



Mutua & 5 others v County Government of Machakos & 12 others; Maluki & 3 others (Interested Parties) (Environment and Land Constitutional Petition 7 of 2019 & Environment & Land Case 116 of 2019 (Consolidated)) [2022] KEELC 14827 (KLR) (14 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14827 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 7 OF 2019
& ENVIRONMENT & LAND CASE 116 OF 2019 (CONSOLIDATED)

CA OCHIENG, J

NOVEMBER 14, 2022

IN THE MATTER OF ARTICLES 2, 3 AND 10, ARTICLES 19, 20
AND 21, ARTICLES 35 AND 40 AND PART 2 PARAGRAPH 8 OF
THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 12, 13, 14, 24, 25
AND 26 OF THE LAND REGISTRATION ACT OF 2012

AND

IN THE MATTER OF SECTIONS 4, 29, 30, 31, 32, 33,
43 AND 44 OF THE PHYSICAL PLANNING ACT

AND

IN THE MATTER OF SECTION 96 AND PART XI OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF NOTIFICATION OF INTENT TO SUB DIVIDE
PLOT L.R. NO. 29666 AND CHANGE OF USER OF THE SAID FROM
AGRICULTURAL TO MIXED DEVELOPMENT ISSUED BY THE DIRECTOR
OF PHYSICAL PLANNING, COUNTY GOVERNMENT OF MACHAKOS

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

JOHN KIOKO MUTUA 1ST PETITIONER

SARAH NZEMBI MUTUA 2ND PETITIONER



AND

COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT
DIRECTOR PHYSICAL PLANNING, COUNTY GOVERNMENT OF
MACHAKOS 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

AND

BENARD MASINGI MALUKI INTERESTED PARTY
ALPHONCE MBATHA KISYULA INTERESTED PARTY
JOSHUA MUTETI KILONZO INTERESTED PARTY
DAVID OSANO RAGIRA INTERESTED PARTY

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 116 OF 2019

BETWEEN

BENARD MASINGI MALUKI 1ST PLAINTIFF
ALPHONCE MBATHA KISYULA 2ND PLAINTIFF
JOSHUA MUTETI KILONZO 3RD PLAINTIFF
DAVID OSANO RAGIRA 4TH PLAINTIFF

AND

JAMES KASYULA MUTUA 1ST DEFENDANT
RUTH KALEKYE MUTUA 2ND DEFENDANT
SARAH NZEMBI MUTUA 3RD DEFENDANT
ANNE NDUKU MUTUA 4TH DEFENDANT
DAVID MUTUA KASYULA 5TH DEFENDANT
JOHN KIOKO MUTUA 6TH DEFENDANT
SIMEON MUTUA 7TH DEFENDANT
MOSES WAMBUA 8TH DEFENDANT
PETER MWEU 9TH DEFENDANT

JUDGMENT

1. In ELC Petition No 7 of 2019, vide a Petition dated the May 13, 2019, the Petitioners pray for the following Orders:



- a. A declaration that the notification of intent to subdivide and Change the User of LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares situate in Mavoko Sub County of Machakos County, issued by the Director of Physical Planning County Government of Machakos on April 12, 2019 at the behest of persons who had no right to LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares amounted to a violation of the Petitioners' right to property as outlined in the Petition herein.
- b. A declaration that the Petitioners are entitled to access the information held by the County Government and the Chief Land Registrar pertaining to the identities of the persons who illegally applied for the subdivision and change of user in respect to LR 29666 (formerly LR No 13208/2) measuring 370.9 hectares together with all other documents emanating from the said unlawful transaction.
- c. A declaration that the Petitioners alongside other members of the family of James Kasyula Mutua, upon registration as proprietors of the Lease dated April 6, 2018, are the absolute and indefeasible owners of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.0 Hectares situate in Mavoko Sub County of Machakos County together with all rights and privileges appurtenant thereto and subject to all agreements, liabilities or incidents of the Lease.
- d. No 29666 (formerly LR No 13208/2) measuring 370.0 Hectares was obtained or made by fraud and is a false document that is unconstitutional, illegal, null and void.
- e. A declaration that the Notification of intent to subdivide and Change the User of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares situate in Mavoko Sub County of Machakos County issued by the Director of Physical Planning County Government of Machakos on April 12, 2019 is unconstitutional, illegal, null and void.
- f. An order of Judicial Review in the nature of Certiorari to issue to bring to this Court the Notice of Intent to subdivide and Change the User of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares issued by the Director of Physical Planning, County Government of Machakos on April 12, 2019, and the same be quashed forthwith.
- g. An order of Judicial Review in the nature of prohibition to issue to prohibit the 1st and 2nd Respondents, either by themselves, agents, servants and or employees from subdividing, changing the user, alienating, damaging, disposing of or in any manner whatsoever dealing with parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.0 Hectares except with the express application, knowledge, consent and/or authority of the Petitioners or other family members of the family of James Kasyula Mutua.
- h. An order of Judicial Review of mandamus, to issue compelling the Chief Land Registrar to rectify the land register in respect of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares by cancelling the registration of the Lease purportedly issued under the hand of one ZY Mucyheke on behalf of the Chief Land Registrar.
 - i. An order of Judicial Review, in the nature of mandamus to issue compelling the 1st and 2nd Respondents to avail to the Petitioners all the information relating to the identities of the persons who illegally applied for subdivision and Change of User in respect of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares, including all the documents pertaining to the said unlawful transaction.



