



**Machoka v The National Land Commission & 2 others (Environment & Land  
Petition 6 of 2019) [2022] KEELC 4750 (KLR) (25 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4750 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ENVIRONMENT & LAND PETITION 6 OF 2019**

**JM ONYANGO, J**

**AUGUST 25, 2022**

**IN THE MATTER OF ARTICLES 2(2), 10(2), 19, 20, 21(1) & (2), 23(1),  
27(1), 40(2), 47(2), 48, 50(1) & 165 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT  
OF THE PROPERTY RIGHTS OF THE PETITIONER**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT, NO. 3 OF 2012**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, 2016**

**AND**

**IN THE MATTER OF: UNSURVEYED COMMERCIAL PLOT MEASURING 0.06 HA**

**AND**

**IN THE MATTER OF: LETTER OF ALLOTMENT REFERENCE NO. TP/37/XV/60**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 (PROTECTION OF  
RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**FRANCIS OBAE MACHOKA ..... PETITIONER**

**AND**

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



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

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

## JUDGMENT

### Introduction

1. I am called upon to determine a petition dated August 20, 2019 supported by the affidavit of one Francis Obae Machoka sworn on even date. The petitioner alleges that their rights have been violated and infringed upon and consequently seeks the following prayers from the court:
  - a) A declaration that the petitioner is entitled to equal protection and/or benefit under the provisions of the *Constitution*, 2010 and the general provisions of the law including but not limited to the *National Land Commission Act*, 2012.
  - b) A declaration that the failure and/or neglect to process and issue a lease instrument and certificate of lease, over and in respect of the unsurveyed commercial plot- Kisii town is invalid and unconstitutional.
  - c) The honourable court be pleased to grant an order of judicial review in the nature of *mandamus* to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to carry out and/or implement the statutory duties conferred upon the same under law and thereby proceed to issue to and in favour of the petitioner the requisite lease instrument and the certificate of lease over and in respect of the unsurveyed commercial plot- Kisii town.
  - d) The honourable court be pleased to grant an order of judicial review in the nature of prohibition, prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein either by themselves, agents, servants, and/or anyone acting on their instructions from issuing any lease instrument(s), certificate of lease and/or any title documents, over and in respect of the unsurveyed commercial plot- Kisii town in contradiction of the letter of allotment dated August 15, 1999, hitherto issued in favour of the petitioner.
  - e) Costs of the petition be borne by the respondents jointly and severally.
  - f) The honourable court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.
2. The petition was opposed *vide* the respondent's grounds of opposition dated April 19, 2021 enumerating the various reasons. The respondents were of the opinion that there is no breach of any constitutional right and further that the petition is devoid of any merit and an abuse of the court process.
3. Before I can dissect the various legal issues that emerge in this matter, I first have to hark back to the genesis of this suit. On August 15, 1999 the petitioner herein was issued with a letter of allotment by the commissioner of lands. The letter of allotment elucidated the various terms and conditions which it was subject to and which would also be binding on the allottee.
4. This is the basis upon which the petitioner has instituted this suit seeking *inter alia* to protect his proprietary rights on a property he claims to have acquired by virtue of the letter of allotment.



5. The parties were directed to canvass the petition by way of written submissions. The petitioner complied and filed his submissions dated September 7, 2021 on September 17, 2021.
6. Despite being granted ample time to comply with the courts directions the respondents regrettably failed and/or neglected to file their respective submissions.

### **Issues for Determination**

7. The following issues emerge for determination:
  - i. Does the petitioner have any interest in that parcel of land known as unsurveyed commercial plot- Kisii town?
  - ii. Does the petition before the court have any merit?
  - iii. Who should bear the costs of this petition?

### **Analysis and Determination**

8. It is the petitioner's case that having been issued with a letter of allotment and having paid the monies at the foot thereof, the 1<sup>st</sup> respondent was obliged to prepare and issue the lease instrument and ultimately the certificate of lease. It is upon this basis that the petitioner claims that his constitutional rights were violated.
9. It is trite that 'he who alleges must prove' sections 107, 108 and 109 of the *Evidence Act*, cap 80 laws of Kenya make provision as to who bears the burden of proof and provides as follows:-
  107. Burden of proof
    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  108. Incidence of burden  
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
  109. Proof of particular fact  
The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'
10. It was therefore incumbent upon the petitioner to produce all the requisite documentation to establish their claim in the property.
11. As aforementioned, the letter of allotment was issued to the petitioner on August 15, 1999. I must therefore turn back the clock and travel back to the old land law regime and examine all the relevant statutes that were in place during that period.



