



M'muturi ((Suing on Behalf of Herself and on Behalf of Other Members of Embakasi Quality Self Help Group)) v County Government of Nairobi (Environment & Land Petition E028 of 2023) [2025] KEELC 3301 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E028 OF 2023**

**JO MBOYA, J
APRIL 23, 2025**

BETWEEN

**PURITY KAMAN M'MUTURI PETITIONER
(SUING ON BEHALF OF HERSELF AND ON BEHALF OF OTHER MEMBERS
OF EMBAKASI QUALITY SELF HELP GROUP)**

AND

COUNTY GOVERNMENT OF NAIROBI RESPONDENT

JUDGMENT

1. The Petitioner approached the court vide Petition dated 6th June 2023 and wherein the Petitioner has sought diverse reliefs. The Petition under reference was subsequently amended culminating into the Amended Petition dated 24th May 2024 and wherein the Petitioner has sought the following reliefs:
 - i. A declaration that the intended forced eviction and displacement of the Petitioners without provision of alternative land and/or shelter/accommodation with the acquiescence of the Respondent and though connivance by its officials is a violation of the Petitioner's fundamental rights to inherent human dignity, security of the person, right to life, accessible and adequate housing, prohibition of forced evictions, reasonable standards of sanitation, health care services, to clear and safe water in adequate quantities and to be free from hunger guaranteed by Articles 26 (1), (3), 28, 29 (c), (f), 43 (1) as read with 20 (5) and 21 (1), (2) and (3) of the *Constitution* of Kenya 2010.
 - ii. A declaration that the arbitrary alienation of vacant portions of the subject property earmarked for a community social hall, sewerage system, community shopping area, inter alia, is a violation of the economic and social rights of the Petitioner's guaranteed under Article 43.



- iii. A declaration that the intended forced eviction/displacement and subsequent demolition of houses of the Petitioners without according their children alternative shelter and/or accommodation is a violation of the fundamental rights of the children to basic nutrition, shelter and health care and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by Article 53 (1) (b), (d) and (2) as read with Article 21 (3) of the Constitution of Kenya, 2010 and Article 28 of the Convention of the Rights of the Child.
 - iv. A declaration that the intended forced eviction/displacement and subsequent demolition of houses of the Petitioners some of whom are elderly persons without according them alternative shelter and/or accommodation is a violation of the fundamental rights of the elderly of pursuit of personal development, to live in dignity, respect and free from abuse and to receive reasonable care and assistance from the State guaranteed by Article 57 (b), (c) and (d) as read with Article 21 (3) of the Constitution of Kenya.
 - v. A permanent injunction be issued against the Respondent by itself, its servants, employees, agents and/or proxies or any other person acting under it or claiming through it from entering, allocating or in any other manner whatsoever from interfering with the parcels of land known and described as L.R 9042/132/137/140.
 - vi. An order of mandamus does issue compelling the Respondent to issue the Petitioner's Society and all its members with the documents to parcels of land known and described as L.R 9042/132/137/140.
 - vii. Costs and incidental to this Petition; and
 - viii. Any other order that this Honourable Court deems fit and just to grant in the circumstances.
2. The Amended Petition is supported by the Supporting Affidavit of Purity Kamana M'Muturi sworn on 24th May 2024 and to which the deponent has annexed various documents including a copy of the Certificate of Registration of Embakasi Quality Self-Help Group and a Part Development Plan dated 21st November 1990.
 3. Furthermore, the Amended Petition is also supported by a Further Affidavit sworn by Purity Kamana M'Muturi on 16th November 2024 and to which the deponent has annexed assorted documents including an Internal Confidential Memo generated by the Director Investigations and Information Analysis – Nairobi City County Government.
 4. The Petition under reference is opposed by the Respondent vide a Response to Petition dated 17th November 2023 and wherein the Respondent has contended inter alia that the Petitioner's claim pertaining to the suit properties is misconceived and legally untenable. Furthermore, the Respondent has averred that the portions of land being claimed by the Petitioner comprise of public land which remained out of what was compulsorily acquired for purposes of construction of the Eastern Bypass. In this regard, the Respondent has posited that the suit plots are therefore not available for allocation and/or allotment.
 5. Additionally, the Respondent has also contended that the parcels of land being claimed by the Petitioner and its members belong to third parties and thus same are not available for re-allocation. To this end, the Respondent has contended that the Petitioner's claim is legally untenable.



