



REPUBLIC OF KENYA



**Onguti & another v Kamau & 11 others (Environment & Land Petition  
E004 of 2021) [2022] KEELC 13778 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13778 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E004 OF 2021**

**JO MBOYA, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**EDWIN MOTARI ONGUTI ..... 1<sup>ST</sup> PETITIONER**

**SAMUEL MOGAKA OCHARO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PETER KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**CHARTUR PROPERTIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MADATALI SUBURAH CHARTUR ..... 3<sup>RD</sup> RESPONDENT**

**HUSSEIN MADATALI CHATUR ..... 4<sup>TH</sup> RESPONDENT**

**ZABA MADATALI CHATUR ..... 5<sup>TH</sup> RESPONDENT**

**REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA) T/A THE  
MATER MISERICORDIAE HOSPITAL ..... 6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 8<sup>TH</sup>  
RESPONDENT**

**NATIONAL LAND COMMISSION ..... 9<sup>TH</sup> RESPONDENT**

**NAIROBI WATER & SEWERAGE & COMPANY LTD ..... 10<sup>TH</sup> RESPONDENT**

**CITY COUNTY OF NAIROBI ..... 11<sup>TH</sup> RESPONDENT**

**KENYA ELECTRICITY TRANSMISION COMPANY LTD .. 12<sup>TH</sup> RESPONDENT**



## JUDGMENT

### Introduction and Background

1. Vide the petition dated the January 5, 2021, the petitioners herein have approached the court seeking for the following reliefs;
  - I. Orders LR No 209/13083 approximately area 1.944 Ha be declared public land.
  - II. That the 4<sup>th</sup> respondent be directed to remove the construction wall on LR No 209/13083.
  - III. Orders be so issued for demolition of perimeter wall and all other structures on LR No 209/13083.
  - IV. That the 9<sup>th</sup> respondent ( National Land Commission) be restrained from allocating the same without consulting all relevant stakeholders in terms of (sic) special impact.
  - V. Such other orders this honourable court shall deem just
2. The petition herein is premised and/or anchored on various grounds which are enumerated on the face thereof and same is further supported by a six-paragraph affidavit sworn on the January 5, 2021.
3. Upon being served with the subject petition, various respondents duly filed Notices of appointment of advocates and thereafter filed their responses on various dates.
4. Suffice it to point out that the 6<sup>th</sup> respondent filed a replying affidavit sworn by one Evelyne N Maina on the April 6, 2021, whereas the 11<sup>th</sup> respondent filed a replying affidavit sworn by one Eric Odhiambo Abwao on the April 1, 2021.
5. Other than the said respondents, the rest of the respondents, merely filed notices of appointment, save that the 2<sup>nd</sup> to 5<sup>th</sup> respondents also filed a notice of motion application dated the March 8, 2021.
6. For clarity, the said application was the subject of the ruling of the court rendered on the February 10, 2022 and same was dismissed.

### Depositions by the Parties:

#### The Petitioners' Case:

7. Vide supporting affidavit sworn on the January 5, 2021, the 1<sup>st</sup> petitioner has contended that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have trespassed onto LR No 209/13083, measuring approximately 1.944 Ha, which parcel of land constitutes and/or comprises of riparian land as per records currently obtaining at the office of director of survey.
8. On the other hand, the deponent has further averred that the said property namely, LR No 209/13083, measuring approximately 1.944 Ha, touches on river Ngong and hence the massive construction that is being under taken by and/or on behalf of the 1<sup>st</sup> to 5<sup>th</sup> respondents, is bound to affect and/or block the sewer line and the drainage system into Ngong river.
9. Further, the deponent has also stated that the suit property, which is complained of is also public land and hence same ought not to have been alienated to and in favor of any private developer, whatsoever.