- j. An order in favour of the Petitioners for compensation against the acts of violations of the rights complained of in this Petition.
 - k. Costs of this Petition be awarded to the Petitioners.
 - l. Any other order or relief that this Honourable Court may issue.
2. The 1st and 2nd Respondents filed a Replying Affidavit sworn by Dissent Ingati where he explains the process of Change of User and confirms that they received an application for subdivision and Change of User from one Chris N Omare on behalf of the Interested Parties in respect to LR No 29666 (*formerly LR No 13208/2*) hereinafter referred to as the '*suit land*'. He confirms that, in the said Application, there was a Certificate of Title accompanied by Internal Search attached as well as a Rates Clearance Certificate dated the March 25, 2019. He contends that the Developer published a Notice in the Star Newspaper on April 12, 2019 to the effect that the registered owners of the suit land were proposing to Change User from Agricultural to mixed use developments. Further, following the application, they received an objection and or demand letter from the Petitioners' vide a letter dated the May 1, 2019 from Messrs Matemtu Katasi Associates. He avers that the Petitioners have never authorized the Director of Physical Planning, County Government of Machakos to issue notice of Intended Change of User. Further, that the County Government could not release information of the person who sought Change of User since it was not clear who the owner of the suit land was. He contends that they responded to the Letter of Objection and invited the Petitioners to make representations or court submissions and present the same to them. He reiterates that the County Government deferred any development permission to allow for representations and or court decisions in respect to the suit land but the Petitioners still proceeded to file this Petition. Further, that they will only issue a Change of User once the issue of ownership is determined.
 3. The 3rd and 4th Respondents claim to have filed Grounds of Opposition which was not available in the Court file. The Interested Parties did not file any response to oppose the Petition.
 4. In ELC No 116 of 2019, the Plaintiffs sought for the following orders:
 1. A declaration that the Plaintiffs are the legal registered proprietors of the property known as Land Reference Number 29666 and are therefore entitled to quiet possession and enjoyment of the same without interference whatsoever from the Defendants.
 2. An order of permanent injunction restraining the Defendants whether by themselves or through their agents or anybody claiming under them from invading, settling on, transferring, sub dividing, selling or in any other manner interfering with the Plaintiffs' occupation, ownership and possession of all that parcel of land known as Land Reference Number 29666.
 3. General damages for trespass on the suit property known as Land Reference Number Land Reference Number 29666 situated in Mavoko Sub County within Machakos County.
 4. Any other or further relief that this Honourable Court may deem fit and just to grant.
 5. The cost of this suit.
 5. The Defendants filed their Statement of Defence dated the March 10, 2020 where they contend that the 1st, 2nd, 4th and 5th Defendants are deceased hence not capable of being cited as parties herein. They insist that the Plaintiffs have never been owners of the suit land. They aver that the purported titles and other documents held by the Plaintiffs' are a forgery. They state that the Plaintiffs have never effected any form of developments on the suit land nor have they been in actual occupation or possession thereon. They claim the alleged notice purportedly issued to settle squatters signed by James Kasyula



Mutua and his son David Mutua Kasyula is a forgery since on October 18, 2018 when the said notice was issued, both persons were already deceased, having passed away in 1996 and 2018 respectively. They reiterate that the Defendants acquired the suit land in 1976 and deny that there has ever been subdivision over the said suit land or transfer to third parties. They argue that the Plaintiffs' claim for injunction is unfounded and unmerited as they are fraudulent pretenders who have even been arrested and charged in a criminal court with various offences related to the making, including altering of false documents relating to the suit land. They state that from 2016, they had commenced the process of Change of User of the suit land and the new Lease was issued on January 17, 2020 bearing the new LR No 29666.