6. The Petition came up for directions on 18th July 2024 whereupon the advocates for the parties covenanted to ventilate/canvass the Petition on the basis of affidavit evidence. In addition, the advocates for the parties also agreed to file and exchange written submissions.
7. Arising from the foregoing, the court proceeded to and issued directions pertaining to the hearing and disposal of the Petition. In particular, the court directed that the Petition shall be disposed of on the basis of affidavit evidence. Moreover, the court also circumscribed the timelines for the filing and exchange of the written submissions.

Petitioner's Case:

8. The Petitioner's case is premised on the Supporting Affidavit of Purity Kaman M'Muturi sworn on 24th May 2024 and the Further Affidavit sworn on 16th November 2024, respectively. In particular, the Petitioner has contended that same is the Chairlady of Embakasi Quality Self-Helf Group which comprises of various members.
9. Furthermore, the Petitioner has contended that the members of the Self-Helf Group comprise of persons who were evicted and formerly rendered homeless during the construction of the Eastern Bypass. Nevertheless, it has been averred that the said members regrouped and took possessions of the chunks of land known as L.R No. 9042/132/137; being portions of land which are said to have been left unused once the bypass was concluded.
10. Additionally, it has been averred that upon occupation of the portions of the land that had remained unused after the completion of the Eastern Bypass, members of the Self-Helf Group approached the officials of the County Government of Nairobi and sought to be issued with Letters of Allotment and/or Authority to occupy the designated portions of land. In this regard, it has been averred that the Respondent herein proceeded to and allowed the request by and on behalf of the members of the Self-Helf Group.
11. It has been contended that following the approval by the Respondent, the Petitioner herein proceeded to and obtained Letters of Allotment over and in respect of the portions of land being claimed. Moreover, it has also been contended that thereafter the Respondent facilitated the survey of the land and proceeded to issue the Petitioner with a Beacon Certificate.
12. It was the Petitioner's further Contention that despite having being issued with Letters of Allotment and Beacon Certificate, the Respondent herein has since failed to process and issue the Petitioner and its members with the requisite documentation to facilitate the issuance of certificates of title. In this regard, it has been posited that the failure to issue the Petitioner and its members with the requisite documentation constitutes a violation of the Petitioner's right of access to land.
13. The Petitioner has further contended that as a result of the failure by the Respondent to issue same and her members with documentation, third parties have since entered upon and encroached onto various portions of the suit property. To this end, it has been contended that the third parties have taken advantage of the situation occasioned by the Respondent.
14. Other than the foregoing, it has been averred that the failure by the Respondent to issue the Petitioner and its members with the requisite documentation also constitutes breach and violation of the Petitioner's legitimate expectation.
15. Flowing from the foregoing, the Petitioner has therefore implored the court to find and hold that same is entitled to be issued with the requisite documentation with a view to enabling same to procure and obtain certificates of title to the suit properties. Furthermore, it has been averred that the Petitioner is



also entitled to an order of permanent injunction to bar the Respondent from undertaking any further allocation of the suit properties to and in favour of third parties.

16. Additionally, the Petitioner has also implored the court to issue an order of mandamus compelling the Respondent to issue the Petitioner with (sic) documents over the suit properties.

