



**Simiyu v County Government of Bungoma & another (Constitutional
Petition E001 of 2023) [2025] KEELC 3781 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CONSTITUTIONAL PETITION E001 OF 2023**

EC CHERONO, J

MAY 8, 2025

IN THE MATTER OF ARTICLE 6, 27, 47 CONSTITUTION OF KENYA, 2010.

AND

**IN THE MATTER OF SECTION 34 AND 88 OF THE
COUNTY GOVERNMENT ACT NO. 17 OF 2012**

AND

**IN THE MATTER OF PLOT NO. 25 MISIKHU MARKET,
BUNGOMA EAST SUB-COUNTY BUNGOMA COUNTY.**

BETWEEN

JAFRED WANYAMA SIMIYU PETITIONER

AND

COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT

**CHIEF OFFICER, LANDS PHYSICAL PLANNING & HOUSING 2ND
RESPONDENT**

JUDGMENT

1. The petitioner filed this petition on 06/04/2023 seeking the following orders;
 - a. A conservatory order to maintain the status quo obtaining prior to the 2nd respondents purported order.
 - b. A declaration that the 1st and 2nd respondents' actions are violation of the petitioner's rights under *the Constitution* and in particular his rights to property and his right to be heard.
 - c. A declaration that the 2nd respondent's actions amount to an abuse of office, are unconstitutional and have no legal basis whatsoever.



- d. A declaration that the intended transfer of plot no.25 Misikhu market to the said Maximilla Machuma Wanyama has no legal basis and is in breach of the rules of natural justice.
 - e. Costs of this petition.
2. The petition is supported by the affidavit of Jafred Wanyama Simiyu-the petitioner herein sworn on 06/04/2023 wherein he deposed that on or about 2009, he was allocated plot no. 25B on Misikhu Market which is adjacent to plot no. 25A belonging to one Wilson Wata who is now deceased. That one Mourice Nabiliki-deceased a son of the late Wilson Wata later on sold and transferred plot 25A to one Susan Nanjala Mukwana, a daughter-in-law to Maximillah Machumba who is now the purported allottee of plot 25 a merge of plot 25A and 25B. That one Fred Munoko now occupies plot no. 25A.
 3. The Petitioner further deposed that Mourice Nabiliki passed away in 2021 while his wife Benadatta Nabiliki died on 10/05/2020. The deponent contends that the letter dated 20/12/2022, addressed to a deceased person who never owned any plot within Misikhu market, was mischievous. He further stated that he has consistently complied with the payment of all requisite land rates and was shocked to discover that he was no longer registered as the proprietor of Plot No. 25B. He stated that he has never received any notification regarding a change of proprietorship or the purported merger of the two plots. As an existing allottee, he stated that he was entitled to be prioritized in any allocation process over a stranger. He deposed that the respondents' actions were discriminatory, unjustifiable, and amount to a violation of his constitutional rights, including the right to a fair administrative action and the right to own property.
 4. In response, the Respondents filed a Replying affidavit to the petition sworn by Maxmillah Misanya Nyongesa on 23/10/2023. The said Maxmillah deposed that the petitioner has failed to demonstrate how his Constitutional rights have been infringed. That to his knowledge, Plot no. 25 belonged to Wilson Wata who sold to Maximillah Machuma who was allocated upon application and approval. That nobody laid claim over the parcel of land and no information exist as to the sub-division of Misikhu Plot 25A and 25B leading to the purported changes. That upon receiving a complaint over the merger, they wrote a letter to the County Director Revenue vide a letter dated 04/05/2023 cancelling their letter dated 20/12/2022 stopping the transfer and to give them time to investigate the ownership of the said plot. It was deposed that this petition is pre-mature since the issue is under investigations which will enable them allocate the plots to the rightful individuals. It was argued that the petitioner has not demonstrated to this court how he was allocated the claimed plot.
 5. During pre-trial conference, the parties agreed to canvass the petition by way of viva voce evidence. At the hearing of the petition, each party called one witness.
 6. Jafred Wanyama Simiyu (PW1) adopted his supporting affidavit sworn on 6th April 2023 as his testimony-in-chief. He also produced five documents annexed to his supporting affidavit as exhibits in support of his case. P-Exhibit 1 is an allotment letter issued by Bungoma County Council, P-Exhibit 2 is a burial permit for one Mourice Wabiliki, P-Exhibit 3 is a death certificate of one Benedette Nabiliki, P-Exhibit 4 is a chief's letter dated 20/12/2022 while P-Exhibit 5 are land rates payment receipts dated 06/01/2022. He also produced a further list of documents dated 29/07/2024 which contains 3 items. P-Exhibit 6 is a demand notice to the County Government of Bungoma dated 09/04/2024, P-Exhibit 7 is a property rates statement and P-Exhibit 8 is a payment receipt dated 09/04/2024. On cross-examination, the Petitioner testified that the letter allocating the plot to Berndetta Nabiliki was issued after her demise. In re-examination, he reiterated that he was allocated the plot upon successful application.