6. The consolidated suit was canvassed by way of written submissions.

Submissions

Petitioners' Submissions

7. The Petitioners in their submissions contend that the 1st, 2nd and 3rd Respondents violated their right to access information. They insist John Kioko Mutua and Sarah Nzembi Mutua together with their family own the suit land. Further, that in the Judgment in Machakos ELC Case No 62 of 2018, issued on January 15, 2019, the Court indeed confirmed they are the owners of the suit land. They contend that the orders sought in the Petition are hence merited. They argue that it is only after the Petition was filed that the 1st and 2nd Respondents revealed the identities of the persons who had applied for Change of User, in their Replying Affidavit wherein the Deponent even admitted that they had indeed refused to divulge information to them. To support their arguments, they relied on Articles 24 and 35 of the *Constitution* as well as the following decisions: *Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others [2013] eKLR*; *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR*; *Anarita Karimi Njeru v Republic No 1[1979] 1KLR 54* and *Mumo Matemu v Trusted Society of Human Rights Alliance Civil App 290/2012 [2013] eKLR*.

1st and 2nd Respondents' Submissions

8. They explain the background of this matter and contend that the notice of intent for Change of Use does not validate ownership of land. They deny infringing on the Petitioners' right to access information and insist that no written correspondence was presented to them. To support their arguments, they relied on Sections 41(3) and 52 of the *Physical Planning Act*, Article 10(c) and (d) of the *Constitution* as well as the following decisions: *Republic v Municipal Council of Mombasa Ex parte Hubert Seifert & Others [2017] eKLR*; *John Kabukuru Kibicho & Another v County Government of Nakuru & 2 Others*; *Farah Abdinor Ahmed v National Land Commission & 2 others [2014] eKLR* and *Republic v Chief Land Registrar & 2 Others*; *Ex parte Trojan Nominees Limited [2020] eKLR*.

3rd and 4th Respondents' Submissions

9. They aver that the Petitioners allegations that they were informed by the Officer in the offices of the Director of Physical Planning, County Government that he will only comply with their request if he is served with a Court Order are mere allegations which are not supported by any document. They submit that the allegation of fraud against the Respondents should be proved. Further, that issue of ownership and trespass can only be raised by way of a civil suit. They relied on the principle of Constitutional Avoidance. To support their averments, they relied on Sections 109 and 112 of the *Evidence Act* as well as the following decisions: *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others (2013) eKLR*; *Katiba Institute v President's Delivery Unit & 3 Others [2017] eKLR*; *Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another [2000]*



eKLR; Kinyanjui Kamau v George Kamau [2015] eKLR; Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority [2016] eKLR; Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No 14, 14 A, B & C of 2014; Kenya Agricultural and Livestock Research Organization (KALRO) v Edison Sonje Taura & 3 Others [2021] eKLR and Edward Karanja Chogo & 2 Others v County Government of Kakamega [2018] eKLR.