Respondent's Case:

17. The Respondent's case is premised on the Replying Affidavit sworn on 17th November 2023 by one Isaac Nyoike Njuguna. The deponent of the Replying Affidavit has posited that the portions of land being claimed by and on behalf of the Petitioners comprise of the remnants of land that was compulsorily acquired for purposes of construction of the Eastern Bypass. In this regard, it has been contended that the land in question is therefore not available for allocation and/or alienation either in the manner sought or otherwise.
18. Furthermore, the deponent of the Replying Affidavit has also averred that the other portions of the land being claimed by the Petitioner herein comprise of private land belonging to third parties. In addition, it has equally been contended that the Respondent has no capacity to allocate and/or alienate private land to the Petitioner and its members.
19. Arising from the foregoing, the Respondent has thus contended that the entire Petition by and on behalf of the Petitioner is misconceived and legally untenable. In this regard, the Respondent has implored the court to dismiss the Petition with costs.
20. The Petitioner filed written submissions dated 10th December 2024 and wherein the Petitioner has highlighted three salient issues, namely; that the petitioner and her members are entitled to be issued with the certificates of title to and in respect of the suit properties; that the Petitioner's rights and fundamental freedoms have been breached, violated and/or infringed upon by the Respondent and that the Petitioner is entitled to the reliefs sought at the foot of the Amended Petition.
21. The Respondent filed written submissions dated 22nd January 2025 and wherein same has highlighted four [4] issues for consideration. The issues raised by the Respondent are namely whether the Respondent is a rightful party before this Honourable Court; Whether the Respondent has interfered with the Petitioner's alleged ownership or occupation of the suit properties; whether the Petitioner's claims against the Respondent are valid or sustainable under the law and whether the orders sought by the Petitioner should be granted.
22. Having reviewed the Amended Petition; the Supporting Affidavit as well as the Further Affidavit filed on behalf of the Petitioner; and the Response filed by the Respondent and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the instant Petition turns on three key issues, namely; whether the Respondent herein has been properly impleaded or otherwise; whether the Petitioner and its members have acquired any lawful rights and/or interests over the suit properties capable of breach and/or infringement in the manner contended or otherwise and whether the Petitioner is entitled to the reliefs sought, if at all.
23. Regarding the first issue, namely; whether the Respondent herein has been properly impleaded or otherwise, it is imperative to state and observe that the Petitioner beforehand is essentially seeking to be issued with (sic) Letters of Allotment over and in respect of the suit properties; the lease and the Certificate of Lease.
24. For good measure, the Petitioner's herein has posited that the Respondent has violated their rights by failing to issue title documents to and in respect of the suit properties. Furthermore, it has been contended that by failing to issue the Petitioner and its members with documents pertaining to the



suit properties, the Respondent has exposed the Petitioners to denial and deprivation of their right of access to land.

25. Though not elegantly crafted, the gist of the Petitioner's claim is that same is seeking orders against the Respondent essentially to be issued with letters of allotment, part development plans, the leases and the Certificates of Lease over and in respect of the suit properties.
26. Furthermore, the Petitioner herein seems to confirm that the suit properties which underpin the Petition comprise of public land. For good measure, the deponent of the affidavit avers that what comprises of the suit properties are the remnants of the parcel of land which was utilised for the construction of the Eastern Bypass.
27. What I hear the Petitioner and its members to be confirming is that same are desirous to be allocated portions of the suit properties on the basis that same are unused for the purpose for which the land was designated, namely; construction of the Eastern Bypass.
28. To the extent that the Petitioner is conceding that the suit properties comprise of public land [remnants of the land that was used for the construction of the Eastern Bypass], the question that does arise is whether the Respondent herein is seized of the authority to issue any letter of allotment; lease; and certificate of lease, [if at all] to the Petitioner.
29. Before endeavouring to answer the question, it is imperative to take cognisance of the provisions of Articles 62 and 67 of the Constitution 2010. Given the importance of the said provisions, it suffices to reproduce same.
30. The provisions of Articles 62 and 67 of the Constitution 2010 are reproduced as hereunder:
Public land.

62. (1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;
- (e) land in respect of which no heir can be identified by any legal process;
- (f) all minerals and mineral oils as defined by law;
- (g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- (h) all roads and thoroughfares provided for by an Act of Parliament;
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
- (j) the territorial sea, the exclusive economic zone and the sea bed;
- (k) the continental shelf;



- (l) all land between the high and low water marks;
 - (m) any land not classified as private or community land under this Constitution; and
 - (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.
- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
- (a) clause (1)(a), (c), (d) or (e); and
 - (b) clause (1)(b), other than land held, used or occupied by a national State organ.
- (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
- (4) 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.
- National Land Commission.