7. Maximiallah Musanya Nyongesa (DW1) adopted her replying affidavit sworn on 23/10/2023 as her evidence-in-chief. She also produced the documents annexed thereto as exhibits. D-Exhibit 1 is a certificate of death of Bernadette Nabilika, D-Exhibit 2 is a letter from the assistant chief of Mirinda Sub-location, D-Exhibit 3 is a copy of land purchase agreement, D-Exhibit 4 is a letter from the County Government of Bungoma dated 20/12/2022 and lastly D-Exhibit 5 is a letter from the County Government of Bungoma dated 04/05/2023. He testified that according to their records, Misikhu market plot no. 25 is one plot in the name of Wilson Wata while plot 25B is non-existent. He testified that there is no lease for Wilson Wata, Susan Mukhwana Nanjala or Bernadette Nabiliki. He could not also confirm the person in occupation of the said plot at the moment. In re-examination, he highlighted the procedure for allocation of a plot.
8. At the close their respective cases, the parties agreed to file written submissions.
9. The petitioner filed submissions dated 05/02/2025 in which he submitted on two issues. The first issue is Whether the petitioner's rights have been violated as claimed. He submitted that his allotment of Misikhu Market plot no. 25B was not impugned and that having been allotted the said plot, the same was not available for allocation or cancellation without following due process. That the merging of his plot and plot no25A was a clear violation of his right to property and fair administration as per Article 40 (1) and 47 (1) of *the Constitution*. Reliance was placed in the case of Everlyne College of Design Ltd v Director of Children's Dept & Another (2013) eKLR.
10. The second issue was what reliefs the court ought to grant. It was argued that since the respondents have lodged investigations and maintained status quo through their letter dated 24/02/2023, the first prayer was spent. They urged the court to however issue the remaining prayers.
11. The Respondents filed submissions dated 27/02/2025 where they submitted on two issues. The first issue was whether an allotment letter is conclusive proof of ownership of land. They relied on the provisions of Section 107, 108 and 109 of the *Evidence Act* and the case of Gladys Wanjiru Ngacha v. Teresa Chepsaat & 4 Others 182/1992 (Nyeri). They argued that to prove interest in land on a letter of allotment, the petitioner had to have all the documents contemplated in the case of Ahmed v Wamalwa (sued as the legal representative of the Estate of Cornelius Wanyonyi Wamalwa-Dcd) & 5 Others (Environment & Land Case E003 of 2022) {2024} KEELC 4772 (KLR) (13 JUNE 2024) (Judgment) and had to comply with the conditions set therein as was the case in Mbau Saw Mills Ltd v. Attorney General on behalf of the Commissioner of Lands) & 2 Others (2014) eKLR. It was further submitted that an allotment letter is not conclusive evidence of ownership of land and that the petitioner was expected to obtain a certificate of title upon complying with the conditions referred to above.
12. On the second issue whether the petitioner's constitutional rights have infringed upon, it was submitted that the petitioner failed to demonstrate ownership of any land and that he cannot claim any rights under Article 40 of *the Constitution*. Reliance was placed in the case of Lilian Waithera Gachuhi v David Shikuku Mzee (2005) KEHC 1890 (KLR). In conclusion, the Respondents argued that the petitioner was not entitled to the orders sought and sought to have the petition dismissed with costs.

