



**Owino & 5 others v Director of Surveys & 7 others (Constitutional  
Petition 25 of 2014) [2022] KEELC 2757 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2757 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
CONSTITUTIONAL PETITION 25 OF 2014**

**A NYUKURI, J**

**JULY 27, 2022**

**IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FREEDOM  
UNDER ARTICLES 35, 40, 43 AND 47 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**CHARLES OWOUR OWINO ..... 1<sup>ST</sup> PETITIONER  
DANIEL MUSYOKI KATHAKU ..... 2<sup>ND</sup> PETITIONER  
BENARD KIMEU MATIVU ..... 3<sup>RD</sup> PETITIONER  
NGWEMBE KIMEU ..... 4<sup>TH</sup> PETITIONER  
PHILES NDETI ..... 5<sup>TH</sup> PETITIONER  
ALICE MBAIKA BENARD ..... 6<sup>TH</sup> PETITIONER**

**AND**

**DIRECTOR OF SURVEYS ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT  
COUNTY GOVERNMENT OF MACHAKOS ..... 4<sup>TH</sup> RESPONDENT  
JONATHAN MUSYOKA KAMIA ..... 5<sup>TH</sup> RESPONDENT  
SAMSON MUTISO NGUTI ..... 6<sup>TH</sup> RESPONDENT  
BENJAMIN WAMBUA MALUVA ..... 7<sup>TH</sup> RESPONDENT  
CHARLES MWEREZA ..... 8<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petitioners filed this suit claiming that their constitutional rights guaranteed under Articles 10, 35, 40, 43 and 47 of *the Constitution* of Kenya 2010, had been violated by the Respondents. They averred that in 1997, the then Municipal Council of Machakos, which was later succeeded by the County Government of Machakos, allocated plots to the Petitioners as follows; Plot No. 159 to the 1<sup>st</sup> petitioner; plot No. 153 to the second petitioner; Plot No. 7 to the 3<sup>rd</sup> Petitioner; plot No. 140 to the 5<sup>th</sup> Petitioner Plot and Plot No. 43 to the 6<sup>th</sup> Petitioner, (hereinafter referred to as the suit properties).
2. They further stated that the said plots were surveyed by the Director of Surveys (1<sup>st</sup> Respondent) and thereafter the Petitioners developed them and started residing thereon. They also averred that between September and December 2011, the 5<sup>th</sup> Respondent who was the Area Chief, colluded with the 6<sup>th</sup> and 7<sup>th</sup> Respondents who were former Councillors in the area, together with the 8<sup>th</sup> Respondent and petitioned the Director of Survey and the County Government of Machakos (1<sup>st</sup> and 4<sup>th</sup> Respondents respectively) to re-survey the suit properties so as to create more plots for their own personal benefit. That the petitioners' plea to the 2<sup>nd</sup> Respondent to intervene did not bear fruit and that the Respondents commissioned a resurvey and re-plan of the area with intention to displace the Petitioners.
3. It was also the Petitioners' assertion that their development on the suit properties was approved by the 4<sup>th</sup> Respondent, who continues to receive land rates and rent from them. Further, that the Respondents have purported to issue fresh allotment letters with no regard to the Petitioners' ownership rights and that the Petitioners' request to the 1<sup>st</sup> Respondent for supply of previous survey records, maps and deed plans have not borne fruit.
4. The Petitioners further complained that their rights under *the Constitution* were breached, including the right of access to information under Article 35, the right to protection of property under Article 40, the right to public participation under Article 10, the right to earn a decent living under Article 43 and the right to a fair administrative action under Article 47. In addition, they stated that the Commissioner of Lands had no power to allocate land, as those powers belong to the National Land Commission in consultation with other offices.
5. The Petitioners sought for the following orders;
  - a. An injunction restraining the Respondents from re-surveying, placing more beacons, re-arranging, re-planning or in any other way interfering with beacons or boundaries of all the plots within Konza Township in Machakos County done and fixed in 1997 when the 4<sup>th</sup> Respondent allocated plot numbers 7, 43, 85, 140, 148 and 159 to the Petitioners.
  - b. A declaration that the Respondents' act and exercise of re-surveying and re-planning Konza Township and creating more plots in exclusion of the Petitioners are unconstitutional.
  - c. A declaration that the acts and exercise of the Respondents in re-surveying and re-planning Konza Township within Machakos County will be in breach of the Petitioners' constitutional rights.
  - d. A declaration that the only legitimate survey and plan of Konza Town is that undertaken by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents when they were allocating plots in Konza Town to the Petitioners.