Analysis and Determination

10. Upon consideration of the Petition, Replying Affidavit, Annexures, Plaintiff, Defence and rivaling submissions, the following are the issues for determination: Whether the Respondents have infringed upon the Petitioners' right to information. Who is the proprietor of the suit land. Whether the Petitioners are entitled to the orders sought in the Petition. Whether the Plaintiffs are entitled to the order sought in the Plaintiff.
11. I note vide an order issued by Justice Angote on February 6, 2020, Petition No 7 of 2019 and ELC 116 of 2019 were consolidated and the parties were directed to respond to the respective pleadings accordingly. From the Court Records, the Interested Parties who are Plaintiffs in ELC 116 of 2019 did not file an Answer to Petition but they purportedly filed a Notice of Withdrawal of their suit dated the October 21, 2021 on October 22, 2021. However, on January 18, 2022, the Defendants' Counsels vehemently opposed the said Notice of Withdrawal of Suit arguing that the said suit was already consolidated with the instant Petition and the Court directed parties to file their respective written submissions to canvass it.
12. As to whether the Respondents have infringed upon the Petitioners' right to information.
13. The Petitioners claim that once they were notified there was an advertisement in the newspaper dated the April 12, 2019 to the effect that the registered owners of the suit land were proposing to Change the User of the said land, they sought to know the identities of the persons who had applied for the same, from an officer of the 1st Respondent but he declined to divulge this information. From the Replying Affidavit filed by the 1st and 2nd Respondents' representative, he confirms that he received an application for Change of User from the Interested Parties and later an objection from the Petitioners' through their advocates, but could not divulge the Identities of the persons who had sought for Change of User because they also presented ownership documents. The 3rd and 4th Respondents insist that the Petitioners should have produced correspondence seeking this information before claiming their rights had been infringed upon.
14. On right to information, Article 35 of the *Constitution* provides that:-
 - 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. 2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. 3) The State shall publish and publicise any important information affecting the nation.'
15. I note in a letter dated the May 1, 2019, written by the firm of Messrs Matemu Katasi & Associates Advocates which was annexed to the replying affidavit of Dissent Ingati, it was clear the Petitioners had sought for information from the County Government which was never divulged. The said deponent at paragraph 16 of his affidavit admitted that they could not release information on the persons who had



sought for Change of User, since it was not clear to them who the legal owner of the suit land was. In the case of *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR, the Judge observed that:

' The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.'

16. See also the decisions in *Nairobi Law Monthly Ltd v Kenya Electricity Generating Company* [2013] eKLR and *Trusted Society of Human Rights Alliance & 13 others v Judicial Service Commission* [2016] eKLR.
17. In this instance, the 1st and 2nd Respondents despite receiving the objection/demand letter dated the May 1, 2019, declined to divulge information to the Petitioners and only did so, once the Petition was filed. The Respondents insist they did not infringe on the right to information but I note despite receiving the said letter dated May 1, 2019, the 1st and 2nd Respondents were still adamant. I opine that the 1st and 2nd Respondents as public entities owed the Petitioners' a duty as envisaged in the Constitution, Access to Information Act as well as Fair Administrative Action Act, to divulge information when sought for. From a reading of the legal provisions cited above, noting that there is no prescribed format on how a party should seek for information, but the Access to Information only indicates it should be in writing, while associating myself with the quoted decisions, I find that the 1st and 2nd Respondents indeed infringed upon the Petitioners' right to information as well as administrative action.
18. As to who is the proprietor of the suit land.
19. Both the Petitioners and Plaintiffs claim ownership of the suit land. However, the Plaintiffs filed a Notice to Withdraw their suit and never filed an Answer to Petition to controvert the Petitioners averments. The Petitioners aver that land parcel number IR 30104 was acquired by their family in 1976 and the same transferred to them on November 12, 1976 as tenants in common in equal shares to the following persons: James Kisyula Mutua; Ruth Kalekye Mutua; Sarah Nzembi Mutua; Anne Nduku Mutua; David Mutua Kasyula; John Kioko Mutua; Simeon Mutua; Moses Wambua and Peter Mweu. They confirm that in 2008, they subdivided the aforementioned parcel of land and one of the resultant subdivisions was the suit land. They explain that they applied for Change of User including development permission from the Municipal Council of Mavoko, in respect to the suit land, which was approved. Further, that they have paid land rent for the suit land. They state that they were advised that a Certificate of Title bearing LR No 29666 as their new land reference number would be issued to them once the process of surrender including Change of User was finalized. Further, that the new title now belongs to James Kisyula Mutua; Ruth Kalekye Mutua; Sarah Nzembi Mutua; Anne Nduku Mutua; David Mutua Kasyula; John Kioko Mutua; Simeon Mutua; Moses Wambua and Peter Mweu. They claim that even before the Plaintiffs made forged documents, they had attempted to encroach on the suit land and in view of the alleged encroachment, they had filed a suit being Machakos ELC No 62 of 2018 wherein no Defence was filed despite service in the print media. Further, Judgment was delivered declaring them as lawful owners of the suit land. They deny transferring the suit land to any third party and explain that they have engaged in farming activities thereon but only slowed down when they lost their parents including a sister. The Petitioners further produced respective documents including Certificate of Lease to confirm ownership of suit land but the Interested Parties/Plaintiffs never produced any documents to that effect. I opine that the burden of proof was upon the Plaintiffs



to also produce documents of title to the suit land and demonstrate how it acquired it, but they failed to do so. I further note that the Interested Parties did not deny that they had actually been charged for forging the title to the suit land.