Legal Analysis And Decision

13. Having reviewed the petition, the affidavit in support and in opposition thereto and having further considered the submissions by the Petitioner and the Respondents the following are the issues that commend for determination;



- a. Whether the Respondent's violated the petitioner's fundamental rights to own property and fair administrative action?
 - b. Whether the petitioners are entitled to the reliefs sought in the petitions?
 - c. Who will bear the costs of this Petition?
14. The petitioners' case is hinged on Articles 40 and 47 of *the Constitution* of Kenya, 2010. In short, the petitioners claim violation of their right to property and their right to fair administrative action in respect to the properties and in regard to issues surrounding the subject properties. I find it necessary for the purposes of this judgment to highlight the said provisions.
15. It is trite that *the constitution* is protective of a proprietor's right and interest over a property under Article 40 of *the Constitution* which provides as follows:
40. Protection of right to property
- (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) ...
 - (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)
 - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. [Emphasis supplied]
16. Articles 47 of *the Constitution* provides as follows:-
47. Fair administrative action
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.

17. The *Fair Administrative Action Act*, 2015 enacted pursuant to the provisions of Article 47 (3) of *the Constitution* made provisions to give effect to Article 47 (1) of *the Constitution* and effectively set out the procedure that needed to be complied with to attain fair administrative action. Section 4(3) and (4) of the *Fair Administrative Action Act*, 2015 provides as follows: -

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- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person the administrator shall give the person affected by the decisions:-
 - a. Prior and adequate Notice of the nature and reasons for the proposed administrative actions;
 - b. An opportunity to be heard and to make representations in that regard;
 - c. Notice of a right of review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. Notice of the right to legal representation, where applicable;
 - f. Notice of the right to cross examine where applicable or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

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- (4) The administrator shall accord, the person against whom administrative action is taken an opportunity to-
 - a. attend proceedings, in person or in the company of an expert of his choice”
 - b. be heard
 - c. cross examine persons who give adverse evidence against him; and
 - d. request for adjournment of the proceedings, where necessary to ensure a fair hearing.

18. The right to fair administrative action goes hand in hand with the right to a fair hearing which is provided for under Article 50 which states as follows:

50. Fair hearing



(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) ...

19. In the context of this case, everything revolves around the properties described as Plot no. 25 A & 25B located in Misikhu Market and whether the rights of the petitioner under Articles 40, 47 and 50 in relation to plot no. 25B has been violated.

20. Although the petitioner did not focus on his acquisition and legitimacy of his alleged ownership of Plot 25B, the Respondent in his replying affidavit and submissions put a lot of focus on how the petitioner acquired the said plot.

21. The petitioner in support of his case argued that he was allocated the plot in question by the defunct Municipal council of Bungoma vide minute no. WTP & M/09 of 17/07/2009 and that he has since been paying the requisite land rates and is up to date as shown in P-Exhibit 5, 7 and 8. The petitioner further avers that he received a letter dated 24/02/2023 from the Ndivisi Ward administrator informing him that his occupation of the said plot was illegal and illegitimate and that his continued occupation would attract a penalty of up to Five Million or a jail term of not less than 7 years. Notably, the referenced letter was not presented in court, and the allegations stemming from its contents remain unverified. Additionally, the petitioner claims to have received a demand for payment of rates amounting to Kshs. 30,200/= from the Respondents through a letter dated 09/04/2024. However, this letter was also not produced in evidence, rendering the allegation unsubstantiated."

22. The petitioner further claimed that the import of the letter dated 20/12/2022 addressed to Benadetta Nabiliki; whom the court notes from the evidence was already deceased at the time the purported merger of plot no. 25A and 25B to form plot no. 25 and to have it registered in the name of Maximillah Machuma Wanyama. It is this letter that he places reliance on in claiming that the directions in this letter violated his right to property and administrative action.