10. On the other hand, the deponent has also averred that the 6<sup>th</sup> respondent, who is the owner of LR No 209/9772, has also trespassed onto or encroached upon LR No 209/13083, which the deponent contends to be Public land.
11. Premised on the foregoing averments, the deponent has therefore implored the honourable court to declare that LR No 209/13083, constitutes and/or is public land.
12. Besides, the deponent has also sought that the honourable court be pleased to grant an order directing the 4<sup>th</sup> respondent to remove the wall that has been erected on LR No 209/13083, and also that the 9<sup>th</sup> respondent, namely, National Land Commission be restrained from allocating same, without consulting all the relevant stakeholders, including the petitioners herein.

**Response by the 6<sup>th</sup> respondent:**

13. Upon being served with the subject petition, the 6<sup>th</sup> respondent filed a replying affidavit through one, namely, Evelyn N Maina sworn on the April 6, 2021. For clarity, the deponent has averred that the subject petition does not disclose any reasonable cause of action against the 6<sup>th</sup> respondent.
14. At any rate, it has been further been averred that no evidence has been tendered or placed before the honourable court that LR No 209/13083, is public land and that the 6<sup>th</sup> respondent has encroached onto same or at all.
15. Finally, the deponent has averred that the claim by the petitioners that the 6<sup>th</sup> respondent be compelled to avail the coordinates for its boundary wall, is misconceived and otherwise legally untenable.
16. In any event, it has been posited that if the petitioners herein were lawfully in pursuit of such Information then same ought to comply with the provision of article 35 of the [Constitution 2010](#), as read together with the provisions of [Access to Information Act, 2016](#).
17. Based on the foregoing averments, the 6<sup>th</sup> respondent has sought to have the petition herein be dismissed, for not disclosing any reasonable cause of action and for being an abuse of the due process of the honourable court.

**Response by the 11<sup>th</sup> respondent:**

18. The 11<sup>th</sup> respondent has responded to the petition vide a replying affidavit sworn by one Erick Odhiambo Abwao and which is sworn on the April 1, 2021.
19. On his part, the deponent has averred that the petitioners herein have no requisite locus standi to commence and/or mount the subject petition.
20. Further, it has been averred that the petition similarly does not disclose any reasonable cause of action as against the 11<sup>th</sup> respondent and in any event, that the 11<sup>th</sup> respondent has no capacity to determine what constitutes public land, which it is contended can only be dealt with and/or addressed by the National Land Commission.
21. Other than the foregoing, it has been similarly averred that if there is any construction being carried out and/or undertaken on the suit property and which construction is likely to block the drainage system into Ngong River, then such a complaint ought to have been addressed with National Environment Management Authority.



22. Finally, the deponent has averred that even though the petitioners have alluded to LR No 209/13083, which is contended to be Public land, no evidence has been placed before the Honourable court to authenticate the ownership status of the suit property or at all.
23. In the premises, it is the contention by or on behalf of the 11<sup>th</sup> respondent that the subject petition is not only an abuse of the due process of the honourable court, but same is legally untenable.

#### **SUBMISSIONS BY THE PARTIES:**

24. On or about the March 23 2022, the petition herein came up for direction, pertaining to and/or concerning the mode of disposal of same.
25. During the course of the said directions, the parties present, albeit in the absence of the petitioners, who had been duly served, proposed to have the petition canvassed and/or disposed of by way of affidavit evidence and written submissions.
26. In line with the foregoing proposal, the court ordered and directed that the petition be prosecuted and be disposed of on the basis of affidavit evidence and written submissions. Consequently, the court also circumscribed the timeline for the filing and exchange of the written submissions.
27. Following the direction of the honourable court, the 2<sup>nd</sup> to 5<sup>th</sup> respondents, the 8<sup>th</sup> and the 11<sup>th</sup> respondents duly complied and filed their written submissions. For clarity, the written submissions by the 2<sup>nd</sup> to 5<sup>th</sup> respondents are dated the June 20, 2022.
28. On the other hand, the submissions by and/or on behalf of the 8<sup>th</sup> respondent are dated the 3<sup>rd</sup> June 2022, whilst the submissions filed on behalf of the 11<sup>th</sup> respondent are dated the July 14, 2022.
29. Suffice it to point out that the three sets of written submissions form and/or comprise part and the record of the honourable court and same have been duly considered and taken into account.

#### **Issues for Determination**

30. Having reviewed the petition dated the January 5, 2021, the supporting affidavit thereto and the responses filed by designated respondents; and having similarly considered the written submissions filed by the Parties, the following issues do arise and are thus germane for determination;
  - I. Whether the subject petition has been pleaded with the requisite particularity and specificity in accordance with the established and hackneyed principles guiding constitutional petitions.
  - II. Whether this honourable court is seized and/or possessed of jurisdiction to adjudicate upon and entertain the subject petition.

#### **Analysis and Determination**

##### **Issue Number 1**

Whether the subject petition has been pleaded with the requisite particularity and specificity in accordance with the established and hackneyed principles guiding constitutional petitions.

31. It is an established and trite rule of pleadings that who ever is keen and or desirous to mount and/or lodge a constitutional petition [like the one before hand] must as a matter necessity invoke the relevant provisions of the constitution, which are contended to have been breached, violated and/or infringed upon or which are the subject of the threat complained of.



32. Other than the established requirement to plead the impugned provisions of the Constitution, in terms of the preceding paragraph, it is also common knowledge that the petitioner must also stipulate and/or identify the persons responsible for the breach, violation and/or infringement complained of.
33. Finally, it is also incumbent upon the petitioner to thereafter particularize and/or specify the manner in which the violations and/or infringement complained of, is being undertaken or otherwise threatened.
34. For coherence, the stipulation of the manner in which the impugned provisions of the constitution are being violated or threatened upon must be enumerated, amplified and/or highlighted in the petition and similarly, same must also be amplified in the affidavit in support of the petition.
35. Once the petitioner has complied with the foregoing rules of pleadings, which are mandatory and obligatory, on every petitioner, same is thereafter required to place before the court Honourable credible evidence in support of the violations and/or infringements complained of.
36. Without belaboring the point, the foregoing rules of pleadings as pertains to Constitutional petitions were underscored, elaborated upon and re-established vide the decision in the case of *Annarita Karimi Njeru v The Republic*, (1979)eKLR, where the court stated and observed as hereunder;
 

“We would, however, again stress that 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, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
37. Recently, the dictum alluded to in the decision (supra), was re-visited by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* Civil Appeal No. 290 of 2012 [2013]eKLR.
38. For coherence, the court observed as hereunder;
  - (41) We cannot but emphasize 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.
  - (42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party



39. Despite the settled principles alluded to in the foregoing decisions, the petition beforehand is so scanty and devoid of the requisite particulars. For clarity, I confess that it is even difficult to comprehend the import and/or tenor of the complaint by the petitioners.
40. Nevertheless, I must also point out that there is no mention of (sic) the article, if any, of the Constitution, which is contended to have been infringed upon, violated and/or threatened with violation.
41. Other than the foregoing, one would have expected that some light would be shed on the petition by filing a comprehensive supporting affidavit, to provide some pound of flesh and amplify the petition.
42. However, the supporting affidavit that has been filed excluding the preamble and the last paragraph, only contains four other paragraphs, each comprising of at most two lines. Consequently, if the petition was bereft of particulars, the supporting affidavit is worse.
43. In the premises, I come to the conclusion that the petition dated the January 5, 2021 filed by the petitioners herein, premature and incompetent. Similarly, same does not meet the established threshold for purposes of an effective determination by the Honourable court.
44. Based on the foregoing ground alone, I would have been constrained to terminate the subject matter and end this Judgment. However, there is yet another critical, nay essential issue that merits discussion.
45. Consequently, I am obligated to venture and deal with the second Issue herein, given the nature and kind of Reliefs that were sought for at the Foot of the Impugned petition.