20. The 3rd and 4th Respondents have argued that this is not the right forum to determine ownership of suit land but I beg to disagree with them as the said ownership had already been determined on February 15, 2019 by Justice Angote in Machakos ELC Case No 62 of 2018, which was indeed a civil case.
21. It is my considered view that in the instant Petition, the Petitioners who were already declared owners of the suit land, were simply seeking the court's intervention as their rights as enumerated therein had been violated. In the circumstances, noting that no Appeal was preferred in Machakos ELC No 62 of 2018, I will proceed to uphold the Petitioners' title to the suit land. I however find that the Petitioners failed to prove damages they sought as a result of the violations of their rights, and will decline to grant them.
22. In the foregoing, I find that the Petition is merited and will allow it. I further find that the Plaintiffs' in Machakos ELC Case No 116 of 2019 have failed to prove their case on a balance of probability and will proceed to dismiss it. I will hence proceed to make the following final orders:
 - i. A declaration be and is hereby issued that the notification of intent to subdivide and Change the User of LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares situate in Mavoko Sub County of Machakos County, issued by the Director of Physical Planning County Government of Machakos on 12th April, 2019 at the behest of persons who had no right to LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares amounted to a violation of the Petitioners' right to property as outlined in the Petition herein.
 - ii. A declaration be and is hereby issued that the Petitioners are entitled to access the information held by the County Government and the Chief Land Registrar pertaining to the identities of the persons who illegally applied for the subdivision and change of user in respect to LR 29666 (formerly LR No 13208/2) measuring 370.9 Hectares together with all other documents emanating from the said unlawful transaction.
 - iii. A declaration be and is hereby issued that the Petitioners alongside other members of the family of James Kasyula Mutua, upon registration as proprietors of the Lease dated April 6, 2018, are the absolute and indefeasible owners of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.0 Hectares situate in Mavoko Sub County of Machakos County together with all rights and privileges appurtenant thereto and subject to all agreements, liabilities or incidents of the Lease.
 - iv. A declaration be and is hereby issued that the Lease dated October 12, 2016 purportedly issued under the hand of one ZY Mucheke purportedly on behalf of the Chief Land Registrar in respect to LR No 29666 (formerly LR No 13208/2) measuring 370.0 Hectares was obtained or made by fraud and is a false document that is unconstitutional, illegal, null and void.
 - v. A declaration be and is hereby issued that the Notification of intent to subdivide and Change the User of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares situate in Mavoko Sub County of Machakos County issued by the Director of Physical Planning County Government of Machakos on April 12, 2019 is unconstitutional, illegal, null and void.
 - vi. An order of Judicial Review in the nature of Certiorari be and is hereby issued quashing the Notice of Intent to subdivide and Change the User of the parcel of land known as LR No



29666 (formerly LR No 13208/2) measuring 370.9 Hectares issued by the Director of Physical Planning, County Government of Machakos on April 12, 2019.

- vii. An order of Judicial Review in the nature of prohibition be and is hereby issued prohibiting the 1st and 2nd Respondents, either by themselves, agents, servants and or employees from subdividing, changing the user, alienating, damaging, disposing of or in any manner whatsoever dealing with parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.0 Hectares except with the express application, knowledge, consent and/or authority of the Petitioners or other family members of the family of James Kysula Mutua.
- viii. An order of Judicial Review of mandamus be and is hereby issued compelling the Chief Land Registrar to rectify the land register in respect of the parcel of land known as LR No 29666 (formerly LR No 13208/2) measuring 370.9 Hectares by cancelling the registration of the Lease purportedly issued under the hand of one ZY Mucheke on behalf of the Chief Land Registrar.
- ix. Costs of the Consolidated Suit be and is hereby awarded to the Petitioners to be borne by the Interested Parties/Plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE

