



REPUBLIC OF KENYA



KENYA LAW
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**Okoti v Ministry of Lands and Physical Planning & 5 others (Petition
32 of 2019) [2022] KEELC 15511 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION 32 OF 2019
LC KOMINGOI, J
NOVEMBER 24, 2022**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST RESPONDENT

HON.ATTORNEY GENERAL 2ND RESPONDENT

SAMMY MWAITA 3RD RESPONDENT

JOHN MWANGANGI 4TH RESPONDENT

KENNEDY MOCHERE KABURI 5TH RESPONDENT

SPOURTINAH MORAA NYAMWEYA 6TH RESPONDENT

JUDGMENT

1. Vide the petition dated July 1, 2019 and supported by the petitioner's supporting affidavit sworn on July 1, 2019, the petitioner seeks;
 - i. That the honourable court be pleased to determine the following questions:
 - a. Whether the approximately 2.0 hectares parcel land known as LR No 12661/2 is public property.
 - b. Whether the impugned transfer of LR No 12661/1 to private entities is null and void ab initio and of no consequence in law.
 - c. Whether the 1st and 2nd respondents should recover LR No 12661/2 and restore it to public ownership.
 - d. Whether the 3rd and 4th respondents are unfit to hold public office.



- ii. That the honourable court be pleased to make the following declarations and issue the following orders;
 - a. A declaration be and is hereby issued that the approximately 2.0 hectares parcel land known as LR No 12661/2 is public property.
 - b. A declaration be and is hereby issued that impugned transfer of the approximately 2.0 hectares parcel of land known as LR No 12661/2 to private entities is null and void *ab initio* and of no consequence in law.
 - c. A declaration be and is hereby issued that the 1st and 2nd respondents should recover the approximately 2.0 hectares parcel of land known as LR No 12661/2 and restore it to public ownership.
 - d. A declaration be and is hereby issued that the 3rd and 4th respondents are unfit to hold public office.
 - e. That the honourable court do issue and hereby issues an order compelling the 1st and 2nd respondents to quash and invalidate the following title deeds;
 - a. LR No 12661/77
 - b. LR No 12661/78
 - c. LR No 12661/79
 - d. LR No 12661/80
 - e. LR No 12661/81
 - f. LR No 12661/82
 - g. LR No 12661/83
 - f. The honourable court do issue and issues an order compelling the 1st and 2nd respondents to recover LR No 12661/2 and register it in the name of the Government of Kenya, or another competent authority to hold in trust on behalf of the republic.
 - g. The honourable court be pleased to issue and hereby issues an order ordering the respondents to pay costs of these proceedings.
 - h. The honourable court be pleased to issue any other or further remedy that the honourable court shall deem fit to grant.
2. The petitioner seeks the court intervention to restore land registered as LR No 12661/2 which he contends is public land that has been grabbed by private developers. His case is that the suit land measuring two (2) acres and situated in Lang'ata was surrendered alongside LR No 12661/3 to the state free of cost by the late honourable Kenneth Njindo Matiba for public purpose as a condition for sub-division of LR No 2245/1/R. He added that the transfer of LR No 12661/3 was effected to the Water Development department while the suit land was fraudulently and illegally subdivided into the following portions;
- a. LR No 12661/77
 - b. LR No 12661/78
 - c. LR No 12661/79



- d. LR No 12661/80
 - e. LR No 12661/81
 - f. LR No 12661/82
 - g. LR No 12661/83
3. The petitioner contended that LR No 12661/77 is owned by the 3rd respondent who was the Commissioner of Lands at the time through Tolosho Limited and LR No 12661/78 is owned by the 4th respondent who was a senior Government officer with the Ministry of Lands, Department of Survey at the time. He added that LR No 12661/78 is the subject of a property dispute being Nairobi ELC civil suit No 374 of 2011-John Mwangangi v Kennedy Mochere Kaburi & 3 others. It is also the petitioner's case that the takeover of the suit land offends article 10, 40, 62 and 259(1) of the Constitution as well as article 24 and 47.
 4. The Attorney General appeared for the 1st and 2nd respondents. A notice of appointment of advocates dated October 17, 2019 was filed by S.M Keyonzo Advocates for the 3rd respondent.
 5. On behalf of the 4th respondent, a notice of appointment of advocates dated October 16, 2019 was filed by Musyoka Murambi and Associates.
 6. A notice of appointment of advocates dated October 9, 2019 was filed by Meenye Kirima Advocates for the 5th and 6th respondents.