67. (1) There is established the National Land Commission.

- (2) The functions of the National Land Commission are—
- (a) to manage public land on behalf of the national and county governments;
 - (b) to recommend a national land policy to the national government;
 - (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (3) The National Land Commission may perform any other functions prescribed by national legislation.

31. Back to the question whether the Respondent has been properly impleaded or otherwise. To answer the question, one needs to engage with the aspect as to whether the Respondent herein [Nairobi City



- County] is mandated to alienate public land or at all. Suffice it to posit that if the Respondent is not mandated to alienate or allocate public land, then the pleas by the Petitioner which essentially touch on allocation are misdirected and misguided.
32. To my mind, if the Petitioner’s intention is to procure and obtain documentation, whether same be letters of allotment, leases and the consequential certificates of title, if any, then such claims cannot be propagated against the Respondent.
33. In my humble view, the Petitioner and its counsel need to refresh and internalise the import of article 67 (2) of the Constitution 2010 which denotes the person/body bestowed with the mandate to alienate public land.
34. Furthermore, the authority and mandate of National Land Commission to manage and administer public land on behalf of both the county and national government respectively has also received judicial pronouncements in diverse decisions.
35. In *National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) (2 December 2015) (Advisory Opinion) the Supreme Court of the Republic of Kenya [The Apex Court] elaborated upon the mandate of National Land Commission as pertains to the management and administration of public land.
36. For coherence, the court stated thus:
- (222) The Land Act defines “alienation” as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent, for such disposal.
- (223) It may be inferred that, the power of alienation of public land is one of the ways through which the NLC administers such land. The requirement of consent to such a transaction, from the National or County Government, is certainly a check-and-balance relationship between the two State organs. The NLC’s function of monitoring the registration of all rights and interests in land, is another mechanism of checking the powers of the body responsible for registration.
- Section 5(2)(e) of the NLC Act-versus-the Constitution’s terms
- (224) Section 5(2)(e) of the NLC Act mandates the Commission to manage and administer all unregistered trust land and unregistered community land on behalf of County Government. Counsel for the Commission for the Implementation of the Constitution submitted that this provision was contrary to the terms of the Constitution. In the case, *In Re IIEC*, this Court had held that while exercising its Advisory Opinion jurisdiction, it may undertake the interpretation of the Constitution.
37. The Court of Appeal in the case of *Cordison International (K) Limited v Chairman National Land Commission & 44 others* [2019] KECA 830 (KLR) has also discussed the person chargeable with the management and administration of public land.
38. The court stated as hereunder:



29. It is important that we start by distinguishing between “alienation” and “allocation” of land. Section 2 of the Lands Act defines “alienation of land” as the sale or other disposal of the rights to land; while “allocation of land” means the legal process of granting rights to public land.
30. Article 67 of the Constitution that establishes the National Land Commission gives it power to, inter alia, manage public land on behalf of the national and county governments. The suit land is public land as defined under Article 62(1) (a) of the Constitution and therefore vests in and is held by the County Government of Lamu in trust for the people resident in the County. Article 62 (2) of the Constitution provides that the land shall be administered on behalf of the County residents by the National Land Commission. Section 5 (1)(a) of the National Land Commission Act is also explicit that one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments. Under section 5(2) of the Act the Commission may,
- on behalf of, and with the consent of the national and county governments, alienate public land.”
31. Section 12 of the Land Act grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the Act specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land.
39. Arising from the various provisions of the law, and the decisions supra, it is common ground that the issues being raised by the Petitioner herein fall outside the purview and jurisdictional remit of the Respondent. Quite clearly, the Respondent cannot give unto the Petitioner and its members the purported documents pertaining to the suit properties or at all.
40. Put differently, the suit as against the Respondent herein is misguided and misdirected. In this regard, I find and hold that the Petitioner and her members are non-suited as against the Respondent.
41. In a nutshell, my answer to issue number one is to the effect that the Respondent herein has been improperly impleaded by the Petitioner and its members.
42. Next is the issue of whether the Petitioner and its members have acquired any lawful rights and/or interests over the suit properties capable of breach and/or infringement in the manner contended or otherwise. As pertains to this issue, it is imperative to recall and reiterate that the Petitioner herein and her members have not been issued with any letter of allotment and/or lease over and in respect of the suit properties. For good measure, even though the deponent of the Supporting Affidavit averred that the Petitioner was issued with a letter of allotment no such letter of allotment was ever tendered and/or produced before the court.
43. Suffice it to state that the only letter of allotment or a semblance thereof which has been tendered is annexure PKN#3 attached to the Supplementary Affidavit and which relates to one Joyce Muthoni Muriithi. The said Letter of Allotment, prima facie, has nothing to do with the Petitioner herein.
44. Nevertheless, even if the Letter of Allotment under reference has something to do with the Petition [which is not the case], it is important to observe that no evidence has been tendered to demonstrate that the terms of the Letter of Allotment were ever complied and/or adhered to.
45. Additionally, it is not lost on this court that even if the Petitioner and its members were to place before the court copies of letters of allotment which is not the case, there is no gainsaying that a letter of



allotment by and of itself does not convey any legal rights to and in favour of the bearer, capable of being protected under the Law.

46. The Supreme Court in the case of *Torino Enterprises Limited v Attorney General* [2023] KESC 79 (KLR) held and stated as hereunder:
57. The respondent also challenged the letter of allotment on grounds that at the time of its transfer, the conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting that the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited. Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant's ownership is traced back to this allotment Letter even if subsequently registered under the Registration of Titles Act cap 281 (Repealed) on April 26, 2001.
58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others* [CA 60/1997](#) [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:
- It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all ” [Emphasis added].
61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.
62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
47. Bearing in mind the legal position espoused in the decision supra, it becomes apparent that the Petitioner and its members have not acquired any lawful rights and/or interests over the suit properties.
48. At any rate, it is also worth remembering that one of the reliefs that is sought by the Petitioner and its members touches on the issuance of an order of mandamus compelling the Respondent to issue the Petitioner Society and all its members with title documents to parcels of land known and described as L.R 9042/132/137/140.
49. Taking into account the relief under reference, there is no gainsaying that the Petitioner and her members are searching for documentation to underpin their claim to and in respect of the suit



properties. Simply put, the Petitioner and her members do not have proprietary rights over the suit properties.

50. Notwithstanding the foregoing, the Petitioner and its members are before the court and same are contending that the Respondent has breached its rights to ownership of the suit properties. Furthermore, the Petitioner has also contended that the Respondent has proceeded to and issued letters of allotment to third parties who have since encroached onto portions of land occupied by the Petitioner and her members.
51. Additionally, the Petitioner and her members have also ventured forward and posited that by failing to issue the Petitioner with documents over and in respect of the suit properties, the Respondent has violated the Petitioner's right of (sic) access to land.
52. The question that comes to mind is whether the Petitioner herein has accrued any lawful rights and/or interests over the suit properties capable of protection under the provisions of Article 40 (3) of the Constitution.
53. Suffice it to state that rights must be acquired before same can be protected by the court. On the contrary, it is imperative to underscore that courts of law do not exist to confer rights and fundamental freedoms to any litigant, the Petitioner not excepted. Instructively, the mandate and jurisdiction of the court is to interpret and apply the provisions of the Constitution 2010 and by extension various statutes in such a manner as to protect the rights of the parties which have since accrued and/or been acquired in accordance with the Law.
54. To this end, I beg to reference the provisions of Article 20 (3) of the Constitution.

Application of Bill of Rights.

