever that the Petitioner ever paid the prescribed fee for the allotment and/or that the same was paid within 30 days as stipulated.

10. The 2<sup>nd</sup> Respondent further avers that the Nyeri Assistant County Commissioner and the Nyeri County Administration Police Commander are not its officers and the 2<sup>nd</sup> Respondent has no powers to alienate land in Nyeri and urges the Court to dismiss the Petition.

11. The Honourable the Attorney General (*the 3<sup>rd</sup> Respondent*) is equally opposed to the Petition. In his Grounds of Opposition dated and filed herein on 13<sup>th</sup> March 2018, the 3<sup>rd</sup> Respondent opposes the Petition on the grounds:

*1. That the Petition is based on a misrepresentation of true facts and based on non-disclosure of facts, hence factually incompetent;*

*2. That the Petitioner has not demonstrated before this Honourable Court how the 3<sup>rd</sup> Respondent has violated his Constitutional rights; and*

*3. That the Petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.*

### ANALYSIS AND DETERMINATION

12. Following directions issued herein on 13<sup>th</sup> November 2017, it was agreed that the Petition proceeds by way of Affidavit evidence as well as written submissions. I have accordingly considered the pleadings filed as well as the written submissions placed before the Court by the

Learned Advocates for the parties.

13. The Petitioner herein describes itself as a foundation incorporated in the Republic of Kenya as a company limited by guarantee with the main function of holding in trust the real immovable properties of the Presbyterian Church of East Africa.

14. In that respect the Petitioner has brought this suit against the three Respondents seeking a declaration that it is the proprietor of an unsurveyed parcel of land situated near Ruringu Stadium in Nyeri. The Petitioner further craves for an order of permanent injunction restraining the Assistant County Commissioner Nyeri as well as the Administration Police Commander Nyeri or any officer acting under them from claiming an interest in, entering, developing, occupying or doing any other thing on the said parcel of land.

15. The Petition which is supported by an affidavit sworn by the Petitioner's Property Officer Samuel Gatheru Kanyoro arises from the Petitioner's contention that the said parcel of land was allocated to its P.C.E.A. St. Cuthbert Parish in the year 1998. It is the Petitioner's case that the Parish accepted the offer by paying part of the fees stipulated in the Letter of Allotment and that the church has since been looking for a donor to assist it to construct a church house thereon.

16. The Petitioner avers that while its ownership of the land had since been regularized by the County Government of Nyeri (*the 2<sup>nd</sup> Respondent*) its officers came to find the Assistant County Commissioner Nyeri Central and Senior Administration Police Officer supervising construction of a perimeter fence around the land on 18<sup>th</sup> August 2017. The Petitioner avers that despite their pleas and protests that the land belonged to them, the said officers shrugged them off and continued with the construction thereby prompting the filing of this Petition.

17. The three Respondents herein the National Land Commission, the County Government of Nyeri and the Attorney General are however united in their opposition to the Petition. The Respondents deny that the Petitioner was allocated the land as alleged or at all. In the alternative, the Respondents assert that if indeed the Petitioner was allocated the said parcel of land, the Petitioner did not comply with the terms of the said allocation and is hence not entitled to the land.

18. According to the Petitioners, the said St. Cuthbert Parish applied to be allocated a "Church Plot" within Ruringu Area of Nyeri County around the year 1978. They aver that they were allocated a parcel of land at a place commonly known as Ruringu Prison but the then Provincial Commissioner later summoned the Church Officials to his office and proposed to re-locate them to a place called Bull's Head near Ruringu stadium.

19. The Petitioners aver that they found the proposal acceptable and that subsequently a Part Development Plan for the land was approved by the Commissioner of Lands after which they were issued with a Letter of Allotment for the land then described as unsurveyed Church Plot – Nyeri. They accepted and paid part of the necessary fees and have since considered the parcel of land as their own.