The 4th Defendant's Response

7. In response to the petition, the 4th respondent filed the replying affidavit sworn on July 14, 2020. He deponed that he was allocated 0.4 hectares in Hardy Estate, Nairobi in March 1999 and that after paying all the requisite charges, he was issued with title number IR No 12661/78(grant No IR 87999) and that the position was confirmed by the Principle Registrar of Titles *vide* a letter dated March 19, 2013 addressed to the director of criminal investigations indicating that he has a genuine title to the said parcel. He further deponed that the 5th and 6th respondents have illegally occupied his parcel prompting him to file Nairobi ELC civil suit No 374 of 2011 John Mwangangi v Kennedy Mochere Kaburi & 3 others which is pending.
8. He also deponed that the petitioner has not provided any evidence of his assertions as pertaining LR 12661/2 and the makers of the documents he relies on have not been called to testify.

The 5th and 6th Respondents Response

9. There is an affidavit sworn on June 21, 2021 by the 5th respondent. However, only the last page of it was scanned and filed online.
10. In opposition to the 4th respondent's replying affidavit sworn on July 14, 2020 and the 5th and 6th respondents' replying affidavit sworn on June 21, 2021, the petitioner filed the supplementary affidavit sworn on April 22, 2022.
11. He deponed that the commissioner of lands did not have powers under the law to allocate public land and that at page 705 of the report of the Ndung'u Land Commission of inquiry into the illegal/irregular allocation of public land, it is stated that the suit land was surrendered to Nairobi City Council but it was subsequently allocated to individuals. He annexed the letter dated November 3, 1988 from M/S Dally and Figgis, the letter dated January 27, 1993 addressed to the commissioner of lands by the town clerk, Nairobi City Council and the reply thereof from the commissioner of lands to



the town clerk dated February 18, 1994 which make reference to the suit land having been surrendered to Nairobi City Council.

The Petitioner's Submissions

12. They are dated April 22, 2022. The petitioner submitted that the issue of *locus standi* does not arise since these proceedings were filed in public interest pursuant to article 22 and 258 of the Constitution. He added that article 3(1) of the Constitution of Kenya places an obligation on every person to defend the constitution and that the petition qualifies as public interest litigation. He relied on the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013]e KLR, John Wekesa Khaoya v Attorney General [2013]e KLR, Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya [2016]e KLR, Kiluwa Limited & Another v Commissioner of Lands & 3 others [2015]e KLR as well as the case of Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others [2016]e KLR.
13. It was the petitioner's submission that the suit land is public land within the meaning of section 2 of the Land Act as read with article 62 of the Constitution and pursuant to section 12(2) (d) of the Land Act, 2012, it could not and cannot be allocated to a private entity thus titles issued to persons after the suit land was subdivided should be cancelled under section 80(1) of the Land Registration Act. He relied on the case of James Joram Nyaga & another v Attorney General and another [2007]e KLR and the case of Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others [1996]e KLR.
14. He urged the court to find that the 3rd and 4th respondents are unfit to hold public office, grant any other appropriate reliefs and order the 3rd-6th defendants to bear costs of the petition.

The 1st and 2nd Respondents Submissions

15. They are dated June 20, 2022. It was the Attorney General's submission that the petition does not meet the threshold as set out in Anarita Karimi Njeru v Republic (1976-1980)KLR and the Mumo Matemu case (supra). He pointed out that while the petitioner alleges violation of articles 19-20, article 27 and article 47 of the Constitution, he does not give specific facts making up the violations and does not adduce evidence to demonstrate the alleged violation. He put forward the case of Benard Murage v Fine Serve Africa Limited & 3 others [2015] e KLR.
16. It was also the Attorney General's submission that this being a land issue, it is imperative that the issues be determined by way of *viva voce* evidence where evidence of witnesses will be tested and documents examined to satisfy the balance of probabilities. He added that proprietary rights are protected under section 26 of the Land Registration Act.

