



**Awori v Attorney General & another (Constitutional Petition  
E001 of 2021) [2022] KEELC 2560 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2560 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
CONSTITUTIONAL PETITION E001 OF 2021**

**A OMBWAYO, J  
JULY 15, 2022**

**IN THE MATTER OF ALLEGED VIOLATIONS OR INFRINGEMENT  
OF CONSTITUTIONAL RIGHTS OF THE PERSON TO WIT  
ARTICLE 10,27 AND 40 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**ARTHUR ATHANASIOUS MOODY AWORI ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Brief Facts**

- 1 The Petitioners herein *vide* their Petition dated June 10, 2020 and filed in court on June 11, 2020 is seeking a declaration that the revocation or purported revocation of the allocation of property Title Number Kisumu Municipality /Block 11/136 to the Petitioner as contained in the Kenya Gazette Notice No. 6862 of July 17, 2017 was unconstitutional, null and void. Moreover, a declaration that the revocation or purported revocation published in the Kenya Gazette Notice No. 6862 of July 17, 2017 is a violation of the Petitioner's rights of protection under Article 40 of *the Constitution* of Kenya over Title Number Kisumu Municipality/Block 11/136 as it seeks to deprive the Petitioner of the said property or his interest and right over the said property. Further, a permanent injunction restraining Respondents from interfering with the Petitioner's rights over the suit property Title Number Kisumu Municipality/Block 11/136. The costs of the Petition be provided for.



## Petitioners' Case

- 2 It is the Petitioners' case that he is the proprietor of land known as Title Number Kisumu/ Municipality /Block 11/136 as he acquired the property legally from the Government of Kenya. That on July 1, 1998, the Government of Kenya through the Commissioner of Lands allocated the suit property to him on terms and conditions specified in the Letter of Allotment.
- 3 That he performed and complied with the conditions and paid the sum of Kshs. 497,480/= to the Government and upon fulfilment of the said conditions, the Commissioner of Lands issued him a Lease together with a Certificate of Lease. He stated that he has been advised by his Advocates on record that upon registration of the suit property in his name, the Letter of Allotment was superseded and he acquired statutory rights over the said property under the provisions of section 28 of the *Registered Land Act* Cap 300 (now repealed).
- 4 The Petitioner stated that the Constitution of Kenya 2010 established the 2<sup>nd</sup> Respondent as a state organ and in 2012, Parliament enacted the National Land Commission Act No. 5 of 2012 which confers powers and jurisdiction on the 2<sup>nd</sup> Respondent which powers include the jurisdiction to review grants and dispositions of public land to establish their propriety rights or legality within a period of 5 years from the commencement of the said statute.
- 5 That the statute commenced on May 2, 2012 and the 5 year period expired on May 2, 2017. On July 17, 2017, the 2<sup>nd</sup> Respondent in the Gazette Notice No. 97 revoked or purported to revoke the allocation of the suit property and at that material time, the Letter of Allotment superseded the Certificate of Lease and the Certificate of Lease was not and has not been revoked.
- 6 It was stated that the action of the 2<sup>nd</sup> Respondent was null and void because at the material time the 2<sup>nd</sup> Respondent had no powers under the law to take the said action and the action to revoke the allocation of the suit property to the Petitioner was unlawful and seeks to deprive him his right of ownership or interest over the said property.
- 7 It is the Petitioner's case that other properties acquired in the same area were not touched by the 2<sup>nd</sup> Respondent and were excluded from revocation and there was no explanation from the 2<sup>nd</sup> Respondent as to why they were selective.
- 8 Jeremy Noel Awori filed a further Affidavit on November 23, 2021 where he stated that he is the son of the Petitioner and stated that sometimes in December 2021, he was shown by his father a letter from the Ministry of Housing dated December 10, 2012 and directing him to trace the documents on the boarding of the house that is on the suit property and on creation of the lease issued to his father to enable him to respond.
- 9 That he made countless visits to the Ministry of Lands and met with various officers in order to trace the file but was unsuccessful and therefore his father was unable to provide a response required to the letter. He stated that after the decision of Justice Kibunja, he was instructed by his father to renew efforts to trace the missing documents at the Ministries of Housing and of Lands to enable him to seek a review the Judgment.
- 10 He stated that after countless visits to the Ministry of Lands, the missing file together with the relevant documents were located in October 2021 and he received copies of the said documents on October 16, 2021 as listed from paragraph 6.1 to 6.10.