20. In support of their case, the Petitioners produced a copy of a Letter of Allotment dated 17<sup>th</sup> October, 1998. That would be some 20 years after the Petitioner was first said to have been allocated the land. The said Letter of Allotment reads in the relevant portion as follows:

"RE: UNS. CHURCH PLOT – NYERI

I have the honour to inform you that the Government, on behalf of the County Council, hereby offers you a grant of the above plot shown edged red on the attached Plan No. 06/75/II subject to your formal written acceptance of the following conditions and to the payment of charges as prescribed hereunder:

Area: 0.25 hectares

Term: 99 years from the 1<sup>st</sup> November, 1998

Stand Premium: 110,000/-

Annual Rent: 22,000/-

...

...

I should be glad to receive your acceptance of the attached conditions together with a banker's cheque for the amount as set out below within thirty (30) days of the postmark."

21. It is clear from a perusal of the Letter that the Petitioner was required to pay a sum of Kshs.129,516/- inclusive of stamp duty within 30 days from the date of the letter. It was also clear from the material placed before me that the Petitioner did not comply with this condition.

22. I say so because the Petitioner has not produced any formal letter of acceptance and/or a copy of the Banker's cheque for the payment that was to be made to the now defunct office of the Commissioner of Lands. Instead, the Petitioner has annexed a copy of a receipt for the

sum of Kshs.50,000/- issued to themselves on 15<sup>th</sup> December, 1998. That was not the stand premium required to be paid and the payment was certainly not made within the requisite 30 days.

23. It is to be noted that prior to the promulgation of the Constitution of Kenya 2010, disposition of Government land was governed by the Government Lands Act (*now repealed*). A perusal of the process of disposition of Government Land even at that time reveals that certain procedures and processes had to be adhered to before such a disposition could be done. Those included the identification of land by the Local Authority or Council within whose jurisdiction the land was situated *inter alia* find out if the parcel of land set for alienation was indeed Government land and second, if it was available for disposition.

24. In the matter before me, the Petitioner appears to suggest that they were allocated land initially at a place known as Ruringu Prison before the then Provincial Commissioner summoned their leadership and offered them an alternative parcel of land which they agreed to go along with. The 2<sup>nd</sup> Respondent County Government which is the successor to the now defunct Nyeri County Council denies being in possession of any records regarding such allocation and it was unclear to me how the Provincial Commissioner and the Petitioners came to the conclusion that the parcel of land was available for allocation.

25. Indeed as the 1<sup>st</sup> Respondent told the court, there are no records at the Physical Planning Department of the Part Development Plan Reference No. C6/75/11 on whose strength the Letter of Allotment was done in the year 1998. The 1<sup>st</sup> Respondent is the body charged with the management of public land throughout the Republic and I had no reason to second – guess their findings in regard to the Part Development Plan. The Letter of Allotment produced by the Petitioner did not have the PDP attached to it and it was hence difficult not to agree with the 1<sup>st</sup> Respondent that the same does not in fact exist anywhere.

26. At any rate having failed to accept the offer within the stipulated period and/or to pay the requisite stand premium, I did not think the Petitioner had acquired any interest in the suit land capable of enforcement in the manner sought herein.

27. While the Petitioner has annexed extracts of minutes of the County Government of a meeting held on 1<sup>st</sup> September, 2016 purportedly ratifying and regularizing the allotment to the Petitioner, I did not think the 2<sup>nd</sup> Respondent could regularize and or ratify what was not regular in the first place. At any rate, even if the minutes which have been disowned by the 2<sup>nd</sup> Respondent were authentic, the 2<sup>nd</sup> Respondent had no such powers. It is the 1<sup>st</sup> Respondent which is now vested with the mandate to allocate land and any application for allocation and/or regularization ought to have been made to the 1<sup>st</sup> Respondent as opposed to the 2<sup>nd</sup> Respondent.

28. Arising from the foregoing, I was not persuaded that the Petitioner is entitled to any of the orders sought herein. The Petition dated 18<sup>th</sup> September, 2017 is accordingly dismissed.

29. Each Party shall bear their own costs.

**Judgment dated, signed and delivered in open court at Nyeri this 10<sup>th</sup> day of February, 2022.**

In the presence of:

Ms Maina holding brief for Kebuka Wachira for the Petitioner

Ms Wamuyu for 2<sup>nd</sup> Defendant

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**