- e. A declaration that the Petitioners are the only legitimate owners of plot numbers 7, 43, 85, 140, 148 and 159 within Konza Township and the same cannot be taken away from them without due process of the law and with full and prompt compensation.
  - f. Order directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to issue legitimate titles, leases and other land ownership documents in respect of plot numbers 7, 43, 85, 140, 148 and 159 within Konza Township to the petitioners.
  - g. Order directing the Respondents to compensate the Petitioners for the breach of their constitutional rights.
  - h. A declaration that the Commissioner of Lands has no powers to allocate land or grant a lease to any individual, institution or any other entity.
  - i. The Respondents do bear the costs of this petition.
  - j. Any other order or relief this court may deem just to grant.
6. The Petition was opposed. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents jointly filed grounds of opposition dated 19<sup>th</sup> October 2017. They stated that the Constitutional Court has no jurisdiction to determine this matter as per Article 162 (2) of *the Constitution* of Kenya and Section 13 of the *Environment and Land Court Act*; that the Petitioners have not demonstrated how the Respondents have violated their rights; that the Petitioners have not proved that the ownership of the land was changed fraudulently; that the petition does not raise any constitutional issues and that the petition is incompetent, incurably defective, bad in law and ought to be dismissed.
7. The 2<sup>nd</sup> Respondent also opposed the Petition and filed a Notice of Preliminary Objection dated 5<sup>th</sup> February 2019 which was anchored on the following grounds;
- a. That the matter before this court contravenes the sub judice rule as per section 13 of the *Environment and Land Court Act*, Article 162, 165 (5) (ii) of *the Constitution* of Kenya 2010 and this court has no jurisdiction to try this matter for which it deals with issues of title and ownership of land.
  - b. That the entire petition is prematurely before court and the court lacks jurisdiction to entertain the matter as it offends the provisions of section 18 (2) and 19 of the *Land Registration Act*, since the petitioners have not exhausted the remedies set out in section 18 (2) and 19 of the *Land Registration Act*.
  - c. Having been filed in a court without jurisdiction, there is nothing for this court to transfer to any other court.
  - d. The petition is an abuse of court process and should be dismissed with costs.
8. The County Government of Machakos, the 4<sup>th</sup> Respondent in this matter, through its County Secretary one Francis Mwaka, swore a replying affidavit dated 9<sup>th</sup> December 2014 in opposition to the petition. His position was that Konza Township where the suit properties are situated is Government land (public land) which served as a holding area for cattle farmers until 1969 when it was invaded by squatters. He also stated that in 1972, Masaku County Council settled squatters on the suit properties on temporary basis and on humanitarian grounds, as the land was public land and not trust land. Further that in 1991 Municipal Council of Machakos took over the area from Masaku County Council and resolved to have the settlement planned to facilitate issuance of Temporary Occupational Licences (TOLs) on the basis of the plan. He also alleged that members of public



- participated in the plan through several barazas by the Provincial Administration and the Municipal Council of Machakos without any objection and that in 1997, the settlers were issued with Temporary Occupational Licences.
9. It was the 4<sup>th</sup> Respondent's position that the District Surveyor was requested to demarcate individual settlers' plots based on unapproved Physical Development Plan (Unapproved PDP) as official surveys are not done on unapproved plans. He emphasized that no official survey was done in Konza Township in 1997 and that the survey alluded to by the Petitioners was not official but meant to facilitate identification of individual plots for those holding TOLs, that hence there is no copy of survey to be given to the Petitioners.
  10. Mr. Mwaka further averred that on 17<sup>th</sup> February 2010, the Commissioner of Lands directed that all owners of developed plots in urban areas who had been settled irregularly be regularized and issued with ownership documents. His position was that pursuant to that directive, the 4<sup>th</sup> Respondent regularized the planning and allocations in Konza township in accordance with the current population and development trends in the area. Further that on 17<sup>th</sup> March 2010, the District Physical Planning Office issued an Official Notice of Intention to Plan and that the said Notice was brought to the attention of the residents of Konza through a Baraza on 22<sup>nd</sup> June 2010 as public participation effort where a consultative meeting was held between residents of Konza Township, Council of Machakos and the District Commissioner.
  11. He further stated that after lengthy deliberations and sensitization about the plan, it was fully accepted by the Konza township residents, and subsequently, the accepted Plan was published in the Kenya Gazette of 20<sup>th</sup> August 2010 and advertised in the Daily Nation and Taifa Leo of 5<sup>th</sup> August 2010. He also deponed that the Director of Physical Planning issued the Notice of Completion of the Development Plan to the Public in accordance with the law on 2<sup>nd</sup> August 2010 and that on 6<sup>th</sup> October 2010, the Plan was approved by the Minister for Lands and no objection was raised by any Government entity on the same.
  12. It was also the 4<sup>th</sup> Respondent's assertion that they were not aware of any meeting held in December 2011 as alleged by the Petitioners. Further that due to increased population, there was need to realign, widen and open up new roads and address encroachment and that during planning, there was minimal movements of residents, but that the residents were aware of the same and were agreeable. His position was that no public utility land was lost in the planning process as no school community raised objection as Konza Primary remained intact. He maintained that the official Plan was prepared to the 4<sup>th</sup> Respondent's expectation within the demands of the current population and that members of the public were allowed to air their views and no objection was raised even in the last Baraza on 19<sup>th</sup> September 2012.
  13. He emphasized that there has been no resurvey as that which was done by the Respondents was the first survey and that planning is in the public interest to ensure that Konza township has all the necessary amenities. His view was that there was no truth in the allegation that the 4<sup>th</sup> Respondent was allocating plots to persons out of the Township.
  14. Jonathan Musyoka Kamia, the 5<sup>th</sup> Respondent opposed the petition and swore an affidavit dated 17<sup>th</sup> November 2014 on his own behalf and on behalf of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents. He stated that he was at the material time and at the time of swearing the affidavit, the Assistant Chief of Konza Sub-Location, where Konza Township lies and has been actively involved in implementing Government policies within Konza Township. He also averred that the suit property was Government land held by the Municipal Council of Machakos and that between 1997 and 1998, the Municipal Council of



Machakos allocated unsurveyed plots to over 500 people of Konza, on a temporary occupation basis and issued them with letters of Temporary Occupation (TOL).

15. He further deposed that as there was no survey of the plots and neither was there an approved plan for Konza town, the town was yet to be planned at the time of issuance of the TOL. He also stated that from 2010, residents of Konza began inquiring from his office, as to when they will be issued with title documents in respect of their plots, which prompted him to hold public Barazas with residents, beginning with the one held 30<sup>th</sup> March 2010 at his office. That this led the 7<sup>th</sup> Respondent to write to the Municipal Council of Machakos, District Land Officer, District Physical Planning Officer and the District Surveyor, vide his letter of 17<sup>th</sup> March 2010 requesting them to act in response to the minutes of the public Baraza.
16. That the Commissioner of Lands vide the letter of 17<sup>th</sup> February 2010 directed all District Land Officers to liaise with the local authorities to identify occupied developed plots and forward such information to the Commissioner of Lands. That thereafter, a stakeholders forum was convened on 22<sup>nd</sup> June 2010 for Konza Development Plan, which meeting resolved that a plan be prepared by the District Physical Planning Officer. He stated further that the District Physical Planning Officer developed a plan for Konza Township and published it in the Kenya Gazette for 20<sup>th</sup> August 2010 and the Daily Nation Newspaper for 5<sup>th</sup> August 2010.
17. It was further deposed by Mr. Kamia that no objection in respect of the published plan was raised by the Petitioners. That upon payment of survey fees by the petitioners and other residents of Konza, the area was surveyed as per the plan, and allotment letters issued accordingly. That the plan ensured that although the plot numbers changed, neither the plot positions nor their boundaries were changed and that it is not true that Konza Primary School had lost part of their land.
18. Mr. Kamia took the position that the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents did not do anything wrong to warrant a petition against them as it is ironical that the Petitioners are opposed to a process in which they were involved.
19. On 29<sup>th</sup> November 2021, this court directed that both the Preliminary objection and the petition shall be canvassed together by way of written submissions. On record are the petitioners' submissions filed on 1<sup>st</sup> February 2022 as well as the 5<sup>th</sup> to the 8<sup>th</sup> Respondents filed their submissions on 19<sup>th</sup> July 2022. The 1<sup>st</sup> to the 4<sup>th</sup> Respondents did not file any submissions.

### **Petitioners' Submissions**

20. Counsel for the Petitioners submitted that the Petitioners have a right of access to information under Article 35 of *the Constitution* and that the 1<sup>st</sup> Respondents had infringed on that right as the petitioners' efforts to obtain previous survey records, maps and deed plans to ascertain the position of their plots from the 1<sup>st</sup> Respondent had not borne fruit. Counsel relied on the case of *Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others*, [2013] eKLR for the proposition that state organs and public entities bear the constitutional duty to avail information in their custody to citizens.
21. It was further argued for the Petitioners that Article 40 of *the Constitution* protects the Petitioners' right to property. That their plots were likely to be taken away which would amount to an infringement on their right not to be arbitrarily deprived of their property. Counsel argued that the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents hatched a plan to resurvey the suit property and petitioned the 1<sup>st</sup> Respondent to resurvey the suit property. That the resurvey by the 1<sup>st</sup> Respondent has interfered with a previous survey, changing boundaries, affecting acreage of the area public school and led to displacement of the petitioners from their homes.



22. Counsel emphasized that the resurvey had led to issuance of fresh allotment letters to the Petitioners' exclusion and that the extra plots have been allocated to the Respondents and their relatives. It was also submitted that the 5<sup>th</sup> Respondent had allocated 23 plots to his wife, children and other relatives, while the 7<sup>th</sup> Respondent had allocated 12 plots to himself, his wife and other relatives. Further that the Respondents did not follow the due process and have trespassed on the suit property.
23. Counsel also contended that the Commissioner of Lands had no powers to allocate land under *the Constitution*, as those powers are conferred on the National Land Commission.
24. Counsel further submitted that the Petitioners had a right to public participation under Article 10. It was contended for the petitioners that the Respondents did not involve the Petitioners in the resurvey exercise. Counsel placed reliance on the cases of *Mui Coal Basin Local Community & 17 others v Permanent Secretary Ministry of Energy & 15 Others* [2015] eKLR and *Robert N. Gakuru & Others v The Governor of Kiambu County & 3 others*, for the proposition that those affected by a decision ought to be meaningfully and deliberately involved in the decision making process. The Petitioners argued that the meetings alluded to by the Respondents did not take place.
25. It was further submitted that the Petitioners were entitled to the right to a fair administrative action under Article 47 of *the Constitution*. Counsel argued that although the Petitioners were entitled to the right to be heard, the Respondents violated this right as no hearing was conducted for purposes of a resurvey. Counsel placed reliance on the case of *Republic v National Police Service Commission* [2016] eKLR, for the proposition that fairness is mandatory where an authority has a decision-making mandate.
26. Counsel argued that violation of *the Constitution* calls for an award of damages. Counsel referred to the case of *Reuben Njuguna Gachuhi & Another v Inspector General Police Service & Others* [2019] eKLR for the proposition that damages for constitutional violation need not be compensatory but are meant to vindicate the rights violated and to prevent future violations.