## **Issue Number 2**

Whether this honourable court is seized and/or possessed of Jurisdiction to adjudicate upon and entertain the subject petition.

46. Vide the subject petition, the petitioners are seeking two primary reliefs, namely;
  - I. LR No 209/13083, approximate arrear 1.944 be declared as public land.
  - II. The 9<sup>th</sup> respondent, namely, National Land Commission be restrained from allocating the same (LR No 209/13083) without consulting the relevant stakeholders in terms of (sic) social impact.
47. Granted, there are some other secondary reliefs which have been sought, essentially demolition of the perimeter wall erected on the suit property. Nevertheless, the paramount issue for determination herein touches on who has the mandate to declare a particular parcel of land as public land or otherwise.
48. Before venturing to address and/or attend to this jurisdictional question, it is imperative to take cognizance of the provision of article 62 of the [Constitution 2010](#).
49. For convenience the said provisions are reproduced as hereunder;
  62. Public land
    - (1) Public land is—
      - (a) land which at the effective date was unalienated government land as defined by an act of parliament in force at the effective date;



- (b) land lawfully held, used or occupied by any state organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the state by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;
- (e) land in respect of which no heir can be identified by any legal process;
- (f) all minerals and mineral oils as defined by law;
- (g) government forests other than forests to which article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- (h) all roads and thoroughfares provided for by an act of parliament;
- (i) all rivers, lakes and other water bodies as defined by an act of parliament;
- (j) the territorial sea, the exclusive economic zone and the sea bed;
- (k) the continental shelf;
- (l) all land between the high and low water marks;
- (m) any land not classified as private or community land under this Constitution; and
- (n) any other land declared to be public land by an act of parliament—
  - (i) in force at the effective date; or
  - (ii) enacted after the effective date.

- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
  - (a) clause (1)(a), (c), (d) or (e); and
  - (b) clause (1)(b), other than land held, used or occupied by a national State organ.
- (3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
- (4) Public land shall not be disposed of or otherwise used except in terms of an act of parliament specifying the nature and terms of that disposal or use.

50. My reading of the foregoing provisions, drives me to the conclusion that the determination and declaration as to what comprises of public land is the mandate of the National Assembly as well as the County Assembly, the latter where the impugned piece of land, fall within the locality of the County Government.

51. From the foregoing observation, it then becomes apparent that this Honourable court does not have the requisite jurisdiction to declare any piece of land as public land, without the intervention of the



National Assembly and the National Land Commission, which is an Independent Constitutional Commission established vide article 67 of the *Constitution 2010*.

52. Notwithstanding the foregoing, it is also appropriate to mention that the suit property, namely, LR 209/13083 is indeed stated to be private land belonging to and registered in the name of Jaj Super Power Cash & Cary Ltd, which is a private proprietor, in possession of the requisite certificate of lease.
53. Indeed the position that the suit property is private property is underscored vide the submissions filed on behalf of the 8<sup>th</sup> respondent, who upon application for the issuance of the environment impact assessment license, reviewed the documentation and were satisfied as to the ownership of the suit property.
54. To the extent that the suit property is indeed private property belonging to and owned by a known proprietor, can this honourable court purport to declare the suit property as public land, albeit without same having been compulsorily acquired.
55. Respectfully, I am afraid that the honourable court herein, whilst being alive to the provisions of article 40 of the *Constitution 2010*, which protects proprietary rights, cannot make such an order.
56. At any rate, it is also apparent, that even though the petitioners are seeking to have the suit property declared as Public land, same have failed to implead and/or include the known and registered Proprietor thereof as a Party to this petition.
57. Surely, can the honourable court proceed to make such drastic orders albeit without the involvement and participation of the registered proprietor of the suit property. Certainly, the answer is in the negative. See articles 27, 47 and 50(1) of the *Constitution 2010*.
58. Other than the prayer seeking to have the suit property declared as public land, the petitioners' have also sought that National Land Commission be restrained from allocating the suit property without the involvement from the relevant stakeholders. However, the question that begs the answer is whether National Land Commission can allocate or better still can alienate private land.
59. In my humble view, once land has been allocated and/or alienated and certificate of title issued, same becomes private land and National Land Commission or such other authorized body, becomes divested of the mandate to deal with such private property.
60. To fortify the foregoing statement, which is otherwise elementary, it is apt to adopt the dictum in the case of *Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR, where the Court of Appeal stated and observed as hereunder;