- 12 The Petitioner also filed a further Affidavit pursuant to the directions of the court issued on November 3, 2021 where he confirmed that he was the Petitioner in Petition No. 6 of 2013 against the County Director of Housing, Kisumu which was determined and Judgment delivered on 21<sup>st</sup> June 2017.
- 13 That despite, the letter dated December 10, 2012 from the Ministry of Housing was concluded with the implicit threat to deploy necessary action to recover from him the house that is on the suit property he was unable to respond to the request for documents. He stated that after the decision by Justice Kibunja, he directed his son to renew efforts to trace the missing documents on the boarding of the house that of on the suit property.
- 14 He confirmed that the missing documents and the file were retrieved in October 2021 by his son whom he had authorized to present the said documents. He further stated that he has been instructed by his Advocate to present the relevant documents to the Environment and Land Court to support the Application for review of Justice Kibunja's Judgment which was made *per incuriam* given that the documents were not available for consideration by the court owing to the fact that the files in which they were located being missing for many years.

### **1<sup>st</sup> Respondent's Case**

- 15 The 1<sup>st</sup> Respondent filed a Replying Affidavit in response to the Application where G.O Nyangi who is the County Director of Housing Kisumu County stated that the Ministry of Housing is the custodian of all Government houses within Kisumu County and according to the government building register, house no. KSU/HOU/HG/97 was put u in 1976 on plot No. Kisumu Municipality Block 11/136.
- 16 That the Petitioner sued the 1<sup>st</sup> Respondent, the County Director of Housing and the Permanent Secretary Ministry of Housing in Kisumu High Court Petition No. 6 of 2013 where the Petitioner filed issues for determination and submissions in canvassing the Petition.
- 17 It was stated that issues No. 9 and 10 questioned the cancellation of the Petitioner's title and whether his rights had been violated under Articles 40, 48 and 50 of *the Constitution* of Kenya by the Respondents. That the Respondents filed submissions in Petition No. 6 of 2013 and the Petition was heard and Judgment rendered on June 21, 2017 by Justice S.M Kibunja.
- 18 That the Judgment entered on June 21, 2017 of the said Petition dismissed the Petitioner's claim and held that he did not acquire the property in a lawful and procedural manner and subsequently the 2<sup>nd</sup> Respondent published a Gazette Notice No. 6862 dated July 17, 2017 revoking the title belonging to the Petitioner. That the 2<sup>nd</sup> Respondent published the said Gazette Notice after sufficient notice and after hearing the Petitioner's case and after determination of Petition No. 6 of 2013.
- 19 It is the 1<sup>st</sup> Respondent's case that there has been no Appeal filed against the Judgment and the Petitioner is trying to re-litigate the same issues in a court of similar jurisdiction as he is guilty of laches. That this Petition and Petition No. 6 of 2013 are similar in nature in that the sub stratum of the two petitions is the legality of the title held by the Petitioner which was revoked by the 2<sup>nd</sup> Respondent.
- 20 It was further stated that this Petition is barred by the principle of *res judicata* and cannot therefore clothe this Petition differently seeking constitutional remedies against the Gazette Notice published by the 2<sup>nd</sup> Respondent yet the matter involves unlawful allocation of public property and the sanctity of title that was deliberated upon in Petition No. 6 of 2013.
- 21 This matter was filed in Kisumu High Court Petition No. 8 of 2020 and when the same came up for Mention before Honourable Justice Ochieng, the same was transferred to the Environment and Land



Court. I gave directions that the Petition be canvassed by way of written submission as directed by this court.

### **Petitioner's submissions**

22 I have perused the file and do confirm that the Petitioner did not file his submissions as directed by the court.

### **1<sup>st</sup> Respondent's Submissions**

23 The 1<sup>st</sup> Respondent herein filed its submissions on March 2, 2022 where it was stated that the prayers sought in Petition No. 6 of 2013 and the instant Petition are similar in nature as the substratum of the suit is the ownership of Kisumu Municipality/ Block 11/136 which was already conclusively determined by Justice Kibunja where the Petitioner's claim was dismissed. It was submitted that the suit is barred by the principle of res judicata in accordance with section 7 of the *Civil Procedure Act*.