### **The 5th, 6th, 7th and 8th Respondents' Submissions**

27. Counsel for the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents submitted that the suit land was Government land that was held by the defunct Municipal Council of Machakos who allocated un-surveyed plots to people, including the petitioners on Temporary occupation Licence (TOL). Counsel's position was that the Temporary Occupation Licence did not confer the Petitioners absolute ownership of the suit property. It was counsel's further submission that the Petitioners held their plots awaiting survey and approved development plan; and therefore, the original survey maps alleged to be in possession of the Respondents, do not exist.
28. Counsel also contended that the National Land Commission was empowered under section 20 of the *Land Act* No. 6 of 2012, to grant and revoke Temporary Occupation Licences. It was argued for the 5<sup>th</sup> to 8<sup>th</sup> Respondents that the Petitioners failed to provide evidence to show that they had been allocated the suit properties by the Government. Counsel was of the view that the Petition failed to raise constitutional issues as the Plaintiff had failed to demonstrate their right of ownership of the suit property and had also failed to prove existence of previous survey records, maps and deed plans and or possession of the same by the 1<sup>st</sup> Respondent. Counsel relied on the cases of *David Gathu Thuo v Attorney General & Another* [2021] eKLR and *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR, for the proposition that a petitioner bears the burden of proof and that a petitioner cannot come to court to obtain information he/she intends to use to prove the same case he is arguing before the court.



29. Counsel maintained that an approved plan for Konza Township was published in the Kenya Gazette on 20<sup>th</sup> August 2010 as seen in the 5<sup>th</sup> to 8<sup>th</sup> Respondents' annexure JMK 8, and that although members of public were invited to make objections, the Petitioners never filed any objections thereto. Counsel observed that the Petitioners' claim cannot be ventilated through a constitutional petition as they were given an opportunity to participate in the process that led to the approval of the Plan and the survey of the suit property and were subsequently issued with the allotment letters.
30. Placing reliance on the cases of *Communication Commission of Kenya & 5 Others v Royal Media Services & 5 others* [2014] eKLR, and *Anarita Karimi Njeru v Republic* [1979], counsel contended that the burden of proof in a constitutional petition lay with the Petitioner to show the rights said to have been infringed, and the basis of his/her grievance. According to counsel, the Petitioner cannot claim violation of the right of access to information without demonstrating that such information exists, neither can they argue that their right to property was infringed without demonstrating that they owned the suit property.
31. Counsel contended that the 5<sup>th</sup> to the 8<sup>th</sup> Respondents adduced evidence to show that the new allotment letters were issued in a process that involved Konza Residents and Business Association and a stakeholders meeting held on 22<sup>nd</sup> June 2010 as demonstrated by the Respondents' annexure JMK 5. Relying on the case of *Mui Coal Basin Local Community & 17 others v Permanent Secretary Ministry of Energy & 15 Others* [2015] eKLR, counsel emphasized that there was intentional inclusivity in the process, as the residents' views were sought and taken into account before the new allotment letters were issued, and submitted that the Petitioners had failed to demonstrate a violation of their right to public participation and fair administrative action. In conclusion, counsel emphasized that the Petition lacked merit and sought for its dismissal with costs.

### **Analysis and Determination**

32. I have carefully considered the Petition, the responses thereto including grounds of opposition, replying affidavits, the preliminary objection as well as submissions and authorities relied upon. In my view, the issues that emerge for determination are;
  - a. Whether this court has jurisdiction to determine this matter.
  - b. Whether the Petitioners' rights under Articles 10, 35, 40, 43 and 47 were violated by the Respondents.
  - c. Whether the Petitioners are entitled to the prayers sought.
33. A constitutional petition ought to raise a constitutional question which calls for the interpretation of *the Constitution* as opposed to a statute. In the case of *Kiambu County Tenants Welfare Association vs. Attorney General & Another* [2017] eKLR, the court held that a constitutional petition ought to raise a constitutional question whose resolution requires constitutional interpretation rather than statutory interpretation.
34. In a long line of court decisions, courts have held that in a constitutional petition, the petitioner is obligated to plead with a high degree of precision the constitutional provisions violated, and demonstrate the manner of the violations done against them. (See *Anarita Karimi Njeru vs. Attorney General* [1979] KLR 154 and *Meme vs. Republic* [2004] eKLR).



35. In the case of *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme Court held as follows;

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic* [1979] KLR 154; the necessity of a link between the aggrieved party, the provisions of *the constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as foundation of conviction and good faith, in engaging the constitutional process of dispute settlement .....

36. However, precision should neither be equated to exactitude nor formality. Precision in constitutional petitions must be manifest in the manner the petition creates a nexus between the petitioner, the constitutional provisions alleged to have been violated and the manifestation of the violations. The purpose of precision is to ensure that the issues in controversy are made clear to both the court and the opposing party. This ensures particularity in response from the opposing party and the proper framing of issues by the court, with the ultimate result being delivery of substantive justice by the court.

37. In the case of *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others* [2013] eKLR, the Court of Appeal held that;

“We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

38. In the instant suit, the Petitioners have stated that their occupation of suit property conferred on them proprietary rights, under Article 40 of *the Constitution* and that those rights have been violated as the Respondents resurveyed their property thereby displacing them from their original positions. They also alleged that the Respondents failed to avail maps and deed plans for the original survey, contrary to their right of access to information under Article 35. Besides, according to them, the decision of the Respondents to resurvey the suit property did not comply with Article 47 of *the Constitution* as the Respondent did not afford the petitioners a fair hearing and neither did the decision comply with Article 10 requiring such action to be consultative and allow public participation. They also state that their rights under Article 43 are threatened with breach. In my view, the issues raised in the petition concern the interpretation of *the Constitution* and particularly Articles 10, 35, 40, 43 and 47 thereof. The petitioners have, with precision specified the Respondent’s actions that according to them, amount to contravention of their constitutional rights. On that basis therefore, I am satisfied that the petition has been pleaded with the required particularity, sufficient to give notice to the Respondents and to enable the court frame and ultimately determine the real issues in controversy.

39. On whether this court has jurisdiction to determine this petition, the 2<sup>nd</sup> Respondent in its preliminary objection dated 5<sup>th</sup> February 2019 contended that this matter contravened the sub judice rule. The



basis of the doctrine of sub judice is Section 6 of the [Civil Procedure Act](#) which provides that a court shall not proceed with the trial of a suit where the issue in controversy is the same issue in a previously instituted suit, which is pending in respect of the same parties or parties under whom they claim. I however note that the 2<sup>nd</sup> Defendant did not provide any evidence to demonstrate the existence of a previously instituted suit involving the same issues as those raised in this petition and between the parties as those in this petition or parties under whom they claim. On that basis therefore, I find that this suit is not sub judice.

40. In addition, the 2<sup>nd</sup> Respondent objected to the petition on ground that this court has no jurisdiction to hear and determine this matter as the same is in respect of title and ownership of land. Jurisdiction is everything and without it the court should down its tools as any decision made without jurisdiction is null and void and of no consequence (See [Owners of Motor Vessels "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR and [Macfoy vs. United Africa Co. Ltd](#) [1961] 3 AllER 1169). Jurisdiction flows from either [the Constitution](#) or statute or both, hence a court of law can only exercise jurisdiction conferred on it by [the Constitution](#) or statute or both, but cannot confer jurisdiction on itself, exercise jurisdiction it does not have or exceed its jurisdiction. (See [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another](#) [2012] eKLR).
41. Turning to the question of jurisdiction, Article 162, (2) (b) of [the Constitution](#) confers jurisdiction on the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Section 13 of the [Environment and Land Court Act](#) No. 19 of 2011, confers both original and appellate jurisdiction on this court to hear and determine all disputes relating to the environment and land. The section provides as follows;
  1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  2. In exercise of its jurisdiction under Article 162 (2) (b) of [the Constitution](#), the court shall have power to hear and determine disputes;
    - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates rents, valuations, mining, minerals and other natural resources;
    - b. Relating to compulsory acquisition of land;
    - c. Relating to land administration and management
    - d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests granting any enforceable interests in land; and
    - e. Any other dispute relating to environment and land.
  3. Nothing in this section shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedom relating to a clean and healthy environment under Article 42, 69 and 70 of [the Constitution](#).
  4. In addition to the matters referred to in subsections (1) and (2) the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.
  5. ....
  6. ....



7. In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –
  - a. Interim or permanent preservation orders including injunctions;
  - b. Prerogative orders;
  - c. Award of damages;
  - d. Compensation;
  - e. Specific performance;
  - f. Restitution;
  - g. Declaration; or
  - h. Costs.
42. The Petitioners’ claim herein is a dispute relating to land. In view of the provisions of Article 162 (2) (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act*, I find and hold that this court has jurisdiction to determine this suit as the same relates to land.
43. Another issue raised by the 2<sup>nd</sup> Respondent concerning this court’s jurisdiction, is that this court lacks jurisdiction as the suit offends the provisions of Sections 18 (2) and 19 of the *Land Registration Act*. The said provisions provide that where boundaries of registered land are only approximate, having not been fixed, a dispute concerning such boundary is a matter to be determined by the Land Registrar and not this court. The Petitioners sought for injunctive and declaratory orders in the Petition. My understanding of the Petitioners’ dispute is a claim for land ownership and not a boundary dispute. In that regard therefore, the said objection is baseless and must fail. Ultimately, I find and hold that in its entirety, the 2<sup>nd</sup> Respondent’s preliminary objection lacks merit and the same is dismissed.
44. I now turn to the issue as to whether the Petitioner’s rights under Articles 10, 35, 40, 43 and 47 of *the Constitution* were violated by the Respondents. The Petitioners claim that they were allocated the suit property by the Municipal Council of Machakos in 1997. According to them, the suit property was surveyed by the Municipal Council in conjunction with the Director of Surveys and thereafter the allocation of the suit property to the petitioners ratified by the Municipal Council before the petitioners were issued with letters of allotment. The Petitioners attached minutes by the Municipal Council of Machakos indicating that there was a plan for Konza Township Plots which was approved and the “plots ratified”. The Petitioners also produced letters dated 7<sup>th</sup> November 1997 from the Town Clerk of the Municipal Council of Machakos indicating that the Town Planning Works and Housing Committee had ratified the allocation of the suit property to each of them respectively. It appears also from the receipts issued in 1997 by the 4<sup>th</sup> Respondent to the Petitioners that the latter paid survey fees. In addition, their building plans were duly approved by the Municipality the reason why some of them put up permanent buildings on the suit property as demonstrated by the building plan marked as annexure “CO5” and photographs of their houses marked as annexure “CO9”.
45. On the other hand, the Respondents maintain that the suit property is public land and that the Petitioners’ occupation thereon was on the basis of Temporary Occupation Licence. The Respondent maintain that the suit property was never surveyed before 2010 and that the only survey done, was done in 2010 and in compliance with the law and no objections were filed by the Petitioners in respect of the same.