12. The letter of allotment was subject to the *Government Lands Act* (repealed) and the title would be issued under the *Registration of Titles Act* and *Registered Land Act* (repealed). These three statutes were in force at the time when the letter of allotment was issued to the petitioner herein.
13. Sections 3(a) and 7 of the *Government Lands Act* (repealed) are relevant in the circumstances. section 3(a) provides;
  - ‘The president, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—
  - (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;’
14. Section 2 of the *Government Lands Act* (repealed) defines unalienated government land as government land which is not for the time being leased to any other person, or in respect of which the commissioner has not issued any letter of allotment.
15. Section 7 of the *Government Lands Act* (repealed) gives the commissioner power to execute conveyances lease or licence for the occupation of government lands on behalf of and under the directions of the president.
16. The procedure for alienation of public land is well settled in law and was expounded upon by the court in *Moses Okatch Owuor & another v Attorney General & another* [2017] eKLR.
17. It is commenced with a request for allocation being made to the Commissioner of Lands, who would then write to the Director of Physical Planning to prepare the part development plan (PDP) indicating the precise site for alienation. The PDP is then published in public reports and local dailies with nationwide circulation for purposes of inviting members of the public to make representations or objections to the PDP. If no objections are received, the Director of Physical Planning submits the certified plans to the minister for his approval. Upon approval, the Director of Physical Planning assigns an approved plan number to the PDP and enters the details in the register of development plans. The approved plan is then forwarded to the Commissioner of Lands to issue a letter of allotment. It is only after the issuance of the letter of allotment and the compliance with the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease.
18. In paragraph 4 of their grounds of opposition dated April 19, 2021 the respondents similarly expounded on the procedure of alienating public land.
19. It is the respondents’ argument that the petitioner has not shown whether the above-mentioned procedure was followed. In short, it is the respondents’ argument that the petitioner ought to have adduced sufficient evidence to demonstrate that the letter of allotment was acquired procedurally and that the terms therein were complied with.
20. I have had the opportunity to examine the letter of allotment annexed to the petitioners affidavit sworn on August 20, 2021. An allotment letter is incapable of conferring an interest in land. In essence, it is nothing more than an offer subject to the conditions therein which ought to be fulfilled by the allottee.
21. In saying so, I am guided by the decision in *Dr Joseph N K Arap Ng’ok v Justice Moiyo Ole Keiyua & 4 others* C A 60/1997 where the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offeror and the offeree and does not confer



interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

22. Additionally, it is well established that an allotment letter should have the part development plan (PDP) attached to it.

23. In *African Line Transport Co Ltd vs The Hon AG*, Mombasa HCCC No 276 of 2013 Njagi J held as follows:

“...Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number.”

And again, in *Nelson Kazungu Chai & 9 others v Pwani University College* (2014) eKLR the court observed that:

“Worth noting as well is that no part development plan was produced to back the appellants’ claim that due process had been followed as alleged.”

24. Having established the necessary steps to be followed, it emerges that a petitioner basing their interest in land on the foundation of an allotment letter must provide the following proof:

- i. First, the allotment letter from the Commissioner of Lands;
- ii. Secondly, and attached to the allotment letter, a part development plan;
- iii. Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline.

25. The petitioner has availed the following key documents for consideration:

- i. A copy of the part development plan,
- ii. A copy of a banker’s cheque no 000025 for Ksh 33,730/= dated September 23, 2002.
- iii. A revenue receipt number 306230 issued on November 11, 2002.

26. A scrutiny of the allotment letter dated August 15, 1999, indicates that the offer ought to have been accepted within 30 days and the conditions in relation to requisite payment similarly ought to have been adhered to within the 30 day window.

27. The allotment letter would automatically lapse after 30 days should the allottee fail to adhere to the set out conditions. The petitioner issued a cheque dated September 23, 2002, three years after the offer had long since lapsed.

28. In the case of *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR it was stated as follows:

“I have considered the evidence on record and the submissions of the parties and do find that a letter of allotment was issued to Mr Joseph K Mugambi on October 21, 1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr J K Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court



holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent...’

29. I concur with the foregoing authorities and apply the holdings therein to the petition before this court. The petitioner regrettably failed to adhere to the conditions of the letter of allotment dated August 15, 1999 and the offer consequently lapsed after 30 days. The payment made in 2002 was therefore way out of time and therefore inconsequential.
30. In his submissions at paragraph 8, counsel for the petitioner conveniently fails to highlight the fact that the payment was done 3 years after the offer had lapsed. It is the petitioner’s argument that upon the acceptance of the designated amount the respondent was by law obliged to proceed and engross the lease instrument in respect of the suit property.
31. The petitioner further argues that failure to progress the letter of allotment and in particular, to issue the lease instrument amounts to infringement of the petitioner’s fundamental freedoms and rights under the provisions of article 27(1), 40(2), 47(1) and 50(1) of the Constitution, 2010.  
The petitioner has relied on various cases to assert his position.
32. An examination of the evidence before the court clearly demonstrates that once the petitioner failed to meet the conditions set out in the letter of allotment, the same lapsed. There was no longer any offer on the table and consequently, nothing to accept.
33. Corollary to the foregoing, no interest in the land could reasonably be transferred to the petitioner. Any such attempt would render the transaction void *ab initio*. He has no proprietary interest to protect under article 40(2) of the Constitution.
34. The petitioner waited for 20 years before realizing that he had failed to clarify his position in relation to the suit property or to recover the monies paid for the suit property. The petitioner clearly understood that he had to adhere to the conditions set out in the letter of allotment; this is corroborated by the fact that he paid the requisite amount 3 years after the offer had lapsed.
35. The petitioner thereafter took 20 years without initiating any action to recover the money paid to the respondent, perhaps in the hope that an expired letter of allotment would be enforced and he would be awarded title to the suit property.
36. The petitioner has failed to provide any explanation why it took him all that time to initiate any action; for all intents and purposes, he slept on his rights. It is quite evident that this petition is an attempt to circumvent the statute of limitations.
38. In view of the foregoing, I come to the ineluctable conclusion that the petition herein is misconceived and the same lacks merit.
39. The petitioner has failed to satisfy the court that the prayers sought in the petition should be granted. Consequently, I hereby dismiss the petition with no order as to costs.
40. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KISII THIS 25<sup>TH</sup> DAY OF AUGUST, 2022.**

**J. M. ONYANGO**

**JUDGE**