24 On the issue of whether the Petition is barred by the Doctrine of res judicata; it was stated that the Petitioner cannot cloth this suit to be seeking declaratory orders against the decision by the 2<sup>nd</sup> Respondent to publish a gazette notice with the effect of cancelling their title while the crux of the matter is ownership of the suit property which had been deliberated upon in Petition No. 6 of 2013. Reliance was placed in the case of *Sisters of Notre Dame De Namur Registered Trustees v National Land Commission & 2 others; Ethics and Anti-Corruption Commission (Interested Party)* [2019] eKLR and *E.T. v Attorney General & another* [2012] eKLR.

25 It was stated that it is litigation craft for Petitioners to substitute parties to a suit and file a similar suit seeking similar orders and that the Petitioner having come to the realization that they were out of time to Appeal the decision in Petition 6 of 2013 and unable to seek judicial review orders of certiorari against the decision of the 2<sup>nd</sup> Respondent, resorted to filing this Petition which was fatal in accordance to the doctrine of res judicata. The 1<sup>st</sup> Respondent relied in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR and submitted that this suit should fail as the materiality of this Petition is ownership of the suit property and protection of property rights accruing thereof which issues had been deliberated upon in Petition No. 6 of 2013.

26 On the issue of whether the 2<sup>nd</sup> Respondent was at fault in publishing Gazette Notice No. 6862 which revoked the Petitioner's title to the suit property; it was stated that the 2<sup>nd</sup> Respondent is an independent commission established under Article 67(1) of *the Constitution* and operationalized by the *National Land Commission Act* No. 5 of 2012 with the fundamental function of Management of public land on behalf of National and County Governments.

27 That the 2<sup>nd</sup> Respondent is mandated under section 14 of the *National Land Commission Act* to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. It was further stated that the 2<sup>nd</sup> Respondent operates as a quasi-judicial body within the context of Article 169(1) of *the Constitution* and it invoked its jurisdiction pursuant to section 14 (1) of the Act following a complaint by Ministry of Housing contesting the legality of the Petitioner's title to the suit property and admitted the complaint for review.

28 It was further stated that the 2<sup>nd</sup> Respondent issued a public notice in print media and informed all interested parties of the content to institute review proceedings to ascertain the legality of the title in question. That the review proceedings complied with *the Constitution* and the Act and the Commission made a determination based on the parties' submissions. There was a recommendation



through gazette notice no. 6862 that the title held by the Petitioner be nullified by the Chief Land Registrar.

29 It was submitted that the 2<sup>nd</sup> Respondent is not bound by the strict rules of evidence pursuant to section 6 (3) of the [National Land Commission Act](#) contrary to what is deponed by the Petitioner's further Affidavit dated November 10, 2021. That it is dishonest to allege that the recommendation for nullification was done in a manner which violated the Petitioner's right to property and the 2<sup>nd</sup> Respondent acted as per its mandate and gave the Petitioner an opportunity to be heard as it followed due process in arriving at its decision. Reliance was placed in the case of [James Kembu Gitura v National Land Commission & 2 others](#) [2021] eKLR.

30 On the issue of whether the Petitioner can be granted the prayers sought; it was stated that the Petitioner has not substantiated any reason for granting of the remedies sought as he is barred by the doctrine of res judicata to bring forth a suit which seeks similar orders against the same parties which orders were canvassed in a previously concluded matter. That the assertion that the 2<sup>nd</sup> Respondent violated the Petitioner's right in cancelling the title to the suit property is futile.

The 1<sup>st</sup> Respondent prayed that the Petition be dismissed with costs.

### **Analysis and Determination**

31 It is the Petitioner's case that he is the registered proprietor of land parcel number Kisumu Municipality/Block 11/136 registered under the provisions of the Registered Land Act Cap 300 Laws of Kenya (now repealed). That the 2<sup>nd</sup> Respondent vide Gazette Notice No. 6862 dated July 17, 2017 purported to revoke the allocation of the suit property.