46. At the centre of this dispute is the issue as to whether the letters dated 7<sup>th</sup> November 1997 by the Town Clerk of the Municipal Council of Machakos, allocating the suit property to the Petitioners, conferred proprietary rights on the Petitioners, capable of protection under Article 40 of *the Constitution*. The alleged allocation having happened in 1997, was done when the repealed Constitution as well as the Government Lands Act, Cap 280 were in force. While the Respondents were categorical that the suit property was Government land, and not trust land, the Petitioners did not contest that assertion. The Petitioners' position was that the subsequent allocation of the suit property in the year 2011, could only have been done by the National Land Commission and not the Commissioner of Lands, as purported by the 5<sup>th</sup> to the 8<sup>th</sup> Respondents. Therefore, the fact that the suit property was Government land under the repealed Constitution is not contested.
47. The repealed Government Lands Act Cap 280 provided for regulating the leasing and other disposal of Government lands. Under Section 3 of that Act, the President of Kenya had powers to grant title and other rights in unalienated Government lands. The said Act also provided that Government land could be subdivided and leases granted or be subject to licence conferring a right of occupation or an agreement of purchase. Section 9 of the Act provided that the Commissioner of Lands could subdivide unalienated Government land and dispose of the same in the prescribed manner. The powers of the President to make grants or disposition of any interests or rights in unalienated Government land were delegated in some instances to the Commissioner of Lands. Government land ought to be distinguished from trust land which was held by the County Council, as was provided for in Section 115 of the repealed Constitution. The Municipal Council held trust land on behalf of the local inhabitants of such municipality. Therefore, in the circumstances of this case, the Municipal Council had no role to play in the allocation of the suit property which was unalienated Government land, and had no power to administer the same. In the case of *Bahola Mkalindi v Michael Seth Kaseme & 2 others* [2013] eKLR, the court held as follows;
- “Where portions of unalienated Government Land falls within townships, it is the Commissioner of Lands, pursuant to Section 9 of the Government Lands Act, Cap 280 who was required to divide such plots and grant leases for any term not exceeding 100 years. The County Council or Municipal Councils could not deal with such plots notwithstanding the fact that the land fell within their jurisdictions.”
- The court further stated as follows;
- “Unalienated Government land was not trust land in that it was not vested in local communities and it was held in trust for them by a county council.
- “Under Section 3 of the Government *Land Act*, it is only the President who was allowed to make grants or disposition over alienated Government land. It is the Commissioner of Lands, on behalf of the President, who used to allocate unalienated Government land to the person whose application for the allocation of such would have been approved by the President. Once the approved candidate for the land had been selected, and an approved Part Development Plan (PDP) by the Director of Physical Planning is issued, an offer was made to the person by the Government. The offer is what came to be known as a letter of allotment which used to be signed by the Commissioner of Lands”.
48. While the Government Lands Act provided that Government land could be subject to a licence in regard to a right of occupation, the 5<sup>th</sup> to 8<sup>th</sup> Respondents' contention that the Petitioners were granted Temporary Occupation Licence, was not supported by any evidence. Temporary occupation could



only be granted by the Commissioner of Lands and not the Municipality and no evidence was tendered by the Respondents to show such Temporary Occupation Licences from the Commissioner of Lands.

49. It is my considered view that as the suit property was Government land, the same could not be allocated to the Petitioners by the Municipal Council of Machakos and therefore the letters of offer by the latter dated 7<sup>th</sup> November 1997, were not capable of conferring proprietary rights on the Petitioners, as the Municipality had no power to allocate Government land, since such power was vested in the President of Kenya and was delegated to the Commissioner of Lands. I therefore agree with the 5<sup>th</sup> to the 8<sup>th</sup> Respondents' submissions that the Petitioners failed to prove that they were allocated the suit property by the Government. In the premises, I find and hold that the Petitioners have no proprietary rights over the suit property, capable of being protected under Article 40 of *the Constitution*, as they failed to prove ownership of the same.
50. As regards the question as to whether the petitioners' right of access to information was violated, the Petitioners argued that Respondents furnish them with copies of survey and deed plans for the original survey done before the suit property was allocated to them. In paragraph 10 of the Petitioners' Supporting Affidavit, the 1<sup>st</sup> Petitioner deponed as follows;
- “ That I verily believe that the survey plan for the township was placed in the custody of the 1<sup>st</sup> Respondent.”
51. In answer to the Petitioners' averment above, the Respondents stated that there was no survey before 2010, and that the survey done in 2010 was done in accordance with the law. It is trite law that he who alleges must prove. If the Petitioners intend to exercise their right of access to information, they are obliged to demonstrate that the information they seek, is in possession of the Respondent.
52. Article 35 for *the Constitution* provides as follows;
1. Every citizen has the right of access to;
    - a. Information held by the state;  
and
    - b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
53. It is therefore clear that to enforce the right of access to information, the Petitioner must demonstrate that the information sought is held by the Respondent. As stated earlier in this judgment, the Petitioner's position is that they believe the 1<sup>st</sup> Respondent holds the information they sought while the Respondents have not only denied that the information sought is in possession of the 1<sup>st</sup> Respondent but also insist that the information sought does not exist.
54. The Petitioners produced a map marked as annexure “CO7” which they have referred to as the survey plan. They insisted that the survey was done before allocation of the suit property in 1997, although they did not specify when that was done. It will be noted that the repealed Physical Planning Act Cap 286 was assented to on 24<sup>th</sup> October 1996 but its commencement date was 29<sup>th</sup> October 1998. Therefore, the law existing before the said commencement date in respect to approval of development plans included the Land Planning Act Cap 303 as well as the Town Planning Act Cap 134 as read with the Development and use of land (Planning) Regulations 1961.
55. Under Regulation 6 of the Development and use of land (Planning) Regulations 1961, a local authority could, in consultation and with the agreement of the Minister prepare and submit to the