“The alienation to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents is the grant [that] takes priority; at the time another grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5<sup>th</sup> respondent to allot and alienate to the original allottees.

In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.



61. Finally, the petitioners herein have also sought that the National land Commission be restrained from allocating the suit property, (assuming same had such powers), without consulting and/or the involvement of the relevant stakeholders.
62. To my mind, the Constitutional mandate to administer and manage public land on behalf of both the National and County Government is exclusively vested in the National Land Commission. See article 62(2) & (3) as read together with 67 (2a) of the [Constitution 2010](#).
63. In any event, the scope and mandate of the National Land Commission whilst administering and managing public land has received judicial pronouncements and same is therefore well delineated.
64. Be that as it may and without belaboring the point, the dictum of the Court of Appeal in the case of [Cordison International \(K\) Limited v Chairman National Land Commission & 44 others](#) [2019] Eklr, is succinct and apt.
65. For coherence, the court stated and observed as hereunder;

“ 30. article 67 of the [Constitution](#) that establishes the National Land Commission gives it power to, *inter alia*, manage public land on behalf of the national and county governments. The suit land is public land as defined under article 62(1) (a) of the [Constitution](#) and therefore vests in and is held by the County Government of Lamu in trust for the people resident in the County. Article 62 (2) of the [Constitution](#) provides that the land shall be administered on behalf of the County residents by the National Land Commission. Section 5 (1)(a) of the [National Land Commission Act](#) is also explicit that one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments. Under section 5(2) of the [Act](#) the Commission may, “on behalf of, and with the consent of the national and county governments, alienate public land.”...31. Section 12 of the [Land Act](#) grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the [Act](#) specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land

. It is therefore clear beyond any peradventure that it is the role of the Commission, and not a county government, to allocate public land. The allocation must however comply with the laid down constitutional and statutory procedure as stated above.”

66. Premised on the foregoing, I come to the inescapable conclusion that this honourable court is devoid and/or bereft of the requisite jurisdiction to entertain and/or adjudicate upon the subject petition.
67. In any event, it is also appropriate to draw the attention of the petitioners to the provisions of article 249 (2) (b) of the [Constitution 2010](#), which underscores the fact that by virtue of being a Constitutional commission, National Land Commission cannot be under the control and or direction of any authority, pertaining to the manner in which same discharges her constitutional mandate.

#### **Final Disposition:**

68. From the various observation made in the body of the Judgment herein, it must have become apparent and evident that the subject petition was misconceived and stillborn.
69. Nevertheless and in view of the foregoing, I come to the conclusion that the petition dated January 5, 2021, other than being premature and incompetent, same was also Misconceived and bad in law.



70. In a nutshell, the petition dated January 5, 2021 be and is hereby dismissed, albeit with no orders as to costs.

71. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Kevin Court Assistant

Ms. Kendy for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent

Mr. Mbogua Ngugi for the 6<sup>th</sup> respondent

Ms. Muyai h/b for Mr. E. Gitonga for the 8<sup>th</sup> respondent

Mr. Okoyo Ondieki for the 11<sup>th</sup> respondent

N/A for the 1<sup>st</sup>, 7<sup>th</sup>, 9<sup>th</sup> 10<sup>th</sup> and 12<sup>th</sup> respondents.

N/A for the petitioners.