32 The Petitioner has alleged that the 2<sup>nd</sup> Respondent has no powers or jurisdiction under the [National Land Commission Act](#) to revoke allocation of the suit property to the Petitioner or interfere with the Petitioner's rights or interest over the suit property outside the 5-year period as stated under the Act. It is also the Petitioner's case that his constitutional rights under Articles 10, 27 and 40 of [the Constitution](#) were violated by the 2<sup>nd</sup> Respondent.

33 The 1<sup>st</sup> Respondent in objection of the Petition stated that the Petitioner sued the 1<sup>st</sup> Respondent, the County Director of Housing Kisumu and the Permanent Secretary Ministry of Housing in Kisumu High Court Petition No. 6 of 2013 and in the said Petition issues No.9 and 10 questioned the cancellation of the Petitioner's title and whether his rights had been violated under Article 40,48 and 50 of [the Constitution](#) by the Respondents.

34 It is the 1<sup>st</sup> Respondent's case that the said Petition was heard and Judgment was delivered where Justice Kibunja dismissed the Petitioner's claim and held that he did not acquire the property in a lawful and procedural manner and after the said Judgment, the 2<sup>nd</sup> Respondent published a Gazette Notice No. 6862 revoking the title to the suit property.

35 I have considered the pleadings, the Affidavits and the submission filed by the parties herein and I am of the view that the following issues need to be determined:

#### **i. Whether the Petition is time barred by the doctrine of res judicata.**

36 Section 7 of the [Civil Procedure Act](#) provides for the principle of res judicata in the following terms;

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.’

- 37 In the case of *Nguruman Limited v Jan Bonde Nelsen & another* [2017] eKLR the court listed fundamental conditions for a case to be held as *res judicata*. Aburili J quoted with approval the case of *Bernard Mugo Ndegwa v James Gitbae & 2 others* [2010] eKLR . At paragraph 36, the judge observed:
- a. That the matter in issue is identical in both suits;
  - b. The parties in the suit are substantially the same;
  - c. There is concurrence of jurisdiction of the court;
  - d. The subject matter is the same; and
  - e. That there is a final determination as far as the previous decision is concerned.”
- 38 I have looked at the Petitioner’s submission filed in Petition No. 6 of 2013 marked as annexure GON-2 in the 1<sup>st</sup> Respondent’s Replying Affidavit and do confirm that among the issue for determination was whether the Petitioner rightfully acquired land known as Kisumu Municipality /Block 11/136. In the said Petition, the Petitioner also filed Issues for Determination and issues 8,9 and 10 was whether the Respondents act of cancelling the Petitioner’s title was unlawful, whether the Respondents actions of cancelling the Petitioner’s title violated the Petitioner’s rights and is contravention of Article 40, 48 and 50 of *the Constitution* and whether the Petitioner’s fundamental rights and freedoms in the Bill of Rights have been violated respectively.
- 39 Justice Kibunja delivered Judgment on ELC Petition No. 6 of 2013 *Arthur Athanasius Awori v Attorney General & 2 others* [2017] eKLR, where the Learned Judge dismissed the Petition on grounds that the Petitioner did not acquire the property in a lawful and procedural manner.
- 40 The Petitioner’s son in a further Affidavit dated November 10, 2021, stated that his father received a letter dated December 10, 2012 from the Ministry of Housing where he directed him to trace the documents on the boarding of the house that is on the suit property and on the creation of the lease issued to him in respect of the suit property. The Petitioner’s son stated that he made efforts to trace the file but was unsuccessful and therefore his father was unable to provide a response to the Ministry of Lands which resulted in the court dismissing Kisumu ELC Petition No. 6 of 2013.
- 41 It was further stated that after Kisumu ELC Petition 6 of 2013 was dismissed, the Petitioner instructed his son to renew efforts to trace the missing documents from the Ministry of Lands to enable him seek review of the said Judgment. It is the Petitioner’s case that the documents were traced on October 2021 which documents are marked as exhibit JA-1 to JA-10.
- 42 This court is of the view that although the Petitioner traced documents to prove that he is the registered owner of the suit property, there is no evidence to show how he located the said documents from the Ministry of Lands. If the Petitioner traced the documents from the Lands office and his intention was that after the said documents were traced, he would file an Application for Review of the Judgment of Justice Kibunja, then he ought to have filed the same instead of filing the present Petition.
- 43 I do find that this Petition barred by the principle of *res judicata* as there is concurrence of jurisdiction, the subject matter is the same and that the matter in question is identical to Kisumu ELC Petition No. 6 of 2013.