- Minister for his approval, a town plan or an area plan in respect of the area under its jurisdiction. To ensure proper subdivision of land in areas other than those of unalienated Government land, could require a local authority to submit to him for approval the subdivision and use plans for its area or any part thereof. Regulation 7 provided that town plans, area plans or subdivision and use plan in respect of unalienated Government land were to be prepared by the Minister, and the plans approved by the Commissioner of Lands under Sections 23 or 24 of the Town Planning Act were deemed to have been approved by the Minister.
56. It was the responsibility of the local authority before submitting plans to the Minister for approval, to ensure the owners of the land affected by such plans are made aware of the proposals contained in the plans and not only invite comments and or objections thereto, but submit such comments and objects to the Minister. It was upon approval by the Minister that the local authority was required to publish a notice in a prescribed manner, indicating that the plan had been approved or amended and inviting the public to inspect the approved plans at the time and place stated in the Notice.
  57. Section 24 of the repealed Physical Planning Act Cap 286, provided that a Local Physical Development Plan was prepared by the Director of Physical Planning with reference to any Government land, trust land or private land within the area of authority of a city, municipal, town or urban council or with reference to any trading or marketing centre. A local physical development plan had the purpose of guiding and coordinating development of infrastructural facilities and services for an area of authority of a city, municipal, town or urban council as well as for control of the use and development of land or for provision of any land in such area for public purposes.
  58. The process of preparation of local physical development plan was provided for in Section 26 of the Physical Planning Act. The process required the Director to prepare a local physical development plan and within 30 days publish a notice in the Gazette and in any manner that he deems expedient inviting the members of public to inspect the same at a place and time specified in such notice. The notice requested interested parties who desired to object to the plan to write to the Director in 60 days indicating their objections. The Director had the discretion to accommodate or decline to accommodate such objections and was required to notify in writing the persons who objected to the plan of his decision and the reasons thereof. Where the person objecting was dissatisfied with the Director's decisions, they were allowed to appeal to the relevant liaison committee and if not satisfied, to the National Liaison Committee; and if dissatisfied, then an appeal would be filed in the High Court (in this case the ELC).
  59. Where no objections were filed at the expiration of 60 days of publication of the Local Development Plan, the Director was required to certify the plan in triplicate and submit the same to the Minister for approval. The Minister could approve the Local Development Plan with or without conditions or modifications or refuse to approve and require a new plan from the Director. The Minister's approval or disapproval was expected in 60 days of the Director's submissions of the plan to the Minister.
  60. Under Section 21 of the Physical Planning Act, the Minister was required within fourteen days after his/her approval of the plan ensure the Director Publishes in the Gazette, a notice that the plan has been approved with or without modifications which may be inspected at the times and places specified in the Notice. Upon approval, a Local Development Plan had the full force in the area it related and all persons within such area were required to comply with the requirements of the approved plan.
  61. I have taken time to explain the procedure for having approved plans under the repealed Town Planning Act, Land Planning Act and the Regulations thereunder, as well as the Physical Planning Act; for purposes of interrogating the Petitioners' assertions that the suit property already had approved plans and therefore that the planning of Konza Town done in 2010 by the Respondents, was being



done for the second time and contrary to the law. Having considered the evidence on record, I have not found any evidence to show that there was an approved plan done in compliance with the repealed Town Planning Act, Land Planning Act or the Physical Planning Act. Therefore, I find and hold that the Petitioners have not proved that there was an approved plan prepared before the suit property was purportedly allocated to them by the Municipal Council of Machakos, as alleged. However, I must hasten to add that the processes of preparing a local Physical Development Plan and that of allocation of Government land are two different processes, done for different purposes. Allocation of land is for purposes of vesting interest or rights in Government land to individuals, while the purpose of a local Physical Development plan is to guide the Planning authority how to develop an area with the aim being to control the nature and order of development. Planning applies to all land tenure systems namely Government land, Trust land as well as private land. The only interface being that allocation of unalienated Government land had to be aligned with the local development plan to achieve the overall objective of the development plan. I have pointed this out as both parties were not clear on the process of allocation of unalienated Government land and the process of planning which blurred the real issues in regard to the two processes.