20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.
 - (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
 - (3) In applying a provision of the Bill of Rights, a court shall—
 - (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
 - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
55. It is also important to take cognisance of the holding of the Court of Appeal in the case of Nelson Kazungu Chai & 9 others v Pwani University College [2017] KECA 135 (KLR) where the court stated as hereunder:

22. Before we conclude, we need to say something about Dr. Khaminwa's submission about the appellants' human rights being violated, and also on forceful evictions. A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inhere to every human being upon birth. They are acquired in different ways after one comes into this world. One cannot acquire property rights over another's property other than in a manner prescribed in law. In this case the appellants' claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed, other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument that the appellants can leverage on to elevate the appellant's right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40



of the Constitution. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding. Our conclusion is that the learned Judge arrived at the right decision based on the evidence placed before him, and he cannot be faulted.

56. In my humble view, the Petitioner and her members have neither acquired nor accrued any lawful rights capable of being breached and/infringed upon; or better still capable of being enforced.
57. Lastly, is the issue of whether the Petitioner is entitled to the reliefs sought, if at all. To start with, the Petitioner has sought a plethora of reliefs including declaration that the intended forced eviction and displacement of the Petitioners without provision of alternative land or shelter would culminate into violation of the Petitioners' rights under articles 26, 28, 29, and 43 of the Constitution.
58. Nevertheless, it is apposite to observe that despite the contention that the Petitioners are likely to be subjected to [sic] forced eviction and displacement, no evidence was tendered to demonstrate that the Respondent has ever threatened such eviction.
59. It bears no repeating that he who alleges must prove. In this regard, it was the obligation of the Petitioners to place before the court evidence to demonstrate (sic) the allegation of intended forced eviction and displacement. Sadly, no such evidence has been tendered. [See *Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] KESC 66 (KLR)]
60. Moreover, the Petitioner has also sought a declaration that arbitrary alienation of portions of the suit properties earmarked for community social hall, sewerage system, community shopping area constitutes a violation of the economic and social rights of the Petitioners. However, it is imperative to state that such a declaration cannot issue against the Respondent herein who certainly has no mandate to alienate public land, or at all. [See Article 67 (2) of the Constitution 2010].
61. The other relief that has been sought by the Petitioner and its members relates to issuance of a permanent injunction to bar the Respondent from inter alia entering, allocating and/or in any other manner interfering with the suit properties. I am afraid that the Petitioner and its learned counsel did not internalise the import and tenor of Section 5 of the National Land Commission Act 2012; and Sections 9, 12 and 13 of the Land Act 2012 [2016].
62. Finally, the Petitioner has sought an order of mandamus to issue compelling the Respondent to issue the Petitioner and its members with (sic) documents to the suit properties. Whatever documents mean, there is no gainsaying that the Respondent has no mandate under the Constitution or the law to issue any documentation conferring title to public land.
63. In the absence of authority and/or mandate to issue documents conferring title to public land, the question that does arise is whether an order of mandamus can issue in the circumstances.
64. The answer to the question posed vide the preceding paragraph is discernible from the holding in the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR where the court held thus:

The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:

The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular



thing therein specified which appertains to his or their office and is in the nature of a public duty.

Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

65. For good measure, an order of mandamus cannot issue against a person who is not chargeable with (sic) the performance of the duty complained of. Such an endeavour [if at all] would amount to an illegality. [See also Republic v Kenya Civil Aviation Authority & another ex-parte Elite Earthmovers Limited [2017] KEHC 8305 (KLR)].

Final Disposition:

66. For the reasons highlighted in the body of the Judgement, it must have become crystal clear that the Petition beforehand is not only premature and misconceived but same is also legally untenable.
67. In the premises, the final order[s] that commend themselves to the court are as hereunder:
- i. The Petition be and is hereby dismissed.
 - ii. Each party shall however bear its own costs.
68. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI ON THE 23RD DAY OF APRIL, 2025.

OGUTTU MBOYA, FCI Arb

JUDGE.

In the presence of:

Benson/ Brandy – Court Assistant .

Mr. Ayieko h/b for Mr. Kang’ethe for the Petitioner.

Mr. Otieno for the Respondent.