**ii. Whether the 2<sup>nd</sup> respondent had powers to revoke the petitioner's title to the suit property.**

44 The functions of the National Land Commission are set out under Article 67 (2) of *the constitution* of Kenya and include:

- 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.
- Section 14 of the *National Land Commission Act*, on the other hand outlines the mandate of the Commission and provides as follows:

- (1) Subject to Article 68(c)(v) of *the Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the National or a County Government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
- (2) Subject to Articles 40, 47 and 60 of *the Constitution*, the Commission shall make rules for the better carrying out of its functions under subsection (1).
- (3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
- (4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.
- (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.
- (6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
- (7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.
- (8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of *the Constitution*.
- (9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).



- 45 In the case of *Republic v National Land Commission Ex parte Holborn Properties Ltd* [2016] eKLR, the court held that the Commission had power to review titles that are privately held where such titles were initially public land and were converted to private holdings with a view of ascertaining whether the title was properly and legally acquired.
- 46 Parties herein did not refer to the correct Gazette Notice Number however the Petitioner herein annexed the Gazette Notice dated July 17, 2017 Volume CXIX-No. 97, Gazette Notice No. 6864 which I have perused and do confirm that the Petitioner's title to the suit property was revoked after the 2<sup>nd</sup> Respondent had followed due process of the law.
- 47 There was a complaint lodged by the Ethics and Anti Corruption Commission on May 6, 2016 regarding the grants issued to various individuals in different counties and the 2<sup>nd</sup> Respondent issued a notice to review the legality of the grants and or occupation of government houses by way of publication of notice dated October 30, 2016 and 18 January 2017. It is not in dispute that the 2<sup>nd</sup> Respondent heard the parties affected and after the proceedings the 2<sup>nd</sup> Respondent found out that the allocation of the suit property was unlawful and therefore revoked the title to the suit property on reasons that there was illegal allocation on public utility land reserved for government housing.
- 48 Although the Petitioner in his Petition stated that the 2<sup>nd</sup> Respondent had no powers or jurisdiction under the *National Land Commission Act* to revoke the allocation of the suit property outside the 5 year period from the commencement of the Act which commenced on May 2, 2012, this court is of the view that the title to the suit property was revoked by the 2<sup>nd</sup> Respondent after completion of the review process as it had followed the procedure outlined in section 14 of the *National Land Commission Act*.
- 49 It is clear from the Gazette Notice that the 2<sup>nd</sup> Respondent revoked the title to the suit property as it had established that the said title was acquired illegally and the allocation of the title to the suit property and the house to the Petitioner was a public utility land reserved for government housing.
- 50 Based on the above analysis, I do find that the procedure for revocation of the title to the suit property by the 2<sup>nd</sup> Respondent was done within the law.

### iii. Whether the petition is merited.

- 51 The Petitioner herein has filed the present Petition on allegations that his rights under Article 10, 27 and 40 of *the Constitution* have been violated as his title to land known as Kisumu Municipality / Block 11/136 was cancelled by the 2<sup>nd</sup> Respondent herein on grounds that he did not acquire the suit property legally.

Article 40 of *the Constitution* provides as follows;

40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or



- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

52 In the case of *Anarita Karimi Njeru v Republic* [1976-1980] KLR, which provides that any party who seeks redress for infringement of their fundamental rights is duty bound to demonstrate to the Court in the clearest way possible in which manner rights have been violated. In the said case, the Court held;

‘if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed.’

53 It is clear from the above analysis that the present Petition lacks merit as the Petitioner has not demonstrated how his rights were violated. The evidence on record shows that the Petitioner acquired the suit property illegally and in an unlawful manner as he was unable to prove his case on a balance of probabilities. This court has also established that the present Petition is res judicata as the issues of ownership to the suit property were determined by Justice Kibunja in ELC Petition No. 6 of 2013 *Arthur Athanasius Awori v Attorney General & 2 others* [2017] eKLR.

54 In the upshot, I do find that this Petition lacks merit and is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED AT KISUMU THIS 15<sup>TH</sup> DAY JULY 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