62. As rights create duties on the part of duty bearers, it is incumbent upon a Petitioner claiming violation of their rights to demonstrate that the Respondent owed them a duty. In this case, while the Petitioners' claim that their right of access to information was violated, they have failed to demonstrate that the Respondents held the information they claim. On that ground, I find that the Petitioners have not demonstrated that their right of access to information was violated. In any case, the right of access to information must be in respect of information required for the exercise or protection of any right or fundamental freedom. As I understand it, the information sought is to assist the Petitioner exercise his/her constitutional right. I do not think that the quest for the information in issue should be within the same suit seeking to enforce other constitutional rights, as that would mean that the Petitioner has filed a petition without evidence and is only hoping to obtain the said information to prove his claim. In my view, the information ought to be sought first, and upon obtaining the same, the Petitioners can now use the information to seek redress in court for constitutional protection.
63. The Petitioners have contended that the survey done and the plan prepared by the Respondents in respect of the suit property having been done in 2010, was a resurvey as survey had already been done, and that the same was done in breach of the Petitioners' right to a fair administrative action. They also state that there was no public participation on the part of the Respondents.
64. Article 10 (2) of *the Constitution* provides that National values and principles of governance include participation of the people. Public participation in governance is central to the concept of the sovereignty of the people as enshrined in *the Constitution*. In the case of *Robert N. Gakuru & others v The Governor Kiambu County & 3 others*, Petition No. 532 of 2013; it was held as follows;

“In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates.”
65. It is therefore clear that public participation ought to be intentional to ensure that the members of public and especially those that may be affected by a decision of a public officer or state organ, are given an opportunity to give their views on such matters so that the same may be considered in the decision-making process. Public participation does not mean that the views of each member of the public must be included or reflected in the decision, as that would mean that each individual member of public is given a veto over the decision, which is not the purpose of public participation. The important aspect in public participation is to ensure that there is intentional inclusivity concerning the matter in issue



- and taking into account the views of those affected by such programme (See *Mui Coal Basin Local Community & 17 others v Permanent Secretary Ministry of Energy & 15 others* [2015] eKLR.
66. The process of public participation in the planning process was inbuilt and provided for in the repealed acts; namely the Land Planning Act, the Town Planning Act and the Physical Planning Act. The same was to be done at the point of publishing a Notice by the local authority inviting the members of public to make representations and file objections if any, which would be heard and determined in accordance with the relevant statute.
  67. Having considered the Respondents' documents in respect of public participation before the plan was approved in 2010, I note that the process began in early 2010. I have considered the letter by the District Physical Planning Officer dated 10<sup>th</sup> June 2010, documents indicating attendance of the Physical Plan Stakeholders Baraza dated 22<sup>nd</sup> June 2010 as well as the Gazette Notice No. 9973 dated 2<sup>nd</sup> August 2010 by the Director Physical Planning, inviting members of public to make representation or objection to the Development Plan. As earlier stated in this judgment, under the repealed Physical Planning Act, under which the Notice of 2<sup>nd</sup> August 2010 was issued, public participation was provided for, for a period of 60 days as was stated in the notice.
  68. The Petitioners have not denied the publication of the said notice, neither have they indicated that they made representations or objections which were not determined in accordance with the repealed Act. Having failed to seize the opportunity presented on 2<sup>nd</sup> August 2010, the Petitioners cannot fault the process of the approved plans and I find and hold that the Petitioners were duly granted access to the relevant information, and given opportunity to make their representations but failed to do so and cannot now complain of being denied a chance at public participation.
  69. The other complaint by the petitioners is that they were not given opportunity to be heard before the resurvey by the Respondents was done. As found hereinabove, the plan approved in 2010 was not a second plan but the only plan done in respect of the suit property. Article 47 of *the Constitution* provides that every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It also provides that if a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given better reasons for the action. As earlier stated, the Respondents have demonstrated that the approved plan was done and procured through a procedurally fair process which was in compliance with the repealed Physical Planning Act.
  70. The Commissioner of Lands issued letters of allotment in the year 2011 to different persons including the Petitioners.
  71. In the instant suit, there is no dispute that the letters of allotment by the Commissioner of Lands were issued in the year 2011. That was after the enactment of the new Constitution of 2010, but before the enactment of the *Land Act* No. 6 of 2012 and the *National Land Commission Act* of 2012. It therefore follows that the action of the Commissioner of Lands had no anchor in *the Constitution*.
  72. Although the Petitioners mentioned in passing, that their right to earn a decent living guaranteed under Article 43 of *the Constitution* was under threat of violation, if they do not continue to be in possession of the suit property, no evidence was produced to support such assertion. I therefore find and hold that there is no proof of a threat to breach the Petitioners' rights guaranteed under Article 43 of *the Constitution*.
  73. In the premises, I find and hold that the Petition lacks merit and the same is dismissed. Each party shall bear its own costs of the suit.



74. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27<sup>TH</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms Rotich for the Petitioners

Ms Kui holding brief for Mr. Mulei for the 4<sup>th</sup> Respondent

No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents

Josephine Misigo – Court Assistant