The 4th Respondent's Submissions

17. They are dated June 10, 2022 and they addressed the following issues:-
 - a. Whether the 4th respondent has legal title to the suit property.
 - b. Who should bear the costs of this suit?
18. Counsel submitted that the petitioner failed to dispense his burden of proof as required under section 108 and 109 of the Evidence Act by failing to demonstrate by way of evidence that the suit land is public land. It was also his submission that the suit land is not public land therefore the 4th respondent is a bona fide purchaser for value without notice and holds a certificate of title having paid the requisite charges. He relied on the case of Lawrence Mukiri v Attorney General & 4 others [2013]e KLR.



19. It was also counsel's submission that under section 3 of the now repealed Government Lands Act (cap 280), the Commissioner of Lands would allocate government land thus the allocation to the 4th respondent was valid. He urged the court to order the petitioner to bear costs of the suit.
20. I have considered the petition, the ground and the affidavit in support. I have also considered the responses, the written submissions and the authorities cited. The issues for determination are:
- i. Whether LR No 12661/2 is public land.
 - ii. Whether it was unlawfully allocated to the 3rd – 6th defendants.
 - iii. Who should bear costs of this petition?
21. It is the petitioners submission that LR No 12661/2 is public land and has been subdivided into seven portions being LR No 12661/77 to LR No 21661/83 respectively. He further submitted that LR No 21661/78 is a subject of litigation between the 4th, 5th and 6th respondents. The issue for determination is whether this issue as raised herein can be determined by way of petition.
22. Does this petition meet the constitutional threshold? In the case of Anarita Karimi Njeru v Republic [1976-1980] KLR the court held thus:-
- “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”.
23. In Mumo Matemtu case the Court of Appeal observed as follows:-
- “.....the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issue in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”
24. From the foregoing decisions it is clear that the petitioner herein is duty bound to demonstrate to the court in the clearest way possible in which manner the rights have been violated.
25. I agree with the 1st and 2nd respondents' submissions that the petitioner has not stated in what manner the provisions of article 47 (1) and (2) of the Constitution of Kenya were violated. The petitioner also does not give specific facts making up violations on the other articles quoted. In the case of Bernard Murage v Fine Serve Africa Limited & 3 others [2015] e KLR the court stated:-
- “Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory laws then it is desirable that such a statutory remedy be pursued first”.
26. I find that it will not be possible for this court to determine whether LR No 12661/2 is public land in the petition. The petitioner claims that the suit property was unlawfully allocated to the 3rd to 6th respondents. A registered proprietor's title to land cannot be arbitrarily cancelled in the manner sought by the petitioner. Whether LR No 12661/2 is public land and whether it was unlawfully demarcated



and allocated to the 3rd – 6th respondents is an issue which has to be determined by *viva voce* evidence. I rely on the case of *Republic v County Government of Tana River & 2 others* [2018] Eklr, the court cited the case of Republic *ex parte* Karia Misc application No 534 of 2003, where Nyamu, Ibrahim and Makhandia JJs, held as follows:

...“In cases where the subject matter in the question to be determined involves ownership of land and the rights to occupy land, namely occupation and disposition, there would be need to allow *viva voce* evidence and cross examination of witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents they would be copies that would not be sufficient to establish authority of title. The original documents would need to be produced at a full hearing where oral evidence would be adduced”.

27. Section 26 of the *Land Registration Act*, 2012 provides that:-

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.
28. In my view since the suit property has been subdivided into several portions and are in the names of private individuals. This dispute can only be determined by *viva voce* evidence where evidence of witnesses will be tested and documents examined to satisfy their veracity.
29. The prayers sought by the petitioner can only be granted after all evidence is tested. This court is unable to grant the prayers as sought in this petition.
30. In conclusion, I find no merit in this petition and the same is dismissed. Each party do bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

M/S Wekesa for Mr. Omtatah (Petitioner)

No appearance for the 1st – 6th Respondents

Mutisya – Court Assistant