23. The Respondents on the other hand argued that the only recognized plot is Plot No. 25, which in their records indicate originally belonged to Wilson Wata and was later sold to Maximillah Machuma Wanyama. They stated that this sale was brought to their attention through a plot transfer form and a letter from the Assistant Chief of Marinda Sub-location dated 07/03/2016. Based on that, they issued a letter to the revenue department requesting a change of ownership to Maximillah Machuma Wanyama. They claim they were unaware that Plot 25 had allegedly been subdivided into Plot 25A and 25B. When a complaint arose alleging the transfer was based on forgery and false information, they wrote to the area chief on 04/05/2023 seeking clarification regarding the ownership dispute. In the said letter, the 2nd respondents noted as follows;

"However, Susan Nanjala of ID No. 27360047 has written a complaint to this office indication that the transfer was supported by a forged letter she never signed and that she is the one who bought and paid for the plot no. called 25A. In your letter you indicated 25B yet we have 25B in the name of Jafred Wanyama Simiyu (Rates demand notice marked 3).

24. Upon reviewing the Respondents' evidence, I find it to be inconsistent. While DW1 testified that the existing plot is Plot No. 25, their letter dated 04/05/2023 refers to Plot Nos. 25A and 25B. The same letter further indicates that the petitioner is responsible for payment of rates on Plot No. 25B. Moreover, the sale agreement involving Mourice Nabiliki Wata, Susan Nanjala, and Felix Wafula



Wekesa identifies the property being sold as Plot No. 25A. In light of the above, I am satisfied that both Plot Nos. 25A and 25B do, in fact, exist."

25. However, it is important to note that for the rights claimed by the petitioner to accrue, he has to demonstrate that he is the lawful and registered owner of the claimed piece of land. The petitioner in support of his claim produced a letter addressed to him from Bungoma County Council and which he claims allotted to him plot no. 25B and receipts in payment of land rates. It is also important to note that an allotment letter was not produced in evidence and neither was a title deed produced in support of the petitioner's claim. As it stands, the court cannot ascertain whether the petitioner was indeed issued with an allotment letter and whether he is the owner of plot no.25A. It is trite that proof of ownership of land is based on documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the process of acquisition such as the application for allocation, minutes of the allocation committee, minutes of the full council approving the allocation, letter of allotment etc. Once the process of acquisition is established, then the holder of the documents as the owner is entitled to the protection of the law.
26. I am persuaded by the findings of the court in the case of Wreck Motors Enterprises versus the Commissioner of Lands & 3 Others Civil Appeal No 71 of 1997, where the Court of Appeal held as follows: -"Title to landed property normally comes into existence after issuance of letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held". Also see the case of Dr. Joseph M.K Arap Ngok Vs Justice Moijo Ole Kuiwua & another Civil application No.60 of 1997 (UR).
27. Arising from the foregoing analysis, I harbour serious doubt as to whether the petitioners possess valid title documents for Plot No. 25A that would warrant the protection of property rights under Article 40 of *the Constitution*, particularly in light of the provisions of Article 40(6). While I have not been called upon to determine the petitioners' legal ownership of Plot No. 25B, and I make no finding on the validity of the documents purporting such ownership, I am nonetheless not convinced that the documents presented provide a credible foundation for invoking constitutional protection under Article 40. Consequently, it is my considered view that the petitioner has failed to establish violation of his fundamental rights under Articles 40, 47, and 50 in relation to the said plot.
28. The Upshot of the foregoing is that the petitioner has failed to prove his claim on the required standard and consequently, this court finds and holds that the Petition dated 06/04/2023 is not merited and the same is hereby dismissed entirely with costs.
29. It is so ordered.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 08TH DAY OF MAY, 2025.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Masengeli H/B for Mr. Ndalila for the Respondent.
2. Mr. H.P Wamalwa for the Petitioner.
3. Bett C/A.

